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Has Shaffer v. Heitner Been Lost at Sea?

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NOTES

HAS SHAFFER V. HEITNER BEEN LOST AT SEA?

In 1977, the Supreme Court reshaped the landscape of personal jurisdiction with its holding in *Shaffer v. Heitner*,[1] which subjected exercises of jurisdiction *in rem* and *quasi in rem* to the same standard of constitutional scrutiny that has been applied to actions *in personam* since *International Shoe Co. v. Washington*.[2] Under the *International Shoe* standard, a court could not assert jurisdiction over a defendant unless that defendant had "minimum contacts" with the forum, such that the exercise of jurisdiction did not offend traditional notions of fair play and substantial justice. In extending this analysis to seizure-based jurisdiction, *Shaffer* requires a relationship between the forum state, the defendant, and the cause of action.[3]

In *Shaffer*, the plaintiff filed a shareholder's derivative action in Delaware against a former officer of the corporation (a non-resident of Delaware) and had shares of stock owned by the defendant attached, giving the Delaware court *quasi in rem* jurisdiction over the defendant. In his analysis for the majority in *Shaffer*, Justice Marshall distinguished two types of *quasi in rem* actions, as well as the true *in rem* action.[4] In both the true *in rem* action and in one type of *quasi in rem* action, the plaintiff's claim is directly related to the property which is the subject of the seizure.[5] Justice Marshall specifically noted that where there was such a relationship between the property (and therefore its owner) and the cause of action, it would be difficult to imagine when an assertion of jurisdiction would be constitutionally impermissible.[6] But in the second type of *quasi in rem* action, where the property is unrelated to the cause of action, its attachment may only serve as the basis for jurisdiction to the extent that jurisdiction is supported by other contacts of the defendant with the forum so that the standards of *International Shoe* are met.[7]

Provisions for seizures *in rem* and *quasi in rem* are found in the Supplemental Rules to the Federal Rules of Civil Procedure for Admiralty. Rule B provides for the attachment of a defendant's "goods

1. 433 U.S. 186, 97 S. Ct. 2569 (1977).
2. 326 U.S. 310, 66 S. Ct. 154 (1945).
3. *Shaffer*, 433 U.S. at 204, 213, 97 S. Ct. at 2580, 2584.
4. Id. at 199, n. 17, 97 S. Ct. at 2577, n. 17.
5. Id.
6. Id. at 207-08, 97 S. Ct. at 2581.
7. Id. at 212, 97 S. Ct. at 2584.

and chattels, or credits and effects . . . if the defendant shall not be found within the district."[8] The rule is functionally identical to the Delaware sequestration statute which permits a court to "compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff if the defendant does not appear or otherwise defaults."[9] Both rules create actions *quasi in rem*, because there is no requirement that there be any connection between the property and the cause of action. Rule C, by contrast, deals only with actions for the enforcement of maritime liens.[10] Such liens are, by definition, directly linked to the property seized under Rule C:

> Upon the occurrence of certain mishaps or the non-fulfillment of certain obligations arising out of contract or status, the maritime law gives to the party aggrieved a right conceived of as a property interest in the tangible thing involved (usually but not always a ship) in the (often as yet unascertained) amount of the accrued liability.[11]

Accordingly, as the title to the rule recognizes, actions under Rule C are true *in rem* proceedings.

Despite the obvious parallels between these actions in admiralty and similar proceedings in other areas of state law,[12] the cases in which the Supplemental Rules for Admiralty have been challenged show a reluctance to apply a *Shaffer*-type analysis to assertions of jurisdiction *quasi in rem*. More disturbingly, with one notable exception, this issue has often been ignored altogether. Thus, while few cases have arisen in which jurisdiction would be questionable under *Shaffer*, the tendency of the courts to avoid addressing this issue may lead attorneys to consider an objection to jurisdiction futile in the future,[13] even if a defendant is sued in a manifestly unfair forum. This comment will review the

8. The pertinent section of Rule B states:

> With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. Fed. R. Civ. P. Supp. Rule B.

9. Del. Code Ann. tit. 10, § 366 (1975), quoted in *Shaffer*, 433 U.S. at 190, n. 4, 97 S. Ct. at 2572, n. 4.

10. Fed. R. Civ. P. Supp. Rule C.

11. G. Gilmore & C. Black, The Law of Admiralty §§ 1-12, at 35 (2d ed. 1975).

12. See, e.g., La. Code Civ. P. art. 9.

13. This may have been the case in *Polar Shipping v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982). See infra notes 34-35 and accompanying text.

decisions which have overlooked and therefore undermined the applicability of *Shaffer* to admiralty proceedings, analyze the reasoning of these decisions, and suggest a fair and practical alternative to the current attitude concerning Shaffer's applicability in this field.

Minimum Contacts in Federal Court

After the Court's pronouncement in *Shaffer*, the validity of admiralty proceedings *in rem* and *quasi in rem* was immediately called into question by legal commentators.[14] The first issue to be addressed is the applicability of *Shaffer*, which dealt with the exercise of jurisdiction by state courts, to federal exercises of jurisdiction. Because *Shaffer* was decided under the Due Process Clause of the Fourteenth Amendment, which addresses only state action, it technically does not bind the federal courts. By contrast, limitations of the national sovereign's jurisdictional authority arise, not from the Fourteenth Amendment, but from the Due Process Clause of the Fifth Amendment.[15]

It has become generally accepted that when a suit is in federal court on a federal cause of action with jurisdiction acquired solely under federal authority, the forum to be considered is the United States as one entity; thus a due process analysis should focus on the defendant's contacts with the United States as a whole.[16] Presumably, a defendant would then be afforded the protections of venue provisions to avoid litigating in an inconvenient forum.[17] This theory was used to support admiralty jurisdiction under *Shaffer* soon after it was decided, as well as by the First Circuit Court of Appeals in the most recent decision regarding Rule B.[18] Assuming that the above analysis was to be applied, the policy of fairness that controls state exercises of jurisdiction would arguably apply to federal courts as well. The only significant difference in the analysis, other than the forum to be considered, would be the absence of "principles of interstate federalism,"[19] which would lessen

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14. See generally, Batiza & Partridge, The Constitutional Challenge to Maritime Seizures, 26 Loy. L. Rev. 203 (1980); Comment, Due Process in Admiralty Arrest and Attachment, 56 Tex. L. Rev. 1091 (1978); Bohmann, Applicability of *Shaffer* To Admiralty In Rem Jurisdiction, 53 Tul. L. Rev. 135 (1978).

15. FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974).

16. FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979).

17. Comment, Due Process in Admiralty Arrest and Attachment, 56 Tex. L. Rev. 1091, 1117, n. 165 (1978).

18. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 459 F. Supp. 1242 (S.D.N.Y. 1978); Trans-Asiatic Oil, Ltd. v. Apex Oil Co., 743 F.2d 956 (1st Cir. 1984).

19. World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 293, 100 S. Ct. 559, 565 (1980).

the requisite connexity with the forum to sustain jurisdiction; that is, while the Supreme Court has held that state courts must consider the interests of other states before claiming jurisdiction over a defendant,[20] a federal court need not exercise such deference.

Yet even under this relaxed standard, jurisdiction under Shaffer has not always been upheld in federal courts.[21] Moreover, if one views the United States as a whole to be the forum in these circumstances, the validity of attachment under Rule B might be lost, since such "non-resident" attachment is traditionally acceptable only in the context of an absent defendant. In that regard, the rule reflects the law as it existed in the early days of the Republic, when jurisdiction was based on the presence of the defendant in the forum, and jurisdiction *quasi in rem* was a necessary device for adjudicating disputes concerning absentee defendants who could avoid service of process simply by escaping to another state. Since the advent of modern jurisdictional theories and state long-arm statutes, *quasi in rem* attachments are considered by some writers to be historical anomalies which today serve more as security devices than as instruments of jurisdiction.[22] This argument (that Rule B is a vestige of a bygone jurisdictional era) is supported by the language of the rule itself, which is available only if the defendant is "not to be found within the district,"[23] and therefore seems to contemplate difficulty in obtaining jurisdiction by other means, a problem which is less common today than it was in earlier times.

In *Shaffer*, the Supreme Court refused to eliminate *quasi in rem* jurisdiction altogether, but subjected it to scrutiny under *International Shoe*. It would appear certain that, inasmuch as procedures *in rem* and *quasi in rem* in admiralty are identical to those under the statutory and common law addressed in *Shaffer*, those seizures should be subject to scrutiny under a *Shaffer* analysis. As represented below, however, the jurisprudence has largely chosen to distinguish admiralty for purposes of applying constitutional limitations on judicial authority which are designed to assure basic fairness in the legal system. The arguments for making Shaffer applicable to admiralty have been weakened by cases which have refused to apply procedural safeguards against seizures in admiralty. In *Sniadach v. Family Finance Corp.*[24] and *Fuentes v. Shevin*[25] the Supreme Court held that before a plaintiff could seize a defendant's property (in these cases, wages and household goods, respectively) pur-

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20. Id.

21. See, e.g., Leema Enter. Inc. v. Willi, 575 F. Supp. 1533 (S.D.N.Y. 1983).

22. Note, Maritime Attachment Under Rule B: A Jurisdictional Disguise for an Unconstitutional Security Attachment, 43 Brooklyn L. Rev. 403, 404 (1977); Batiza & Partridge, The Constitutional Challenge to Maritime Seizures, 26 Loy. L. Rev. 203, 235-36 (1980).

23. See supra note 8.

24. 395 U.S. 337, 89 S. Ct. 1820 (1969).

25. 407 U.S. 67, 92 S. Ct. 1983 (1972).

suant to filing a lawsuit, due process requires that the defendant be notified of the seizure and that a hearing be held to justify it. As will be explained below, the courts of appeal have uniformly refused to extend these procedures to seizures in admiralty, and in doing so, have called into question the applicability of *Shaffer* in the maritime realm.

The first significant case to squarely face the issue of the constitutional amenability of maritime seizures was *Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.*[26] The facts of *Grand Bahama* would have made the assertion of jurisdiction by the court under a *Shaffer* analysis in a non-maritime matter questionable, to say the least. The plaintiff was a Bahamian firm which had supplied fuel in the Bahamas to a vessel under charter to the defendants. The cause of action, arising in the Bahamas, was completely unrelated to the forum, Seattle, Washington. The defendant's only contact with Washington was the presence of a bank account in Seattle, which was attached pursuant to Rule B. As the trial court admitted, this relationship with the forum, while arguably more substantial than that of the defendants in *Shaffer* to the trial forum in that case, was "a limited contact nonetheless."[27]

Having conceded the tenuousness of this relationship, the court refused to proceed with a *Shaffer*-type analysis, finding the analogy with *Shaffer* to be only superficial, and application of a minimum contacts test therefore unnecessary. The court struck a chord which set the tone for the courts of appeal in cases to come: "[*Shaffer*] can be distinguished on both constitutional and analytical grounds."[28] The sources of the distinctions, according to *Grand Bahama*, lay in the Constitution's separate grant of power to the federal courts to hear cases in admiralty, and the historical acceptance and use of maritime attachment in the American law of admiralty.[29]

It is ironic that one of the greatest steps in establishing an exception to *Shaffer*'s due process requirements for admiralty came not in a challenge to Rule B, nor even in a challenge under *Shaffer*, but rather in a challenge to Rule C on procedural due process grounds. In *Merchants National Bank v. Dredge Gen. G.L. Gillespie*,[30] the Fifth Circuit relied on the unique character and context of the maritime lien in holding that maritime seizures under Rule C need not strictly meet the procedural due process requirements set forth in *Sniadach*, *Fuentes*, and their progeny.[31] The court narrowly limited its inquiry early in the opinion and re-emphasized this narrowness in its conclusion: "We emphasize again that the present opinion addresses only admiralty proceedings *in rem*,

26. 450 F. Supp. 447 (W.D. Wash. 1978).
27. Id. at 452.
28. Id. at 453.
29. Id. at 453-55.
30. 663 F.2d 1338 (5th Cir. 1981).
31. Id. at 1345.

and in no way concerns the *in personam* or *quasi in rem* proceedings that also arise in admiralty, particularly the garnishment procedures of Rule B."[32] Thus, while the problems of constitutional amenability under *Shaffer* did not surface in *Merchant's Nat'l Bank*, the court was specifically staying its hand. Additionally, the panel's reservation implicitly recognized Justice Marshall's point that pure *in rem* proceedings would probably be unaffected by an application of *Shaffer*. By specifically refusing to rule on Rule B, the court realized that it was only in a *quasi in rem* situation, such as in *Grand Bahama*, that amenability under *Shaffer* would present a difficult issue. The court wisely chose to avoid an unnecessary decision on that point.

Judge Tate, in dissent, invoked *Shaffer* as authority for refusing to create an exception in admiralty to the procedural due process requirements of the Constitution.[33] Conceding that *Shaffer* dealt specifically with substantive due process, he read the Court's opinion as providing for a uniform standard of due process for all private litigants. Both in procedural and substantive due process analyses in admiralty, his has remained the minority position.

The trend to distinguish admiralty in matters arising under the Due Process Clause was first extended to Rule B the following year in *Polar Shipping Ltd. v. Oriental Shipping Corp.*[34] In *Polar Shipping* the plaintiff had chartered a vessel to the defendant. Claiming that the charter had expired, the plaintiff attached certain credits due to the defendant in Hawaii. While the court's opinion does not discuss the contacts of the defendant with Hawaii, the defense's apparent failure to raise the issue of constitutional amenability suggests that the defendant probably did have sufficient contacts with the forum to sustain jurisdiction, or that, on the basis of *Grand Bahama* and similar decisions, the defendant believed that to raise such a challenge would be useless. Nonetheless, it is surprising that the panel majority did not even raise *Shaffer* in light of its recognition that "under Supplemental Rule B, *in personam* jurisdiction over the defendant is obtained by compelling its appearance through attachment of its goods and chattels or, credits and effects."[35] This finding, of course, echoes Justice Marshall's characterization of the Delaware statute at issue in *Shaffer* and invites comparison. This fact was apparent to the dissenting judge who noted that "the need to obtain jurisdiction (by attaching the defendant's assets) may not even be a factor that this court should consider. *Shaffer v. Heitner* held that *quasi in rem* jurisdiction violates due process because it does not meet the minimum contacts standards of jurisdiction."[36] This statement in

32. Id. at 1350.
33. Id. at 1353 (Tate, J., dissenting).
34. 680 F.2d 627 (9th Cir. 1982).
35. Id. at 630.
36. Id. at 645 (Byrne, J., dissenting).

dissent may, however, be too broad. *Quasi in rem* jurisdiction is unconstitutional only if a defendant in a particular action does not have minimum contacts with the forum, within the meaning of *International Shoe*.

One would surmise that the dissenting judge discussed this point with the other members of the panel, but any such consideration is conspicuously absent from the majority opinion. Like the Fifth Circuit in *Merchants Nat'l Bank*, the court was apparently reluctant to address the issue when it was not properly before it. The panel chose instead to follow its predecessors in distinguishing admiralty for purposes of due process review, relying largely on the Fifth Circuit's decision in *Merchants Nat'l Bank*. While noting that in *Merchants Nat'l Bank* "Judge Brown expressly limited his decision to Supplemental Rule C and refrained from intimating any opinion concerning a writ of foreign attachment to obtain jurisdiction over a non-resident defendant in an *in personam* suit, such as we have before us,"[37] the court stated that "[n]evertheless, we think that the principle announced by Judge Brown is also applicable to Supplemental Rule B."[38] The basis of this distinction, as in other cases, rested on the separate grant of authority to hear cases in admiralty in the Constitution, the historical background of the rule, and the court's belief that practical considerations make the device of seizure essential in admiralty proceedings.

The Eleventh Circuit repeated this reasoning last year in rejecting a similar challenge to Rule B.[39] The background of the case suggests that the courts may have begun to assume the constitutionality of seizures in admiralty regardless of the relationship of the property involved to the forum or the cause of action. The parties had negotiated and signed a charter in New York, under which the defendant received use of the plaintiff's vessel. During the term of the charter the defendant damaged certain goods en route to Argentina and refused to pay damages. To avoid its own liability, the plaintiff brought an action in Savannah, Georgia, contending that the plaintiff was "entitled to indemnity and/or contribution from defendant with respect to any liability which may be adjudged against it in favor of the cargo interests."[40] The suit alleged that the vessel, *Puntas Malvinas*, property of the defendant (but not the vessel involved in the charter sued upon), was in port and prayed that it be arrested and attached. The clerk of court had the vessel arrested. When it was subsequently discovered that the vessel itself was not the property of the defendant, the plaintiff amended his pleadings

37. Id. at 637.

38. Id.

39. Schiffahrtsgesellschaft Leonhardt & Co. v. Bottacchi, 732 F.2d 1543 (11th Cir. 1984).

40. Schiffahartsgesellschaft Leonhardt & Co. v. Bottacchi, 552 F. Supp. 771, 773 (S.D. Ga. 1982).

to request attachment of cargo on the vessel owned by the defendant, which resulted in the seizure of that property.[41]

The jurisdictional problems raised on these facts are readily apparent. In terms of a *Shaffer* analysis, there was no apparent connection between the cause of action and the forum, because the contract at issue was made in New York, and the property seized was unrelated to the contract. Furthermore, there appeared to be no connection between the defendant and the forum other than the fortuitous presence of the defendant's property there. Consequently, under *Shaffer*, there would be insufficient contacts to support jurisdiction. Moreover, *Grand Bahama* can be distinguished because in this case there was an alternate forum available—surely suit could have been brought in New York, where the contract was made.

Despite these obvious problems, the court of appeals did not address the issue of constitutional amenability under *Shaffer*. The district court discussed *Shaffer* in an exposition of the recent history of both substantive and procedural due process in admiralty, but ultimately stated that "it is settled that *Shaffer* is not applicable to admiralty jurisdiction."[42] The court of appeals was silent on this point, although like its predecessors, it was eager to distinguish admiralty for constitutional purposes, citing a familiar litany of ancient cases and historical authority.

As the foregoing synopsis of the pertinent jurisprudence should make clear, the district court could claim no authority for its statement that the inapplicability of *Shaffer* to admiralty is settled, except from the *Grand Bahama* decision. At that time, none of the courts of appeal had directly faced the issue, although the Second Circuit had discussed it.[43] Clearly, the Fifth Circuit did not intend to decide the issue when its panel expressly limited its decision in *Merchants Nat'l Bank*, and the Ninth Circuit, in *Polar Shipping*, was apparently aware of the issue when it refrained from discussing it in its analysis of Rule B. What the court probably relied on was the apparent attitude of the courts, expressed in procedural due process challenges to the Admiralty Rules, that "Admiralty is Old and Admiralty is Different."[44] While this attitude is discernible, it is not authoritative. Accordingly, rumors of the death of *Shaffer* in admiralty proceedings may be premature.

The latest case to address the constitutionality of the Supplemental Rules for Admiralty is the first to address the applicability of *Shaffer* in admiralty proceedings since *Grand Bahama*.[45] In *Trans-Asiatic Oil,*

41. 732 F.2d at 1544-45.

42. 552 F. Supp. at 775-76, 782.

43. See case cited supra notes 70-71 and accompanying text.

44. Merchants Nat'l. Bank v. Dredge Gen. G.L. Gillespie, 663 F.2d 1338, 1353 (Tate, J., dissenting).

45. The Second Circuit discussed *Shaffer* but did not specifically address its applicability to admiralty proceedings. See supra notes 70-71 and accompanying text.

Ltd. v. Apex Oil Co.,[46] the First Circuit Court of Appeals seems to have indicated that, in the proper factual context, *Shaffer* may still be a viable limitation on the exercise of jurisdiction by federal courts sitting in admiralty. In *Trans-Asiatic Oil*, a Panamanian corporation filed suit in Puerto Rico against a Missouri-based corporation and attached certain credits there due the defendant. The defendant challenged the seizure on both substantive and procedural due process grounds.

Although the court did not "decide to what degree a *foreign* admiralty defendant must have minimum contacts with the United States to be subject to *quasi in rem* jurisdiction,"[47] the court applied a minimum contacts analysis to address the jurisdictional amenability of the defendant, a *domestic* corporation. In dismissing the defendant's argument that it was protected by *Shaffer*, the court stated that "[f]ederal jurisdiction being national in scope, due process only requires sufficient contacts within the United States as a whole,"[48] obviating the need to discuss the issue of the jurisdictional amenability of foreign defendants. Although this ended the minimum contacts discussion, the court apparently assumed that, as an American corporation, the defendant could not argue a lack of contacts with the United States to challenge the court's jurisdiction. After disposing of the minimum contacts issue, the court held that, where a minimum contacts test is met, a defendant is not protected by the constitutional requirements of *International Shoe*, but by the doctrine of *forum non conveniens*.[49] As discussed below, *forum non conveniens* is basically a venue protection which evolved in the common law and which is now partially codified.[50]

While the court is entirely correct in its analysis, it should be pointed out that the *International Shoe/Shaffer* due process protections afforded a defendant against suit in an unfair forum are not to be confused with those offered by *forum non conveniens*, although that doctrine has been used to dismiss defendants in admiralty, leaving complainants to seek redress in a foreign forum.[51] Thus, a court should not fall into the analytical trap of refusing to offer constitutional protections in admiralty on the grounds that the doctrine of *forum non conveniens* offers sufficient or identical safeguards.

Under the doctrine of *forum non conveniens*, dismissal or transfer is determined under a standard of convenience, as opposed to the fairness test imposed by *Shaffer* and *International Shoe*. This is a logical distinction, since a decision on the venue issue presumes the constitutionality of jurisdiction (although some courts have held that a venue question

46. 743 F.2d 956 (1st Cir. 1984).
47. Id. at 959 (emphasis added).
48. Id.
49. Id.
50. 28 U.S.C. § 1404 (1982).
51. See, e.g., Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981).

may be addressed without an inquiry into the existence of jurisdiction).[52] Importantly, in a motion to transfer or dismiss on the grounds of *forum non conveniens*, the movant bears a heavy burden of proving that the complainant's choice of forum is inconvenient, reflecting great deference to that choice. This burden is detailed in Justice Jackson's classic statement of factors to be weighed in a court's decision on a *forum non conveniens* issue:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.[53]

Obviously, the forum which is most "easy, expeditious, and inexpensive" will not always be the one that is most fair in jurisdictional terms. Otherwise a foreign defendant might be forced to defend a suit in the United States because the plaintiff, his attorneys, his physicians, his expert witnesses, and his documentary evidence are all located there, even though the defendant lacks minimum contacts with the United States, even taken as a whole. Given such a scenario, fairness should dictate the availability of constitutional protections afforded by *Shaffer*.

In *Trans-Asiatic Oil*, the court preserved the possible availability of such protection to foreign defendants. With the door thus open to extend *Shaffer* to admiralty, courts should carefully observe the rationale of *Trans-Asiatic Oil*, rather than succumb to the temptation to look instead only at the court's decision, which sustained jurisdiction.

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52. Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1145, nn. 6-7 (5th Cir. 1984)(discussing the division of the circuits on this point and the Supreme Court authority relied on in the Fifth Circuit).

53. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 843 (1947). *Gilbert* has been reaffirmed by the Supreme Court in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252 (1981), and has been adopted in the Fifth Circuit. See Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231 (5th Cir. 1983) (stating that "[I]n an opinion which has been recognized as having 'crystallized' the law of forum non conveniens, the Gilbert court all but codified the relative law." 711 F.2d at 1234).

Surprisingly, the court in *Trans-Asiatic Oil* made no mention of the decision in *Grand Bahama*—previously the leading case in this area and thoroughly publicized in legal writing. Although the court seemed willing to apply a minimum contacts test in admiralty, its opinion, like so many before it, discussed admiralty as an exceptional area of the law, stating that "[a]s a participant in maritime commerce, Apex must expect to be sued wherever its credits and property may be found."[54] If this language is read literally, it contradicts the apparent holding that a minimum contacts analysis should be applied, because it suggests that any forum where credits are located would be fair to the defendant. Thus, despite indicating that a minimum contacts analysis is appropriate, the First Circuit gives credence to the primary argument of its predecessors, founded on the presumption that, as Judge Tate states, "Admiralty is Ancient and Admiralty is Different."[55] Although admiralty is indeed ancient, and no one would contest its distinct legal sphere, it is questionable whether these are factors of constitutional magnitude.

One of the first elements used to distinguish admiralty is that the authority of federal courts to hear these cases arises from an express constitutional provision.[56] As the Eleventh Circuit pointed out, "[t]he framers considered admiralty jurisdiction so significant that they awarded the Federal Courts the power to sit in Admiralty under a separate constitutional delegation."[57] This argument is flawed in two respects. First of all, it confuses subject matter jurisdiction with personal jurisdiction. The constitutional grant of power to federal courts to hear cases in admiralty makes those courts competent to adjudicate maritime disputes generally. In any particular case, however, the court must have personal jurisdiction over the parties; in terms of *International Shoe*, the parties must have sufficient contacts with the forum such that the courts of that forum are competent to determine the rights of those particular parties. In failing to recognize the distinction between subject matter and personal jurisdiction, the courts have segregated admiralty defendants as a class and held that as such they are to be afforded some lesser degree of protection by the Due Process Clause of the Fifth Amendment. Such a generalized conclusion was at least implicitly rejected by *Shaffer*. The plaintiff-appellees in *Shaffer* asserted that because the defendants were officers and directors of a Delaware corporation, they should be deemed to have minimum contacts with the state for jurisdictional purposes. Justice Marshall rejected this claim in *Shaffer*, stating that such a "line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of appellants to Greyhound and

54. 743 F.2d at 960.

55. *Merchants Nat'l Bank*, 663 F.2d at 1353 (Tate, J., dissenting).

56. U.S. Const. art. III, § 2.

57. Schiffahrtsgesellschaft Leonhardt & Co. v. Bottacchi, 732 F.2d 1543, 1547 (11th Cir. 1984).

its stockholders. It does not demonstrate that appellants have 'purposely availed themselves of the privilege of conducting activities within the forum state.'"[58] The proper analogy for admiralty is that while the Constitution (in Article I, section 2) does grant federal courts the authority to hear maritime cases, that provision only deals with the choice of substantive law (which the federal sovereign alone can define) and its application. Exercises of jurisdiction over the person must still focus on the relationship of the defendant to the forum.

Secondly, to distinguish admiralty because the authority of the courts arises by specific constitutional grant does not logically support its distinction. Federal courts are, by nature, courts of limited jurisdiction.[59] Their authority extends only to those cases enumerated in Article III, section 2 of the Constitution. The fact that cases in admiralty are specifically named as justiciable in federal court should not automatically distinguish them for constitutional purposes. The logic of the courts in doing so would mean that due process means something different in diversity cases, in federal question cases, and in every other category enumerated by the Constitution. On the contrary, as Judge Tate noted in his dissent to *Merchants Nat'l Bank, Shaffer* can be read to stand for the preference for uniform treatment of all cases under the Due Process Clauses.[60]

The courts which have distinguished admiralty for purposes of a *Shaffer* analysis have relied heavily on the long-standing use of maritime seizures and their acceptance by the courts. In *Shaffer*, however, the Court stressed the fact that due process is an organic concept in rejecting similar arguments to altering basic principles of jurisdiction *quasi in rem*: "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."[61] In this light, the historical argument is questionable. Moreover, there has been a trend in recent years to bring admiralty into line with other areas of the law, as evidenced most notably in the 1966 "merger" of law and admiralty: "Prior to 1966, the admiralty courts had been 'veiled in mystical words, phrases, rules, and forms of practice which no outsider could confidently penetrate.' After 1966, the 'imaginary chair,' the 'fiction of an independent admiralty jurisdiction' would, presumably, vanish."[62]

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58. *Schaffer*, 433 U.S. at 216, 97 S. Ct. at 2586.

59. See generally, C. Wright, The Law of Federal Courts § 7 (4th ed. 1983).

60. *Merchants Nat'l Bank*, 663 F.2d at 1353 (Tate, J., dissenting).

61. 433 U.S. at 212, 97 S. Ct. at 2584.

62. Robertson, Admiralty Procedure and Jurisdiction After the 1966 Unification, 74 Mich. L. Rev. 1628, 1630-31 (1976)(quoting Crutcher, Imaginary Chair Removed from the United States Courthouse; Or, What Have They Done to Admiralty?, 5 Williamette L.J. 367, 374-75 (1969)).

This merger of Law and Admiralty is similar to that of Law and Equity in 1928, which has not given rise to any lasting constitutional distinctions. No less should be true of a merger of Law and Admiralty. Indeed, courts have not hesitated to modify traditional notions of admiralty's realm, such as permitting courts to exercise the remedies of equity in admiralty proceedings, something very unusual prior to the unification. Judge Brown, the author of *Merchants Nat'l Bank*, and once called "our leading admiralty authority"[63] by Justice Douglas, has stated: "the Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."[64] In light of the Supreme Court's rejection of historical arguments in *Shaffer* and the narrowing gap between Law and Admiralty, especially since the 1966 merger, the courts' historical arguments for distinguishing cases in admiralty are unpersuasive.

Finally, the courts have attempted to distinguish admiralty proceedings from suits at law for practical reasons. As Judge Brown stated in *Merchants Nat'l Bank*,

> a paramount consideration is the highly mobile character of contemporary maritime commerce. With vessels able to limit their time in port to less than 24 hours, tremendous risks confront those who are involved in a collision with a vessel that is still navigable, those who render goods and services to a vessel, and those who extend credit to a vessel.[65]

Yet as the court noted in *Karl Senner, Inc. v. M/V Acadian Valor*[66] (which was subsequently overruled by *Merchants Nat'l Bank*), in refusing to distinguish admiralty proceedings in procedural due process cases,

> property, simply because it is movable, possesses no inherent characteristics which immunize it from due process. To hold otherwise would invite distinctions which the Supreme Court has consistently refused to recognize. Indeed, it is difficult to contemplate property more mobile or more susceptible of concealment than automobiles, motorboats, or refrigerators. Yet, it was in the context of [such] litigation that Fuentes was conceived.[67]

The *Senner* court's point is well taken: the "practical" considerations alluded to by the courts of appeals are of no greater moment than similar considerations in non-maritime cases. A defendant can flee a court's

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63. Chevron Oil Co. v. Huson, 404 U.S. 97, 115, 92 S. Ct. 349, 359 (1971)(Douglas, J., dissenting), quoted in Robertson, supra note 62, at 1640, n.60.

64. Compania Anonima Venezolana de Nav. v. Perez Export Co., 303 F.2d 692, 699 (5th Cir. 1962).

65. 663 F.2d at 1347.

66. 485 F. Supp. 287 (E.D. La. 1980).

67. Id. at 294.

jurisdiction by air or automobile, or can conceal consumer goods such as those dealt with in *Sniadach* and *Fuentes* (when they are the subject of repossession or similar proceedings), with at least as much ease and freedom as a vessel can leave port. To whatever extent the restrictions of due process impair the element of surprise for a plaintiff, it is obviously the decision of the Supreme Court that the resulting injustices to the plaintiff are acceptable as part of the price of fundamental fairness in the courts. An identical quid pro quo should apply in admiralty. Moreover, in the situations contemplated by Judge Brown above, the claims of the vessel's creditors would give rise to maritime liens on the vessels, which would make a seizure action a true *in rem* proceeding under Rule C; jurisdiction would be virtually assured.

An Alternative Analysis—Amoco Overseas Oil

In practice, the application of *Shaffer* due process standards to Rule B seizures in admiralty need not significantly disrupt traditional procedures. First of all, as in non-admiralty matters, the cases in which a minimum contacts analysis cannot be met are relatively rare, in light of the cases determining what contacts are sufficient to justify an exercise of jurisdiction.[68] Secondly, the fear that in admiralty matters no other forum may be available to the plaintiff is adequately addressed by the court in *Shaffer*, which left open the possibility of continued validity for seizures under such circumstances.[69] Finally, without disregarding the requirements of due process altogether, the fact that an action is brought in admiralty may still warrant special consideration under a *Shaffer* analysis. Because most parties to admiralty suits are merchants or commercial entities engaged in expensive operations of international scope, it may be fair to summon such a defendant to a distant forum on minimum contacts which might be insufficient in another context. This is not to say, however, that defendants in admiralty should be categorically denied constitutional protections available to other parties. It simply recognizes that under *International Shoe* and subsequent decisions, a factual inquiry into the nature of the activities of a particular defendant (maritime defendants being no different) may indicate that jurisdiction in a particular forum was a forseeable and legally justified consequence of the defendant's activities.

This logic was implicit in the appellate review of *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne*,[70] where a shipper of oil seized funds deposited to the credit of a carrier who delivered an insufficient quantity of oil. The Second Circuit, while not discussing

68. For a discussion of the liberal interpretation the courts have given the minimum contacts test, see F. James & G. Hazzard, Civil Procedure § 12.14 (2d ed. 1977).

69. *Shaffer*, 433 U.S. at 211, n. 37, 97 S. Ct. at 2583, n. 37.

70. 605 F.2d 648 (2d Cir. 1979).

the point at great length, distinguished *Shaffer* on several factual—not constitutional grounds:

> First, and most notable, is the fact that here, unlike *Shaffer*, the property attached is related to the matter in controversy . . . Second, Shaffer involved an attempt by one domestic state to assert jurisdiction over defendants who, it appears, could have been sued in at least one other state in the United States. Here, on the other hand, the jurisdictional issue is whether the appellant may be sued in the United States at all. . . . Third, *Shaffer* did not consider assertion of jurisdiction over property in the admiralty context. Because the perpetrators of maritime injury are likely to be peripatetic, and since the constitutional power of the federal courts is separately derived in admiralty, suits under admiralty jurisdiction involve separate policies *to some extent*.[71]

Therefore, on the basis of these factual findings, the court concluded that there was a sufficient basis for personal jurisdiction under *Shaffer*. Although the court embraced the fallacious rationale concerning admiralty's "separately derived" legal status, the court appears to have been referring only to the fact that maritime defendants are commonly "peripatetic" and therefore more likely to be amenable to jurisdiction as individuals. It did not adopt a broad exception for defendants in admiralty. Thus, while *Amoco Overseas Oil* recognizes the distinct nature of admiralty, the language emphasized above makes clear that that difference should not make *Shaffer* inapplicable—it should only present another factual element to be weighed in determining whether an assertion of jurisdiction is fair.

Conclusion

In *Trans-Asiatic Oil*, the First Circuit became the first court to recognize the applicability of a minimum contacts standard to seizures quasi *in rem* in admiralty since it was raised by the Second Circuit in *Amoco Overseas Oil*. *Trans-Asiatic Oil* therefore stands as authority to stem the tide of judicial thought which would refuse to extend constitutional protections on jurisdiction to maritime defendants. Whether it will be followed, extended, or ignored remains to be seen, but thoughtful analysis should confirm that further use of the minimum contacts doctrine in the realm of admiralty need be neither disruptive nor unfair to most proceedings, while maintaining the integrity of due process.

Likewise, *Amoco Overseas Oil* sets forth a practical analysis which illustrates to other courts the factual inquiries which are relevant to determining whether an assertion of seizure-based jurisdiction in ad-

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71. Id. at 655 (citations omitted).

miralty is fair. It is submitted that the inquiries illuminated by these cases are preferable to the general distinction of admiralty which leaves maritime defendants without constitutional protections. The Fifth Circuit has not been faced with this issue, but since it narrowly limited its decision in *Merchants Nat'l Bank*, and specifically did not speak to situations under Rule B, it has left a niche for distinguishing *quasi in rem* assertions of jurisdiction. While other courts have rejected due process arguments more categorically, none, other than the First and Second Circuits, have addressed this particular issue. Thus when other courts are faced with such a case, while they may be forced to employ logic which is somewhat inconsistent with procedural due process cases like *Merchants Nat'l Bank* and *Polar Shipping*, they will not have to reverse any cases outright, with the exception of any prior district court opinions like *Grand Bahama*. In extending *Shaffer*, the courts will promote both fairness in the admiralty courts and logic and uniformity in due process cases.

George Arceneaux III