Supreme Court of the United States
Washington, D.C. 20543

May 18, 1977

RE: No. 75-1812  Shaffer v. Heitner

Dear Thurgood:

Although I am recorded in dissent, I believe that I can join Parts I, II, and III of your fine opinion for the Court. Part IV, however, continues to give me pause, and I wonder if you would be willing to consider the following suggested revision:

As I read Part IV, you hold that minimum contacts as required by International Shoe are not established by the fact that one holds a position as director or officer in a corporation chartered by a given state and governed by state law. I seriously question this conclusion. I do not believe that the existence or nonexistence of minimum contacts in a constitutional sense is at all affected by Delaware's failure expressly to assert an interest in controlling corporate fiduciaries (p. 26), or in exacting from them an explicit consent to be sued (p. 28). Moreover, the Delaware Court never had occasion to pass on this question since it viewed such an inquiry as irrelevant under Pennoyer v. Neff. Thus I think we ought not decide
an important constitutional issue like this in a manner that effectively forecloses the assertion of state court jurisdiction in Delaware - or, for that matter, in other states that may expressly seek to make their corporate directors amenable to suit in the local forum.

I thus believe that the Court would do well to consider a remand in this case. My preferred disposition is (1) to state that the constitutional requirement of minimum contacts is established when an individual serves as a director or officer in a state chartered corporation, but (2) to remand to the state court for an interpretation of whether Delaware law authorizes action based upon this proper jurisdictional predicate.

I recognize that Delaware's sequestration statute, as previously construed, acts on the mere presence of property within the state, and not on minimum contacts. Nonetheless, personal service was made in this instance (p. 25 n. 40) and, in view of the fact that we greatly change the jurisdictional ground rules today, the state courts might well decide that the legislature's overarching purpose of securing personal appearance of defendants in state courts is best served by reading the property attachment aspect of the statute as severable and expendable, and permitting jurisdiction based upon minimum contacts plus adequate service (e.g., International Shoe).

As an alternative, I might join a Part IV that remands both the minimum contacts question and the inquiry under (2) to the state courts for initial determination - although I would still want to reserve the option of writing on the minimum contacts issue.
I realize that as the lone dissenter I may lack standing to suggest such a modification but hope it may appeal to you and other Brethren.

Sincerely,

Mr. Justice Marshall

cc: The Conference
Supreme Court of the United States  
Washington, D.C. 20543

May 18, 1977

75-1812 - Shaffer v. Heitner

Dear Thurgood,

This seems to me one of the most interesting cases we have had here in a long time. I think you have written an excellent opinion, and if, as I hope, it becomes the opinion of the Court, it will surely be immortalized as required reading for every first year law student in the country for years to come.

I join Parts I, II, and III of your opinion with enthusiasm. While I could probably also join Part IV, I think I would prefer the second alternative suggested in Bill Brennan's letter to you of today, i.e., remanding the International Shoe issue for decision in the Delaware Supreme Court rather than deciding it here.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference
May 18, 1977

Re: No. 75-1812 - Shaffer v. Heitner

Dear Thurgood:

As Potter says, your opinion is a very important one. It is also very well done, and I am happy to join. The issue of minimum contacts was addressed by the parties, and I prefer to decide it although if you are persuaded to remand, I would not dissent.

Sincerely,

[Signature]

Mr. Justice Marshall

Copies to Conference