in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

No. 35, Original

THE UNITED STATES OF AMERICA

vs.

THE STATE OF MAINE, *et al.*

Motion for Leave to File AMICUS CURIAE Brief and Brief as AMICUS CURIAE on Behalf of The Florida Council of 100, Inc.

Dennis M. O'Connor,
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MIAMI REVIEW — 371-4853 — 377-3721

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MISCELLANEOUS

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ABBREVIATIONS AND USAGE IN THIS BRIEF

California case	*United States v. California*, 332 U.S. 19 (1947).
ICJ Opinion	*North Sea Continental Shelf Cases*, 1969 I.C.J. 3 (1969).
OCSLA	Outer Continental Shelf Lands Act, 67 Stat. 462; 43 U.S.C. §§ 1331-1343 (1953).
Shelf	Continental Shelf; 43 U.S.C. § 1331(a); 15 U.S.T. (Pt. 1) 471, Art. 1.
Shelf Convention	1958 Geneva Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471.
State	State of the United States.
SLA	Submerged Lands Act, 67 Stat. 29; 43 U.S.C. §§ 1301-1315 (1953).
Truman Proclamation	Presidential Proclamation No. 2667, Sep. 28, 1945, 59 Stat. 884 (1945).
U. S. Brief	Brief for the United States in Support of Motion for Judgment in this case.
Whiteman Digest	Whiteman, *Digest of International Law*, Vol. 4 (Department of State Publication No. 7825, 1965).

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in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 35, ORIGINAL

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned as counsel for The Florida Council of 100, Inc., a non-profit corporation of the State of Florida, move for leave to file the attached brief as *amicus curiae* in the present controversy in order to present to

this Court: a) a new line of argument which has never been presented to or considered by this Court in the present or in prior submerged lands cases; and b) argument and a recommended conclusion different from the positions asserted by the Plaintiff and Defendants in the present controversy, specifically an argument of concurrent Federal and State jurisdiction which is unlikely to be advocated by any of the parties in this case. The interests of justice will be served if the parties in this case respond to the arguments in the attached brief.

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in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 35, ORIGINAL

THE UNITED STATES OF AMERICA

vs.

THE STATE OF MAINE, *et al.*

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Florida Council of 100, Inc., a non-profit corporation of the State of Florida founded in 1964, is dedicated to the purposes of improvement and development of the economic climate of the State and the nation. Issues of the optimum development and conservation of the submerged lands of the Atlantic Continental Shelf and the continental shelf of the United States are within these interests. The Executive Committee of the Florida Council of 100 has authorized the submission of this brief.

Counsel individually also have a professional interest in the resolution of the present controversy through the rational development and determination of the law relating to the issues of this case. Dennis M. O'Connor is Professor of Law and Marine Sciences, and Director of the Ocean Law Program, at the University of Miami. Willard D. Dover has served as Chairman of the Boundaries Committee, and as a Commissioner, of the Florida Commission on Marine Sciences and Technology.

Appreciation is expressed to the Florida Commission on Marine Sciences and Technology for a research grant to the University of Miami which permitted completion of certain research upon which this brief is in part based.

STATEMENT

This suit was brought to establish as against the defendant States exclusive rights over the seabed and subsoil of the continental shelf lying off their shores under the Atlantic Ocean. The State of Maine issued a prospecting permit for oil and gas exploration on the continental shelf lying off its shores. The other defendant States had made various claims to assert some rights in and jurisdiction over the portions of the continental shelf off their shores. When the Executive Branch found after communication with these States that they would not relinquish entirely all claims to some rights in and jurisdiction over the continental shelf, the Federal Government brought this suit "for a declaration of the exclusive rights of the United States, as against the defendant States, in the subsoil, seabed, and natural resources underlying the Atlantic Ocean, including the Straits of Florida, more than three geographical miles from the ordinary low-water line and from the outer limit of inland waters . . . " (Complaint, p. 10.)

QUESTION PRESENTED

Whether rights in and jurisdiction over exploration and exploitation of the resources of the continental shelf underlying the Atlantic Ocean beyond three miles from the coastline belong to the United States or to the defendant States exclusively or concurrently.

SUMMARY OF ARGUMENT

The formation of our nation and adoption of our Constitution did not confer or allocate, prior to this Century, exclusive legal rights in the Atlantic Continental Shelf as between the States of the Union and the Federal Government of the United States for at least two reasons: first, our constitutional history did not assign any territorial or sovereign rights to the Federal Government without the consent of the States; and secondly, legal rights (as compared to inherent sovereign rights) in the Shelf came into existence only in the Twentieth Century. Neither ancient grants nor successions from foreign Crowns limit the contemporary assertion of either Federal or State rights in the Shelf, as Shelf rights, unlike an unknown resource content of a known territory or property which was validly conveyed, are of a new type based upon the inherent power of a sovereign to assert a jurisdiction beyond its territory and boundaries on the bases of both the contiguity of seabed resources and the expected impact of their exploration and exploitation upon its territory.

The policy basis underlying the submerged lands cases which held that coastal States did not have rights in seabed resources beyond their coastline has been reversed by Con-

gress when it transferred all the submerged lands then in controversy (from the coastline three miles seaward, and within "boundaries" as defined in legislation) to exclusive State jurisdiction for purposes of exploration and exploitation of seabed resources. This Congressional action left such cases without controlling or even persuasive force in deciding the present controversy.

The Constitutional Powers of foreign relations, defense, interstate commerce and conservation which have been delegated to the Federal Government cannot be shown to require exclusive federal jurisdiction over the Shelf for other purposes. No "aspect of external sovereignty" is presented by domestic allocation within the framework of our Constitution and national laws of Federal and State jurisdiction over the resources of the Shelf, as our nation possesses these resources exclusively relative to the other nations of the world. Because of their contiguity, and the expected impact of their development, Shelf resources may be the subject of rights and jurisdiction both of coastal nations and coastal States. The principles of jurisdiction applied in our national law operate alike for both States and the Federal Government; and the capacity of the States to exercise jurisdiction is limited only by the constitutional delegation of powers to the Federal Government and by the Federal exercise of competence within the proper sphere of Federal authority. As neither Congress nor the Executive has taken all legal rights in the Shelf since these arose in the Twentieth Century, nor has claimed nor by preemption exercised exclusive jurisdiction over Shelf resources, the coastal States may exercise a concurrent jurisdiction over the Shelf with the Federal Government.

Resolution of the political questions subsequent to finding of concurrent Federal-State jurisdiction over the Shelf is best left to Congress, the Executive and the Coastal States rather than continue protracted litigation of the unfolding issues in a multiplicity of cases.

I.

THE FORMATION OF OUR NATION AND ADOPTION OF OUR CONSTITUTION DID NOT CONFER OR ALLOCATE EXCLUSIVE LEGAL RIGHTS IN THE OUTER CONTINENTAL SHELF (HEREINAFTER "SHELF") AS BETWEEN THE STATES OF THE UNION (HEREINAFTER "STATES") AND THE FEDERAL GOVERNMENT OF THE UNITED STATES.

A. Our Constitution and Constitutional History did not confer or allocate exclusive legal rights in the Shelf as between the States and the Federal Government.

(1) In describing the creation and flow of legal territorial rights because of and during the Revolution against England, this Court held, regarding acts which took place in 1777:

> ". . . There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisition of territory made by the United States, distinct from or independent of, some one of the States . . ." *Harcourt v. Gaillard,* 12 Wheat. 523, 526 (1827).

(2) The Articles of Confederation specifically negatived any claim by the national government to territorial rights at the expense of the States, stating in Article IX:

> . . . no State shall be deprived of territory for the benefit of the United States."

(3) The Constitution was also carefully drawn to forfend the very type of unwarranted assertions of sovereign power and property rights by the central government which are involved in this case. As to territorial and property rights, the Constitution is clear, concluding, as it does, with the statement in Article IV, Section 3, Clause 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and *nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*" (Emphasis added).

(4) As to governmental powers (sovereign rights) which may be applied to events occurring beyond or within the territory of the States, the Bill of Rights in Amendment X made it perfectly plain that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(5) There is no expressed rule or principle of the Constitution purporting to grant, dispose of, or apportion exclusive sovereign or property rights in subsequently-acquired contiguous territory or areas as between the adjacent State and the Federal Government. The law and practice in instances of acquisition of contiguous areas is further discussed below in Part V, B (2) of this brief.

(6) The basic claim of the Federal Government, that the only rights which the States may have in the Shelf are those which may have been granted to them by the Federal Government, is unfounded and unsound. Underlying its entire position, and containing the real gist of its theory of the case, is the claim stated in the Brief for the United States in Support of Motion for Judgment (hereinafter "U.S. Brief") at page 20:

> "C. EXCEPT AS GRANTED BY CONGRESS SINCE STATEHOOD, THE COASTAL STATES HAVE NO RIGHTS IN THE SUBMERGED LANDS OR NATURAL RESOURCES SEAWARD OF THE COASTLINE."

This is a spurious claim, without foundation in constitutional law or policy. As seen above, our Constitution does not grant, dispose of, or apportion exclusively sovereign or property rights as between the States and the Federal Government without the consent of the States. Therefore, any exclusive rights the Federal Government has in the Shelf, under national law, must derive either from: (a) the States of the Union (though not at the time the Union was formed); or (b) the inherent rights of states generally.

(7) The groundless assumption that the whole bundle of rights in the Shelf must belong to one party to the exclusion of the other (U.S. Brief, 7, "Question Presented," and Answers of Various of the States Defendants filed in 1969) also flies in the face of our federal system. The simple and beautiful truth about our form of government is that it is based upon a duality of rights and powers. To say that all Shelf rights must necessarily remain as a whole in the States or pass exclusively to the central government upon the formation of the Union is to deny the very soul and structure of that Union, as many rights are neither exclusively Federal nor State.

(8) Based upon the foregoing, we submit that the Constitution of the United States and the formation of the Union did not confer, allocate, grant or dispose of exclusive rights in the Shelf as between the States and the Federal Government. The effects of the delegated powers of the United States and the reserved sovereignty of the States relative to present day allocation of Shelf rights are discussed more fully in Parts IV and V of this Brief.

B. Legal Rights in the Shelf came into existence in the Twentieth Century.

(1) Some of the confusion in the U.S. Brief stems from its allegation that no Shelf rights existed at the time of the Revolution and its inconsistent conclusion that such rights passed to the United States upon the formation of the Union. (U.S. Brief, 11-12.) We submit that the stated conclusion is rendered false by the truth of the allegation.

(2) The Government makes the point that "exploitive rights" in the Shelf did not exist at the time that our Union was formed. (U.S. Brief, at 11.) In the sense that the term "exploitive rights" is used as meaning "legal rights to exploit," we agree.

(3) Whether viewed as property rights or sovereign rights, all rights in the Shelf (termed variously "rights," "sovereign rights" and "exploitive rights" in the U.S. Brief) came into existence as legal rights only after two things happened: (a) such rights were perceived with attendant claims being made to them; and (b) the means for assertion and exercise of such rights became available by reason of the advance of civilization and technology. As used in jurisprudence the term "right" connotes a well-founded legal claim, or the capacity to assert a legally enforceable claim. *Bouvier's Law Dictionary,* Vol. 2 *Right,* pp. 927-929 (1897). 77 C.J.S. *Right,* 392 (1952).

(4) In our national law, the coastal States began to perceive and assert legal rights in the Shelf about 1921 with the California leasing statute. Other States subsequently made similar claims, asserting and bringing into exercise claims sometimes said to have been derived from their Constitutions or our constitutional history. No Federal assertion of any claims to legal rights in the Shelf was made until 1937, when the Secretary of the Interior, Harold Ickes, began to have "doubts" as to whether the Federal or State governments owned the submerged lands. Legislative History — Submerged Lands Act, Prior Committee Reports, Appendix I, H. R. Rep. No. 1778 (83d Cong., 1st Sess.; 1953 *U.S. Code Cong. and Admin. News,* 1415, 1417-1418, 1426-1427 (1953) (excerpt, pp. 1417-1422, is reproduced in Appendix to this Brief). The tem-

poral relationship of these Federal and State claims is not, however, dispositive of the sovereign or property rights which may exist in the Shelf. Under national law, as discussed herein and below, it is our Constitution and laws which are controlling both (a) as to the distribution of sovereign powers within our nation, and (b) as to the allocation of, and power of disposition over, property rights as between the States and the Federal Government.

(5) The phrase "continental shelf" was invented and used in a geological and geographical sense in 1887, but its emergence in a juridical context was precipitated by the Truman Proclamation of 1945 (Presidential Proclamation No. 2667, September 28, 1945, 59 Stat. 884 (hereinafter "Truman Proclamation")). Gutteridge, The 1958 Geneva Convention on the Continental Shelf, XXXV *Brit. Yb. Int'l.* L. 102 (1959)

(6) The submerged portions of the continent existed prior to the advent of civilization and law, although the characteristics of these portions were not recognized until recent decades. They became the subject of legal rights only in the Twentieth Century. In the most recent authoritative judicial pronouncement on the subject, the International Court of Justice put it this way:

> "97. . . . The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation . . ." *North Sea Continental Shelf Cases*, (1969) I.C.J. 3, at 51. (Hereinafter "ICJ Opinion.")

(7) Juridical development of legal rights in and to the Shelf began in 1945, and those legal rights came into being prospectively only, not retroactively. See *Matson Navigation Company v. United States* (The Montebello), 141 F.Supp. 929 (Ct. Cl., 1956).

(8) Legal rights in the Shelf, therefore, could not have been acquired by, or granted to, any entity until the Twentieth Century. The inherent rights in the Shelf associated with the sovereignty and sovereign powers of coastal States and nations are discussed more fully below in Parts IV and V of this Brief.

II.

NEITHER ANCIENT GRANTS NOR TERRITORIAL BOUNDARIES LIMIT EITHER STATE OR FEDERAL LEGAL RIGHTS IN THE SHELF.

A. Ancient grants from, and successions to, the Crowns of England, Holland or Spain are not essential to the resolution of this case and reference to them serves only to obfuscate the real issues.

(1) It is axiomatic that a general conveyance of real property or a cession of territory also transfers rights to the minerals and other resources located therein. But legal rights in the Shelf or jurisdiction over its resources (which lie beyond the territory of States) are a new type of property or sovereign rights not subject to the principles of implied conveyance or limited by express limitation of conveyance. The asserted ancient grants and executory

conveyances of rights in the offshore submerged lands may be affirmatively controlling if a State is recognized as the beneficiary of an effective grant, but their absence does not limit either State or Federal legal rights in the Shelf.

(2) The Federal Government proceeds at some length to demonstrate that there were no legal or exploitive rights in the English Crown and makes what it seems to think is a telling point: that the Crown did not pass these nonexistent rights on to Canada or Australia (or, by inference, to the American Colonies) (U.S. Brief, 24-30). The Government also undertakes to prove that no Shelf rights existed in England and Canada until after 1876 or 1878 (U.S. Brief, 25). We agree, but point out that it was only long after those dates that any such rights came into existence. (See Part I, B of this Brief.)

(3) How rights which did not exist and were completely unknown could have been passed on to anyone is left unexplained. But the really exquisite nature of this series of *non-sequiturs* becomes apparent only when they are distilled and put together to form the Federal Government's thesis: Since exploitive rights were unknown and did not exist in the Crown of England, and since the Crown did not pass on to the Colonies those unknown and nonexistent rights, the Colonies passed such rights to the Federal Government of the United States at the time of formation of the Union. The magical process by which an unknown nothing was transformed into an unknown something, underwent a mythical passage to a central government, and then remained unknown for more than 150 years, is still secret.

(4) Rejecting these sophistries, we suggest that law and plain common sense require the conclusion that neither the States nor the Federal Government enjoyed any legal or exploitive rights in the Shelf before, upon, or immediately after the formation of the Union for one simple reason: those rights came into existence more than a century later.

B. Modern boundaries and the delimitation of territory do not limit either State or Federal jurisdiction in this case, for the legal rights in and jurisdiction over the Shelf lie beyond the boundaries of all parties.

(1) The Truman Proclamation made no mention of boundaries, but clearly was intended to apply beyond the territorial sea of the United States, the limits of which are commonly recognized as our nation's most seaward territorial boundary. The White House Press Release which accompanied the Truman Proclamation spoke of a depth of contour line of about 100 fathoms, which line lies in most areas beyond the limits of the territorial sea. Whiteman, Digest of International Law, Vol. 4, pp. 757-758 (Department of State Publication 7825, 1965) (hereinafter "Whiteman Digest"). The concurrent Executive Order (No. 9633; 10 F. R. 12305; 3 C.F.R. 437 (Supp., 1957)) preserved the rights of the States and the Federal Government in the Shelf outside as well as within the three-mile limit with the following language:

> " . . . Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states,

> relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." 1945 U.S. Code Cong. Service, p. 1315 (1945). Whiteman Digest, 758-759.

Revocation of this Executive Order and establishment of a naval petroleum reserve (solely for oil and gas exploration and exploitation) by Executive Order No. 10426 (18 F.R. 405; 3 C.F.R. 924-925 (Supp., 1958)) did not affect the legal situation of whatever rights the States may have had in the Shelf. It clearly did not attempt to exclude all rights of the States in the Shelf, as it established a reserve "for oil and gas only," and it was declared "[s]ubject to valid existing rights." *Id.* § 1 (a) and (b).

(2) The geographic marine surface boundaries for purposes of jurisdiction over navigation and other uses of the water column, such as fishing, do not limit jurisdiction over the submerged portion of the continent. In point of time, such boundaries were claimed and set long before there was any knowledge of, much less claims to, the use and development of the Shelf. Whiteman Digest, Ch. IX, §1 (pp. 1-14) and §2 (pp. 14-137), Ch. XI, §1 (pp. 740-764). "By 1900, the three-mile or one-league limit had been positively adopted or acknowledged as law by twenty of the twenty-one states which claimed or acknowledged a territorial sea at that time. The twenty states were . . . and the United States." Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas*, 11 Stan. L. Rev. 597, 632-634 (1959).

(3) In the first *California*, *Louisiana* and *Texas* cases, the States argued that boundaries should control.

"The basis of California's asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state . . . " *U. S. v. California*, 332 U.S. 19, at 23 (1947) (hereinafter "*California* case"). See also, *U. S. v. Louisiana*, 339 U.S. 699, 705 (1950), and *U. S. v. Texas*, 339 U.S. 707, 711 (1950). The holdings were that boundaries did not control. *California* case at 31; *U. S. v. Louisiana*, 339 U.S. 699, 705; *U. S. v. Texas*, 339 U.S. 707, 720; (U. S. Brief, 22-23).

(4) In submerged lands legislation the term "boundaries" has been relevant only in the Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. §§ 1301-1315) (hereinafter "SLA"). Even there, however, the term "boundaries" was used only to define the express quitclaim by the Federal Government to any proprietary interest within the accepted State "boundaries." "Boundaries" as used therein did not purport to determine any matters relating to the seabed beyond such areas. To the contrary, except for the quitclaim of submerged lands under the U. S. territorial sea, the SLA expressly preserved whatever rights the United States may have had in the Shelf (43 U.S.C. §1302) (just as did the Truman Proclamation, with its attendant Executive Order, some eight years prior to the SLA).

(5) Approval by this Court of a 3-league, or 9-mile, boundary for Texas and Florida in the Gulf of Mexico subsequent to the SLA had the effect of according these coastal States exclusive legal rights in the natural resources of the Shelf beyond the boundaries of the United States. *U. S. v. Louisiana*, 363 U.S. 1, 84 (1960); *U. S. v. Florida*, 363 U.S. 121, 129 (1960). The language of the SLA confirming United States Shelf jurisdiction beyond boundaries was held further in *U. S. v. Louisiana et al.* 363 U.S.

1, 83-85 to give exclusive jurisdiction to the United States, a matter which this brief discusses below in Part VI.

(6) The Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. §§1331-1343) (hereinafter "OCSLA") dealt with lands or rights entirely beyond the boundaries of the States and the nation, that is, the area in question in this case. But nothing in that Act purports to divest States of the Union of any rights, although the States' power to apply taxation laws to the Shelf was limited. Congress merely exercised its undoubted authority to set up its own rules for Federal leasing on the Shelf. The legislative history of the OCSLA is clear. The Committee Report states:

> "Purpose of the Bill
>
> "The purpose of H.R. 5134 is to amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond the boundaries of the States may be leased and developed by the Federal Government. At the present time the Submerged Lands Act merely established that the seabed and subsoil in the Outer Continental Shelf beyond State boundaries appertained in [sic] the United States and was subject to its jurisdiction and control.
>
> "There are no provisions for the leasing and development of the area by the Federal Government nor are provisions made for the exchange of State leases for Federal leases in the same area.

> "This bill contains provisions to accomplish those very objectives." H.R. Rep. No. 413, 83rd Cong., 1st Sess. (1953); *1953 U.S. Code Cong. and Admin. News*, Vol. 2, pp. 2177-2178 (1953).

Indeed, the claim language in the OCSLA is unmistakably, and, we believe, significantly, similar to the Truman Proclamation (adding only the phrase "power of disposition" to cover and authorize the leasing program being established in the Act). 43 U.S.C. §1332. Setting up a leasing program in an area where the Federal Government unquestionably has rights (though non-exclusive) is an entirely different thing from an attempt to divest the States of all Shelf rights. As the Court well knows, Congress considered this whole matter for many years, and suffered some vetoes, before the 1953 legislation was finally drafted, passed and approved by the President. The voluminous Committee Reports (*See, e.g.* excerpt in Appendix to this Brief), as well as the *California* (332 U.S. 19), *Louisiana* (339 U.S. 699) and *Texas* (339 U.S. 707) cases, are replete with discussions of boundaries. Had Congress later wanted to base an attempted divestitude of the Shelf rights of States on boundaries, it most certainly would have said so. The feeble and contrived allegation of the Federal Government on this point serves to emphasize the validity of our position. The Government states (U. S. Brief, 23-24):

> " . . . So, also, *although Congress did not purport to foreclose greater claims*, the underlying premise of the Submerged Lands Act — which in 1953 granted a three mile belt to the State bordering on the Atlantic Ocean — is that the present defendants theretofore held no rights in the bed

> of the territorial sea and thereafter would hold none farther seaward, where federal administration was provided for under the Outer Continental Shelf Lands Act enacted in the same year . . . " (Emphasis added.)

This allegation says that, although Congress did not purport to foreclose the States' claims on the Shelf, such claims were automatically foreclosed by an underlying premise of the SLA. We suggest that such a conclusion is patently unwarranted, and that boundaries simply have no bearing on the matter of Shelf rights for this clear reason: Shelf rights are generally beyond territorial boundaries and Congress did not change this legal situation.

III.

THE POLICY BASIS UNDERLYING THE FIRST CALIFORNIA SUBMERGED LANDS CASE HAS BEEN REVERSED BY CONGRESS, LEAVING IT WITHOUT CONTROLLING OR EVEN PERSUASIVE FORCE IN DECIDING THE PRESENT CONTROVERSY.

(1) In the case of *United States v. California* there were only two real issues on the merits, and they were decided under the heading "*third*" in the Opinion (332 U.S. 19, at 29-39). The Court held:

(a) that California had not produced enough references and evidence to prove:

> " . . . that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." (332 U.S. 19, at 31); and

(b) the commerce, defense and foreign relations powers of the national government required:

> " . . . that the Federal Government rather than the state has paramount rights in and power over that belt [the three-mile territorial sea], an incident to which is full dominion over the resources of the soil under that water area, including oil."
>
> (332 U.S. 19, at 38-39; parenthetical matter added).

(2) Holding (a) is not controlling in this case because, firstly, it dealt with a matter of evidence and proof. Review of the Whiteman Digest, Ch. IX, indicates that most authorities on the territorial sea were subsequent to the formation of our nation. Additionally, the fact that California failed to prove that the 13 original States exercised *dominium* over the territorial sea cannot be held against the parties in this case, 10 of whom are original States. Secondly, legal rights in the Shelf were not acquired by either the States or the Federal Government until much later than the revolution against England.

(3) Holding (b) is clearly based on policy considerations determined by the Court to exist at that time in 1947. Such a policy was also a clear basis for the 1950 *Louisiana* decision (339 U.S. 699, at 705) and the 1950

Texas decision (339 U.S. 707, 712). *But the policies relied on by the Court in 1947 and 1950* to allocate the seabed from the coastline out to three miles from shore to the Federal Government *were reversed by action of the Congress and the President in 1953* by enactment of the SLA. See Appendix to this Brief. We are mindful of the provision of the SLA that it shall not be "deemed to affect in any wise the rights of the United States . . . " (43 U.S.C. §1302) on the Shelf (outside of the State and the United States boundaries). It is clear that this language in the SLA does not give anyone any rights in the Shelf and its resources. What it does accomplish is a reversal of the policy basis for the holdings in the *California* case and the *Louisiana* (339 U.S. 699) and *Texas* cases (339 U.S. 707). Without that policy basis, the reasoning in those cases cannot be sustained unless there is some other compelling reason why the long-recognized claims of States must be forfeit. But the Federal Government does not even allege any other or new policy, basing its present claims squarely on the previous cases (U.S. Brief, 22-24). Indeed, the Government (U.S. Brief, 22) itemizes the same policy bases for its present claims as: " . . . defense, international relations, and external sovereignty . . . " "External sovereignty" presumably refers to foreign commerce, unless it is merely redundant to "international relations."

(4) Stripped of its policy rationale by Congress, the *California* case today offers no impediment to a review of the factors involved in determining the allocation of Shelf rights. That case was decided in the aftermath of World War II, only six years after an attack on Pearl Harbor, and only five years after blackouts and hysteria on the Pacific coast resulting from the fear of a Japanese amphibious assault. Memories of the plans of enemy con-

quest and control of natural resources in Asia, and of a Nazi proximity to the oil reserves of the Middle East (El Alamein) were fresh and potent. The "Cold War" was just beginning and the United Nations was in a precarious struggle for life. Criticism is not here intended. To the contrary, we are urging that time and the historical perspective of nearly a quarter century reveal far-reaching changes both within and outside our nation.

(5) Currently, the security fear is not of loss of essential natural resources. Nowhere does the Government allege any fear of an invasion from the Shelf or a threat of loss of Shelf resources to foreign nations. To the contrary, the official U. S. position as presented internationally is to demand a "narrow" Shelf (stopping at the 200 meter isobath) with a dedication of the remainder of the ocean floor to the benefit of international community in a "trusteeship zone" and an international regime. Presidential Statement, 116 Cong. Rec. X S7747-7748 (May 25, 1970); and Draft United Nations Convention on the International Sea-Bed Area (Working Paper Submitted by the United States to the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction), Arts. 1, 2, 3, 26 and 27, 25 U.N. GAOR, Supp. No. 21 (A/8021), pp. 130, 132-133, 138-139 (1970).

(6) The security, foreign relations and commerce issues are examined more fully below in Part IV of this Brief. The point being made here is that new policies consistent with those laid down by Congress and the Executive and attuned to the present realities are not foreclosed by the prior decisions of the Court, all of which were based on the *California* case.

IV.

THE CONSTITUTIONAL POWERS DELEGATED TO THE FEDERAL GOVERNMENT BY THE STATES CANNOT BE SHOWN TO REQUIRE EXCLUSIVE FEDERAL JURISDICTION OVER THE SHELF.

The exercise of exclusive Federal Powers by the United States carries with it paramount rights limited to those reasonably necessary to effectuate their specific purposes. It does not establish exclusive rights generally nor establish all rights for all purposes. The need must be evident or shown in each case to the Court.

A. The Foreign Relations Power does not require exclusive Federal rights in and jurisdiction over the Shelf for purposes other than Foreign Relations.

(1) The fact that the Shelf lies in general beyond the limits of the territorial sea does not raise foreign policy problems which prohibit the exercise of some State jurisdiction over the Shelf. The 1958 Geneva Convention on the Continental Shelf (15 U.S.T. (Pt. 1) 471) (hereinafter "Shelf Convention") recognizes the water column above the Shelf as international waters (Art. 3) (Whiteman Digest, 920). And the OCSLA specifically recognizes the water column above the Shelf as international waters (43 U.S.C. §1332 (b)). Both these international and national prescriptions, and the ocean law associated with them, are binding upon the States in their exercise of any jurisdiction which they may have over the Shelf. The Department of State did not object to language in the Execu-

tive Order which accompanied the Truman Proclamation and provided that the Order and the Proclamation did not affect the determination of issues between the Federal Government and the States. Whiteman Digest, 755-756.

(2) The United States has not based its territorial sea or international boundary claims on Shelf considerations. Quite to the contrary, it has consistently opposed and protested the claims of other nations (particularly in Latin America) to extensive territorial seas based on an interpretation by those nations that such claims follow the Truman Proclamation. Whiteman Digest, 793-814 and 874-882.

(3) No foreign affairs problems have been caused by the recognition by the Court on the basis of the SLA of a nine-mile boundary in the Gulf of Mexico for submerged lands of Florida and Texas — six miles into or beneath international waters. It was held by the Court in those cases that the question of State and Federal jurisdiction over these areas of the Shelf was a matter of domestic concern. *U. S. v. Louisiana et al.*, 363 U.S. 1, 64, 84; *U. S. v. Florida*, 363 U.S. 121, 129.

(4) International Law, codified in the Shelf Convention and confirmed in the ICJ Opinion, recognizes that the Shelf rights of the coastal nation are exclusive as regards any other nation, regardless whether the coastal state asserts any claim. Shelf Convention, Art. 2. No other nation has any interest. Thus, the allocation of such rights internally within a nation cannot be the concern of any other nation.

(5) The States presently exercise a jurisdiction to prescribe laws in some cases for foreign ships in the territorial sea, and in ports and other internal waters. Even for admiralty questions, which are generally within federal jurisdiction, the States prescribe law for such matters as leins, local regulations and torts. 2 Am.Jur. 2d *Admiralty* §7, pp. 723-724 (1962). See also the discussion of authority over internal waters, the territorial sea and adjacent ocean areas in McDougal and Burke, *The Public Order of the Oceans*, Chs. 2, 3 and 6 (1962). There is considerable commerce by foreign ships in these waters, and this State jurisdiction does not harmfully impinge on foreign relations or adversely affect foreign affairs or security interests to the detriment of our nation. *A fortiori*, when the jurisdiction of the United States is exclusive relative to the interests of the other nations of the world, as it is on the Shelf, there can be no question of any undesirable effects on foreign affairs by State exercise of jurisdiction.

(6) There is no question of the authority of the Executive to conclude international agreements regarding the Shelf for any foreign relations purpose, which agreements may determine the extent of jurisdiction (Federal and State) over the Shelf and the manner in which such jurisdiction may be exercised. In the case of *Missouri v. Holland*, 252 U.S. 416 (1920) this Court upheld as against the jurisdiction and police power of a State, a treaty and pursuant legislation of Congress providing for reciprocal protection of migratory birds which make seasonal flights between Canada and the United States. If the United States chooses to enter into an international agreement or treaty defining or limiting Shelf rights there is simply no question of the legal efficacy of this exercise of the foreign

relations power, both as to Federal and State jurisdiction over and rights in the Shelf. The mere possibility of an international agreement which might require a consequential limitation of the rights or powers of the States does not, however, operate to limit or divest such rights or powers.

(7) Finally, were a coastal State to undertake activities on the Shelf, or to exercise any jurisdiction over the Shelf, in a manner adversely affecting the conduct of foreign relations this Court has the power to declare such activities or jurisdiction unconstitutional even absent any specific prohibitory legislation by Congress or prescriptions of the Executive. *Zschernig v. Miller* 389 U.S. 429 (1968).

(8) In sum, the foreign relations power delegated to the Federal Government by the States in our Constitution is adequate for its purpose on the Shelf and at sea as well as on land. It does not require exclusive Federal jurisdiction over the Shelf any more than exclusive Federal jurisdiction over aliens and foreign enterprises or State property on land. To the contrary, as United States legal rights on the Shelf are exclusive relative to other nations the question of Federal and State jurisdiction is purely one of domestic concern and is regulated solely by our national law. While it may be desirable in the future conduct of United States foreign relations to make international agreements limiting or regulating United States jurisdiction over the Shelf, our existing Constitutional Law is entirely adequate to make any such agreements binding upon the States as well as the Federal Government. Moreover, if the States exercise any jurisdiction over the Shelf which adversely affects the foreign relations of the United States, the Legislative, Executive or Judicial Branches of

our Federal Government can curtail such an exercise of jurisdiction. As the foreign relations power is adequate and exclusively federal it cannot afford a basis for allocating legal rights on the Shelf to the Federal Government for purposes other than foreign relations.

B. The Defense and Commerce Powers do not require exclusive Federal rights in and jurisdiction over the Shelf.

(1) No instance can be found where the Defense Power, assigned exclusively to the Federal Government in our Constitution, is inadequate in the territory or property of any State. The Defense Power of the Executive is general and does not require exclusive ownership of the Shelf or any other category of property to protect the security interests of the United States. Nor does the Defense Power operate to divest the States of other sovereign powers.

(2) The States regularly cooperate with the Federal Executive on defense matters relative to territorial and territorial sea areas under their jurisdiction, and there is no reason to suppose that State cooperation in such matters would be any less for any jurisdiction which they may have over the Shelf. The only instance related to jurisdiction over the resources of submerged lands of the Shelf and territorial sea in which the States might have stood in opposition to the Federal Defense Power was precisely one in which all interested Federal agencies, including the Department of Defense, were met in cooperation by State officials in the establishment of safety fairways in the Gulf of Mexico. See Griffin, Accommodation of Conflicting Uses of Ocean Space with Special Reference to Navigation

Safety Lanes, in *Proceedings of the Second Annual Conference of the Law of the Sea Institute*, at pp. 73, 79-81 (1968).

(3) In sum, the Defense Power assigned by our Constitution exclusively to the Federal Government is adequate for its purpose, and does not require exclusive Federal jurisdiction for purposes other than defense for its efficacy or implementation.

(4) The Commerce Power delegated to the Federal Government in our Constitution, and conservation interests, do not require ownership either of territory or of a class of property by the Federal Government for their effectuation. To the contrary, the Power and associated interests and powers are required solely to regulate the use of property by others and to limit the exercise of State and local jurisdiction within our Constitutional framework.

(5) That questions of interstate and foreign commerce may arise as a result of State jurisdiction over the Shelf cannot be questioned. The Legislative, Executive and Judicial Branches of the Federal Government may deal with such questions, however, both by applying our Constitutional and general laws and by prescribing new law within their respective competences.

(6) Conservation of the resources of the Shelf similarly does not present any novel or insoluble problem in our Constitutional framework. The Federal Government can always control or prevent the production of oil and gas (or other resources) on the Shelf in the same way it does on dry land. Conservation is not impaired in any way. Declaration of specific powers for conservation and re-

stricted exploitation of oil and gas resources of the Shelf by Executive Order (No. 10,426; 18 F.R. 405; 3 C.F.R. 924-925 (Supp., 1958)) was expanded by Congress in the OCSLA (43 U.S.C. §1341). There is simply no question of needed reserves being dissipated, and the national interest jeopardized, by irresponsible exploitation.

V.

THE COASTAL STATES HAVE SOME LEGAL RIGHTS IN AND MAY EXERCISE JURISDICTION OVER THE SHELF UNLESS THESE RIGHTS AND POWERS HAVE BEEN CONSTITUTIONALLY TAKEN BY THE FEDERAL GOVERNMENT.

A. The Coastal States Have Some Rights in the Shelf.

(1) The coastal sovereign entity always had inherent rights in the Shelf, but as seen above and reinforced herein these inherent rights did not ripen into legal rights until the Twentieth Century.

(2) The ICJ Opinion and the contemporary opinions of scientists are alike in associating the Shelf with the adjacent land. The ICJ opinion speaks of the origin and nature of both inherent and legal Shelf rights:

> "95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have

existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume 1 of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf . . .

"96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea . . .

"97. . . . the natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation . . ." ICJ Opinion, at 51.

Scientists now know that the continents and the deep ocean floor are different in kind. The continents are primarily composed of granitic rock, rich in silica and

the alkalis (sometimes nicknamed "white rock"), while the deep ocean floor is mainly basaltic rock, rich in heavy minerals (hence, "black rock"). The most fundamental and remarkable physiographic feature of our planet is the tremendous scarp at the interface of the continents with the deep ocean floor. Simply put, the solid earth is covered, on a world-wide basis, with a relatively thin layer or crust of basaltic rock. The continents float on this basaltic rock. The continents float on this basaltic layer in a manner which has been likened to an iceberg in the sea. In a study prepared at the request of the National Council on Marine Resources and Engineering Development and officially presented by the United States to a United Nations Committee (Department of the Interior Press Release, Aug. 14, 1969), Federal Government scientists summed up the point this way:

> "GEOLOGIC AND PHYSIOGRAPHIC PROVINCES AND THEIR BEARING ON POTENTIAL SEABED MINERAL RESOURCES
>
> "The solid earth's surface consists of two great physiographic divisions, the ocean basins, and the continents that rise to mean heights of 4,300 to 5,800 meters above the ocean floor. The ocean basins, of course, are filled with sea water — more than filled, in fact, for the ocean extends over the margins of the continental masses for distances ranging from a few to more than 1,300 km. The boundary between the continental masses and the ocean basins thus lies beneath the sea, generally at depths ranging from 2,000 to 4,000 meters.

"The physiographic contrast between the continents and the ocean basins reflects fundamental geologic differences between them. The continental crust is richer in silica and the alkalis and poorer in iron and magnesia than the oceanic crust. Although the continental crust averages about 35 km. in thickness compared with about 5 km. for the oceanic crust, its density is less (fig. 4). The continental and oceanic masses are in flotational equilibrium with the underlying mantle, and the lighter continents rise above the ocean basins, much as does an iceberg in the sea.

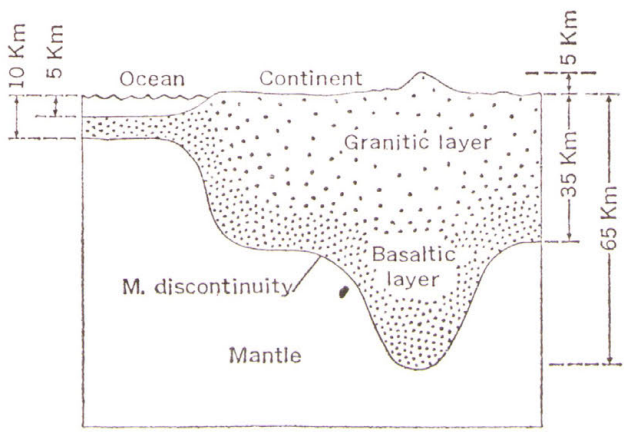


Figure 4. Idealized cross section showing the flotational equilibrium between oceanic and continental crust. (Takeuchi and others, 1967).

"The igneous rocks of the continental crust consist mainly of granite and related rocks relatively rich in silica and the alkalis, although some basalt and other rocks rich in iron and magnesia are also present. In many areas these

granitic rocks intrude, or are overlain by, thick accumulations of sediments deposited in ancient seas that spread over the continents, and in marginal oceanic basins — sediments derived in large part from the weathering and erosion of adjacent land. Oil, gas, sulfur, saline minerals, coal and other deposits occur in these sedimentary basins. Oceanic crust, in contrast, is largely composed of basalt and related rock; and, except near the continental margin where erosional debris from the land may be present, it is generally overlain by no more than a few hundred meters of sediments.

* * *

". . . Petroleum, coal, sulfur, salt, potash, phosphate rock, limestone, and many other minerals have been concentrated by biologic and sedimentary processes in sedimentary rocks . . .

* * *

"In spite of their smaller size compared to the floor of the large ocean basins, the submerged parts of the continents, the continental rises, and the small ocean basins contain the greater part of the potential subsea mineral resources, both in terms of the variety of minerals that exist and the value of those that are likely to be recovered within the next few decades. Most important among these minerals is petroleum, the bulk of which likely occurs in the continental terraces and rises and the small ocean basins . . ." (McKelvey, V.E., and Wang, Frank F. H., *World Subsea Mineral Resources*, pp. 5-7 (Department of the Interior, U.S. Geological Survey, 1969).

(3) The essential harmony between the ICJ Opinion and the present knowledge of the scientific community is apparent: The Shelf is a part of the land mass which is submerged temporarily in terms of geologic time. Legal rights connected with it have only recently been claimed or acknowledged. Whatever rights coastal entities had to the Shelf in times past were inherent rights only, and not legal rights, until acknowledged and clothed with the protection of law. And the legal rights established in the attendant and appurtenant Shelf belong to the coastal sovereign.

(4) The emptiness of the claim that all rights in the Shelf must emanate from the central government in Washington, D. C., is emphasized by the fact that the resources in question (mainly petroleum and related minerals) occur in the sedimentary rock of the Shelf. These same sediments were eroded from the dry land of the continent before being deposited on the Shelf. Thus, the components of the mineral deposits themselves actually "derived in large part from the weathering and erosion of adjacent land." (McKelvey and Wang, *supra*, p. 5). The "adjacent land" in this case is necessarily the coastal States.

(5) In sum, the inherent rights in the Shelf were inherent both as being at one time potential rights and also as inhering in the coastal sovereign entity. Why, we ask, must the legal rights maturing from the inherent rights of coastal States be deemed to be Federal when the rock itself came from areas which are now the States?

(6) The ICJ Opinion sums up the matter of inherent Shelf rights clearly and, we believe, persuasively (at p. 22):

"19. More important is . . . what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. *In short, there is an inherent right.* In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised . . . " (Emphasis added.)

And (at P. 31):

"43. More fundamental than the notion of proximity appears to be the principle — constantly relied upon by all the Parties — of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something

> already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant . . . "

(7) Recognition that the ICJ Opinion was dealing with nation-states on the international level does not impair the applicability of these principles to coastal states generally, including the States. As seen above, it is abundantly clear that the Shelf is an extension from the land domain of the coastal States as well as that of the United States. The very rock which contains the sought-after minerals originated by erosion from the areas of the coastal States. Thus, the "natural prolongation" could hardly be more natural as regards the coastal States.

(8) From the ICJ Opinion, as well as from compelling logic, it is clear that the coastal sovereign entity, by whatever name or designation, always had inherent rights to the submerged portion of the continent. But these rights were not perceived or claimed until the Twentieth Century, and did not begin to ripen into legal rights until the specific claim of the 1945 Truman Proclamation (with its attendant disclaimer of any disposition of rights of the States *vis-a-vis* the Federal Government).

(9) In this connection, it is most revealing to look at the declaration of the Executive Branch regarding the formulation of law for the Shelf, which is contained in the official State Department Whiteman Digest under the heading "History of the Truman Proclamation":

> " . . . .This Nation's claim to the natural resources was strengthened by the *earlier* action of some of the States in leasing, and consequently

> bringing about the actual use and occupancy of the Continental Shelf . . . " Report from the Committee on the Judiciary, Mar. 27, 1953, to accompany H.R. 4198, Submerged Lands Act, H.R. Rep. No. 215, 83d Cong., 1st Sess., p. 7. (Emphasis added.) Whiteman Digest, 759.

(10) The emergence of the Shelf in international law cannot be construed, even remotely, to deprive the States of their inherent or legal rights in the Shelf. The argument of the U. S. Brief may be misleading when it asserts that the Truman Proclamation operated "[d]omestically" (U.S. Brief, p. 13). That Proclamation operated to claim rights for the United States internationally, while the accompanying Executive Order (No. 9633; 10 F.R. 12305; 3 C.F.R. 437 (Supp., 1957)) and White House Press Release (Whiteman Digest, 757-758 and U. S. Brief, 13) make it clear that domestically no effect on the States was intended.

(11) The conclusion, therefore, is that unless all sovereign and property rights in the Shelf have been positively taken from the States since 1945, the coastal States, consistently with the developing international and national law of the Shelf, may claim, assert and exercise some jurisdiction on the Shelf.

B. The coastal States may exercise jurisdiction over Shelf resources.

(1) It is axiomatic that a State may exercise a jurisdiction to protect a right.

(2) The law and practice in instances of acquisition of contiguous areas indicates that, rather than a band of new federal jurisdiction being created surrounding our States, the territory of the States of the United States is established or expanded. In the instance of the Chamizal, for example, in which an area was added to the United States by the migration of the Rio Grande River between the United States and Mexico, it was accepted that the area belonged to Texas and was subject to its jurisdiction. See Remarks of the President, 50 *Dept. of State Bull.*, pp. 49-50 (Jan. 13, 1964). The Shelf resources similarly are the subject of rights and jurisdiction arising subsequent to the formation of the States and the United States. It cannot be shown that our Constitution and laws require different types of subsequently acquired property to be the subject of different relative Federal and State rights.

(3) As regards sovereign powers, the reserved sovereignty and associated general police powers of the States may extend to the Shelf even though it lies beyond the boundaries of the States and of the United States, unless and until their application is excluded by Congress. This Court has upheld the applicability of State police powers to federally licensed activities on the navigable waters of the United States, in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440. And application of State forced pooling orders to federally granted oil and gas leases on lands in the federal public domain is a proper exercise of State jurisdiction if not excluded by Congress. *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, 277 F.Supp. 366 (1967), aff'd. 406 F.2d 1303 (1969). Congress has not excluded the exercise of State jurisdiction over the Shelf (see Part VI of this brief below). And the legislatures of the coastal States have not ceded or relin-

quished all claims to jurisdiction. Consequently, the coastal States may exercise police powers over the Shelf for a number of purposes. Such purposes may include enforcement of pooling policies, conservation laws, safety, and other laws associated with police powers.

(4) The jurisdiction exercised by coastal States over the Shelf is also consistent with the principles of competence to prescribe with respect to events having an effect within territory. See *Restatement II, Foreign Relations Law of the United States*, §§ 18-21 (1965). It is also consistent with the principles of the exercise of jurisdiction over the Continental Shelf. *Id.*, § 23. And with the jurisdictional conflict of laws rules. See *Restatement II, Conflict of Laws*, Proposed Official Draft, Part I, §§ 10, 24, 56 (1967).

(5) The principles of concurrent Federal and State rights in and jurisdiction over the Shelf were not squarely presented to or considered by the Court in prior cases, and the present defendant States are not bound by causes or decrees to which they were not parties.

(6) The Federal Government has, however, claimed fee simple ownership in the Shelf in earlier cases. Now for reasons indicated herein it is claiming today "something less than fee simple." Neither Congress nor the Court has ever supported the fee simple claim of the Federal Government. The decisions in the *California* case (at p. 36) and the *Louisiana* (339 U.S. 699, 704) and *Texas* (339 U.S. 707, 719) cases spoke of "paramount rights in" and "power over" the Shelf, when defining the interest of the Federal Government. The OCSLA was notably silent about this fee simple claim, reverting to the language of the Tru-

man Proclamation, i.e., "appertained", "jurisiction", and "control". 43 U.S.C. § 1332. The phrase "power of disposition" in the OCSLA referred only to the leasing program therein established.

(7) In the face of this restraint by the other two Branches of government, the Executive began retreating from its early, exaggerated, claim to fee simple ownership and in later cases is claiming progressively less. For example, in the 1960 *Louisiana* case, the complaint alleged that the government was "entitled to exclusive possession of, and full dominion and power over" the Shelf. (363 U.S. 1, 5.) In *U. S. v. Ray*, in 1970 — ten years later, the Fifth Circuit stated, at the specific instance of the Executive, that the rights of the United States in the Shelf were "something less than fee simple." (423 F.2d. 16, 18-19 (1970)) (The language of the paragraph crossing pages 19-20 was amended to include the last three sentences by slip opinion dated Apr. 10, 1970.) In the instant case, the Complaint, p. 11, claims for the United States only "sovereign rights .... (on the Shelf) .... for the purposes of exploring the area and exploiting its natural resources ..."

(8) The concurrent jurisdiction of the Federal Government and the States is nothing startling or revolutionary. It already exists and is recognized for numerous situations, including events on the Shelf, even though State jurisdiction is not necessarily co-equal or co-extensive with Federal jurisdiction in such cases. State law has been adopted as surrogate Federal law for the Shelf. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 357. Examples of concurrent jurisdiction include crimes on federal property or against federal officers; the jurisdiction of state and federal agencies (including the Coast Guard)

within territorial and inland navigable waters; injury on, or damage to, offshore drilling rigs beyond the three or nine mile limits; and oil pollution beyond the three or nine mile territorial limits(with respect to collection of damages by third parties). This Court has upheld application of State law (a tax on the severance of timber) on federal reserve lands where private companies had contracts with the Federal Government, because Congress had not assumed exclusive legislative jurisdiction over the lands. *Wilson v. Cook*, 327 U.S. 474, 487 (1945). Conformed to in *Cook v. Wilson*, 193 S.W. 2d. 818 (1946).

(9) In sum, state laws and police powers extend over the Shelf and over the extraction of its resources, even though the Shelf is beyond state boundaries, unless and until Congress determines to exclude their application.

VI.

NEITHER CONGRESS NOR THE EXECUTIVE HAS EXCLUDED ALL COASTAL STATE RIGHTS IN AND JURISDICTION OVER THE SHELF AND ITS RESOURCES.

(1) Assuming that the Federal Government has a species of plenary power which enables it to take all Shelf rights away from the States and to exclude any exercise of State jurisdiction over the Shelf, there has been no attempt to do so. It is no answer to assert, as does the U. S. Brief, that the failure of Congress to make the attempt somehow resulted in its accomplishment (U. S. Brief 23-24).

(2) Acceptance of a theory of a secret and a silent taking of Shelf rights by Congress after its fourteen years of deliberation on submerged land matters, would be to impute to Congress base motives and an intent to violate our Constitution. Any interpretation of the OCSLA as such a taking would render it unconstitutional as a deprivation of property without just compensation — a direct violation of our Constitution, Amendment V. Public entities, including the states, are entitled to compensation for property taken from them by the Federal Government. *State of Washington v. United States*, 214 F.2d 33 (1954), Cert. Den., 348 US 862; *Sarpey County, Nebraska v. United States*, 386 F.2d 453, 181 Ct. Cl. 666 (1967). Further, it is a basic rule of statutory construction that the Court will not opt for an interpretation which would render a statute unconstitutional if there is any fair reading of it which would keep it within the framework of our Constitution. *United States v. Cohn Grocery Co.*, 225 U.S. 81 (1920); Sutherland, *Statutory Construction*, Vol. 2, §§ 2401, 4509, pp. 174-175, 326-327 (3rd ed., 1943).

(3) Congress was well aware of the legal and constitutional problems involved in the submerged lands controversy. Further, it was sympathetic to the position of the States and was dismayed and troubled by the implications of the decision in the *California* submerged lands case. *There is no indication of any intent to deprive the states of all their rights in the Shelf.* In fact, the legislative history of both the SLA and the OCSLA discloses that Congress was very careful to refrain from making any federal claims which would deprive the constitutional or legal rights of anyone, including the States. The portion of the legislative history of the SLA printed as an Appendix of this Brief is indicative of this intent of Congress. See Appendix to this Brief.

(4) The OCSLA leasing program is a constitutional exercise of power by Congress, but it does not exclude all exercise of rights and jurisdiction by the States over the Shelf. The establishment of a leasing program, and of a single leasing entity for the Shelf resources was within the powers of Congress. The necessity for certainty of rights so that large capital investments could be made and the need to fix a federal severance charge or royalty for the extraction of Shelf resources were properly within the powers exercised by Congress. Unless the intent of Congress was to exclude the exercise of all State rights and jurisdiction over the Shelf, the federal leasing program would not of itself preclude exercise by the States of a jurisdiction over the Shelf and its resources for purposes of conservation, safety, the accommodation of conflicting uses where there may be economic impairment, the enforcement of pooling orders, and the exaction of taxes or other payments for the severance or production of resources from the Shelf. The federal leasing program established in OCSLA was simply a confirmation and legislative authorization of the federal leasing which had been going on under the 1945 Executive Order for eight years.

(5) The legislative intent of Congress is revealed clearly in the history of the OCSLA. The intent to confirm and give validity to the Truman Proclamation, and to vest the power to take or dispose of the natural resources of the Shelf beyond States' boundaries in the Secretary of the Interior, are noted. The language of the first substantive section in OCSLA, 43 U.S.C. § 1332, declaring the policy of the United States "that the subsoil and the seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this sub-

chapter," was stated in the committee report on H.R. 4198 (in which Sept. 8(a) contained substantially the same language) to assert "as against the other nations of the world the claim of the United States to the natural resources in the Continental Shelf." *1953 US Code Congressional and Administrative News*, Vol. 2, pp. 1390, 1391 (1953).

(6) Further indication of the intent of Congress may be seen from the language of the entire Sect. 8(a) in H.R. 4198 as it passed the House of Representatives in 1953:

"TITLE III

"OUTER CONTINENTAL SHELF OUTSIDE STATE BOUNDARIES

"Sec. 8. JURISDICTION OVER OUTER CONTINENTAL SHELF. — (a) It is hereby declared to be the policy of the United States that the natural resources of the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act. Federal laws now in effect or hereafter adopted shall apply to the entire area of the outer continental shelf. The Secretary is hereby empowered and authorized to administer the provisions of this title, and to adopt rules and regulations not inconsistent with Federal laws to apply to the area.

"*Except to the extent that they are inconsistent with applicable Federal laws now in effect or*

hereafter enacted, or such regulations as the Secretary may adopt, the laws and police powers of each coastal State which so provides shall be applicable to that portion of the adjacent outer continental shelf which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer continental shelf, and the Secretary shall determine and publish lines defining each such area of State jurisdiction: *Provided*, That State taxation laws within such area shall be limited to severance or production taxes and may be levied only by those States which apply and administer their conservation laws and other State governmental functions in said area: *Provided further*, That the rate of such severance or production tax shall not be in excess of the rate of said tax within State boundaries.

"This Act shall be construed in such manner that the character as high seas of the waters above the outer continental shelf and the right to their free and unimpeded navigation and navigational servitude shall not be affected.

"(b) Oil and gas deposits in the outer continental shelf shall be subject to control and disposal only in accordance with the provisions of this Act and no rights in or claims to such deposits, whether based upon applications filed or other action taken heretofore or hereafter, shall be recognized except in accordance with the provisions of this Act." (Emphasis added.)

The emphasized portion of the second paragraph of Sec. 8(a) comprises 43 U.S.C. Sec. §1333(a)(2) with modifications, and the enacted version of OCSLA went on in the same Section to exclude the application of State taxation laws on the Shelf. This further provided that applicable State laws will be administered and enforced by the officers and courts of the United States. Thus, except for provision for a single, federal leasing entity, and the exclusion of the application of State taxation laws on the Shelf, Congress did not exclude the application of other State laws to the exploration and exploitation of the resources of the Shelf.

(7) Viewed in proper perspective, then, and giving Congress the benefit of constitutional awareness and motives, the OCSLA was merely a confirmation of what Congress believed was the previously existing situation on the Shelf, with the establishment of a single, federal leasing program, and the exclusion of the application of State taxation laws on the Shelf. But, as shown above, the previously existing situation on the Shelf included the sovereign and property rights of the States, subject, of course: 1) to the supremacy of federal powers within their proper sphere, and, 2) to the capacity to exercise jurisdiction over the Shelf as over other United States public lands for a variety of purposes other than taxation.

(8) The only relevant official actions of the Executive were contained in the Executive Order of the President which accompanied the Truman Proclamation. Exec. Order No. 9633, 3 C.F.R. 437 (Supp., 1957) (which specifically preserved the rights and jurisdiction of the States in the Shelf) and the Executive Order establishing a naval petroleum reserve, which was declared expressly subject to

existing rights and for oil and gas only. Exec. Order No. 10,426, 3 C.F.R. 924 (Supp., 1958).

(9) The conclusions thus far are clear: since Shelf rights crystalized into legal rights and the capacity to exercise jurisdiction around 1945, and these rights and powers have not been foreclosed by necessary construction of the powers delegated to the Federal Government by our Constitution, and have not positively taken away from the States by Congress or the Executive since that time, they still subsist.

VII.

THE COURT SHOULD DECLARE THE CONCURRENT FEDERAL-STATE RIGHTS IN AND JURISDICTION OVER THE RESOURCES OF THE SHELF AND LEAVE THE CONTINUING POLITICAL QUESTIONS TO BE RESOLVED BY THE EXECUTIVE AND LEGISLATIVE BRANCHES AND THE COASTAL STATES.

A. The courts are not the appropriate arena for decisions on the political aspects of submerged lands matters.

(1) The burden of this Court from submerged lands litigation during the quarter century since the *California* case has been enormous. Yet there has been no real resolution of the basic controversies. Only portions of the California, Louisiana and Texas coasts have been delimited by judicial decree. A vast amount of work remains to be done

by the Court, and by Masters it appoints, on baseline questions alone if the previously established patterns of decision are continued. Myriad other controversies will probably be presented if present trends continue. And the issue of Federal and State jurisdiction over the Shelf (beyond the three-mile territorial sea) is only now for the first time being squarely presented to the Court.

(2) Claims of coastal States for an involvement in the decisions concerning the Shelf and its resources can be expected to increase. Demands to apply State laws for purposes of conservation, environmental protection and safety have been heard where the States are specially interested in ocean activities which affect nearby Shelf resources or the integrity of the marine environment, or which damage their shores or injure their citizens. In recognition of these demands Congress in the Water Quality Improvement Act of 1970, Sec. 11(o) (2), assigned certain additional authority to the States concerning oil pollution from ships, onshore and offshore facilities:

> "Nothing in this section shall be construed as *preempting any State* or political subdivision thereof *from imposing any requirement* or liability with respect to the discharge of oil into any waters within such State." (Emphasis added.) Pub. L. No. 91-224, Title I (Apr. 3, 1970); 84 Stat. 91; 33 U.S.C.A. 1161 (o) (2) (1970).

Congress had earlier stated:

> " . . . [I]t is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in pre-

venting and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution." Fed. Water Pollution Control Act, Sec. 1.(b); 33 U.S.C.A. 1151 (1970).

(3) Congressional establishment of a federal leasing program and exclusion of State taxing power over Shelf resources do not amount to an exhaustion of the field of legal problems which may arise relative to rights in and jurisdiction over the resources of the Shelf and associated activities. The public interest at the time Congress enacted the OCSLA demanded some certainty in Shelf exploration and exploitation. Congress responded with an interim solution which, as can be seen from the claims of all the parties to this case, is incomplete. Many other decisions will be necessary to establish in detail and with finality the equitable division of both benefits and burdens associated with rights in and jurisdiction over Shelf resources. One question as yet unanswered is whether the States may obtain any revenues from the Shelf resources other than by "taxation" which is precluded by the OCSLA. 43 U.S.C. § 1332(a)(2). May a State-imposed severance charge be considered not inconsistent with, but supplemental to, the federal law and thus required under the terms of the OCSLA to be implemented by federal officers?

(4) The demand of the Federal Government in this case for a declaration of "exclusive rights" in the resources

of the Atlantic Continental Shelf as against the defendant States (Complaint, p. 10) is essentially a political demand which leaves obscure many justiciable issues such as these: May a coastal State (such a Maine) require and issue a prospecting permit for Shelf exploration pursuant to its conservation, safety and mineral exploitation powers? (See *Wilson v. Cook*, 327 U.S. 474, and *Texas Oil and Gas Corp. v. Phillips Petroleum;* 277 F.Supp. 366 (1967) which authorized the application of State taxation laws and pooling orders relative to the extraction of resources from federal lands, and Part V. B. of this Brief, above). May a coastal State exercise some jurisdiction over Shelf resources, and the exploration and exploitation activities associated with them under its general police powers?

(5) The enormous gaps in present law concerning the Shelf are best filled by suitable legislation of the Federal Government and the States, and by Federal-State Compacts. Rather than seek a general declaration of exclusivity by this Court, with resultant prolongation and continued refinement of litigation on a myriad of issues, many of them political, the Executive Branch could seek action by Congress within the sphere of Federal Powers and concurrent action with the coastal States on matters where this is appropriate. Surely, obsolete and bankrupt technical arguments about King George and his Realm cannot be allowed to control the destiny of our States and the United States on matters so involved with present national interest as the development and conservation of Shelf resources. (Compare the "first hurdle" argument advanced in the U.S. Brief, 24-30.) Although we have inherited English common law for the protection of private rights and interests, the powers of the English Crown and

the extent of its "Realm" should not be allowed to determine today relative Federal-State rights and interests in the Shelf established under our federal system.

(6) Rejecting anachronistic fetters such as a presumed disposition of Shelf rights and jurisdiction by the conception of territory two centuries ago, or by our Constitution (which does not dispose of territorial rights of the States without their consent, and which delegates less than all sovereign powers to the Federal Government), or by the assumption in the California case that the seabed area there in issue (within the three-mile territorial sea) was beyond boundaries and therefore should be beyond State jurisdiction, the path is opened to a recognition of concurrent jurisdiction whereby both the States and the Federal Government may operate within their proper Constitutional spheres of jurisdiction on contemporary Shelf legal problems.

(7) As the development and conservation of Shelf resources and the protection of the marine environment continue to present ever more immense and intricate issues, the good will and cooperation of the States, rather than their exclusion from participation, best serves the resolution of these issues. Instead of denying the considerable contribution which can be made by the States, their cooperation within the framework of our constitutional system is established by a finding of concurrency. The political issues and many of the details of Federal and State rights in and jurisdiction over the Shelf can be resolved by the other Branches of government and the coastal States, with the Judicial Branch considering only the more defined issues of a justiciable character.

B. Declaration of the concurrent Federal-State jurisdiction over the Shelf best serves the public interest.

(1) The public interest of the United States includes the interests of all citizens and is best served by the concerted action of all levels of government including those closest to, and most affected by, the problems with which government deals. Advances in science and technology make the shared interest and concurrent jurisdiction of the States and the Federal Government more vital and important, as the opportunities and vulnerability of each level of government increase both with expanding exploration and exploitation of Shelf resources and as a result of actions taken by other government levels.

(2) The Executive recognizes the importance of the roles of coastal States in ocean and coastal problems. In the Annual Report of the President to the Congress on Marine Resources and Engineering Development, dated April, 1970, the President of the United States concluded his "President's Transmittal Message to Congress" with the paragraph:

> "The Federal government will continue to provide leadership in the nation's marine science program. But it is also important that private industry, State and local governments, academic, scientific and other institutions, increase their own involvement in this important field. The public and private sectors of our society must work closely together if we are to meet the great challenges which are presented to us by the oceans of our planet.
>
> "/s/ Richard Nixon
> The White House, April 1970."

This same Annual Report of the President is replete with calls for greater State involvement. For example, referring to the February 10, 1970, Environmental Message of the President to the Congress it states (p. 27):

> ". . . . Important sections of the message were devoted to water pollution. The Government has proposed legislation to encourage States to assume a greater responsibility for planning, regulating and managing their coastal areas . . . ."

And (at page 28):

> "Our impact on the marine environment must be regulated so that the coastal areas and the deep ocean can be preserved, developed and used for our continuing benefit. This can be accomplished through comprehensive management, beneficial use, protection and development of the coastal areas employing Federal, State and local governments and public and private interests . . . ."

In his annual report on marine affairs to Congress this year the President concluded his Letter of Transmittal as follows:

> "We have embarked on a strong marine science program for the 1970's. In the year ahead the Federal Government will build upon these accomplishments. And we will look to all sectors of the Nation's marine science community — State and local governments, industry and the universities — to contribute to the fullest to the United

States' efforts to make better use of the oceans and to provide world leadership on the major ocean issues before the community of nations.

"/s/ Richard Nixon
The White House, April 7, 1971"

(3) Further dramatic evidence of recognition of the interests of States in Shelf exploration and exploitation came when the Chief Executive recently requested Congress to cancel certain federally granted oil leases specifically because they lay seaward of a State sanctuary. In the words of the President to Congress:

"In 1955 the State of California took steps to protect a particularly beautiful area of its coastline by creating a State Sanctuary extending sixteen miles along the Santa Barbara Channel and closing it to all petroleum exploration. About a decade later, however, the federal government issued leases for petroleum exploration immediately seaward from the State Sanctuary. Oil platforms were soon constructed and petroleum drilling began. In January, 1969, a blowout in the Channel resulted in widespread oil pollution of the Sanctuary.

"The twenty federal leases seaward from the Sanctuary which were granted by the previous Administration should be cancelled. Legislation being submitted today would terminate these leases and create a Marine Sanctuary . . . .

* * *

"This proposal for Santa Barbara illustrates our strong commitment to use offshore lands in

> a balanced and responsible manner. *It recognizes the earlier decision made by the people of California to set aside a part of their coastline as a sanctuary,* and it extends the protected area across the Channel to Santa Cruz Island . . . ." (Emphasis added.) 6 *Pres. Docs.* 752-753 (Jun. 15, 1970); 116 *Cong. Rec.*, No. 96, p. S8823 (Jun. 11, 1970).

Congress did not approve the President's request, and the Department of the Interior is considering resumption of oil drilling in the Santa Barbara Channel under more stringent regulations. *New York Times*, Sep. 3, 1971, at 54, col. 1. One may conjecture that had the more severe requirements of California been in effect for drilling on the Shelf off its shores in 1969 the Santa Barbara spill might have been avoided. *See e.g.* Nanda and Stiles, Offshore Oil Spills: An Evaluation of Recent United States Responses, 7 *San Diego L. Rev.* 519, 528 (1970). Or that had both the California decision to establish a sanctuary, and the State drilling regulations prescribed specifically for its geologic situation, been considered the spill might have been avoided. It is certain, however, that the long term public interest of our nation is best served not by political interaction of the President and the Congress but by regular participation of the States in making law for the Shelf, both as to regulation of development activities, the conservation of resources, and the preservation of the marine environment.

(4) It needs little reflection to realize that the land bases and shore installations associated with offshore resource development are a primary concern of the coastal States. These exploration and exploitation activities involve

an integrated and continuous flow of persons and things both outward from land into the ocean and inward from the sea to the shore, from dry land to Shelf and from Shelf to dry land. The process does not stop at any artificial "boundary" line, to begin again beyond or inside such an artificial line. Men, materials, supplies, ships, barges, tenders, pipelines, electrical power and communications cables, and drilling rigs themselves are all a part of this continuous process of circular flow between the shore and the Shelf.

(5) Not only is the impact of Shelf activities and development greatest on the adjacent coastal State, that State invariably has strong grounds for jurisdiction on the basis of its territorial competence over men and materials, on the basis of citizenship (as it is in the main its residents who do the work on the Shelf), and often on the basis of jurisdiction over the ships and other vehicles and equipment using its ports and frequently possessing its State character through registration. And the resources extracted from the Shelf frequently are processed in, sold in, and used in the adjacent coastal State. Denying that State a role in decision-making for activities on the Shelf which affect it may limit only its bases for jurisdiction, not its interest and concern for the entire process of resource extraction and utilization.

(6) Further, the rapid progress in development of fixed offshore platforms and underwater habitates affixed to the Shelf, where human beings can live for extended periods of time, is reported in numerous stories in the public press as well as in scholarly journals and raises a whole new set of factors which calls for State involvement. Will the inhabitants on our Shelf be residents, hence citizens, of the adjacent coastal State? Do they qualify as

electors? Must they pay State *ad valorem* taxes, State income taxes and other State taxes? Do their children qualify to attend State public schools? Are these children and their parents "residents" so as to take advantage of the tuition differential in State universities? Can such persons stand for election to State office?

(7) In sum, there is ample scope for the action and cooperation of all branches of government at both the Federal and State levels relative to the exploration and exploitation of Shelf resources. Appropriate governmental action and cooperation are fostered best by candid declaration in this case that there exists concurrent Federal and State jurisdiction over the Shelf and that the best course of action is concerted cooperative action on the many specific issues which are evoked.

(8) Declaration of concurrent Federal-State rights in and jurisdiction over the Shelf by this Court will not displace or impair the paramount interest and powers of the Federal Government within the areas of its delegated sovereign powers; will not destroy the federal leasing program established by Congress in the OCSLA; and will not hinder the possibilities of Federal-State accommodation of interests on the myriad problems and controversies which will arise over the activities on and development of resources of the Shelf. Rather, declaration of concurrent rights and jurisdiction can be expected to promote Federal-State cooperation and lead to resolution of those problems in the Executive and Legislative arenas. Such arenas are most suitable for the elaboration of decisions on baselines and the accommodation of conflicting claims on conservation, safety and other matters which are within the interests of the sovereigns concerned.

(9) As Justice Frankfurter stated in his concurring opinion in the Florida case (363 U.S. 121, at 132 (1960)):

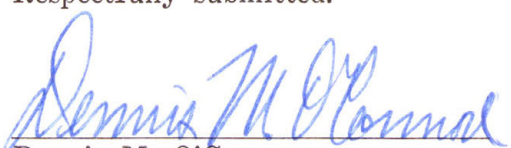
> "But in these matters we are dealing with great acts of State, not with fine writing in an insurance policy. . ."

Further "great acts of State," blended with enlightened and sympathetic statesmanship, will be the real source of resolution of the interests of all parties. Bickering over legalistic and technical points of language to resolve major issues with polictical overtones does not fulfill this requirement.

CONCLUSION

For the reasons stated, we urge the Court to declare that rights in and jurisdiction over exploration and exploitation of the resources of the Shelf underlying the Atlantic Ocean beyond three miles from the coastline do not belong exclusively either to the Plaintiff or to the defendant States, and that concurrent Federal and State rights and jurisdiction exist for the Shelf. The Court can of course retain jurisdiction to rehear the case if the political issues are not set to rest.

Respectfully submitted.



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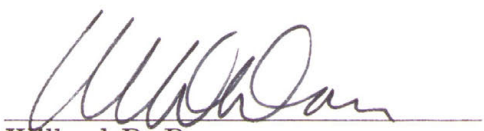

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APPENDIX

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LEGISLATIVE HISTORY—SUBMERGED LANDS ACT

PRIOR COMMITTEE REPORTS, Appendix I,

House Report No. 1778,

1953 U. S. Code Cong. and Admin. News, p. 1415, 1417-1422
(Footnotes omitted.)

III. HISTORY OF LEGISLATION

One hundred and sixty years of unchallenged ownership by the States

Throughout our Nation's history the States have been in possession of and exercising all the rights and attributes of ownership in the lands and resources beneath the navigable waters within their boundaries. During a period of more than 150 years of American jurisprudence the Supreme Court, in the words of Mr. Justice Black, had—

"used language strong enough to indicate that the Court then believed that the States also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

That same belief was expressed in scores of Supreme Court opinions and in hundreds of lower Federal courts' and State courts' opinions. Similar beliefs were expressed in rulings by Attorneys General of the United States, the Department of the Interior, the War Department, and

the Navy Department. Lawyers, legal publicists, and those holding under State authority accepted this principle as the well-settled law of the land.

As late as 1933, the then Secretary of the Interior, Harold L. Ickes, in refusing to grant a Federal oil lease on lands under the Pacific Ocean within the boundaries of California, recognized:—

"Title to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriate except by authority of the State."

Claims of States first challenged by Federal officials in 1937

It was not until a few applicants for Federal oil leases and their attorneys continued to insist that the United States owned the soil under navigable waters, that, in the words of Mr. Ickes, "doubt" arose in his mind as to which Government owned the submerged lands. The "doubt" was first publicly expressed in the Nye resolution introduced in the Seventy-fifth Congress in 1938, and was subsequently expressed in the Hobbs and O'Connor resolutions and the Nye and Walsh resolutions introduced in the Seventy-sixth Congress in 1939, all of which failed of enactment. Had the Congress followed the recommendations of the Departments of Interior, Justice, and Navy, by enacting any one of the resolutions, it would have attempted to appropriate for the United States, without compensation to the States, the 3-mile marginal belt as a naval petroleum reserve, and the Attorney General would have been authorized to establish through judicial proceedings the Government's title.

The theory advanced in 1938 and 1939 by the same Federal departments which now oppose H. R. 5992 was to the effect that the United States had no right to appropriate the natural resources within the submerged coastal lands unless the Congress, as the policy-making branch of the Government, asserted what was contended to be a dormant right. They spoke of the right as being "novel" and one never before asserted by the United States under the Constitution, and as being a right which the States had been asserting and enjoying, and would continue to assert and enjoy unless and until the Congress changed the policy of the Federal Government. Congress, however, did not change the long-existing and recognized policy.

Congress in 1946 recognized States' claims

As a result of continuing threats of Secretary of the Interior Ickes to grant Federal leases on portions of the submerged coastal lands, resolutions were introduced in 1945 in the Seventy-ninth Congress, quieting title to these lands in the States. After extensive hearings, these resolutions were passed in 1946 as House Joint Resolution 225. However, the reaffirmation of the well-established policy was voided through a veto by President Truman. The House failed to override the veto.

While the Congress was considering House Joint Resolution 225, the Federal officials, being dissatisfied with the continued refusal of Congress to appropriate property long claimed by the States, instituted on May 29, 1945, a suit against the Pacific Western Oil Corp., a lessee of the State of California to recover part of the submerged lands claimed by California and its lessee.

After House Joint Resolution 225 passed the House by a large vote, and while it was pending in the Senate, the suit against Pacific Western Oil Co. was voluntarily dismissed by Attorney General Clark, and an original action was brought by him in the Supreme Court against the State of California, wherein he alleged that the United States "is the owner in fee simple of, or possessed of paramount rights in and power over" the submerged lands within 3 miles of the California coast. These two suits were instituted and the latter one against California was prosecuted after the Congress had refused in 1938 and again in 1939 requests of the Attorney General and other Federal officials for permission to institute a suit for that purpose.

The House, in failing to override the veto of House Joint Resolution 225 was no doubt influenced, as the President had been, by the pending litigation.

Decision of Supreme Court denying California ownership

On June 23, 1947, the Supreme Court rendered its opinion in the case of United States v. California, 332 U.S. 19, 67 S.Ct. 1658, and on October 27, 1947, a decree was entered which reads, in part, as follows:

"1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the

north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein."

In the Court's majority opinion, Mr. Justice Black said:

"The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner."

He then proceeded to define those two capacities as that of national defense and of conducting foreign relations.

Mr. Justice Black, in the majority opinion, stated further:

"As previously stated this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court then believed that States not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

Thus the Court by its decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be.

This committee, having heard the testimony of many able and distinguished State attorneys general, of representatives of the American Bar Association and State bar associations, and of other able and distinguished jurists and lawyers, is of the opinion that no decision of the Supreme Court in many years has caused such dissatisfaction, confusion, and protest as has the California case. We have heard it described in such terms as "novel," "strange," "extraordinary and unusual," "creating an estate never before heard of," "a reversal of what all competent people believed the law to be," "creating a new property interest," "a threat to our constitutional system of dual sovereignty," "a step toward the nationalization of our natural resources," "causing pandemonium," etc.

Power of Congress to reestablish long-accepted policy of State ownership

The committee recognizes that it is within the province of the Supreme Court to define the law as the Court believes it to be at the time of its opinion. However, the Supreme Court does not pass upon the wisdom of the law. That is exclusively within the congressional area of national power. Congress has the power to change the law, just as the Supreme Court has the power to change its interpretation of the law by overruling pronouncements in its former opinions which have been accepted as the law of the land. Therefore, in full acceptance of what the Supreme Court has now found the law to be, Congress may nevertheless enact such legislation as in its wisdom it deems advisable to solve the problems arising out of the decision.

Indeed, the power of the Congress to establish the law for the future as it was formerly believed to be, was, in effect, recognized by the Court in the California case for it held in connection with the lands in question that the power of Congress under article IV, section 3, clause 2 of the Constitution to dispose of territory or other property of the United States was without limitation; and that it would not be assumed that—

"Congress, which had constitutional control over Government property, would execute its powers in such way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission."

Many witnesses testified that they construed the opinion as an invitation or recommendation to the Congress to consider the legislative question as to whether in the public interest the States should continue in possession of, and exercise State control of, the submerged lands within their boundaries, or the Federal Government should take from the States these lands and hereafter exercise all control over them.

IV. SUPREME COURT DECISION MAKES LEGISLATION NECESSARY

When House Joint Resolution 225 was passed by the Congress, there existed only a threat to the long-established and settled policy of State ownership of these lands. Now, as a result of the reversal of this policy by the Supreme Court's opinion in the California case, there exists, in the words of Attorney General Clark, " a variety of unusually complex problems which must be resolved."

The Committee deems it imperative that Congress take action at the earliest possible date to clarify the endless confusion and multitude of problems resulting from the California decision, and thereby bring to a speedy termination this whole controversy. Otherwise inequities, injustices, vexatious and interminable litigation, and the retardment of the much-needed development of the resources in these lands will inevitably result.

Issue of title is confused

While the Supreme Court decreed that California was not the owner of the 3-mile marginal belt, it failed expressly to decree that the United States was the owner. Furthermore, although requested by the Attorney General, and others appearing amici curiae, the Court refused to hold that the United States was the "owner in fee simple" or had "paramount rights of proprietorship" in such 3-mile belt.

"Fee simple" and "proprietorship" are words commonly used in law to denote ownership, while the words "paramount rights in and full dominion over" employed by the Court are foreign to the law of real property.

Attorney General Clark expressing the view that paramount rights and full dominion signified a title even higher than a fee simple testified:

"They said to us in effect, go ahead and get the oil. That is what the effect of the opinion is. What more could the Supreme Court have held? If it held that we had fee simple title, something might come up some day on this

particular land. This is a novel decision. This land is under water. It is in the 3-mile belt * * * So they did not want to be bound by any fee simple proposition.

"So they could have said fee simple title, they could have said any of the descriptive terms that we use with reference to titles, but they might have found themselves in difficulty later on when someone else might have claimed that all you have said here is that the United States had fee simple title."

Mr. Justice Frankfurter, in his dissenting opinion, had difficulty in determining the meaning and legal significance of the words used by Mr. Justice Black in the majority opinion, stating that:

"The Court, however, grants the prayer but does not do so by finding that the United States has proprietary interests in the area. To be sure it denies such proprietary rights in California.

"Of course the United States has "paramunt rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?

"The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part."

Mr. Justice Reed said in his dissent:

"This ownership in California would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the Nation."

Many witnesses were of the opinion that the construction of paramount rights as including fee ownership would, if carried to its logical conclusion, destroy the basic legal distinction between governmental powers under the Constitution on the one hand, and State or private ownership of real property on the other, because the "paramount powers" of the United States do not depend upon whether the point at which they may need to be exercised is above or below low-water mark or on one side or the other of a line dividing a bay from the coastal waters.

Many witnesses expressed the opinion that the title was left suspended in mid-air, leaving the property ownerless, contrary to the basic concept of our common law that legal title to every piece of property must exist in someone; others expressed the view that the Supreme Court held, in effect, that Congress, as the policy-making branch of the Federal Government, had the power, in the first instance, to determine who shall be the owner of the lands.

The theory that title to the 3-mile belt was in "the family of nations," expressed by Congressman Hobbs, of Alabama, was also adhered to by representatives of the Navy Department in 1938 and 1939. With respect to inland waters, Congressman Hobbs agreed that the paramount rights of the Federal Government, as defined by the Supreme Court in U. S. v. California, 332 U.S. 19, 67 S.Ct. 1658, might likewise be exercised for the purposes of national defense and international negotiations.

Mr. Justice Black, in speaking for the majority of the Court in the California case, said:

"The very oil about which the State and Nation here contend might well become the subject of international dispute and settlement."

If the Court in making the statement had reference to the military power of a foreign nation to dispute the rights of the States to take oil under submerged lands within their boundaries, then the same statement could correctly be made about oil under uplands, providing, of course, the foreign nation possessed a military force strong enough to compel a settlement by the United States. However, if the statement was made because the Congress had never legislatively asserted on behalf of the United States or the States title to the submerged lands within their boundaries, then we think that is all the more reason why the Congress should now remove all doubt about the title by ratifying and confirming the titles long asserted by the various States, subject always, of course, to the paramount powers of the Federal Government under the Constitution, which titles have never been disputed by any foreign nation.

The committee is unable to determine whether or not the Supreme Court held that the United States has actual title in and to the submerged coastal lands adjacent to California, but it is obvious that Congress has the power to legislate in any event, for, as the Court said, the Federal Government has —

"the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."

On the other hand, if the Federal Government does have a fee simple title to these lands and even something greater and paramount to title as contended by the Attorney General of the United States, then the Congress, under the authority of article IV, section 3, clause 2, of the Constitution, has unlimited control over such lands and may dispose of them in such manner as it deems in the public interest. The committee is, therefore, of the opinion that S. 1988, if enacted, will establish, confirm, and vest in the littoral States, which have since the formation of our Union claimed title to the marginal belt, such title and rights as the Federal Government has, subject to the reservations contained therein.

CERTIFICATE OF SERVICE

We certify that in compliance with Supreme Court Rule 33 we have this day served a copy of the foregoing Motion and Brief upon the Plaintiff and Defendants in this case by mailing a copy certified air mail, with postage prepaid, to each of the following:

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Dated: September 17, 1971.

By Dennis M. O'Connor

By