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Repository Citation
George Rutherglen, The Contemporary Justification for Maritime Arrest and Attachment, 30 Wm. & Mary L. Rev. 541 (1989), http://scholarship.law.wm.edu/wmlr/vol30/iss3/3
THE CONTEMPORARY JUSTIFICATION FOR MARITIME ARREST AND ATTACHMENT

George Rutherglen*

A ship may be here today and gone tomorrow, not to return for an indefinite period, perhaps never. Assets of its owner, including debts for freights, as in this case, within the jurisdiction today, may be transferred elsewhere or paid off tomorrow.¹

This quotation reveals both the essence and the weakness of the reasons for maritime arrest and attachment. Arrest and attachment are pretrial remedies in admiralty for seizing the defendant’s assets (not the defendant’s person, as the terminology of arrest might suggest). For instance, if a vessel owner fails to pay for supplies furnished to the vessel on credit, the supplier can commence an action *in rem* against the vessel in any port in which it may be found by obtaining a writ for its arrest.² Alternatively, the supplier can commence an action *in personam* against the owner and attach the vessel without notice to its owner or an adversary hearing, based solely on the sworn allegations of the complaint.³ Usually the owner obtains release of the vessel, or even forestalls a seizure in the first place, by posting bond for the amount of the plaintiff’s claim, or by entering into an agreement with the plaintiff for security in lieu of bond.⁴ The plaintiff also must post bond for the marshal’s initial expenses in maintaining the vessel if it is seized. The

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1. Polar Shipping v. Oriental Shipping Corp., 680 F.2d 627, 637 (9th Cir. 1982).
defendant is entitled to a hearing immediately after the seizure. A seizure, or the security posted in lieu of a seizure, confers limited personal jurisdiction over the owner and provides a source for satisfying any judgment obtained by the plaintiff. Attachment operates in similar fashion, although the asset attached need not be the subject of the plaintiff's claim.

These pretrial remedies traditionally have been justified, as they are in the preceding quotation, by the assumption that most admiralty cases involve international commerce and that most assets in maritime commerce, such as vessels and their cargoes, are exceptionally mobile. Yet not all admiralty cases have international dimensions; many cases arise from the coastwise trade or on the inland waterways or from oil drilling off the coast of the United States. Nor are assets in maritime commerce uniquely mobile. Airplanes present an immediate parallel to ships. Likewise, liquid assets and negotiable claims, although important in admiralty, play a far more prominent role in other areas of international commerce, especially international finance. Neither the international character of maritime commerce nor the mobility of maritime assets justifies arrest and attachment in admiralty.

Yet these remedies in admiralty are far more powerful than the corresponding pretrial remedies in civil actions on land. They allow the plaintiff to seize the defendant's assets without either notice or hearing and without posting bond for the defendant's expenses. Instead, the seizure itself gives notice, the hearing follows the seizure, and the defendant usually ends up posting bond to release the seized asset. Both forms of seizure also allow the plaintiff to obtain personal jurisdiction over the defendant in a district with which the defendant has no contacts other than the presence of the seized asset. Indeed, the defendant's absence from the district is a prerequisite for maritime attachment.

7. Fed. R. Civ. P. B.
Predictably, these features of arrest and attachment have resulted in constitutional attacks on the rules that provide for these remedies, Supplemental Rules B and C of the Federal Rules of Civil Procedure. Defendants attacked the rules, in their original form, on two grounds: first, that they denied defendants notice and opportunity to be heard before the seizure, as required by *Sniadach v. Family Finance Corp.*,12 and second, that they allowed the plaintiff to obtain personal jurisdiction over the defendant without sufficient contacts between the defendant and the forum, as required by *Shaffer v. Heitner*.13 The first of these arguments resulted in amendments to rules B and C to provide the defendant with enhanced procedural protection,14 but protection which still falls short of that required for other pretrial remedies. The new procedures respond to the constitutional concerns expressed by the circuit courts over the absence of a hearing, either before or immediately after the seizure, under the former version of the rules.15 The second argument has not resulted in any change in the rules. Every circuit to consider the issue has held that the rules do not extend the jurisdiction of the federal courts beyond constitutional limits.16

The constitutional objections to Rules B and C represent a larger trend toward the unification of admiralty procedure with the procedure in other civil actions.17 The 1966 amendments to the Federal Rules of Civil Procedure and other procedural reforms were based on a general belief that the procedures in ordinary civil

litigation should also apply to admiralty cases. These reforms were limited only by the special needs and characteristics perceived in admiralty cases, and specifically, in the rules governing arrest and attachment, by the international character of admiralty cases and the mobility of assets in maritime commerce. Upon examination, these characteristics do not turn out to be so special after all.

Even if these characteristics justified the special constitutional treatment of pretrial remedies in admiralty, they would not justify the existing rules as a matter of policy. The due process clause guarantees only minimally adequate procedures. It does not require the fairest or most effective procedures or those most appropriate for admiralty cases. A single-minded focus on constitutional law should not be allowed to sanctify the traditional procedures in admiralty or, for that matter, the procedures currently used, in other civil actions.

Part I of this Article examines the special procedures governing maritime arrest and attachment, including the reforms resulting from the recent constitutional attacks on Rules B and C. Part II analyzes the justification for the special procedures in arrest and attachment, reviewing both the limited provisions for notice and hearing and the expansive provisions for personal jurisdiction based on seizure of the defendant's assets. Part III discusses several different ways in which the procedures for arrest and attachment can be reformed. The most important of these reforms would require the plaintiff to post bond for the defendant's expenses resulting from the seizure and to pay those expenses if the defendant ultimately prevailed in the underlying action. Moreover, even if the plaintiff posted bond, a seizure would not confer personal jurisdiction over the defendant in the absence of other contacts with

18. In consolidated actions, consisting of admiralty and legal claims, the admiralty practice of trial without a jury has been accommodated to the right to jury trial in much the same manner as the corresponding equity practice. Fitzgerald v. United States Lines, 374 U.S. 16, 21 (1963). Pendent jurisdiction in admiralty has been assimilated to the practice in other federal cases, resulting in the virtual abolition of the separate "admiralty side" of the federal district courts. Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959); Leather's Best, Inc. v. Steamship Mormaclynx, 451 F.2d 800, 810-11 (2d Cir. 1971).

the forum. These rules would be subject to only three exceptions: for cases in which a seizure was necessary to protect the plaintiff’s ability to recover from the defendant at all, a form of jurisdiction by necessity; for cases in which the plaintiff had a maritime lien of high priority, already recognized in the law governing seamen’s claims; and for cases in which the defendant had validly waived its procedural rights, typically by written contract. These exceptions are designed to limit the current procedures for arrest and attachment to the cases in which they remain justified, without relying on the quaint fictions that personify ships in admiralty or on the related legacy of traditional admiralty practice.

I. The Current Procedures for Arrest and Attachment

Arrest and attachment are similar but different devices for seizing the defendant’s assets and obtaining personal jurisdiction in admiralty. They are governed by slightly different procedural rules and very different substantive doctrines. Of the two, attachment is the more familiar. It corresponds exactly to the procedures for quasi in rem attachment or garnishment that were common in civil actions on land before such procedures came under constitutional attack. Attachment allows the plaintiff to seize the defendant’s assets to satisfy any judgment that the plaintiff might eventually obtain and to assert personal jurisdiction over him, at least for a judgment up to the value of the object seized. Because it was designed primarily to acquire personal jurisdiction over the defendant, attachment is available only if the vessel can be found within the district, but the defendant cannot. Attachment does not require a maritime lien and, unlike a sale following arrest, sale following attachment does not extinguish any maritime liens on the seized object.

Arrest, by contrast, is an esoteric procedure, unique to admiralty. It is the only means of commencing an in rem action, nominally against the arrested object. The object arrested is usually a

23. Id. at 802.
vessel but also may be cargo or intangible financial assets. The real
parties in interest are the owner of the object seized and any other
claimant with an interest in it. They are the persons who stand to
lose if a judgment is entered against the res. (For convenience, I
will assume that the arrested or attached object is a vessel, al-
though it need not be, and that the vessel’s owner is the actual
defendant.) A plaintiff can commence an in rem action by arrest
only if he holds a maritime lien on the arrested object or if a stat-
ute specifically authorizes such an action.24 The law of maritime
liens adds a peculiar level of complexity to the law governing ar-
rest, for several reasons: because some, but not all, admiralty
claims give rise to maritime liens; because the priority among these
liens is determined according to a unique and, in some respects,
inexplicable system of rules; and because these liens can be extin-
guished by a judicial sale without notice or hearing to the lienor.25
The last of these characteristics raises an obvious problem of due
process because it allows lienors, other than the plaintiff who ar-
rested the vessel, to be deprived of a property interest without any
notice or hearing. Perhaps for this reason, other maritime liens are
extinguished only if the arrested asset is actually sold. If the de-
fendant posts bond to obtain release of the asset, then the result-
ing judgment affects only maritime lienors who appear in the ac-
tion. These lienors can look only to the bond to satisfy their liens.26

The constitutional attacks on arrest, however, have not focused
on the rights of third-party lienors but on the rights of the defend-
ant himself.27 These attacks resulted in a limited reform of the ad-
miralty rules in 1985, through amendments to Rule B on maritime
attachment, Rule C on arrest, and Rule E on actions in rem and
quasi in rem generally.28 These amendments addressed only the
constitutional requirements of notice and hearing, ignored the con-
stitutional objections to personal jurisdiction based solely on
seizure of the defendant’s property, and provided the defendant

26. E.g., Southern Or. Prod. Credit Ass’n v. Oil Screw Sweet Pea, 435 F. Supp. 454, 458-
59 (D. Or. 1977); G. Gilmore & C. Black, supra note 22, at 798-800.
27. See infra note 31.
(1985).
with only minimal protection from seizures without notice and hearing. In so doing, the amendments effectively codified a consensus that had developed in the federal circuit courts.

Every circuit that had examined the constitutionality of the admiralty rules after *Sniadach v. Family Finance Corp.* and *Shaffer v. Heitner* had held that they denied due process, but only insofar as they failed to provide for an immediate hearing after arrest or attachment. In reaching this conclusion, the courts relied on the last two, somewhat inconsistent decisions of the Supreme Court on the constitutional standards for pretrial seizures: *North Georgia Finishing, Inc. v. Di-Chem, Inc.* and *Mitchell v. W.T. Grant Co.* These decisions allow seizure of the defendant's property without prior notice and hearing only if the plaintiff submits sworn allegations supporting the seizure, a judicial officer then reviews the allegations and issues the writ, and the defendant has an opportunity to contest the seizure at a hearing immediately after it takes place. These decisions also might require the plaintiff to post bond to compensate the defendant for his losses from the seizure, if it turns out to have been improper. The circuit courts tried to bring Rules B and C into conformity with these standards by insisting that lower courts grant the defendant a hearing held immediately after the seizure, as Rule E(5) and Rule 12(b) authorized and as several district courts had required by local rule.

34. *Id.* at 618.
35. The procedure upheld in *Mitchell* and the procedure invalidated in *North Georgia Finishing, Inc.* both required a bond. The Court did not emphasize the presence of a plaintiff's bond in either opinion.
36. *See Culp, supra* note 15, at 367; *see also* cases cited *supra* note 31.
The 1985 amendments followed essentially the same approach of minimal reform to meet minimal constitutional requirements. In conformity with the decisions of the circuit courts, new Rule E(4)(f) was added to require a prompt hearing at the request of any person with an interest in the seized property, and following the practice in a few districts, new Rules B(1) and C(3) were added to require judicial examination of the complaint before issuance of the writ. The new rules preserved the requirement that the complaint must contain specific sworn statements supporting the seizure. The amendments, however, were as notable for what they did not do as for what they did. They required neither a bond from the plaintiff to cover the losses caused by an erroneous seizure, nor a showing of exigent circumstances (unless the writ was issued without any judicial review at all), nor immediate notice to persons with an interest in the seized property by means other than the seizure itself.

The failure to require direct notice to the defendant, and in most cases, any notice at all to third persons with interests in the seized object, is the most striking example of the distinctive procedures sanctioned by tradition in admiralty. After Mullane v. Central Hanover Bank & Trust Co., notice by posting usually does not meet the requirements of due process in actions initiated by private plaintiffs. Even when the seizure is undertaken by the government for an important governmental purpose, such as collection of taxes, posted or published notice is insufficient to inform identifiable third parties that their interest in the seized property may be lost. In actions commenced by maritime attachment,

these minimal requirements are generally met. Before entry of a default judgment, the defendant must be notified by mail or served with process. Notice to third parties with interests in the seized vessel is not necessary because their interests remain unaffected by a judgment or sale. By contrast, in in rem actions commenced by arrest, notice is almost never provided except by seizure of the vessel and by publication in a newspaper. Although a judicial sale extinguishes their liens in the vessel, maritime lienors are entitled to notice only in actions to foreclose preferred ship mortgages. Even then, notice is required only if the lien is on an American-flag vessel and has been recorded with the collector of customs in the port where the vessel is registered.

To be sure, the lack of notice after arrest poses only theoretical problems in most cases. Typically, the owner of the vessel posts bond. Satisfaction of the plaintiff's judgment by recourse to the bond extinguishes only the liens of parties who actually participate in the action. Moreover, even if their liens have been extinguished, maritime lienors usually can bring an action in personam against the defendant. Despite these limits, however, third-party lienors are still entitled to notice, if not as a matter of constitutional right, at least as a matter of sound procedural policy. The defendant's decision to post bond is beyond the control of unnotified third-party lienors, whose liens may have higher priority than that of the plaintiff. Notice would give them an opportunity to post bond on behalf of the defendant to protect their own security interest in the vessel or to participate in the action to avoid losing their lien through delay. Their ability to go against the defendant person-
ally likewise is inadequate in those cases in which the defendant is insolvent. 50 Regardless of the lienor's ability to proceed in personam against the owner or charterer of a vessel, the maritime lien provides the lienor with additional security from which to satisfy his claim. In this respect, the lien is indistinguishable from a contractually created security interest, like a mortgage, which cannot be extinguished without due process.

Despite these obvious procedural problems, failure to give notice to third-party lienors has been the norm in in rem actions, not only in this country, but around the world. 51 This failure is explained, if not excused, by a more fundamental failure: the absence of any but the most rudimentary system for recording maritime liens. If maritime lienors cannot be identified and located, they cannot be notified. The failure to establish a recording system may have been understandable in the era in which admiralty practice developed, when information traveled no faster than the ships themselves, but it is no longer understandable today. Even in the nineteenth century, the Torrens system of registering certificates of title was developed as a means of recording ownership of vessels, 52 and today, no technological obstacles stand in the way of a comprehensive recording system.

Although international cooperation on a uniform filing system remains only a distant prospect, a national filing system for American-flag vessels would be a great improvement over the existing system of partial and scattered recordation. Maritime liens can now be recorded only on vessels already subject to a preferred ship's mortgage and only by filing in the vessel's home port. 53 A more comprehensive system of filing would allow maritime lienors the option of protecting their liens by recording them in a centralized file, perhaps with a current copy to be maintained on board the ship itself. Even if recording did not affect the priority of unrecorded liens, it would provide lienors with information about the credit record of a vessel, the other liens on the vessel, and its whereabouts after an earlier lien attached. If lienors found that

these benefits were not worth the cost of recording, they could always choose to forego recordation and the priority that it provided. Currently admiralty law confers extravagant procedural advantages on the lienor who first asserts his claims and imposes equally extravagant penalties on lienors who delay. Such defects lie beyond the reach of a constitutional approach to reform of admiralty procedures. Because a constitutional approach focuses exclusively on what due process requires in the way of minimally adequate procedures, it leaves the more fundamental problems of admiralty law unseen and therefore untouched.

Another such problem is the tactical advantage that the present rules confer on a plaintiff who arrests or attaches a vessel and then seeks to extract a favorable settlement from the defendant. The present rules require the defendant to post bond to release the vessel or, alternatively, to obtain the plaintiff’s consent or stipulation for release. They impose no corresponding obligation on the plaintiff to post bond to cover the cost of an erroneous seizure. The only obligation imposed on the plaintiff is to prepay the marshal’s expenses in maintaining the vessel while it is under arrest, an amount usually between $1,000 and $10,000. These expenses are eventually recoverable as costs by a prevailing plaintiff. The defendant’s expenses, by contrast, are recoverable only in an action for wrongful arrest. If the vessel is not released, the defendant’s losses suffered because of his inability to use the vessel are likely

56. Fed. R. Civ. P. E(5)(a). This rule limits the amount of a special bond, which covers only a single claim, to double the value of the plaintiff’s claim or the value of the arrested vessel, whichever is less. A statutory provision allows release upon the posting of bond in double the amount sought by the plaintiff, but because its terms are less favorable than Rule E(5)(a), defendants seldom use the provision. 28 U.S.C. § 2464 (1982).
60. Furness Withy (Chartering), Inc. v. World Energy Systems Assocs., Inc., 854 F.2d 410, 411-12 (11th Cir. 1988) (requiring proof of bad faith); Ocean Ship Supply v. M/V Leah, 729 F.2d 971 (4th Cir. 1984) (requiring proof of malice or bad faith); Incas & Monterey Printing & Packaging v. The Sang Jin, 747 F.2d 958, 964 (5th Cir. 1984) (defendant must show bad
to be several times greater than the plaintiff's expenses. If bond is posted, often in anticipation of arrest, the plaintiff's expenses are negligible; however, the defendant's expenses in posting bond are at least one percent of the face value of the bond, and often more if the defendant does not have liability insurance that covers the plaintiff's underlying claim.\textsuperscript{61} The defendant can avoid the cost of a bond only if the plaintiff will accept some other form of security, such as a letter of guarantee from the defendant's insurer.\textsuperscript{62}

Entirely apart from constitutional arguments that due process requires the plaintiff to post bond to obtain a seizure without notice or hearing, the arguments of procedural policy for requiring a bond are compelling. To the extent that arrest takes a vessel out of commerce, it imposes a loss that must be borne by someone. It is not apparent why this loss must fall initially on the defendant. This cost should be shifted to the plaintiff in those cases in which the arrest or attachment is vacated or in which the plaintiff loses on the merits. Some statutes providing for pretrial attachment on land, like the statute in \textit{W.T. Grant Co.},\textsuperscript{63} require a bond from the plaintiff; other statutes authorize the judge or magistrate to require a bond.\textsuperscript{64} In admiralty actions, Rule E(2)(b) might furnish authority for such a requirement by providing that the district court may order the plaintiff to post security for "all costs and expenses" that might be awarded against him.\textsuperscript{65} This provision, apparently, allows the defendant's expenses to be shifted to the
plaintiff only for wrongful arrest or attachment. Rule 11 also requires the district court to impose sanctions, including the reasonable expenses of the opposing party, for pleadings that are not "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." For reasons to be explored more fully in Part III, these expenses should be shifted to the plaintiff in any action in which the plaintiff does not ultimately prevail.

The same stubborn insistence on traditional admiralty practice has exerted an even stronger influence over personal jurisdiction acquired through arrest or attachment. Even the constitutional arguments against *quasi in rem* jurisdiction, accepted by the Supreme Court in *Shaffer v. Heitner*, have failed to displace the traditional rules of admiralty procedure. Instead, courts, commentators, and practitioners have attempted to rationalize these rules by interpreting the concept of contacts with the forum broadly. With some justification, they have made the defendant's contacts with the United States, not his contacts with the state or district in which the court sits, the measure of personal jurisdiction. Because maritime arrest and attachment are creatures of federal law, they allow the exercise of personal jurisdiction over any defendant with sufficient contacts with the entire United States. This broad assertion of jurisdiction extends to all claims asserted against American defendants and all claims asserted by American or foreign plaintiffs arising out of the defendant's activities in the United States.

Although theoretically justifiable, this variation on the standard analysis of the jurisdiction of state courts appears to be an ad hoc accommodation of traditional admiralty procedures with the constitutional analysis first formulated in *International Shoe Co. v.*


Washington,71 and now required by Shaffer v. Heitner.72 It has no foundation in Rules B or C, which are modeled on the in rem and quasi in rem procedures discredited in Shaffer v. Heitner. It appears to be an added gloss on the rules designed solely to save them from unconstitutionality. A similar limiting interpretation of the statute in Shaffer v. Heitner, however, did not save it.73

Jurisdiction based on the defendant’s contacts with the United States also contrasts oddly with the requirement in Rules B and C that the seized property be found within the district in which the plaintiff files his claim.74 If actions under these rules constitutionally could be brought anywhere in the country, why limit them only to the district in which the property is located? Rule B is even more paradoxical because it allows attachment only in districts in which the defendant “cannot be found.”75 Once the location of property within the district is demoted from a constitutional prerequisite for jurisdiction, it appears to be little more than a requirement of venue; and indeed, there is no other general provision for venue of actions begun by arrest or attachment.76

Instead of depending solely on the place of seizure, however, venue should depend on factors that generally affect the convenience of litigation. One such factor is the location of the seized property. Although the district court can more readily oversee the seizure of property within the district, another district court may be a better forum to try the plaintiff’s underlying claim. No theoretical obstacle and few apparent practical obstacles prevent seizing a vessel in one district and trying the case in another, particularly when the defendant usually posts bond to release the vessel. Even when no bond is posted, a district court sitting in admiralty could supervise the defendant’s assets outside the district just as the bankruptcy courts now do.77 Transfers from one federal district

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73. Id. at 213-17.
74. Fed. R. Civ. P. C(2); see 7A J. Moore & A. Pelaez, supra note 20, ¶ B.04.
76. In re Louisville Underwriters, 134 U.S. 488 (1890).
77. S. Riesenfeld, supra note 64, at 504-07.
court to another have been allowed, even in in rem actions, as have dismissals in favor of a foreign court on the ground of forum non conveniens.

The constitutional rationalization of personal jurisdiction by arrest and attachment reveals, yet again, the limits of a constitutional approach to admiralty procedure. The basis in policy for allowing the plaintiff to sue wherever he can find the vessel appears to be remarkably weak once it is severed from the constitutional rationale for jurisdiction by seizure. It invites forum shopping by foreign plaintiffs who seek the application of more favorable American law, thus creating problems of choice of law that might better be addressed by restrictions on personal jurisdiction. It also invites other forms of harassment by the plaintiff in choosing the forum in which to litigate. Other doctrines, such as dismissal or transfer for forum non conveniens, or choice of foreign law, can eliminate the worst of these abuses. They do not, however, justify rules that allow the opportunity for abuse in the first place.

In any event, an expanded contacts analysis does not save the rules in their entirety because they apply to defendants who have no contacts with the United States other than the presence of the seized vessel. To handle these cases, some authors have taken the drastic step of making the presence of property within the United States sufficient for the exercise of personal jurisdiction. Another less question-begging approach is to classify these cases as in-


Alternatively, one could argue that the procedures for arrest are constitutional because an action to foreclose upon a lien can always be brought where the asset subject to the lien may be found. This argument may be valid for contractually created liens, such as ship mortgages, but it is not valid for maritime liens in general. With a contractually created lien, the defendant has arguably waived his right to object to personal jurisdiction by giving the plaintiff a property right in the vessel. By contrast, any other maritime lien is created by operation of law and does not require any form of consent by the defendant. Moreover, the claim giving rise to the lien may have no contact with the forum chosen by the plaintiff.
stances of jurisdiction by necessity. The standard concept of jurisdiction by necessity, however, does not extend to cases that can be brought elsewhere. To reach these cases, the concept of jurisdiction by necessity must be expanded so that it is not applied, as it usually is, on a case-by-case basis, but to a previously defined class of cases. It might be applied to all cases arising from accidents on the high seas on the ground that if some nation did not exercise jurisdiction over all such cases, no nation would. Even so, it would apply, not to all admiralty cases, but only to those in which an alternative forum was generally not available.

The incompatibility between a case-by-case approach, typical of a constitutional analysis of personal jurisdiction, and a uniform approach to an entire category of cases, typical of admiralty arrest and attachment, has hindered most of the attempts to make the admiralty rules conform to constitutional standards. The attempts to bend the contacts analysis of International Shoe to accommodate the admiralty rules proceed from a fundamentally sound, but poorly articulated, recognition of this problem. No obvious reason explains why the requirements of due process must be applied only to one case at a time, but not to general categories of cases in which the defendant is likely to have sufficient contacts with the United States or the plaintiff is likely to need an American forum. Conversely, not every assertion of admiralty jurisdiction will fall within those categories. Neither the standard analysis of personal jurisdiction nor the traditions of admiralty practice should be taken at face value. Both must be evaluated in light of the currently valid justification for maritime arrest and attachment.

II. THE ARGUMENTS FOR MARITIME ARREST AND ATTACHMENT

The simple appeal to tradition furnishes the most straightforward argument for existing practice under Rules B and C. From the middle of the nineteenth century, American admiralty law has made these procedures available to plaintiffs, relying initially on the fictions that personified vessels in admiralty and the now dis-

83. See, e.g., The Belgenland, 114 U.S. 355, 361-63, 368-69 (1885).
credited concept of *quasi in rem* jurisdiction.\textsuperscript{84} The appeal to tradition alone, however, begs the very question at issue: whether special characteristics of admiralty cases require special procedures. In other areas, traditional procedures have yielded to the constitutional demands of due process and to the more general demands of law reform.\textsuperscript{85} With only superficial inconsistency, the Supreme Court asserted in *Shaffer v. Heitner*\textsuperscript{86} that "'[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."\textsuperscript{87}

The force of tradition does not lie in a mystical reverence for the past, but in the familiarity of the admiralty bar with specialized procedures and in the desirability of preserving international uniformity. Neither of these sources provide particularly strong arguments for maritime arrest and attachment in their current, largely unrestricted form. Reforming the procedures for arrest and attachment to make them resemble the general procedures under Federal Rule of Civil Procedure 4 and state law would not greatly inconvenience admiralty practitioners. Admiralty practice need not be preserved as an exclusive specialty.\textsuperscript{88}

Neither does international uniformity require the full range of arrest and attachment available under American law. These procedures are broader than procedures of the same name in other legal systems, both in recognizing maritime liens and in providing for maritime attachment. Other nations generally do not allow maritime liens for the supply of necessaries, tort claims, or personal

\textsuperscript{84} G. Gilmore & C. Black, supra note 22, at 589-94; 7A J. Moore & A. Pelaez, supra note 20, ¶ B.02.


\textsuperscript{86} 433 U.S. 186 (1977).

\textsuperscript{87} Id. at 212 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); Kalo, supra note 16, at 37-45.

Injuries. Indeed, the special treatment that American law accords suppliers has proved to be the principal source of American opposition to international uniformity through conventions on maritime liens and arrest. On the other hand, where American law has created maritime liens for suppliers, foreign law, and particularly English law, has created statutory rights in rem that are enforced by a procedure that resembles maritime attachment.

The argument for uniform international law should not rest on the abstract need for similar procedures in different legal systems. Instead, it should depend on the practical consequences of different procedures, especially in conferring advantages on creditors in different countries who assert claims against the same debtor. Cast in these terms, the argument is not based on tradition at all, but on the need for special pretrial remedies against debtors who are likely to leave the jurisdiction or to remove their assets from it. Any procedural reform, whether or not limited to admiralty, must preserve the pretrial remedies necessary to grant full relief to the plaintiff.

Reduced to its essentials, the argument from tradition is the argument against any reform: that the advantages of a better set of legal rules are outweighed by the disadvantages resulting from disruption of established expectations and practices. This calculation of costs and benefits depends, however, on an initial assessment of how good the existing procedures are and how much they might be improved. Apart from tradition, three arguments support the current scope of the summary remedies of arrest and attachment. The most commonly invoked is the mobility of assets in maritime commerce and the corresponding difficulty of finding defendants and bringing them to court.

Another is the international character of many admiralty cases; it is closely related to the argument for


90. Haight, supra note 89, at 4-5.

91. W. Tetley, supra note 89, at 235-36.

92. E.g., Schifahartsgesellschaft Leonhardt & Co. v. A. Bottacchi, S.A., 773 F.2d 1528, 1537 (11th Cir. 1985) (en banc); Polar Shipping v. Oriental Shipping Corp., 680 F.2d 627, 637 (9th Cir. 1982); Batiza & Partridge, supra note 16, at 242-44.
maintaining American creditors on an equal footing with foreign competitors.\textsuperscript{93} A final argument for special procedures, but only in \textit{in rem} actions, is premised on the high priority granted to salvage claims and seamen’s claims for wages.\textsuperscript{94} Just as these claims are entitled, as a matter of substantive law, to higher priority than the claims of competing creditors, they might also deserve higher priority as a matter of procedural law.

These arguments all share a common limitation, which arises from a common weakness. They apply only to some of the admiralty cases in which arrest and attachment are available, and they make too much depend either on the existence of a maritime lien (in the case of arrest) or on the presence of admiralty jurisdiction (in the case of attachment). In admiralty, as elsewhere in law, a single distinction might be perfectly appropriate for some purposes but not others. The existence of maritime liens and the scope of admiralty jurisdiction depend on arguments that have little, if anything, to do with the need for seizure of a vessel without notice and hearing or with the need for personal jurisdiction based on seizure of the vessel alone. Outside of admiralty, a security interest no longer confers such procedural advantages on secured creditors;\textsuperscript{95} neither does the bare subject-matter jurisdiction of the court. The constitutional decisions that brought about this change in other areas of law recognized the obvious: that plaintiffs, even if they are secured creditors, do not invariably need these remedies to recover from the defendant.\textsuperscript{96}

\textbf{A. The Mobility of Assets in Maritime Commerce}

The first of the arguments for special pretrial remedies in admiralty begins with the premise that assets in maritime commerce are particularly mobile. This premise may have been true a century ago, when ships and their cargos were among the most valuable assets that regularly moved from one jurisdiction to another. As we

\begin{itemize}
\item \textsuperscript{93} Schiffahartsgesellschaft, 773 F.2d at 1535-36; Culp, supra note 15, at 372-73; Schwartz, supra note 16, at 282.
\item \textsuperscript{94} Culp, supra note 15, at 371.
\item \textsuperscript{96} E.g., Fuentes v. Shevin, 407 U.S. 67, 93 (1972).
\end{itemize}
have seen, it is no longer true today, when billions of dollars of financial obligations routinely travel around the world with the banking day. Financial transfers by wire have long since outrun, both in speed and in volume, even the fastest vessels.

Yet the mechanisms for asserting control over financial assets remain extremely limited. The government can seize or freeze these assets without prior notice or hearing through procedures like jeopardy assessments and levies for past due federal taxes;°7 and financial institutions can assert their right of setoff without government assistance only if they occupy the roles of both creditor and depository.°8 Secured creditors generally can engage in self-help by repossessing collateral on default, but they must do so without breach of the peace and without government assistance.°9 These restrictions greatly diminish the effectiveness of repossession as a means of acquiring control over financial assets of the debtor, particularly those assets in the hands of a third party. Outside of admiralty, garnishment or sequestration must meet the ordinary standards of due process; even in admiralty, it must conform to common law and statutory requirements that limit the seizure of financial assets to those in the defendant’s account when process is served.°0

Of course, the restrictions on seizure of financial assets may demonstrate, not that the procedure for maritime arrest and attachment is too broad, but that the procedure for seizing financial assets is too narrow. Indeed, it is more likely that both procedures


100. See, e.g., Reibor Int’l v. Cargo Carriers, 759 F.2d 262, 268 (2d Cir. 1985) (garnishment invalid if served either before garnishee received funds or after he transferred them); Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 68 (S.D.N.Y. 1980); cf. Union Planters Nat’l Bank v. World Energy Sys., 816 F.2d 1092, 1098 (6th Cir. 1987) (attachment invalid when no funds issued pursuant to letter of credit).
need to change than that either is sufficient as it stands. Neither procedure can be justified by relying on the greater mobility of assets in maritime commerce. On the contrary, it is necessary either to eliminate the disparity between these procedures or to explain why the more cumbersome procedures generally apply to the more mobile assets.

The two procedures might be distinguished on a slightly different basis: that vessels, which are the usual object of maritime arrest and attachment, can only be seized when they are in port. When they are in transit, often in international waters, they can be seized only by difficult and dangerous naval action. Except when they are in port, they are beyond the reach of private plaintiffs. Financial assets, however, always are in some account or safe deposit box. Of course, if the plaintiff cannot find out where the defendant’s financial assets are, then these assets are as inaccessible as vessels on the high seas. In fact, vessels are much easier to track than financial assets. For a few hundred dollars, vessel tracking services now report where a vessel has been and predict its next likely destination. No comparable services are available to private plaintiffs trying to trace financial assets around the world. They must rely on an ad hoc and expensive combination of credit reports, private investigation, civil discovery, and government cooperation when it is forthcoming.

The same technological advances and economic structures that have made financial assets more difficult to seize have also made large, tangible assets, like vessels, easier to find. Until well into the nineteenth century, information about a vessel’s location probably did not travel much faster than the vessel itself. Now, such information can be relayed instantaneously through trading and financial networks. The compromise struck by admiralty procedures made some sense under the old technological and economic structures. Admiralty law compensated for the fact that vessels were effectively immune from seizure while they were in transit by making them vulnerable to seizure whenever they were in port. What was a tolerable compromise then appears to be unnecessary now.

101. Letter from Claire Lyons, of ECS Marine, Marine Information Services, to the author (August 10, 1987) (quoting prices in the range of $100 per week for tracking services).
A more forceful argument for summary procedures might be made from an ex ante perspective, when credit is extended to the debtor, than from the ex post perspective, after the debtor has allegedly defaulted and the creditor is seeking to recover against the vessel. From an ex ante perspective, the creditor might view the threat of summary seizure as a powerful deterrent to default by the debtor. A debtor subject to this remedy would avoid default because its creditors could effectively shut down the operation of the seized vessel. Creditors, on the other hand, would find this remedy particularly attractive because it would prevent further maritime liens, especially liens of higher priority, from attaching to the vessel and diluting the value of their own security interests. By diminishing the risk of default, summary remedies would reduce the cost of credit and enhance the overall efficiency of the market for credit in maritime commerce.

This argument is persuasive as far as it goes. However, the argument only goes to the existence of procedures like arrest and attachment, not to the nearly complete absence of safeguards against abuse of these procedures. Because creditors usually cannot seize a vessel without breach of the peace, they must rely on arrest and attachment as alternatives to self-help remedies like repossession. The threat of resorting to these remedies is necessary to deter debtors from default, but it does not follow that these remedies should be unrestricted. The gain in efficiency from increased compliance by debtors with their obligations may be offset by increased losses from abuse of these remedies by creditors. Such abuse could be limited by imposing procedural restrictions on the plaintiff's right to a summary seizure: in particular, by requiring the plaintiff to post bond. Requiring bond would deter creditors from seeking seizures to support weak or unjustified claims, but would not deprive them of a deterrent to default in other cases. As Part III explains, deterrence of unjustifiable seizures would work to the benefit both of debtors, by leaving the operation of their vessels unimpeded by weak claims, and of creditors, whose security would not be diluted by unsupported seizures instigated by other creditors of the same debtor.
B. The International Character of Maritime Transactions

The second argument for extraordinary pretrial remedies in admiralty, based on the international character of maritime transactions, is obviously related to the argument based on mobility of assets. The mobility of vessels poses an additional threat to creditors because the debtor’s vessels can be removed from the jurisdiction where the creditor does business. Just as obviously, this argument fails to justify summary remedies in wholly domestic cases. These cases pose no risk of a defendant absconding to some foreign nation or seeking the protection of foreign law. The advantages and requirements of the coastwise trade make such a response to the threat of litigation a costly alternative to appearing and posting bond for the vessel. Vessels in the coastwise trade and vessels that carry cargo owned or financed by the federal government must be registered in the United States and owned by an American citizen.102

To conform to the limited scope of this argument, summary remedies might be confined solely to international cases. Any such limitation, however, poses the problem of how a court is to distinguish international from domestic cases in the early stages of litigation when pretrial remedies come into play. Ownership of a vessel, for example, routinely involves several different corporations and subsidiaries of different nationalities, not including charterers and subcharterers.103 The situation is complicated even further by the plaintiff’s limited information about who owns the vessel or other assets to be seized and who is liable for the claim that he alleges. Ideally, the international character of an admiralty case should be a precise determination of the gravamen of the contacts.

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103. A. CAFRUNY, supra note 102, at 109-10; Mahla, Some Problems in Vessel Financing—A Lender’s Lawyer’s View, 47 Tul. L. Rev. 629, 637, 640 (1973); see Robol, supra note 79, at 437.
with the United States and with other nations. As a practical matter, this determination must be reduced to an aspect of the plaintiff’s showing that he needs extraordinary remedies in order to recover anything at all. As Part III argues, summary procedures must be available in such extraordinary cases, just as they are on land, and factors such as the registration of the vessel and the location of the defendant’s principal place of business must enter into an assessment of the plaintiff’s need for summary remedies.

International maritime cases also pose a related risk: that proceedings in foreign courts will extinguish the plaintiff’s maritime lien on the defendant’s vessel, or more generally, deplete the assets of the defendant from which the plaintiff can recover on his claim. American courts generally recognize foreign judgments in actions commenced by arrest or attachment. The risk from foreign judgments is greatest in actions in rem which, like the American equivalent, do not generally require notice to maritime lienors or recognize an American creditor’s maritime lien. A similar risk might also arise from foreign actions for bankruptcy or limitation of liability, which might extinguish the plaintiff’s claim altogether. These actions, however, usually are accompanied by notice to and joinder of all the defendant’s creditors whose claims are affected by the resulting decree.

104. American courts refuse to recognize foreign judgments in very limited circumstances: when the foreign court lacks jurisdiction, which can be obtained by seizure of the vessel, or when the judgment has been procured by collusion or fraud. Gulf & S. Terminal Corp. v. Steamship President Roxas, 701 F.2d 1110, 1111-12 (4th Cir.), cert. denied, 462 U.S. 1133 (1983); The Garland, 16 F. 2d 283, 286 (E.D. Mich. 1883); Sharpe, Maritime Liens and Rights In Rem in United States Law, in New Directions in Maritime Law 145, 153-55 (D. Sharpe & W. Spicer eds. 1985). Nevertheless, foreign judgments occasionally receive less than full faith and credit because no international requirements correspond to the full faith and credit and due process clauses of the Constitution. U.S. Const. art. IV, § 1; amend. V; amend. XIV, § 1. See Gulf Oil Trading Co. v. Creole Supply & Creole Shipping, 596 F.2d 515, 520-21 (2d Cir. 1979) (recognizing effect of foreign sale, but imposing constructive trust in favor of another maritime lienor).


106. Sharpe, supra note 104, at 154.

In any particular case, the threat posed by foreign actions raises questions analogous to those raised by a motion to dismiss on grounds of *forum non conveniens*. If the American court does not acquire jurisdiction by arrest or attachment, then the plaintiff may be forced to pursue his claim in a foreign court chosen by a competing creditor. The same factors that inform an analysis of *forum non conveniens*, such as amenability of the defendant to suit, convenience of the parties and the court, pendency of an action in a foreign court, and applicable foreign law, also should affect a finding that summary procedures are necessary to protect the plaintiff from the prejudicial effect of foreign litigation. As with determinations that the defendant is likely to flee the jurisdiction, however, a detailed inquiry into this question exceeds the capacity of a court considering summary pretrial remedies. Rather, it must be merged into a general inquiry into the need for summary seizure to protect the plaintiff's eventual right to recover.

The international character of maritime commerce creates a more general risk, apart from the facts of any particular case, that American admiralty law might leave American creditors at a competitive disadvantage compared to foreign creditors in prosecuting claims against the same debtors. This risk is reflected in the priority that American law accords to the liens of American suppliers over preferred ship mortgages held by foreigners. Under the law prevailing in most nations, the priority of maritime liens is generally determined by forum law. Contrary to existing practice, some degree of international uniformity would be desirable, even if procedural details were left to national legal systems, as they are under an existing international convention on arrest.

American procedure need not imitate every procedural advantage that foreign law confers on foreign creditors. To allow a more lenient as-

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109. Bickel, supra note 79, at 41-47; Robol, supra note 79, at 405-06; see Collins, Comments on the American Rule of In Rem Liability, 10 Mar. L. 71 (1985) (criticizing general rule against dismissal of in rem actions based on actions pending in a foreign court).
111. W. Teyley, supra note 89, at 554-55.
essment of the need for summary remedies when the defendant is likely to be sued in a foreign court or does not have assets regularly present in the United States is sufficient.

C. Priority of Claims

The third argument for summary procedures depends on the substantive priority of maritime liens. In an *in rem* action, these claims must be satisfied ahead of all other claims, except custodial expenses.\textsuperscript{113} No complete and systematic rationale can be found, however, either for which claims give rise to maritime liens or for the priority among these liens. For example, maritime tort claims, both for personal injury and for damage to property, receive relatively high priority and seamen’s claims for maintenance and cure for injuries in the course of employment receive nearly the highest priority.\textsuperscript{114} But seamen’s claims for injuries under the Jones Act receive no priority at all because they do not give rise to maritime liens.\textsuperscript{115}

The priority among maritime liens depends on a combination of classification rules and timing that are bewildering and sometimes inconsistent. Preferred ship mortgages generally have priority over later contract claims but not over earlier contract claims or any tort claims, regardless of when they arose or whether they arose out of a contractual relationship. Moreover, in the absence of a preferred ship mortgage, later contract claims have priority over earlier contract claims, and indeed, earlier contract claims may be extinguished by laches.\textsuperscript{116} Whatever the explanation for this system of priorities, it has no apparent connection to the need for summary procedures.

Like the other arguments for special treatment of admiralty claims, this argument is far too broad. It must be limited to those maritime liens with high priority, for which summary procedures reinforce the incentives created by the lien itself. Moreover, the

\textsuperscript{113} New York Dock Co. v. Steamship Poznan, 274 U.S. 117 (1927).
\textsuperscript{114} Panama R.R. v. Johnson, 264 U.S. 375, 377 (1924); The Osceola, 189 U.S. 158, 175 (1903).
\textsuperscript{115} Plamals v. Steamship Pinar Del Rio, 277 U.S. 151, 156 (1928).
parties must be incapable of negotiating over these procedures themselves. Otherwise, the plaintiff could obtain a waiver of the defendant's rights by contract, as discussed in Part III. The claims that most clearly meet these requirements are claims for seamen's wages and for salvage, neither of which results in many in rem actions.

The high priority of liens for seamen's wages rests on the need to protect seamen from vessel owners and operators who leave them stranded and unpaid, perhaps in a distant port. The maritime lien counteracts the tactical advantage that vessel owners and operators have in dealing with individual seamen after a voyage has started. This policy is already recognized in the harsh double penalty for late payment of seamen's wages and in a provision relieving seamen of all filing fees, costs, and bonds in actions for wages, salvage, or violation of laws to protect their health and safety. The same policy is recognized in the remedy for maintenance and cure, which gives rise to a maritime lien equal in priority to the lien for wages. For similar reasons, an individual seaman is not likely to negotiate a waiver of his employer's right to notice and opportunity to be heard or to post bond to cover the expenses resulting from seizure of his employer's vessel.

Claims for salvage also give rise to maritime liens with high priority. These claims receive high priority to maintain the incentives of salvors to engage in salvage and to turn salved property over to

118. 46 U.S.C. § 10504(c) (Supp. IV 1986).
121. Culp, supra note 15, at 371 (this point holds true for personal injury claims also). Seamen represented by a union should probably be treated the same way as unrepresented seamen. Although unionized seamen might be fully protected by collective bargaining, the degree of protection depends upon the union's bargaining power. A. Rees, The Economics of Trade Unions 69-73 (1962). For American unions, sufficient bargaining power is confined almost entirely to American-flag vessels in domestic commerce, which must employ seamen based in the United States. 46 U.S.C. §§ 8103, 12106 (Supp. IV 1986). American seamen in international commerce must compete with foreign seamen who are usually paid less than half as much. A. Caffruny, supra note 102, at 93-94. Yet even within domestic commerce, unionized seamen are entitled to the benefits of union political activity to increase the minimum conditions of employment for all employees.
the court. To allow the salved property to remain in the defendant's undisputed control would diminish the salvor's incentive to return it after the completion of salvage. This result could lead to embezzlement, a nagging problem in the law of salvage, or to negotiations over control of the property to be salvaged, which might impede the attempt at salvage itself. Moreover, when salvors remain in possession of the salved property, arrest or attachment may not raise any questions of due process at all, because it involves surrender of the property to the court, not government action seizing the property from the defendant.

The exception for claims for seamen's wages and salvage might be extended to claims with similar features, such as claims for general average or for seamen's injuries. Claims for general average closely resemble claims for salvage because both claims result from individual sacrifices that benefit all of the participants in a voyage. Moreover, the most common general average claims, by vessels against cargo for extraordinary expenditures necessary to complete a voyage, result in a lien against cargo until it is delivered into the possession of the consignee or released by bond. As with salvage claims, the plaintiff need not seize the object of the in rem action, because it is already in his possession or control.

Likewise, the exception for claims by unpaid seamen might be extended to claims by injured seamen for unseaworthiness or for claims under the Jones Act or to personal injury claims generally. Unpaid seamen are no worse off than injured seamen, whose claims have lower priority or, if they are asserted under the Jones Act, no priority at all. Claims under the Jones Act, however, are governed by their own procedural rules, which generally lead seamen to forsake admiralty jurisdiction in order to obtain a jury trial.

122. The Blackwall, 77 U.S. 1, 14 (1870).
125. See supra text accompanying note 115.
126. FED. R. CIV. P. 9(h), 38(e). The seamen need not forsake admiralty jurisdiction entirely, however, if they join claims for maintenance and cure and unseaworthiness with a claim under the Jones Act. In such cases, the seamen might conceivably obtain the advantage of summary admiralty remedies for the first two claims and the advantage of a jury trial on the third claim. See Fitzgerald v. United States Lines Co., 374 U.S. 16, 20-21 (1963). No case, however, has so held. Fernandes v. United Fruit Co., 303 F. Supp. 681 (D. Md. 1969).
The right to jury trial under the Jones Act already seems to provide seamen with an adequate remedy, without any summary procedures at all, as evidenced by the extensive litigation over who constitutes a seaman within its coverage.\textsuperscript{127}

As Part III explains, other admiralty claims can safely do without summary remedies. In claims arising out of contracts—for instance, claims for cargo damage, for the supply of necessaries to the vessel, or to foreclose a preferred ship mortgage—the parties can agree that summary remedies are available to the plaintiff. In any particular case, a vessel owner may be able to obtain credit only by waiving the procedural prerequisites to arrest and attachment. However, in general, the law should not presume that vessel owners would waive their protection against abusive seizures. Most tort cases, apart from seamen’s injuries and those between parties in a contractual relationship, arise from collisions between vessels.\textsuperscript{128} In these cases, summary remedies do not significantly affect the incentives of the parties to be more careful, which depend on the risk of damage and injury to everyone involved in a collision. Just as on land, tort claims in admiralty give rise to complicated questions of fault that cannot be evaluated in summary proceedings. By contrast, the plaintiff’s contractual right to summary remedies can be ascertained easily. In the absence of a contractual waiver, summary remedies must be reserved for exceptional cases to preserve the plaintiff’s ability to recover from the defendant or to enforce a maritime claim of particularly high priority.

\textbf{III. Some Proposals for Reform}

The limited justification for maritime arrest and attachment suggests the obvious course for reform: insofar as these pretrial remedies authorize seizure without notice or hearing and extend personal jurisdiction over the defendant, they should be limited to the cases that justify such drastic procedural consequences. Re-


\textsuperscript{128} G. Gilmore & C. Black, \textit{supra} note 22, at 485.
form along these lines would do more than dispel the constitu-
tional doubts that linger about the procedures for arrest and at-
tachment. It would provide reasons for allocating procedural rights
between the plaintiff and the defendant, not only to satisfy constitu-
tional principles of fairness, but also to enhance the overall effi-
ciency of the procedural and substantive rules of admiralty law.
And if it proved to be successful, reform would further weaken the
hold of tradition on admiralty law and would open it to develop-
ments, not only in other areas of American law, but in foreign and
international law as well.

The overbreadth of the present procedures is more than a formal
defect. It allows the plaintiff to impose costs on the defendant
without suffering any corresponding costs himself. It allows the
plaintiff to exploit these procedures to obtain immediate advan-
tages in litigation and settlement, by forcing the defendant to bear
the cost of an asset idled by seizure, or alternatively, the cost of a
release bond, and perhaps the expense of defending an action in a
distant and inconvenient forum.

The most obvious way to reduce these costs is to require the
plaintiff to bear some of them himself. In particular, the plaintiff
should be liable for the defendant’s expenses resulting from the
seizure if the defendant ultimately prevails. The plaintiff should
also be required to post bond for the defendant’s expenses before
any seizure takes place. To minimize litigation over procedural is-
ues and to expedite issuance of a writ of arrest or attachment, the
bond could be set at some fixed percentage of the plaintiff’s claim,
ten percent, for example, which approximates the defendant’s cost
of obtaining bond for the full amount of that claim. In addition,
severing the connection between seizure of the defendant’s vessel
and personal jurisdiction could reduce the expense of litigating in
an inconvenient forum. With only modest changes, ordinary princi-
pies of personal jurisdiction and venue then could be applied to
claims in admiralty.

Constitutional law naturally emphasizes the procedural rights of
the defendant, because it focuses on the risk that the defendant
will suffer a loss of property without due process. Even so, consti-
tutional law sometimes adopts a broader perspective to take ac-
count of the rights of the plaintiff or third parties. The plaintiff
may suffer a loss of property without due process if he is left with-
out a forum in which he can bring a claim against the defendant or without assets from which he can recover. Likewise, third parties who are prejudiced by an action, like maritime lienors whose liens are extinguished without notice or hearing, may also suffer a denial of due process. Arguments of efficiency must begin from a still broader perspective, one that takes into account the interests of all the parties and third parties affected by an action.

From such a broader perspective, particularly an *ex post* perspective, after the defendant has defaulted, his creditors are divided by conflicts of interests. In this situation, each creditor, in competition with the other creditors, wants to extract benefits from the defendant through arrest and attachment. Although each creditor would take advantage of the procedures for summary seizure, each would also deny them to competing creditors. Arrest and attachment allow each creditor to gain effective priority over competing creditors by obtaining recovery from the defendant first and by locating the litigation in the forum most convenient for him and least convenient for them. In a dispute between any one creditor and the defendant, all the other creditors would side with the defendant. He represents their interests in preserving his assets and his ongoing enterprise as a source of payment for their claims.

From an *ex ante* perspective, before the defendant has defaulted, the same conflict of interest among creditors appears, although in a subtler form. In this situation, his creditors want to ensure that he complies with his obligations. Summary seizure, without notice, hearing, or bond, enables them to do so by threatening to seize the defendant’s assets immediately on default. This procedure also allows them to obtain immediate satisfaction of their claims, reducing the risk that the defendant will impair their security by evasion, fraud, or incurring claims to other creditors. All of these consequences reduce the cost of credit for the collective benefit of all the creditors and the debtor. Yet, in addition, summary seizure allows creditors with weak claims to attain a degree of priority over creditors with stronger claims, by seizing the defendant’s assets first in a forum most convenient for them. The risk of tactical manipulation of seizures increases the cost of credit and introduces again a conflict of interest among creditors. Each creditor then must raise the cost of credit to take account of the risk that the actions of other creditors will impair his security.
The cost of such strategic behavior can be reduced by imposing restrictions on the plaintiff’s resort to summary procedures. A requirement, such as plaintiff’s bond, which is correlated with the merits of the plaintiff’s case, reduces this cost without reducing the collective benefits of summary procedures because it discourages only the weakest claims: those in which the plaintiff is likely to forfeit the bond because of the risk of losing the underlying action. The parties themselves, the defendant and all his creditors, cannot impose such requirements by contract because large, and often insuperable, transaction costs prevent them from allocating procedural rights in the most efficient manner.

These transaction costs are most apparent when the plaintiff has a tort claim that gives rise to a maritime lien but does not arise from any contractual relationship with the defendant, such as a collision or salvage claim. In these cases, the parties are unable to bargain before the claim arises. Even when the parties have a contractual relationship, creditors cannot easily protect themselves from the claims of later creditors through contractual clauses restricting the latter’s procedural rights. Prior creditors would be most likely to enforce such clauses when the defendant was nearly insolvent. In precisely those cases, the prior creditors would have few, if any, effective remedies against a breaching defendant, who would have correspondingly decreased incentives for compliance. The problem of transaction costs then would reappear as a problem of allocating the losses resulting from the breach between prior creditors and later creditors. If these losses were imposed on prior creditors, the clauses would be ineffective. If the losses were imposed on later creditors, they would increase the cost of later credit. In particular, the risk that such clauses would remain unknown to later creditors would cause them to charge more for credit or to engage in a costly search for such preexisting contracts. Both responses increase the cost of credit to the debtor without any offsetting collective benefit.

Other rules of admiralty law, particularly the peculiar rules for priority of maritime liens, also discourage earlier creditors from protecting themselves by contracts with the defendant that limit the rights of later creditors. For instance, the prohibition-of-lien clause often found in charter parties attempts to prohibit the charterer by contract from creating new liens against the vessel. Con-
gress, however, has severely restricted the effect of this clause by limiting the prohibition only to the liens of suppliers who have actual knowledge of the clause.\footnote{129} Vessel owners and maritime lienors have not attempted similar agreements, at least not with any frequency, because they would defeat the priority of subsequent maritime liens over earlier liens of the same class and over all liens of a lower class. Even preferred ship mortgages are subordinated to later arising “preferred maritime liens.”\footnote{129}

Because transaction costs prevent the plaintiff, the defendant, and other creditors of the defendant from allocating rights among themselves, the law must try to approximate an efficient allocation for them. The defendant should have the right to avoid summary seizure and to limit personal jurisdiction because he internalizes the costs of these procedural rights to other creditors; the plaintiff does not. If the defendant makes his vessels vulnerable to seizure and makes himself vulnerable to personal jurisdiction in dealing with one creditor, he compromises his ability to deal with other creditors. New creditors will regard their own claims against him as less secure because his assets may be seized, and he may have to defend claims by the first creditor in a distant and inconvenient forum. The new creditors therefore will charge more for extending credit to him or will not offer him credit at all. Any particular vessel owner may be able to minimize the overall cost of credit in this way, but the law should not assume, as it does now, that vessel owners invariably would enter into such agreements.

The plaintiff will internalize the transaction costs only if he must choose between posting bond himself and suing in a more convenient forum or purchasing a waiver of these requirements from the defendant. Allocating these rights initially to the plaintiff, as the present procedures do, increases competition among creditors to arrest and attach the defendant’s vessel. Because transac-


tion costs prevent the creditors from dealing directly among themselves or indirectly through a network of contracts with the defendant, they cannot prevent this competition by agreement. This competition, in turn, increases the cost of enforcing maritime claims and the cost of credit to vessel owners.

Although the defendant should have the rights over arrest and attachment initially, he should be able to waive these rights by contract, in effect transferring them to the plaintiff. As a matter of constitutional law, the Supreme Court has upheld such waivers in agreements between parties of comparable bargaining power, which in practice include most commercial transactions between business firms. Vessel owners in maritime commerce, the typical defendants in admiralty actions commenced by arrest or attachment, meet these requirements easily.

As a matter of policy, the defendant should be able to waive these procedural rights by agreement with a single creditor, despite its adverse effects on other creditors. Contractual waiver allows the parties to reallocate these procedural rights when the gain from reallocation outweighs the loss from transaction costs. Such contractual waivers might leave prior creditors at a disadvantage, but at no greater disadvantage than a debtor’s decision to pay cash in subsequent transactions for supplies and services. Unless creditors have obtained such waivers themselves or can force the debtor into bankruptcy, they have trusted their ability to recover to his business skill. Although in admiralty procedures, particularly in in rem actions and limitation proceedings, an analogy to bankruptcy is tempting, this analogy holds only if some mechanism exists for joining all of the creditors of a single debtor in a single proceeding. Joinder, in turn, requires notice, but admiralty has so far pro-


By contrast, the Supreme Court has invalidated an individual’s waiver of procedural rights in a contract of adhesion. Fuentes v. Shevin, 407 U.S. 67, 94-96 (1972).

132. Service of process is necessary for formal joinder of a party, Fed. R. Civ. P. 4(a), 14(a), 19(a), and notice of the pendency of an action is necessary to give a party an opportunity to intervene. Fed. R. Civ. P. 24.
vided only the most rudimentary forms of notice to third-party creditors in *in rem* actions. Outside of bankruptcy proceedings and apart from preferences granted just before bankruptcy, a commercial debtor can waive procedural rights for the benefit of particular creditors, including the right to any judicial proceedings at all before entry of judgment. Indeed, debtors can waive rights to a hearing or to object to personal jurisdiction simply by not asserting them. Similarly, the debtor should be able to waive these rights by contract before any proceedings begin.

In many cases, plaintiffs who now exercise the right to summary seizure and personal jurisdiction under the existing rules would remain able to obtain the same rights from the defendant by agreement. Of course, such an agreement would require concessions on other terms. Even so, an agreement would allow holders of preferred ship mortgages, suppliers, shippers of cargo, and charterers to obtain enhanced procedural rights against the defendant in cases in which they believed that these rights were essential for extending any credit to the vessel owner.

In the absence of a waiver, the only exceptions to the general requirement that the plaintiff post bond and that the defendant satisfy the ordinary rules for personal jurisdiction should be the two exceptions suggested in Part II: when it is necessary to protect the plaintiff's ability to recover at all from the defendant; and when the plaintiff asserts certain maritime claims of high priority. The first of these exceptions should require a showing analogous to the “exigent circumstances” now required for a seizure without judicial examination. The second exception should be limited to the claims identified in Part II: for seamen's wages, salvage and perhaps maintenance and cure and general average.

If neither of these exceptions apply, a court should allow seizure without prior notice and hearing only if the plaintiff posts bond. The plaintiff's bond should cover the costs to the defendant of a seizure in any action in which the defendant ultimately prevails. Such a requirement would limit the abusive use of seizures against

133. See *supra* notes 47, 48 and accompanying text.
135. FED. R. CIV. P. 12(h), 46.
defendants with significant assets in the United States. This requirement corresponds to the state procedure approved in *Mitchell v. W.T. Grant Co.*, 137 which required a bond from the plaintiff and authorized the court to award damages and attorney's fees for wrongful issuance of the writ. 138 Many states now require a bond from the plaintiff to support pretrial attachment or garnishment, at least in the discretion of the trial court. 139 In the admiralty rules themselves, Rule E(2)(b) grants discretion to the district court to require a bond for costs that might be assessed against either party. 140

Requiring the plaintiff to post bond has advantages over other restrictions on summary seizures, such as a preliminary showing of need or merit, which is required to obtain a temporary restraining order or a preliminary injunction. 141 Such evidence is difficult to evaluate without an adversary hearing in the limited time before the writ of arrest or attachment must be issued. Again, because the seizure must be made early in the proceedings, it cannot be made after a thorough evaluation of the facts of the case. Requiring a bond from the plaintiff at a fixed percentage of the plaintiff's claim or a fixed percentage of the defendant's bond for release of the vessel, both avoids this inquiry in routine cases and narrows the range of exceptional cases in which this inquiry is unavoidable. If most plaintiffs can post bond, then there is less need to create or to expand exceptions for cases in which bond is not required.

With or without bond, seizure of the defendant's vessel should not confer personal jurisdiction or venue on the court that orders the seizure. With one exception, courts should resolve these questions according to the ordinary principles of civil procedure. As the Supreme Court emphasized in *Shaffer v. Heitner*, 142 the presence of the defendant's assets within the state constitutes a contact rel-

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138. Id. at 617, 622.
139. See supra note 64.
140. For a similar proposal to amend supplemental Rule E(2)(b) to give the district court discretion to require a bond from the plaintiff, see Schwartz, supra note 16, at 267. For a proposal to require a creditor's bond for pretrial seizures generally, see Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807, 859-60 (1975).
relevant to personal jurisdiction only if it is related to the plaintiff's claim or, in an unusual case, if it is part of a continuous and systematic course of activity by the defendant within the forum. A seizure after the plaintiff has posted bond, or after a showing of need for a summary seizure, should not be determinative of personal jurisdiction. A court can resolve that question later in the proceedings, by examining the defendant's contacts with the state in which the federal district court sits or by an independent showing of jurisdiction by necessity.

Similarly, a court should determine venue according to the usual standards for venue in federal actions. Those standards include the district in which the claim arose or in which the defendant resides, which for corporations extends to any district in which the corporation "is doing business." The present rule, providing for venue in any district in which process is served upon the defendant or his property is arrested or attached, could then be limited to cases in which no other venue was available. As with personal jurisdiction, courts could postpone application of these rules, and decisions on motions to transfer or dismiss for forum non conveniens until well after the seizure of the vessel. Indeed, the action might well be bifurcated. The seizure would remain effective in the district in which it was made, provided the vessel was not released, and a court could transfer the underlying action either on grounds of convenience or to remedy defects of personal jurisdiction or venue.

Seizure of a vessel, without more, should be sufficient for personal jurisdiction and venue only in cases arising in international waters. These cases typically include collision, personal injury, and salvage cases, but they may include cases of cargo damage and breach of charter parties. In these cases, some court must be able to exercise personal jurisdiction and venue on a territorial basis. These cases present just a standardized maritime variation on the doctrine of jurisdiction by necessity. When claims arise in international waters, they arise, by definition, outside the territorial juris-

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144. Id. § 1391(c).
diction of any state or nation. If the plaintiff cannot sue the defendant where the vessel is seized, he is effectively deprived of one commonly available forum: the jurisdiction where his claim arose. If the claim could not arise in any other jurisdiction, the plaintiff should be given an additional forum in which to sue to make up for the one he has lost. Although this forum might not be strictly necessary in any particular case—for instance, because the defendant is from the United States or from another country where the plaintiff could easily sue him—it should be available to the plaintiff subject to the usual motions to transfer or dismiss for forum non conveniens.

IV. Conclusion

The recent, limited revision of Rules B, C, and E addressed only the most obvious defects in the procedures for arrest and attachment. Unless the Supreme Court decides that the revised procedures are unconstitutional, the current round of reform may have run its course. Even if traditional admiralty practice will not likely yield to further reforms immediately, it is not likely to withstand the pressure for change indefinitely. The preceding proposals are offered with that broader objective in mind.

It is unrealistic to expect that a reexamination of traditional admiralty procedures will lead to wholesale abandonment of arrest and attachment. But it is equally unrealistic to expect that reexamination will lead to a justification for these remedies that extends over the entire range of maritime liens or admiralty claims. The arguments offered in support of summary procedures in admiralty are not invalid so much as overbroad. They justify a part, but only a part, of the present rules. Even an imprecise distinction, between ordinary cases in which the plaintiff's right to arrest and attachment should be restricted and exceptional cases in which the present procedures are appropriate, is better than the present distinction based on maritime liens and admiralty jurisdiction.

The focus on constitutional defects in the procedures for arrest and attachment has obscured the need to remedy the broader defects in these procedures. These defects cannot be remedied by more careful distinctions between the cases in which summary seizures and extended personal jurisdiction are necessary and the cases in which they are not. That distinction can be made more
precise only at the cost of further proceedings, thus raising the question of when those proceedings are to take place: whether before or after seizure. I have suggested instead that the single most effective reform would be to require the plaintiff to post bond for the defendant's expenses resulting from any seizure in an action in which the plaintiff does not ultimately prevail. Reform along these lines would simultaneously reduce the absolute number of seizures by arrest and attachment, mostly by eliminating those that are baseless or sought only for tactical advantage and preserve these extraordinary remedies in the cases for which they are truly necessary.