The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years

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I
INTRODUCTION

This year marks the thirtieth anniversary of the unification of admiralty actions with civil actions under the Federal Rules of Civil Procedure. The architect of this transformation of admiralty practice was Brainerd Currie, the Reporter of the Advisory Committee on Admiralty Rules and a scholar whose articles had made the decisive arguments for unification. Although his proposals were widely supported by members of the admiralty bar and the federal judiciary, it was the shape he gave them that assured their continued durability. Only one further set of significant amendments has been necessary to keep the rules up to date and these amendments were needed only in order to bring the rules into conformity with subsequent constitutional decisions.  

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3See Fed. R. Civ. P. B and C advisory committee notes, reprinted at 105 F.R.D. 231–34 (1985). In 1991, a technical amendment changed the manner of service under Rules C and E to relieve the United States Marshals Service of the obligation to execute routine process, following similar amendments to Rule 4, the general rule on service of process. A proposal also is now pending to amend Rule 9(h) to
Outside of admiralty the 1966 amendments to the Federal Rules of Civil Procedure are best known for adopting the current version of Rule 23 on class actions. The controversy that has surrounded that rule stands in marked contrast to the comparative stability of the Federal Rules on admiralty and maritime claims. Amendments to Rule 23 are now under active consideration and other provisions of the Federal Rules of Civil Procedure have been repeatedly changed, in 1983, 1985, 1987, 1991, and 1993. These changes to the rules themselves have been accompanied by changes in the rulemaking process. Yet criticism of both the content of and the grounds for recent changes has continued, to the point that the fiftieth anniversary of the Federal Rules of Civil Procedure saw critics call into question the assumptions that animated the drafting and adoption of the rules. Although Charles Clark, the principal draftsman of the Federal Rules, believed procedural reform to be a continuing obligation, he also warned that half-hearted reform “is worse than none at all—having all the vices of novelty and none of the virtues of lasting improvement.” If reform is a good thing, recent years perhaps have seen too much of it, at least outside of admiralty. Can we be sure that we have not seen too little of it within admiralty?

This article seeks to answer this question in the three parts that follow. Part II considers the aims and achievements of the 1966 amendments that unified admiralty procedure with civil procedure generally. Unification is the best single word to describe what these amendments accomplished, but with unification came continued separation in the form of the special provisions for admiralty cases, chiefly the Supplemental Rules for Certain Admiralty and Maritime Claims. The 1966 amendments did not decide simply to merge the former Admiralty Rules with the Federal Rules as an act of intellectual clarification; the amendments also preserved distinctive procedures where they were necessary in admiralty. An inquiry into why this was done casts light on both the limitations and the goals of effective procedural reform through the rulemaking process.

Part III examines the provisions in the admiralty rules whose operation has been relatively free from controversy in the years since 1966. These are the provision for unification itself, in Rule 1, which was accompanied by numerous technical amendments to bring admiralty cases within the scope of various procedural rules; the mechanisms for identifying admiralty claims under Rule 9(h) and preserving the distinctive procedure of trial of admiralty claims before a judge under Rule 38(e); the broad joinder of defendants allowed through impleader under Rule 14(c); and the special provisions for possessory, petitory, and partition actions under Rule D and actions for limitation of liability under Rule F. A few new problems have come up under these rules, but none (at least so far as this author has been able to discover) that would justify systematic amendments to the rules.

Part IV returns—predictably if not inevitably—to the rules that were the subject of the 1985 amendments: Rules B, C, and E on maritime attachment, arrest, and related procedures. These are the rules most difficult to reconcile with conceptions of procedural fairness prevailing in other areas of civil litigation. Because I am already on record as favoring reform of these rules,¹⁰ I will spare the reader a reiteration of arguments presented elsewhere. I will confine this discussion to recent developments under these rules which have exposed their underlying conceptual structure to further erosion. Eventually, it will be necessary to confront the question whether to preserve the rules in their current form, using fictions that have become increasingly difficult to understand, or to revise them so that they respond to conceptions more widely accepted outside of admiralty. Perhaps the time for revision has not yet come—although the amendments to these rules in 1985 presented the opportunity to reexamine them fully—but certainly it is time to reflect on how these rules might be revised. In that way, we might preserve the legacy that Brainerd Currie and his collaborators conferred upon us in 1966: a unified but distinctive set of admiralty procedures that meets the needs of contemporary litigation.

II
THE 1966 AMENDMENTS

The animating purpose of the 1966 amendments was to effect the merger of admiralty with other civil actions, just as the original version of the Federal Rules of Civil Procedure had accomplished the merger of law and equity. The single change that merged admiralty cases into the one form of civil action recognized by the rules was to add the phrase “or in admiralty”

to the first sentence of Rule 1. That single change extended the scope of the Federal Rules to all "cases at law or in equity or in admiralty." Apart from this laconic amendment, several basic policy choices had to be made and a multitude of technical amendments adopted to make the merger fully effective. In one way or another, these matters all involved the question whether—and how—to carry forward provisions from the old Admiralty Rules. Most of these provisions could be absorbed into the Federal Rules with minor changes, and many required no changes at all. The few that required the preservation of entirely separate rules were codified in the Supplemental Rules for Certain Admiralty and Maritime Claims. All of these changes were constrained by the limits on the rulemaking process, which put changes to substantive law, the right to jury trial, and subject-matter jurisdiction beyond the scope of the rules. The 1966 amendments carried off the merger of admiralty and civil actions within these limits, and without technical defects—no small achievement in its own right. More significant still, they provided the framework for the subsequent development of admiralty law without the hindrance of antiquated procedural rules.

The immediate impetus and benefit of merger was twofold: first, to take advantage of the increasing congruence between admiralty procedures and those under the Federal Rules; and second, to eliminate the problems caused by the transfer of cases between the admiralty and civil sides of the same federal court. As the advisory committee stated in its general justification of the 1966 amendments, the practice under the Admiralty Rules and under the Federal Rules of Civil Procedure had converged toward a common model of simple and nontechnical procedures, derived partially from traditional admiralty practice. The remaining differences between the two systems were not so much differences in overall approach as inexplicable disparities that served only to trap the unwary. By 1966, the existence of two entirely separate procedural systems could no longer be justified.

One problem posed by the existence of two procedural systems was particularly bothersome. As Brainerd Currie had documented in an earlier article, the existence of the admiralty side and the civil side of the federal court (as the separate jurisdictions were then called) created needless conceptual and practical confusion when one case straddled both sides of the same court. In the most extreme case, it resulted in dismissal without the possibility of refiling because the claim had become barred by the statute of limitations. For instance, if a case was filed on the admiralty side of the

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11See Preliminary Draft, supra note 2, at 369–70 (containing a table of cross-references between the old Admiralty Rules and the Federal Rules of Civil Procedure with the proposed amendments), and Colby, supra note 2, at 1260–62 (listing major changes).
12Preliminary Draft, supra note 2, at 333.
13Silver Oar, supra note 1, at 18–40.
federal court although the only basis for jurisdiction was in diversity, dismissal of the case for lack of admiralty jurisdiction would cause it to be completely barred if the statute of limitations had run. Even if the claim was not barred, the existence of two procedural systems led to entirely needless problems such as the inability to join related claims or the cost of refiling the action and serving process again.

Surprisingly, these problems were not completely resolved by the 1966 amendments, and remain a matter of concern even to this day. The failure to remedy them says something important about the limits of reform through the Federal Rules. As in the days before merger, the most severe problems arise when the plaintiff’s mistake in filing in the wrong court also results in a failure to comply with the applicable statute of limitations. This situation occurs today in claims against the United States, which can be brought in admiralty under the Suits in Admiralty Act\(^{14}\) or the Public Vessels Act,\(^{15}\) or outside of admiralty under the Tucker Act\(^{16}\) or the Federal Tort Claims Act.\(^{17}\) Each of these claims has its own procedures and limitation periods, and under the Tucker Act, contract claims in excess of $10,000 must be brought in the Court of Federal Claims.\(^{18}\) Because the two-year limitation period for the claims in admiralty is shorter than the limitation period for the claims outside of admiralty, a plaintiff who mistakenly sues outside of admiralty can find that his claim is barred because he did not sue early enough to satisfy the admiralty limitation period.\(^{19}\) Treatment of his claim as an admiralty claim is unavailing because it only results in a dismissal under the statute of limitations. This result depends upon the same distinction between admiralty and other civil actions that the merger of the two kinds of actions was designed to avoid. Yet because the distinction is embedded in statutes that waive the sovereign immunity of the United States, it cannot be eliminated through reform of the Federal Rules. The two sides of the federal court, in the limited sphere of claims against the United States, live on.

From this example, perhaps of narrow significance, a more general lesson can be learned: the limits on the rulemaking process do not permit it to serve as the vehicle for completely merging two separate bodies of law. Rulemaking under the Rules Enabling Act is confined to procedural rules; it cannot


\(^{15}\)46 U.S.C. app. §§ 781–89.

\(^{16}\)28 U.S.C. §§ 1346(a)(2) and 1491(a)(1).


\(^{19}\)See, e.g., Bovell v. United States Dep’t of Defense, 735 F.2d 755, 757 (3d Cir. 1984), and McCormick v. United States, 680 F.2d 345, 351 (5th Cir. 1982) (remanding to determine if running of limitation had been tolled).
“abridge, enlarge, or modify any substantive right.”20 And even as to procedural rules, it cannot infringe on the right to jury trial or affect the subject-matter jurisdiction of the federal courts.21 A recent decision, *Henderson v. United States*,22 confirms the first and last of these exclusions, if only by finding them inapplicable. *Henderson* concerned the requirement under the Suits in Admiralty Act that service of process be made upon the local U.S. Attorney “forthwith.”23 The Supreme Court held that this provision was superseded by the general provision in Rule 4 allowing service of process within 120 days of filing of the complaint or within such longer time as the court allows.24 After first noting that the case raised no issue of substantive law, because the action had been timely filed within the two-year limitation period under the Suits in Admiralty Act,25 the Court went on to hold that it also raised no issue of subject-matter jurisdiction because the provisions for service of process in the act were purely procedural.26 The Court’s arguments for each of these conclusions is less significant than the need for the Court to make them in the first place.

All three limitations on the rulemaking power are of constitutional dimensions, the right to jury trial explicitly in the Seventh Amendment and the other two implicitly in the allocation of power to Congress to make federal law and to control the jurisdiction of the federal courts. It would require a drastic change in the balance of power within our constitutional structure—and perhaps a constitutional amendment—to confer such broad powers on a rulemaking process controlled by the judiciary.27 In contrast to the limited power of the rulemakers, the range of admiralty law extends beyond procedural rules to matters of substantive law and remedies. The most that the rulemakers can hope to achieve on these issues is to facilitate the litigation of issues based on different sources of law. In this limited, but important task, the 1966 amendments succeeded admirably. Brainerd Currie, who was never a believer in comprehensive codification,28 drafted a set of

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2028 U.S.C. § 2072. The statutory authority for the Admiralty Rules was not explicitly subject to any such restriction, although, until 1948, it was narrower than the authority under the Rules Enabling Act because the Admiralty Rules could not affect federal statutory rights. Unification, supra note 1, at 2–5.

21Fed. R. Civ. P. 82.


24This provision is now found in Fed. R. Civ. P. 4(m).

25116 S. Ct. at 1642 n.6. For a case recognizing the limits on rules to affect substantive questions of preclusion, see Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa, 56 F.3d 359, 366–67 (2d Cir. 1995).


28Currie, supra note *, at 614–15 (criticizing the restatements of the conflict of laws).
amendments that were as significant for what they did not do as for what they did.

Then, as now, the developments in substantive law that created the need for procedural reform concerned personal injury claims, mainly by maritime workers, and mainly in the context of admiralty and common law claims joined together in a single action. The principal case that led to the 1966 amendments, *Romero v. International Terminal Operating Co.*,\(^{29}\) illustrates the situation well enough: as plaintiffs took advantage of the increasingly generous remedies for maritime workers, they also tried to take advantage of jurisdictional and procedural rules to enhance their right to jury trial. In *Romero*, of course, the plaintiff sought to preserve both his right to jury trial under the Jones Act and his admiralty claims for maintenance and cure and unseaworthiness. The increasing breadth of these remedies, as a matter of substantive law, became entangled with issues of subject-matter jurisdiction and the right to jury trial. Controversy over these entanglements continues to this day and is discussed in detail in the next section of this article. What the 1966 amendments did was to establish a framework for resolving these issues by allowing joinder in a single action of all claims available to the plaintiff, whether in admiralty, at law, or in equity.

After the merger of these separate branches of law, all of the plaintiff’s claims could be brought together in a single action by operation of the general rules on joinder,\(^{30}\) supplemented by technical additions, such as Rule 13(c) on joinder of third-party claims in admiralty.\(^{31}\) Changing the rules on joinder could not, by itself, bring all the plaintiff’s claims into federal court because it was also necessary to obtain subject-matter jurisdiction over each of the joined claims. In 1966, the related doctrines of pendent and ancillary jurisdiction fulfilled this need; in 1990, these doctrines were codified under the heading of supplemental jurisdiction.\(^{32}\) Changes in the rules could only eliminate the obstacle of joinder to bringing all the claims together in a single action. Insofar as the right to jury trial was intertwined with issues of jurisdiction, the same limitation again came into play: changing the rules could eliminate one obstacle to bringing all the plaintiff’s claim before the jury, but it could not resolve the question whether some, any, or all of them should be decided by the jury.

The only questions that could be resolved by the rules were those concerned with the distinctive procedures in admiralty, apart from jurisdiction and trial before the judge alone. Hence the inevitable focus of the rules.

\(^{29}\) 358 U.S. 354 (1959).


\(^{31}\) See Leather's Best, Inc. v. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971).

on the summary procedures for arrest and maritime attachment, and to a lesser extent, on the procedures for limitation of liability. The provisions for arrest and maritime attachment are almost wholly creatures of the rules, influenced in recent years by constitutional decisions under the Due Process Clause. The provisions for limitation proceedings, on the other hand, implement a statutory scheme that contains its own procedural, as well as substantive, provisions.\textsuperscript{33} Rule F on the procedure in limitation proceedings functions much more like the Bankruptcy Rules than the other Supplemental Rules for Certain Admiralty and Maritime Claims: it provides needed detail to flesh out a statutory scheme for consolidating related claims, determining the assets against which they can be satisfied, and apportioning those assets among creditors. There is nothing distinctively maritime about proceedings to limit liability, as the source of these proceedings in the Limitation of Liability Act makes clear. The Act superseded earlier judicial decisions rejecting the principle of limited liability in admiralty.\textsuperscript{34} Consistent with the command of the Enabling Act, Rule F cannot affect the substantive rights created by the Limitation of Liability Act. Only Rules B and C, on maritime attachment and arrest, have involved developments since 1966 that raise issues wholly within the scope of the rules themselves. These issues are taken up in Part IV.

III
RULES RELATED TO ADMIRALTY JURISDICTION AND JURY TRIAL

Rule 9(h) on identification of admiralty claims most directly concerns the existence of admiralty jurisdiction. It is intimately tied to Rule 38(e), preserving the exclusion of juries from admiralty cases. Changes in the statutes on removal and supplemental jurisdiction require a closer look at these rules, although amendment of the rules hardly seems necessary. Rule D on possessory, petitory, and partition actions has not recently been a hotbed of activity—if it ever was—and the cases invoking the rule have concerned the distinct issue of admiralty jurisdiction. The same is true of the major cases on limitation proceedings under Rule F. The developments under each of these rules show that the 1966 amendments remain adequate to the task of accommodating changes in other sources of law.

\textsuperscript{33}46 U.S.C. app. §§ 183–89.
A. Rule 9(h)

The text of Rule 9(h) accomplishes two purposes, one expressly and the other by implication. On its face, the text creates a mechanism for identifying admiralty claims when they may be brought in federal court on some basis other than admiralty jurisdiction. This function of the rule applies to that wide category of claims that could be brought either in admiralty or outside of admiralty under the savings-to-suitors clause. Only a handful of claims must always be brought in admiralty, the principal examples being claims in rem, to foreclose on preferred ship mortgages, to limit liability, and claims against the United States.\(^\text{35}\) The implicit purpose of the rule is to recognize that admiralty jurisdiction does not apply to an entire case, but claim by claim. Hence the language allowing "a statement identifying the claim as an admiralty or maritime claim." The use of the word "claim" makes a difference precisely in those cases in which a single action contains claims both inside and outside of admiralty.

In such cases, Rule 9(h) does not require an identifying statement to be filed, but if none is, then two default rules come into play. If the claim can only be brought in federal court based on admiralty jurisdiction—either because it can never be brought under the savings clause or because on its facts it cannot be brought under any other heading of federal jurisdiction—then it is treated as an admiralty claim. If, on the other hand, the claim can be brought in federal court on some other basis, then it is treated as a claim outside of admiralty unless the complaint contains a statement identifying it as an admiralty claim. Such a statement can be added to the complaint under the general provisions for liberal amendment in Rule 15. Both of these default rules work smoothly, except in the situation in which the case starts in state court and the defendant attempts to remove it to federal court.

The possibility of admiralty jurisdiction on removal was created by an amendment to the general removal statute allowing removal of claims exclusively within the jurisdiction of the federal courts.\(^\text{36}\) The new provision, section 1441(e), overrules the traditional rule barring removal of admiralty claims. Congress enacted this provision apparently without considering its implications for admiralty practice.\(^\text{37}\) Nevertheless, the literal terms of section 1441(a) plainly embrace admiralty claims as "any civil

\(^{35}\) For a full list, see N. Healy & D. Sharpe, Cases and Materials on Admiralty 73 (2d ed. 1986). This list is dated only in including claims under the Death on the High Seas Act, which can now be brought in state court under a special savings clause in the act itself. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 231 (1986).

\(^{36}\) 28 U.S.C. § 1441(e). This provision was added by the Civil Justice Reform Act, Pub. L. 99–336 §3(a), 100 Stat. 637 (1986).

action brought in a State court of which the district courts of the United States have original jurisdiction." When admiralty claims fall within the exclusive jurisdiction of the federal courts, section 1441(e) allows removal even if it simply relieves the plaintiff of a mistake in filing the action in state court in the first place. Indeed, the whole point of the amendment is to relieve plaintiffs of the consequences of precisely this mistake. The congressional judgment favoring these erring plaintiffs might be doubted on grounds of policy, but it has as much force within admiralty as it has outside it.

Two complications arise in admiralty cases, however, which make this policy more difficult to implement. First, section 1441(b) prevents removal of any case that does not arise under federal law when any defendant is a citizen of the state in which the case was filed. Admiralty cases do not arise under federal law, by the holding in Romero, and so they receive the same restrictive treatment as diversity cases. This restriction makes sense for diversity cases because denying removal leaves these cases in state court. The same restriction does not make sense for admiralty cases because it results only in dismissal of the case from state court, if the case is exclusively within the admiralty jurisdiction, leaving the plaintiff with the option of refiling in federal court. Unlike the situation in diversity cases, in admiralty cases, an in-state defendant can force the case into federal court by one means or another. The statute should be amended to eliminate this anomaly by allowing removal of admiralty cases by in-state defendants.

A more severe complication arises from the savings-to-suitors clause. An admiralty claim need not appear in state court by mistake. The plaintiff might bring it there under the savings clause. These claims cannot be removed to federal court unless they have an independent basis in federal jurisdiction apart from admiralty. This longstanding doctrine does not fit very well with the literal terms of the removal statute, quoted earlier. Its justification instead depends on protecting the plaintiff's right to jury trial, which is available in state court or in federal court where jurisdiction is based on some ground other than admiralty. This rationale for the prohibition on removal of savings clause actions remains unaffected by the amendment extending removal jurisdiction to claims exclusively within the jurisdiction of the federal courts. The amendment says nothing about the right to jury trial, and savings clause actions, by definition, are not exclusively in admiralty.

A plaintiff who has brought a savings clause action in state court can take

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40See Sharpe, supra note 37, at 491.
any of three positions about the nature of the action: first, that it is not to be brought in admiralty and is to remain in state court unless it falls under some other heading of federal jurisdiction; second, that it is to brought in admiralty and that he has mistakenly brought it in state court; or third, that its nature as an admiralty claim is of no concern to him. When the defendant files a notice of removal in federal court, and a copy of the notice in state court, the removal to federal court becomes effective. The plaintiff can then add to the complaint a statement identifying his claim as one in admiralty under Rule 9(h).\textsuperscript{41} An amendment to do so is allowed by Rule 9(h), and since removal must be made promptly upon notice of the grounds for removal, leave to amend should regularly be granted under Rule 15(b). The option of filing such a statement should solve most—if not all—of the problems created by the recent amendment to the removal statute.

If the plaintiff files no statement, then under the default provisions of Rule 9(h), a savings clause action remains one outside of admiralty and must be remanded to state court. This outcome takes care of the first and third alternatives outlined above.\textsuperscript{42} If, on the other hand, the plaintiff files a statement identifying the claim as one in admiralty, then it falls within the second alternative. The plaintiff has erroneously filed an admiralty claim in state court, but is relieved of the consequences of this mistake by the provisions for removal of claims exclusively within the jurisdiction of the federal courts. No concern about denying the plaintiff a right to jury trial should defeat this outcome, because the plaintiff himself has decided to bring the claim in admiralty. Likewise, no concern about relieving the plaintiff of the consequences of his mistake should defeat removal. Congress decided to do that when it amended the removal statute.

Of course, all of these complications can also be avoided by adhering to the traditional rule that removal in admiralty is not allowed under any circumstances. Pursuing that alternative avoids any need to rely on Rule

\textsuperscript{41}28 U.S.C. §§ 1446(d) and 1448. See Fedoreczk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69, 72–73 (3d Cir. 1996) (no admiralty jurisdiction over removed claim because not identified as admiralty claim).

\textsuperscript{42}The plaintiff could also achieve the same result by filing a motion to remand to state court on this ground.

The plaintiff's ability to identify his claim by default also solves another vexing problem concerned with removal. Claims under the Jones Act are not removable at all, by a special provision of the Federal Employers Liability Act, 28 U.S.C. § 1445(a), which the Jones Act adopts by reference. 46 U.S.C. app. § 688(a). A further consequence of this provision is that it bars removal of all claims that are not “separate and independent” of the claim under the Jones Act. 28 U.S.C. § 1441(c). Claims that arise out of the same transaction or occurrence, such as those for unseaworthiness and maintenance and cure, may or may not be “separate and independent,” depending on the obscure decision in American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951). A plaintiff who fails to identify these claims as admiralty claims, however, can block their removal for that reason alone. A more fundamental solution to the problem, as with removal by an in-state defendant, is to amend the general removal statute to clarify or eliminate removal of “separate and independent” claims.
9(h), but at the cost of neglecting the amendment to the removal statute. Although Rule 9(h) was not drafted with this amendment in mind, it is a testament to the sound judgment of its drafters that it can solve a problem that they could not foresee.

B. Rule 38(e)

Together with Rule 9(h), Rule 38(e) codifies the connection between admiralty jurisdiction and the right to jury trial, or more precisely, the right to trial before a judge. If a claim is identified as one in admiralty, or if it can only be brought in admiralty, then the rules confer no right to jury trial. Just as with removal, in actions that could be brought under the savings clause, the plaintiff controls the right to jury trial by controlling the identification of his claim. In other civil actions, by contrast, the right to jury trial can be invoked by either party, whether asserting the claim or defending against it.\textsuperscript{43}

While the Federal Rules recognize the connection between jurisdiction and jury trial, they do so only in refusing to extend the right to jury trial to admiralty claims. That is all that Rule 38(e) says. It leaves open the possibility that some other source of law could confer a right to jury trial over an admiralty claim, as indeed had happened before the 1966 amendments in \textit{Romero v. International Operating Co.}\textsuperscript{44} That case held that when admiralty claims for maintenance and cure and for unseaworthiness were joined to claims under the Jones Act, they fell within the federal court's pendent jurisdiction (or what we would today call supplemental jurisdiction) so long as they arose out of the same facts as the claim under the Jones Act. With that jurisdictional basis, these admiralty claims could be transformed into savings clause claims and tried to a jury. Although \textit{Romero} did not reach this result, the subsequent decision in \textit{Fitzgerald v. United States Lines Co.}\textsuperscript{45} did, although on significantly different grounds. The Supreme Court relied on the right to jury trial under the Jones Act as the basic reason for submitting the related admiralty claims to the jury. Simplification of the trial could only be achieved by submitting all of these claims to one trier of fact, and since Congress had already required trial by jury under the Jones Act, all of the claims had to be submitted to the jury.\textsuperscript{46} This reasoning finds

\textsuperscript{43}Fed. R. Civ. P. 38(b).
\textsuperscript{44}358 U.S. 354 (1959).
\textsuperscript{45}374 U.S. 16, 19 (1963).
\textsuperscript{46}Id. at 21. This simplifying step cannot be taken if Congress has expressly forbidden jury trial on a claim joined with one brought under the Savings Clause. See Palischak v. Allied Signal Aerospace Co., 893 F. Supp. 341, 351–52 (D.N.J. 1995) (claim under Suits in Admiralty Act joined with state survival claim).
independent support in a series of decisions concerning the merger of legal and equitable claims. To the extent that these claims involve overlapping factual issues, those issues must be tried to the jury to preserve the constitutional right to jury trial under the Seventh Amendment.47

What Romero and Fitzgerald began, the lower federal courts have continued. Without much difficulty, they have extended the reasoning of these cases to compulsory counterclaims. A defendant who is forced into federal court by a plaintiff who asserts an admiralty claim should not lose any right to jury trial on the counterclaim.48 Several courts have also addressed the more difficult question of whether the plaintiff can get the benefit of jury trial on claims at common law, such as claims under the Jones Act, while at the same time using special admiralty procedures, such as arrest and maritime attachment, on related admiralty claims. Most of these cases have allowed the plaintiff to have his cake and eat it too,49 a result that initially appears to be unfair. The plaintiff, by joining together factually related claims, can get the benefit of combined procedures that are not available together either at law or in admiralty. Plaintiffs are allowed to mix and match procedures to gain the greatest tactical advantage from hybrid claims devised from entirely different branches of law. Does this consequence follow from the merger of admiralty with other civil actions?

Not immediately, no, but over the long term, almost inevitably. The Federal Rules do not take a position on the ultimate consequences of merger, as, indeed, they cannot insofar as these consequences extend to matters of substantive law, jurisdiction, and jury trial. All the rules say is that special admiralty procedures apply only to admiralty claims as defined in Rule 9(h).50 They leave open the application of other procedures to other claims, and for that matter, to admiralty claims as well. Because the definition of admiralty jurisdiction proceeds claim by claim, other civil claims do not lose their associated procedures, such as the right to jury trial, by being joined with admiralty claims. Once they are joined, however, these other procedures can be carried over to admiralty claims so long as they are compatible with the admiralty procedures preserved by the Supplemental Rules. Indeed, subject only to this qualification, the general provisions of the Federal Rules must be carried over to admiralty claims. This is just what merger means, and if there were any doubt, it is resolved by Rule A: “The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with

48See Wilmington Trust v. United States District Court, 934 F.2d 1026, 1030 (9th Cir. 1991), and J. Lucas, Admiralty: Cases and Materials 163–64 (4th ed. 1996).
these Supplemental Rules." With respect to procedures beyond the scope of the Federal Rules, such as jury trial, the same result can be achieved by judicial decision or legislation.

Merger supports the extension of general procedures to admiralty claims even when it does not require it. There is no inherent incompatibility between jury trial and the pretrial procedures of arrest and maritime attachment. One claim can be subject to both procedures without any adverse effects. The only incompatibility is historical, in the origins of the procedures in two separate systems of courts. Merger immediately eliminates any objection based on separate historical origins and, over the long term, it causes those separate origins to fade even from memory as it diminishes the present implications of past differences. What started out as integral aspects of different systems of justice ends up as poorly understood peculiarities of ancestors of the single form of civil action. This process will not inevitably result in the complete assimilation of admiralty claims to other civil actions, nor does it apply to admiralty claims alone, but it inevitably works in only one direction—in favor of further unification. It has, for instance, increased the range of equitable remedies available in actions formerly at common law and also in admiralty. Over the long term, all the implications of merger favor uniform treatment of claims according to their functional characteristics.

There is no functional characteristic of admiralty claims that prevents the combination of jury trial and pretrial admiralty remedies. The sense of unfairness in allowing the plaintiff to get the best of both systems of laws depends ultimately on the judgment that those systems should be kept separate. Merger directly contradicts this judgment. The risk of unfairness must be evaluated by considering each of the procedures invoked by the plaintiff separately. Whatever unfairness might be thought to arise from jury trial of seamen's personal injury claims has already been resolved by Congress in the Jones Act, and to the extent that the Jones Act creates a common law remedy, by the Constitution in the Seventh Amendment. So, too, for any other claim outside of admiralty that supports a right to jury trial, the priority accorded to that right should dictate that the jury decide all issues normally submitted to it. The right to jury trial extends to all issues common to admiralty and legal claims joined in a single action, although as with the seamen's claims considered in Fitzgerald, all factual issues might

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54 Wilmington Trust Co., 934 F.2d at 1032.
be submitted to the jury for the sake of efficiency if the overlapping issues predominate.

Any unfairness from allowing the plaintiff to invoke the pretrial remedies of arrest and maritime attachment has more to do with the specific rules that govern those procedures than with the general consequences of merger. These rules, Rules B, C, and E stand as the single most important exception to the general principles of merger and of uniform procedures in admiralty and other civil actions. Before these rules are examined in detail, however, it is necessary to look at the other distinctive admiralty procedures recognized by the Federal Rules.

C. Rule 14(c)

Rule 14(c) carries forward the broad joinder of third-party claims allowed in admiralty practice. The general provisions on third-party practice allow the impleader of a third-party defendant, such as an insurer, who is liable to the defendant if the defendant, in turn, is found liable to the plaintiff. Rule 14(c) allows a defendant to an admiralty claim an additional form of impleader: impleader of a third-party defendant who is directly liable to the plaintiff. The only restriction on these claims is that they must arise out of the same transaction or occurrence as the plaintiff’s claim. After some initial hesitation, the cases under Rule 14(c) held that the impleaded claim need not itself be in admiralty, as a consequence again of the merger of admiralty with other civil actions. As with Rule 9(h) and Rule 38(e), the principal questions under Rule 14(c) concern subject-matter jurisdiction and jury trial.

Whatever doubts there were about subject-matter jurisdiction should have been resolved by the Judicial Improvements Act of 1990, which codified the doctrine of supplemental jurisdiction and extended it to the full range of a constitutional case or controversy. The case or controversy brought into federal court by the plaintiff’s underlying admiralty claim extends at least as far as the same transaction or occurrence required for joinder under Rule 14(c). In Finley v. United States, the Supreme Court raised some doubts about the scope of supplemental jurisdiction as applied to claims that brought in new parties, but these were resolved in favor of jurisdiction, initially by decisions that distinguished the situation in Finley from claims

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55 Fed. R. Civ. P. 14(a), (b).
56 Leather’s Best, Inc., 451 F.2d at 810 n.12 (rejecting this restriction as based on pre-merger practice).
joined under Rule 14(c)\textsuperscript{60} and then decisively by the Judicial Improvements Act. The Act was intended, in part, to overrule \textit{Finley} insofar as it denied supplemental jurisdiction to bring new parties into the litigation.\textsuperscript{61}

As for questions of jury trial, they should be resolved in exactly the same way discussed earlier: all issues common to an admiralty claim and a legal claim joined together in a single action should be triable to a jury.

\textbf{D. Rules D and F}

These rules, too, to the extent that they have given rise to litigation, have raised issues of subject-matter jurisdiction. Although the issues of jurisdiction are open to dispute, nothing in the rules bears on how they should be resolved. And, for reasons already emphasized, the rules themselves are powerless to alter federal jurisdiction of their own force.

Rule D covers possessory, petitory, and partition actions. It has been invoked occasionally by plaintiffs who seek to avoid certain historic exceptions to admiralty jurisdiction, in particular, over claims concerning the construction or sale of a vessel.\textsuperscript{62} Since actions under Rule D properly raise claims only based on legal title to the vessel—not just equitable title—the cases have correctly excluded these claims from the operation of the rule.

Rule F covers actions to limit liability. All of the disputed issues under the Limitation of Liability Act, including the continued need for a general statute on this subject, are matters for statutory interpretation or, more plausibly, amendment—not for changes in the rule. In two recent decisions, the Supreme Court has made clear that the ordinary rules of admiralty jurisdiction apply to actions to limit liability, reversing attempts by lower federal courts to restrict the substantive scope of the Limitation of Liability Act by narrowly interpreting the reach of admiralty jurisdiction. In \textit{Sisson v. Ruby},\textsuperscript{63} the Court held that admiralty jurisdiction covered tort claims arising from a fire aboard a recreational vessel. The Court therefore remanded the case to consider the merits of the vessel owner’s action to limit liability.\textsuperscript{64} As a matter of policy, there scarcely appears to be any justification for allowing the owners of recreational boats to limit liability, let alone to the value of the vessel after the event giving rise to liability. Yet these concerns did not lead

\textsuperscript{60}See, e.g., Loeber v. Bay Tankers, Inc., 924 F.2d 1340, 1347 (5th Cir. 1991).
\textsuperscript{63}497 U.S. 358 (1990).
\textsuperscript{64}Id. at 367.
the Supreme Court to restrict the admiralty jurisdiction in order to narrow the application of the Limitation of Liability Act. So, too, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the Supreme Court again found admiralty jurisdiction in a case in which limited liability appeared unjustified as a matter of policy. This case concerned claims for massive losses arising from a notorious incident in which the basements of office buildings in Chicago’s Loop were flooded when pilings were driven too close to a service tunnel under the Chicago River. The pilings were designed to protect piers from incidental collisions from vessels and so were sufficiently related to navigation to support admiralty jurisdiction. Again, only the jurisdictional issues was before the Supreme Court. Both *Sisson* and *Grubart* left open for consideration on remand the merits of the claim to limit liability, and in particular, whether the underlying tort claims were excluded from limitation under the statutory exception for losses caused by the “privity or knowledge” of the vessel owner.

Like the related issues of admiralty jurisdiction and coverage, the other issues that frequently arise in actions to limit liability are governed by the Limitation of Liability Act and the decisions interpreting it, not by the provisions of Rule F. Thus the time limit for bringing actions to limit liability, six months from written notice of a claim, appears both in the statute and in the rule. Yet it is the statutory provision, as a matter of substantive law, that is decisive. The rule simply repeats the statutory time limit as a preface to the procedures for commencing a claim. Thus the question whether the Limitation of Liability Act can be raised as a defense, after the six-month time limit has expired, remains one of substance outside the scope of the rule.

The statute and judicial decisions also resolve the important tactical question of when to enjoin other proceedings against the vessel and the vessel owner. The statute simply declares that if the owner satisfies certain conditions, “all proceedings against the owner with respect to the matter in

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66 Id. at 1050–53.
67 Id. at 1047.
question shall cease." The Supreme Court has qualified this seemingly absolute statutory command through a series of decisions allowing other proceedings against the owner when they pose no risk of exhausting the limitation fund. These decisions preserve the claimants' ordinary right to control the manner in which their claims are brought, and specifically, any right to jury trial if they bring their claims under the savings clause.

Some decisions have taken this reasoning based on the right to jury trial one step further, applying it to claims within the limitation proceeding itself. The leading case in this line, Complaint of Poling Transportation Co., upheld a right to jury trial on claims for personal injury arising from a fire and explosion following a spill of gasoline unloaded from an oil tanker. Relying on Fitzgerald, the district court found a right to jury trial because the personal injury claims could have been tried to a jury in state court. The court reached this conclusion despite the fact that the conditions for lifting the stay against independent proceedings had not been met and despite the absence of any basis for federal jurisdiction over the personal injury claims outside of admiralty. This conclusion contradicts the well settled doctrine that actions to limit liability are exclusively within the admiralty jurisdiction and therefore do not support the right to jury trial. The court was nevertheless persuaded by the importance of the claimants' right to jury trial, based on decisions under the Seventh Amendment. These decisions, however, recognize an exception to the right to jury trial in the analogous situation in bankruptcy in which a claim filed against the bankrupt's estate effectively constitutes a waiver of the right to jury trial. Whatever the merits of this doctrine in bankruptcy, and whatever its force in limitation proceedings, it illustrates yet again the need to go far beyond the Federal Rules to resolve these questions.

IV
MARITIME ATTACHMENT AND ARREST

These procedural devices are at once the most distinctive features of admiralty practice and those most clearly within the scope of the Federal

73 See Lake Tankers Corp. v. Henn, 354 U.S. 147, 152 (1957); Ex parte Green, 286 U.S. 437, 439–40 (1931); and Langnes v. Green, 282 U.S. 531, 540 (1930).
76 Poling, 776 F. Supp. at 782.
77 Id. at 786.
Rules. Rules B, C, and E define and limit these devices and were themselves the subject of the most significant amendments to the Federal Rules on admiralty. In 1985, these rules were amended to conform to decisions since 1966 on the constitutional requirements for pretrial procedures under the Due Process Clause. These rules have also been subjected to a corresponding amount of academic discussion and so, while they stand at the center of the Federal Rules on admiralty, they also stand least in need of renewed analysis and debate. As this author, and others, have pointed out, the persistent question under the rules is the extent to which they can be exempted from the standard requirements of the Due Process Clause, both with respect to the procedural safeguards necessary for pretrial seizures and with respect to the limits on personal jurisdiction. Only the first of these issues was addressed by the 1985 amendments and the second remains to be fully worked out, either in judicial decisions or in amendments to the rules.

The 1985 amendments to Rules B, C, and E were largely adequate to their limited purpose. In the short term, they need not be perfected or succeeded by a subsequent round of amendments. Only one subsequent development might have called for an immediate re-examination of the rules, but it has not proved to be of great practical significance. That is the widespread use of civil forfeiture as a punishment for crime, particularly organized crime and drug-related crime. By the terms of Rule A, the rules on arrest also extend to “statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not.” According to this provision, the procedures for arrest also apply to forfeiture of property involved in a criminal enterprise. Yet the major forfeiture statutes themselves contain procedural provisions that resolve most of the controversial questions about forfeitures. The need to adjust the Supplemental Rules to take account of developments in criminal law is therefore minimal.

If an immediate change in the rules is not called for, the case for changes over the long term should not be forgotten. In the two subsections that follow, these changes are discussed under two general headings: procedural requirements for pretrial seizure that are desirable as a matter of policy and personal jurisdiction based on concepts other than the fictions of presence. Both topics derive from the fundamental principle that animates unification: the need to justify distinctive procedures in admiralty on some ground other than the consequences of an historically separate set of courts.


A. Notice and Hearing

The 1985 amendments to Rules B, C, and E sought to bring the procedures for maritime attachment and arrest into conformity with current constitutional requirements for notice and opportunity to be heard under the Due Process Clause. Whether they completely succeeded in doing so might be questioned, but no challenge to the amended rules on this ground—apart from a few cases and local rules requiring supplementary forms of notice—has been upheld. The 1985 amendments added two basic requirements to the rules: first, examination of the request for seizure by a judicial officer, except in exigent circumstances; and second, a hearing immediately after the seizure.\(^{81}\) The immediate question raised by these amendments is whether they meet all the requirements of the Due Process Clause. The long-term question is whether these extraordinary pretrial remedies should be generally available in all admiralty cases.

Even as amended, Rules B, C, and E depart from the requirements for pretrial seizures in other areas of law, primarily in not requiring individual notice to the defendant nor, in the case of arrest, to others with an interest in the property seized.\(^ {82}\) The Due Process Clause is not usually satisfied by the combination of published notice and notice by seizure provided by Rules B and C.\(^ {83}\) It also requires individual notice if at all practical.\(^ {84}\) Despite their failure to conform to this standard constitutional requirement, several provisions in the rules and other aspects of admiralty practice minimize the adverse consequences of failure to give individual notice. In actions commenced by attachment, individual notice must be given to the defendant before any default judgment is entered\(^ {85}\) and any resulting judgment is binding only on the defendant, not on any maritime lienor.\(^ {86}\) In actions in rem, which must be commenced by arrest, individual notice to maritime lienors with interests in the vessel is not required unless the vessel is the


\(^{82}\)The rules also do not require the plaintiff to make any showing of exigency in order to obtain a seizure, and when such a showing is made, the plaintiff gains the added benefit of avoiding judicial review before the seizure. Fed. R. Civ. P. Supp. R. B(1), C(3). Likewise, the plaintiff is not required to post bond. By contrast, similar pretrial remedies outside of admiralty usually require either one or the other: either a showing of exigency or a bond. See Connecticut v. Doehr, 501 U.S. 1, 20, 25–26 (1991) (opinion of White, J.). Neither of these requirements, however, has been imposed as a matter of due process. Id. at 30 (Rehnquist, C.J., concurring in part and concurring in the judgment).


subject of a preferred ship mortgage and the lienors’ interests are recorded under the Ship Mortgage Act.\textsuperscript{87} Lienors whose interests are not recorded can see their liens extinguished without notice by judicial sale of the vessel, an event, however, which seldom occurs because the vessel’s owner usually obtains its release by posting security for it. In the latter situation, only the interests of the maritime lienors who appear in the \textit{in rem} action are affected by the sale.\textsuperscript{88} Most important, as a practical matter, the asset seized by maritime attachment or arrest is usually of sufficient value that notice does work its way back to the defendant or owner because of the significance of the seizure. But for this very reason, if indirect notice is often effective, or if it is supplemented by other provisions for notice, then an added explicit requirement of individual notice cannot be that burdensome. And, of course, if it is truly impractical to give individual notice, then it is not constitutionally required.

At this point, the constitutional argument for individual notice could just as well be framed as a policy argument for sound procedures. Indeed, an exclusive focus on the precise requirements of the Due Process Clause misses more fundamental questions of policy. The Constitution only requires minimally adequate procedures, not those responsive to the changing needs of maritime commerce. Constitutional reform cannot resolve this question of policy, or even provide a fully satisfactory resolution of questions, such as notice, that have constitutional dimensions. The constitutional requirement of individual notice, for instance, depends on the plaintiff’s ability to identify and locate those with interests in the vessel (or other asset that is seized), which depends, in turn, on the existence of some system of recording interests in the vessel. So far, no such system is in place for vessels or maritime liens and none could be created through constitutional decisions alone. The local rules in some districts go part way toward remedying this deficiency by requiring individual notice to all individuals with security interests recorded in any registry of interests in property.\textsuperscript{89} These rules at least represent a first step in the right direction.

A further question of policy, which I have pursued in an earlier article, concerns the desirability of having the plaintiff post bond to cover the defendant’s losses from an erroneous seizure.\textsuperscript{90} A plaintiff’s bond is now

\textsuperscript{87} U.S.C. app. §§ 31325 and 31343.
\textsuperscript{88} See Gilmore & Black, supra note 34, at 588–89, 786–90.
\textsuperscript{89} See Local Admiralty R. C(4)(b)(3) (C.D. Cal.); Local Admiralty R. 6–1(b)(3) (N.D. Cal.); Local Admiralty R. 602–4(b)(3) (D. Haw.); United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1316 (10th Cir. 1994) (publication insufficient in civil forfeiture action); and MacDougalls’ Cape Cod Marine Service, Inc. v. One Christina 40’ Vessel, 900 F.2d 408, 411–12 (1st Cir. 1990) (posting on vessel and publication insufficient when owner known and not in possession of vessel).
\textsuperscript{90} See Rutherglen, supra note 10, at 551–53, 569–74.
required only in the discretion of the district court, although the plaintiff must typically post security for the marshall's expenses in seizing and maintaining the vessel. (Other assets can be attached or arrested also, but for the sake of simplicity, the remaining discussion in this part will refer only to attachment or arrest of vessels.) The latter requirement is now codified in the local admiralty rules of several district courts. Any change in the Federal Rules to require the plaintiff to post bond, beyond simply setting default values for the ordinary and necessary expenses of seizing and maintaining the vessel, would raise questions of altering substantive rights in violation of the Rules Enabling Act. Curiously, however, an existing provision of Rule E has never been challenged on this ground, although it reduces the bond required of the defendant below the level set by statute to release the vessel. The question raised by any such amendment would be whether it affected any substantive rights outside of litigation, and in particular, the right of defendants to claim wrongful arrest. This claim requires a showing of bad faith, which could not be changed by the rule. Requiring a plaintiff to post a bond for security against such a claim, however, would not enlarge the underlying substantive right, any more than other provisions for bonds in support of an injunction or on appeal. Nevertheless, there is authority outside of admiralty that would find any such change to be substantive.

All of these questions about the details of maritime attachment and arrest, are subordinate to the larger question implicit in unification: how closely should the procedures for maritime attachment and arrest resemble those for pretrial procedures in other areas of law? This question does not admit of a

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91Fed. R. Civ. P. Supp. R. E(2)(b), (7). Such bonds are typically required only in the discretion of the district court, or even in narrower circumstances. See Result Shipping Co. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 399–402 (2d Cir. 1995) (discretion of district court), and Afram Lines Int'l, Inc. v. M/V Capetan Yiannis, 905 F.2d 347, 349–50 (11th Cir. 1990) (bond required from plaintiff only to release property seized at the instance of a defendant asserting a counterclaim).

92See, e.g., Local Admiralty R. 6(A) (D. Alaska) (requiring $500 in security); Local Admiralty R. 7 (N.D. Fla.) (same); Local Admiralty R. 7(A) (N.D. Ill.) (requiring $250 in security); Local Admiralty R. 25.02 (E.D. La.) (same); Local Admiralty R. (e)(8) (D. Md.) (requiring $3,000 in security for vessels more than 65 feet in length and $500 for vessels 65 feet or less); Local Admiralty R. 6 (S.D.N.Y.) (requiring $250 in security); and Local Admiralty R. (e)(8), (10) (E.D. Va.) (requiring $500 in security in addition to a sum to cover the Marshal's fees). Additional expenses of maintaining a vessel, also initially imposed on the plaintiff, can range from $1,000 to $10,000. See Healy & Sharpe, supra note 35, at 122–23.

93Compare, e.g., Fed. R. Civ. P. Supp. R. E(5) (bond at least in amount of claim with interests and costs but not more than twice value of claim) with 28 U.S.C. § 2464 (bond must be double amount of claim); see also Gilmore & Black, supra note 34, at 797.


single answer for all cases that fall within the admiralty jurisdiction. The distinctive needs of parties in international commerce require more effective summary procedures than those in purely domestic commerce. Yet admiralty jurisdiction extends to both, without any means under the existing rules of readily distinguishing between the two. Conversely, parties who have claims outside of admiralty that also arise from international transactions may have the same needs, but cannot use the same procedures. What would be ideal are rules, simple enough to be applied in summary proceedings, that distinguish between the cases in which pretrial seizures usually are necessary and those in which they are not. The rules for determining subject-matter jurisdiction in admiralty—which, after all, were designed for an entirely different purpose—are a poor substitute for rules designed to achieve this purpose directly. It is an open question, worthy of continued consideration, how such rules might be framed.

B. Presence and Personal Jurisdiction

Outside of admiralty, the presence of the defendant's assets has been discarded as a fiction that no longer justifies the assertion of personal jurisdiction. 97 Within admiralty, this fiction has continued to prosper, perhaps because it pales in comparison to the related fiction that a vessel is the actual defendant in an in rem action. With respect to personal jurisdiction, Rule B allows a general form of quasi in rem jurisdiction discredited in other areas of law and Rule C, with additional connotations of subject-matter jurisdiction, allows cases to be brought in rem against vessels. Although the decisions reveal no inclination of the courts to hold these rules unconstitutional, some developments outside of admiralty have further eroded the hold that these fictions have on the legal imagination. Again, these forces may operate slowly, but they exert pressure in only one direction—towards full unification.

The 1985 amendments brought the rules into substantial compliance with the Due Process Clause on the right to notice and opportunity to be heard. They left them completely at odds with the cases on personal jurisdiction under the same clause. Rule B, in particular, survives in formal defiance of the principal recent decision on personal jurisdiction under the Due Process Clause, Shaffer v. Heitner. 98 It does precisely what Shaffer forbids, precisely for the reasons that Shaffer forbids it. It allows attachment of the vessel for the purpose of forcing the defendant to come into the jurisdiction and submit to personal jurisdiction and it does so by relying on the traditional fictions

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that the court's power extends to the person of the defendant to the extent of his property within its reach.\textsuperscript{99} Although most applications of Rule B can be saved by recasting the modern minimum contacts analysis so that it considers all contacts with the United States,\textsuperscript{100} the theoretical embarrassment remains that a Federal Rule, previously approved by the Supreme Court, does exactly what the Supreme Court has subsequently declared unconstitutional.

This problem in the theory of personal jurisdiction, although serious, is familiar. A related, but more practical problem concerns the vexing requirement in Rule B that "the defendant cannot be found within the district."\textsuperscript{101} This requirement limits maritime attachment to those cases in which personal jurisdiction cannot be based on the defendant's activities in the district where the plaintiff's claim is brought. A recent case, \textit{Maritrans v. M/V Balsa} \textsuperscript{37},\textsuperscript{102} has interpreted this requirement to mean that the defendant must not be subject to personal jurisdiction under Rule 4(h), which in turn invokes state procedures subject to the standard minimum contacts analysis. As a case note already has pointed out, the court relied on a local rule that imposed this interpretation on Rule B and that has been widely copied in other districts.\textsuperscript{103} Thus the decision itself is of more than local interest. A close analysis of its reasoning need not be repeated here, although it may be doubted whether local rules are the appropriate vehicle for interpreting Federal Rules of national application and uniformity.\textsuperscript{104} What \textit{Maritrans} illustrates, in exceptionally acute form, is the collision between the old methods of gaining personal jurisdiction and the new. Rule B allows the old method of \textit{quasi in rem} jurisdiction to be used only when the new method proves to be inadequate. But, of course, the new method was

\textsuperscript{99}The Ninth Circuit recently offered a clear statement of the purposes of maritime attachment:

The attachment procedure provides aggrieved parties an opportunity to gain satisfaction against defendants they might not be able to reach through ordinary in personam proceedings. Polar Shipping Ltd., 680 F.2d at 637; see 2 Thomas J. Schoenbaum, Admiralty & Maritime Law § 21–2, at 471. In this respect, maritime attachment's purpose resembles the purpose of the in rem fiction articulated by the Supreme Court.


\textsuperscript{102}64 F.3d 150 (4th Cir. 1995), cert. denied, 116 S. Ct. 775 (1996).


adopted just to remedy the defects of the old method. Both methods cannot coexist together indefinitely.

The procedures for arrest under Rule C illustrate the same conflict between old methods and new. Arrest confers jurisdiction in rem, which has aspects of both personal and subject-matter jurisdiction: personal jurisdiction to the extent that it brings all those with interests in the arrested vessel within the power of the court; subject-matter jurisdiction to the extent that it brings admiralty claims in rem exclusively within the jurisdiction of the federal courts. In *Republic National Bank v. United States*,105 the Supreme Court noted the ambivalent character of in rem jurisdiction,106 but held that continued presence of the asset within the district was not a prerequisite to continued jurisdiction.107 Presence of the asset within the district was necessary only at the outset of the action.108 *Republic National Bank* is one of the few forfeiture cases with implications for admiralty practice, but its implications further undermine whatever residual force there is to the fiction that the power of the court rests on the presence of the arrested vessel or security substituted for it.109 Indeed, in an earlier decision, the Supreme Court had already permitted transfer of an in rem action before an arrest had been made, treating presence in the district as a requirement of venue that could be overridden for reasons of convenience.110 *Republic National Bank* further strengthens this resemblance to a rule of venue by limiting the requirement of presence to the initial stages of an action. As a rule of venue, of course, it does not lack significance—the presence of the vessel is now the only constraint on the plaintiff’s choice among federal district courts in an in rem action—but it does mean that the requirement is not indispensable. It rests on the functional need to limit the plaintiff’s choice of forum and to select a court that can easily monitor seizure, maintenance, and sale of the

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106See id. at 88 (analyzing requirement of presence of asset inside the district both as personal jurisdiction and subject-matter jurisdiction).
107Id. at 82–86.
108Id.
109See Gilmore & Black, supra note 34, at 801–05 (noting limits on fiction for purposes of preclusion). Some decisions continue to dismiss cases because the vessel has left the district, but without discussing *Republic National Bank*. See, e.g., Isbrensdten Marine Serv. v. M/V Inagua Tania, 68 F.3d 1315, 1316 (11th Cir. 1995) (per curiam). A dismissal might be justified if no process can effectively run against the owner of the vessel, but this result does not automatically follow from release of the vessel. Rule C(5) specifically provides for ancillary process if part of the res has been removed. See Stevedoring Servs., 59 F.3d at 883 (release of funds attached under Rule B does not divest the court of jurisdiction), and Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan, 890 F. Supp. 532, 565 (N.D. Miss. 1995) (ancillary process available if major portion of the res remains within control of the court).
vessel. Presence itself is not an absolute prerequisite to the exercise of judicial power.

In at least one class of cases, presence does not serve the underlying needs of a sound rule of venue and courts have treated it as the fictional basis for jurisdiction that it is. These are treasure salvage cases in which the salved vessel or wreck lies outside the boundaries of the district, which generally extend only as far as state territorial waters.111 In these cases, courts have exercised in rem jurisdiction based on control over some artefact recovered in the salvage operations and symbolically tendered by the plaintiff to the court.112 The justification for these decisions rests on the need for regulation of salvage claims and, in particular, the need to protect the plaintiffs’ investment in their salvage operations from encroachment by rival salvors. No court is particularly well suited to regulate salvage operations on the high seas, but in these cases at least, none was any better suited than the one chosen by the plaintiffs. These cases no doubt are exceptional and they certainly provide no basis for rewriting Rule C. Nevertheless they illustrate how modern conceptions—in these cases of jurisdiction by necessity—erode the force and effect of presence as the sole determinant of jurisdiction.

V

CONCLUSION

Until now, and no doubt for the near future, the 1966 amendments to the Federal Rules of Civil Procedure will provide the framework for developments in admiralty practice. Most of the special provisions in these rules for admiralty cases are not problematic at all and the supplemental rules for maritime attachment and arrest have been further amended to eliminate their most severe departures from prevailing constitutional requirements. The glaring exception of jurisdiction based on presence of a vessel within the district has created, as yet, few practical problems. The issues surveyed in this article do not call for another wholesale revision of the rules, especially when the original rules have served so well. The problems that have been noted do offer this opportunity: to reexamine the long-term aims of unification of admiralty with other civil actions and to identify the areas in which future amendments might profitably be considered. The hit-or-miss

quality of the repeated revision of other Federal Rules in recent years should lead any reformer of the admiralty rules to proceed with caution. On the merits, a systematic analysis of the balance to be struck between unification and distinctive admiralty rules remains necessary, as does empirical study of the practical effects of the rules that we now have.\textsuperscript{113} But these alone are not sufficient. The case must also be made for replacing the existing structure created by Brainerd Currie and others in 1966 and doing so within the limitations of the Rules Enabling Act. So far, that case has yet to be made.
