July, 2013

Commerce and Tradition as Gatekeepers of Admiralty: Falsity and Futility

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I
INTRODUCTION

In an article, The Admiralty Jurisdiction of Torts and Crimes and the Failed Search for its Purpose, 1 (hereinafter the “ARTICLE”) my primary thesis was that the admiralty jurisdiction of the nation springs the international law of its sovereignty, and is territorial and not measured by casual circumstances. The ARTICLE traced the development of the Admiralty mainly from both England and France. In both, the government of the waters claimed by the sovereign (the Admiralty) was not by an ordinary internal department of the state but on the concept of the sea as a province governed by a deputy called a high admiral who commanded the nation’s warships. The purpose of this “postscript” is to extract from the ARTICLE for more emphasis the discussion of the Supreme Court’s two late-20th-century innovative tests for admiralty tort jurisdiction and bring the record of their folly up to date. Readers will be referred to the ARTICLE for more detailed discussions of background.

II
WHAT IS ADMIRALTY?

Maritime laws (but not “admiralty” courts) were known from ancient times. 2 In Anglo-American legal history such a court was first created as a function of the Lord Admiral in 1337, when the King directed him to appoint deputies learned in the maritime law to do justice according to it. 3 The adm-

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2 E.g., The Rhodian Sea Law.
3 1 MONUMENTA JURIDICA, THE BLACK BOOK OF THE ADMIRALTY (SIR TRAVERS TWISS ED.) (1871) at 2 and 7.

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eral’s command of the country’s naval forces was of course the rationale for his choice to govern the oceanic province. That included not only defense and the maintenance of good order generally but such varied particulars as fishing seasons and methods, maritime employments of seamen and others, impediments and pollutions of waters, and a Court of admiralty under him to decide disputes arising in his maritime province. This jurisdiction was broadened in the vice-admiralties of the several American colonies, continued by them as new sovereign States, and assumed entirely in the Constitution of the United States.

The pattern in France and other European nations was similar and Admiralty has come to mean the customary regime of a nation’s possession and control of its territorial waters and relations with others in their common waters. Its historic origins and development, the understandings of it in international law, the historical uses of its powers, and practical good sense combine to define it as an authority of territorial scope and functions.

As such, it should be viewed jurisdictionally in the same sensible way as our other national commons or provinces in the air and space above us. As do our other Constitutional powers and limitations, it must also respond to social and technological change, not limited to the instruments and devices of the day. It is a grave error for admiralty courts to try to rationalize admiralty jurisdiction in relation to particular activities or objects rather than to the waters themselves. They, and their occupancy or uses for whatever purposes, are the proper subject of Admiralty.

III

CONFUSION OF PURPOSE Follows Devolution of Functions

The modern devolution of some Admiralty functions here, while retaining all the admiral’s historic powers, has detached some from others, placing broad regulatory and police powers under the Coast Guard (and an admiral still) and the judicial powers in the civil courts. With this change, history and original concept are dimmed. The admiralty courts, detached from...
direct contact, ironically carried away the institutional name, while losing all but occasional awareness of some of the regulatory scope within their purview.

Without practical intimacy with the functional Admiralty, the Supreme Court began to search for its limits in the types, sizes and uses of vessels, a familiar segment of the historic jurisdiction. Activities at a conceptual level, such as commerce and pleasure were urged, debated and shown unworkable, and the detached Court was then tempted to look for specific activities, based not on Admiralty’s control of the waters but now on factual evaluations of activities, more appropriate to the merits than to the jurisdiction and unsuitable for guidance in a changing scene of commerce and technology.

In 1973 and 1982 it introduced two such tests adequate to dispose of the particular situations before it. These tests of tort jurisdiction, based on its supposed purposes, were: 1) an entry test of involvement of “traditional maritime activity” dependent on what the judge thought to be tradition; and 2) whether the event had the “potential to disrupt commerce,” which might be called an exit test as dependent on trial of the facts, although, like tradition, left in practice to the guesswork of the judge.

The ARTICLE (supported by conflicting views in the Court) argues that the tests of tort jurisdiction described above are unprincipled, capricious, confusing and ineffective in practice and bound to lead to broad and capricious applications and consequent doubt and litigation.9 Years of continued evidence of these defects prompts me to single them out here for more prominent condemnation.

IV
SOME POLITICAL BACKGROUND10

For political reasons, differences arose almost immediately about the scope of admiralty jurisdiction under the Constitution. It was allocated to the federal government from the principled political motive of gathering exclusively and uniformly the broad jurisdictions of the colonies. Controversy arose early, however, over its adaptation geographically and economically to the nation as a whole. In conflict over the extent of federalism and State’s rights, many were concerned with the rights of the States to make and enforce laws on matters they thought it unnecessary for the federal government to control.

10 See ARTICLE 455-59.
From the start, justices favoring both broad and narrow readings of the
district sat on the Supreme Court and there were dissents on that subject
throughout the 19th century and again as late as 1982. \(^{11}\) Probably as a con-
sequence, the Court waffled for some time in the scope of its general expres-
sions of the district acquired, while not making its expressed limit the
definite point of decision. In this way the boundaries of the district were
left undefined and subject to the supposition that they were still to be sought.
All this dispute tended to focus on Admality’s judicial branch and ignore
the rest of it, the governmental Admality of regulatory and police powers.

In later years, schemes for contraction of the district have been
unsuccessfully made on the old political ground of States’ rights; \(^{12}\) grounds
of supposed purposes to serve the shipping industry; \(^{13}\) a view of original
intent limited to control of prize, piracy and smuggling; \(^{14}\) and most persist-
ently the view that the district should be limited to “commerce.”

V

COMMERCIAL TEST ARGUED AND REJECTED

It has been argued repeatedly, in order to limit the district, that
Admality exists only to serve or protect commerce. \(^{15}\) A further mischief lies
in the assumption that commerce is only traffic in money and goods. In
Gibbons v. Ogden, the Court had to decide whether the word “commerce” in
the Constitution is limited “to traffic, to buying and selling, or the inter-
change of commodities . . . [or] comprehends navigation,” and decided that
it is not so limited: “All America understands, and has uniformly understood,
the word “commerce,” to comprehend navigation.” \(^{16}\) The Court reiterated
this view, using “commerce” as navigation and requiring, in the context,
nothing to do with trade. \(^{17}\)

Later attempts to narrow the meaning of commerce and district sprang from the profusion of pleasure craft and their appearance in the admi-
ralty courts. An article published in 1963 challenged their intrusion and pro-

\(^{11}\) See Foremost Ins. Co. v. Richardson, 457 U.S. at 677, 1982 AMC at 2260 (Powell, J. dissenting).
\(^{12}\) See Foremost, 457 U.S. at 677-78, 1982 AMC at 2260-61 (Powell, J. dissenting).
\(^{13}\) See Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760,
2006 AMC 1297 (5th Cir. 2006).
\(^{14}\) See William R. Casto, The Origins of Federal Admality Jurisdiction in an Age of Privateers,
\(^{15}\) See e.g., Foremost, 457 U.S. at 677, 1982 AMC at 2260 (Powell, J. dissenting); Preble Stoltz,
\(^{16}\) 22 U.S. (9 Wheat.) 189, 190 (1824).
\(^{17}\) Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 315 (1852).
posed their exclusion. The author sought to justify this view historically by writing that “[b]ecause pleasure boating did not exist in any meaningful sense until very recently, history cannot dictate what law should be applied to [it].” We would not suppose that the Constitution had no application to telephonic communications because the telephone was unknown in 1787.

The opponents of jurisdiction of pleasure craft confronted a stubborn dilemma they did not recognize. In addition to the Rules of the Road, which had always applied to them, powered pleasure boats came under explicit federal regulation beginning in 1940, by virtue of the Motorboat Acts, which applied without distinction to work boats and pleasure craft. We might assume that they were founded on the Admiralty and Commerce powers, but need no such assumption as to the former because the Acts provided penalties for violations enforceable by suit in admiralty, without distinction of work and pleasure. Their re-codified successor law still does. If the Admiralty power alone did not suffice to support the regulation and jurisdiction of pleasure boats, the commerce power would have to be relied on to support those statutes. Pleasure craft would then have to be considered commercial, and could therefore not be excluded as not engaged in commerce. Whatever view of “commerce” you might prefer to take, therefore, the exclusion of pleasure craft could not be squared with the Congressional understanding expressed in the Acts.

In the Supreme Court, controversy was renewed over federalism. In the Foremost case in 1982, the issue was drawn over a collision of two pleasure boats on navigable inland waters, and admiralty jurisdiction was upheld five-to-four. The dissenters would have excluded the craft from admiralty as non-commercial, although. The Court had several times assumed the inclusion of pleasure craft without discussion of the question now raised.

The Court conceded the interest of admiralty jurisdiction in the protection of maritime commerce, but the majority rejected “too narrow a view of the federal interest sought to be protected,” and explained the broader federal

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19 Id. at 666.
22 46 U.S.C. § 4311(c) (action in rem); 46 U.S.C. § 12309; see also, e.g., 46 U.S.C. § 12301 (failure of motorboat to have State number.)
interest in “the potential effect of noncommercial maritime activity on maritime commerce.”

The Court was apparently informed about the uses of so-called pleasure boats, as it recognized the impracticality of the commercial distinction where many vessels are used for both purposes and rejected it as a controlling factor in admiralty jurisdiction, observing also that Congress made no such distinction in its definition of vessels as referred to in its statutes.

Congress often specifies the commerce of the vessels to which its statutes apply, as passenger vessels, tank vessels, or motor boats including pleasure craft. But our jurisdictional statute for maritime crimes and the Supreme Court, in exercising criminal jurisdiction in reliance on the general Admiralty power, draw no distinction between the vessels involved or their uses; we punish murders on American yachts in the same manner as on American merchant vessels.

Although the courts have continued to say that a fundamental interest of admiralty jurisdiction is the protection of maritime commerce, it appears that the notion of it as a condition is defunct.

VI

“TRADITIONAL” MARITIME ACTIVITY TEST

In the early days of air commerce there was much speculation about what laws applied to aircraft in flight, including whether and to what extent maritime law and admiralty jurisdiction applied to them on and over navigable waters. Much of this background is reviewed by the Supreme Court in the Executive Jet case discussed below. The federal courts were not avid to embrace the field in their admiralty jurisdiction. The major subject of concern was loss of life and was resolved by Congress as to crashes in navigable waters by the Death on the High Seas Act and it was scarcely possible after that to deny jurisdiction of injuries short of death.

In 1968 a jet airplane with no passengers, taking off from Cleveland’s airport on the shore of Lake Erie, struck a flock of seagulls, lost power and stalled and sank in the shallow waters of the lake, with no injuries to the crew. The owner sued the City in admiralty for the loss of the plane. The
Supreme Court held that the suit failed for lack of admiralty jurisdiction.\(^{30}\) It was settled law that an admiralty tort must occur on navigable waters,\(^{31}\) and in analogous circumstances not involving aviation, that a mishap occurring on land although ending in the water is not of admiralty jurisdiction.\(^{32}\) The Court referred to such cases with approval and indeed observed that it made no sense to base jurisdiction on where an object fell after it had received the fatal impact. Virtually acknowledging that it could decide the case on this ground, it preferred to look for a rule independent of impact on land that would eliminate more aviation cases. The rule it hit upon was that “claims arising from airplane accidents” must not only occur on navigable waters but “bear a significant relationship to traditional maritime activity.”\(^{33}\) In using “traditional” as it did, the Court had tagged the word as an epithet for the activity before the Court.

“Tradition,” a belief or practice handed down orally, has no legal meaning, no authoritative source, no requirement of uniformity or compulsion or other objective limits geographical or temporal, such as trade usage and custom have, and for which tradition never substitutes. Tradition is invented and declared to exist not only in a community or mere neighborhood but most often probably in a family.\(^{34}\)

This rule expressly intended for aviation accidents was taken up and applied indiscriminately by a number of district courts in the next few years and in the Foremost case in 1982 the Supreme Court bowed to its use and stated it as a general rule of tort jurisdiction.\(^{35}\) It was repeated in Sisson in 1990, where it was sharply and justly criticized in a concurring opinion by Scalia, J. and White, J.:

> [T]hat test does not add any new substantive requirement for vessel-related torts, but merely explains why all vessel-related torts (which ipso facto have such a “significant relationship”), but only some non-vessel-related torts, come within §1333. The Court’s description of how one goes about determining whether a vessel-related tort meets the “significant relationship” test threatens to sow confusion in what had been, except at the margins, a settled area of the law.\(^{36}\)

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\(^{31}\) The Plymouth, 70 U.S. 20 (1866).

\(^{32}\) Smith & Son v. Taylor, 276 U.S. 179, 1928 AMC 447 (1928) (longshoreman struck on pier by sling from ship and fell into water).

\(^{33}\) 409 U.S. at 268, 1973 AMC at 15-16.

\(^{34}\) See generally Graydon S. Staring, “Tradition”: A Buzz Word As Evidence In Maritime And Common Law, 7 BENEDICT’S MARITIME BULLETIN 125 (No. 2/3, 2009); Available at: http://works.bepress.com/graydon_staring/30; Eric Hobsbawn & Terence Ranger (eds.) The Invention of Tradition (Cambridge 1992).

\(^{35}\) Foremost, 457 U.S. at 673, 1982 AMC at 2257-58.

\(^{36}\) Sisson v. Ruby, 497 U.S. at 368, 1990 AMC at 1809 (Scalia, J. concurring).
When the test is applied to non-aviation cases, it is too vague to manage, unpredictable and accordingly inconsistent in results, and in fact as predicted, does "sow confusion," as shown by the cases collected below and in the ARTICLE.

The requirement of tradition is perplexing and unlikely ever to be otherwise. While the word refers to practice, it does not connote the uniform acceptance or compulsion of usage or custom, or the required longevity of the one or antiquity of the other. Tradition is a portmanteau word, with many and various sociological uses, ranging from undocumented history and old lyrics to family holiday dinners. It has almost no recognition as of evidentiary significance. 37 "Traditions" may be as old as last year or last month; they have been invented for political or social purposes. 38 In what histories may the qualifying tradition be found: e.g., British? Samoan? Biblical? And in what eras, the present only, or the colonial, or anything between or before? The existence and terms of a tradition are unquestionably facts to be determined on evidence, but the reports indicate that they are guessed at by the judge before any facts have been tried. Courts of appeals trying to formulate an objective approach to the test have performed a tetrapylotomi, resulting in a four-part riddle containing the same word "traditional." 39

In applying the test, some federal courts have shown reluctance to recognize tradition in pleasurable frivolities. But the decision is difficult and probably controversial as to which pleasure seekers are more frivolous than reveling passengers who fall overboard from cruise ships, whose fate in the water, or rescue from it, will be readily admitted to the dignity of the Admiralty.

37 See C.J.S. Evidence § 284 (not sufficiently probative to warrant inference of truth, with limited exceptions.)

38 ERIC HOBBSBAWN & TERENCE RANGER (EDS.) THE INVENTION OF TRADITION (Cambridge 1992) N.B. at p. 1:

'Invented tradition' is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.... However, insofar as there is such reference to a historic past, the peculiarity of 'invented' traditions is that the continuity with it is largely fictitious. In short, they are responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.

39 See Kelly v. Smith, 485 F.2d 520, 525, 1973 AMC 2478, 2486 (5th Cir. 1973) (factors to be considered: "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law"), accord, T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855, 857, 1975 AMC 343, 345 (9th Cir. 1974), cert. denied 421 U.S. 1000 (1975); Complaint of Paradise Holdings, Inc., 795 F.2d 756, 759, 1987 AMC 104, 107-08 (9th Cir. 1986), cert. denied 479 U.S. 1008 (1987).
As it is, little that is done on the water is now actually questioned on the point of tradition, apart perhaps from swimming, and there only by someone who isn’t doing it to save his life after losing his vessel or falling overboard. And if recreational diving, scuba and otherwise, are admitted, how can swimming itself be ignored? It would be absurd to exclude the case of a swimmer struck by a vessel, and no different result should follow when the object is a skier or a kite-board. Swimming may appear a stranger court only through ignorance of what Admiralty frequently regulates in practice.

The test generates continual litigation, however, as parties seek to establish or refute tradition, and the conflicts and bizarre contrasts at the fringes reflect little credit on the test. Further examples appear below.

VII

DISRUPTION OF COMMERCE ENTERS AT THE BACK DOOR

In the *Sisson* case the Court recalled having said in a footnote in *Foremost* that “not every accident in navigable waters that might disrupt

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41 See, e.g., Medina v. Perez, 733 F.2d 170, 1985 AMC 627 (1st Cir. 1984).

42 See 33 CFR 165.33 ((a) No person or vessel may enter or remain in a security zone...; 33 CFR 165.160 (examples of zones and restrictions).


47 U.S. at 675, 1982 AMC at 2259 n. 5.
maritime commerce will support federal admiralty jurisdiction” but when a “potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of boats in this case, admiralty jurisdiction is appropriate.” The reference to potential hazard was fraught with mischief. The judgment was so manifestly sensible and the dissent so perversely otherwise that the notion was superfluous.

The Court had already decided that, if commerce were required, pleasure craft could not be excluded from it. A collision of one pleasure craft with any other craft, with damage done, was therefore the realization of a hazard to maritime commerce. In a collision of two pleasure craft the hazard was realized as to them and “potential” only as to others. Thus potentiality would be significant only if a distinction were to be observed between pleasure craft and others for the purpose of jurisdiction. But the Court had already rejected such a distinction. If the potentiality of disruption was held out as a possible sop to the dissenters, it failed. The dissent included a disdainful footnote dismissing that test: “If a ‘potential disruptive effect’ on interstate traffic in fact implicated a federal interest strong enough to support federal jurisdiction, then federal courts also should hear cases in which accidents disrupt similar land traffic.”

Harmless as a make-weight in a case already tried, potential hazard functions quite differently as a factual condition to be applied negatively. It is an evaluation of risk based on facts to be tried if not to be guessed at by judges not presumed to be qualified to do so. Having been recognized to be an incompetent doorman to the Admiralty Club, Commerce was reassigned as bouncer, often only to oust the plaintiff after the facts have been developed and he has spent his money at the bar. At closing time there is little practicality in declaring that he should not have been admitted to court.

Thus, nevertheless, was founded in Sisson the double test of traditional maritime activity and potential to disrupt maritime commerce. Fortunately, the Court had recognized that maritime commerce was not all monetary and also stated, and later emphasized, that the test was not interference with commerce but the potential of such an incident to do so.

In their concurrence, Scalia, J., joined by White, J., said of this new qualification, in part:
In my view the reading [of Foremost] that imputes the . . . requirement is in error. We referred to “the potential disruptive impact of a collision” merely to rebut the petitioner’s argument that jurisdiction in that particular case would not further the general purposes of admiralty jurisdiction, since navigation by pleasure craft could not affect maritime commerce. It was enough in that case to answer that it could. But that response cannot reasonably be converted into a holding that in every case such an answer must be available—that no single instance of admiralty tort jurisdiction can exist where there is no potentially disruptive impact upon maritime commerce. 49

The proliferation of this new test in the reports of the lower courts confirms its value as grist for litigation and its lack of value as a boundary. (Some relevant figures on this point appear below.) A recent opinion brings the point into sharp focus. A vessel had been arrested and released on security. A suit in admiralty was later brought for misrepresentations leading to the arrest and consequent loss and a court of appeals decided there was admiralty jurisdiction. The maritime event was that, as a result of harmful words uttered ashore, an officer of the law boarded the vessel at her pier and arrested her. Because causing the arrest of a vessel is a well-established procedure, the representations were substantially related to traditional maritime activity. And, of course, the arrest, by forbidding her movement, disrupted the maritime commerce represented by the vessel arrested. 50

What this points up is that any vessel disrupted represents disruption itself, and not just any vessel but anything in maritime commerce. These objects and actors include not just vessels but crews, cargoes, passengers and other persons to whom or which casualties may occur. The Seventh Circuit holds injury to a crewmember to be disruption itself: “without doubt an injury to one of its crew disrupts its participation in maritime commerce.” 51 And more recently the Ninth Circuit has so held, elaborating on the point in the case of a fisherman assaulted and beaten by a former employer from another vessel over a wage dispute:

[R]esolving a disagreement with a crewmember through physical violence could render the crewmember unable to perform his fishing duties. . . . could delay or cause cancellation of scheduled fishing trips because of decreased manpower. . . . [and] if the ship had to fish with less crewmembers or with the loss of a key crewmember, it could decrease the number of fish the crewmen are able to catch. . . . (citations omitted) 52

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49 Sisson, 497 U.S. at 371, 1990 AMC at 1811.
51 Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 386, 2001 AMC 2563, 2571 (7th Cir. 2001); see also Tagliere v. Harrah’s Illinois Corp., 445 F.3d 1012, 1015, 2006 AMC 1290, 1294 (7th Cir. 2006) (injury to passenger meets test and injury to crewmember even more likely.)
52 Gruver v. Lesman Fisheries Inc., 489 F.3d 978, 983, 2007 AMC 1559, 1563 (9th Cir. 2007).
Instances abound.\textsuperscript{53}

Perhaps a more surprising, although hardly illogical, example is a case in which blasting ashore cast spoil into an oyster bed, a venture in maritime commerce, which was damaged and disrupted by the spoil itself and efforts to remediate it, a “traditional” activity.\textsuperscript{54}

As it transpires, it is unnecessary to look around for someone else who might have been called to help or delayed by the casualty. The casualty is itself the disruption.\textsuperscript{55} Maritime commerce is varied and intricate. A conceptual phrase like “potential to disrupt” is pregnant with disputes and, after much expense, the disputants and the authors are likely to be surprised. As a condition of jurisdiction, it turns out to be impractical and ineffective.

VIII

DISAGREEMENT WITH CONGRESS

The courts are not the only interpreters of the Constitution. Congress states its interpretation, sometimes explicitly, in passing laws referring to the admiralty jurisdiction or dependent on it, and the Supreme Court has deferred to Congress. This was the view taken by the Court when Congress directed the exercise of the jurisdiction in inland navigable waters,\textsuperscript{56} and in the foreclosure of preferred ship mortgages,\textsuperscript{57} and in subjecting damage on land to admiralty, first in limitation of liability proceedings\textsuperscript{58} and then in the Extension of Admiralty Jurisdiction Act, which the Court has applied several times without regard to whether the Act was constitutional. This back-


\textsuperscript{54}Dolan Brothers Shellfish Co., Inc. v. Boissoneault, 2007 AMC 968 (D. Conn. 2007).

\textsuperscript{55}Id.; see also, e.g., Sluijmers v. United States, 306 F. Supp. 2d 982, 2003 AMC 2875 (D. Ore. 2003) (injury to salvor boarding vessel from helicopter disrupted commerce by disabling him); In re Horizon Cruises Litigation, 101 F. Supp. 2d 204, 2000 AMC 2275 (S.D.N.Y. 2000) (outbreak of disease on vessel disrupted commerce by cancellation of next cruise.)

\textsuperscript{56}The Propeller Genesee Chief, ARTICLE note 10, at 453, 1999 AMC at 2097 (“If this law...is constitutional, it must be supported on the ground that the lakes and rivers...are within the scope of admiralty and maritime jurisdiction as known...when the Constitution was adopted.”)

\textsuperscript{57}Detroit Trust Co., ARTICLE note 87, 293 U.S. at 52, 1934 AMC at 1435 (“Congress...not limited by previous decisions as to the extent of the admiralty jurisdiction.”)

\textsuperscript{58}Richardson v. Harmon, 222 U.S. 96, 2001 AMC 1207 (1911).
ground was reviewed in the leading circuit case on the Extension Act, which dealt with damage by a vessel to a dike attached to a river bank. The court there also took note of evidence that both the English and French admiralties took cognizance of damage to banks, and structures on them, and concluded that the Act was remedial only and therefore applied to damage done before it was passed. Legislation based on the inclusion of pleasure craft has been discussed above. In light of a recent decision, the Extension Act assumes renewed importance and requires special discussion below.

A compelling expression of Congressional understanding and intention is found in the statutory definition of our “special maritime” jurisdiction and the offenses punishable under it. It is defined to include “[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State,” and [U.S.-owned or -flagged vessels “within the admiralty and maritime jurisdiction” etc.]

This definition is one of territory defined in turn by the territory of the admiralty jurisdiction and not by discrete subjects or concepts. Numerous crimes are defined to be punished when committed within that jurisdiction; they include assault, maiming, robbery, domestic violence, stalking and sexual abuse. There is not a word about the exclusion of any type of vessel, and when the presumable purpose of these laws is considered, it would be unreasonable to expect such a restriction. Clearly, Congress considers reference to the “admiralty and maritime jurisdiction of the United States” broad enough to meet the case, and the notes of cases annotated under these sections confirm that. A cavil that these are after all criminal matters cannot be entertained. There is no history to suggest, what the words of the commissions would belie, that the admirals had criminal jurisdiction over an act but not of the civil consequences attached to it.

IX
THE RECORD: PHANTOM TRADITIONS AND UBIQUITOUS POTENTIAL DISRUPTIONS

Many lawyers, judges and parties would surely be pleased with a simpler and more economical approach as eliminating original doubt about a given

59 United States v. Matson Navigation Co., ARTICLE note 73; see also GODOLPHIN 43-48 (“All prejudice done to the Banks of Navigable Rivers, or to Docks, Wharfs, Keys, or anything whereby Shipping may be endangered, Navigation obstructed, or Trade by Sea impeded.”) quoted at 1 BENEDICT ON ADMIRALTY, Vol. No. 1 § 47, Godolphin on the Jurisdiction, in 1685.
60 See Part IV.C.2.b) infra.
62 18 U.S.C. §§ 113, 114, 2211, 2261, 2262, and 2241-48, respectively.
claim. It is, moreover, not as though the purposive approach has led to uniformity or certainty. (In the next several footnotes the cases cited on the same point in the ARTICLE will not be repeated, only the new ones issued since 2006.) A total of 161 opinions (27 new) citing “traditional maritime activity” or “potential to disrupt commerce” were found in American Maritime Cases for the 12 years from 1991 (the year after Sisson) through 2012. In some cases the issue was jurisdiction itself and in others the choice of maritime or State law. In reviewing them, 21 cases (11 new) were disregarded as irrelevant, for reasons such as lack of navigable water, or obscurity. Of the 100 (22 new) remaining trial court opinions, 11 (one new)\(^63\) denied jurisdiction for lack of traditional activity alone, of which at least two have been reversed;\(^54\) four (two more)\(^65\) for lack of disruption alone, and three (one new)\(^66\) on both grounds. In the remainder, admiralty jurisdiction of widely various activities was upheld, most with respect to both tests\(^67\) but some only based on tradition without mention of disruption.\(^68\) There remained 51 (five

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\(^63\) Bender Shipbuilding & Repair, Inc. v. Caterpillar Inc., 2012 AMC 1322 (S.D. Ala. 2012) (fire on incomplete vessel at construction pier); see also ARTICLE n. 200.


\(^66\) Johnson v. Royal Caribbean Cruise Lines, 2011 AMC 1171 (S.D. Fla. 2011) (simulated surfing on cruise vessel); see also ARTICLE n. 203.


new) appellate opinions. Five (one new)\(^69\) of these affirmed denials of admiralty jurisdiction and one a recent grant.\(^70\) 13 denials (two new) were reversed\(^71\) and only three rulings in favor of admiralty reversed, none since 2006.\(^72\) So in all the courts, 134 (20 new) upheld admiralty jurisdiction, and 26 (four new) finally denied it. Among the denials are several where the connection with navigable water or navigation was attenuated\(^73\) and some that are scarcely reconcilable with others, as might be expected with such subjective tests.\(^74\)

It is of considerable interest that, in the latter half of the 12-year period, there were only 22 relevant trial court cases compared with 78 in the earlier half, and only five appellate opinions, compared with 46; and there occurred only four of the trial court denials numbered above,\(^75\) and only one appellate denial, an affirmance.\(^76\)

These numbers and inconsistencies suggest; first, that there is much initial uncertainty about satisfying these subjective tests and therefore about the available jurisdiction and applicable law; second, that with the passage of

\(^{69}\) Peru v. USS Missouri Memorial Assn., 2007 AMC 597 (9th Cir. 2007) (aff’g denial; fall on permanently moored battleship); Delgado v. Reef Resort Ltd., ARTICLE note 141 (scuba diving not traditional or disruptive); Hasty v. Trans Atlas Boats, Inc., 389 F.3d 510, 2004 AMC 2860 (5th Cir. 2004) (claim against harbor police for lack of protection not traditional); Cochran v. E.I. du Pont de Nemours, 933 F.2d 1533, 1992 AMC 2599 (11th Cir. 1991) (seaman’s injury from toxic material on vessel in port not traditional); H2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 1997 AMC 390 (9th Cir. 1996) (asphyxiation in a houseboat while tied to shore not disruptive.)

\(^{70}\) Hamm v. Island Operating Co., Inc., 450 Fed. Appx. 365, 2012 AMC 292 (5th Cir. 2011) (aff’g jurisdiction; seaman transferring cargo to fixed platform injured by crane.)

\(^{71}\) Mission Bay Jet Limitation Proceedings, 570 F.3d 1124, 2009 AMC 1617 (9th Cir. 2009) (rev’g unreported denial; user thrown off jet ski); Gruver v. Lesman Fisheries, Inc., 489 F.3d 978, 2007 AMC 1559 (9th Cir. 2007) (rev’g 2005 AMC 2272; assault on moored fishing vessel in dispute over wages owed former crewman); see also ARTICLE n. 206.

\(^{72}\) See ARTICLE n. 207.


\(^{74}\) Compare Sinclair v. Soniform, Inc., 935 F.2d 599, 1991 AMC 2341 (3d Cir. 1991) (recreational scuba diving; jurisdiction); with Delgado v. Reef Resort Ltd., ARTICLE note 141 (recreational scuba diving; no jurisdiction) and Delta Country Ventures, Inc. v. Magana, ARTICLE note 205 (recreational non-scuba diving; no jurisdiction); compare H2O Houseboat Vacations, Inc. v. Hernandez, ARTICLE note 204 (no jurisdiction of Carbon Dioxide poisoning on houseboat when moored to shore because no potential to disrupt) and Lewis v. Sea Ray Boats, Inc., 65 Pac.3d 245, 2003 AMC 815 (Nev. 2003) (same) with Houseboat Starship II, Limitation Proceedings, 2006 AMC 1335 (M.D. Tenn. 2005) (distinguished on the ground poisoning occurred after beginning of cruise); see also ARTICLE notes 141, 142.


\(^{76}\) Peru v. USS Missouri Memorial Assn., 2007 AMC 597 (9th Cir. 2007) (aff’g denial; fall on permanently moored battleship.)
time the lower courts, recognizing the vagueness of the tests, have become more welcoming of various activities and more liberally imaginative of the possibilities and natures of disruption; and third, that their elimination would have little effect on the overall jurisdictional results. The decisions also reflect not only inconsistencies within themselves but inscrutable distinctions from earlier ones of great authority\textsuperscript{77} that are still followed in the circuits as mandatory, without reference to the newer tests.\textsuperscript{78}

The courts must sometimes devise new tests to sift out frivolous or inconsequential claims of jurisdiction. But these tests, which have no historic foundation in the origin of federal allocation of the constitutional power, are not justified by their impact on its exercise and their inconvenient, costly and capricious subjectivity for lawyers, parties and judges.

\textbf{X}

\textbf{CONCLUSIONS}

The use of traditional maritime activity and potential disruption of maritime commerce as conditions of admiralty tort jurisdiction has no foundation in history or jurisprudence. They conflict with understandings and positive legislation of Congress, and with positive rulings of the Supreme Court in particular cases. As predicted by Justices, they cause confusion and produce litigation about their meanings and application. Their vagueness is unsuited to the task they have been assigned, and their record of application shows that they are unproductive of rational results.

They are gates easily opened by imaginative pleading of traditions and potentials unsupported by proofs and extending to fantasy in some cases. They should be abandoned by the Court and the sensible and historic rule of occurrence on navigable waters reaffirmed, which will be found now adequate to meet the concern for aviation that first occasioned these troublesome misfits.


\textsuperscript{78}E.g. Ward v. Cross Sound Ferry, 273 F.3d 520, 2002 AMC 428 (2d Cir. 2001) (gangway injury governed by The Admiral Peoples, supra); White v. United States, 53 F.3d 43, 1995 AMC 1904 (4th Cir. 1995) (gangway injury governed by The Admiral Peoples); see Florida Fuels, Inc. v. Citgo Petroleum Corp., 6 F.3d 330, 1994 AMC 752 (5th Cir. 1993). ("well-established that maritime law encompasses the gangway" citing The Admiral Peoples.)