IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF,

versus

STATE OF MAINE, ET AL., DEFENDANTS

Before the Special Master

EXCEPTIONS TO REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS OF THE STATES OF NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA

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UNITED STATES OF AMERICA, PLAINTIFF,

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Before the Special Master

EXCEPTIONS OF THE STATES OF NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA TO THE CONCLUSIONS OF THE SPECIAL MASTER

Come now the States of North Carolina, South Carolina, and Georgia and except to the conclusions set forth in the report of the Special Master as follows:

1. These Defendants except to conclusions 1, 2, 4, 5, 6, 7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 28, and 29 on the ground that they are contrary to the evidence.

2. These Defendants except to conclusions 8, 9, 10, 11 and 14 on the ground that they are irrelevant to the basic question presented by this litigation.

3. These Defendants except to conclusions 21, 31 and 32 on the ground that they are contrary to the law and the evidence.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1969

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UNITED STATES OF AMERICA, PLAINTIFF,

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STATE OF MAINE, ET AL., DEFENDANTS

Before the Special Master

BRIEF FOR THE STATES OF NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA IN SUPPORT OF THEIR EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

HISTORY OF THE PROCEEDINGS

The history of this proceeding is accurately set forth at pages 1 through 8 of the Report of the Special Master.

HISTORICAL BACKGROUND

I

The concept of a coastal state having a right to assert authority over adjoining seas goes back to antiquity and was well established by Roman times.

A. **Record References.**

Aside from a number of references to Roman Law (*e.g.*, Tr., 2134; *Maine, et al.*, Exhibit 690, p. 71), the tes-

timony and exhibits submitted by the parties do not expressly concern themselves with the origin of the concept of a coastal state having a right to assert authority over adjoining seas. The works of the authorities relied upon by the parties, however (*e.g.*, Potter, *The Freedom of the Seas in History, Law, and Politics,* pp. 28-32 [1924]), amply demonstrate that the concept goes back to antiquity and was well established by Roman times.

B. **Argument.**

The Romans referred to the Mediterranean Sea as "mare nostrum" or "our sea".[1] The appellation was not particularly presumptuous. According to Higgins and Colombos, *International Law of the Sea,* p. 24 (1943), maritime codes date at least from the Rhodian Code of the third or second century, B.C. By Roman times, the concept of a **proprietary right** in the sea was well established in both law and practice. Roman law early distinguished between that property which was incapable of belonging to any man (*res nullius*), and that which was capable of being owned either privately (*in nostro patrimonio*) or by all men in common (*res communis*). Roman law was also quite clear in its placement of the sea in the last-mentioned category of that property which is capable of ownership (*i.e., res communis*). According to the Institutes of Justinian:

> "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not like the sea, subject only to the law of nations." Institutes 2.1 (Sandars Translation).

Although from a conceptual viewpoint it could well be argued that the phrases "mankind" (*omnium*) and "law of

[1] See Newmark, *Dictionary of Foreign Words and Phrases,* p. 138, "mare nostrum" (1950).

nations" (*juris gentium*) in the above passage caused this provision of Roman law to be applicable to all men, whether citizens of Rome or not,[2] it was quite generally recognized that the enforcement and protection of this property right "in common" was the special prerogative of the Roman people collectively, or, in other words, a special prerogative of the State. See Sandars, *The Institutes of Justinian,* pp. 91-92 (7th Ed. 1952). As pointed out in Potter, *The Freedom of the Seas in History, Law, and Politics,* pp. 28-32 (1924), the Mediterranean was, in Roman eyes, a Roman lake; as such it was subject to Roman law enforced by the sovereign authority of Rome; and the common ownership (*res communis*) of it in the proprietary sense meant *res communis* or *res publicae* for Roman citizens and not necessarily for anyone else.

II

The assertion of dominion and control over adjoining seas by coastal states survived the fall of Rome and the death of its own claims.

A. Record References.

1. "With the breaking of Roman power, the Mediterranean states which had exercised maritime dominium in previous years regained control over certain maritime areas near their territories. Pisa and Tuscany once more controlled the Tyrrhenian Sea, and imposed tolls upon those entering its waters. The

[2] Authorities as Sandars have pointed out that the term *res communis* was not infrequently used in the sense of *res publicus* or public property. In this connection, it may be noted that even today Black's Law Dictionary, p. 1470, "*res publicae*" (4th Ed. 1951), includes as examples of "[t]hings belonging to the public": the sea, navigable rivers and highways. Fenn speaks of the not surprising historical transition of the "*res publicae* which classical Roman law ascribed to the *populus Romanus,* or, to the state", to the concept of dominion in the monarch "either as supreme property owner, or as representative of the state". See *Maine, et al.,* Exhibit 690, p. 71.

Genoese did likewise in the Ligurian Gulf. Venice—somewhat later—acquired a dominion of the Adriatic which was variously described by contemporary writers as a 'seignory,' a 'royalty,' an 'empire," and so on. It was said that they possessed 'as full a jurisdiction in the sea as in the city,' that the neighboring gulf 'belonged' to them." *Maine, et al.,* Exhibit 739, pp. 36-37.

2. The claim of the Venetians and Genoese to "jurisdiction and imperium" over adjoining seas extended to a distance of at least 100 miles. *Maine, et al.,* Exhibit 690, p. 123.
3. The Papacy claimed jurisdiction over the coastal waters of Latium—which came to be referred to as "the Church's sea" (*mare ecclesiae*). *Maine, et al.,* Exhibit 739, p. 37.
4. Claims of maritime dominium and sovereignty over broad expanses of adjoining oceans and seas were also asserted by numerous other coastal states including Spain, Portugal, Denmark, France, Poland and Norway. *Maine, et al.,* Exhibits 189, pp. 371-372; 469, p. 38. See also *United States,* Exhibit 51.

B. **Argument.**

In addition to the language quoted in the initial record reference above, it has been succinctly observed that:

"The idea that wide areas of the sea could be the object of State sovereignty lived long after Rome's own claims died. All through the Middle Ages, Mediterranean States claimed jurisdiction 100 miles from shore. England made special claims beginning in the time of Edgar the Peaceful, and insisted on salute from foreign vessels in the 'British Seas' as late as the seventeenth century. In the same era, Papal grants were the basis of claims by Spain and Portugal to the entire South Atlantic, Pacific, and Indian Oceans. Denmark asserted dominion over all waters between her homeland and Iceland, on the theory that ownership of each of the opposing shores gave her special rights to all waters up to a line halfway between the two—a

theory which Plowden applied on behalf of England, in claiming halfway to Spain and the entire area of the English Channel." Note, *National Sovereignty Over Maritime Resources,* 99 U. Pa. L. Rev. 82 (1950).

Fulton similarly points out:

"Long before the end of the thirteenth century Venice, eminent for her commerce, wealth, and maritime power, assumed the sovereignty over the whole of the Adriatic, though she was not in possession of both the shores, and after repeated appeals to the sword she was able to enforce the right to levy tribute on the ships of other peoples which navigated the Gulf, or to prohibit their passage altogether. **The neighbouring cities and commonwealths were soon compelled to agree to her claim, which was eventually recognized by the other Powers of Europe and by the Pope. The rights of Venice to the dominion of the Adriatic, arising this way by force, became firmly established by custom and treaty.**" Fulton, *The Sovereignty of the Sea,* pp. 3-4 (1911). (Emphasis added.)

Fulton further states that:

". . . in the north of Europe, Denmark and Sweden, and later Poland, contended for or shared in the dominion of the Baltic. The Sound and the Belts fell into the possession of Denmark, the Bothnian Gulf passed under the rule of Sweden; and all the northern seas between Norway on the one hand, and the Shetland Isles, Iceland, Greenland and Spitzbergen, on the other, were claimed by Norway and later by Denmark, on the principle referred to above, that possession was held of the opposite shores. . . .

Still more extensive were the claims put forward by Spain and Portugal. In the sixteenth century these Powers, in virtue of Bulls of the Pope and the Treaty of Tordesillas, divided the great oceans between them." *Ibid.* at pp. 4-5.

We are unaware of any evidence in the record which disputes either the existence of these claims or the fact

that many were internationally recognized by treaty and custom. The natural flow of the concept of a coastal state's right to assert both *dominium* and *imperium* over its adjoining seas from the *res publicae* (*i.e., res communes*) of Roman Law to the "crown rights" of later periods of history has already been referred to. In the words of Fenn in "The Origin of the Right of Fishery in Territorial Waters", p. 71n.4 (1926) [*Maine, et al.,* Exhibit 690]:

> "The historical reason, of course, is, that the *res publicae* which classical Roman law ascribed to the *populus Romanus,* or, to the state, were gradually coming to be ascribed to the monarch, either as supreme property owner, or as representative of the state."

III

The claim of British Sovereigns to dominion and control over the seas adjoining the British Isles dates back to antiquity.

A. **Record References.**

1. In *"Mare Clausum",* John Selden refers to the existence of pre-Roman assertions of Britain's dominion over its adjoining seas, saying:

> "It is upon good ground concluded, that the most ancient Historie, whereto any credit ought to bee given about the affair's of *Britain,* is not elder then the time of *Caius Julius Caesar;* the Ages before him beeing too obscured with Fables. But at his coming wee finde clear passages of the *Britains* Ownership and Dominion of the Sea flowing about them, especially of the South and East part of it, as a perpetual Appendant of the Soveraigntie of the Island. For, they not onely used the Sea as their own at that time for Navigation and Fishing; but also permitted none besides Merchants to sail unto the Island without their leav; nor any man at all to view or sound the Ports and Sea-Coast." *Maine, et al.,* Exhibit 204, pp. 188-189.

2. Pitman Potter refers to the continuing assertions of dominion over the adjoining seas during the Anglo-Saxon and post "Conquest" periods in his work "The Freedom of the Seas in History, Law, and Politics", by pointing to the facts that:

   "A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself 'king . . . of the ocean lying round about Britain.' After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly the sovereignty which his ancestors the kings of England were wont to have in the sea. . . ." *Maine, et al.*, Exhibit 469, pp. 38-39 See also *Maine, et al.*, Exhibits 197, pp. 185-186; 718, p. 37.

3. The division of the ocean lying about Great Britain into four parts known as the four British seas is similarly ancient, with some of the *Saxon* Monarchs having taken the title of *"Basileus quatuor Marium"* (King or Emperor of the four seas). *Maine, et al.*, Exhibit 718, pp. 35-38. See also *Maine, et al.*, Exhibit 204, pp. 182-186.

4. Plaintiff's own witness, Professor Samuel E. Thorne, conceded that the "royal fish doctrine" [the king's ownership of certain fish as sturgeon and whale] goes back to Anglo-Saxon times. Tr., 2685.

5. Sir Mathew Hale's conclusion (circa 1667) that the King owned the seabed was based upon his study of records going back as far as Edward I (1272-1307). [Testimony of Professor Morton J. Horwitz.] Tr., 123.

6. A proclamation of Edward I in 1299 entitled "Of the Superiority Over the English Sea and the Office of Admiral" referred to the fact that: "the Kings of England, by reason of the sayd Kingdom, from time whereof there is no memory to the contrary, have been in peaceable possession of the Dominion of the Sea of England, and of the Isles being in the same."

[Testimony of Professor Morton J. Horwitz.] Tr., 121-122; *Maine, et al.*, Exhibit 176.

B. **Argument.**

The antiquity of crown claims of dominion and control over the seas surrounding the British Isles is amply supported by the cited record references. Not only has Plaintiff not introduced any evidence at all to the contrary, but at least one of its witnesses, Professor Samuel E. Thorne, concedes that the "royal fish doctrine" [clearly a *property* prerogative of the king (*i.e.*, dominium) respecting certain fish of the sea] dates back to Anglo-Saxon times.

ARGUMENT

1. The first conclusion of the Special Master, *i.e.* that English law prior to the accession of the Stuart dynasty in 1603 did not recognize ownership by the crown of the seabed and subsoil of the narrow or English seas, is contrary to the evidence.

A. **Record References.**

1. By the reign of Queen Elizabeth (1558-1603) it was well recognized that the Crown owned the seabed in the seas adjoining Great Britain. [Testimony of Professor Morton J. Horwitz.] Tr., 125-126, 128. See also *Maine, et al.*, Exhibit 201.
2. A treatise writer of the period, William Welwood, in "An Abridgement of all Sea-Lawes" (1590), declared the extent of the Crown's claims to be 100 miles out to sea if they were able to extend their protection that far. [Testimony of Professor Morton J. Horwitz.] Tr., 127. See also *Maine, et al.*, Exhibit 209.
3. "Under English law and practice of the 17th and 18th centuries, ownership of the seabed under the high seas off English coasts was vested in the Crown. The precise distance this ownership extended from the coast was a matter of some uncertainty. But that

English law then recognized Crown proprietary rights in the seabed is altogether clear." [Testimony of Professor Morton J. Horwitz.] Tr., 120. See also Tr., 671-672.

4. Dozens of treatise writers of the period acknowledged the King's sovereignty, dominion and ownership of the seabed as well as the sea itself, and there are hundreds of official acts based upon recognition of the royal claim. [Testimony of Professor Morton J. Horwitz.] Tr., 128, 145-54. See also *Maine, et al.,* Exhibits 171, 174, 175, 176, 178, 181, 182, 203, 204, 207, 221, 443, and 444.

   (a) 4 Bacon, *A New Abridgement of the Law* (1759) declares:

   > "It is universally agreed, that the king hath the Sovereign Dominion in all Seas and great Rivers; which is plain from *Selden's* Account of the ancient *Saxons* who dealt very success- in all naval Affairs; and therefore the Territories of the English Seas and Rivers always resided in the King.
   >
   > **And as the King hath a Prerogative in the Seas, so hath he likewise a Right to the Fishery and to the Soil;** . . ." *Maine, et al.,* Exhibit 171. (Emphasis added.)

   (b) Blackstone, *Commentaries on the Laws of England* (1765) Vol. 2, p. 262, explains the law by saying:

   > ". . . for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry." *Maine, et al.,* Exhibit 174.

   (c) Spelman, *The English Works of Sir Henry Spelman* (1723) similarly shows that:

   > "The appropriate Sea is that which joyneth to the Territories of any Prince, as namely his Majesty of *England* . . . and the face thereof be free for all Men as touching . . .

and Navigation; **yet the Beddy and Soil belongeth to the particular Lord: so that no Man haply ought to cast a Net or Anchor therein, but by his favour and License, for which they commonly render Toll and Custome.**" *Maine, et al.*, Exhibit 207.

(d) One of Selden's principal arguments in *"Mare Clausum"* (1635) is that there must be a property right to the seabed because its products are not inexhaustible. [Testimony of Professor Morton J. Horwitz.] Tr., 135. *Maine, et al.*, Exhibit 204, p. 143.

(e) Selden's *"Mare Clausum"* (1635) was recognized as an authoritative work to which eminent lawyers as Lord Chief-Justice Hale and Hargrave appealed as proving the existence and legality of the rights of the crown of England to dominion and control of the British seas; Selden's views held their place in recognized treatises on the law of England as late as 1830. [Testimony of Professor Morton J. Horwitz.] Tr., 137. *Maine, et al.*, Exhibit 189, p. 368.

(f) Charles I ordered copies of Selden's "Mare Clausum" to be kept in the Council-Chest, Court of Exchequer, and Court of Admiralty as evidence of the Dominion of the British seas. *Maine, et al.*, Exhibit 189, p. 369.

(g) There are hundreds of 16th and 17th century royal grants of either overflowed lands or lands that were reclaimed from the sea. *Maine, et al.*, Exhibit 144-145.

(h) In 1609, James I asserted the English Crown's sovereignty over the sea by denying foreigners the right to fish upon "the Seas of Great Britaine, Ireland, and the rest of the Isles adjacent" without having first obtained a license from the King or his Commissioners. [Testimony of Professor Morton J. Horwitz.] Tr., 213. *Maine, et al.*, Exhibit 221.

(i) Charles I issued a similar proclamation "for restraint of Fishing upon His Magesties Seas and Coasts without License" in 1636. [Testimony of Professor Morton J. Horwitz.] Tr., 214, 215. *Maine, et al.,* Exhibit 222.

5. The only British judicial decision known to have adjudicated the point during the Seventeenth Century is *Rex v. Oldsworth,* Hillary 12 Charles I (1636-37). At issue was the ownership of derelict lands. The decision upholding the Crown's right to such lands (from which the sea had receded due to changes in the tide) was squarely based upon the proposition that since the soil under the sea was the King's while under water, it could not "become the subjects because the water hath left it." [Testimony of Professor Morton J. Horwitz.] Tr., 141-142.
6. Professor Samuel E. Thorne, **one of Plaintiff's own witnesses,** conceded on cross examination that *Rex v. Oldsworth* did in fact uphold the Crown's ownership of the sea and the seabed, and that so far as he knew *Rex v. Oldsworth* was the only decision on the question of whether the Crown did own the sea and seabed. Tr., 2679-2680, 2682.
7. Professor Samuel E. Thorne, **one of Plaintiff's own witnesses,** admits that the concept of Crown ownership of the sea and soil beneath the sea was known as early as the reign of Queen Elizabeth. Tr., 2442.
8. Professor Samuel E. Thorne, **one of Plaintiff's own witnesses,** agrees with Fulton's description of Selden's "Mare Clausum" as the "approved embodiment of British public policy" of the period. Tr., 2703.
9. The concept of the Crown's dominion and ownership was described in the 19th Century in Hall, "Essays on the Rights of the Crown in the Sea", p. 2 (1875), as follows:

"This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the

maritime jurisdiction, but it includes the very fundum or soil at the bottom of the sea." *Maine, et al.,* Exhibit 449, p. 2.

10. While uncertainty existed as to the precise extent of the Crown's dominium and control of the sea, the figure of 100 miles was commonly referred to as the outer limit of the King's prerogatives. [Testimony of Professor Morton J. Horwitz and Professor David H. Flaherty.] Tr., 127, 152-53, 409, 889. *Maine, et al.,* Exhibits 199, 209.

    (a) William Welwood declared the extent of Crown claims to be 100 miles out to sea in his 1590 treatise. [Testimony of Professor Morton J. Horwitz.] Tr., 127. *Maine, et al.,* Exhibit 209.

    (b) In interpreting the proclamation of James I (concerning the prohibition of foreigners fishing in the British seas) of 1609 to the Spanish Ambassador, Lord Salsbury said that it was generally agreed that the territorial sea was 100 miles. [Testimony of Professor Morton J. Horwitz.] Tr., 409.

    (c) The second charter of the Virginia Company (also 1609) defined the jurisdiction of the colony over the marginal sea, seabed, and resources thereof as extending 100 miles out to sea. [Testimony of Professor David H. Flaherty.] Tr., 887-889, 896.

    (d) In 1713, Sir Charles Hedges, Judge of the Admiralty Court, wrote that "all nations pretend to dominion at sea on their coasts; some extend it to no further than they can reach, some sixty miles, some a hundred or more, with regard to the seas which wash their borders, or opposite shores." [Testimony of Professor Morton J. Horwitz.] Tr., 152-153. *Maine, et al.,* Exhibit 199.

    (e) In 1811, Chitty, in his "Game Laws", refers to a 60 mile limit. [Testimony of Professor Morton J. Horwitz.] Tr., 409.

(f) Nations of the 16th and 17th centuries (including England) sometimes exercised simultaneous jurisdictions at different distances for different purposes in the seas. [Testimony of Judge Philip C. Jessup.] Tr., 1136.

11. Conceptual distinctions between the Crown's rights of dominium and imperium were well understood and accepted during the 17th and 18th centuries. [Testimony of Professor Morton J. Horwitz.] Tr., 129, 138. *Maine, et al.,* Exhibits 178, 194.

(a) In a series of lectures delivered at Gray's Inn in 1622, Serjeant Robert Callis stated:

"First, touching our *Mare Anglicum* . . . the King hath therein these powers and properties, *videlicet.*

1. *Imperium Regale*
2. *Potestatem legalem*
3. *Proprietatem tam soli quam aquae*
4. *Possessionem & proficuum tam reale quam personale*

And all these he hath by the Common Law of England: in the G. R. 2 Fritz. Prot. 46. it is said **that the Sea is within the Legiance of the King, as of his Crown of England;** This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Anglia,* and this by the Common Law of England." [Testimony of Professor Morton J. Horwitz.] Tr., 129. *Maine, et al.,* Exhibit 178, p. 17; see also, *e.g., United States,* Exhibit 17, Memoranda and Appendix, p. 1 (Statement by Roscoe Pound).

(b) In Sir Mathew Hale's "De Jure Maris" (circa 1667), it is similarly noted of the King's rights and interest in the adjoining seas:

"In this sea the king of England hath a double right, *viz.* **a right of jurisdiction** which he ordinarily exerciseth by his admiral, and **a**

> **right of propriety or ownership.** The latter is that which I shall meddle with.
>
> The King's right of propriety or ownership in the sea and soil thereof is evidenced principally by these things that follow." [Testimony of Professor Morton J. Horwitz.] Tr., 138. *Maine, et al.,* Exhibit 194, pp. 10-11. (Emphasis added.)

B. **Argument.**

While legal history is no more an exact science than is the law itself, the massive evidence introduced by the Defendant States furnishes a degree of certitude far beyond that accorded to most commonly accepted historical propositions in showing: (1) that the claim of the British Sovereigns to both *dominium* and *imperium* in their adjoining seas was well established during the seventeenth and eighteenth centuries, and (2) that these claims embraced ownership of the seabed as well as the sea itself. Indeed one of Plaintiff's own witnesses, Professor Samuel E. Thorne, expressly conceded that the concept of Crown ownership of the sea and the soil beneath the sea was known as early as the reign of Queen Elizabeth (Tr., 2442), that Selden's exposition of the concept in *Mare Clausum* was the "approved embodiment of British public policy" of the period (Tr., 2703), and that it was upheld by the only known judicial decision of the period squarely in point, *i.e., Rex v. Oldsworth,* Tr., 2679-2680, 2682. Since there is little in history that is not debated by someone or other, the virtual unanimity of opinion on the matter on the part of English legal authorities of the period would seem by itself to attest to the accuracy of the historical proposition. From Blackstone, Bacon, Hale and Selden on down it was uniformly accepted (and expounded) that the Crown's dominion and ownership of the British seas included the seabed. See *Maine, et al.,* Exhibits 138, 171, 174 and 204. We

respectfully submit that as a historical fact, the proposition that this was indeed the law, policy and practice in England during the 17th and 18th centuries cannot seriously be questioned.

2. The second conclusion, *i.e.* that the sovereignty claimed by the crown prior to 1603 in the English seas was protective and not territorial in nature, is contrary to the evidence.

See argument in support of Exception No. 1, *supra.*

3. The fourth conclusion, *i.e.* that claims of the crown to exclusive fishing rights in the English seas did not, except during the Stuart era, involve claims to the ownership of the seabed of those seas, is contrary to the evidence.

We have already shown that the claim of the British Sovereigns to both dominion and imperium over the seas adjoining the British Isles was well established during the seventeenth and eighteenth centuries, and that these claims embraced ownership of the seabed as well as of the sea itself. See argument in support of Exception No. 1, *supra.* It should further be pointed out that this claim was consistent with the international law of the period.

A. **Record References.**

1. International law in the 17th and 18th centuries permitted the assertion and ownership of seabed and subsoil rights by coastal states in their adjoining seas. [Testimony of Judge Philip C. Jessup.] Tr., 474-574.

   (a) "In the 17th and 18th centuries the general view was that a coastal state possessed sovereignty, ownership or jurisdiction in the waters adjacent to its coast, out to a distance which was not wholly fixed but which was in many instances more than three miles. Obviously, how far such claims could lawfully extend depended in large part on the geography and history of the area

in question . . . on a coast such as the Atlantic coast of North America, claims to 50 or 100 miles of sea or even more—which were in fact made—would not have been, and were not, considered unlawful in the 17th and 18th centuries, so long as the right of free navigation was not interfered with and any establishing fishing rights were respected." [Testimony of Judge Philip C. Jessup.] Tr., 505-506.

(b) The British claims of the period were acquiesced to by other nations. [Testimony of Professor Morton J. Horwitz and Judge Philip C. Jessup.] Tr., 213, 1132.

(c) The claims of Edward III to sovereignty over the seas lying about the coasts of his kingdom were recognized by the Treaty of Paris in 1360. [Testimony of Professor Morton J. Horwitz.] Tr., 122.

(d) There is considerable evidence that other nations regularly submitted to the licensing of their fishermen by English authorities for the privilege of fishing in the seas about England; one such license permitted fishing in the English Seas only at distances in excess of twenty-eight miles from shore. [Testimony of Professor Morton J. Horwitz.] Tr., 139-140.

2. International law has never (either before, during or after the 17th and 18th centuries) prohibited a coastal state's assertion and exercise of seabed and subsoil rights in the seas adjoining its land territories. [Testimony of Judge Philip C. Jessup.] Tr., 507, 1161-1162.

(a) Under international law, a nation could in the 17th and 18th centuries, and can today, exercise jurisdiction in areas of the seas without claiming full sovereignty over the same. [Testimony of Judge Philip C. Jessup.] Tr., 1133-1134.

(b) The concept of a nation simultaneously exercising different jurisdictions at different distances in the sea, and exercising such jurisdictions in

seas beyond those respecting which it claimed full sovereignty was recognized in the 16th and 17th centuries. [Testimony of Judge Philip C. Jessup.] Tr., 1136.

(c) A claim to ownership of seabed, or bottom, is distinguishable from a claim of complete sovereignty. [Testimony of Judge Philip C. Jessup.] Tr., 1135.

(d) Even during the period which took the most restrictive view of sovereign rights in the sea—the 19th and early 20th centuries—international law did not restrict the right of coastal states to exploit their seabed resources. [Testimony of Judge Philip C. Jessup.] Tr., 507.

3. The contraction of the older 17th and 18th century claims of full sovereignty over broad expanses of the seas to a narrower territorial sea concept (which became more or less fixed at three miles during the 19th and early 20th centuries) did not curtail the various jurisdictional or property rights which were long recognized as being distinguishable from full sovereignty so long as these rights of other states to navigate and to fish were not precluded. [Testimony of Judge Philip C. Jessup.] Tr., 506-507, 1148-1157.

(a) The well recognized right of coastal states to exploit their seabed resources survived the curtailment of the ancient claims to full sovereignty over vast expanses of the ocean. [Testimony of Judge Philip C. Jessup.] Tr., 507, 1149-1150.

(b) The "three mile limit" which had been established as American policy by the early part of the 19th century had reference to "territorial waters" and not to such other jurisdictions as "fisheries". [Testimony of Judge Philip C. Jessup.] Tr., 1152-1153, 1155.

(c) Historically speaking, seabed claims and assertion of the right to exploit seabed resources have not been confined to territorial waters. [Testimony of Judge Philip C. Jessup.] Tr., 1156-1157.

(d) Plaintiff's own witness, Professor Louis Henkin, conceded that the concept of coastal states having seaward jurisdiction in excess of three miles for some purposes was accepted in 1776 and thereafter, and that to his knowledge the first writer to use the three mile limit as an equivalent of a cannon shot was Galiani, an Italian writer, in 1782. Tr., 2574-2594-2595.

B. **Argument.**

In the words of Judge Philip C. Jessup:

"The distinction between on one hand, the rights of a state in the belt of territorial waters, both with respect to navigation and to fisheries therein, and on the other hand, the rights of a State to exploit any accessible resource of the seabed adjacent to its coast, whether within or without territorial waters, has been recognized in international law over the centuries. Writer after writer has quoted with approval the statement of Vattel: 'Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?'" Tr., 564-565.

While this distinction, "recognized in international law over the centuries", would in and of itself seem to wholly refute any possible contention that the ancient rights of ownership over seabed had been lost as a result of the 19th and early 20th century contraction of the broader imperium and dominium claims over the sea of the 17th and 18th centuries, there is also the fact that this contraction really did not come into being until **after** the American colonies secured their independence from Great Britain.

The evidence shows that **at the time of colonization** (17th and 18th centuries) **and at the time the colonies became independent** (1776), the ancient claims of the British sovereigns to full imperium and dominium over broad areas of the seas adjacent to their lands (up to 100 miles or more seaward) were both part and parcel of accepted British

law, policy and practice, and were also wholly consistent with the international law of the 17th and 18th centuries.

4. The fifth conclusion, *i.e.* that the jurisdiction in admiralty claimed and exercised by the English crown on the high seas in the centuries prior to 1776 and the right of the flag enforced by it were of a protective nature and not exercised territorially in the so-called English or narrow seas, is contrary to the evidence.

In 1650 the Council of State directed the admiralty to enforce the flag salute as an attribute of the English "dominion of these seas." See Exhibit 224. The 17th century legal writers who discussed the flag salute uniformly regarded it as an attribute of the crown's sovereignty in the English seas. See, *e.g.* Selden, *Mare Clausum,* pp. 398-402, Stubbe (Exhibit 693, p. 496), and Molloy (Exhibit 726, 102-30). See also Exhibit 211, p. 708, Exhibits 621-629, 1 Marsden, *Law and Custom of the Sea,* 509-10 (1915).

5. The sixth conclusion, *i.e.* that the rights of the crown to emerged or relicted lands and to royal fish, wreck, treasure trove, flotsam, jetsam and lagan were based, during the centuries preceding 1776, on its claim, under its prerogative, to ownerless property, although, during the Stuart period, some of these rights were also based on the claim of the crown to ownership of the seabed, is contrary to the evidence.

The English law relating to emerged or derelict lands during the 17th and 18th centuries recognized a general property right in the English seas and seabed. Indeed, one of Plaintiff's own witnesses, Professor Samuel E. Thorne, testified that the only decided case during the 16th and 17th centuries that he was aware of was *Rex v. Oldsworth,* a case which upheld the Crown's claim in a decision squarely predicated upon the proposition that since the soil under the sea was the King's while under water it could not "be-

come the subjects because the water hath left it." Tr., 141-142, 2679-2680, 2682.

6. The seventh conclusion, *i.e.* that following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century, the right of the crown to the sovereignty of the English seas became more and more an anachronism and that it was allowed to die out from practical affairs, so that before 1776 it had become obsolete and had been abandoned as a principle of English law, with the earlier claim of the crown to ownership of the seabed of the English seas having disappeared with it, is contrary to the evidence.

See argument in support of Exception No. 3, *supra.*

7. The eighth conclusion, *i.e.* that during the eighteenth century there arose a wholly new concept of a comparatively narrow belt of marginal sea lying within the range of common shot from the shore in which a coastal state might exercise sovereignty to enforce its neutrality and for other purposes, and that by 1776 this concept was beginning to be recognized in English law, is irrelevant to the basic question presented by this litigation.

We are generally speaking in agreement with this conclusion. The "new concept" was **beginning** to be recognized in English law by 1776 but had not superceded the prior law by that date. See argument in support of Exception No. 3, *supra.* In any event this new concept deals with *imperium* and not *dominium* and hence is irrelevant to the basic question presented by this litigation— which is **not** sovereignty by the paramount right to exploit **proprietary** rights in the seabed.

8. The ninth conclusion, *i.e.* that early in the nineteenth century the width of this marginal or territorial sea, as it came to be called, was defined by the United States, Great Britain and many other maritime nations as three geographical miles and that within it

the sovereignty of the coastal nation was recognized as supreme, subject to the right of innocent passage by peaceful foreign vessels, is irrelevant to the basic question presented by this litigation.

The argument just stated in support of our exception to Plaintiff's eighth conclusion is equally applicable to the ninth conclusion. See argument in support of Exception No. 7, *supra.*

9. The tenth conclusion, *i.e.* that except for the extravagant claims of the Stuart kings to ownership of the entire seabed of the English seas, claims which died with the end of their dynasty, the law of England prior to 1783, in conformity with international law, recognized claims to the ownership of the seabed only on the basis of prescription or actual occupation by the claimant, is contrary to the evidence and is also irrelevant to the basic issue presented by this litigation.

This conclusion is objectionable for a number of reasons, which are as follows:

(a) **Relevancy**

The proposed conclusion of law is first of all irrelevant to the precise issue presented in this case since this issue turns not upon "sovereignty" (*i.e., imperium*) but upon *dominium* or who enjoys the property rights or ownership rights respecting the exploitation of the natural resources of the sea and seabed. A claim to ownership of seabed is distinguishable from a claim of complete sovereignty. [Testimony of Philip C. Jessup.] Tr., 1135.

(b) **Erroneous as a matter of law**

Finally, "occupation" of the sea or seabed, even in the very limited sense in which physical occupation is possible (*e.g.,* stakes driven into the bed of the sea or the mounting of a drilling apparatus) is not now and never has been (during the 17th and 18th centuries or otherwise) requisite to a coastal state's assertion or exer-

cise of an exclusive right to exploit of the natural resources of its adjoining seas and seabed. As Philip C. Jessup, former Judge of the International Court of Justice at The Hague, pointed out in response to the question "To whom do the resources belong if the coastal state never makes the limited occupation, never takes any action?" Tr., 1161.

> "I think it is very clear from the decision of the International Court in the North Sea case that this is an inherent right and you may begin to exploit whenever you have the desire or facilities." Tr., 1161.
>
> "In order to exercise it [the right] 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) . . . the right does not depend on its being exercised." Tr., 1161.

Judge Jessup was emphatic in testifying that occupation or use has **never** been necessary for a coastal state to establish exclusive rights in the adjacent seabed. Tr., 641-42. A great deal of his testimony was spent presenting evidence (Tr., 519-644) "to dispel the impression which some writings might concede that such rights to the seabed and subsoil depends upon the location in bays, or upon occupation or even immemorial usage." Tr., 591.

Judge Jessup quotes extensively from "Sovereignty Over Submarine Areas" (Tr., 538-554), an article by Professor Hersch Lauterpacht, a former member of the International Court of Justice and a member of the International Law Commission:

> "Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. For it is clear that in all cases in which title to submarine areas has been pro-

claimed there has been no approximation to effective occupation.

* * *

"In so far as occupation means effective occupation—and that is its only natural meaning—it is not applicable to the continental shelf and to submarine areas generally." Tr., 539-40, 554.

Though there may be some writings supporting Plaintiff's position, most authorities take the opposite view and the weight of evidence is clearly on Defendants' side.

Plaintiff's reliance during the hearings below on the Abu Dhabi arbitration award is without merit. According to Judge Jessup, quoting Richard Young, Editorial Comment in 46 Am. J. Int. L. 512, 514 (1952), "Lord Asguith's comments on the shelf are dicta unnecessary to his decision." Tr., 518. And in any event, Plaintiff's description of dicta in a private arbitration award as "judicial precedent" is, to say the least, highly questionable.

The International Court of Justice, on the other hand, does provide judicial precedent for the opposite of Plaintiff's conclusion of law 18. The *North Sea Continental Shelf cases* [1969], I. C. J. 1, held that "a coastal state's right [in the continental shelf] exists *ipso facto* and *ab initio,*" and described that interest as "an inherent right." *Id.* at 22. North Carolina, South Carolina and Georgia do not believe that an inherent right which exists *ipso facto* and *ab initio* is dependent on any affirmative actions of prescription or occupation.

Actually the rule that occupation is not necessary is a rule of necessity to the legitimacy of any claim at all. It goes without saying that man cannot occupy the sea or seabed in the same sense that he can occupy land. Man is not a fish. If Plaintiff is contending that this sort of occupation is or ever was necessary, obviously there could have

been no assertion of sovereignty at all over any body of water, be it an inland lake, a bay, or the adjoining sea.

10. The eleventh conclusion, *i.e.* that during the nineteenth and twentieth centuries ownership of the bed of the territorial sea came to be generally recognized without regard to prescription or actual occupation, is contrary to the evidence and is also irrelevant to the basic issue presented by this litigation.

See argument in support of Exception No. 9, *supra.*

11. The twelfth conclusion, *i.e.* that the charters given to the companies and individuals who were the proprietors and founders of the colonies which later became the Defendant states granted territory on the mainland bounded by the Atlantic Ocean but did not grant maritime sovereignty or dominion over a territorial sea, a concept then unknown, or property rights in the seabed or its resources, is contrary to the evidence.

A. **Record References.**

1. The first charter of Virginia, issued in 1606, granted the seabed and subsoil of the adjoining sea to a distance of one hundred miles from the shore. The Charter grant was phrased as follows:

> "And that they shall have all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the first Seat of their Plantation and Habitation by the Space of fifty like **English** Miles, as if aforesaid, all alongst the said Coasts of **Virginia** and **America,** towards the **West** and **Southwest,** or towards the South, as the Coast lyeth, and all the Islands within one hundred Miles, directly over against the said Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for

the space of fifty like Miles, all alongst the said Coast of **Virginia** and **America**, towards the **East** and **Northeast**, or towards the **North**, as the Coast lyeth, and all the Islands also within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Woods, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever from the said Place of their first Plantation and Habitation for the space of fifty like Miles, all alongst the said Coast of **Virginia** and **America**, towards the **East** and **Northeast**, or towards the **North**, as the Coast lyeth, and all the Islands also within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Woods, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land, by the Space of one hundred like **English** Miles; . . . ." *Maine, et al.,* Exhibit 41.

2. The American historian, Charles McLean Andrews, has stated that the territorial boundaries set forth in the 1606 Virginia charter for the first colony, ". . . formed a section of land, which according to the wording of the patent was to extend fifty miles north along the seacoast above the first settlement and fifty miles south, one hundred miles into the interior **and one hundred miles out to sea.**" [Testimony of Professor Joseph H. Smith.] Tr., 696. See also *Maine, et al.,* Exhibit 251, p. 84. (Emphasis added.)

3. The second Virginia Charter, of 1609, an "Enlargement and Explanation" of the 1606 grant, after stating the Northward and Southward distances of the grant, further grants:

   ". . . And also the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid; Together with all the Soils,

Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries, Woods, Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences within the said Territories, and the Precincts thereof, whatsoever, and thereto, and thereabouts both by Sea and Land, being or in any sort belonging or appertaining, and which We by our Letters Patents, may or can grant, in as ample Manner and Sort, as We, or any of our noble Progenitors, have heretofore granted to any Company, Body Politic or Corporate, or to any Adventurers, Undertaker or Undertakers of any Discoveries, Plantations, or Traffic, of, in, or into any Foreign Parts whatsoever, and in as large and ample Manner, as if the same here herein particularly mentioned and expressed; . . . ." *Maine, et al.*, Exhibit 42, pp. 3795-96.

4. The 1620 grant to the Council of New England, issued in response to a petition of the "second colony" under the Virginia Charter of 1606, clearly granted the right to the soil of the adjacent seas. In addition to granting fishings, mines, minerals, royal mines of gold and silver, precious stones and quarries, the charter includes, ". . . and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining: . . ." The charter further provides that the Council shall ". . . have and to hold, possess and enjoy, all, and singular the aforesaid Continent, Lands, Territoryes, Islands, Hereditaments, and Precincts, Sea Waters, Fishings, with all, and all Manner their Commodities, Royalties, Liberties, Preheminences, and Profitts. . . ." *Maine, et al.*, Exhibit 11.
5. Although the charter to the Council of New England did not specify the distance from the shore to which they possessed rights in the "seas adjoining" and

"sea waters", their understanding of the extent of these rights is expressed in the August 10, 1622, grant of the Province of Maine to Sir Ferdinando Gorges and Captain John Mason. In that grant the Council refers to the charter theretofore granted them as encompassing certain lands, ". . . together with the seas and islands lying within one hundred miles of any part of the said coasts of the country aforesaid. . . ." *Maine, et al.,* Exhibit 2, p. 1622.

6. Sir Ferdinando Gorges applied for and received a royal charter in 1639 which was essentially a confirmation of the 1622 grant from the Plymouth Company. The 1639 charter included an extremely expansive grant of rights, among which were:

   ". . . all and singular the Soyle and Grounds thereof as well drye as covered with waters. . . ."

   ". . . And all Gould Pearle Silver Previous Stones and Ambergreece whiche shalbee founde within the said Province and Premisses or any of them and the Lymitts and Coasts of the same or any of them. . . ."

   ". . . and as large and ample Rights Jurisdiccons Priviledges Prerogatives Royalties Liverties Immunityes Franchises Prehmeninences and Hereditaments as well by Sea as by Lande within the said Province and Premisses and the Precints and Coasts of the same of any of them and within the Seas belonging or adjacent to them or any of them as the Bishopp of Durham within the Bishopricke or Countie Palatine of Duresme in our Kingdome of England now hath useth or enjoyeth or of right hee ought to have use or enjoye within the said Countie Palatine as if the same were herein particulerly menconed and expressed. . . ." *Maine, et al.,* Exhibit 3.

7. The 1639 royal charter to Sir Ferdinando Gorges, as did the 1622 Charter from the Plymouth Company, granted him all the islands within five leagues. The expansive nature of the 1639 charter, particularly when read as a confirmation of the 1622 char-

ter from the New England Council, included a grant to the soil under the seas to a distance at least five leagues from the Maine Coast. [Testimony of Professor Joseph H. Smith.] Tr., 719.

8. Proprietary rights in the soil of adjacent seas were a part of the royal prerogative. *Maine, et al.,* Exhibit 171. [Testimony of Professors Morton J. Horwitz and Joseph H. Smith.] Tr., 123-127, 138, 672. Professor Smith testified that the word "royalties" (*regalia* or *regalitates*) meant the rights of the King or Queen, *jura regis* or *jura regalia,* otherwise collectively called the King's or Queen's prerogative, and that the use of the term, together with associated terms in the charters, *i.e.,* "commodities", "jurisdictions", included, *inter alia,* the crown's rights in the sea and seabed. He stated that he believed it clear that ". . . when the term 'royalties' was used in colonial charters it was intended and understood to include those rights." Tr., 680.
9. Professor W. Keith Kavenaugh, one of Plaintiff's witnesses, admitted that he was untrained in English legal history and had made no specific study of the meaning of the concept of royal prerogative or regalia in 16th and 17th century England. Tr., 1426. He further admitted that he did not know what the term "royalties" included with respect to the sea, seabed and subsoil, but conceded that it was possible that the term included such rights. Tr., 1448-49.
10. Professor Kavenaugh stated unequivocally in his testimony that he did not know whether under English law in 1664 the term "royalty" included ownership of the sea and seabed. Tr., 1531. He further stated that prior to his engagement as a witness in this case his attention had never been directed to the question of the seabed and its resources. Tr., 1665.
11. Professor Richard B. Morris, another of Plaintiff's witnesses, stated at one point in his testimony that he did not differ in any way with the testimony of Professor Kavenaugh. Tr., 1895. Professor Morris

also stated that there were rights in territorial waters in the 18th century to an undefined extent. Tr., 1856. He then admitted the existence of territorial waters off the coast of the North American Colonies in the 18th Century and commented that it was unclear as to whether any rights were vested in the coastal sovereign below the surface of those waters. He further admitted that he had no opinion as to whether within such territorial waters the coastal sovereign possessed any rights to the seabed and subsoil. Tr., 1858.

12. Professor Louis Henkin, one of Plaintiff's witnesses, asserted in his testimony that the English Crown had not sought to create any rights in the sea and seabed by the Colonial charters. But during cross examination he admitted that he had been mistaken as to when the charters were granted, and then agreed that the early colonial charters were granted during the period in which the English sovereigns were most intensely aware of sovereignty over the sea and were making the most expansive claims to that sovereignty. He then stated that if the charters were made around that period he would withdraw statements as to why the sovereigns would not have wished to make claims off the North American coast similar to the claims they were making around England. Tr., 2625-27.

13. Professor Samuel E. Thorne, one of Plaintiff's witnesses, asserted in his testimony that he had seen no evidence that during the early 17th century English law recognized Crown rights in the seabed and subsoil adjacent to the colonies in North America. Tr., 2461-62. On cross examination he admitted that he had made no study of the extent to which such rights were in fact claimed or exercised. He also admitted an awareness of certain English legal writers during the 17th century who asserted that the Crown had such rights in the sea adjacent to the North American colonies. Tr., 2731-32. Professor Thorne further agreed that the natural way for a 17th cen-

tury English lawyer to refer to prerogative rights, such as ownership of the sea, or ownership of the seabed, or the right to exclude or license foreign fishermen, would be as "royalties". Tr., 2733-2734.

14. Numerous colonial charters and grants contained language evidencing an intent to grant crown prerogative rights of dominium in the adjoining sea and seabed. These grants were expansive in their description of prerogative rights granted, generally expressing such grants in terms of "commodities, jurisdictions, royalties, privileges, franchises, preheminences and hereditaments". Professor Smith testified, with respect to such language in the 1633 royal charter of Charles II (Rhode Island), that: "If this language did not encompass the King's right to the soil of the adjoining seas, it is hard to visualize what words could have been effective." Tr., 734. Examples of such charters are:

(a) The royal patent to Lord Baltimore for the province of Maryland in 1632. This patent also granted all islands which had been or shall be formed in the sea situated within ten marine leagues from the shore. *Maine, et al.,* Exhibit 141.

(b) The 1663 royal charter of Charles II which incorporated "The Governor and Company of the English Colony of Rhode-Island and Providence Plantations in New-England, in America". *Maine, et al.,* Exhibit 156.

(c) Grant of Charles II to James, Duke of York (New York and New Jersey). *Maine, et al.,* Exhibit 67.

(d) The second charter to the Duke of York (1674). *Maine, et al.,* Exhibit 68.

(e) Charter granted in 1725 to the Province of the Massachusetts Bay in New England. No express grant of royalties, etc., was contained in the in the sea were granted. *Maine, et al.,* Exhibit 44. charter, but islands and islets within ten leagues

(f) The Connecticut Charter of 1662. *Maine, et al.*, Exhibit 272.

(g) Letters patent of 1662/3 for Carolina. *Maine, et al.*, Exhibit 273. S. C. Exhibit 1.

(h) The 1732 charter to James Oglethorpe and trustees for establishment of the Georgia Province. This charter also granted islands on the sea within twenty leagues. *Maine, et al.*, Exhibit 274; Georgia Exhibit 1.

Argument.

As shown in the record references, the claims of the British Sovereigns to ownership of the seabed in the seas adjoining the British Isles were well established during the seventeenth and eighteenth centuries. The language contained in the colonial charters constitutes evidence of the assertion of similar claims by the Crown over the adjacent seas of the discovered lands in America.

Professor Louis Henkin, one of Plaintiff's own witnesses, conceded that the early colonial charters were granted during the period in which the English Sovereigns were most intensely aware of sovereignty over the sea. Tr., 2625-27. It therefore is no coincidence that the Virginia Charters of 1606 and 1609 granted all the islands lying within one hundred miles of the coast, and that in the 1609 charter the grant appertains to all commodities, jurisdictions, royalties, privileges, franchises, and preheminences within the said territories and the precints thereof **both by sea and land.** *Maine, et al.*, Exhibits 41 and 42.

Earlier treatise writers had declared the extent of dominium and control of adjacent seas to be 100 miles. The fourteenth century work of Bartolus, *Tractatus de Insula,* proclaimed that one having jurisdiction over the territory adjacent to the seas has jurisdiction over the sea for one hundred miles notwithstanding that the sea is common to all. [Testimony of Professor Joseph H. Smith.] Tr., 699.

William Welwood in his 1590 treatise, *"An Abridgement of all Sea-Lawes"*, declared the extent of Crown claims in the sea to be 100 miles. [Testimony of Professor Morton J. Horwitz.] Tr., 127. *Maine, et al.,* Exhibit 209.

The concept of a proprietorship in the sea and its profits, including the seabed and subsoil, was clearly not a novel development finding first expression in the Virginia Charters. That it had long been deemed a natural prerogative flowing from the sovereign's control and dominium over the adjoining land has been previously shown.

The arguments advanced by Plaintiff that claims to property in adjacent seas historically were recognized only by prescription from time immemorial, and thus arguably not applicable to the newly discovered American territories, are premised upon inverted logic as to the nature of the claims. It is likely that the exercise and avowal of such claims over an expansive period of time would, as to a particular claimed area, enhance in the sovereign claimant the concept of the justness of the claim and to that extent further its acceptance by the international community, or at the least discourage challenge. But it is historically more logical and practicably understandable that the **exercise** of powers of dominium over adjoining seas from time immemorial gave birth to the **concept** and **assertion** of such dominium as a matter of prerogative right.

This concept and claim, having fully developed in the British Sovereign's exercise of authority over the English seas, and having solid foundations in the practices of antiquity, was fully aserted by the Crown in the American adjacent seas.

The language of grant in the charters cited in the record references hereto is, almost without exception, as comprehensive and full as possible regarding the grant of those rights included within the concept of the royal prerogative.

Professor Kavenaugh, one of Plaintiff's witnesses, contended that there was no specific mention of the seabed or subsoil in the colonial charters, and he therefore assumed that if such tangible items were not mentioned in the charter then they were intended to be excluded. Tr., 1474. He subsequently admitted that he did not know what the term "royalties" included with respect to the seabed, but conceded that it was possible the term included such rights. Tr., 1448-49.

After examining the language in the 1633 royal charter of Charles II (Rhode Island), Professor Smith observed that the "sweeping clause in the charter" which granted, among other rights, "commodities, jurisdictions, royalties, privileges, franchises, preheminences, and hereditaments, whatsoever", in the tracts, bounds, lands, and islands granted, impelled him to the opinion that by virtue of the charter the patentee had a right to the soil beneath the adjoining seas to the same extent as did the Crown in England. Tr., 733-34. Professor Smith further stated:

> "If this language did not encompass the King's right to the soil of the adjoining seas, it is hard to visualize what words could have been effective. If these did not accomplish the grant, what words in the lexicon of the Stuart prerogative would have done the job?" Tr., 734.

Professor Smith in his testimony examined and commented upon the language of grant in each of the charters cited in the record references hereto. The expressions of grant are substantially similar in the various colonial charters as pertains to grant of royalties and Crown prerogatives. Many of the charters grant fishings, royal fishes, royal mines, and contain references to the seas, as well as grants of islands lying at varying distances from the shores.

Following the survey in his testimony of the various colonial charters, Professor Smith stated:

> "When the various colonial charters are read cumulatively they indicate that the Crown claimed and granted to, or made effective for, the American dominiums of the crown the same sort of rights in the adjoining Atlantic as it claimed in the English seas. Since the precise extent of the claim in English waters was undetermined, the opportunity was taken to particularize the limits in certain of the colonial charters, though these limits varied from one charter to another." Tr., 791-92.

Professor David H. Flaherty concurred with Professor Smith in his evaluation of the extent of the grants in the Virginia charters, and stated:

> "An examination of the successive charters of the Virginia Company from 1606 to 1612 makes plain that the marginal sea and the seabed within one hundred miles of the seacoast were included in the territory granted to the Company by the Crown." Tr., 896.

These comprehensive grants by the Crown in the American colonies continued at least through 1732, the date of the charter grant to "The Trustees for establishing the colony of Georgia in America." That charter, a trusteeship for 31 years, granted the islands on the sea lying within 20 leagues of the coast, and contained a grant of royal fishings of whale and sturgeon as other fishings, pearls, royalties, and privileges. The charter further granted such rights and privileges:

> ". . . in as ample manner and sort as we may or any of our royal progenitors have hitherto granted to any company, body politic or corporate, or to any adventurer or adventurers, undertaker or undertakers, . . . in as large and ample manner as if the same was herein particularly mentioned and expressed. . . ." *Maine, et al.,* Exhibit 274; Georgia Exhibit 1.

The Georgia Charter demonstrates that the royal prerogative with respect to new colonies was still asserted and dealt with in as comprehensive a manner in the eighteenth century as in the early American charters.

Professor Kavenaugh, a witness for the Plaintiff, testified that in his opinion the colonies did not receive any rights in the seabed under the colonial grants. Tr., 1431. But it was developed during cross examination that this opinion was based upon the witness's purely personal notion that the sea was not susceptible of ownership. Tr., 2134. This notion is not only refuted by the authorities previously cited herein, but was based upon very tenuous grounds. Tr., 2153. Professor Kavenaugh did admit that the crown would have prerogative rights in the seas adjacent to the colonies. Tr., 2187.

Numerous other colonial deeds and grants deriving from the royal charters were discussed in the testimony of the witnesses. There is no need here to re-examine each individually. It is apparent from the language and history of the charters already discussed that the British Sovereigns did in fact claim rights of dominium in the seas adjacent to the American colonies and, in varying degrees, granted those rights in the colonial charters. The revocation or surrender of various of the charters prior to the revolution certainly could not *ab initio* void those early claims, and unquestionably could not have been regarded by the Crown as a diminution of boundaries or sea dominium respecting its colonies.

12. The thirteenth conclusion, *i.e.* that colonial activities in the marginal seas of the colonies prior to 1776 were almost entirely limited to fishing in waters close to shore involving the use of shore-based facilities and to the regulation of these and other activities as carried on by the colonists therein, and did not involve any claim to ownership of the seabed is contrary to the evidence.

A. **Record References.**

1. John Selden in "Mare Clausum" made an analogy of pearls and coral to undersea mines in his comments on the exhaustibility of the products of the sea. He stated that:

   "But truly we often see that the sea itself, by reason of other men's Fishing, Navigation, and Commerce, becom's the wors for him that own's it, and others that enjoy it in his right; so that less profit ariseth, than might otherwise bee received thereby. Which more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other things of that Kinde. Yea, the plentie of such seas is lessned every hour, no otherwise than that of Mines of Metal, Quarries of Stone, or of Gardens, when their Treasures and Fruits are taken away." *Maine, et al.,* Exhibit 204, p. 141.

2. The government of New York in 1715 adopted an act entitling Garret de Graeuw and his Assigns to the Fishery of Porpoises during a term of seven years. That act gave de Graeuw the exclusive right to fish for porpoises ". . . in the seas, Harbours, Rivers and other Waters within this Colony." *Maine, et al.,* Exhibit 276, p. 839. [Testimony of Professor Joseph H. Smith.] Tr., 794-95.

3. The government of New York in 1715, 1730, and twice in 1737, adopted statutes regulating the raking of oysters. These statutes are not limited in scope and undoubtedly pertained to oyster beds below low water mark in the sea. *Maine, et al.,* Exhibits 277, 278, 279 and 280. [Testimony of Professor Joseph H. Smith.] Tr., 795.

4. New Jersey enacted a statute in 1718 which restricted to certain times of the year the raking of oysters from the ". . . Oyster beds within this Province." *Maine, et al.,* Exhibit 326. [Testimony of Professor Joseph H. Smith.] Tr. 796.

5. William Penn in 1682 chartered the Free Society of Traders granting them a manor of 20,000 acres. In-

cluded within the grant was ". . . free fishing of whales, sturgeon, and all royal and other fishes in the main sea and bays of the said province, and in the inlets, waters, and rivers within or adjoining to" the manor. *Maine, et al.,* Exhibit 283. [Testimony of Professor Joseph H. Smith.] Tr., 797.

6. The exploitation of the sea in the production of salt and operation of saltworks was undertaken at various times in the Virginia colony. [Testimony of Professor David H. Flaherty.] Tr., 1055-58.
7. The gathering of oysters for food and shell was a regular occupation in the Virginia colony by the mid-eighteenth century. [Testimony of Professor David H. Flaherty.] Tr., 1060.
8. In 1693 the Council of Virginia gave several persons a commission to catch whales and removed the duty from them. [Testimony of Professor David H. Flaherty.] Tr., 1061.
9. In 1710 the Governor and Council of Virginia approved the petition of two partners that they be allowed to engage in whaling "upon the Coast of this her Majestys Colony and in the bay of Chesapeak. . . ." [Testimony of Professor David H. Flaherty.] Tr., 1062.
10. In 1692 Governor Copley of Maryland appointed Edward Greene as officer to salvage all drifts, wastes and wrecks, including whales, ". . . as shall be driven or cast on shoar or be found floating within the limits and bounds aforesaid." The stated reason for the appointment was incursions of Pennsylvanians and other foreigners ". . . upon and within the limits and bounds of this Province at the Seaboard Side. . . ." *Maine, et al.,* Exhibit 374. [Testimony of Professor Joseph H. Smith.] Tr., 795-96.
11. Virginia enacted numerous trade regulations providing for supervision over matters relating to ships engaged in oceanic pursuits. [Testimony of Professor David H. Flaherty.] Tr., 1019.

B. **Argument.**

The foregoing record references are examples of a few of the exercises by the American colonies of rights to exploit and regulate the resources of the sea.

The fact that the technological capabilities of the colonists during the seventeenth and eighteenth centuries were limited, and did not permit of the level and degree of exploration and exploitation of sea and seabed resources which is possible in 1973, in no way restricts the essential nature of the rights asserted.

The charter grants, which included mines, pearls, fishes, and other commodities, clearly contemplated that all such profits as could be obtained from the land and sea were granted to the extent to which they were susceptible of exploitation. The regulation of oyster beds and fisheries by the statutes and orders of the colonial governments indicates an awareness of the value of these resources, the necessity to conserve them, and is an expression and claim of charter derived authority over these proprietary interests.

Judge Philip C. Jessup stated in his testimony that the assertion by the colonies of rights over the oyster fisheries and salt beds in his opinion constituted claims to the right to exploit the subsoil or seabed resources. Tr., 1182.

These claims are in no way diminished or minimized by contentions that they were not always exercised (or in point of fact capable of being exercised) at as great a distance from shore as they are today, or that they should have been more expansive in practice to have evidentiary value. The practical exercise of jurisdiction and ownership by the colonies of resources of their seas were in fact as broad as their technology permitted. It is inconceivable that the colonies would not have laid exclusive claims, premised upon charter grants, to mineral resources in their seabed had such been known and capable of exploitation.

The record shows that the colonies did in fact exploit those natural resources which they were aware of in their adjoining seas to the extent that they were technologically able to do so. As Judge Philip C. Jessup points out, there is no distinction in the legal principle applicable to exploitation of pearl fisheries and that applicable to drilling for oil. Tr., 518.

The evidence also demonstrates that the claims to dominion and imperium over the colonial adjacent seas were consistent with the international law of the period.

A. **Record References.**

1. Professor David H. Flaherty stated, with reference to the Virginia charter of 1606:

   "Nor was the Company's acquisition of seaward jurisdiction a secret from contemporaries. The Spanish Ambassador to London wrote to Philip III on January 24, 1607, about the plans for the settlement of Virginia, including the information that the English Crown had given 'them permission to occupy any island within a hundred leagues from shore. . . .'" Tr., 898.

2. Professor Flaherty also stated:

   "Emanuel Van Meterin, consul to the Antwerp merchants in London, and a principal foreign observer there, printed a summary of the 1606 charter in 1608, which included the information that the Virginia Company's territories included the islands within one hundred miles of the seacoast." Tr., 898.

3. Professor Louis Henkin, one of Plaintiff's witnesses, conceded that in the 17th and 18th centuries the British claimed the right to exclude the French from fishing in a marginal belt off the waters of North America. Tr., 2607.

B. **Argument.**

The record references and argument submitted herein by these Defendants in suport of their proposed finding of fact No. V are fully applicable to the status of the American colonies with respect to the consistency of their claims to imperium and dominium over adjacent seas with the international law of the period.

As we have already seen, the claims of the British Sovereigns to imperium and dominium over adjacent seas were not premised upon a concept of prescription from time immemorial, but rather were based upon the internationally recognized right of a coastal state to exercise jurisdiction and ownership in the waters adjacent to its coast. Those rights were asserted in the American seas by the Crown, granted in the various colonial charters, and were not in conflict with the international law of the 17th and 18th centuries.

13. The fourteenth contention, *i.e.* that the admiralty jurisdiction exercised by colonial admiralty courts prior to 1696 and by royal courts of admiralty sitting in the colonies after that date was not territorial in nature, is irrelevant to the basic question presented by this litigation.

This conclusion is irrelevant to the basic question presented by this litigation since it at best relates to sovereignty or imperium rather than dominion. A claim to ownership of seabed is distinguishable from a claim of complete sovereignty [testimony of Philip C. Jessup] Tr., 1135.

14. The fifteenth conclusion, *i.e.* that colonial law and practice prior to 1776 do not support the claim that property rights to the seabed of the marginal sea seaward for 100 miles or any lesser distance had been granted to the colonies or that such rights were exercised by them except in a few cases where por-

tions of the seabed within the three-mile limit were actually occupied, is contrary to the evidence.

See argument in support of Exception No. 12, *supra.*

15. The sixteenth exception, *i.e.* that when in 1776 the American colonies achieved independence, and that when in 1783 the Treaty of Peace was concluded neither the crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied, is contrary to the evidence.

The American Revolution was the beginning of the Independent Nation Status of each of the Thirteen Colonies.

A. **Record References.**

1. Professor Joseph H. Smith testified:

"... by the eve of the American Revolution there was general recognition that the common law of England was in force in the North American colonies. While certain points of law, involving particularly individual liberties, were at times in dispute between the crown and the colonies, no such dispute existed concerning crown rights in the seabed. These rights, therefore, existed as fully on this side of the Atlantic as they did in English waters. With respect to royal colonies those rights remained vested in the crown itself and were delegated to the royal governments. In the case of charter colonies, corporate or proprietary, seabed rights had been conveyed in whole or in part to such governments.... the accepted status of English law in this country on the eve of the Revolution confirms and strengthens the specific evidence from the charters that seabed rights were recognized here in the colonial period.

Q How did American independence affect the situation?

A Once independence was achieved or contemplated the whole problem of the reception of

the laws of England entered into a new phase. The question now was how much of the colonial law should be received as the law of the individual states, for no state contemplated that with independence all their corpus of law vanished or should vanish leaving a *tabula rasa.* The instruments of transition, for the most part, were so-called 'reception provisions' in either state constitutions or statutes.

There was some variance but in general the common law of England was one of the elements received." Tr., 835-837.

2. Professor Smith also testified:

"To begin with the Declaration of Independence, it of course declared 'That these United Colonies are, and of Right ought to be Free and Independent States.' Not one state, but states. I do not believe it has ever been, or can be, seriously questioned that the signers believed they were creating thirteen independent and sovereign states, and that each of those states succeeded individually to all sovereign, territorial and ownership rights which had previously been vested either in the British Crown or in the colonial government. The Supreme Court so held in a number of very early decisions.

Some delegates in Congress had argued that the colonies should confederate first and declare independence only afterwards. *The Constitution of the United States of America (Annotated),* Senate Document No. 39, 88th Cong., 1st Sess. (1964) at 26. But this proposal was rejected. The Articles of Confederation were not adopted by the Congress until November 17, 1777, and came into effect only in 1781." Tr., 849.

3. Judge Philip C. Jessup testified:

"'Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign, and independent,

> and that they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.' Scott, Sovereign States and Suits 55-57 (1925) (Footnotes omitted. See also *Id.* at pp. 35-40, 46-47, 54, 63.)" Tr., 650.

B. **Argument.**

In addition to the foregoing record references, it may be noted that in October 1776, the Continental Congress directed that every officer should swear the following oath of allegiance:

> "I do acknowledge the thirteen United States of America, namely, New Hampshire, etc. to be free, independent, and sovereign states. . . ." 2 Journ. 400 (as cited in "A General View of the Origin and Nature of the Constitution and Government of the United States", p. 77 [1970]).

The understanding of the thirteen original states as to their **individual** acquisition of all rights, prerogatives and powers formerly held by the Crown is reflected in their early constitutions. Looking by way of illustration to South Carolina, we see evidence as to that State's conception of its independent status in the South Carolina Constitution of 1776. In that year, the colony's Provincial Congress adopted and promulgated "A Constitution or Form of Government agreed to and resolved upon by the Representatives of South Carolina." The action was an arbitrary but necessary exercise of sovereignty, since the colony's former government had evaporated (at least in a strictly legal sense) when Lord William Campbell, the last royal governor, dissolved the colonial Assembly in September 1775. Temporary control over the colony was assumed by the Provincial Congress, which was composed largely of the same "principal gentlemen" who had comprised the colony's leadership during the growing dispute with the

Crown. It was they who decided that a constitution should be drafted "for regulating the Internal Polity" of the colony during what was expected to be an interim period during which the controversies between Crown and colonies would be resolved.

Having rejected Christopher Gadsden's dramatic appeal for an immediate declaration of independence, the South Carolina Provincial Congress voted, on February 11, 1776, to take under consideration "what regulations" were necessary "for securing peace and good order during the unhappy disputes between Great Britain and the colonies." A committee was chosen, consisting of Charles Cotesworth Pinckney, John Rutledge, Charles Pinckney, Henry Laurens, Christopher Gadsden, Rawlins Lowndes, Arthur Middleton, Henry Middleton, Thomas Bee, Thomas Lynch, Jr., and Thomas Heyward, Jr. The committee submitted the draft of a constitution on March 4. This was debated from the 8th to the 21st, given its long preamble on the 24th, and adopted on the 26th. At five o'clock in the afternoon of that day it was put into effect when the Provincial Congress, hitherto an extra-legal body, replaced the General Assembly which had been dissolved by the last royal governor on September 15, 1775. See S. C. Exhibit 2.

This constitution was the second adopted by an American colony (that of New Hampshire antedated it by some three months) and the first to outline a complete system of government. In the manner in which it was drafted and in its contents it was in accord with the majority of those that were adopted after the Declaration of Independence. Its influence upon these later constitutions is suggested by John Adams' statement that "the news from South Carolina has aroused and animated all the continent. It has spread a visible joy, and if North Carolina and Virginia should follow the example, it will spread through the rest of the colonies like electric fire." See S. C. Exhibit 2.

The South Carolina Constitution of 1778 continued to evidence the independence of South Carolina. Although the constitution of 1778 was a mere act of the legislature, it was evolved over a two-year period with an intervening election and under the fire of vigorous public discussion. On October 14, 1776, Rawlins Lowndes presented a report from a committee of the General Assembly appointed to revise the temporary constitution of that year; and this report, as amended, was ordered printed. Three months later the new Assembly yielded to the demands of the dissenters and agreed to end government support of the Anglican Church. On April 14, 1777, *The Gazette of the State of South Carolina* advertised the printed bill embodying the proposed constitution. Because of the loss of the legislative journals of 1777 and 1778, it is not known when the other changes were made; but the constitution adopted on March 19, 1778, was very different from its predecessor. Its bill of rights was selective rather than comprehensive. It replaced the Legislative Council with a Senate elected directly by the people, and, along with the constitutions of three other states, pioneered in devising the modern system of impeachment of officials. See S. C. Exhibit 3.

The Treaty of Paris of 1783 confirmed Independent Nation Status upon each colony, vesting each with imperium and dominion over its lands and adjoining seas.

A. **Record References.**

1. Professor Joseph H. Smith testified:

> "American independence was of course confirmed by the Peace of Paris of 1738, 8 Stat. 80. By Article I Great Britain acknowledged the United States, which are enumerated, as 'free, sovereign and independent States.' Article II provides that the boundaries of the United States are to include 'all islands within twenty leagues of any part of the shores of the United States.' While there is no

language, such as we have found in most of the colonial charters, referring to such regalities within these limits as waters, seas, mines, fishings, etc., it is my opinion that in the light of the long history of such charter provisions it was well understood at the time that language granting islands within a certain distance of the coast also granted the intervening sea and seabed, out to at least that distance. Thus it is my opinion that the Peace of Paris included an acknowledgment by Britain that all crown rights in the marginal sea off the North Atlantic coast, at least out to 20 leagues, had passed to the states, and to the states individually.

In my opinion it is perfectly clear that the language quoted **must** have been intended to have this meaning. There is no doubt that at this period the crown claimed sovereignty over the marginal sea and seabed, and if the language quoted did not convey that sovereignty then from the British point of view the marginal sea and seabed immediately off the coast of the United States would have continued to belong to the crown of England. I think we can be confident that this absurd result was not intended.

This conclusion is graphically confirmed by a map (*Maine, et al.* Exhibit 327) which was owned and closely studied by King George III. This is a copy of a map illustrating 'The British Colonies of North America' published by John Mitchell in 1755. King George's copy of the map includes inserted lines which do not appear on the original. These lines extend into the sea. One of them is variously labeled 'Boundary of Nova Scotia by the Treaty of Utrecht,' and 'line expressing the exclusive Right of the Fishery Reserved to Great Britain by the Treaty of Utrecht, extending 30 leagues from the land.' The other line in the sea, extending all the way along the coast of the present United States north of Florida, is

labeled 'Boundary as described by Mr. Oswald.' Richard Oswald was the principal negotiator for Britain of the Peace of Paris of 1783. The line was obviously intended to demarcate a boundary in the sea 20 leagues from the coast of the United States. It plainly represents a contemporaneous British interpretation that the language of the Peace of Paris quoted above was intended and understood to confirm to the United States—individually, not collectively—not only islands at least within 20 leagues of the coast but also the sea and seabed within that distance.

Moreover, an American copy of the same map, used by John Jay at the peace negotiations, shows a very similar boundary in the sea (*Maine, et al.,* Exhibit No. 339). Thus the parties were agreed on the construction to be given the treaty language.

For a complete description of the various copies of Mitchell's map and their significance for the Peace of Paris, see 3 Miller, *Treaties and other International Acts of the United States of America,* 319-56, especially pp. 328-49. (*Maine, et al.,* Exhibit No. 355)." Tr., 845-848.

2. Judge Philip C. Jessup testified:

"*Definitive Treaty of Peace with Great Britain, Sept. 3, 1783,* 8 Stat. 80. By Article I his Britannic Majesty acknowledges the United States, which are enumerated, as 'free, sovereign and independent States.' Article II provides that the boundaries of the United States are to include 'all islands within twenty leagues of any part of the shores of the United States.' Article III confirms to citizens of the United States 'the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish

of every kind on such part of the coast of New foundland as British fishermen shall use . . .; and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America.'" Tr., 501-502.

3. Judge Jessup also testified:

"These conclusions are reinforced, I think, as to the Atlantic continental shelf of the United States by evidence concerning the negotiation of the Peace of Paris of 1783, by which Britain recognized and confirmed the independence of the thirteen United States. As I have already mentioned, Article II provides that the boundaries of the United States are to include 'all islands within 20 leagues of any part of the shores of the United States.' Read *in vacuo* these words are doubtless ambiguous as to whether the 'boundaries' were also to encompass the intervening seas and seabed, but there is extrinsic evidence which makes it clear that they were. The whole matter of the status of 'Mitchell's Map' of 1755 in the treaty negotiations is extensively dealt with by Hunter Miller in 3 *Treaties and Other International* Acts of the United States of the United States of America (1933), pp. 319-56 (*Maine, et al.,* Exhibit No. 355). (See also Moore, *International Adjudications* (1929), Vol. 1, pp. 6-10, 63-67, 144-59, 241-51, 266-67, 289-90, 373, 81, 387-97, 436-41, 491; Vol. 2 (1930), pp. 7, 13-20, 329.) When the northeastern boundary question arose between Great Britain and the United States, their agreement of 1827 to submit the question for arbitration included a provision (Artcile IV) that 'the Map called Mitchell's Map, by which the Framers of the Treaty of 1783 are acknowledged to have regulated their joint and official Proceedings, . . . shall be annexed to a treaty received such explicit recognition in a subsequent treaty as having 'regulated' the negotiations. Miller and Moore give ample additional evidence showing that the drafters of 1827 were quite

correct in their judgment of the importance of Mitchell's Map.

The fact of crucial importance is that there have survived, and today exist, copies of Mitchell's Map used by both the American and the British negotiators at the 1782 Peace Conference, and that on both these copies, there were drawn the boundary lines established by the Peace of Paris, including lines in the sea eastwards of the coast of the United States and running all along its length. These lines are obviously rough attempts to mark a boundary 20 leagues from the coast of the United States. The British copy of the map, called the 'King George Map' since it was the personal property of the king, has written along the boundaries, including the boundary in the sea, the words 'boundary as described by Mr. Oswald,' who was the chief British negotiator in 1782. (*Id.*, at 337-38; a copy of the King George Map is *Maine, et al.*, Exhibit No. 337.) The American copy of the map (see 3 Miller at 341-42) has the words 'Mr. Oswald's Line' written by the sea boundary in the handwriting of John Jay. (This 'Jay copy' of Mitchell's Map is *Maine, et al.*, Exhibit No. 339.)

These maps make it clear that, as between Great Britain and the United States, the Peace of Paris fixed boundary lines off the American coast 20 leagues into the sea. Whether or not these were regarded as boundaries for **all** purposes, whether or not the drafters of the Treaty would have regarded the United States as having full territorial sovereignty within these boundaries, and whether or not they could be regarded as implying that the United States had no seabed or subsoil rights extending **beyond** 20 leagues (all these points could be disputed at length), I have no doubt that the boundary lines were understood, at least, as confirming the exclusive rights of the 13 United States in the seabed and subsoil within 20 leagues of the coast." Tr., 508-511.

4. Judge Jessup continued:

"By a treaty of 1892 the United States agreed with Great Britain to submit to an international arbitral tribunal a dispute concerning the right of the United States to control the fur seal fishery in the Bearing Sea. I wish to read a rather full extract from the case and argument of the United States because it demonstrates that neary 80 years ago, and more than half a century before the Truman Proclamation of 1945, the United States Government was itself asserting the rights which I believe the thirteen states had upon the conclusion of the Treaty of Peace of 1783, when their position as separate sovereign states was internationally placed beyond dispute." Tr., 622-623.

5. Judge Jessup stated that the 13 American colonies were treated internationally as separate sovereign and independent states prior to the date when the Constitution of the United States entered into force, saying:

"This fact is clear from the Preliminary Articles of Peace between His Britannic Majesty and the United States of November 30, 1782. Article i of that agreement reads as follows: 'His Britannic Majesty acknowledges the said United States, *viz.* New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors, relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented. It is hereby agreed and declared that the following are, and shall be their Boundaries *viz.* . . .' (All the references given to these early treaties here are taken

from 2 *Treaties and other Acts of the United States of America* [Hunter Miller ed. 1931]. The article just quoted is at pp. 96-97.)

The same provision is found in Article 1 of the Definitive Treaty of Peace of September 3, 1783. . . . The same recognition is found in the Treaty of Amity and Commerce between the United States and France of February 6, 1778. . . . Furthermore, in Article 1 we find the texts both in English and French use both the terms United States of America' (les Etats unis de l'Amerique) and 'the said S t a t e s' (des dits Etats). . . ."

* * *

"These treaties with France—the first ever made by the United States—were ratified by Congress on May 4, 1778. However, there was a most interesting additional ratification by Virginia, ... Thomas Jefferson, at that time Governor of Virginia, and who three years previously had drafted the Declaration of Independence, to be made effective by the treaty of alliance with France, of which he transmitted the instrument of ratification in behalf of his State. It is ot be presumed that he knew the meaning of the Declaration and that he thought his actions to be in accordance with its terms."

* * *

"Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign, and independent, and that they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.' Scott, Sovereign States and Suits 55-57 (1925) (Footnotes omitted. See also *Id.* at pp. 35-40, 46-47, 54, 63.)" Tr., 644-650.

6. Judge Jessup concluded:

"In the light of these fact, it must be concluded that on the conclusion of the Treaty of Peace with

Great Britain in 1783 each one of the thirteen 'colonies' had the status of separate states in the international sense, equal to all the other members of the international community of states in the rights and privileges which, in those days, sovereign states enjoyed under international law.

This conclusion is not impaired by the fact that in some of these treaties, in addition to the specification of the separate States of the 'United States,' there are references to the 'two parties' or 'both parties.'

It having been acknowledged in the preambles that the foreign Government was contracting with thirteen states, it is as if, in familiar modern contractual language where a multiple or collective group contracts, the treaty had said 'hereinafter referred to as the party of the second part.'

I have examined the testimony of Professor Joseph H. Smith and I find that the conclusions he reaches, on the basis of the sources of evidence which he analyzes, confirm conclusions which I have just stated. On the problem of separate individual statehood, he reinforces at his p. 153, from a constitutional point of view, what I have stated from an international point of view.

On the question of terminology respecting offshore rights, which I discuss at p. 24 and following in my testimony, largely from the evidence of treaty texts, much of Professor Smith's data support the opinion I state. For example, see his pp. 24 and following and his summary at pp. 101-102. His coments on oyster beds and salt pans (pp. 105, 109-110) are additional evidence of the right to exploit resources of the seabed.

And I agree with the conclusions he states on pp. 136, 139-40, 142, and elsewhere to the effect that Great Britain, in the period in question, claimed sovereignty over the marginal sea and rights to exploit the seabed even outside the three mile

limit, off the North American coast as well as in English waters." Tr., 655-656.

B. **Argument.**

The fact that the Treaty of Paris of 1783 confirmed independent nation status upon each colony individually, vesting each with imperium and dominium over its lands and adjoining seas, is fully supported by the overwhelming weight of the evidence as shown in the record references. There is no plausible evidence to the contrary.

16. The seventeenth exception, *i.e.* that from and after July 4, 1776, the date of independence, the United States of America, under the Continental Congress, the Articles of Confederation and under the Constitution, constituted a union of internally independent states with a national government to which were delegated certain powers including the powers associated with external sovereignty such as the conduct of foreign relations, of defense and of foreign commerce, is contrary to the evidence.

The period prior to adoption of the Articles of Confederation has been discussed in our argument in support of Exception No. 15, *supra.* The Articles of Confederation did not alter the Independent Nation Status of the individual colonies or States.

A. **Record References.**

1. Professor Joseph H. Smith testified:

"First, the provisions of the Articles themselves. Article II provides that 'each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.' Article IV characterized the confederation as a firm league of friendship among these sovereign and independent states.

Article IX set up, in great detail, an elaborate procedure for the arbitration of disputes between two or more states concerning 'boundary, jurisdiction or any other cause whatever,' and contained the express proviso 'that no state shall be deprived of territory for the benefit of the United States.' It is hard to imagine any language which could more conclusively or expressly negative any notion of an implied transfer of territorial rights.

It is well known that one of the principal political issues, if not the principal issue, during the confederation period was whether, and on what terms, the states possessing territories west of the Appalachians by virue of their colonial charters would give up those territories. The whole history of the western lands question demonstrates a recognition that the states preserved all their territorial and ownership rights until and unless express cessions were made. This was a matter of paramount importance. Indeed, the reason the Articles of Confederation did not become effective until 1781 was the Maryland refused to ratify them until it satisfied that the western lands of the larger states would be ceded."

* * *

"Thus the development under the Articles of Confederation shows two things. First, the states were recognized as retaining all their territorial and ownership rights except insofar as they expressly ceded them, conditionally or unconditionally. Second, while no express provision in the Articles permitted the acquisition and government of territory by the confederation, the doctrine that the confederation might acquire and govern territory **temporarily** pending its erection into new states won acceptance."

* * *

"Two of the states, North Carolina and Georgia, had not ceded their western lands at the time the Constitution went into effect. North Carolina's

act of cession was adopted on December 22, 1789 (*Maine, et al.*, Exhibit No. 329, pp. 3-8); Georgia's act of cession was not adopted until April 24, 1802 (*Maine, et al.*, Exhibit No. 330, pp. 142-146). Both of these post-Constitution acts of cession contained, as had Virginia's earlier cession, a condition providing that the territories ceded should be formed into states. The United States accepted both these acts of cession."

* * *

"I might add that Article II of the Georgia act of cession of 1802 (*Maine, et al.*, Exhibit No. 330, p. 45) also contained an express cession by the United States of any claim, right or title they might have 'to the Jurisdiction or Soil of any Lands lying within the United States, and out of the proper Boundaries of any other State' within the state of Georgia as it remained after the cession. The United States accepted this provision, which is wholly inconsistent with the notion that any territorial or ownership rights had passed by implication on the adoption of the Constitution." Tr., 850-861.

2. Judge Philip C. Jessup testified:

"I have made no study of whether any of the other states ratified the French treaties, or whether any other state ratified any of the subsequent treaties down to 1789, all of which were concluded after the Articles of Confederation entered into force. I doubt whether they did, since Article IX gave 'the United States in Congress assembled' the sole and exclusive right to make treaties, requiring the vote of nine states in Congress. (As to the French treaties, adopted before the Articles of Confederation came into force, Miller observes that 'the urgency of the occasion overrode any technical necessity of a ratification voted by thirteen states.' 2 *Treaties and Other International Acts of the United States, supra,* p. 30). That the delegation of powers over foreign relations, including treaty

making, does not impair the sovereignty of the delegating state for international-law purposes is confirmed by the holding of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco* (*France v. United States*), (1952) I. C. J. 175." Tr., 650-651.

B. **Argument.**

The evidence, as shown by the above record references, amply demonstrates that the Articles of Confederation were not intended to, and in fact did not, terminate or alter the independent nation status of each of the former colonies. Moreover, it is of utmost importance to note that the Articles of Confederation were not even in existence when the thirteen colonies declared their independent nation status in 1776. The Articles of Confederation were not so much as drafted prior to November 1778, and did not become effective until 1781. The Treaty of Paris, signed two years later (1783), continued to recognize the independent nation status of the thirteen former colonies.

The Federal Government, by the ratification of the Constitution by Nine States, was given defined and limited powers of imperium only.

A. **Record References.**

1. "The powers delegated by the proposed Constitution to the federal government are few and defined." *The Federalist No. 45* (Madison). [Testimony of David H. Flaherty.] Tr., 974.
2. Imperium and dominium are separate, distinct and severable; and either one may be granted by a sovereign without a grant of the other. U. S. Exhibit No. 17, Vol. III, Appendix, p. 1.
3. Professor Smith and Flaherty have clearly shown that the only powers granted to the federal government by the Constitution are limited governmental

and jurisdictional powers (imperium). Tr., 848, 854-58, 972-75.

B. **Argument.**

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in *McCulloch v. Maryland,* 17 U. S. 316 (1819):

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge. That principle is now universally admitted. . . . We admit, as all must admit, that the powers of the [federal] government are limited, and that its limits are not to be transcended."

Justice Story, in *Hunter v. Martin's Lessee,* 14 U. S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

There, then can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution.

It is also clear that governmental powers (imperium) and proprietary powers (dominium) are separate and distinct. This was recognized as far back as 1622 (Testimony of Morton J. Horwitz, Tr., 129; *Maine, et al.,* Exhibit No. 178, p. 17), and continually acknowledged by noted writers since that time. U. S. Exhibit No. 17, Vol. III, Appendix, p. 1 (statement of Roscoe Pound). See also Sir Mathew Hale's "De Jure Maris", Tr., 138; *Maine, et al.,* Exhibit No. 194, pp. 10-11. The severability of dominium and imperium

and the fact that imperium may be passed without a concurrent delegation of the powers of dominium is also recognized. U. S. Exhibit No. 17, Vol. III, Appendix, p. 1.

From these two propositions flows a third proposition. **What was delegated to the federal government by the Constitution were governmental powers (imperium) only.** Under Article I, Section 8, only the specifically enumerated powers in the Constitution and those necessary and proper for the execution of those enumerated powers were granted to the federal government. Nowhere in the Constitution is there any explicit transfer of any property interest (dominium) by the states to the federal government. There being no delegation of property by the Constitution, the United States can have acquired no dominium from the states except by voluntary cession either prior or subsequent to the ratification of the Constitution.

> ". . . The United States can have no right of soil within any of the states of the Union, unless by a cession from the particular states, or a foreign state. . . ." H. Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States,* 95 (1970).

Those powers of imperium not delegated to the Federal Government and all rights of dominium were retained by the States and the People thereof.

A. **Record References.**

1. Some powers of governmental control (imperium) were given up by the people to the federal government, while others were retained by the states. 10th Amendment; *The Federalist No. 45* (Madison). [Testimony of Professor David H. Flaherty.] Tr., 973-74.
2 **All** proprietary interests (dominium) were retained by the states and not transferred or granted to the federal government by the United States Constitu-

tion. [Testimony of Professor Joseph H. Smith.] Tr., 848, 854-58.

3. The retention of proprietary rights is exemplified by the actions of the states in specifically providing for the method of transferring such rights in the Constitution and the subsequent grant of cession of lands by the states of North Carolina and Georgia. [Testimony of Professor Joseph H. Smith.] Tr., 856-858, 860. *Maine, et al.,* Exhibits Nos. 329-330.

B. Argument.

It strikes North Carolina, South Carolina and Georgia as elementary that the states upon their formation of the federal government retained the governmental powers (imperium) of control, regulation and jurisdiction over all sovereign matters not granted to the federal government. Professor Flaherty clearly established this principle in his testimony on transcript pages 973 and 974, where he discussed relevant articles, sections and amendments to the United States Constitution and their relation to this finding of fact.

Professor Flaherty concluded his testimony on this point by quoting from *The Federalist No. 45*:

> ". . . Those [powers] which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

This point cannot, we believe, be more succinctly set forth than it is in the 10th Amendment to the United States Constitution:

> "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." Professor Smith demonstrates in his testimony that

the United States Constitution did not grant the federal government any property whatsoever. Provisions were made, however, for the federal government to acquire property from the states, but only after obtaining the consent of the state or states concerned. Certainly the federal government did not acquire nor was it given the power to acquire property by some authority other than the United States Constitution. As stated by Professor Smith:

> "'In view of the long and critical debate over cessions during the confederation period, and the full awareness by all participants of cession and territorial questions, it is inconceivable that any of the framers believed that territorial or ownership rights were being ceded implicitly and without discussion.
>
> At one point during the Constitutional Convention Rufus King of Massachusetts suggested that, if the debts of the states were to be assumed, then in return all unallocated lands of the states should be given up to the federal government. 2 Farrand, *Records of the Constitutional Convention,* 328 (1911). But significantly, this proposal received almost no support among the delegates and was never even seriously considered.
>
> Article IV, Section 3 of the Constitution provides, of course, that new states may be admitted to the Union by Congress, but that no new state shall be formed within the jurisdiction of any other state or states without the consent of those states. It is interesting to note that Roger Sherman of Connecticut opposed this provision as unnecessary; to him it was self-evident that 'the Union cannot dismember a State without its consent.' *Id.* at 455. However, the representatives of Maryland vigorously urged that the provision be deleted for the opposite reason, namely, that Congress should have the right to dismember the larger states without their consent. *Id.* at 461-62. There was a full debate on this question and the provision was retained by a vote of 8 to 3. *Id.* at 462. Again Maryland attempted to delete the provision, *Id.* at 463-

64; and again the proposal was rejected by the same vote. *Id.* at 464.

Immediately after the adoption of the first clause of Article IV, Section 3 as it still remains, Charles Carroll of Maryland moved to add that nothing in the Constitution should be construed to affect the claim of the United States to vacant lands (*i.e.*, lands not within any state boundary) ceded to them by the Treaty of Peace. *Id.* at 465. James Madison thought such a provision unnecessary but harmless, but proposed that 'to make it neutral and fair, it ought to go farther and declare that the claims of particular States also should not be affected.' *Id.* The debate resulted in the adoption of what became the second clause of Article IV, Section 3 of the Constitution: '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.'

Also of paramount importance in ascertaining the intent of the framers is the provision of Article I, Section 8 of the Constitution, giving Congress legislative powers over a federal district for the seat of government and over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings. The section expressly provides that the federal district and the other places mentioned may be acquired only with the consent of the legislatures of the states in question. The clause as first proposed, while providing that the federal district could be acquired only by the cession of particular states, did not require the consent of the state legislatures for the purchase of places for forts, etc., over which federal legislative authority was to be exercised. This omission, was promptly pointed out by Gerry of Massachusetts, who contended that 'this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed

would be a means of awing the State into an undue obedience to the Genl. Government.' *Farrand, supra,* at p. 510. The matter was immediately resolved by the addition of the words 'by the Consent of the Legislature of the State,' after which the clause was adopted unanimously.

In my opinion the constitutional provisions I have mentioned, and the debates leading to their adoption, are inconsistent with any notion that the framers intended that the adoption of the Constitution involved the implicit transfer by the states to the federal government of any territorial or ownership rights whatever, whether in the seabed of the continental shelf or elsewhere. Where such rights were to be transferred, express language was drafted to provide therefor and to require the consent of the states that would be affected. Article IV, Section 3 expressly protected the states against dismemberment and provided that nothing in the entire Constitution should be so construed as to prejudice any territorial or property claim of any state. It is difficult to imagine how the intent could be more clear." Tr., 854-858.

The only logical conclusion, then, that we believe can be drawn, is that the states intended and did in fact retain the property rights (dominium) that each acquired from the English Crown by reason of the American Revolution.

By way of illustration, we find in the South Carolina cession agreement of 1787 (*Maine, et al.,* Exhibit 370) that the cession of western lands was from those lands lying "within the limits of the **charter** of South Carolina." Thus South Carolina clearly retained all proprietary rights in its adjoining seas during the post-revolutionary Confederation period.

Subsequent to ratification of the Constitution, the retention of dominium is exemplified by the actions of North Carolina and Georgia in the cession of lands to the federal government. [Testimony of Professor Joseph H.

Smith.] Tr., 860; *Maine, et al.,* Exhibit Nos. 329-330. Not only was an affirmative act of the individual states necessary for the federal government to acquire these lands, but, each of the States placed conditions on the act which, among others, provided that the territories would be formed into new States. These conditions were accepted by the United States. This evidence, we believe, conclusively demonstrates that the federal government acquired no property rights (dominium) from the States by virtue of the United States Constitution.

The rights of dominium retained by each of the several States include the proprietary rights in the seabed and subsoil.

A. **Record References.**

1. Professor Flaherty testified:

> "No one, I believe, would contend that there was ever any express transfer of the rights of the rights of the states to the seabed of the continental shelf. It follows that, so far as the intent of the framers is concerned, there was no transfer at all, since the historical evidence conclusively negatives the idea of a transfer by implication." Tr., 848.

2. The proprietary rights of the states in the sea and seabed were acknowledged by the United States in 1878 when the federal government requested and received permission to enter, occupy and use land below the low water mark off the New Jersey coast. *Maine, et al.,* Exhibit Nos. 486-87.
3. The proprietary rights of the states in the sea and seabed were acknowledged by the United States in 1945 when the federal government requested and received an easement to lay a submarine communications cable in the Atlantic Ocean off the New Jersey coast. *Maine, et al.,* Exhibit Nos. 547-49.
4. Evidence that these proprietary rights were retained by the states and did not pass to the federal govern-

ment by virtue of the United States' paramount powers of national defense, foreign affairs, and commerce is found in Professor Kirkpatrick's testimony to the effect that State ownership of the continental shelf is not inconsistent with or in conflict with the federal powers. Tr., 73-95.

5. Support for Professor Kirkpatrick's conclusions comes from the Plaintiff's own witness, Profsesor Henkin, who testified that to his knowledge no internal problems or embarrassment to the United States has occurred because of the seabed grants to the states under the Submerged Lands Act of 1953. Tr., 2647.
6. Even assuming, as the Defendants rigorously do not, that the states did not retain proprietary rights in the seabed, and assuming that these rights belonged to the United States, the federal government ceded such rights to Georgia, in the cession agreement of 1802. *Maine, et al.,* Exhibit No. 330; Georgia Exhibit No. 8.
7. The rights of dominium in the seabed and subsoil remain inherently vested in the states even though the particular states did not occupy or exploit the continental shelf. Judge Jessup's conclusion in this regard, Tr., 641-43, is supported by the opinion in the North Sea Continental Shelf cases [1969], I. C. J. 1, 29. Tr., 256-27.

B. **Argument.**

Whether title to the seabed and subsoil adjacent to the original thirteen states lies in the United States collectively or in the individual thirteen states separately is a question that can only be answered by examining the Constitution and the federal framework which it created. This federal framework was nowhere more succinctly set forth than in the words of Justice Frankfurter:

> "The essence of a constitutionally formulated federalism is the division of political and legal power between two systems of government constituting a single Na-

> tion. . . . our Constitution is one of particular powers given the National Government with powers not so delegated reserved to the states, or, in the case of limitations upon both governments, to the people. . . . The choice of this form of federal arrangement was the product of a jealous concern lest the federal powers encroach upon the proper domain of the States and upon the rights of the people." *Knapp v. Schweitzer,* 357 U. S. 371, 375 (1957).

Those powers vested in the federal government are set forth in the Constitution. They include the powers expressly enumerated in Art. I, § 8, and those powers "necessary and proper" for carrying into execution all the powers delegated to the federal government by the Constitution. While questions as to the exact extent of these powers "will probably continue to arise as long as our system shall exist", it is indisputable that these powers are limited and that these limits are not to be transcended. *McCulloch v. Maryland,* 17 U. S. 316, 405 (1819).

All powers not delegated to the federal government remain vested in the people or the states. 10th Amendment. As stated by Madison in *The Federalist No. 45*:

> "The powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

What the states had before they joined in the formation of the Union has been clearly set forth by the Supreme Court.

> "By this treaty [Treaty of Paris, 1783], the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States." *Johnson v. McIntosh,* 21 U. S. 543, 584 (1823).

During the period of Confederation,

> "[T]here 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 can be no acquisition of territory made by the United States distinct from, or independent of some one of the States." *Harcourt v. Gaillard,* 25 U. S. 523, 526 (1827).

Since the rights of dominium resided in the states prior to the ratification of the Constitution, it cannot be denied that they **remained** in the states after the ratification. There is no express provision in the Constitution which vests the federal government with any territory. This is pointedly borne out by the fact that the acquisition of territory by the United States for the federal district and for any other place or needful building may be accomplished only with the consent of the particular state legislatures. U. S. Const., Art. I, Sec. 8.

Furthermore, no new state may be formed within the territory of any other state without the express consent of the legislatures of the states so affected. U. S. Const., Art. IV, Sec. 3. This same section also specifically provides that "nothing in this Constitution shall be so construed as to Prejudice any Claims . . . of any particular State." In light of all these provisions, there can be no doubt that the Constitution did not explicitly vest the United States with any territory within the then existing state boundaries.

Similarly, it cannot be contended that there was any implicit transfer of territory by the states to the federal government in the Constitution. Professor Smith has stated that "no state could lose territorial or ownership rights by implication," (Tr., 853) and that "the historical evidence conclusively negates the idea of a transfer by implication" (Tr., 848) under the Constitution.

The accuracy of the foregoing is further demonstrated by Chief Justice Marshall's opinion in *United States v. Bevans,* 16 U. S. 336 (1818). The facts of that case involved a murder committed by a United States marine while on

duty aboard the U.S.S. Independence. The offense was committed while the gunship was anchored in the main channel of Boston harbor. The question before the Supreme Court was whether the federal courts had jurisdiction over the crime by virtue of a Congressional act passed under the exclusive authority of Congress to deal with admiralty and maritime affairs.

In his opinion, Chief Justice Marshall said:

"The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States." *Id.* at 386.

He then proceeded to discuss one of the specific contentions argued by the United States in the case before the Special Master today. Does the grant of exclusive jurisdictional powers (imperium) carry with it the powers of dominium?

"Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.

It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judi-

> cial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.
>
> It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away." *Id.* at 388.

Chief Justice Marshall recognized the danger to our federal system if the grants of particular, exclusive powers of imperium were construed so as to include the grant of dominium also. North Carolina, South Carolina and Georgia do not think the passage of time has lessened that danger.

Proof of the fact that the states retained all rights of dominium is provided by the voluntary cessions of western lands by North Carolina and Georgia. North Carolina ceded its western territory to the federal government in 1789, several months after joining the Union. Georgia ceded its lands in 1802. Both voluntary grants to the United States contained numerous conditions, all of which were accepted by the federal government. *Maine, et al.*, Exhibit Nos. 329-330.

Judicial recognition of the states' retained rights of dominium was provided by the United States Supreme Court in *Fletcher v. Peck,* 10 U. S. 87 (1810). One of the issues presented to the Court was whether the land, in what today is the State of Mississippi, belonged to Georgia or the United States. Chief Justice Marshall held that the land in question had belonged to Georgia and that Georgia had the right in 1795 to grant fee simple title to those lands lying within her colonial boundaries. *Id.* at 142.

If the rights of dominium in a state's western lands did not pass either explicitly or implicitly by the ratification of the Constitution to the federal government, Defendants do not see how the rights of dominium in the seabed could have passed either. There exists no basis for such a distinction. North Carolina, South Carolina and Georgia believe it an inescapable conclusion that their proprietary interests in the seabed, as well as their proprietary interests in western lands, remained vested in themselves after joining the Union.

17. The eighteenth exception, *i.e.* that if the English crown in 1776 had any remaining rights to sovereignty of the marginal seas and ownership of the seabed off the coasts of the colonies, those rights would have passed at independence and under the Treaty of Peace of 1783 to the national government as the holder of the external sovereignty of the United States and not to the several states, is contrary to the evidence.

See argument in support of Exceptions No. 14, 15 and 16, *supra.*

18. The nineteenth exception, *i.e.,* that if the States in 1789 had any rights to sovereignty of the marginal sea and ownership of the seabed off their coasts which they had received in any manner, which I do not find that they did have, those rights would have been lost to the national government upon their ratification of the Constitution, is contrary to the evidence.

See argument in support of Exception 16, *supra.*

19. The twentieth exception, *i.e.* that the sovereign jurisdiction of the three-mile belt of territorial sea and ownership of its seabed became vested in the United States, rather than in the states, when, after 1776, the concept of the territorial sea was recog-

nized and its extent defined by the national government, is contrary to the evidence.

See argument in support of Exceptions 15, 16 and 17.

Moreover, the evidence presented in this case clearly shows that the states' rights of dominium continue to exist to the present day.

Judge Jessup has testified that dominium in the seabed remains vested in a coastal state even though that state does not occupy or exploit the seabed. He has shown that occupation or use is plainly not necessary today to establish exclusive rights in the continental shelf; and it is Judge Jessup's opinion that occupation or use was never necessary. Tr., 841-42.

The International Court of Justice concurs with Judge Jessup in its opinion in the *North Sea Continental Shelf Cases* [1969], I. C. J. 1. The Court there stated that a "coastal state's right [in the continental shelf] exists *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned." *Id.* at 29.

If these rights of dominium belong to a state regardless of whether or not they are claimed or exploited by the state, the only way the Defendant states could have lost their claim to the continental shelf and its subsoil would have been by acquiescing to another sovereign's exploitation of those rights or by voluntary cession. Clearly there has been no such acquiescence on the part of North Carolina or Georgia simply because it was not until very recent times that the technology existed for exploiting the resources in the seabed off the Atlantic coast. In these recent times assertion of ownership in the seabed, and **not** acquiescence, has been the rule followed by all parties in this litigation. This fact is strengthened by Judge Jessup who testified that, to his knowledge, no state has ever renounced its claim to the continental shelf resources. Tr., 1210.

Additionally, the United States has introduced no evidence to show that any of the several states has ever made a cession of its seabed rights to the federal government since the ratification of the Constitution. This is understandably so since no such evidence exists. As Professor Flaherty has testified, "No one, I believe would contend that there was ever any express transfer of the rights of the states to the seabed of the continental shelf." Tr., 848.

The states' proprietary rights in the seabed were recognized by the United States itself on at least two occasions. In 1878 the federal government requested and received from the State of New Jersey permission to enter, occupy, and use land below the low water mark off the New Jersey coast. *Maine, et al.,* Exhibit Nos. 486-87. The federal government again acknowledged the states' dominium over the seabed when, in 1945, it requested and paid for an easement to lay a submarine communications cable in the Atlantic Ocean off the New Jersey coast. *Maine, et al.,* Exhibit Nos. 547-49. Such actions by the United States are inconsistent with any other position than an acknowledgment of the proprietary rights of all the Atlantic coast states to their adjacent seabeds.

Contentions by the United States that proprietary rights to the seabed have passed to the federal government by implication at the time of or subsequent to the ratification of the Constitution by virtue of the federal government's paramount powers in the areas of national defense, foreign affairs, and commerce, are without merit. This has been demonstrated by the testimony of Professor Flaherty that "the historical evidence conclusively negates the idea of a transfer by implication." Tr., 848. This fact also is borne out by Professor Kirkpatrick's testimony that the states' ownership of the continental shelf is not inconsistent with or in conflict with federal powers and responsibilities. Tr., 73-95.

As proof of his contention, Professor Kirkpatrick points to the cooperation between state and federal governments in dealing with the seabed within three miles of the coast since the Submerged Lands Act of 1953 reaffirmed those lands in the coastal states. If there was a paramount need for federal ownership of the seabed, it would seem it would be most crucial within the first three miles off the Atlantic coast line. Yet Congress has demonstrated that ownership of the seabed in this area is not in conflict with federal powers by passing the 1953 Submerged Lands Act. This fact is substantiated by the Plaintiff's own witness, Professor Henkin, who testified that to his knowledge there has been no grievous international problem or embarrassment to the foreign affairs of the United States since 1953 because of the states' rights of dominium in the continental shelf. Tr. 2647.

As pointed out by Professor Kirkpatrick, the federal government's powers of imperium provide ample protection for the national interest if a conflict arises. For example, the Secretary of the Army has the power to veto any construction of structures in or over navigable waters, including the three-mile offshore belt. If there existed sufficient need for federal ownership of particular offshore lands, these lands could be had by purchase or through the exercise of the federal power of eminent domain. In any event, federal need of proprietary powers in the seabed—no evidence of which has been shown—does not jusitfy or permit assumption of ownership rights. We, therefore, are firmly convinced that the states were the true and proper owners of the seabed and subsoil and have remained so ever since the American Revolution.

20. The twenty-first exception, concerning the import of *United States v. California,* 332 U. S. 19 (1947), is contrary to the law as applied to the facts of the present litigation.

During the hearings below the United States relied heavily upon its interpretation of the decision of this Court in *United States v. California,* 332 U. S. 19 (1947), as having determined the issues of the present litigation adversely to the Defendant states.

We respectfully show that the California case did not determine the questions presently in issue, has no relevancy to the instant proceeding, and to the extent that any portion of the decision may be construed as having determined any matters currently in issue adversely to the interests of the Defendant states the decision was in error.

No Defendant in the current litigation was a party to the California case. It therefore cannot seriously be contended by the United States that *California* was in any way determinative of the present Defendants' claims of property rights in their adjacent seas.

We therefore regard the United States' reliance upon *California* as premised upon a belief that certain issues relevant to the assertions of the present Defendants were fully examined by the Supreme Court and determined in a manner such as to deny these Defendants a favorable consideration of those issues. Careful examination of the California decision clearly reveals that such is not the case.

California, as part of its argument asserting ownership of the seabed within a three-mile belt, attempted to show that the original thirteen states acquired from the Crown of England title to all land within their boundaries under navigable waters, including a three-mile belt in adjacent seas. The second stage of the California position was that by virtue of its admission to the Union on an "equal footing" with the original states, California similarly was vested with title to such lands. It should be noted that we believe the "equal footing" clause to pertain to governmental powers rather than property rights, and the very

nature of California's claim, based upon the equal footing argument, may have had some effect in deterring the Court from considering the case as one exclusively involving property rights.

Although numerous colonial documents relating to the original states were presented to the Court, the Court stated: "Neither (party) has suggested any necessity for the introduction of evidence, and we perceive no such necessity at this stage of the case." *United States v. California, supra,* at 24. Thus the Court did not have the benefit of the interpretive testimony of expert witnesses concerning the meaning of those documents. In the present litigation it does.

The decision in *California* may fairly be characterized as containing no determination as to whether the thirteen original colonies acquired proprietary rights in their adjacent seas or whether they possessed such rights at the time of independence. The Court stated:

> "From all the wealth of material supplied, however, we cannot say 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." *United States v. California, supra,* at 31.

This statement can only be taken to mean that as to California's assertions in that regard, there was a failure of proof. We do not believe the somewhat similar contentions of the Defendants in this case lack proof, but rather submit that the weight of evidence is substantially in favor of Defendants' position. We observe that in *California* the Court stated that at the time of independence there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. With that statement we fully agree, as

we believe the Defendants' evidence in the present case establishes that international law and custom at that time recognized rights of dominion in adjacent seas to a distance considerably in excess of three miles.

But of greatest significance is the fact that *California* clearly was not decided upon questions of historical claims or rights. Pervading the entire opinion is the Court's concern with its concept of "paramount rights" and the expressed belief that considerations of national security, treaty or similar international obligations, and questions relating to national sovereignty precluded California from exercising any dominion over the sea beyond low water mark.

The dissenting opinion of Justice Frankfurter succinctly described the separability of imperium and dominium, such as to permit of **ownership** by the State of the territory in question without impairing the **sovereignty** of the United States.

Justice Reed, in his dissent, stated that:

> "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." *United States v. California, supra,* p. 42.

Shortly after the decision in *California,* the Congress repudiated the concept of "paramount rights" involving inseparable sovereignty and property interests by enactment of the Submerged Lands Act of 1953, 43 U. S. C., §§ 1301-1315. That Act granted to the states "all right, title, and interest of the United States, if any it has . . ." in and to the lands beneath the sea within three miles of the coast line of each coastal state.

It was thereby congressionally determined that the ownership of such submerged lands by the states could be

separated from the sovereignty possessed over those lands by the United States. In the twenty years since the enactment of the Submerged Lands Act it has been conclusively demonstrated that ownership of the seabed by the coastal states has not impaired the national sovereignty of the United States over the waters above, nor interfered with the treaty or other international obligations of the United States.

We believe that the division of rights of *imperium* and *dominium* accomplished by the Submerged Lands Act, as to the three-mile marginal sea belt, together with the successful historical exercise of those separated interests over a period of two decades, establishes that there is no conceptual or factual deterrent in the division of those interests to a greater distance in the sea. Certainly the states will continue to be bound by and accede to such treaties or international obligations that may be undertaken by the United States, and no contention to the contrary is made by these Defendants.

21. The twenty-second conclusion, *i.e.* that prior to the Proclamation of September 28, 1945 by President Truman, 59 Stat. 884, rights to the resources of the seabed beyond territorial waters could be obtained only on the basis of prescription or actual occupation and neither the United States nor the Defendant States had made any such claim, is contrary to the evidence.

See argument in support of Exception No. 9, *supra.*

22. The twenty-third conclusion, *i.e.* that the Truman Proclamation of 1945 for the first time claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beyond the three-mile limit of the territorial sea off the coasts of the United States, and that the Proclamation initiated a new rule of

international law in this regard, is contrary to the evidence.

See argument in support of Exception No. 9, *supra.*

23. The twenty-fourth exception, *i.e.* that this claim (to wit: the Truman Proclamation of 1945) was validly made by and on behalf of the United States under its powers of external sovereignty and did not inure to the individual benefit of any of the Atlantic coastal states, is contrary to the evidence.

See argument in support of Exception No. 9, *supra.*

24. The twenty-sixth conclusion, *i.e.* that the Submerged Lands Act of 1953 validly limited to a width of three geographical miles the marginal band of sea the seabed of which it confirmed and vested in the Defendant States, even though the Act granted to the states situated on the Gulf of Mexico seabed rights within their recognized historic boundaries out to three marine leagues, is contrary to the evidence.

The Submerged Lands Act conclusively established that the rights of *imperium* and *dominium* in the sea are separable. The Act cannot properly be interpreted as limiting the claims of these Defendants to a three-mile marginal belt.

The Act, in effect, quitclaimed to the coastal states all right, title, and interest of the United States to the resources of the seabed within three miles of the coasts of those states. As stated in the separate opinion of Justice Black in *United States v. California,* 381 U. S. 139, 187 (1965), during the testimony presented at the Senate committee hearings on the bill references were made by the author of the bill and by the Secretary of the Interior to "restoring" to the states their plenary rights, property and jurisdiction over the areas lying within state boundaries. This clearly is a reference to the supposed effect of the first California case. But as shown herein, the case did not

and could not determine rights possessed by the present Defendants.

The Submerged Lands Act is properly read as confirming in the coastal states ownership of the seabed and subsoil of their adjacent seas **no less than** three miles from their coasts. These Defendants submit that prior to the formation of the Union they owned the seabed and subsoil of such lands considerably in excess of three miles from the coast. The rights of these Defendants in such submerged lands have not been previously judicially determined. Therefore, as to the present Defendants, the Submerged Lands Act merely constituted a confirmation of a portion of the seabed ownership already possessed. The Act cannot be regarded as a taking of the property rights of the Defendant states in waters beyond three miles from their coasts.

25. The twenty-seventh conclusion, *i.e.* that under the Truman Proclamation, the Outer Continental Shelf Lands Act of 1953, and the Convention on the Continental Shelf of 1964, the United States has the right, as against the Defendant States, to the resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of territorial sea off the Atlantic coast, is contrary to the evidence.

See argument in support of Exceptions 9, 16, 17, 18, 19, and 24, *supra.*

26. The twenty-eighth conclusion, *i.e.* that the States of Rhode Island and North Carolina were not wholly independent nations and did not have external sovereignty during the period between the operative date of the federal government under the Constitution and the subsequent dates when they, respectively, ratified the Constitution, is contrary to the evidence.

A. **Record References.**

The only time the question of the status of the last four states to ratify the Constitution was raised in the transcript was on cross examination of Plaintiff's witness, Professor Henkin. When asked what he thought the last four states' position was after the ratification by the first nine, he said he had no opinion. However, Professor Henkin did note that it was an "interesting" question. Tr., 2669-70.

B. **Argument.**

It is vigorously asserted that upon the Declaration of Independence North Carolina became a sovereign and independent state. See *Marshall v. Lovelass,* 1 N. C. 412 (Ct. of Conference 1801); *cf. Bayard v. Singleton,* 1 N. C. 5 (Sup. Ct. 1787). However, regardless of the status of North Carolina during the Revolutionary and Confederation periods, after June 21, 1788, the statew as an independent sovereign.

Article VII of the Constitution specifically states that "[t]he ratification of the Conventions of nine States shall be sufficient for the Establishment of the Constitution between the States so ratifying the Same." See also *The Federalist No. 43* (Madison). On June 21, 1788, New Hampshire became the ninth state to ratify and on that date the Constitution was established. The Constitution became operational in March 1789. *Owings v. Speed,* 18 U. S. 420, 422-23 (1820). Since "[b]oth governments could not be understood to exist at the same time," *Id.* at 422, it is clear that March 1789 the Articles of Confederation were no longer in effect. North Carolina remained independent from the newly formed national government until November 21, 1789, when it became the twelfth state to ratify. Thus, for at least 8 months, or more properly 15 months, North Carolina existed as a separate and independent na-

tion bound by no higher authority save that of her own constitution.

This inescapable fact is further borne out by the early actions of Congress. One of the early revenue acts placed North Carolina and Rhode Island on the same footing as foreign countries.

> "The States of Rhode Island and Providence Plantations, and North Carolina, have not as yet ratified the present Constitution, by reason whereof this act doth not extend to the collections of duties within either of the said two States, and it is thereby necessary that the following provision with respect to goods, wares or merchandise imported from either of the said two States should for the present take place: (a) Sec. 39 *Be it therefore further enacted,* That all goods, wares and merchandise not of their own growth or manufacture, which shall be imported from either of the said two States of Rhode Island and Providence Plantations, or North Carolina, into any other part or place within the limits of the United States, as settled by the late treaty of peace, shall be subject to the like duties, seizures and forefeitures, as goods, wares or merchandise imported from any State or country without the said limits." Act of July 31, 1789, ch. 5, §§ 38-39, 1 Stat. 48.

Congress also thought it necessary to extend privileges to the two States remaining outside the United States, while at the same time they continued to tax North Carolina and Rhode Island products as they would any other goods imported "into the United States."

> "Sec. 2. *And be it further enacted,* That all privileges and advantages to which ships and vessels owned by citizens of the United States, are by laws entitled, shall be, until the fifteenth day of January next extended to ships and vessels wholly owned by citizens of the States of North Carolina, Rhode Island and Providence Plantations.
> * * *

> "Sec. 3. *And be it further enacted,* That all rum, loaf sugar, and chocolate, manufactured or made in the States of North Carolina or Rhode Island and Providence Plantations, and imported or brought into the United States, shall be deemed and taken to be, subject to the like duties, as goods of the like kind, imported from any foreign State, kingdom or country, are made subject to." Act of September 16, 1789, ch. 15, § 2-3, 1 Stat. 69-70.

Additionally, the Judiciary Act of 1789, 1 Stat. 73-74, made no provision for any federal Courts to be established in either North Carolina or Rhode Island. Thus, Congress explicitly recognized that North Carolina and Rhode Island were not part of the United States and dealt with the states as it would any other foreign nation. As Justice Henry Baldwin, in discussing the actions of the federal government in 1789, said:

> ". . . if the three branches of the legislative power were not demented, these two States were no more constituent parts of the American empire at that time, than Canada and Nova Scotia." [3]

Finally, the first national elections were held and George Washington was elected President before North Carolina ratified the Constitution on November 21, 1789.

Clearly, by any standard, the status of North Carolina from June 1788 to November 1789 could have been nothing less than that of a separate and independent nation. Therefore, all rights of an independent sovereign, including rights in the adjacent seabed not less than 20 leagues seaward, belonged to North Carolina; and only those rights and powers delegated to the federal government under the Constitution passed to the United States on November 21, 1789.

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[3] H. Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States,* 96 (1970). This is a Da Caps Press Reprint of the 1837 edition under the same title.

27. The twenty-ninth conclusion, *i.e.* that the State of Georgia did not acquire the resources of the seabed under its boundary settlement of 1802 with the United States, is contrary to the evidence.

Through the Cession Agreement of 1802 between the United States and Georgia, the western lands of Georgia were ceded to the United States. The United States, among other considerations, agreed that:

> "The United States accept the cession above mentioned, and on the conditions herein expressed; and they cede to the State of Georgia whatever claim, right, or title, they may have to the jurisdiction or soil of any lands lying within the United States, and out of the proper boundaries of any other State, and situated south of the southern boundaries of the States of Tennessee, North Carolina, and South Carolina, and east of the boundary line hereinabove described, as the eastern boundary of the territory ceded by Georgia to the United States." Georgia Exhibit No. 8.

This cession agreement unquestionably amounts to no less than a quitclaim deed to the jurisdiction or soil of any lands lying east of the western boundary of Georgia, as described in the cession agreement.

The precise language in the cession agreement is of particular significance. The United States ceded whatever **claim, right,** or **title** it might have to the described lands. Clearly this language includes property rights (dominium), as well as such rights of sovereignty as the State might be granted consistent with the Constitution. The scope of the cession is made even clearer by the description of that to which the claim, right, or title is ceded, namely, the jurisdiction **or soil** of any lands, as described.

The disjunctive cession of jurisdiction or lands would clearly encompass property claims, right, or title whether or not Georgia could simultaneously claim or possess a

right of jurisdiction over those lands. The cession of such claims, right, or title as the United States might have to the soil of any lands, as described, would extend to any claims, right, or title of the United States in the seabed and subsoil of the sea adjacent to Georgia.

Even if, as the United States erroneously contends in this case, rights in the seabed passed directly from the Crown to the United States at independence, those rights, as to the sea adjacent to Georgia, passed to Georgia pursuant to the 1802 cession. And, even if, as the United States further erroneously contends, the rights of the State of Georgia in its adjacent sea passed to the United States upon Georgia's ratification of the Constitution, those rights were returned to Georgia pursuant to the 1802 cession.

If the United States seriously makes any contention that at the time of independence **no** rights in the seabed of the adjacent seas were acquired by either Georgia or the United States, this, of course, would be utterly frivolous in light of the weight of the historical evidence presented during the hearings in this case and discussed herein.

28. The thirty-first conclusion, *i.e.* that the United States is entitled to judgment in this proceeding, is contrary to the law and to the evidence.

This conclusion is contrary to the law and to the evidence for all of the reasons previously set forth. Under the law and the evidence it is the Defendants who are entitled to judgment in this case.

29. The thirty-second exception, *i.e.* that the costs of suit, including the expenses of the special master, should be borne by the twelve Defendants States in equal shares, is contrary to the law and evidence.

Since under the law and the evidence it is the Defendants who are entitled to judgment, the costs of the suit,

including the expenses of the special master, should be borne by the United States.

Respectfully submitted,

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