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A Return to Objectivity in Admiralty Tort Jurisdiction?

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Introduction

We may take it from centuries of world history that the exercise of an admiralty jurisdiction is a customary attribute of sovereign maritime nations. It comprises not merely the judicial jurisdiction we readily, and mostly, think of, but the entire machinery of control over adjacent waters, naval (from which it takes its name), legislative, administrative and police powers, and finally the special admiralty court to deal with its laws. As an institution of sovereign government in modern times it has been divided and redistributed in the United States and other countries. Its primary military function remains with the Navy, of course. Its police and border and customs enforcement functions, and regulatory governance of mariners and shipbuilding, and its concerns with pilots, aids and obstructions, fishing and related matters are shifted to our Coast Guard (which still has admirals). Its power to define and punish certain offences at sea is explicitly lodged with Congress, and further broad legislative powers drawn by Congress from the Admiralty Clause, and its judicial powers, criminal and civil, shifted to our federal courts, except for the quasi-judicial regulatory powers exercised by the Coast Guard. But the capacities of all its divided segments are still bounded to a considerable extent by the depths and free flows of water, which nature and nations alter from time to time.

As the admiralty bar well knows, the Constitutional boundaries of our admiralty judicial jurisdiction, after two centuries, are still not uniformly recognized. They are argued in recent cases, and neither in the courts nor in academic writings is there agreement. Because the proper law of the admiralty jurisdiction is also the

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2 U.S. Const. art. I, § 8, cl. 10.
3 See, e.g., Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 1934 AMC 1417, 1428 (1934) (Ship Mortgage Act: “The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States.”); Panama R.R. v. Johnson, 264 U.S. 375, 386, 1924 AMC 551, 554-55 (1924) (Jones Act; “Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. … Practically therefore the situation is as if that view were written into the provision.”); see also text at notes 55-60 infra.
proper law of maritime cases and issues when they are heard in other courts,\textsuperscript{5} the uncertainties of the jurisdictional boundary raise uncertainties also about the relevant law, regardless of the court where the issue arises. In response to the arguments of litigants seeking boundaries that will serve their interests, courts sometimes refer to the original purposes, real or supposed, of the admiralty jurisdiction, as means of refining its Constitutional assertion more narrowly. As its origins recede in time, references to them become murky and the conclusions drawn accordingly flawed. With attention narrowly focused on civil jurisdiction, the broader setting of admiralty jurisdiction generally is never mentioned and it is fair to conclude that the courts in civil cases are not at all mindful of it.

So long as uncertainty appears and counsel argue formulas for a narrower jurisdiction in the interest of winning, the courts, too, may be drawn to such arguments, sometimes on the basis of federal-State accommodations, sometimes to thin out their dockets, and even to satisfy a jurisprudential prejudice, as in one risibly outlandish instance.\textsuperscript{6} While these observations apply to both tort and contract disputes, it is only with torts, formerly the most straightforward subject, governed simply by consummation on navigable waters, that I am concerned here. In looking for the source of a restriction on that simple territorial criterion, we face two questions immediately. The first is what was the jurisdiction available to adopt in the United States Constitution. The second is what was the extent of the adoption. Both questions are involved in arguments for a contraction of the admiralty to exclude portions of its tort jurisdiction in favor of leaving them to the State courts. To do that requires constructions that will supply non-existent qualifications of the Constitutional words, “all Cases of admiralty and maritime jurisdiction”,\textsuperscript{7} or the similar words of the Congressional grant to the district courts in civil causes.\textsuperscript{8} This paper is concerned, however, only with the Constitutional power and not with the statutory discretion to exercise it.

The Constitutional Adoption of Admiralty

We could, as a sovereign, have adopted as a jurisdiction, whatever we observed or imagined, within reason, and spelled out our chosen borders. But what was familiar and undoubtedly present in the minds of the framers were the English jurisdiction and the jurisdictions of the colonial vice admiralty courts. The content of the English admiralty from the reign of Edward I onward had been thoroughly mined by English and American judges and scholars, some of whom are


\textsuperscript{7} U.S. Const. art. III, § 2.

\textsuperscript{8} Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9.
mentioned below,\(^9\) from the 16\(^{th}\) to the 19\(^{th}\) centuries. The Lord High Admiral’s jurisdiction, expressed in his commission\(^{10}\) and in the subjects of interest in his court,\(^{11}\) swept the broad field of conduct on and about his waters, and those were liberally assigned to him, apart from the prohibition against his venturing *infra corpus comitatus*, that is, into the counties, where the sheriffs were also great officers with similar authority. His appointment and that of his counterpart in France,\(^{12}\) in a period when the kings found themselves in conflict about sovereignty over adjacent waters,\(^{13}\) was, in effect, to be the governor of the king’s province of the sea.

The records show early concerns for military protection, policing the coastal waters, suppressing pirates, protection of revenue and maintaining good order for the protection of all concerned. Dr. Browne mentions reports that, about the time of Edward I, the “seas were extravagantly infested by pirates” as of possible relevance to the invigoration of both the English and French admiralties then,\(^{14}\) but this criminal concern can hardly have been a factor limiting the broad grants of civil jurisdiction to the admirals in both countries. “Jurisdiction over the seas of *England and Ireland*, and the Dominions and Isles of the same, as a province, are committed to his Custody and Tuition, as to a President …”\(^{15}\) Nothing in the records supports the notion that the king established the jurisdiction for some narrower reason than that. The jurisdictions of the colonial vice admirals, usually

\(^9\) 1 MONUMENTA JURIDICA, THE BLACK BOOK OF THE ADMIRALTY (SIR TRAVERS TWISS, ED.) (1871); see De Lovio v. Boit, 7 F. Cas. 418, 420 (No. 3,776), 1997 AMC 550, 554 (C.C.D. Mass. 1815) (Story, J., “The most venerable monument is the Black Book of the admiralty itself, which ... is generally agreed to have been originally compiled in this reign [of Edw. III] ... This book has always been deemed of the highest authority on matters concerning the admiralty.” citing JOHN EXTON, SEA JURISDICTION OF ENGLAND (1664) and others); 2 ARTHUR BROWNE, CIVIL AND ADMIRALTY LAW 42 (2d ed. 1802); Richard Zouch, Jurisdiction of the Admiralty, in GERARD MALYNES, LEX MERCATORIA (London 1686); JOHN EXTON, MARITIME DICAEOLOGIE, OR SEA-JURISDICTION OF ENGLAND (London 1664); JOHN GODOLPHIN, A VIEW OF THE ADMIRAL JURISDICTION (2d ed. London 1685); Sir Leoline Jenkins, statesman and admiralty judge in reign of Chas. II and author of numerous letters and other papers, in WILLIAM WYNNE, THE LIFE OF SIR LEOLINE JENKINS (London 1724) (quoting numerous papers); R.G. MARSDEN, SELECT PLEAS IN THE COURT OF ADMIRALTY (1390-1602) (London 1894 and 1897); 1 BENEDICT, supra note 1 (including original historical materials of Benedict in 19\(^{th}\) century editions).

\(^10\) See 1 BENEDICT, supra note 1, ch. II § 23. The Admiral’s Commission; De Lovio, supra note 11, at 436, 1997 AMC at 588 and n. 38.

\(^11\) See Zouch, supra note 9, 90, 96, Ass. 1 & 3, quoted in 1 BENEDICT supra note 1, ch. II § 31. The Inquisition at Quinborough; Sir Leoline Jenkins, A Charge Given at an Admiralty Sessions held at the Old-Bailey, in 1 WILLIAM WYNNE, supra note 9, reprinted in GEORGE TICKNOR CURTIS, DIGEST OF CASES ADJUDGED IN THE COURTS OF ADMIRALTY OF THE UNITED STATES AND IN THE HIGH COURT OF ADMIRALTY IN ENGLAND, App. 529, 530 (Boston 1839).

\(^12\) See 1 RENÉ-JOSUÉ VALIN, NOUVEAU COMMENTAIRE SUR L’ORDONNANCE DE LA MARINE 32, Tit. 2, art. 1, commentary, pp. 105-06 (La Rochelle 1760).


\(^14\) 2 BROWNE, supra note 9, at 24 n.6.

\(^15\) Zouch, supra note 9, 91-92, Ass. II (citing John Selden).
the governors, were broader still, because they were considered free of certain territorial restrictions imposed in England by two statutes of Richard II.

Such was the vista of admiralty jurisdiction known to the colonies, and with independence they hastened to establish State admiralty courts with the same jurisdictions of instance causes as well as prize, and sometimes the same judges.16 This American jurisdiction in State hands was what was obviously available, and the framers of the Constitution embraced it for no stated reason except that it would be inappropriate to leave it in the hands of the various States, because “it related to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen”.17 No narrow purpose of function, distinct from territory, was recorded. Wayne, J., writing for the Supreme Court in Waring v. Clarke, said: “There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately.”18

Traditional Maritime Activity

In the 19th century, the territorial principal of the tort jurisdiction was generally accepted and The Plymouth19 became the standard citation for the proposition that tort jurisdiction existed by reason of consummation on navigable waters. In 1973, with Executive Jet Aviation,20 however, began a modern movement in the courts to limit the jurisdiction by imposing on it new, subjective qualifications of purpose or limited interest. The desire to avoid jurisdiction of a domestic air crash within the territorial waters of a State led the Supreme Court to abandon the simplicity of The Plymouth and hold that admiralty tort “claims arising from airplane accidents” must not only occur on navigable waters but "bear a significant relationship to traditional maritime activity."21 This subjective test, when limited to its proper terms, would not have much impact outside of domestic aviation cases and this was the apparent intent of it. But when the test was applied by lower courts to non-aviation cases, problems appeared.

If they had then treated the ruling as narrowly as the Court confined it, to “claims arising from airplane accidents”, some confusion would be avoided. As Scalia, J., joined by White, J., said of the test in a concurring opinion in the Sisson case:

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18 Waring v. Clarke, 46 U.S. (5 How.) 441, 457 (1847).
In my view that 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.22

Traditions vary demographically, geographically and over time. In what societies may we look for the qualifying tradition, only in the area of the casualty or more widely, and in what eras, the present only, the colonial, or anything between? One may understand, at first impression, the reluctance of federal judges to entertain the fates of frivolers. But are water skiers more frivolous than reveling passengers who fall overboard from cruise ships, whose fate in the water or rescue from it will readily be admitted to the dignity of the admiralty?

As it is, little that happens on the water actually fails the test of tradition, apart perhaps from swimming (and is that not traditional?) but it generates continual litigation, as parties seek to establish or refute tradition and the conflicts23 and bizarre contrasts24 at the fringes reflect little credit on the test.

**Maritime Commerce**

The next functional restriction to appear was that the purpose of the admiralty is to serve or protect commerce, thought of as traffic in money and goods. But maritime commerce is traffic in vessels. If limited to money and goods, how could admiralty law have governed the admiral’s navy, as it has always done, and those other many “non-commercial” vessels, both private and public? The early descriptions of jurisdiction make no distinction as to types of vessels or of their activities, and there is no reason to think that any such distinction would have been thought reasonable. In *Gibbons v. Ogden*, the Court had to decide whether

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the word “commerce” in the Constitution, is limited “to traffic, to buying and selling, or the interchange of commodities … [or] comprehends navigation.” The Court said that to limit it “would restrict a general term, applicable to many objects, to one of its significations,” and would not do so. “All America understands, and has uniformly understood, the word "commerce," to comprehend navigation.”

The root of attempts to narrow the meaning of commerce, and by that means narrow the jurisdiction, lies no doubt in the profusion of pleasure craft and their appearance in the admiralty courts. An article published in 1963 proposed their exclusion, asserting that "[t]here can be no doubt that historically the civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce," and took as a premise that commerce was limited to trade and a boat used for pleasure was not in commerce. If commerce were restricted to trade, waters usable only to pleasure boats, and the pleasure boats that used them, could be excluded. A court could then say, as one did: “Neither non-commercial fishing nor pleasure boating nor water skiing constitutes commerce. Commerce for the purpose of admiralty jurisdiction means activities related to the business of shipping.” If that overruled judgment had been sustained, the courts could dismiss cases on that narrow ground without facing the problem of applying their definition to any but “pleasure” boats, leaving aside naval and Coast Guard vessels and other federal and State public vessels not in trade, and numerous exploring and surveying vessels (including somewhat ungraciously those of Christopher Columbus and John Cabot in exploring the East Coast and Sir Francis Drake the West). But the courts would still have had to determine whether one were taking only pleasure from the boat or profit from chartering it, as is commonly the case.

But, 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 to work boats as well). They were founded on the admiralty powers, and provided penalties for violations enforceable by suit in admiralty, without distinction of work and pleasure. Their re-codified successor law still does. These acts present a dilemma for those who would exclude pleasure vessels. Suppose the admiralty power did not suffice to support the regulation and jurisdiction of pleasure boats and the commerce power had to be relied on to support those statutes. Pleasure craft would then have to be considered commercial, and the admiralty jurisdiction could therefore not exclude

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25 22 U.S. (9 Wheat.) 189, 190 (1824).
30 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).
them as not engaged in commerce. Therefore whatever view of “commerce” you might choose to take, that exclusion could not be squared with the Congressional understanding expressed in the motorboat acts.

In the Supreme Court a controversy was emerging over federalism, which has meant the borderlines between federal and State law. In the *Foremost Insurance* case in 1982, the issue was drawn over a collision of two pleasure boats, and admiralty jurisdiction was upheld five-to-four.31 The dissenters wished to exclude pleasure craft from the admiralty jurisdiction, as non-commercial. The Court had several times assumed the existence of admiralty jurisdiction in cases on pleasure craft without discussion of the question now raised.32 After making the concession that “the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce”, an argument presumably made by the defendant, for which no foundation was cited by the Court, the majority rejected “too narrow a view of the federal interest sought to be protected,” and explained the broader federal interest in “the potential effect of noncommercial maritime activity on maritime commerce.” 33

The Court recognized the impracticality of the commercial distinction as it is surely understood by persons familiar with vessels and their uses:

> Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been, rented, or whether it had ever been used for commercial fishing, control the existence of federal court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line drawing into maritime transportation.34

The Court then observed that Congress made no such distinction in its definition of vessels as referred to in its statutes, and made none in acts that might well have been affected by the distinction.35 Our general jurisdictional statute for maritime crimes36 draws no distinction between the vessels involved or the purposes for which they are being used. The Supreme Court, in exercising criminal jurisdiction in reliance on the general admiralty jurisdiction suggests no such distinction,37 and it would be absurd to think that, while we may punish a

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33 Foremost, 457 U.S. at 674-75, 1982 AMC at 2258.
34 Foremost, 457 U.S. at 675-76, 1982 AMC at 2259.
35 Foremost, 457 U.S. at 676-77, 1982 AMC at 2259-60.
36 18 U.S.C. § 7; see also, e.g., 46 U.S.C. app. § 728 (duty to render assistance at sea).
murder on an American trading vessel, we may not do so if it occurs on an American yacht.

A variation on “commerce” was expressed by Chief Judge Haynsworth, who said, in rejecting admiralty jurisdiction of a water-skiing case, that “[t]he admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping …”38 He cited no authority for that statement, and no wonder, for it is a wholly imaginative extrapolation of the notion of “commercial” purpose. But the dissenters in Foremost agreed with it39 and others have quoted it since. 40 It should have been decently buried by the Foremost majority in 1982, but made a spectral visit to the Seventh Circuit 17 years later.41 With luck it will not be exhumed again, although the same court in 1991 quoted the canard about “the primary focus” as “the protection of maritime commerce.”42

Although recognized not to depend on trade and abandoned as a potential direct restriction on jurisdiction, “maritime commerce” survives reflexively whenever threatened with disruption. In the Sisson case the Court recalled that, in a footnote in Foremost,43 it had said that “(n)ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction,” but that 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.”44 This reference to potential hazard as a feature that reinforced jurisdiction, and did not address an issue in that case, was fraught with mischief when stated conversely. This happened in Sisson and founded the double test of traditional maritime activity and potential to disrupt maritime commerce.

In their concurrence, Scalia and White, JJ. said of this new qualification, in part:

In my view the reading [of Foremost Insurance] 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.

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41 Continental Casualty Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 519, 1999 AMC 2714, 2720 (7th Cir. 1999) (“admiralty jurisdiction is aimed at providing the shipping industry … with a neutral forum [and] uniform body of law”).
43 457 U.S. at 675, 1982 AMC at 2259 n. 5.
44 Sisson, supra note 4, 497 U.S. at 362, 1990 AMC at 1805.
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.45

The proliferation of this new branch of the test in the reports of the lower courts confirms its high value as grist for litigation, as well as its nearly total lack of value as a useful borderline.46 A recent opinion brings the point into sharp focus. A vessel had been arrested and bailed out. A suit in admiralty was later brought for misrepresentations leading to the arrest and it fell to a court of appeals to decide whether there was admiralty jurisdiction. The maritime event was that, as a result of harmful words uttered ashore, an officer of the law walked aboard the vessel at her pier and served a writ. Because asking a court for the arrest of a vessel is a well-established procedure, representations in doing so are substantially related to traditional maritime activity. And it requires only a few words then to explain that the arrest, by forbidding movement, disrupted the part of maritime commerce represented by the vessel arrested.47 Thus any vessel, person or thing in maritime commerce disrupted represents disruption itself. It is unnecessary to look for someone who may be called to help or someone else who may be delayed by the casualty. The casualty is itself the disruption.48

A Return to Territorial Objectivity?

The Plea of Scalia, White and Thomas, JJ.

In the Sisson case Scalia, J., joined by White, J., concurred in the holding of jurisdiction but disagreed with the subjectivity of the tests, expressing the view on traditional activity and disruption of commerce quoted above.49 They also said, referring to disruption:

No jurisdictional rule susceptible of ready and general application (and therefore no practical jurisdictional rule) can be so precise as to pass such an "overbreadth" test. One can afford, and perhaps cannot avoid, such case-by-case analysis for the few cases lying at the margins—when, for example, a plane falls into a lake—but it is folly to apply it to the generality of cases involving vessels. ...
What today's opinion achieves for admiralty torts is reminiscent of the state of the law with respect to admiralty contracts. The general test, of course, must be whether the contract "touch(es) rights and duties appertaining to commerce and navigation," ... But instead of adopting, for contracts as we had (until today) for torts, a general rule that matters directly related to vessels were covered, we sought to draw the line more finely, case-by-case. That body of law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself "maritime," has brought ridicule upon the enterprise. As one scholar noted in 1924, "(t)he rules as to building and repairing vessels" ... "and the results obtained therefrom, are so humorous that they deserve insertion in the laws of Gérolstein." ... There is perhaps more justification for this approach with respect to contracts, since in that field the "vessel" test would not be further limited by the "locality" test, as it is for torts ... But there is no reason for expanding that approach to the tort field. ...

The sensible rule to be drawn from our cases, including Executive Jet and Foremost, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, as a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts.

(Citations and footnotes omitted.) ...

The latter tests [traditional activity and disruption of commerce] produce the sort of vague boundary that is to be avoided in the area of subject matter jurisdiction wherever possible. ...

The views of Scalia and White, JJ. in Sisson were substantially reiterated by Thomas, J., joined by Scalia, J. in the Grubart case. Thus the issue has been joined within the Court as to purposive jurisdiction.

It is, moreover, not as though the purposive approach has led to uniformity. A total of 124 opinions are digested in American Maritime Cases review of the AMC headnotes digested under "Traditional Maritime Activity" and "Effect on Commerce" from 1991 through 1995. In reviewing them, 14 were disregarded as irrelevant or unclear. Of the remainder, nine denied admiralty jurisdiction for lack of traditional activity alone, six for lack of disruption alone, and four on both grounds. Within the same group, it appeared that of those decided on the first ground one was overruled and one reversed, and of those decided on both grounds one was overruled, leaving 16 finally denying jurisdiction on one ground or the other. Among these are several where the connection with navigable water

50 Grubart, supra note 4, 513 U.S. at 549, 1995 AMC at 930 (Thomas, J. concurring).
or navigation was attenuated\textsuperscript{51} and some that are scarcely reconcilable with others, as might be expected from such subjective tests.\textsuperscript{52} 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; and second, that their elimination would have little effect on the jurisdictional results. The decisions also reflect not only inconsistencies within themselves but inscrutable distinctions from earlier ones of great authority\textsuperscript{53} that are still followed in the circuits as mandatory without reference to the newer tests.\textsuperscript{54} It is no doubt sometimes appropriate for the courts to devise tests not heretofore found in the law to sift out frivolous or inconsequential claims of jurisdiction. But these tests, which have no historic foundation in the origin or adoption of the Constitutional jurisdiction are not justified by their impact on its exercise and their inconvenient and costly subjectivity for lawyers and parties.

**The Understandings of 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 ordinarily deferred to it. This was the view taken by the Court when Congress directed the exercise of the jurisdiction in inland navigable waters,\textsuperscript{55} and in the foreclosure of preferred ship mortgages\textsuperscript{56} and in subjecting damage on land to admiralty, first in limitation of liability proceedings\textsuperscript{57} and then in the Extension of Admiralty Jurisdiction Act,\textsuperscript{58}


\textsuperscript{52} Compare Sinclair v. Soniform, Inc., 935 F.2d 599, 1991 AMC 2341 (\textsuperscript{3rd} Cir. 1991) (recreational scuba diving; jurisdiction); with Delgado v. Reef Resort Limited, 364 F.3d 642, 2004 AMC 1109 (\textsuperscript{5th} Cir. 2004); (recreational scuba diving; no jurisdiction) and Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1993 AMC 855 (\textsuperscript{9th} Cir. 1993) (recreational non-scuba diving; no jurisdiction; criticized for conflict with Sisson in LeWinter v. Genmar Industries, Inc., 26 Cal. App.4\textsuperscript{th} 1214, 1220, 1994 AMC 2745, 2748-49, 32 Cal. Rptr.2d 305, 308 (Cal. App. 2\textsuperscript{nd} Dist. 1994) and renounced as “no longer good law” in Taghadomi v. United states, 401 F.3d 1080, 1087, 2005 AMC 958, 966 (\textsuperscript{9th} Cir. 2005)); see also note 23 supra.

\textsuperscript{53} Compare H2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 1997 AMC 390 (\textsuperscript{9th} Cir. 1996) (no jurisdiction of injury on houseboat when moored to shore because no potential to disrupt) with The Admiral Peoples, 295 U.S. 649, 1935 AMC 875 (1935) (jurisdiction, and maritime law, in fall from gangplank to pier because gangplank part of vessel) and Brady v. Roosevelt Steamship Company, 317 U.S. 575, 1943 AMC 1 (1943) (fall from boarding ladder at pier).

\textsuperscript{54} See Ward v. Cross Sound Ferry, 273 F.3d 520, 2002 AMC 428 (\textsuperscript{2nd} Cir. 2001); White v. United States, 53 F.3d 43, 1995 AMC 1904 (\textsuperscript{4th} Cir. 1995); Florida Fuels, Inc. v. Citgo Petroleum Corp., 6 F.3d 330, 1994 AMC 752 (\textsuperscript{5th} Cir. 1993).

\textsuperscript{55} Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 453, 1999 AMC 2092, 2097 (1851) (“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{56} Detroit Trust Co., supra note 3, 293 U.S. at 52, 1934 AMC at 1435 (“Congress … not limited by previous decisions as to the extent of the admiralty jurisdiction.”).

\textsuperscript{57} Richardson v. Harmon, 222 U.S. 96, 2001 AMC 1207 (1911).
which the Court has applied several times without regarding Constitutionality as a serious issue. Legislation based on the admiralty jurisdiction of pleasure craft has been discussed above. This background 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. It also took note of evidence that both the English and French admiralties took cognizance of damage to banks and structures on them. It also concluded that the Act was remedial only and therefore applied to damage done before it was passed.

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 otherwise conceptually. Numerous crimes are 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, or the requirement of one. 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 the sections cited confirm it. A cavil that these are after all criminal matters cannot be entertained. There is no history to suggest, what the words of the commissions indeed belie, that the admirals having criminal jurisdiction of an act had not jurisdiction of its civil consequences.

**The Extension Act**

In light of a recent decision, the Extension of Admiralty Jurisdiction Act of 1948 assumes greater importance and requires special discussion. The passage of the Act was unquestionably motivated by the desire to deal with damage or injury on land from a maritime tort. That purpose is indicated by the legislative history.

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59 See text at notes 28-30 supra.
60 United States v. Matson Navigation Co., 201 F.2d 610, 1953 AMC 272 (9th Cir. 1953); see also GODOLPHIN 43-48 (“All prejudice done to the Banks of Navigable Rivers, or to Docks, Wharffs, Keys, or anything whereby Shipping may be endangered, Navigation obstructed, or Trade by Sea impeded”) quoted at 1 BENEDICT ch. III § 47. Godolphin on the Jurisdiction.
62 18 U.S.C. §§ 113, 114, 2211, 2261, 2262, and 2241-48, respectively.
and has tended for more than half a century to limit our thinking about the Act. It provides that the admiralty jurisdiction "shall expend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

In applying the Act, the Supreme Court has declined to be drawn into a question raised as to whether it creates jurisdiction or rather interprets the Constitutional and Congressional grant and directs the exercise of it. The latter is the sensible view, since the Congressional grant was in the same words as the Constitution and should be viewed as conveying the full Constitutional power. If the Extension Act were an independent grant, it would be unConstitutional in purporting to establish jurisdiction of common law claims that did not meet Constitutional limits on such claims.

The Act's words of positive direction are to exercise the jurisdiction in "all cases ... caused by a vessel on navigable water" with the qualification that the jurisdiction is not to be limited by the occurrence of the damage on land. As matters stood when the Act was passed, that qualification was the only extension involved; the Court had not begun to devise new tests limiting the doctrine of The Plymouth, and so the inclusion of all cases of damage or injury caused by vessels on navigable waters, as a point of departure, undoubtedly represented the congressional understanding of the state of the law in 1948.

Except for the "notwithstanding" clause, the matter-of-fact words of the Extension Act attracted no attention until the agitation of the 1970s to exclude pleasure craft as non-commercial. Then in 1974, the Eighth Circuit, rejecting that argument under the historic reading of the jurisdiction, held exclusion also contrary to the Extension Act. This reading of the plain words was ignored by two other circuits, or rejected without citing it, in favor of limiting the Act to the purpose stated in the legislative history.

**Judge Posner Logs On—Tagliere v. Harrah’s Illinois Corp.**

A more recent opinion by the Seventh Circuit may be more influential. The plaintiff was injured aboard a riverboat casino when the stool she was leaning on collapsed. She sued after being time-barred under state law but not under

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65 See Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 1963 AMC 1649 (1963); Sisson, supra note 4, 497 U.S. at 359, 1990 AMC at 1802 n. 1; see also Grubart, supra note 4, 513 U.S. at 543, 1995 AMC at 925 n. 5 (noting lack of need to decide).
66 Moye v. Henderson, supra note 40, 496 F.2d at 979, 1974 AMC at 2669).
admiralty law. The vessel was moored indefinitely. The case was dismissed for lack of admiralty jurisdiction, without a record on which it could be decided yet whether the mooring was permanent so that the vessel might no longer be qualified as one. With characteristic clarity and good sense, Posner, J. wrote an opinion reversing the dismissal. He recognized that the accident “had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land” and that admiralty’s rules would be no better suited, or perhaps worse, to resolving the claim than state law, and there was, “therefore,” common-sense appeal to the district court’s ruling”, and went on:

But the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear. (Citations omitted.) It is very unfortunate when parties are not sure which court they should be litigating their dispute in, as the case at hand illustrates. [Describing the problem of the statutes of limitations.]

He cited authorities that in questions of causation a vessel includes “the vessel’s fixtures, furniture, and other ‘appurtenances’”. It may be added that the vessel’s crew are also included, as a result of the “adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship.”

He discussed the Eighth Circuit’s opinion and the reliance of the two other circuits on the legislative history, and said:

We do not think that the legislative history should override the broad statutory language, which provides a clear and simple jurisdictional test for cases like this, in contrast to the vague "maritime nexus" (or "connection") test ("the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity," (citing Sisson) that is used to determine jurisdiction under section 1333(1), which confers but does not define admiralty jurisdiction. Our case would pass that test as well; vagueness has it uses.

The main practical use of the "connection" test has been to expel from the admiralty jurisdiction freak cases. [Referring to some cited in Grubart.] Grubart itself involved the flooding of tunnels and basements in Chicago caused by the fact that months earlier a crane sitting on a barge had driven piles too far into a riverbed above a tunnel.

Yet unusual as were the facts in Grubart, the case was about an appurtenance (the crane) of a boat (a barge) afloat on navigable waters and an accident, albeit on land, caused by the handling of the appurtenance. A passage in the Court’s opinion suggests that the Court thought the case rather simple: "This Court has not proposed any radical alteration of the traditional criteria for invoking admiralty

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69 Id. Slip op. at 2.
70 Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224, 1945 AMC 265, 272 (1945).
jurisdiction in tort cases, but has simply followed the lead of the lower federal courts in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engaged in activity far removed from anything traditionally maritime." 513 U.S. at 542. The "location" rule at its broadest was that any accident that occurs on navigable waters is within the admiralty jurisdiction. (Citing The Plymouth.) That would have encompassed the airplane, swimmer, and motorist cases, and the Court made clear in Grubart that it wouldn't go that far. When a boat is involved, however, the location rule is not only thoroughly compatible with the language of the Extension of Admiralty Jurisdiction Act, but appears to have survived Grubart and thus to be the test under the general admiralty jurisdiction conferred by 28 U.S.C. § 1333(1), as well.71

He acknowledged the distinctive features of admiralty law, some of which were not designed for this type of accident.

But to decide in each case whether admiralty law or state law would make a better fit with the particular circumstances … would make the determination of jurisdiction hopelessly uncertain [and be] not a price worth paying for the slightly better match of law to fact that would result.

He reviewed some of the differences between admiralty and state law and said:

Without meaning to minimize these differences, which figure importantly in some cases, an effort to determine admiralty jurisdiction case by case by estimating the relative closeness of fit of state law and admiralty law to the particular circumstances of the case would create more uncertainty than efficiency. We conclude that the district court erred in dismissing the suit …"72

This decision represents a sensible way of escaping the "questions of penumbra, of shadowy marches"73 as Holmes, J. called them in another context, that have afflicted predictions of admiralty tort jurisdiction in recent decades and at the same time move close, if not exactly, to its authentic character. It embraces anything done by a vessel or her crew, to themselves or others, or by others to them, on navigable waters, and at least anything done by passengers to one another serious enough to involve action by the vessel or crew. Libel, slander and fraud involving passengers only will come to mind as objectionable, but except for cheating at cards, are seldom likely to have their tortious effect on water, and be consummated there.

Conclusions

The admiralty tort jurisdiction based objectively on territory that we historically practiced was authentic. It represented no special interests other than

71 Tagliere, supra note 68, at 4-6.
72 Id. at 7-8.
sovereignty and the defense of the realm. In particular, it was founded on no special purpose of supporting a commerce of goods or a non-existent industry, apart from enforcing the good order in which they could exist on water, as on land. It had, however, an unquestionable political purpose of extending the central power of the nation on the sea. The judicial jurisdiction it included was broad and with it went a Constitutional authority of Congress to refine and interpret it within reasonable relationship to maritime matters, an authority long recognized by both Congress and the Supreme Court. Congress’s understanding of the jurisdiction, or refinement if one views it that way, has been that, in both civil and criminal matters, it is a jurisdiction of territory rather than subject matter, and as broad as all navigable waters connected with the sea or between States.

The Constitutional formula therefore should have today its proper territorial borders, not based on suppositions of financial "commerce", or industry, or the search for a related tradition that often cannot be pursued without slogging in the swamp of remote causation. It must be as broad as the jurisdiction of maritime crimes defined by Congress, since the jurisdiction of those crimes is defined by reference to it. It comprehends at least all acts done by or to vessels, in the broadest sense, and all acts considered federal crimes when committed on navigable waters.

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