Annex 1, Volume 2, to Brief of Amici Curiae in United States v. Florida, No. 52, Original.

No. 35, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

BEFORE THE SPECIAL MASTER

# BRIEF FOR THE COMMON COUNSEL STATES

Volume II

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VI.

## THE ENGLISH LAW OF MARITIME SOVEREIGNTY AND DOMINION WAS NOT INCONSISTENT WITH INTERNATIONAL LAW IN THE PERIOD 1606-1783, AND NO BRITISH OR AMERICAN COURT COULD OR WOULD HAVE SO HELD.

Plaintiff contends that, even conceding that maritime sovereignty and dominion were fully established in English and American colonial law in the 17th and 18th centuries, all the vast body of law and practice proved by the record herein should be ignored or regarded as a nullity on the ground that under the international law of that period sovereign nations were forbidden to claim and exercise such rights.

### A. No British or American Court Would Have Questioned Its Government's Territorial Claims on the Basis of Alleged Contrary Doctrines of Customary International Law.

Even if the international law of the period had been as plaintiff contends, it is beyond dispute that no British or American colonial court would have presumed to set aside provisions of English law, or to impeach the official acts of the executive organs of the state -- particularly with respect to territorial claims -- on the ground of alleged inconsistency with customary international law. It has always been, and still is, the law in both Britain and the United States that courts will do nothing of the kind, but rather that such

territorial claims, and particularly claims to maritime sovereignty, by the proper governmental organs are conclusive on the courts and are not to be questioned. Poll v. Lord Advocate, (1897) 5 Scots L.T. 167, 3 British Int'l Law Cases 747 (1965); Peters v. Olsen, (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; Mortensen v. Peters, (1906) 8 F.93, 3 British Int'l Law Cases 754; Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 424, 464, (1799) (Iredell, J.); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306-09, 314 (1829); (Marshall, C.J.); Williams v. Suffolk Insurance Co. 38 U.S. (13 Pet.) 415, 420 (1839); In re Cooper, 143 U.S. 472 (1892); Wilson v. Shaw, 204 U.S. 24 (1907); United States v. The James G. Swan, 50 F.108 (1892); United States v. The Kodiak, 53 F.126 (1892); The Grace and Ruby, 283 F.475, 478 (1922); Scott, The Declaration of Independence, the Articles of Confederation, the Constitution of the United States xvi-xvii (1917). See also Exhibit 813, pp. 130-37, and authorities there cited.

In this country, even a treaty is overruled by a subsequent act of Congress, and treaties derive what status they do have in our domestic law from their position as part of "the supreme law of the land" pursuant to Article VI, Clause 2 of the Constitution. See Restatement (2d), Foreign Relations Law of the United States §§ 141, 145 (1965). Neither in this country nor in Britain has the judiciary ever been regarded as having the power to overrule acts of the executive or

legislative branches on the grounds of inconsistency with customary international law. Thus if maritime sovereignty and dominion were established in English law and state practice in the 17th and 18th centuries -- as they clearly were -- the question of consistency vel non with customary international law is irrelevant.

Nevertheless, we shall proceed to examine the rather academic question whether an international court -- if one had existed, which it did not -- would have held Britain's claims to maritime sovereignty and dominion invalid if a case presenting such an issue had come before it.

B. Plaintiff's Contentions Regarding International Law Cannot Be Sustained.

In contending that international law was inconsistent with English law, plaintiff bears a heavy burden of proof. As Judge Jessup has explained (Tr. 474-77), sovereign states are placed under restraints by international law only (apart from treaty) if there is a generally recognized and accepted international legal doctrine, forbidding the national conduct in question, which has achieved a consensus among civilized nations. Accord, The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.); The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871). Thus the question is not whether in the 17th and 18th centuries international law affirmatively recognized or permitted claims by nations to maritime

sovereignty and dominion, but rather whether international law definitely and positively, and by consensus, precluded them. When it is further recognized that Great Britain has since the very beginning of international law been one of the most active and influential nations in contributing to the establishment of that law in general, and to the establishment of international law dealing with maritime affairs in particular, plaintiff's task in proving that in the 17th and 18th centuries there existed an international consensus among civilized nations which outlawed Britain's claims and conduct is an arduous one indeed.

In fact, history and the record show that prior to and during the 17th and 18th centuries maritime sovereignty and dominion were claimed and exercised by the overwhelming majority of civilized nations bordering on the sea -- probably, indeed, by <u>every</u> such nation -- and that international law, so far from forbidding such sovereignty and dominion, affirmatively countenanced it. Never at any relevant time has international law failed to recognize the validity of national sovereignty and dominion in coastal waters. In the 17th century there was no recognized limit to such waters, and whole seas were claimed and appropriated. By the 18th century it was generally (though far from universally) recognized that there was some limit on the maritime sovereignty and dominion which a nation could lawfully claim, but there was no consensus as yet on

what that limit was; 100 miles was the limit most in favor, except with respect to neutrality, where a cannon-shot rule was beginning to develop. Other intermediate limits -- particularly a 60-mile rule -- had substantial currency as well, both in doctrine and in the practice of nations.

The situation in the second half of the 18th century -- the period of the establishment of American independence -- was that international law had long recognized the legitimacy of maritime sovereignty and dominion in coastal waters; that most certainly there was no established rule of international law forbidding such sovereignty and dominion; that there was universal recognition that a coastal state possessed sovereignty and dominion in its coastal waters; that there was no generally recognized principle of international law setting a limit on the geographical extent to which sovereignty and dominion could be established; that various distances were advocated, and that 100 miles was a limit very much in favor and in fact the limit most frequently encountered and advocated in this period. No consensus had developed by 1776 or 1783 which rejected 100 miles as too wide.

At the very end of the 18th century and thereafter, as we shall see later (pp. 455-61 ), international law developed some distance towards a consensus that for purposes of full territorial sovereignty of surface waters the older rules such as 100 miles

were too expansive, and that the territorial sea should be considerably more limited. The motivating force in this development was the desire of the great maritime powers, and especially Great Britain and the United States, to make as much of the seas as possible free for navigation, for naval operations and to some extent for surface fishing. The reasons for the more restrictive modern rules therefore had nothing to do with claims to the seabed or subsoil.

Plaintiff earnestly contends that prior to American independence the modern restrictive rules -- the cannon-shot limit or the three-mile belt -- had achieved the status in international law of obligatory limitations on the width of the territorial sea. That contention is demonstrably unsound; but the issue of exactly when (if ever) the cannon-shot or three-mile rule achieved the status of an obligatory maximum is academic, since those rules apply to the surface of waters only and not to the seabed or subsoil. Thus, even if the more expansive 100-mile territorial sea conferred by the colonial charters had been lost through operation of international law prior to American independence, that would avail plaintiff nothing unless it could show that the restrictive rules appropriate to navigational uses of surface waters applied with equal force to the seabed and subsoil. This it cannot do.

1. Broad Claims to Territorial Seas Were Fully Sanctioned by State Practice.

The situation prior to and during the 17th century has been accurately described as follows:

> "At the beginning of the seventeenth century it is probable that no part of the seas which surround Europe was looked upon as free from a claim of proprietary rights on the part of some power, and over most of them such rights were exercised to a greater or less degree. In the basin of the Mediterranean the Adriatic was treated as part of the dominion of Venice; the Ligurian sea belonged to Genoa, and France still claimed to some not very well-defined extent the waters stretching outwardly from her coast. England not only asserted her dominion over the Channel, the North Sea, and the seas outside Ireland, but more vaguely claimed the Bay of Biscay and the ocean to the north of Scotland. The latter was disputed by Denmark, which considered the whole space between Iceland and Norway to belong to her. Finally, the Baltic was shared between Denmark and Sweden. In their origin these claims were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognized; and in attendance upon it naturally came that of levying tolls and dues to recompense the protecting State for the cost and trouble to which it was put. From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported." Hall, A Treatise on International Law (7th ed. 1917), republished in Crocker, op. cit. at 65-66.

In addition to the examples given, Turkey claimed and exercised sovereignty in the Aegean. Many of these claims were uncontested down to the mid-18th century. Crocker, op. cit. at 71-72.

The above statement by Hall, and particularly the first sentence, has been quoted with approval or paraphrased by many eminent modern international-law authorities. E.g., Scott, The Classics of International Law, introduction to Bynkershoek's De Dominio Maris 15; Colombos, The International Law of the Sea 48 (6th rev'd ed.). Colombos adds that this situation obtained "up to the end of the eighteenth century." Ibid. Fletcher noted that, as an international lawyer as well as an English common lawyer, "Selden based his treatise on the positive practice of the day. He stated the law as he found it . . . ." Fletcher, "John Selden (Author of Mare Clausum) and His Contribution to International Law," 19 Transactions of the Grotius Society 1, 11 (1962).

The only nation which appears at any time ever to have denied the existence of any territorial sea was the Netherlands. Tr. 2590-91. The Dutch were driven to this extreme position by the fact that the richest of the North Sea herring fisheries were within a very short distance of the British coast, so that admission by them of any territorial sea at all would have seriously impaired their fishing industry. However, even the Dutch were by no means consistent; at the outset of the Anglo-Dutch fisheries dispute the

Netherlands contended for the cannon-shot rule, Swarztrauber, op. cit. at 25, and shortly thereafter they acquiesced in the line-of-sight rule, at least in practice (p. 90, supra). They also claimed the entire Zuyder Zee as internal or territorial waters of their own. Crocker, op. cit. at 71.

By the Treaty of Tordesillas of 1494, Spain and Portugal purported to divide all the seas of the world between them, subject only to the right of innocent passage. Swarztrauber, op. cit. at 13. These ultimate claims to maritime sovereignty and dominion were of course resisted by other nations, and the reaction to them may be said to have been the beginning of the development of international law towards the establishment of some limits on exorbitant maritime claims.

There was a consensus in the 16th and 17th centuries among civilized nations on one relevant point of international law: that sovereignty and dominion over new areas could be established by discovery and the performance of symbolic acts of sovereignty, not requiring effective occupation or possession of the entire area claimed. Exhibit 712.

"The three-mile limit of territorial seas, as a rule of international law, did not surface until the 18th century, but the concept of territorial seas had developed much earlier." Swarztrauber, op. cit. at 10. There is universal agreement among

historians of international law that the concept of territorial sovereignty and dominion in marginal waters had developed long prior to 1700. One of the few authorities ever to doubt this proposition was the Supreme Court in the California and subsequent cases, which declared that "the concept of the territorial sea did not arise in international law until after this country achieved its independence." United States v. Louisiana, 363 U.S. 1, 74 (1960). Judge Jessup has testified, and indeed wrote long before the commencement of the present litigation, that this was a wholly erroneous view. Tr. 486-87. The Court seemed not fully to appreciate the demonstrable fact that the three-mile limit and the cannon-shot rule represented a curtailment, not an expansion, of the right to maritime sovereignty and dominion as previously recognized. Tr. 505-07.

In 1909 the Permanent Court of Arbitration, an international tribunal applying international law, recognized that the doctrine of full territorial maritime sovereignty and dominion was no recent invention. The court referred to

> "the fundamental principles of the law of nations, both ancient and modern, in accordance with which, the maritime territory is an essential appurtenance of land territory, whence it follows that at the time when, in 1658, the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession." The Grisbadarna Case (Norway v. Sweden), Scott, Hague Court Reports 121, 127 (1916). (Emphasis added.)

In the 18th century it became more customary than previously for nations to agree by treaty, on a bilateral basis, on limits of national maritime jurisdiction for various purposes. The cannon-shot rule was used in many of these treaties dealing with the subject of neutrality. Swarztrauber, op. cit. at 30-32; Crocker, op. cit. at 253, 300. We have found no 18th-century instance of the application of the cannon-shot rule, either by treaty or by national regulation or other action, to any subject other than neutral rights and duties. In particular, the cannon-shot rule was never applied during this period as a measure of exclusive fishing rights. Professor Henkin admitted this, and conceded that the concept of the cannon-shot rule and the reason therefor had nothing to do with the question of exclusive fishing rights. Tr. 2579-80. A fortiori, the cannon-shot rule has never had anything to do with the question of the exclusive right to explore and to exploit seabed and subsoil resources.

Even for purposes of neutrality, the cannon-shot rule was far from the only criterion applied in 18th-century treaties. As we have seen (pp. 152-53, supra), the British treaties with North African states generally used the line of sight for that purpose; so did other treaties, such as that between the Turks and the Kingdom of the Two Sicilies, and national ordinances adopted by such nations as Spain and Denmark, which regarded the line of sight as equivalent to 16-20 miles. Swarztrauber, op. cit. at 36-37. Other limits

sometimes used for neutrality in treaties were ten leagues (Crocker, op. cit. at 183) and three leagues. Id. at 182. Franco-Moroccan treaties of 1685 and 1767 excluded all Moorish ships for 30 miles from the French coast. Crocker, op. cit. at 253, 300.

As stated above, no 18th-century treaty has been found which used the cannon-shot rule as a measure of exclusive coastal fisheries. In the relatively rare instances where fishing rights were regulated by treaty, much broader limits than cannon-shot were used. We have already discussed the Treaty of Utrecht and the Peace of Paris of 1763, both of which used 30 leagues for that purpose with respect to the North American coast, and the 1790 treaty between Britain and Spain, which recognized ten-league exclusive fisheries in the coastal waters of all Spanish possessions in the Pacific (p. 145, supra).

Denmark collected tolls for passage between the North Sea and the Baltic from early times until 1857. In the 17th century Denmark claimed full sovereignty and exclusive fishing in all the waters between Norway, Iceland and Greenland, and Denmark sold licenses to foreigners for fishing there well into the 18th century. Danish ordinances established a six-league exclusive fishing belt around Iceland in 1631, and a four-league belt was in force from 1682 to 1836. As to Greenland, a thirteen-league belt was established in 1738, which was expanded to fifteen leagues in 1740 and 1751 and reduced to four leagues in 1758. On the Norwegian coast, a ten-league exclusive

fishing belt was established in 1692. Swarztrauber, op. cit. at 44-47; Crocker, op. cit. at 513-15. Neither Iceland nor Norway has ever been willing to accept a rule as restricted as three miles or cannon shot for its exclusive fisheries, and their insistence on wider maritime belts has given rise to considerable controversy down to our own century, which persists to this day.

In the 17th century, a decision of the Supreme Court of Piedmont, which then included Genoa, cited Bartolus and Baldus in upholding national sovereignty of the Ligurian Sea; the issue involved the capture of a Spanish ship at a distance of 50 miles from the coast. Swarztrauber, op. cit. at 11.

The sole instance of any three-mile limit for any purpose anywhere prior to the American Revolution which Professor Henkin was able to cite (Tr. 2575 ) -- and we have encountered no other -- was an instruction from King Adolph Frederick of Sweden in 1758 adopting three miles for neutrality purposes. In fact there is a learned debate as to the relationship between the Swedish mile and the modern nautical mile, and the better view appears to be that King Adolph Frederick's three miles actually amounted to 12 or 18 nautical miles. Swarztrauber, op. cit. at 52-53. The United States' three-mile limit of 1793 was the first clear use of such a limit in history, and as we shall see it was regarded as tentative, a minimum, and for the purpose of neutrality only (pp. 435-41, infra).

2. The Views of Publicists Recognized the Right to Territorial Seas with Virtual Unanimity, and No Consensus Had Developed Restricting Such Seas to Any Limit Less than 100 Miles.

Since until recently there were no international tribunals declaring and dispensing international law (and even today their jurisdiction and effectiveness are quite limited), the views of eminent scholarly authorities, or "publicists," have always been regarded as somewhat more important in international law than in most systems of municipal or national law. Such views, however, as Judge Jessup has pointed out, have always been considered subsidiary means of establishing international law, much less conclusive than treaties*/ or general principles or customs recognized as obligatory by the consensus of civilized nations and applied by them in their state practice.

Fenn, Exhibit 690, has ably described the doctrinal development of the concept of maritime sovereignty and dominion in the mediaeval and post-mediaeval period. He has shown how what was

*/A treaty, of course, makes law as between the parties to it. It may or may not be evidence of a general principle, since nations are at liberty to contract by treaty either in accordance with or in derogation from principles of customary international law. Treaties may be used as evidencing a general customary principle only where there is a large number of treaties whose provisions conform to the principle and where there is other evidence that the parties entering into the treaties recognized that they were acting in accordance with a general principle considered as binding, or at least as a customary norm, even apart from treaty. E.g., 1 Hackworth, Digest of International Law 17-21 (1940); Schwarzenberger, A Manual of International Law 28-33 (5th ed. 1967).

originally regarded as "jurisdiction," not all the attributes of which were wholly clear, took on more and more aspects of sovereignty and dominion until eventually it was recognized that marginal waters are part of the territory of a coastal state in the same sense as the land, subject only to the right of innocent passage for foreign navigation. This development was substantially complete prior to 1600; and ever since there has been an overwhelming consensus among scholars recognizing the legitimacy of the territorial sea. The proper extent of that sea, on the other hand, was the subject of violent disagreement, and many conflicting views were advanced. It cannot be said that by the second half of the 18th century any obligatory rule of international law had developed which limited the extent of the territorial sea, except that the 15th-century claims of Spain and Portugal to all the oceans of the world had been rejected.

Fenn thus summarizes the 17th-century situation, with particular reference to the Anglo-Dutch dispute:

> "The right of ownership, then, in territorial waters, was not the fundamental dispute in the controversy referred to, except in so far as unsound definitions of territorial waters made it so. The extent of ownership over the sea was the kernel of the dispute. What the owner could do with his sea became of crucial importance because of the amount of sea claimed by him and not because he claimed some part of the sea. That he should claim any part of the sea at all (excepting gulfs, bays, and inlets) scandalized the Dutch and became an issue only because the waters immediately off shore [from Britain]

were abundantly supplied with herring, and not because the claim marked a departure from accepted or familiar legal theory." Exhibit 690, pp. 133-34.

"The evidence produced in the foregoing pages points to the conclusion that the somewhat uncritical praise which has been given occasionally to Grotius's essay on the freedom of the sea is not altogether warranted. The freedom of the high seas was not disputed by the advocates of a state's ownership of its territorial waters, with the possible exception of Selden. And even he conceded that, in practice, freedom of trade and of navigation should not be violated. His point that there is nothing in the nature of the sea to prevent its appropriation is sound. That the sea has not in fact been appropriated by the Powers is due to reasons of an entirely practical character. The only two countries which attempted to put into practice their claims to a monopoly of the western highways of traffic found that their case fell of its own weight. The fiats of the ius gentium, of the ius naturale, and of the ius civile simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable. At the other extreme lay the claims to absolute rights in territorial waters. Here, the weight of opinion is overwhelmingly in favor of the thesis that a state has the rights of ownership in the sea adjacent to its coasts. Grotius's position on the matter is ambiguous. He separated gulfs, bays and inlets from the main sea; but he failed to clothe the state with tangible rights in these waters. He failed also to distinguish between that strip of coastal waters which had become known as the adjacent sea, and the main body of the sea. In his later work on the law of war and peace he modified his position somewhat on this latter question, but he failed there also to make any concession which would seem to countenance the existence of property rights in the sea. So far as can be gathered from his cautious statements on the whole subject, he seemed to think that the rights of the state in the waters in question extended only to the maintenance and enforcement of a certain jurisdiction over

> these waters, and to the protection of navigation and fishing therein. It may be said with some certainty that this is the view of "Mare liberum." When it is said that Selden and his colleagues were quick to see that Grotius had attacked the British claims in "Mare liberum," it should be remembered that it is his position on the adjacent sea which constituted the attack, and not his position on the high seas. For the Continental lawyers, also, who were not parties to the British controversy, the question concerned the adjacent sea only. Outside of Holland, the Grotian position found no support. Legal theory pronounced against the community of ownership, against a common proprietorship, of the littoral sea. The British claims, and, to a less degree, the Scandinavian claims, were extravagant to the point where they encroached upon the high sea. When Grotius denounced such pretensions, he spoke to the mark. But he denounced them for the wrong reason. This question is essentially different from the former one. That is to say, that the question, how far out to sea territorial waters extend, is essentially different from the question, whether there can be territorial waters. Grotius, in denouncing the pretensions referred to, denounced them on the ground that there could be no territorial waters. . . . The real problem was, to restrict territorial waters within reasonable bounds." Exhibit 690, pp. 219-20.

Accord, O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 313 (1971): "the real question, as everyone in the seventeenth century recognized, was whether the extensive claims of England, Sweden, Venice and other nations to Mare Clausum in neighboring seas were intellectually defensible in respect of their distance, not their nature, which was undisputed."

Grotius' position was somewhat equivocal, and by no means remained consistent throughout his life. While in Mare Liberum he

appeared to deny any territorial sea, that position was substantially qualified in his later work, De Jure Belli ac Pacis. There he admitted that some territorial sea was appropriate, and appeared to regard the line of sight as its proper limit. Exhibit 693, p. 347; Crocker, op. cit. at 189; Swarztrauber, op. cit. at 20. He agreed that a coastal sovereign could tax fishing by its own subjects; at one point he recognized that fishing resources could be exhaustible, and therefore that it might be lawful to exclude foreigners as well. Exhibit 690, pp. 155-57; Tr. 2592. He never dealt at all with the seabed, the resources of which are obviously exhaustible. Exhibit 739, p. 67. Finally, after he left the Dutch service for the Swedish, he never opposed Sweden's maritime claims in the Baltic, and indeed is stated to have written on the publication of Selden's Mare Clausum that he had written his own Mare Liberum "as a Hollander, and is exceeding glad to see the contrary proved." Fulton, op. cit. at 375. In any event, Grotius appears to be the only publicist at any time since 1500 -- at least the only one of any importance -- who even seriously entertained the notion of denying the territorial sea altogether.

Every jurist and publicist recognized as an international-law authority who wrote between 1670 and 1800 recognized the existence of the territorial sea and the entitlement of the coastal nation to full sovereignty and dominion therein. U. S. Exhibit 17 (Vol. 15), second pagination, pp. 18-21.

We shall now mention briefly the principal scholarly views as to the width of the territorial sea which were dominant in the 18th century, with mention of some of the principal authorities prior to and during that century who advocated them. English authorities have already been discussed. For the views held by scholarly American statesmen during the American Revolution, see pp. 368-72, infra.

The 100-mile limit for territorial waters, first proposed, at least as to jurisdiction, by Bartolus in the 14th century, was adopted by the great majority of jurists throughout the 15th, 16th and 17th centuries and was still distinctly the majority view as late as 1795. Among the great number of publicists who adopted the 100-mile limit, aside from the English writers whom we have already discussed, were Caepolla (15th century), Stypmann (died 1650), Gentili, Loccenius (1651), Casaregis (1740), Abreu (1746), and many others. U.S. Exhibit 7, p. 121; Exhibit 690, pp. 98-105, 115; Crocker, op. cit. at 72, 183, 188-89; Swarztrauber, op. cit. at 11, 27, 33, 250, 424; Bustamante, The Territorial Sea 22-23 (1930). The 100-mile limit is sometimes described as a two-day voyage, which is the basis on which Bartolus arrived at it. Many other writers referred to the 100-mile limit as well known and customary without explicitly endorsing it. In view of the status of the 100-mile limit down through the 18th century, it is impossible to

maintain that prior to the American Revolution a general consensus among civilized nations had developed which established an obligatory rule of customary international law requiring that territorial waters be narrower than 100 miles in extent.

Other writers, beginning with Bodin in 1577, described the limit of territorial waters as 30 leagues. U.S. Exhibit 7, p. 120; Crocker, op. cit. at 188. As we have seen (pp. 240-42, supra), the 30-league limit, which is virtually identical to 100 miles, was adopted for exclusive fishing purposes in the American seas by Britain and France in the treaties of 1713 and 1763.

After the 100-mile or 30-league limit, the next most frequently encountered proposal for the limit of territorial waters was 60 miles, which originated with Baldus in the 14th century. The 60-mile limit was referred to without disagreement in 1672 by Puffendorf, one of the best-known and most influential international publicists. U.S. Exhibit 7, p. 120; Crocker, op. cit. at 250, 425; Swarztrauber, op. cit. at 11, 15, 28. Sixty miles is the equivalent of 20 leagues, which as we shall see (pp. 372-76, infra) was adopted in the Peace of Paris between Britain and the United States in 1783. The 60-mile rule was frequently referred to well into the 19th century. E.g., 1 Chitty, The Laws of Commerce 93 (11th ed. 1857).

The three rules described above --100 miles, 30 leagues (which is virtually identical) and 60 miles -- enjoyed the approval of

the overwhelming majority of publicists down through the 18th century. These can be grouped together as the broad-limit rules. There were also several versions of what may be called the narrow-limit rules, namely line of sight, three leagues, two leagues, cannon shot and finally three miles. All these narrow-limit rules had their primary, and generally their only, application to neutrality -- the distance into the sea where the coastal nation had the right and the duty to protect belligerent ships from one another.

As we have seen in the case of England (pp. 134-37 , supra), nations could and did establish much more modest limits for neutrality than for other aspects of sovereignty and dominion, and indeed were quite inclined to do so, since neutrality limits imposed onerous obligations upon them, without any corresponding benefits except as to hostilities committed so close to shore as to endanger the land territory. See also Tr. 1153. Moreover, powerful maritime nations had a strong interest in limiting the extent of neutral waters, in order to minimize those areas of the sea where their weaker enemies could find sanctuary in time of war. Down through the 18th century, the narrow-limit rules were rarely if ever regarded by publicists as reasonable obligatory limits for exclusive fisheries or for other aspects of sovereignty and dominion aside from neutrality.

The line-of-sight rule appears to have originated in a neutrality proclamation of King Philip II of Spain in 1565. Swarztrauber, op. cit. at 36. It was rejected by Bynkershoek as too indefinite, id. at 38, but was championed by Rayneval in 1803 for neutrality purposes. Id. at 39; Crocker, op. cit. at 72, 250. Unlike the other narrow-limit rules, the line-of-sight principle did have some limited application in fisheries matters, by virtue of treaties and pragmatic compromises; but we have encountered no publicist who advocated line-of-sight as an obligatory maximum for exclusive fishing rights, let alone for seabed and subsoil rights.

Galiani, writing in 1782, appears to have been the first to suggest three miles as equivalent to the range of cannon. He considered that the limit for neutrality purposes should be two leagues, twice the range of cannon. Fulton, op. cit. at 563. Valin suggested that for exclusive fishing purposes the rights of the coastal state should be limited to two leagues or to as far out to sea as bottom soundings can be obtained, whichever is farther. Swarztrauber, op. cit. at 33.

The cannon-shot rule for purposes of neutrality was advanced by Bynkershoek in 1702, and won the adherence of many other 18th-century publicists, including the influential Vattel. Vattel, however, believed that the neutrality belt could be broader than cannon shot if the power of the coastal state permitted and some lawful

purpose was involved; and he was clear that seabed resources such as the Ceylon pearl fisheries were proper subjects of ownership, even though they extended much farther out than cannon shot. Crocker, op. cit. at 84, 251, 458; Swarztrauber, op. cit. at 28-30. The geographical extent of cannon shot was frequently regarded as three leagues (not three miles) down to the end of the 18th century. Crocker, op. cit. at 254.

Martens, writing in 1785, was one of the many publicists who identified cannon shot with three leagues; he was also, as best we can establish, the only publicist prior to 1800 who regarded the cannon-shot or three-league limit as a boundary applicable not only to neutrality but also to full territorial sovereignty, including exclusive fishing rights.*/ Apparently, however, Martens regarded the three-league rule not as an obligatory maximum but as a sort of obligatory minimum: he declared that the three-league belt "is the least that a nation ought now to claim as the extent of its dominions of

*O'Connell seems to assume that the cannon-shot rule was regarded in the 18th century as applicable to aspects of sovereignty and dominion other than neutrality. "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 303, 320-23, 382 (1971). On the evidence, we think that assumption has no basis whatever in state practice and none, or very little, in the views of publicists aside from Martens. The assumption is a natural anachronism: in the 19th century the cannon-shot and three-mile rules were frequently applied to surface maritime claims for purposes other than neutrality.

the seas." U.S. Exhibit 17 (Vol. 14), pp. 65-66. It was well into the 19th century before cannon shot and three miles came generally to be identified, and that identification was never at any time universally agreed upon. William Paley's Moral and Political Philosophy, published in New York in 1824 and well known in this country, still identified cannon shot with three leagues (p. 77).

We have encountered no publicist prior to 1800 who advocated a three-mile rule for any purpose, even neutrality. As we shall see, Chancellor Kent, the first American international publicist of stature, recognized its adoption by Jefferson in 1793 but criticized it as much too narrow (p. 441, infra). Even when, after 1800, the three-mile rule became more popular, for some years it was regarded as applicable to neutrality only. One of the first treaties which used three miles for any purpose other than neutrality was the Anglo-French Treaty of 1839, which established three miles as the limit of exclusive surface (not sedentary) fishing rights. U.S. Exhibit 7, p. 139.

### 3. No Narrow-Limit Rule Was Applied to Seabed Claims.

No instance has been found during the period under discussion of any authority who denied the right of a coastal state to the exclusive ownership and use of the resources of the seabed and subsoil under its marginal sea. To the contrary, those writers who

addressed the question, including Puffendorf and Vattel, fully recognized that the considerations militating towards freedom of the seas -- the desirability of free navigation, the natural capacity of the sea to be used by nations in common, and the inexhaustibility of at least some of the fisheries -- had no application whatever to the resources of the seabed and subsoil, and thus that there was no reason or necessity for any doctrine of res communis to be applied there. Crocker, op. cit. at 68, 312, 457; Colombos, op. cit. at 69; Tr. 477-79.

Judge Jessup testified that the resources of the seabed and subsoil have always been regarded as subject to the exclusive ownership of the coastal nation as far out as such resources are exploitable. He summarized his views in a passage important enough to deserve quotation in full from the transcript:

> "To give a hypothetical example: suppose that in 1720, or 1770, or 1785, a pearl oyster bed or a tin deposit, technologically and economically exploitable, had been discovered on the seabed ten miles off the coast of Massachusetts (or any other of the Atlantic colonies). If the Massachusetts authorities had consciously permitted free exploitation of that resource by persons of all nations, and that license had ripened by passage of time into established custom, Massachusetts might well have been limited, as a matter of international law, in later asserting exclusive rights -- just as the United States argued respecting Argentina. But I regard it as virtually inconceivable that as a matter of fact, in 1720, 1770 or 1785, Massachusetts would have consciously permitted internationally free exploitation on these hypothetical facts. From what

> I know of the international law climate of that era, both generally and with particular respect to British and American attitudes, I believe it virtually certain that on the discovery of the resource Massachusetts would have asserted the exclusive right to regulate the resource, on behalf of itself, and the exclusive right to exploit it, either on behalf of its own citizens alone or on behalf of all British subjects. (Of course it might have bargained away part or all of its exclusive right by treaty, in return for other benefits.) I do not believe there would have been any significant international protest against that assertion. And I believe that assertion would have been fully in accordance with the international law and practice of the time. I think other sovereigns would have been bound to respect it, and I think they would have respected it. And I do not think the legal situation was significantly different at any more recent time, including the 19th and early 20th centuries." Tr. 642-43.

Professor Henkin conceded that the practice of nations has been in accordance with Judge Jessup's views:

> "Q. . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A. I don't know of any such examples." Tr. 2640.

Judge Jessup gave a wealth of examples of seabed and subsoil exploitation in many parts of the world, dating back long before 1800, demonstrating that wherever and whenever exploitable resources have been discovered in the seabed and subsoil of the marginal sea they have been regarded, more or less without question, as

the exclusive property of the coastal state. E.g., Tr. 564-66, 572-73, 577-81, 585-88, 590-91, 601-02, 614, 619.

In view of all the above, the United States cannot possibly sustain its position that exploitable resources in the seabed and subsoil of the North American marginal seas would have been regarded as incapable of ownership in the 17th and 18th centuries, let alone that there was any established rule of international law which prohibited the coastal state from asserting and exercising exclusive rights over them.

VII.

## AT THE AMERICAN REVOLUTION THE STATES INDIVIDUALLY SUCCEEDED TO THE MARITIME TERRITORIAL SOVEREIGNTY AND DOMINION BOTH OF THEIR PREDECESSOR COLONIAL GOVERNMENTS AND OF THE BRITISH CROWN.

Plaintiff's position is that at American independence the United States, as an entity distinct from the States, succeeded in some fashion to the maritime sovereignty and dominion of the British crown and, apparently, even to those rights in the marginal sea and seabed which prior to 1776 belonged to the colonial and proprietary governments. The Common Counsel States maintain, to the contrary, that maritime crown and colonial rights, both territorial and proprietary in nature, passed at independence to the States individually, just as did the equivalent rights on land.

Plaintiff's position is based entirely on the argument that the States never possessed "external sovereignty," which plaintiff appears to equate with sovereignty in the international-law sense. Plaintiff asserts that the United States, as an entity distinct from the States, acquired "external sovereignty" from the crown even prior to the Declaration of Independence, and that such sovereignty was therefore antecedent to and a limitation on whatever sovereignty the States acquired individually in 1776.

In our submission the concept of external sovereignty, or international personhood, is really irrelevant to any issue in this

proceeding. States which consider themselves sovereign, and are sovereign by their own laws, may or may not be recognized as sovereigns by the international community; but to the best of our knowledge no nation claiming sovereignty has ever permitted its sovereign status under its own law to be determined by whether the international community recognizes it or not.

More importantly, sovereignty in the abstract is not the isssue here: the question is whether it is the States or the Federal Government which succeeded to certain quite specific territorial and proprietary rights in the seabed and subsoil of the marginal sea, which rights prior to independence had belonged in part to the crown and in part to the colonial governments. Neither in international law nor in our own constitutional law apart from the California line of cases -- not even in the eccentric Curtiss-Wright dicta, see pp. 409-14, infra -- is there the slightest intimation that external sovereignty, in a nation where sovereign powers are divided, automatically means that the Federal Government necessarily divests the State governments of territorial jurisdiction and proprietary rights in any part of the national domain, whether on land or at sea or under the sea.

In the case of the United States, it really makes very little difference whether the Federal Government acquired powers of external sovereignty prior to 1789 or not. The pertinent question is whether

in our constitutional history the Federal Government was at any time regarded as the direct successor either of the crown or of the colonial governments to immediate territorial jurisdiction over, and proprietary rights in, any geographical area, and particularly over the marginal seas and their seabed and subsoil. We think it readily demonstrable that the Federal Government was never so regarded.

When plaintiff's contentions are translated from abstract terms like "external sovereignty" into concrete propositions, it is seen that plaintiff contends little more than that during the revolutionary and Confederation periods the United States possessed and exercised power over foreign relations and power to make war and peace; that is, to conduct hostilities and to terminate them. Tr. 2377; Exhibit 688, p. 487. Plaintiff interprets the historical evidence in much too simplistic and categorical a fashion; the key to an understanding of what superficially is conflicting evidence is that in these periods the "United States" were not considered as having any identity separate from, let alone superior to, the 13 independent sovereign States; the "United States" were those States, acting in concert by virtue of an alliance, league or federation to win the war. In any event, it is entirely clear that the States individually succeeded to all the territorial boundaries and rights of property which had existed prior to the Revolution. Plaintiff has suggested no way whatever in which it can bridge the historical and logical gulf between "external sovereignty" on the one

hand and, on the other, the alleged succession of the United States, considered as a separate entity, to territorial and property rights in the marginal sea and seabed.

A. The States Were Individually Sovereign in the Revolutionary And Confederation Periods.

In an attempt to make the national sovereignty antedate the independence of the States, plaintiff traces its concept of external sovereignty back to the first Continental Congress of 1774. Pl. Br. 176-77. The short answer is that the first Continental Congress did not regard itself or any authority in this country as possessing independence or powers of external sovereignty. Reconciliation with the crown was hoped for and earnestly sought, and the intent to seek independence was expressly disclaimed. Exhibit 757, pp. 529-35; Levitan, "The Foreign Relations Power," 55 Yale L. J. 467, 480-81 (1946). Independence did not come until 1776, and it came then as a wholly conscious revolutionary decision to make a fundamental alteration in the state of affairs that had existed until that date. */

It would be a mistake, if we wish to understand the thinking of the revolutionary statesmen, to speak of sovereignty, whether external or otherwise, as residing in any governmental body. In Europe,

*/ For a thorough discussion of the nature and acts of the first Continental Congress, and a demonstration that it was not even a governmental body, let alone a union in any sense, see Small, "The Beginnings of American Nationality," 8 Johns Hopkins University Studies 14-42 (1890).

monarchs were the sovereigns; in England, the crown had anciently been considered the sovereign, but since the Revolution of 1688 sovereignty was generally regarded as residing in Parliament, consisting of King, Lords and Commons. The first article of the political philosophy which prevailed among our revolutionary statesmen was that sovereignty resided in the people, and in the people of each State. See, e.g., Levitan, op. cit. at 480. Sovereignty was ultimate and indivisible. Sovereign powers, on the other hand, were divisible, and could be exercised by agents -- governmental bodies. But those bodies -- whether State legislatures, Congress or any others -- were never regarded as themselves sovereign; they were only agents of one or more sovereigns.

Sovereignty remained with the people of the States, and the agents -- the governmental bodies -- served only at the sovereign's pleasure. Those powers which a sovereign had delegated to agents could be taken back and exercised by the sovereign acting directly. That was done through a convention of the people of a State, such as those which initiated the revolutionary State governments and those which later ratified the Constitution of 1787. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819). The theory further held that each original colonial charter was a compact, which British violations entitled the State to dissolve in favor of its full powers of self-determination.

Finally, it was considered that prior to the Revolution legislative power had been in each colonial legislature, not in Parliament, and that independence meant simply that the crown's executive and judicial powers were removed. McIlwain, The American Revolution: a Constitutional Interpretation 18-185 (1923); Patterson, "In re United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286, 302-04 (1944). Since prior to independence the colonies had had no legislative or governmental connection with one another, it followed, and was recognized to follow, that removal of the crown's paramountcy left the States separately independent.

The theory held that prior to the Revolution

> "the colonies in America were in fact states in the political sense, that they were what are commonly known as 'nations,' that their local legislatures were the supreme power over them, under the crown; that their sole connection with Great Britain lay in the crown; that the parliament at Westminster was but one of many co-equal legislatures, analogous, for example, to the General Court of Massachusetts Bay. The logical consequence of such a conception of the empire was complete independence, whereby the colonies would become units in international law, separate so-called sovereign states in the society or family of nations." Adams, Political Ideas of the American Revolution 17-18 (1939).

See also id. at 40-61, 86-181; Scott, The United States of America: a Study in International Organization 15, 33, 133 (1920); Scott, Sovereign States and Suits 5-24 (1925).

These propositions could be confirmed, if questioned, by a host of quotations from the writings of the revolutionary statesmen.

The Declaration of Independence itself is steeped in these concepts.

The Declaration was the act of thirteen sovereigns acting together. It is entitled "The Unanimous Declaration of the Thirteen United States of America," and it declared those States to be "free and independent States." Several of the States had declared their independence even prior to the adoption of the Declaration. Every State had authorized its delegates to Congress to vote for the Declaration, which indeed had to be postponed until all the instructions had been received. Exhibit 757, p. 537; Burnett, The Continental Congress 154-81 (1941). The concept was that each State was declaring itself independent, through its delegates in Congress, and recognizing the independence of the others. During the debates on the Declaration it was declared by James Wilson, Robert R. Livingston, John Dickinson and others "that if the delegates of any particular colony had no power to declare such colony independent, certain they were the others could not declare it for them; the colonies being as yet perfectly independent of each other." 6 Journals of the Continental Congress 1088; Levitan, op. cit. at 483. The Declaration, after its promulgation, was ratified by every State. Exhibit 757, pp. 537-38.

President James Monroe, in his annual message of 1823, described the results of the Declaration as follows:

> "The first is that in wresting the power, or what is called sovereignty, from the Crown it passed directly to the people. The second, that it passed directly to the people of each Colony and not to the people of all the Colonies in the aggregate; to thirteen distinct communities and not to one. To these two facts, each contributing its equal proportion, I am inclined to think that we are in an eminent degree indebted for the success of our Revolution." 6 Hamilton (ed.), The Writings of James Monroe 224 (1902).

In September, 1776 a committee of Congress appointed to confer with Lord Howe, consisting of Franklin, John Adams and Rutledge, explained to him that every colony had approved of the Declaration "and all now considered themselves as independent States." Exhibit 758, p. 140. Adams was even more explicit:

> "The resolution of the Congress which declared independency was not taken up upon its own authority. Congress had been instructed so to do by all the colonies. It is not in our power, therefore, my lord, to treat otherwise than as independent States. . . ." Id. at 143.

The congressional resolution preceding the conference had referred to Congress as "the representatives of the free and independent States of America."

The early State constitutions likewise make it clear that each State regarded itself as separately independent. Exhibit 700, p. 290; Scott, Sovereign States and Suits 50-52 (1925).

Both before and after the Declaration of Independence, and both before and after the Articles of Confederation, Congress was a

league or alliance of the States, meeting together for the purpose of prosecuting the war. Congress was not regarded as an entity separate from the States, let alone superior to them; Congress was the States, acting together for common purposes. Each State had one vote, and action by Congress required the unanimous consent of all except in cases where each State had agreed to be bound by a non-unanimous vote. The reason invariably given for each State's having a single and equal vote was that each State was a sovereign, and under international law sovereigns are equal. Exhibit 687, p. 181; Exhibit 757, p. 542. When Benjamin Rush sought to attack the equal-vote principle, he felt it necessary to attack the State-sovereignty principle on which it was based. While Professor Morris relies heavily on Rush's statement, the fact is that his view did not prevail and his proposal was rejected. Tr. 1747-48, 2377-78.

The congressmen were appointed by the States, were removable at will, and were totally subject to whatever instructions the States gave them. Tr. 2382-83. The Journals do not even name what individuals were present in Congress, but rather what States were present. Exhibit 709, pp. 8, 109; Tr. 2384. The term United States was always used as a plural noun, followed by a plural verb; and the synonym "these States" was often used instead. Tr. 2430-31. The "United States" were not regarded as having any reality separate from the States acting in alliance: "when a minister plenipotentiary or

envoy shall arrive within any of the United States, . . . ." Exhibit 745, p. 94.(Emphasis added.) In the Continental Congress, "each State is considered as present, and its will expressed by the vote of its delegates. The Congress of States are left . . . to perform such duties as are enjoined, and execute such powers as are given to them, by their respective and varying instructions. . . ." Baldwin, A General View of the Original Nature of the Constitution and Government of the United States 16 (1837).

John Adams, Randolph and others described Congress as a diplomatic body or assembly, Exhibit 757, p. 542; and scholars have habitually done the same, though Professor Morris could not remember encountering that view. Tr. 2383.*/

Since Congress was the States, had no existence apart from them, and possessed no powers except by their delegation and acquiescence, it is really irrelevant how extensive or limited Congress' powers were.**/ In fact, however, those powers were extremely limited. Congress was not a law-making body or a legislature. It

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*/ In assessing the candor, expertness and persuasiveness of Professor Morris' testimony, the Common Counsel States respectfully refer the Special Master in particular to Tr. 2271-73, 2280-83, 2285-86, 2309-12, 2328-29, 2378 (compare with U.S. Exhibit 388), 2385-87, 2389-91, 2394-2402, 2410-11, 2414-20, 2433-34.

**/It would hardly be contended, for example, that the sovereignty of the allied nations in World Wars I and II was destroyed because by mutual consent they had integrated their military commands and performed other war-making functions in common.

had no courts, with the single exception of the prize appeal court (pp. 325-26, infra). It had no property or territory until the States ceded their western lands. It had no executive or enforcement power within the States; for example it was the States individually, not the Congress, which seized the property of British subjects and Tories. As has universally been recognized, Congress had no power to impose its will upon the States, even with respect to "external" matters such as compliance with a treaty. Congress had no taxing power, and relied entirely on the States and on credit for the financial resources necessary to support the army. "The concurrence of 13 distinct sovereign wills is requisite under the confederation to the complete execution of every important measure that proceeds from the union." The Federalist, No. 15, p. 98 (Cooke ed. 1961).

There is nothing to the contrary of any of this in Congress' circular letter to the States of 1779, on which Professor Morris has placed primary reliance, Tr. 2381. The letter deals mostly with finance, and shows the total dependence of Congress in that respect on State taxation and on borrowing. The letter declares the purpose of the war to be "the independence of these States," 15 Journals of the Continental Congress 1059, and points out that that goal had been declared by the representatives of the States in the Declaration of Independence and had been ratified by each State. Finally, the letter observed that while the Articles of Confederation had not yet come

into formal effect, the confederation already existed de facto. Ibid. There is nothing in any of this inconsistent with the position of the Common Counsel States in this proceeding.

The establishment by Congress of a prize appeal court, with power to reverse decisions of State admiralty courts, was not inconsistent with the preservation of State sovereignty.*/ Establishment of the court was purely a war measure, and was acquiesced in by the States as a necessary corollary of the war in which they were engaged in alliance. Proof that the court was not regarded as derogating from State sovereignty is found in the fact that those most suspicious of any hint of encroachment on State sovereignty, such as Thomas Burke and Richard Henry Lee, voted to uphold its jurisdiction. Tr. 1742, 2376. The court had no power to enforce its decisions, and when it reversed a judgment of the New Hampshire Court of Admiralty that reversal remained a nullity until after the Constitution of 1787 went into effect, because New Hampshire simply declined to take any steps to implement it.

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*/ No one has suggested that the existence of the international courts of today extinguishes the sovereignty of nations submitting to their jurisdiction. James Brown Scott (who among his other diplomatic accomplishments was a United States delegate to the Hague Conference of 1907, which revised the constitution of the Permanent Court of Arbitration, and who edited the Hague Court Reports) regarded the prize appeal court as a direct predecessor of and precedent for such international tribunals: the judicial provisions of the Articles of Confederation "are as capable of application to the sovereign, free and independent states forming the society of nations as they were to the sovereign, free and independent States forming the Confederation." Scott, The United States of America: a Study in International Organization 213 (1920).

When eventually the Supreme Court under the Constitution held that the prize appeal court had had jurisdiction, it did so on the basis that establishment of the court was a war measure and that New Hampshire had expressly acquiesced in it and thus agreed to be bound by its judgments. Penhallow v. Doane; see pp. 385-90, infra. Julius Goebel's recent first volume of the Oliver Wendell Holmes History of the Supreme Court contains a definitive analysis of the prize appeal court and demonstrates that it was not, and was not regarded as, inconsistent with complete State sovereignty. Exhibit 694. Goebel regards Justice Paterson's statements in the Penhallow case (pp. 386-88, infra) as dicta and historically unsound, and observes that almost a century and a half later "they were made to buttress a historically indefensible judicial pronouncement on the control of foreign affairs," that is, Justice Sutherland's dicta in the Curtiss-Wright case. Exhibit 694, p. 768.

The Articles of Confederation in the most explicit terms confirmed and retained the sovereignty and independence of the separate States. Article II provided 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 III provided that those sovereign States enter into "a firm league of friendship with each other," thus characterizing the Confederation as a league

or alliance. The equality of sovereigns as evidenced by the equal vote of each in the Congress was retained (Article V). Professor Morris' only explanation of these provisions was that the "nationalists," whom he regards as the only eminent statemen, were off fighting for their country or abroad on foreign missions, and that those remaining in Congress to write the Articles of Confederation were in his opinion second-rate thinkers. Tr. 2387. What legal conclusion Professor Morris thinks can be drawn from this assessment of his is at best opaque.

The original draft of the Articles, introduced by John Dickinson, provided for "an alliance of sovereign States," Exhibit 666, p. 421, but contained no express declaration of State sovereignty and independence. An amendment so providing was promptly presented; it was debated for two full days and was adopted by a vote of 11 states to one, with one divided. Exhibit 704, pp. 122-23, footnote; Tr. 2379-80; McLaughlin, Constitutional History of the United States, 118-20 (1936); Burnett, The Continental Congress 237-38 (1941). Thus it is plain that this was no meaningless or rhetorical formula but was given the most serious consideration and was regarded as a matter of critical importance.

Congress' concern for State sovereignty, and its view that Congress under the Articles remained identical with the States themselves, are also shown by the drafting history of the provision of

Article IX establishing a Committee of the States, consisting of one delegate from each State, to act on certain matters when Congress was not sitting. The name first proposed for this body was the Council of State, but it was carefully changed to "Committee of the States" by amendment. Exhibit 744, p. 339; Tr. 2385.

Madison's view was unequivocal that the Articles of Confederation created a league or alliance between independent States. In No. 43 of The Federalist, pp. 297-98 (Cooke ed. 1961), he addressed himself to the argument that the Articles could not be replaced by the new Constitution without the unanimous consent of the States. Madison's answer was that in many of the States the Articles had been adopted only by the legislature, not by the people, and "a compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties." Madison is here drawing on the doctrine that it is the people of each State who are sovereign, and that all governmental bodies possess powers only by delegation from them. The legislatures had not been delegated power to do anything more than to enter into treaties -- not the power to change the organic law, let alone to surrender the sovereignty of the States. Only conventions of the people could do that. Since the State constitutions had been adopted by such conventions, Madison regarded those constitutions as superior to the Articles of Confederation. See also

Exhibit 688, pp. 521-22. Both Madison and Randolph made the same point on the floor of the Convention of 1787, Exhibit 687, pp. 26, 122-23, in insisting that the new Constitution be ratified by State conventions rather than by the legislatures.

Paterson agreed at the 1787 Convention that the States under the Articles were sovereign and independent. Id. at 182. So did Alexander Hamilton, id. at 283; and indeed that view was "asserted from every quarter of this house," id. at 500, except for James Wilson and one or two others. Hamilton took the same position in his political writings in New York during the Confederation period. In 1784 he wrote that in 1776 "the late colony of New York became an independent State." Exhibit 696, p. 253. In 1787, a few months before the Federal Convention, Hamilton made a lengthy speech in the New York Assembly advocating a bill to accede to the independence of Vermont. Exhibit 698. Hamilton regarded Vermont as already independent de facto, id. at 45, and referred to it as a "country." Id. at 47. In arguing that the New York Legislature had power to enact the bill, Hamilton relied on its sovereign powers and on the doctrine of international law that a sovereign has authority to cede part of its territory. Id. at 49-50. Finally, in dealing with property owned by New York citizens but confiscated by Vermont, Hamilton

regarded the international law of war and of requisition of alien property as applicable. Id. at 60-61. Plainly, Hamilton regarded the States as fully independent in every sense.*/

Professor Morris has quoted a few "nationalist" statements, Tr. 1747-53, though a glance at them will demonstrate that they prove far less, even as to the views of those who made them, than Professor Morris claims. Of course there were such statements. There was always one faction among the revolutionary statesmen who wanted a national government; these were mostly persons who had long opposed independence and who were distrustful of the democratic tendencies in the State governments. The point is that this faction was entirely unsuccessful in achieving its ends down to 1787, when a permanent compromise was arrived at between them and their opponents. The issue was fought out on the text of the Articles of Confederation, on the western lands issue (pp. 354-59, infra), and on other matters, and invariably the nationalists suffered defeat. They were always in a minority in Congress, except for a brief period in 1781-83, and even during that period they failed to achieve any of their important goals. The whole subject has been exhaustively analyzed by Merrill Jensen, Exhibit 703.

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*/ New York and Vermont were close to a state of war in 1784. Massachusetts recognized the independence of Vermont in 1781, and in 1784 issued a proclamation of neutrality in the dispute. These are classic acts of international sovereigns. Scott, Sovereign States and Suits 61-62 (1925).

Plaintiff insists that, though the States may have been and remained sovereign in every other sense, they never possessed "external sovereignty," that is, they were never recognized by international law or the international community as sovereign States. Even as to this irrelevant point, the weight of authority is clearly to the contrary.

We have seen that the States formed, first de facto and later de jure by the Articles of Confederation, a federated or federal league, a confederation. Such a phenomenon was well known in international law; the Dutch, Swiss and German confederations were the best known examples and were constantly cited as precedents by the revolutionary statesmen for what they were creating. International law fully recognized the nature of such a confederation as consisting of multiple sovereign states. Vattel, who was the international publicist best known and most often quoted in America during the revolutionary period (Tr. 565; McLaughlin, Constitutional History of the United States 33, 44, 69, 73, 315 (1936)), had this to say on the subject:

> "Sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.

> A person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted." Vattel, The Law of Nations 3 (6th American ed., 1844).

Vattel mentions the Greek, Dutch and Swiss confederacies as examples of this class. He also points out that two or many sovereign states may, without any impairment of their sovereignty, "be subject to the same prince." Ibid. That was, of course, the situation of England and Scotland in the 17th century, and of Britain and Hanover in the 18th. In fact most states in the 17th and 18th centuries were linked in one fashion or another to others, either in a federation, through a joint personal sovereign, by a protectorate, or by the duty of homage to an overlord. Vattel recognizes each of these types of affiliation and is clear that none of them entails the loss of international personhood. Id. at 2-3. All this was wholly familiar to any 18th century scholar or statesman.*/ Plaintiff's assumption that sovereigns recognized by international law are normally or invariably wholly unitary is a gross oversimplification even today, and as applied

*/ The prevalent view among our revolutionary statesmen was that before the Revolution the British Empire had been a federation of States or even had consisted of unfederated separate States linked only by a joint personal sovereign. This is exhaustively demonstrated in Adams, Political Ideas of the American Revolution 17-18, 40-61, 86-152 (1939); see also Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 398, 410-11 (1948); McLaughlin, Constitutional History of the United States 15 (1935); McIlwain, Federalism as a Democratic Process 35 (1942).

to the 18th century is the crudest of anachronisms. See, generally, Greaves, Federal Union in Practice 9-12 (1940).

Montesquieu, one of the most potent of all influences on the revolutionary statesmen, likewise analyzed the legal nature of a federal or confederate republic, and declared that "the confederates preserve their sovereignty." The Spirit of the Laws, Book IX ch. 1, p. 146 (1873 ed.).

Plaintiff is on unsound ground when it contends that a state must conduct its own foreign relations singly and separately in order to be recognized as a sovereign in the international-law sense. All sovereigns conduct their foreign affairs through agents, and particular persons or bodies can be agents for more than one sovereign at the same time. Certainly in the 18th-century view, a federal republic consisted of several sovereignties conducting foreign affairs through joint agents. Indeed, international law goes much farther and recognizes that a state may retain its international personality even if it delegates and transfers the conduct of its foreign affairs to a distinctly different state and its agents. As Judge Jessup pointed out, the Permanent Court of International Justice so held with respect to Morocco when it was a French protectorate and had turned over the conduct of its foreign relations to France. Tr. 651. Morocco was by no means a unique situation; many countries from time to time have been regarded, and some are today regarded, as sovereigns in

the international-law sense even though their foreign affairs are conducted by another country. A host of examples could be given. Cf. Restatement (2d), Foreign Relations Law of the United States §4 (1965).

The American States did not go nearly so far; they never surrendered their foreign relations to a different state and its agents, but rather carried on their foreign affairs (for the most part) through joint agents of their own. Each diplomatic agent appointed by Congress was informed by his instructions that he was "the representative of sovereign States," and his first order of business was to procure recognition of that status by the nation to which he was accredited. Exhibit 705, p. 521. The instructions to Francis Dana as minister to Russia required him to inform the Russian Empress of the "sovereignty, rights and jurisdiction of each of the thirteen States inviolably," and of the refusal of the States to make peace with Britain without an acknowledgment of the sovereignty of each and every one. U.S. Exhibit 351, p. 1171. The letters of credentials delivered by Congress to its diplomatic representatives named each State and appointed the diplomat the agent of each. Exhibit 705, pp. 521-22; Exhibit 706, p. 547; 15 Journals of the Continental Congress 1116. The "letters of credence" carried by Franklin and the other Commissioners to France ran from "the delegates of the United States of New Hampshire, Massachusetts

Bay," etc., Congress as such not even being mentioned. 5 Journals of the Continental Congress 828, 833.

The treaties of 1778 with France, the only treaties made by the States prior to the entrance into force of the Articles of Confederation, named as parties the thirteen States separately. Tr. 645-48. Professor Henkin concedes that "in various respects the terms of the treaties seem to treat each of the thirteen as a separate sovereign." Exhibit 700, p. 291. The naming of each state in treaties is wholly inconsistent with plaintiff's theory that the States were not internationally known or recognized. The treaties were made by the agents of the States, and were ratified by Congress, which as we have seen was the States acting together in alliance. That ratification would seem to have been entirely adequate, without any derogation of State sovereignty; nonetheless, the Virginia legislature ratified the treaties separately, Tr. 648-50, and according to Professor Henkin all the other States did so as well. Exhibit 700, p. 291; Tr. 2643-44.

The several treaties made during the Confederation period likewise named each State separately, and thus constituted further international recognition of the independence and sovereignty of each State. Tr. 653-55. By the Peace of Paris Great Britain acknowledged the thirteen United States, each named, "to be free, sovereign and independent States," Tr. 644, and relinquished its claims "to the government, propriety and territorial rights of the same, and

every part thereof." As in other treaties, the form used is the "United States, vis. . . .", followed by the name of each (Article I), confirming that the term "United States" meant the thirteen States, not any entity different from them.

The instructions to Oswald, the British commissioner, had empowered him to treat with commissioners of "the thirteen United States of America," naming each one separately. 5 Wharton, Revolutionary Diplomatic Correspondence of the United States 749 (1889). Oswald's prior instructions had authorized him to agree in a treaty to "the complete independence of the thirteen colonies," 6 id. at 17. As is well known, the American commissioners refused to treat with Oswald until he was able to acknowledge and to recognize the independence of the thirteen States prior to and separately from a treaty provision. In 1777 Congress had declared that it would reject any treaty between Britain and the United States "inconsistent with the independence of the said States."

John Adams considered that it was the States, not one State, which carried on foreign relations: "we are young States, and not practiced in the art of negotiations." 2 Wharton, op. cit. at 755. In diplomatic and foreign documents United States always take a plural, not a singular, verb, just as in documents relating to domestic affairs. Jefferson, writing in 1786 to Madison regarding the projected Constitutional Convention, stated its proper objective as "to

make us one nation, as to foreign concerns, and to keep us distinct in domestic ones." 2 Washington (ed.), The Writings of Thomas Jefferson 66 (1853). (Emphasis added.) Hamilton considered that under the Articles the powers of external sovereignty were exercised by the States: "under the old Constitution the important powers of declaring war, making peace etc. can be exercised by nine States." 2 Elliot's Debates 263; Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938). ~~The Supreme Court of~~ A court of Pennsylvania held that under the Articles the States were sovereigns in the international-law sense. Nathan v. Commonwealth, 1 Dallas 77 (1781); see Scott, The United States of America: a Study in International Organization 58-59 (1920).

While the Articles of Confederation conferred upon Congress the power to make treaties, that power was regarded as severely limited. The provision of the Peace of Paris "that creditors on either side shall meet with no lawful impediment to the recovery" of debts (Article IV) was considered to be beyond the power of Congress, and some of the States disregarded it. Exhibit 686, p. 15. As to the return of confiscated property to British subjects, the American peace commissioners successfully insisted that they had no power to bind the States to such an obligation, and the provision of the treaty (Article V) was stated as merely a recommendation by Congress to the States. Exhibit 761, p. 793; Tr. 2410-11.

Congress. A host of documentation could be produced to show the falsehood of that allegation. For example, John Adams wrote in 1780 of great curiosity throughout Europe "to see our new constitutions," by which he meant the State constitutions. Exhibit 759, p. 527. Later the same year, Adams requested copies of the constitutions with which to satisfy the European interest, and said as an afterthought that "it would be proper to print the Confederation in the same volume." Exhibit 760, pp. 67-68. The constitutions were accordingly published by order of Congress, in a volume entitled The Constitutions of the Several Independent States of America (1781). See also Greene, The Foundations of American Nationality 547 (1922).

When a court of commissioners appointed by Congress, pursuant to a power conferred by the Articles of Confederation, adjudicated a boundary dispute between Connecticut and Pennsylvania, Robert R. Livingston, Secretary of Foreign Affairs, reported the decision to LaFayette in the following striking terms:

> "The great cause between Connecticut and Pennsylvania has been decided in favor of the latter. It is a singular event. There are few instances of independent states submitting their cause to a court of justice. The day will come when all disputes in the great republic of Europe will be tried in the same way, and America be quoted to exemplify the wisdom of the measure." 6 Wharton, Revolutionary Diplomatic Correspondence of the United States 202 (1889).

Professor Morris alleged that there was a common United States citizenship during the revolutionary and Confederation periods. Tr. 2378. He placed his sole reliance on a letter from Jay to Franklin of May 13, 1781, and Franklin's reply of August 20, 1781. U. S. Exhibit 388. Professor Morris' interpretation of these letters is incomprehensible. Jay's letter declared, "though a person may by birth or admission become a citizen of one of the States, I cannot conceive how one can either be born, or made a citizen of them all." Franklin replied that he thought "your objections reasonable." This shows how far John Jay, that great nationalist, was from thinking of the United States as an entity distinguishable from, let alone superior to, the thirteen States of which they consisted. For Jay, as for everyone else during this period, the United States simply had no existence apart from its constituent sovereigns. Even the 1787 Constitution did not create any federal citizenship, but merely provided (Article IV, Section 2), as the Articles had done, that the citizens of each State were entitled to all the privileges and immunities of citizens in the several States.

The government established by the Constitution was not the same government which existed under the Articles, and the new government was in no sense the legal successor of the old one or the inheritor of any powers from it, except that debts of the old Congress were assumed (Article VI). With that one exception the

Constitution does not even refer to the old government or to the Articles. It was a new compact among the States, and the government it established derived all its power and authority from a new act of delegation by the people of the States.

Innumerable writers have demonstrated that the 1787 Constitution had the nature of a compact entered into by independent sovereigns. The extent to which the States retained their sovereignty after the Constitution came into force has long been debated, but few have been so reckless as to deny the compact theory of its inception. The 1787 Convention was "an international conference." Scott, The United States: a Study in International Organization 145, 148-56 (1920).

It has sometimes been contended that the preamble to the Constitution ("We, the people of the United States") suggests that the Constitution was the act of, or was to be adopted by, the people collectively. In fact, the preamble, as it unanimously passed the Convention on August 7, 1787, was in these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution," etc. 1 Elliot's Debates 224, 230-31 (2d ed. 1836); Scott, The United States of America: a Study in International Organization 541, 552 (1920). The change to the final phraseology

was made by a subcommittee on style, and was obviously not intended to affect the substance. The reason for the change was that there was no assurance that every State would ratify the Constitution, and it would plainly have been inappropriate for it to go into effect purporting to be the act of States which remained outside it. Scott, Sovereign States and Suits 71-72 (1925). In fact two States did remain outside for quite some time; if they were not independent sovereigns during that period, it is difficult to know what status to assign them. See Tr. 2669-70. And it was never suggested that the United States had any right to coerce them if they did not choose to come in voluntarily.

Plainly, the framers regarded the people of each State, in their conventions which were regarded as the direct expression of their sovereignty, as those on whom adherence or non-adherence of each State to the Constitution, and therefore its legitimacy as a governmental charter, depended. Article VII of the Constitution, providing that the ratification by nine States "shall be sufficient for the establishment of this Constitution between the States so ratifying the same," confirmed the nature of the Constitution as a compact between sovereigns; the word between was put in on special motion, which shows how closely words were watched at the time. 1 Elliot's Debates 277. And the final act of the 1787 Convention made it clear that the delegates regarded themselves as acting on behalf of the

States: "done in convention, by the unanimous consent of the States present, the 17th day of September, in the year of Our Lord 1787." Id. at 317. "On the question to agree to the Constitution, enrolled in order to be signed, all the States answered, 'Ay.'" Id. at 318.

At the Convention, as in the Continental Congress, each State had a single equal vote, and the vote on each article of the Constitution was recorded by State, individuals not even being mentioned. Id. at 155-318. A great wealth of additional evidence could be adduced from the proceedings in the State ratifying conventions, and from many other contemporary and later sources, confirming the nature of the Constitution as a compact among sovereigns.

Even after the 1787 Constitution, the theory was that the States preserved their participation in the international act of treaty-making through the requirement of ratification by the Senate, senators being regarded as representatives of their States. Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555, 572 (1938).

In 1837 the Senate adopted, by a large majority, a resolution declaring "that in the adoption of the Federal Constitution the States adopting the same acted, severally, as free, independent and sovereign States." Congressional Globe and Appendix, 25th Cong., 2d Sess.,

p. 98. Again in 1860, the Senate resolved "that, in the adoption of the Federal Constitution, the States adopting the same, acted severally as free and independent sovereignties, delegating a portion of their powers to be exercised by the Federal Government for the increased security of each against dangers, domestic as well as foreign." Congressional Globe, 36th Cong., 1st Sess., pt. 3, p. 2321.

We will not discuss the views which political figures have taken from time to time on this question, except to make one observation about Daniel Webster. Webster's reply to Calhoun is perhaps the most famous denial in American history that the Constitution was a compact among sovereigns. But Webster very materially changed his views in his later life. In arguing to the Supreme Court in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839), Webster declared:

> "I am not prepared to say that the States have no national sovereignty [as distinguished from 'municipal sovereignty']. The laws of some of the States -- Maryland and Virginia, for instance -- provide punishment for treason. The power thus exercised is, certainly, not municipal. Virginia has a law of alienage: that is, a power exercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy -- enemy to whom? The law of escheat, which exists in all the States, is also the exercise of a great Sovereign power.
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> * * *
>
> "The States of this Union, as States, are subject to all the voluntary and customary laws

> of Nations. [Mr. Webster here referred to, and quoted a passage from Vattel (p. 61), which, he said, clearly showed that states connected together as are the States of this Union, must be considered as much component parts of the law of nations as any others.]" 13 Pet. at 559-60. (Bracketed matter in original.)

(The Court fully accepted Webster's argument; see p. 404, infra.)

And in giving legal advice to foreign bankers, Webster declared

> "Every State is an independent, sovereign, political community, except in so far as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written Constitution, and exerting its authority over the people of all the States. This general government is a limited government. Its powers are specific and enumerated. All powers not conferred upon it still remain with the States and with the people." 57 Niles's National Register 273.

On the basis of all the evidence, the vast majority of scholars in every period have agreed on "an all but unanimous conclusion" that during the revolutionary and Confederation periods the States individually possessed independence and full sovereignty, including external sovereignty, and were nations recognized as such by international law. David M. Levitan, "The Foreign Relations Power" 55 Yale L.J. 467, 488 (1946). These scholars include: James Sullivan, History of Land Titles in Massachusetts 60 (1801); Henry Baldwin (Justice of the Supreme Court of the United States), A General View of the Origin and Nature of the Constitution and Government of the United States 79-81 (1837); John Lothrop Motley,

1 Rebellion Record 210 (1861); 10 George Bancroft, History of the United States 421-22 (1874); Small, "The Beginnings of American Nationality," 8 Johns Hopkins Studies in Historical and Political Science 7-77 (1890); Henry Cabot Lodge, A Fighting Frigate 225 (1902); Van Tyne, "Sovereignty in the American Revolution: an Historical Study," 12 Am. Hist. Rev. 525 (1907); James Brown Scott, */ The Declaration of Independence, the Articles of Confederation, the Constitution of the United States iii-iv (1917); Robert M. Hughes, Handbook of Admiralty Law 9 (2d ed. 1920); James Brown Scott, The United States of America, a Study in International Organization, passim, e.g., pp. 45, 50-51, 58-60 (1920); R.L. Schuyler, The Constitution of the United States, an Historical Survey of Its Formation 16-17 (1923); Samuel Eliot Morison, Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution xl (1923); Allan Nevins, The American States During and After the Revolution 1775-1789, pp. 660-61 (1924); James Brown Scott, Sovereign States and Suits 28-30, 35-80 (1925); James Brown Scott, "Treaty Making Under the Authority of the United States," 28 Proceedings, Am. Soc. Int'l. L. 2 (1934);

*/ James Brown Scott (1866-1943) was Solicitor of the Department of State (1906-10), a delegate to the Paris Peace Conference of 1919, special advisor to the Department of State and Chairman of the Joint State and Navy Neutrality Board (1914-17); president of the American Society of International Law (1929-39), president of the Institut de Droit International (1925-27, 1928-29), editor in chief, American Journal of International Law (1907-24). He served as a member of many international commissions for the conciliation of disputes between nations. See also footnote p. 325, supra.

Evarts Boutell Greene, The Foundations of American Nationality 460-61, 558-59 (1922); Andrew C. McLaughlin, Constitutional History of the United States 83, 106, 118-36 (1936); Julius Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 551 (1938); H.R.G. Greaves, Federal Union in Practice 23-32 (1940); C. Perry Patterson, "In re United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); James Quarles, "The Federal Government: as to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?", 32 Georgetown L.J. 375 (1944); Robert E. Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 398 (1948); Ernest R. Bartley, The Tidelands Oil Controversy 29-30 (1953); Merrill Jensen, The New Nation (1965), Exhibit 703; Thomas A. Bailey, A Diplomatic History of the American People 52 (8th ed. 1968); 1 Julius Goebel, History of the Supreme Court of the United States (1971), Exhibit 694; Raoul Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev., 1, 28-33 (1972); Judge Philip C. Jessup (in his testimony in this proceeding, Tr. 644).

The United States have officially taken this position on at least two occasions in a diplomatic context. In the St. Croix River Arbitration under the Treaty Between Great Britain and the United States of November 19, 1794, the United States contended that on July 4, 1776 Massachusetts became "a free sovereign and independent State, . . . and in consequence thereof, was the legal successor of

the said province of the Massachusetts Bay in New England," and that from 1783 to 1789 Massachusetts was in confederation with the other twelve States, "all which states were, and before had been, free sovereign and independent States." 1 Moore, International Adjudications 110 (1929). And in 1807, a treaty between the United States and Great Britain (never ratified) laid down a maritime boundary in Passamaquoddy Bay and provided that the islands and waters west of the line were "within the jurisdiction and part of Massachusetts, one of the . . . United States." 6 Moore, International Adjudications 344 (1933).

In opposition to the great weight of authority among scholars, Professor Morris adduced precisely four writers: Story in the early 19th century, and a group of three writers between 1865 and 1890: Pomeroy, von Holst and Burgess. Tr. 1728, 1732-34, 2369-72. Professor Morris conceded that he had been able to cite no constitutional scholar writing since 1890 who supports his position. Tr. 2375. We submit that the few writers cited by Professor Morris are wrong on the record and the evidence.

Story was too young to have any first-hand knowledge of the facts, and wrote before most of the sources became available. He "was thought to be capable, on occasion, of putting his erudition to work in furtherance of essentially political ends," and "was a staunch advocate of a thoroughly centralized legal system," culminating in

his decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), overruled, Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Robertson, Admiralty and Federalism 31 (1970).

The ulterior motive of Pomeroy, von Holst and Burgess is obvious: they were writing in an attempt to justify the Northern position during the War Between the States; the pro-secession argument had begun with sovereignty of the States prior to 1789; and the Reconstruction writers felt called upon to dispute that rather than confining themselves to arguments as to the status of the States after the Constitution, as they could have done. Pomeroy was quite frank about his motive: "grant that in the beginning the several States were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun." Pomeroy, Introduction to the Constitutional Law of the United States 39 (5th ed. 1880).

Burgess, in addition, had other fish to fry: he was an extreme Hegelian, a devotee of German absolutist philosophy, whose example "we shall do well to imitate"; he regarded the centralized national state as the highest achievement of mankind, "the highest good," "the highest entity," possessed of "infallibility," which "can do no wrong"; he also held that the Teutonic race was uniquely qualified to govern, and was justified in denying inferior peoples political participation, and eliminating them if need be. 1 Burgess,

Constitutional Law v, 1-4, 37-58 (1890). For Burgess, ultimate sovereignty resided not in the people, as our political tradition has always held, but in the national state, and consists of "original, absolute, unlimited, universal power over the individual subject and over all associations of subjects." Id. at 52. For an excellent summary of Burgess' views, see 21 Dic. Am. Biog. 132-34. "He repudiated the doctrine of natural law, social contract, and the federal state" (id. at 133) -- i.e., he repudiated precisely those doctrines most fundamental to the views of our revolutionary statesmen and to our constitutional history.

Von Holst was a German professor; his work had to be translated into English. These writers are far from the mainstream of the American tradition of political philosophy and constitutional law. Even Professor Morris could not bring himself to assert the contrary. Tr. 2371.

Moreover, Burgess, Pomeroy and von Holst each declared that, while Congress was sovereign in the early revolutionary period, that sovereignty collapsed and disappeared on the entrance into force of the Articles of Confederation in 1781, and was not resurrected until 1789. Burgess, op. cit. at 101; Pomeroy, Introduction to the Constitutional Law of the United States 40-42 (9th ed. 1886); 1 von Holst, Constitutional and Political History of the United States 27-29 (1876); Tr. 2370, 2372. Story came at least

close to agreeing: "Congress in peace was possessed of but a delusive and shadowy sovereignty. . . . It has been justly observed that 'a government authorized to declare war, but relying on independent states for the means of prosecuting it, capable of contracting debts, and of pledging the public faith for their payment, but depending on thirteen distinct sovereignties for the preservation of that faith, could only be rescued from ignoring and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature.'" 1 Story, Commentaries on the Constitution 174, 177 (5th ed. 1905). Thus even Professor Morris' few favorite authorities desert him on a point which is fatal to his contention that the States never possessed sovereignty and independence. */

*/ Pomeroy, moreover, wrote a book on water law, in which he declared:

> "In England, the title to the alveus, or bed, of all navigable streams is vested in the crown. . . . To these sovereign rights the several states succeeded upon the establishment of American independence. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the several states respectively." Pomeroy, A Treatise on the Law of Water Rights 468 (1893).

The same was true, he said, of "tide-waters on the borders of the sea." Id. at 505.

B. The States, Whether "Externally Sovereign" or Not, Succeeded Individually to the Territorial Boundaries and Property Rights Both of the Crown and of the Colonial and Proprietary Governments, Including Rights in the Marginal Sea and Seabed.

The Revolution was in substantial part fought and won to vindicate the colonial charters. Parliament's attempt to alter the Massachusetts charter in 1774 -- by the Massachusetts Government Act, one of the "intolerable acts," as was the Quebec Act -- was the immediate cause for the convocation of the first Continental Congress in that year. Greene, The Foundations of American Nationality 428-29 (1922). The Declaration of Rights and Grievances of the first Congress insisted on the rights of the colonies both to the common law and to the provisions of the charters. 1 Journals of the Continental Congress 67; McIlwain, The American Revolution: a Constitutional Interpretation 18 (1923). The bill introduced by Lord Chatham in Parliament in 1775 -- the last attempt by the colonies' friends in England to ward off the Revolution -- provided that "the colonies in America are justly entitled to the privileges, franchises and immunities granted by the several charters or constitutions, which ought not to be invaded or resumed, unless for misuse, or some legal ground of forfeiture." See also Adams, Political Ideas of the American Revolution 97, 155-56 (1939).

President Monroe's special message of 1822 declared as follows:

> "And that the power wrested from the British Crown passed to the people of each colony the whole history of our political movement from the emigration of our ancestors to the present day clearly demonstrates. What produced the Revolution? The violation of our rights. What rights? Our chartered rights. To whom were the charters granted, to the people of each colony or to the people of all the colonies as a single community? We know that no such community as the aggregate existed and of course that no such rights could be violated." 6 Hamilton, The Writings of James Monroe 225 (1902).

It cannot be questioned without frivolity that, whatever the locus of the abstract concept of "external sovereignty," at independence the States succeeded individually to their boundaries, their charter rights, and their common law, all as enjoyed by the antecedent colonial and proprietary governments, and in addition assumed the territorial and property rights of the crown. Tr. 837-45. Professor Morris conceded that the States succeeded individually to their public lands, which prior to independence had belonged to the proprietors or to the crown, and that the boundaries among the States were determined by their charters. Tr. 2303-07. Professor Henkin further conceded that the States succeeded individually to property outside their boundaries which had belonged to their antecedent colonial governments. Tr. 2645-46.

Article IX of the Articles of Confederation expressly provided that "no State shall be deprived of territory for the benefit of the United States." As Professor Smith testified, "it is hard to imagine any language which could more conclusively or expressly

negative any notion of an implied transfer of territorial rights." Tr. 850. This language was not non-controversial or pro forma; to the contrary, it represented the victory of the adherents of State sovereignty in a hard, most bitterly fought battle which divided the revolutionary statesmen both during the war itself and thereafter. This was, of course, the dispute over the western lands. While no one ever attempted to take from the States for the benefit of the United States their rights in the marginal sea and seabed, there was a concerted effort on the part of the States not possessing western lands by their charters to appropriate the western lands of the other States, without consent or cession by those States, for the benefit of the entire Confederation. That effort was repeatedly, decisively and categorically rejected.

The landless States, led by Maryland, during the debate on the Articles repeatedly attempted to insert provisions which would have stripped the other States of their western lands or would have given Congress the power to revise the boundaries of the States. All these attempts were voted down. Exhibit 744; see also Exhibit 703, pp. 23-25.*/ It was for that reason that Maryland withheld adoption of the Articles for three long years of wartime, from 1778 to 1781.

*/ Dickinson's original draft of the Articles had given Congress the power of "limiting the bounds of those colonies, which by charter or proclamation, or under any pretence, are said to extend to the South Sea." Burnett, The Continental Congress 217 (1941). This was promptly stricken. Id. at 250.

The other landless States had long since conceded defeat; and when Delaware, in adhering to the Articles, attached resolutions grumbling about that defeat, Congress permitted the paper to be filed only with an express proviso "that it shall never be considered as admitting any claim by the same set up or intended to be set up." Exhibit 744, pp. 427-30.

The subsequent history of the controversy is summarized by Professor Smith at Tr. 851-52. See also Exhibit 707, pp. 693-94; 6 Journals of the Continental Congress 1077-79, 1082-83; 19 id. at 208-13; 26 id. at 118-21. Professor Morris testified that on September 13, 1783 Congress passed a resolution declaring the western lands "without the boundaries of the several States" and appropriating them to the United States "as one undivided and independent nation," Tr. 1772-73; the resolution in question, without its context, is U.S. Exhibit 356. On cross-examination Professor Morris, after considerable sparring and with great reluctance, was compelled to admit that he was entirely mistaken, and that the resolution in question was not adopted but was rejected. Tr. 2397-2402. In fact the resolution obtained the votes only of three States. Exhibit 708, p. 559; see also Tr. 2394.*/

*/ Professor Morris' attempted use of this resolution is far more significant than merely showing a careless mis-reading of the record. The fact that he believed Congress ever could or would have adopted such a resolution demonstrates a profound ignorance of the entire congressional attitude towards the western-lands question throughout the revolutionary and Confederation periods.

Instead, Congress accepted a voluntary cession by Virginia of some of its western lands,*/ and rejected an amendment by New Jersey providing that by such acceptance Congress was not necessarily recognizing Virginia's charter claims to its western lands. Exhibit 709, pp. 112, 116-17; Tr. 2403. Virginia had imposed certain conditions on its cession; Congress accepted some of these and Virginia withdrew the others, but even those withdrawn were tacitly accepted and complied with. Exhibit 662, pp. 272, 365. The entire history of the western-lands dispute shows a steady refusal by Congress, even at times when the result was substantial impairment of the unity of purpose of the alliance in wartime, to cast the slightest doubt on the validity of charter claims, or to admit the possibility of any acquisition by the United States of any territorial or property rights other than those voluntarily ceded by the States which owned them.

There is also substantial evidence that, even after the western lands were ceded, it was the general opinion that the United States had no constitutional power to hold permanently any territories

*/ Virginia never ceded its western lands south of the Ohio River, and retained them until parts of them became the States of Kentucky and West Virginia. To this day, Virginia, as well as North Carolina and Georgia, retain territories which would have been taken from them if Professor Morris were correct that the Proclamation of 1763 or the Quebec Act of 1774 had curtailed their boundaries. See U.S. Exhibit 368, last page.

not within one of the States, but that territory acquired by the United States collectively was held only temporarily until it could be erected into new States. Tr. 852, 2432; The Federalist, No. 38, pp. 248-49 (Madison) (Cooke ed. 1961). That view found substantial support in Supreme Court decisions. Granville-Smith v. Granville-Smith, 349 U.S. 1, 4-5 (1955); Dorr v. United States, 195 U.S. 138, 148 (1940); Snow v. United States, 85 U.S. (18 Wall.) 317, 319-20 (1873); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); United States v. Nelson, 30 F. 112 (Ore. Cir. 1887); Ex parte Morgan, 20 F. 298, 304-05 (W.D. Ark. 1883).

In Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221, 222-24, 229-30 (1845), the Court combined this doctrine with the doctrine that the federal title to the western lands derived from the acts of cession by the States within whose charter boundaries they lay, and applied both principles to the bed of navigable waters, including the seabed:

> "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana.
>
> * * *

"When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories.

* * *

"By the 16th clause of the 8th section of the 1st article of the Constitution, power is given to Congress to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists.

* * *

"In the case of Martin and others v. Waddell, 16 Pet., 410, the present chief justice, in delivering the opinion of the court, said: When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution. Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States. . . .

* * *

> "For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof." 3 How. at 221, 222-24, 229-30.

When, in the late 19th century, the United States began to acquire far-flung territories not adjacent to the continental United States, for which statehood was not envisaged, the problem was resolved by a doctrinal distinction between "incorporated" territories, which had the potentiality of statehood and to which the Constitution fully applied, and "unincorporated" territories, which were not thought of as future states. Granville-Smith v. Granville-Smith, supra; Balzac v. Porto Rico, 248 U.S. 298, 305-11 (1922); Hawaii v. Mankichi, 190 U.S. 197, 218-19 (1903). Up until the Spanish-American War, no doctrine of "unincorporated" territories was necessary, because the United States was universally understood to hold no territory other than States and potential States. This evolution of doctrine respecting territories in our constitutional law is wholly inconsistent with the notion that from the time of the Constitution, or even earlier, the United States possessed in its own right territorial and property rights in the marginal sea and seabed which were not part of or the property of any State. See Hardwicke, "The Constitution and the Continental Shelf," 26 Tex. L. Rev. 298, 423-26 (1948).

It has always been established doctrine that the original States were the owners of their public lands, except to the extent that they had alienated them or ceded them to the United States, and that the title of the United States to the western lands did not derive directly from the crown, but rather depended on the acts of cession by the States which owned them. The United States has officially taken this position. Donaldson (U.S. Public Land Commission, Committee on Codification), The Public Domain (1884), Exhibit 684. Accord, 2 Shalowitz, Shores and Sea Boundaries 442 (1964). The Supreme Court so held in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 586 (1823), and Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827); see pp. 398-402, infra.

The sanctity-of-charters position was fully maintained during the negotiations preceding the Peace of Paris. The instructions of 1779 to John Adams, sole peace commissioner, defined "the boundaries of these States" as including both the western lands and all islands within 20 leagues of the coast, and demanded that Britain evacuate all those areas, yielding "to the powers of the States to which they respectively belong." Exhibit 745, pp. 225, 227.

Professor Morris made much of a letter of instructions from Congress to John Jay dated October 4, 1780, U.S. Exhibit 386; Tr. 1800-02, which he contends indicated that the United States claimed the western lands under a common title rather than by virtue

of the individual colonial charters. The letter in fact said nothing about a common title; it invoked the provisions of the Peace of Paris of 1763, to which Spain had been a party, in contending that Spain had renounced any claim to the western lands in favor of Britain. While Professor Morris has attempted to describe this letter as an instruction to the peace commissioners, it was actually a letter to Jay in his capacity as minister to Spain; Adams was the sole peace commissioner until Jay and others were added to the delegation on June 15, 1781. Tr. 1783.*/ In 1780 Spain was claiming certain lands east of the Mississippi which it had occupied during the war. Obviously an argument based on the colonial charters would have carried no weight with Spain, which was wholly unconcerned with and not bound by a purely municipal deed from the British crown to some of its subjects. As against Spain, the United States' title depended on the Peace of Paris of 1763, by which Spain and France had renounced the lands in question. Professor Morris' argument that by relying on the 1763 treaty vis-a-vis Spain the United States were somehow asserting a common title, or repudiating the colonial charters, has no substance whatsoever. See also Tr. 2407-09.

On October 17, 1780, Congress wrote again to Jay, amplifying its prior instructions and setting out the reasons therefor. Exhibit 661, pp. 127-35; Exhibit 745, pp. 326-39. In this

*/ Professor Morris was well aware of this when he wrote The Peacemakers, pp. 215-16 (1965).

letter, drafted by Madison, Congress went out of its way to refer frequently to the charters and to the rights of the States individually, to an extent quite extraordinary given the fact that the recipient of the letter was the minister to Spain, which could legitimately reply that the charters were of no concern to it. Congress wrote:

> "[I]t must be observed that it is a fundamental principle in all lawful governments and particularly in the constitution of the British Empire, that all the rights of sovereignty are intended for the benefit of those from whom they are derived and over whom they are exercised. It is known also to have been held for an inviolable principle by the United States whilst they remained a part of the British Empire, that the sovereignty of the King of England with all the rights and powers included in it, did not extend to them in virtue of his being acknowledged and obeyed as king by the people of England or of any other part of the empire, but in virtue of his being acknowledged and obeyed as king by the people of America themselves; and that this principle was the basis, first of their opposition to, and finally of their abolition of, his authority over them. From these principles it results that all the territory lying within the limits of the States as fixed by the sovereign himself, was held by him for their particular benefit, and must equally with his other rights and claims in quality of their sovereign be considered as having devolved on them in consequence of their resumption of the sovereignty to themselves." Exhibit 661, p. 128.

> "If the occupation by the King of Great Britain of posts within the limits of the United States as defined by charters derived from the said king when constitutionally authorized to grant them, makes them lawful objects of conquest to any other power than the United States, it follows that every other part of the United States that now is or may hereafter fall into the hands of the enemy is equally an object of conquest." Exhibit 661, p. 129.

> "As this territory [the western lands] lies within the charter limits of particular States and is considered by them as no less their property than any other territory within their limits, Congress could not relinquish it without exciting discussions between themselves and those States concerning their respective rights and powers which might greatly embarrass the public councils of the United States and give advantage to the common enemy." Exhibit 661, p. 130.

See also Tr. 2349-55. As Irving Brant, one of the authors relied on by plaintiff, has recognized, this letter, which was written by Madison, rejected any "claim that the king's title had devolved on the United States collectively." U.S. Exhibit 391, p. 81. Professor Morris' allegation that the charter arguments were ever "dropped," Tr. 2354, is utterly without foundation. */

Brant's chapter on the instructions to Jay is well worth reading in its entirely. 2 Brant, James Madison 70-88 (1948). He

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*/ At the hearings Professor Morris read a passage from his book The Peacemakers briefly describing the October 17 letter, though not mentioning its repeated references to the charters. Tr. 2346-48. (There he gives the date as October 16; the letter was presented to Congress on that day, and approved on the 17th. Exhibit 661, p. 127.) When shown a copy of that letter from the Secret Journals, he questioned the authenticity of the text and asserted that the passages damning to his position were "dropped" before the letter was sent. Tr. 2349, 2354. We thereafter presented as Exhibit 661 the text of the letter from Hutchinson and Rachal's Madison Papers, which Professor Morris considers "very accurate," Tr. 2349, and indeed is the source he cited in The Peacemakers, pp. 239, 511 n. 67. The passages quoted above are taken from this source, and were never "dropped." Professor Morris' response was to present the letter to Jay of October 4, 1780 (p. 360, supra; U.S. Exhibit 386) as the one he really meant to rely upon. Plainly that letter is not the one referred to in the passage from The Peacemakers which Professor Morris read; in any event, (1) nothing was "dropped," since the October 17 letter came later, and (2) the October 4 letter did not rely on any common title.

shows in detail that the instructions represented yet another victory for the sanctity-of-charters position; Congress was unwilling, as Marbois wrote, to "let the least doubt of the validity of the charters appear.'" Id. at 74. And Madison used the charter claims to refute the theory that "France ceded the land in 1763 to the king, not to the colonies," and therefore that Spain had a right to conquer it as a belligerent against Britain. Id. at 80.

In August 1782 Congress considered the matter of instructions to the peace commissioners for the last time. Before Congress was a report by a committee consisting of Daniel Carroll, Randolph and Montgomery. This report is included in the record from the Secret Journals of Congress as Exhibit 746, pp. 161-201, and from the Journals at Exhibit 707, pp. 482-521. The report, in its Journals version, which Professor Morris regards as authoritative (Tr. 2349), devoted 29 pages, Exhibit 707, pp. 488-516, to an exhaustive argument that by virtue of the colonial charters, which were described at length and were repeatedly asserted to be in full force and effect with respect to boundaries, the States whose charter boundaries included western lands, "considered as independent sovereignties, have succeeded to those rights." Id. at 490. At the very end of the report, in a final brief paragraph occupying half a page, it was suggested that "if the vacant lands cannot be demanded upon the titles of individual States, they are to be deemed to have been the property of his Britannic Majesty, as sovereign of the thirteen colonies

immediately before the revolution, and to be devolved upon the United States collectively taken." Id. at 516-17.

One would think that the Congress would have been willing to make any argument that might have been successful in extending the boundary of the United States to the Mississippi, and it would be difficult to argue that if it had accepted this report Congress would have prejudiced, as a matter of internal law, the claims of the individual States to their western lands. However, on presentation of the report the delegates of Virginia immediately moved to strike the offending paragraph on the ground that "the claim to the western territory rested solely on the titles of individual States. That Congress had no authority but what it derived from the States. The States individually were sovereign and independent, and upon them alone devolved the rights of the crown within their respective territories." U.S. Exhibit 374, p. 448. Because of these objections the report was not adopted, but was committed, and never received the approval of Congress. U.S. Exhibit 374, p. 449; Exhibit 707, pp. 523-24; see Tr. 2321-22, 2394-96. This episode graphically confirms that Congress was never at any time willing to admit the slightest implication, even a far-fetched one, which could derogate from the continuing validity of the territorial and property rights of each State individually as established by its charter.

Finally, in October 1782, Congress adopted resolutions to be given to the French minister to the United States which insisted on "the territorial claims of these States." Exhibit 761, p. 793.

A motion was made to insert the word "United" before the word "States," and the motion was rejected. Id. at 795. */

In view of this history, it is not surprising that the peace negotiators in Paris contended that the right of the United States "to extend to the Mississippi was proved by our charters." 6 Wharton, Revolutionary Diplomatic Correspondence 31 (1889). Jay wrote that during the negotiations he had used every one of the arguments in the letter of October 17, 1780, which as we have seen included the charter claims and deliberately excluded any reliance on a common title. 2 Brant, James Madison 87 (1948).

The entire history of the western-lands question, both with respect to controversies among the States in Congress and with respect to the diplomatic negotiations leading to the Peace of Paris of 1783, can leave no doubt that, even where State charter claims were bitterly contested, they were upheld as part of our law. And except with respect to the western lands, nobody ever questioned for a moment at any time the proposition that each State succeeded to its charter boundaries and to all territorial and property rights formerly possessed by the crown and by the antecedent colonial or proprietary government. Thus any assertion that during the revolutionary period the crown and colonial rights to the marginal sea and seabed in the Atlantic somehow passed to the United States collectively is wholly frivolous.

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*/ In the Peacemakers, p. 440, Professor Morris was well aware that by this act of Congress "avowed the territorial claims of the states."

James Sullivan of Massachusetts correctly stated the universal understanding in 1801:

> "The legal aspect of sovereignty and titles referred to by Samuel Adams was again stated by James Sullivan, in his History of Land Titles in Massachusetts published in 1801. Sullivan was a supreme court judge from 1776-1782, Attorney General 1790-1807, first president of the Massachusetts Historical Society, founded in 1791, Governor of Massachusetts 1807, and the leading supporter in Massachusetts of Thomas Jefferson. He said, (p. 60)
>
> > 'The thirteen original States claimed and had a cession of sovereignty and independence, each in its several capacity, by the mother country. They remained sovereign separate powers until the present constitution was formed. That constitution formed a nation; but it was a creature of 1789. It had them no public property, nor did the people, whose authority gave it existence, make it the proprietor of any other lands, than such as had been ceded, under the old confederation, to the United Colonies.'
>
> "The only property thus 'ceded', was (as pointed out by Sullivan) 'their remote territories' following an invitation to make such cessions from the Continental Congress.
>
> > 'Massachusetts ceded all beyond a line, falling from the Lake Ontario to the State of Pennsylvania, which now forms the east line of what is called, in the general government, The Western Territory.'
>
> "Massachusetts 'ceded' nothing else (see Sullivan 57-60).
>
> "Sullivan's statement reflects the common understanding as well as the obvious meaning of Articles I and II of the Treaty of Peace." Wait, "The Muniments of Title of Massachusetts to Her Submerged Lands," 35 Mass. L. Q. 1, 19 (1950).

C. The Peace of Paris of 1783 and the Negotiations Preceding It Demonstrate American Awareness of Maritime Rights and Show No American Disagreement with Territorial Seas 100 Miles or 30 Leagues in Width.

Article III of the Peace of Paris of 1783 provided as follows:

> "It is agreed that the people of the United States shall continue to enjoy unmolested 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 Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova-Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground."

Agreement on this provision was preceded by extensive deliberations in Congress and negotiations with the British, which revealed an intense awareness on the part of the American statesmen of the importance of maritime rights. General surveys of these developments are found at Exhibit 720, pp. 125-27, and Exhibit 748, pp. 68-71.

In 1776 and again in 1778, the Americans proposed that they and the French divide the Newfoundland and Canadian fisheries between them,

excluding the British altogether, Exhibit 742, p. 199. The French failed to respond favorably. Thereafter the American position was to demand a common right of fishing in Newfoundland and Canadian waters. The French declined to support this American position, on the ground that "coastal fishing belongs by right to the proprietor of the coast"; since by this time it was understood that Britain would retain Canada and Newfoundland, the French recognized no American right to claim a share of the fisheries there. U.S. Exhibit 334, pp. 7-9; Exhibit 748, pp. 69-70. */

The American reply was based not on "freedom of the seas" arguments but on the contention that the historic practice of American fishing in Canadian waters had given rise to a vested, established right. U.S. Exhibit 375, p. 79. While ultimately, by virtue of John Adams' eloquence, the United States were able to obtain "liberty" of fishing right up to the Canadian coasts, in 1779 Congress was quite willing to accept a provision that would have reserved the fisheries out to three leagues for the British alone. Exhibit 745, pp. 202, 208, 230-32; U.S. Exhibit 347, p. 961.

The Peace of Paris carefully distinguished between the American "right" to fish on the outer banks of Newfoundland and other non-coastal

*/ The French legal position was clear: the British crown was "the sole and undoubted proprietor of the Island of Newfoundland, and consequently of the fishery upon its coasts." Richard B. Morris, The Peacemakers 326 (1965). The French position extended both to "shore rights for drying fish" and to "fishing within coastal waters." Id. at 330.

waters, and the "liberty" to fish in coastal waters. This point of terminology was the subject of considerable discussion. Exhibit 720, p. 126. Of course no provision at all was needed unless the Americans believed that Britain had or would claim an exclusive right in the absence of a treaty provision to the contrary. In 1816 John Quincy Adams, then Minister to Britain, made that point in a letter to Lord Castlereagh:

> "If the United States would have been entitled, in virtue of a recognized independence, to enjoy the fisheries to which the word right is applied, no article upon the subject would have been required in the treaty. Whatever their right might have been, Great Britain would not have felt herself bound, without a specific Article to that effect, to acknowledge it as included among the appendages to their independence." 7 British and Foreign State Papers 105 (1834).

Adams regarded the 30-league exclusive-fishing limits in the treaties of 1713 and 1763 as evidence of what the British considered to be their exclusive right, and concluded: "that Great Britain would not have acknowledged these rights, as belonging to the United States in virtue of their independence, is evident." Ibid. In Adams' view, the American "right" was founded not "as a necessary result of their independence" (that is, by virtue of any principle of freedom of the seas), but rather as a vested right deriving from the established and historic use of fisheries: "a right which they have theretofore enjoyed, as a part of the British nation, and which, as an independent nation, they were to enjoy unmolested." Id. at 106.*/ Adams continued with the passage quoted at p. 245 , supra,

*/ As Judge Jessup testified, in this period vested or established fishing rights in favor of a non-coastal nation were regarded as exceptions to the recognition of broad territorial waters and the concomitant exclusive rights of the coastal sovereign. Tr. 506, 640-42.

declaring the exclusive nature of both the coastal and the banks fisheries. Finally, he recognized that fisheries were the subject of exclusive ownership under both British and American law:

> "It was precisely because they [the United States] might have lost their portion of this joint national property, to the acquisition of which they had contributed more than their share, unless a formal article of the treaty should secure it to them, that the article was introduced. By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual and the fishery to another. The right to the soil may be exclusive, while the fishery may be free or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the Treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed, was reserved to Great Britain, the fisheries themselves and the accommodations essential to their prosecution, were, by mutual compact, agreed to be continued in common." Id. at 108.

In all this John Quincy Adams was faithfully adhering to the argument his father successfully made in 1782. The senior Adams had said not a word about freedom of the seas, even as to the fisheries on the outer banks of Newfoundland, but by his own account claimed the "right" to those fisheries solely on the basis of occupation and use. U.S. Exhibit 375, p. 79; see also Greene, The Foundations of American Nationality 520 (1922).

In the report submitted to Congress in August 1782 regarding the peace negotiations, a committee set out arguments which the commissioners might use in seeking participation in the Newfoundland banks

fisheries. The report acknowledged that "a reasonable tract" of coastal fishery belonged to the owner of the coast, and discussed the various doctrines and precedents of international law as to the distance to which that exclusive right extends: 100 miles, 60 miles, the 14 miles of Scottish "reserved waters," the 30 leagues of the treaties of 1713 and 1763, and the three leagues and 15 leagues applied to the St. Lawrence and Cape Breton fisheries by the 1763 treaty. Exhibit 707, pp. 482-85. The report is entirely devoted to the outer banks of Newfoundland, and its argument is that those banks, being 35 leagues from land at their closest point, were outside all the conventional limits used for the measurement of exclusive fisheries. Id. at 482, 485. Reliance was also placed on the long-established and therefore vested nature of the American right to the fishery. Id. at 485. While the report contains general language about the freedom of the seas, it is impossible to find any language in it contending that the 30-league/100-mile limit was discountenanced by English or international law; the argument was that the fishery to which the report related was outside that limit.

D. The Peace of Paris Established, for at Least Some Purposes Including Exclusive Fisheries, a 20-League Maritime Boundary Off the Coasts of the Defendant States.

As to the coastal waters of the United States themselves, the Peace of Paris provided (Article II) that the "boundaries" of the United States should be on land as defined, and "comprehending all islands

within twenty leagues of any part of the shores of the United States." That formula was proposed by Congress in its first instructions to the peace commissioner in 1779, Exhibit 745, pp. 139, 226, and was accepted by the British without change and, so far as appears, without discussion. It seems highly improbable that the commissioners on either side were unaware that ownership of islands to a certain distance in the sea had always been regarded as including the seas out to that distance; moreover, 60 miles (20 leagues) was one of the measurements then most in vogue in international law for the extent of territorial waters (p. 306, supra). The Americans were well aware of that, 60 miles in the exclusive-fishery context having been mentioned in the report to Congress of August 1782. Exhibit 707, p. 482. The record contains copies of the maps used by both the British and American commissioners in the negotiations, on which they marked the boundaries established by the treaty; both maps show a boundary line in the sea, obviously intended to be 20 leagues out, all along the coast of the United States. Exhibits 327, 339, 355; Tr. 508-11, 845-48, 1194-1206.

Quite plainly, as Judge Jessup and Professor Smith have testified, the treaty did establish, and was understood to establish, a boundary line 20 leagues out in the sea for some purposes other than mere ownership of islands. Tr. 508-11, 845-48, 1194-1206, 1271-77. As Judge Jessup has emphasized, in view of the long history of fisheries disputes, treaties

and regulations in North Atlantic waters, it seems unquestionable that at the very least the provision was intended to recognize exclusive American fisheries out to the 20-league line. Tr. 1195. That conclusion is confirmed by the fact that the British copy of the map also shows, obviously for comparative purposes, the 30-league Treaty of Utrecht line, which dealt with exclusive fisheries.

It seems fairly apparent that in 1779 Congress picked one of the conventional distances in vogue for territorial waters and proposed it (in the conventional "islands" language) for inclusion in the treaty; the British, who were not users of the coastal fisheries off the United States, probably accepted it more or less without question. The retreat from the 100-mile boundaries of the charters to 60 miles for exclusive fisheries was probably influenced by the freedom-of-navigation theories coming into vogue at this period among maritime powers. Plainly, seabed and subsoil rights would have been regarded as no more restrictive; and if we are correct that the reason for the retrenchment to 60 miles related to freedom of navigation, the provision carries no implication that the 100-mile charter boundaries did not remain in effect as to the seabed and subsoil, and perhaps as to surface rights other than navigation and exclusive fisheries. On the whole, therefore, the 20-league provision of the Peace of Paris is most reasonably regarded as a confirmation of the charter claims out to 60 miles, without impairing the charter boundaries of 100 miles with respect to the seabed and subsoil.

Professor Morris makes two arguments against the construction of the 20-league line as a sea boundary: first, that it did not appear on subsequent maps; second, that it would produce the preposterous result of leaving to Britain a 10-league belt between that line and the 30-league line of the Treaty of Utrecht. Tr. 1814-16. Both arguments are frivolous. As to the first, very few maps at any time in history have shown maritime boundaries, as a glance at any map or atlas of any period will show. Indeed, such boundaries on maps are virtually unheard of. Rather remarkably, an official British map of 1785 did show the 20-league boundary line, Exhibit 614, as did a map published in 1876 in connection with the centennial celebration of American independence. Exhibit 822.

As to the professor's second argument, it is based on a studied unwillingness to accept the elementary proposition that the right to territorial waters is dependent upon the sovereignty of a coastline; of course Britain lost its territorial waters off the coast of the United States when it lost sovereignty over the land. Moreover, the argument is based on the assumption that the 30-league line of the Treaty of Utrecht extended south of Nova Scotia; by the terms of the treaty itself it did not do so, and the British view that a 30-league/100-mile line extended down the coast of the United States was obviously based on general English and international law. See pp. 224-31, 305-06, supra. */

*/ If Britain did have a treaty right, as against France, to a 30-league exclusive-fisheries zone off the coasts of the United States, the succession of the defendant States to Britain as sovereigns of those coasts entailed, under established principles of international law, their succession to the treaty right also. The general rule is that a successor State inherits those

Finally, Professor Morris contends that "the United States was negotiating for territory and other rights in collectivity and not for the individual and separate States." Tr. 1788-89. If he means that the commissioners were negotiating "in collectivity" as to the territorial waters of the United States, the argument is far-fetched in the extreme, and Professor Morris gives no evidence for it. His only argument is that the rights to the Canadian fisheries were negotiated for collectively; of course they were, since they were not within or appurtenant to the territories of any State, and all the States claimed equal rights to them. As we have seen (pp. 364-66, supra), the only occasion when negotiation "in collectivity" was ever proposed for any rights to which individual States had charter claims related to the western lands, and there the proposal was decisively rejected. There is not a word in Professor Morris' book The Peacemakers which suggests any negotiations "in collectivity."

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treaty rights and obligations of its predecessor which pertained to, were for the benefit of, or constituted a burden upon, the territory subject to the State succession. 5 Hackworth, Digest of International Law 360-77 (1943); 2 Whiteman, Digest of International Law 936-1028 (1963); O'Connell, The Law of State Succession (1956).

VIII.

## THE EXCLUSIVE RIGHT OF THE STATES TO EXPLORE AND TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF WERE NOT TRANSFERRED TO THE UNITED STATES BY THE CONSTITUTION.

### A. The Constitution Expressly Preserves State Territorial Boundaries and Property Rights.

Clause two of Article IV, Section 3 of the Constitution declares in the most explicit language that no constitutional provision may affect the claims of the States to territory or property. The clause provides as follows: ". . . nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State." Clearly prohibited would be the interpretation of the powers of the Federal Government over defense and foreign relations, or any other federal powers, in such a way as adversely to affect the claims of the States to the submerged lands off their shores.

The history of this provision of the Constitution demonstrates that the intent of the framers was to use the term "any claim" in a broadly inclusive sense. According to Madison's notes on the proceedings of the Federal Convention, the provision was debated only once, on August 30, 1787. On that occasion Daniel Carroll of Maryland proposed the following amendment:

> "Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U.S. to vacant lands ceded to them by the Treaty of peace."
> 2 Farrand, Records of the Federal Convention 465 (1911).

Madison thought such a provision unnecessary but harmless, but proposed that "to make it neutral and fair, it ought to go farther & declare that the claims of particular States also should not be affected." Id. at 465. Since this was generally accepted, Carroll withdrew his amendment and substituted the following:

> "Nothing in this Constitution shall be construed to alter the claims of the U.S. or of the individual States to the Western territory, but all such claims shall be examined into & decided upon, by the Supreme Court of the United States." Id. at 465-66.

The Carroll substitute was thereupon postponed and the convention took up, and adopted, a similar amendment proposed by Gouverneur Morris of Pennsylvania:

> "The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U - S - or of any particular State." Id. at 466.

The debate then continued over an amendment which provided that "all such claims" be examined and decided upon by the Supreme Court. It was eventually decided that such a provision was superfluous since the Supreme Court already had jurisdiction over suits to which the United States or a State was a party.

It is important to note that the Convention moved from a very specific provision, dealing with vacant lands ceded by the Treaty of Peace,

to a very inclusive provision dealing with "any claims." The central purpose behind the substitution of the Morris amendment was to include all conceivable claims of either the United States or of the individual States. The substitution was activated by the same sentiments expressed by Madison: the desire to be inclusive and to make certain that the adoption of the Constitution would have no effect on any territorial or property claims.

B. Several Other Provisions of the Constitution and the Debates at the Federal Convention Indicate the Intention Not To Change or To Affect State Boundaries or the Ownership of Property.

It is inconceivable that any of the framers believed that territorial or property rights were being ceded implicitly and without discussion, 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.

At one point during the 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). 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.

Also of importance in ascertaining the intent of the framers is the provision of Article I, Section 8, 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 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." Id. 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.

These constitutional provisions, 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, in the seabed of the continental shelf or elsewhere. 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.

The argument that the States' continental-shelf rights were transferred to the United States as a corollary of "external sovereignty" or of the foreign-affairs and defense powers is discussed at pp.477-94, infra.

C. The Great Weight of Supreme Court Authority Has Recognized State Sovereignty in the Period 1776-1789, and State Succession to All Territorial and Property Rights of the Crown and the Colonial Governments Was Uniformly Upheld Until the California Case.

We shall now summarize (and usually quote) all the language we have encountered in Supreme Court opinions which bears on the locus of sovereignty and State succession to territorial and property rights during the revolutionary and Confederation periods.*/ Professor Morris gave (Tr. 1729-32) a grossly distorted and incomplete version of the substance of the early Supreme Court decisions on these points.

In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the question was whether the Supreme Court had jurisdiction over an action brought by a citizen of one State against another State. Since Article III of the Constitution expressly gave the Court jurisdiction over controversies between a State and citizens of another State, the issue does not seem to have been very difficult; even so, the Court's judgment was overruled by the Eleventh Amendment to the Constitution. Three of the opinions contain language relevant to the question here. Justice Iredell, dissenting, contended that the jurisdictional provision of the Constitution

*/ Cases dealing specifically with State succession to tide waters and the bed and subsoil thereof are referred to at pp. 416-18, infra.

was not self-executing, and that in the absence of an act of Congress the Court should follow the common-law principle of immunity of the sovereign from suit. Iredell was at pains to point out the reception of the common law in all the States. His conclusion was that the States were successors to the immunity from suit of the crown along with other attributes of sovereignty:

> "No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them: of course, the part not surrendered must remain as it did before." Id. at 435.

Justice Wilson, who decided with the majority, and who as Professor Morris has pointed out was one of the most extreme nationalists prior to 1787, nonetheless sharply distinguished between the locus of sovereignty, at least in fact, during the Confederation period and under the Constitution:

> "With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificant object, which the nation could present: 'The People of the United States' are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate

> constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested." Id. at 463.

Chief Justice Jay, also in the majority, appeared to recognize both a national and a federal theory of the revolutionary and Confederation periods, without committing himself to one or the other:

> "The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of war, and in the warmth of mutual confidence, they made a confederation of the states,

> the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution." Id. at 470.

The other two justices writing opinions, Blair and Cushing, said nothing relevant to the pre-1789 constitutional situation. Thus in the Chisholm case we find three justices expressing relevant opinions: Iredell maintained that the States were fully sovereign prior to 1789 and had not lost that sovereignty in any essential sense; Wilson held that the States were sovereign before 1789 but had yielded the aspect of sovereignty at issue in the case; Jay alone cast any doubt on the pre-1789 sovereignty of the States, but only as a hypothesis, giving equal weight to the opposite hypothesis.

In Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795), the Court held that the prize appeal court established by Congress in 1778 had possessed jurisdiction to reverse a decision of the admiralty court of New Hampshire. The case necessarily involved an inquiry into the powers of Congress prior to the effective date of the Articles of Confederation. All four justices who wrote opinions -- Paterson, Iredell, Blair and Cushing -- relied heavily on the fact that New Hampshire had voted in favor of the act of Congress establishing the prize court, and that having so voted New Hampshire could not withdraw its consent without withdrawing from the Confederation, which all three justices believed it had

a perfect right to do. Justice Paterson went on in vivid terms to affirm the de facto power of Congress, even prior to the Confederation, over external and military affairs:

> "Much has been said respecting the powers of congress. On this part of the subject, the counsel on both sides displayed great ingenuity and erudition, and that too in a style of eloquence equal to the magnitude of the question. The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government: congress conducted all military operations both by land and sea; congress emitted bills of credit, received and sent ambassadors, and made treaties: congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America. In congress were vested because by congress were exercised, with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised, this supreme authority? No one will hesitate for an

> answer. It was lodged in, and exercised by, congress; it was there, or nowhere; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war. For in such case, there would have been as many supreme wills as there were states, and as many wars as there were wills. Happily, however, for America, this was not the case; there was but one war, and one sovereign will to conduct it. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul. As to war and peace, and their necessary incidents, congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount and supreme. The truth is, that the states, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the states collectively, under congress, as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which, other sovereigns would be more immediately interested; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors." Id. at 80-81.

Paterson was quite clear, however, that the powers of Congress were derived from the delegation and acquiescence of the States:

> "Another circumstance worthy of notice, is the conduct of New Hampshire, by her delegate in congress, in the case of the Sloop Active. Acts of Congress, 6th March 1779. By this decision, New Hampshire concurred in binding the other states. Did she not also bind herself? Before the articles of

> confederation were ratified, or even formed, a league of some kind subsisted among the states; and whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The states, when in congress, stood on the floor of equality; and until otherwise stipulated, the majority of them must control. In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that New Hampshire was not bound, nor congress sovereign as to war and peace, and their incidents, because they resisted this supremacy in the case of the Susanna. But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned, and that she continued to be bound, because she continued in the confederacy. As long as she continued to be one of the federal states, it must have been on equal terms. If she would not submit to the exercise of the act of sovereignty contended for by congress, and the other states, she should have withdrawn herself from the confederacy." Id. at 81-82.

Justice Iredell, likewise, founded the authority of Congress squarely on the delegation and acquiescence of the States:

> "The powers of congress, at first, were indeed little more than advisory; but in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every man must admit, and none could take more pains, than congress, for a long time, did, to get their authority regularly defined by a ratification of the articles of confederation. But that previously thereto they did exercise, with the acquiescence of the states, high powers of what I may, perhaps, with propriety, for distinction, call external sovereignty, is unquestionable. Among numerous instances that might be

given of this (and which were recited very minutely at the bar), were the treaties of France in 1778, which no friend to his country at the time questioned in point of authority, nor has been capable of reflecting upon since, without gratitude and satisfaction. Whether among these powers comprehended within their general authority, was that of instituting courts for the trial of all prize causes, was a great and awful question; a question that demanded deep consideration, and not, perhaps, susceptible of an easy decision. That in point of prudence and propriety it was a power most fit for congress to exercise, I have no doubt. I think, all prize causes whatsoever ought to belong to the national sovereignty." Id. at 90.

"If congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance. When the obnoxious acts of parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might, and undoubtedly would have been. If they had pursued this separate system, and afterwards, the people of each province had resolved that such province should be a free and independent state, the state, from that moment, would have become possessed of all the powers of sovereignty, internal and external (viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations), as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed, or thought of forming, any sort of federal union whatever." Id. at 92-93.

Justice Blair, likewise, founded the Congressional authority in question on New Hampshire's express delegation of it, and held that New Hampshire could have withdrawn that delegation by withdrawing from the Confederation. Id. at 112.

Cushing likewise regarded Congress' authority as derived solely by delegation of the States:

> "I have no doubt of the sovereignty of the states, saving the powers delegated to congress being such as were 'proper and necessary' to carry on, unitedly, the common defence in the open war, that was waged against this country, and in support of their liberties, to the end of the contest." Id. at 117.

In Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), the Court held unanimously that a Virginia statute of 1777, confiscating debts owed to British subjects, was superseded by the contrary provision in the Peace of Paris of 1783. Each justice assessed the validity of the Virginia statute under international law, thus recognizing that Virginia at the time was an international person whose act either complied with or violated international law. Only Justice Chase found it necessary to inquire further into the validity of the Virginia statute at the time it was enacted, and his analysis is an emphatic and unequivocal affirmation of State sovereignty:

> "I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth. I shall hereafter consider, whether the law of the 20th of October 1777, operated to confiscate or extinguish British debts, contracted before the war. It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a new government, by the authority of the

people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore, an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe. I hold it as unquestionable, that the legislature of Virginia, established as I have stated, by the authority of the people, was forever thereafter invested with the supreme and sovereign power of the state, and with authority to make any laws in their discretion, to affect the lives, liberties and property of all the citizens of that commonwealth, with this exception only, that such laws should not be repugnant to the constitution or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of

the Virginia legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and in my opinion, on the courts of the United States. If Virginia, as a sovereign state, violated the ancient or modern law of nations, in making the law of the 20th of October 1777, she was answerable, in her political capacity, to the British nation, whose subjects have been injured in consequence of that law. Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts. Would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided, she had not delegated such power to congress, before the making of the law of October 1777, which I will hereafter consider.

"In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign and independent state; and on the 4th of July 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that,as such, they had full power to levy war, conclude peace. &c. I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

"Before these solomn acts of separation from the crown of Great Britain, the war between Great Britain and the united colonies, jointly and separately, was a civil war; but instantly, on that great and ever

> memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon, all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt, lib. 3, c. 18, § 292-95; lib. 3, c. 5, § 70, 72, 73." Id. at 222-24.

Chase held that the 1783 treaty could supersede Virginia's legislation because Virginia had delegated the power to make treaties by entering into the Articles of Confederation:

> "Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had delegated that power to Congress . . . . [I]f she had before parted with such power, it must be conceded that she once rightfully possessed it.
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> * * *
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> "If the legislature of Virginia could not, by ordinary acts of legislation, do these things, yet, possessing the supreme sovereign power of the state, she certainly could do them, by a treaty of peace; if she had not parted with the power of making such treaty. If Virginia had such power, before she delegated it to congress, it follows, that afterwards, that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the 9th article of the confederation (ratified by all the states, on the first of March 1781), in which it was declared, 'that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned

> in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce.' This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the terms on which they shall be made: a war between two nations can only be concluded by treaty." Id. at 234, 235-36.

Thus for Chase, as indeed for every justice in there early opinions, Congress possessed what powers it had, both prior to and under the Articles of Confederation, solely by delegation from the States, which therefore possessed all sovereign powers individually prior to that delegation.

In Sim's Lessee v. Irvine, 3 U.S. (3 Dall.) 424 (1799), the Court upheld an interest in land created by Virginia in territory subsequently ceded to Pennsylvania pursuant to a compact of 1780 between the two States which contained a provision confirming antecedent property rights. Chief Justice Ellsworth's opinion referred to the laws of Virginia "passed subsequently to her independence." Id. at 456. Iredell held that at independence each State separately succeeded both to the property and territorial rights of the crown, subject to any lawful encumbrances thereon. Id. at 459. Iredell also expressed his opinion, id. at 464, that prior to the Constitution of 1787 the Pennsylvania legislature, being fully sovereign, had the power to ignore an obligation incurred

by compact or treaty with another State, and that the courts would have upheld such legislation even though in violation of the compact.

Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), dealt with a Georgia statute of 1782 which confiscated the property of several named persons. The plaintiff, one of the persons named in the act, sued to have the law overturned, arguing that it was a bill of attainder prohibited by the Constitution. The Court unanimously held that in 1782 Georgia was an independent sovereign and therefore had the power to pass such a law unless it was forbidden by its own constitution. Since the constitution of Georgia did not prohibit bills of attainder, the law was valid and the confiscation was upheld.

McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808), concerned a New Jersey law passed during the Revolution confiscating the property of hostile aliens. The Court held that each State became an independent sovereign upon the Declaration of Independence, or before that upon any declaration of independence of its own. At its independence each State acquired all the attributes of sovereignty possessed by any sovereign nation, including the powers of the crown as well as those which had been granted to the colonies by the crown. The Court expressly held that the Treaty of Peace of 1783 was a recognition of the sovereignty of the several States and not a grant of it.

Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810), involved a Maryland act of 1780 providing for the confiscation of all alien property. The Court construed the Maryland act as effecting a complete confiscation as of the date of its passage with no further steps being required. The Court held that the 1780 act was valid and that, since the confiscation was complete prior to the Treaty of 1783, the treaty did not nullify the confiscation.

Preston v. Browder, 14 U.S. (1 Wheat.) 114 (1816), concerned the validity of a treaty of 1777 between the State of North Carolina and a tribe of Indians. The Court upheld the treaty, noting that after the Declaration of Independence North Carolina was an independent sovereign and that the treaty between North Carolina and an Indian nation to settle hostilities between them was a customary exercise of sovereign power. The Court further held that the boundaries of North Carolina as an independent State were those provided in its colonial charter.

In United States v. Bevans 16 U.S. (3 Wheat.) 336 (1818) (Marshall, C.J.),the Court rejected the argument that the grant of admiralty jurisdiction to the federal courts in the Constitution had divested Massachusetts of territorial sovereignty over the waters of Massachusetts Bay. Marshall declared:

> "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 in 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, dockyards, 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 judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.
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> "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. The residuary powers of legislation are still in Massachusetts." 3 Wheat. at 389.

It can hardly be doubted that Marshall would have said, had the argument which was successful in the California case been presented to him, that the foreign-affairs and defense powers were no more intended to involve a cession of territory than was the admiralty jurisdiction.

In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), the Court unanimously held that title to land within the United States could not be acquired by purchase from the Indians. Chief Justice Marshall's most interesting opinion dealt with a number of points at issue in the present proceeding. Marshall traced the title to the soil of this country through the royal grants made in the colonial charters, pointing out in particular that the quo warranto proceeding of 1624 had not changed the boundaries of Virginia. Id. at 578. He noted the recognized principle of international law during the colonial period that title to lands inhabited by savages was acquired by discovery alone, not requiring occupation. Id. at 573. He affirmed the continuing legal status of the charters, and the constitutional incapacity of the crown to revoke proprietary charters without cause:

> "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected. Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were

> originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected until the revolution, when it was forfeited by the laws of war." Id. at 580-81.

Finally, since the lands in controversy in the litigation lay in the old Northwest territory, he traced the title to that territory of the United States to its cession by Virginia:

> "The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become members of the confederation,' &c., 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.' The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." Id. at 586.

In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall in the most unequivocal terms affirmed the sovereignty and independence of the States separately during the revolutionary and Confederation periods:

> "As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." Id. at 187.

Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827), involved a title dispute to land which one side claimed on the basis of a grant made in 1777 by the British governor of Florida. The land was in the Mississippi territory. Following the Peace of 1783 the area in question had been claimed by the United States, South Carolina and Georgia. While finding it unnecessary to decide between the claims of South Carolina and Georgia, the Court clearly preferred the former on the ground of its colonial charter rights:

> "The original title of South Carolina, under the grant to the lords proprietors, was unquestionable; and she contended, that she had never been legally divested of soil or sovereignty." Id. at 525.

> "And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit, by a solemn grant from the crown to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown." Id. at 527.

The Court rejected the claim of the United States in its own right on grounds that are decisive to the issues in this litigation:

> "There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear , could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set up by her against Georgia and South Carolina, to wit, that Spain could not acquire, by conquest, a territory within the limits claimed by an ally in the war . . . . There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states." Id. at 525-26. (Emphasis added.)

And the Court regarded the Peace of Paris as confirming individual State boundaries and territorial rights:

> "It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limites, were as much theirs, at the declaration of independence, as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of right, on the part of Great Britain." Id. at 527-28.

In Poole v. Fleeger, 36 U.S. (11 Pet.) 184 (1837), the Court referred to the holding in Harcourt v. Gaillard as "a settled principle," and held that "the prerogative of the king, and the transcendent powers of parliament, devolved on the several states, by the revolution." 11 Pet. at 212a, 212i.

In Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838), the Court held as follows regarding the status of the separate States as successors to the royal prerogative prior to the Constitution of 1787:

> "Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority (6 Wheat. 651; 8 Ibid. 584, 588); adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its

> exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified." Id. at 720.

The Court followed established doctrine in regarding every power of the Federal Covernment as deriving solely by delegation from the separate States:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation;' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, is a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in Poole v. Fleeger, 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers." Id. at 724-25.

Finally, the Court reaffirmed the established doctrine that in 1783 the United States had no territory other than by virtue of the territorial boundaries of the several States:

> "Hence resulted the principles laid down by this court in Harcourt v. Gaillard, 12 Wheat. 526, that the boundaries of the United States were the external boundaries of the several states; and that the United States did not acquire any territory by the treaty of peace, in 1783." Id. at 729.

In Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588-92 (1839), the Court held that the States are subject to the same principles of comity in their relations among themselves as are prescribed by international law for independent nations. The States "are sovereign States," id. at 590. "We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this union." Id. at 592.

In Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), the Court reaffirmed all the crucial constitutional doctrines established by the preceding half-century of litigation, and applied them to territorial and proprietary rights in the soil under tide waters. The issue was whether such rights, and specifically the exclusive right to oyster fisheries, had been retained by the proprietors of East Jersey in 1702 or surrendered by

them to the crown along with governmental rights. The Court held in favor of surrender. In the course of its exhaustive opinion, the Court confirmed that in the colonial period title to new lands was acquired by discovery alone (id. at 409), and held that at independence the States individually succeeded to the sovereign and proprietary rights previously vested in the crown:

> "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." Id. at 410.

> "And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.
>
> "This construction of the surrender is evidently the same with that which it received from all the parties interested at the time it was executed. For it appears by the history of New Jersey, as gathered from the acts, documents, and proceedings of the public authorities, that the crown and the provincial government established by its authority always afterwards in this territory, exercised the same prerogative powers that the king was accustomed to exercise in his English dominions. And, as concerns the particular dominion and propriety now in question, the colonial government from time to time authorized the construction of bridges with abutments on the soil covered by navigable waters; established posts; authorized the erection of wharves; and, as early as 1719, passed a law for the preservation of the oyster fishery in its waters. The public usages,

also, in relation to the fisheries continued to be the same. And from 1702, when the surrender was made, until a very recent date, the people of New Jersey have exercised and enjoyed the rights of fishery, for shell-fish and floating fish, as a common and undoubted right, without opposition or remonstrance from the proprietors." Id. at 416-17.

"Neither is it necessary to examine the many cases which have been cited in the argument on both sides, to show the degree of strictness with which grants of the king are to be construed. The decisions and authorities referred to apply more properly to a grant of some prerogative right to an individual to be held by him as a franchise, and which is intended to become private property in his hands. The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly--and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it. But in the case before us, the rivers, bays, and arms of the sea, and all prerogative rights within the limits of the charter undoubtedly passed to the Duke of York, and were intended to pass, except those saved in the letters patent. The words used evidently show this intention; and there is no room, therefore, for the application of the rule above mentioned.

"The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke? Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals,

for his own benefit. And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description[.] It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.

"Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant this colony, and to form the political body over which he was to rule, were subjects of Great Britain, accustomed to be governed according to its usages and laws.

"It is said by Hale in his Treatise de Jure Maris, Harg. Law Tracts, 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great waste, and, as a consequence of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some

particular subject hath gained a propriety exclusive of that common liberty.'

"The principle here stated by Hale, as to 'the public common of piscary' belonging to the common people of England, is not questioned by any English writer upon that subject. The point upon which different opinions have been expressed, is whether since Magna Charta, 'either the king or any particular subject can gain a propriety exclusive of the common liberty.' For, undoubtedly rights of fishery, exclusive of the common liberty, are at this day held and enjoyed by private individuals under ancient grants. But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public. And there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony. On the contrary, after enumerating in the clause herein before quoted, some of the prerogative rights annexed to the crown, but not all of them, general words are used, conveying 'all the estate, right, title, interest, benefit, advantages, claim, and demand' of the king in the lands and premises before granted. The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a prerogative right, passed to the duke in the same character. And if the word 'soils' be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with 'other royalties,' and conveyed as such. No words are used for the purpose of separating them from the jura regalia, and converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to

> make it as near as might be agreeable in their new circumstances, to the laws and statutes of England; and how could this be done if in the charter itself, this high prerogative trust was severed from the regal authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke for his own individual emolument? There is nothing we think in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown." Id. at 411-14.

The cases thus far discussed set forth a historically sound, balanced and, for the most part, consistent approach. In 1936, Justice Sutherland introduced a bizarre and dangerous eccentricity into constitutional law with his opinion for the Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304. Sutherland declared that external sovereignty and power over foreign relations had passed directly from the crown to the Federal Government, and that those federal powers in no way depend on the Constitution but existed prior thereto and independently thereof.

This view -- which if consistently applied would, for example, permit a treaty to override the Bill of Rights -- has been denounced by

virtually every learned commentator who has discussed it as both historically preposterous and constitutionally reprehensible.*/ The theory would have been the ultimate heresy to the revolutionary statesmen, whose first article of faith, as we have seen, was that sovereignty was not "inherent" in any governmental body, but in the people of the States, and that sovereign powers could be exercised only by their agents pursuant to delegation. "To conjure up an 'inherent' executive power in the teeth of this history is both to shut our eyes to the historical record and to abort the plainly manifested intention of the Founders to create a federal government of limited and enumerated powers." Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1, 33 (1972). "It is high time that the mischievous and demonstrably wrong dicta of Justice Sutherland be put to rest." Id. at 28. Berger's article

*/ See, e.g., Goebel, Exhibit 694, p. 768; Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L. Rev. 1 (1972); Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623 (1972); Berger, "War-Making by the President," 121 U. Pa. L. Rev. 29 (1972); Bickel, "Congress, the President, and the Power to Wage War," 48 Chi-Kent L. Rev. 131 (1971); Bartley, the Tidelands Oil Controversy 30 and passim (1953); Kauper, "The Steel Seizure Case," 51 Mich. L. Rev. 141, 144-45 (1952); Levitan, "The Foreign Relations Power: an Analysis of Mr. Justice Sutherland's Theory," 55 Yale L.J. 467 (1946); Patterson, In re United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286 (1944); Quarles, "The Federal Government: as to Foreign Affairs Are Its Powers Inherent as Distinguished from Delegated?," 32 Geo. L.J. 375 (1944); Goebel, "Constitutional History and Constitutional Law," 38 Col. L. Rev. 555 (1938); Lee, "Doctrine of Inherent Power," 3 John Marshall L.J. 293 (1937).

Among the recent manifestations of the theory are undeclared "presidential" wars and the burglary by federal agents of a doctor's office, justified as "well within the President's inherent constitutional powers" to protect national security. Washington Star-News, July 24, 1973, p. 1.

contains an exhaustive and unanswerable demolition of Sutherland's theory from an historical point of view.

Even Professor Henkin, writing after he was retained by the United States in the present litigation, could bring himself to accord Curtiss-Wright only the most qualified and doubtful approbation:

> "Justice Sutherland's theory has not been unanimously acclaimed. His history, in particular, has been challenged, and surely it is not manifestly all his way: there is disagreement whether the Declaration of Independence declared a single sovereign entity or thirteen independent nation-states; there is evidence that, after independence, at least some of the erstwhile colonies, at least for some time and for some purposes, considered themselves sovereign, independent states; even under the Articles of Confederation it is not wholly clear that 'the United States' was a sovereign entity rather than a band of sovereigns acting together through the agency of the Congress. But Sutherland's view of the locus of sovereignty between 1776 and 1789 has strong support. . . ." Exhibit 700, p. 23.
>
> "That there were to be principal powers of government outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, or in the Federalist Papers and other contemporary debates. The Sutherland theory, like the earlier cases finding power in sovereignty, carves a broad exception in the historic conception, often reiterated, never questioned and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only. It means that a panoply of important powers is to be determined from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside the constitutional tradition and our particular heritage." Exhibit 700, pp. 24-25.

Professor Henkin recognized that Sutherland's theory constituted pure dictum, id. at 25, and indeed that the Justice strained to import it into

a decision to which it was wholly unnecessary in order to give status to a private view which he had held long before he had become a member of the Court and in which he was most interested, id. at 288 n.6.

The theory has, moreover, been repudiated by several subsequent decisions of the Court.

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Solicitor General Perlman relied on Curtiss-Wright, for the proposition that the President had "inherent" power to seize the steel mills during the Korean War, for military purposes, as commander in chief. 96 L. Ed. 1163. The Court's opinion did not mention Curtiss-Wright but flatly repudiated its theory: "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 343 U.S. at 585. Justice Jackson's concurring opinion dismissed Sutherland's theory in a footnote as dictum. 343 U.S. at 635 n.2.

In Perez v. Brownell, 356 U.S. 44, 57 (1958), Justice Frankfurter's opinion for the Court, while relying on the holding of Curtiss-Wright, repudiated Sutherland's theory by carefully and pointedly declaring the wholly different and traditional basis for the federal foreign-affairs power, i.e., that it was delegated to the Federal Government by the States by the provisions of the Constitution of 1787:

> "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of

> the existence of this power in the law-making organ of the Nation. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318; Mackenzie v. Hare, 239 U.S. 299, 311-312. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations." 356 U.S. 57.

In Zemel v. Rusk, 381 U.S. 1 (1965), Chief Justice Warren cited the Curtiss-Wright case for the proposition that Congress ordinarily gives the Executive more authority over foreign affairs than over domestic matters; but he went on to observe: "this does not mean that simply because a statute deals with foreign relations, it can grant the Executive unrestricted freedom." The Court's rejection of the theory of inherent executive power was in keeping with the position taken earlier in Reid v. Covert, 354 U.S. 1 (1956). Responding to the argument that the Constitution had no application to foreign affairs, Justice Black in that case stated emphatically:

> "The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 5-6.

"In short," one scholar has recently concluded after a review of the pertinent Supreme Court case law, "the dictum in Curtiss-Wright has neither paternity nor progeny." Warmuth, "The Nixon Theory of the War Power: a Critique," 60 Calif. L. Rev. 623, 697 (1972).

Finally, it remains only to observe that the Curtiss-Wright dictum has nothing whatever to do, either directly or by implication, with the issue in the present litigation. Even had Justice Sutherland been correct, and external sovereignty and the foreign-affairs power had passed directly from the crown to the Federal Government, there is nothing in those concepts which deprives the States of territorial and property rights in the continental shelf. This point will be discussed at pp. 477-94, infra..

## IX.

## THE EXCLUSIVE RIGHTS OF THE STATES TO THE CONTINENTAL SHELF HAVE NOT BEEN ABANDONED OR EXTINGUISHED SINCE 1787.

### A. It Was Well Understood Throughout Our History Down to 1947 That Under the Constitution the States Retained Their Rights in Tide Waters, Including the Marginal Sea, and the Bed and Subsoil Thereof, and Congress Has Repudiated the California Court's Decision to the Contrary.

It was universally recognized and understood throughout our history until the 1930's that the States individually retained their territorial and property rights in the marginal sea, and that the United States as a separate entity had no such rights therein. The United States never made any claim to exclude the States from those rights until 1937, when Secretary Ickes did so, reversing a position he had taken previously. Bartley, The Tidelands Oil Controversy, 95-101, 128-35 (1953); U.S. Exhibit 11, p. 56. Little need be said about the universal understanding, since the Court in the California case recognized and admitted it, if somewhat grudgingly, with respect to its own past decisions:

> "As previously stated, this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." United States v. California, 332 U.S. 19, 36 (1947).

While many of the decided cases dealt with internal waters rather than with the marginal sea, they all relied on and were wholly consistent with the English law of property in land under water, and, as we have seen, that law never made any distinction between property rights in internal tide waters and those in the marginal sea. The California Court utterly misunderstood or ignored that English legal background when it said that the statements in prior Supreme Court decisions were "merely paraphrases or offshoots of the Pollard inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle." Ibid. The point is that English and American common law had never made any distinction whatever between "inland" and "ocean" waters with respect to property rights. There was no need for a "new" ocean rule; it had been there all along.

Moreover, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), enunciated no "inland-water rule"; that decision expressly declared that "the territorial limits of Alabama have extended all her sovereign power into the sea." 3 How. at 230. It is beyond question that for the Pollard Court "navigable waters," title to the bed of which was in the States, included the marginal sea as well as inland waters, with no distinction between them, just as had always been the case in English law and practice.

The California Court recognized that there were a number of cases which did specifically affirm State rights in the marginal sea, 332 U.S. at 37-38. Its treatment of Manchester v. Massachusetts, 139 U.S. 240 (1891), was typical of an approach wholly contrary to both the letter and the spirit of those decisions. The Court observed that in Manchester "the illegal fishing charged was in Buzzard's Bay, found to be within Massachusetts territory." Id. at 37. While that is true, the Manchester Court said nothing about limiting the Massachusetts fisheries statute in question, which extended to all of Massachusetts' waters, including its territorial sea. To the contrary, the Court held: "the extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control has been granted to the United States, this control remains with the States." 139 U.S. at 264. And the Court declared that Massachusetts had a right to territorial waters to a minimum of three miles from the coast. Id. at 257.

It is unnecessary to belabor the point, or to discuss other decisions, since as we have seen the California Court recognized that it was overruling a long tradition of law and practice which had many times been approved in its own prior decisions.

These decisions, and those of other courts, are adequately treated for our present purposes in the papers in the California and subsequent cases, and need not be rehashed here. See especially U.S.

Exhibit 6, pp. 672-73, 678-79, 697-98; U.S. Exhibit 8, pp. 23-26, 31-34, 48-49, 51-73, 101-26; U.S. Exhibit 11, pp. 7-8, 24-40, 51-52; U.S. Exhibit 12, pp. 10-16, 23; U.S. Exhibit 17, pp. 208-10. State-court cases are uniformly to the same effect; a few of them are cited at pp. 128 and 212, supra.

The two principal 19th-century learned authorities on the law of waters likewise had no doubt that the States had preserved their rights under English law and their own charters to all their waters, including the marginal seas. Angell, Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof 50 and passim (1826); Gould, A Treatise on the Law of Waters 75-76 and passim (1900). Accord, Bartley, The Tidelands Oil Controversy, passim (1953); Whittlesey, Law of the Seashore, Tidewaters and Great Ponds xxviii-xxxi (1932); Williams (Regional Plan of New York and Its Environs), Foreshore and Rights in Land Under Navigable Waters in the New York Region v, 202-03 (1928); Gerard, Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries and Other Land and Franchises in the City of New York 1-17 (1872); Embrey (Virginia State Commission on Conservation and Development), Waters of the State 128-62, 198-211 (1931); Mershon, The Major and the Queen 65-66; Mershon, English Crown Grants 104-16; 1 Farnham, The Law of Water and Water Rights 48-52, 74-76 (1904).

There was likewise, throughout the period 1783-1947, a very considerable body of State legislative and administrative assertion and exercise of territorial and property rights in the marginal sea. Again we shall not deal with this in any detail, since we do not expect that the assertion will be contested. A large body of material on these points is found in U.S. Exhibits 1 through 17; that material has been supplemented to some extent by exhibits introduced by the Common Counsel States in this proceeding. The State powers in question are documented, and examples given, in Gould, op. cit. at 72-95.

We assume, for example, that it will not be contested that State statutes repeatedly regulated surface fishing and other marginal-sea activity. E.g., New Jersey: U.S. Exhibit 11, p. 50; Massachusetts: U.S. Exhibit 9, pp. 9-91; Exhibits 519, 521, 522, 526, 544, 545, 552; see Manchester v. Massachusetts, supra. In Louisiana v. Mississippi, 202 U.S. 1, 52 (1906), the Court declared that "the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

The States frequently enacted statutes regulating and in some instances leasing sedentary fisheries in the marginal sea. New Jersey: U.S. Exhibit 11, pp. 49-51; Rhode Island: U.S. Exhibit 11, pp. 49-50; U.S. Exhibit 9, p. 92; Virginia: U.S. Exhibit 11, p. 50; Commonwealth

v. Newport News, 158 Va. 521, 164 S.E. 689, 698 & n. 6 (1932); Georgia: U.S. Exhibit 11, p. 50; U.S. Exhibit 6, pp. 648-50; North Carolina: U.S. Exhibit 6, pp. 660-61; Massachusetts: U.S. Exhibit 9, p. 90; Exhibits 513, 514, 515, 516, 519, 520, 521, 544, 550, 551, 552. Such State jurisdiction was held to exclude federal jurisdiction within the State's territorial limits in The Abby Dodge, 223 U.S. 166 (1912).

As Professor Henkin conceded (Tr. 2662), the States habitually executed deeds of portions of the seabed of the marginal sea to the United States, which the United States requested and accepted, usually on the basis of a formal opinion by both federal and State counsel confirming the State's title. South Carolina: U.S. Exhibit 11, p. 55; Florida: U.S. Exhibit 11, p. 55; New Jersey: Exhibits 486, 487, 489; Delaware: U.S. Exhibit 11, p. 55; New York: Exhibit 488, p. 74 n.5; Exhibits 547, 548, 549; Virginia: U.S. Exhibit 11, p. 55. See also Bartley, The Tidelands Oil Controversy 122-28 (1953). The States also enacted statutes controlling the construction of wharves, etc., or transferring the title of the seabed, in the marginal seas. New Jersey: U.S. Exhibit 11, p. 52; New York: U.S. Exhibit 11, pp. 52-53, U.S. Exhibit 12, pp. 7-9.

Several of the States during the 19th and early 20th centuries enacted statutes setting the limit of their full territorial sovereignty

in the marginal sea as three miles from the coast. U.S. Exhibit 6, pp. 703, 706-07; U.S. Exhibit 11, pp. 47-48; see also Exhibit 494. At pp. 428-53, infra, we demonstrate that the three-mile limit for purposes of full territorial sovereignty was never regarded as incompatible with assertions of more limited rights of jurisdiction and property beyond that limit. The point here is that the three-mile statutes represent solid examples of the universal understanding that the States individually possessed whatever rights the nation as a whole possessed in the marginal sea, and thus are flatly contrary to the California decision. Territorial boundaries were, of course, regarded as carrying ownership in property with them.

Finally, when exploitable mineral resources of oil and gas began to be discovered, in the late 19th century and the early years of this century, in the seabed of the marginal seas of certain of the States, it was assumed as a matter of course for many years that it was the State government, not the federal, which had the exclusive right to explore and to exploit them. Bartley, The Tidelands Oil Controversy, passim (1953); Hearings on Submerged Oil Lands Before Subcommittee No. 4, House Committee on the Judiciary 76th Cong., 1st Sess., p. 110 (1939); Boone v. Kingsbury, 206 Cal. 148, 273 Pac.

797 (1928);*/ Calif. Stats. 1921, c. 303, p. 404; Calif. Stats. 1923, p. 593; Ireland, "Marginal Seas Around the States," 2 La. L. Rev. 252 (1940); U.S. Exhibit 7, pp. 70-71 n.10.

Bartley aptly described the reaction to the California line of cases, in the light of the universal understanding prior thereto, as follows:

> "It came as a considerable shock to the officials of coastal states to find that they did not have the authority over the area from low-water mark to the three-mile limit which they had assumed. The coastal states for nearly 150 years had utilized and controlled the marginal sea area as though they owned it -- which in fact they thought they did. They had regulated the fisheries in the area, applying state laws to vessels licensed under national statutes and operated by out-of-state persons. They had prescribed the size of fish that might be taken, had directed the manner in which fish might be caught, and had even exercised successful though indirect control over the activities of floating canneries operating outside the three-mile limit. Oysters, shrimp, and sponges had been subjected to similar controls. The states had granted or leased areas in the marginal sea to private persons and corporations and to the national government itself. The purposes of these state grants were many and varied. Long before any person dreamed of black gold, the process of land reclamation and harbor development, on land granted or leased by the states, had begun. Breakwaters had been built and harbors dredged from below low-water mark and converted to useful

*/ That decision held that California owned the soil of its marginal sea and had the right to license the exploitation of the mineral resources thereof. Review was sought in the Supreme Court of the United States, which denied certiorari and dismissed the appeal for want of a substantial federal question. Workman v. Boone, 280 U.S. 517 (1929).

> commercial purposes. Later, with visions of wealth from petroleum royalties spurring them to action, the states of California, Texas, Louisiana, and, to a lesser extent, others, had leased the offshore lands for oil production. Immensely valuable property rights had been established in the marginal-sea areas, rights dependent upon grant or lease by a state made upon the unchallenged assumption that the state 'owned' the area it purported to grant or lease." Op. cit. at 5; see also id. at 27-42.

In United States v. Louisiana, 363 U.S. 1, 17-19 (1960), the Supreme Court frankly recognized the overwhelming opposition to its California decision, and set forth conclusive evidence showing that Congress disagreed with the decision and had acted to repudiate it:

> "It was strongly urged, both before and after the California decision that because the States had for many years relied on the applicability of the Pollard rule to the marginal sea, it was just and equitable that they be definitively given the rights which follow from such an application of the rule, and the California, Louisiana, and Texas cases were severely criticized for not having so applied it. [17]

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"[17] H.R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H.R. 5992, at 1, 2, 3, 16 (Apr. 21, 1948): 'H.R. 5992 is, in substance, the same as numerous bills introduced in the House . . . . [T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries . . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all

navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.'

"S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17-18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:

"'The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.

"'The present Court in the California decision did not expressly overrule these prior Supreme Court opinions but, in effect, said that all the eminent authorities were in error in their belief.

"'For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier.'

"H. R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H. R. 4484, at 5 (July 12, 1951):

"'Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters. Therefore, title II recognizes, confirms, vests, and establishes in the States the title to the submerged lands, which they have long claimed, over which they have always exercised all the rights and attributes of ownership.'

"S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S.J. Res. 13, at 7-8 (Mar. 27, 1953):

"'All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. Prior to the California decision, no distinction had been made between lands beneath inland waters and lands beneath seaward waters so long as they were within State boundaries.

"'The rule was stated by the Supreme Court in the early case of Pollard v. Hagan . . . .

* * *

"'The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past -- that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.'"

In his separate opinion Justice Black, author of the California decision, likewise fully recognized Congress' conclusions and the facts on which they were based:

"[W]e must look to the claims, understandings, expectations and uses of the States throughout their history. This is because of the congressional expressions, stated time and time again that the Act's purpose was to restore to the States what Congress deemed to have been their historical rights and powers. Nor can I accept the Government's argument that these States' interests in the marginal seas must be determined in accord with the national policy of foreign relations. Everything in the very extended congressional hearings and reports refutes any such idea. Instead, these sources indicate that Congress passed the Act to apply broad principles of equity--not as we see it but as Congress saw it.[8]

"[8]Under the heading, 'Equity best served by establishing State ownership,' the earlier Senate Report incorporated in the Report on the 1953 Act summarizes the equitable features involved:

"'The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

"'The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

"'If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession . . . .' S. Rep. No. 133, 83d Cong., 1st Sess. 67, reprinting S. Rep. No. 1592, 80th Cong., 2d Sess.

"To the same effect is the conclusion of the 1953 Report: 'By this joint resolution the Federal Government is itself doing the equity it expects of its citizens.' Id. at 24."

* * *

". . . The very last paragraph of the report on the bill referred to it as 'an act of simple justice to each of the 48 States in that it reestablishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution.'" 13

"13Id., at 24."

* * *

"It is admitted that prior to 1937 the United States never claimed any title to, or exercised any possession over, any part of these marginal lands, either within or without three-mile limits, except under grants from the States. On the other hand, each of the Gulf States began to exercise acts of possession, ownership, dominion and sovereignty over the marginal belt from the time of admission into the Union, without regard to any three-mile limit. The hearings of Congressional Committees show and their reports assert that very large sums of money have been spent by the States and their public agencies and grantees in the development and improvement of the marginal submerged lands adjacent to the States' borders. Not only have the States' possession, dominion and sovereignty over these marginal belts been open and notorious, but that is coupled with the fact that for much more than a century federal departments and

> agencies not only acquiesced in but unequivocally recognized the States' rightful claims to these belts. It is conceded that in many instances the Government itself has deemed it necessary to acquire title from these States before attempting to exercise any power of its own. There is nothing to indicate that the claims or uses of the marginal lands were ever limited to three miles." 363 U.S. at 90-91, 92, 94-95.

See also Exhibit 813, pp. 22-24, 32, 40-44 for still further proof that Congress repudiated the California line of decisions as incorrect.

The decisions have also been rejected by the vast preponderance of scholarly comment as unsound (p. 483-84, infra), and their rationale that federal ownership of submerged lands was required by the foreign-affairs and defense powers has been repudiated by the State Department, Congress and subsequent decisions of the Court; see pp. 483-89, infra. In view of all this, there is no merit in plaintiff's contention (Pl. Br. 25-29) that because of the California line of decisions the defendant States bear "a heavy burden" in order to prevail in this proceeding. If any one bears a heavy burden, it is surely the plaintiff.

B. The United States Did Not Abandon or Relinquish the Rights of the States by Adopting the Three-Mile Limit.

Plaintiff contends that any rights of the States in the continental shelf beyond three miles which existed in 1789 have since been extinguished through renunciation or abandonment by the United States. The United States makes no claim that there was

ever any express or explicit abandonment of such rights; the argument is solely that such abandonment necessarily followed from the United States' adoption of and adherence to the three-mile limit of territorial waters. Tr. 2647-48.

The short answer to plaintiff's argument is that, even if it were the fact that the United States had at any time acted as though rights in the continental shelf had been abandoned by implication (to repeat: no express abandonment has been or could be alleged), the United States has long since changed that position and has, since 1945 by plaintiff's admission, been a vigorous advocate of exclusive continental-shelf rights, while continuing to adhere to the three-mile limit with respect to full territorial sovereignty. The legitimacy of the States' title should be judged in the light of the United States' present expressly asserted title against foreign nations, rather than in the light of an alleged implied position in past years inconsistent with that title. In a court of equity, certainly, it would be unconscionable to presume that the United States had extinguished State property rights through a course of conduct alleged to be inconsistent therewith, and that thereafter the United States by reversing that course of conduct had asserted and perfected those very same rights, not on behalf of the States but on behalf of itself. From an equitable point of view such a sorry argument is little better than a defense of larceny after trust.

Equity aside, there is no reason in law why the States' claims as of today should not be weighed against the United States' present international posture, rather than against some alleged prior inconsistent position of the United States which by plaintiff's admission was repudiated many years ago.

We think the foregoing answer to plaintiff's contention is conclusive. Nonetheless, we shall proceed to demonstrate that the United States' adherence to the three-mile limit was never understood to entail the renunciation of all rights of every kind out beyond three miles, and particularly was never understood as a renunciation of the right involved herein: the right of exclusive exploitation of the resources of the continental shelf. To the contrary, history and the record show that the three-mile limit was never absolute, and was well understood not to preclude the assertion of rights for certain purposes to greater distances. The three-mile limit was never applied by the United States to the seabed and subsoil of the continental shelf; it was regarded as applicable only to the surface of the marginal seas. This was in line with the purpose of the three-mile limit, which was to assure the greatest possible freedom of the seas for navigation, for naval operations and to some extent for surface fishing. Since the purposes of the rule had no application to the seabed, the rule did not apply there either.

Judge Jessup is the leading living scholar in this country, and probably in the world, on the history and nature of territorial waters and of the three-mile limit. Judge Jessup testified that the United States has never abandoned or renounced the property rights of the States in the continental shelf, and specifically that no such renunciation can be deduced from the United States' adoption of and adherence to the three-mile limit. Tr. 1166-67, 1210. Judge Jessup's entire testimony stands for, and demonstrates, the proposition that there is no inconsistency between the three-mile limit and its purposes, on the one hand, and, on the other, exclusive rights to the exploitation of continental-shelf resources to a much greater distance.

1. No Renunciation Can Be Inferred from Mere Silence.

It can hardly be supposed that a renunciation by the United States of vested State territorial and property rights would have occurred casually or implicitly, without discussion or protest. In the period when the renunciation allegedly occurred, it would almost certainly have been regarded as beyond the constitutional power of the Federal Government to accomplish without the consent of the affected States. Professor Henkin was at pains to argue that it might be held today that the United States does have the power to alter State boundaries or to renounce State territorial rights without

such consent. Tr. 1914-15. But Professor Henkin conspicuously refrained from arguing that it would have been so held before recent times; and he conceded the existence of what he called "aging dicta that the United States cannot cede territory of a State without its consent." Tr. 1914. In fact it is easy to demonstrate that in the 19th century State consent to such a cession was regarded as essential.

That question arose in acute fashion in the dispute between the United States and Great Britain regarding the border between Maine and New Brunswick. At one time the dispute was arbitrated, but the United States rejected the arbitral award in 1831 because of objections by Maine and Massachusetts. The United States then negotiated an agreement with Maine to gain a free hand in negotiations with Great Britain (Exec. Doc. 431, 25th Cong., 2d Sess.), but it was never ratified. Subsequently Secretary of State Webster, in preparation for further negotiations, obtained the appointment by Massachusetts and Maine of representatives to participate in the negotiations. Maine's instructions to its delegates required compensation for any Maine lands given up in a negotiated treaty. Consequently, as part of the Webster-Ashburton Treaty of 1842, the United States obligated itself to pay Maine and Massachusetts each $150,000 in return for the renunciation of claims to disputed land awarded to Great Britain as part of the agreement. See generally

1 Moore, Arbitration Digest 90-153 (1898); 22 British and Foreign State Papers 818-32 (1847); 7 Winsor, Narrative and Critical History of America 177-80 (1888). In 1833 the United States officially explained to the British that the Federal Government had no constitutional power to cede any territory of a State. 22 British and Foreign State Papers at 819. In view of this history, it is impossible to maintain that the rights of the Atlantic States in the continental shelf could have been renounced by the United States in the 18th or 19th century, not only without the consent of the affected States but without even any formal act or instrument to accomplish the alleged renunciation.

Nor may it be soundly contended that the rights of the States were lost through mere inaction or lack of assertion or exploitation. The fact is that from the foundation of the Union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States. There was therefore no occasion for the continued reiteration of the rights of the States; the problem simply did not arise. But this does not in any way imply that, if exploitable resources had been discovered in the continental shelf, the United States vis-a-vis foreign powers, and the States individually, would have refrained from asserting the exclusive right to their exploitation -- a right which they did, of

course, assert once exploitable resources were found or even suspected. */ Obviously, if exploitable resources had been found during the 19th century and the States had remained silent, allowing individual citizens and foreigners to reap the benefits thereof, a case for abandonment or renunciation of their exclusive rights could be made out. But no such case can be made out from the mere lack of constant reiteration of those rights when no occasion for their reiteration existed or arose.

*/ It bears mentioning that under English law the right to an exclusive fishery is not abandoned by non-use, even over a long period of time. Exhibit 728, p. 717. Title to land, of course, is never lost by lack of occupation, exploitation or use, but only by the establishment of adverse possession by a new owner.

2. The United States' Adherence to the Three-Mile Limit Has Not Been Consistent or Unqualified.

In view of plaintiff's heavy reliance on the three-mile limit, it is necessary to examine the circumstances of the United States' adoption of and adherence to that limit. Professor Henkin's position seems to be that the three-mile limit was established law even prior to the American Revolution and that the United States merely followed standard practice in adhering to it. Tr. 1899. This of course is the opposite position from that of the California decision, which was apparently written under the impression that international law permitted no territorial waters when the United States became independent and that the right to such waters arose only thereafter, largely through the acts of the United States. 332 U.S. at 32-33. The truth is that neither of these bizarre views is accurate, but rather, as we have already shown, that international law was perfectly clear in the late 18th century that every coastal state was entitled to territorial waters, that there was no general agreement on the extent of those waters, and that three miles was the least that any one had ever proposed for the extent of territorial waters and less than any nation had embraced up to that time.

Assertions of jurisdiction in the marginal sea must, of course, be carefully distinguished with respect to the type and purpose of the jurisdiction being asserted. The type of jurisdiction

first asserted by the United States in the sea to a specific distance*/ was the right of visitation and search of foreign vessels for customs and smuggling purposes. The extent of that right was established by statute in 1790 as four leagues (approximately 12 miles), and that jurisdiction has remained unimpaired from that day until this. Masterson, Jurisdiction in Marginal Seas 184-90 (1929); Swarztrauber, The Three-Mile Limit of Territorial Seas 93-94 (1972); Crocker (U.S. Dept. of State), The Extent of the Marginal Sea 637-39 (1919). In Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-35 (1804) (Marshall, C.J.), the Court held that international law did not limit the smuggling jurisdiction of coastal nations to the cannon-shot line (the three-mile limit was not even discussed), but that the jurisdiction is not "limited within any certain marked boundaries," and could well be broader on an open coast than in, for example, the English Channel.

The question of maritime jurisdiction next arose in the context of neutrality. The question was precipitated in 1793 by French seizures of British ships near the coasts of the United States.

*/ Judge Jessup described a number of early American treaties, beginning with the treaty of 1778 with France, which contain provisions "which reveal an appreciation of the fact that states had rights and interests in sea areas off their shores . . . . I cannot define the exact milage which may have been in mind when the treaty terms were employed, but I submit that the drafters had in mind something less than the earlier claims to vast oceans but something definitely more than inland waters and, it is reasonable to assume, more than territorial waters stricto sensu." Tr. 499-500.

The United States government was forced, very much against its will, to commit itself as to the distance off its coasts to which it would enforce the right of neutrality. In the course of 1793, several views were advanced. Alexander Hamilton declared:

> "According to the general laws and usage of nations, the jurisdiction of every country extends a certain distance into the sea along the whole extent of its coast. What this distance is remains a matter of some uncertainty, though it is an agreed principle that it at least extends to the utmost range of cannon shot, that is, not less than four miles. But most nations claim and exercise jurisdiction to a greater extent. Three leagues, or nine miles, seem to accord with the most approved rule, and would appear from Martin, a French author, to be that adopted by France, though Valin, another French author, states it at only two leagues, or six miles." Exhibit 697, pp. 27-28.

In the same year, Attorney General Randolph issued an opinion claiming all of Delaware Bay as territorial waters of the United States. Randolph's opinion contained the most interesting observation that "the necessary or natural law of nations (unchanged as it is, in this instance, by any compact or other obligation of the United States) will, perhaps, when combined with the Treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the range of cannon shot." Crocker, op. cit. at 633. The reference to the Peace of Paris can only be to the provision giving the United States all islands within 20 leagues of the coast, since the treaty contains no other provision which Randolph could have had in mind. His opinion

was confirmed and adopted by Jefferson. 1 American State Papers (Foreign Relations) 71, 72 (1819).

In June and August of 1793, Jefferson believed that captures made five miles off the coast of the United States violated the neutrality jurisdiction of this country. Id. at 119-22, 145.

Jefferson's letter of November 8, 1793, to the British minister fixed "provisionally" a three-mile belt for purposes of neutrality only. Swarztrauber, op. cit. at 57; Tr. 2427-28. Jefferson's note emphasized four times in one paragraph that his decision was temporary only and did not preclude eventual determination on a broader distance. He said that "respectable assent among nations" had been given to neutrality belts of more than 20 miles, and that three miles was "the smallest distance . . . claimed by any nation whatever." He further pointed out that "the character of our coast . . . would entitle us, in reason, to as broad a margin of protective navigation as any nation whatever." Jefferson later explained to John Quincy Adams that he had carefully left the door open to claiming neutral waters out to the Gulf Stream. Swarztrauber, op. cit. at 58. Secretary of State Pickering likewise emphasized the provisional nature of the determination. Crocker, op. cit. at 637; see also Exhibit 813 pp. 107-19, 210-18.

The treaty of 1794 with Great Britain adopted cannon shot, not the three-mile limit, as the measure of neutral waters. Tr.

502-03; Crocker, op. cit. at 637. A treaty of 1795 with Spain committed both parties to enforcing neutral rights for vessels "which shall be within the extent of their jurisdiction by sea or by land," without stating any specific distance. Tr. 503. The cannon-shot rule, with no mention of three miles, was still applied in treaties of the United States as late as 1836. Exhibit 813, p. 115 n. 61.

In 1804 Jefferson, now President, asserted that the three-mile limit was to be measured from the line at which the coast is first visible, which he believed to be about 25 miles. It thus appears that in 1804 Jefferson believed that the neutrality belt extended some 28 miles from shore -- not as an innovation or a proposal for change, but as a construction of his own determination of 1793. Exhibit 702, p. 319. This assertion was made in an instruction to the Secretary of the Treasury to obtain charts which would permit precise ascertainment of the line of neutral waters.*/

In the next year Jefferson told John Quincy Adams of his conviction that American neutral waters should extend to the Gulf Stream and indicated that he intended to claim that limit in the future. Crocker, op. cit. at 641-42. In 1806 Jefferson indicated to Monroe that the Gulf Stream proposal was already in effect for diplomatic though

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*/ In this document, Jefferson also defined the issue under consideration as being to determine "which specific aggressions [incidents of British impressment] were committed within the common law, which within the admiralty jurisdiction, and which on the high seas."
/cont'd

not yet for military purposes: hostilities within the Gulf-Stream line "are to be frowned on for the present, and prohibited so soon as either consent or force will permit us." Exhibit 702, p. 450. The edge of the Gulf Stream is the point where the continental shelf ends and a natural escarpment occurs.

In 1806 Secretary of State Madison proposed four leagues, or preferably the Gulf Stream, as the width of American neutral waters, and instructed Monroe and Pinckney to attempt to obtain that measure in a treaty with Great Britain. Crocker, op. cit. at 639-40. In the unratified treaty of 1806, the American negotiators, having ardently but unsuccessfully attempted to gain more, agreed that the limit of neutral waters should be five miles. Swarztrauber, op. cit. at 94; Crocker, op. cit. at 642; Masterson, op. cit. at 254-56; 3 American State Papers (Foreign Relations) 149 (1832).

Professor Morris contends (Tr. 1829-30) that because the boarding of the Chesapeake by the Leopard occurred three leagues off the American coast, it is clear that Great Britain did not regard that area as part of United States waters despite the 20-league provision of the treaty of 1783. What the professor overlooks is that in that period the British were claiming and exercising the right of impressment in American waters right up to the shoreline, and even within

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Exhibit 702, p. 319. Thus Jefferson clearly understood, as we have contended herein and the plaintiff has denied, that the admiralty jurisdiction in English and American colonial law was always regarded as territorial in its nature.

ports and harbors, without regard to any definition of territorial waters. Tr. 2423-26; 3 American State Papers ( Foreign Relations) 83 (1832); 4 Brant, James Madison 254-56; 10 Ford (ed.), Works of Thomas Jefferson 439 (1905).

Some years later, Chancellor Kent regarded the three-mile limit as far too modest, and believed that American neutral waters should extend to at least four leagues from the coast and also should embrace waters within "lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi." Crocker, op. cit. at 181. (Those are "quite distant" headlands indeed.) Most interestingly, Kent was fully aware that jurisdictional limits in the sea were proper to different distances for different purposes, and specifically that sedentary fisheries and similar seabed resources were legitimate objects of property. Id. at 180. Kent concluded that "the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end." Id. at 181. Plainly, if a valuable and exploitable mineral resource had been discovered in Chancellor Kent's time four or ten or thirty miles off the American coast, he would have believed it wholly clear that the adjacent State had a right of exclusive exploitation thereof.

By the Treaty of Guadalupe Hidalgo between Mexico and the United States in 1848, the boundary between the territorial waters of the two countries was defined as extending three leagues from land. Swarztrauber, op. cit. at 91-92. This three-league territorial sea, which was confirmed by another treaty in 1853, and which was recognized and asserted by the United States on many occasions (Exhibit 812, pp. 92-107), formed the basis for Texas' claim to territorial waters of three leagues, which was accepted by the Supreme Court in the second Gulf States litigation as having been recognized and confirmed by the United States. United States v. Louisiana, 363 U.S. 1 (1960). In that case the United States vigorously argued, as it does here, that any State boundaries beyond three miles had been repudiated by the Federal Government's adherence to the three-mile limit. The Court squarely rejected this contention, holding that boundaries in the sea may exist for various limited purposes and that such boundaries for the purpose of continental-shelf ownership were in no way inconsistent with the national three-mile limit of full territorial sovereignty.

> "We think that the Government's contentions on this score rest on an oversimplification of the problem.
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> "A land boundary between two States is an easily understood concept. It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of

> a boundary in the sea, however, is a more elusive one. The high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation. It is recognized, however, that a nation may extend its national authority into the adjacent sea to a limited distance for various purposes. For hundreds of years, nations have asserted the right to fish, to control smuggling, and to enforce sanitary measures within varying distances from their seacoasts . . . . The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and assertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a 'national boundary.'"
> 363 U.S. at 33-34.

See also Exhibit 668; Exhibit 814, pp. 208-10.

Similarly, the Florida constitution of 1868, which was accepted by Congress in readmitting Florida to the Union, provided for territorial waters of three leagues off the Gulf coast and out to the Gulf Stream in the Atlantic. In 1935 a United States court held that provision sufficient to give Florida the right to regulate sponge fisheries beyond the three-mile limit. Pope v. Blanton, 10 F. Supp. 18 (N.D. Fla. 1935). In Skiriotes v. Florida, 313 U.S. 69 (1941), the Supreme Court held such regulation by Florida valid as to citizens

and found it unnecessary to reach the question whether foreigners could be subjected to it. More recently, of course, the Supreme Court has accepted Florida's three-league Gulf boundary as giving it the right to the continental-shelf resources within those limits. United States v. Florida, 363 U.S. 121 (1960).

In 1863 the United States took the position that international law, "since the invention of Armstrong rifled cannon," fixed a neutrality belt of six miles. Exhibit 813, pp. 125-26. In 1874 the United States joined six other nations in a declaration advocating a territorial sea of three leagues. Crocker, op. cit. at 485; Swarztrauber, op. cit. at 104. As late as 1896, the United States favored territorial waters and a neutrality zone of six miles. Op. cit. at 94.

The United States thus has hardly been a consistent and unqualified adherent of the three-mile limit as plaintiff now asserts.

That the three-mile limit was never regarded as an abdication of all rights or claims outside that limit is proved by the long history of the United States' jurisdiction over customs and smuggling extending four leagues from shore. As we have seen (p. 436, supra), that jurisdiction antedates the three-mile limit itself, and applies to foreign as well as to American ships. The jurisdiction has been repeatedly upheld by the Supreme Court; while at times other nations have questioned it, the United States has

insisted upon it in the face of all opposition, and eventually succeeded in obtaining general acquiescence thereto. Enforcement of this twelve-mile jurisdiction was particularly active and important in the relatively recent period of the 1920's, because of the customs and smuggling problems caused by the prohibition of liquor in this country during that period. See generally, Masterson, op. cit. at 184-252, 304-74; 1 Hackworth, Digest of International Law 664-90 (1940). Doubtless because of the existence of this American jurisdiction, the United States did not protest when in 1910 Russia declared a twelve-mile belt as "the marine customs area, within the limits of which every vessel, whether Russian or foreign, is subject to supervision by those Russian authorities in whose charge is the guarding of the frontiers of the empire." Masterson, op. cit. at 286.

The United States will contend, of course, that the smuggling jurisdiction is an exception to the three-mile limit, and that the existence of one exception does not imply the existence of another. As we have seen, and shall see further below, it was by no means the only exception. But the point is that the three-mile limit was never regarded as precluding the existence of various rights beyond it -- even rights which, like the smuggling jurisdiction, operated on the surface of the sea and most definitely interfered with free navigation, let alone rights to the mineral resources of the seabed, which have nothing to do with the freedom of the seas. The fact that there was no

need to assert the latter exception, because the problem did not arise, in no way suggests that the assertion would not have been made had the occasion arisen.

3. The Three-Mile Limit Was Not Applied by the United States to the Seabed and Subsoil.

While the three-mile limit as originally declared by Jefferson, and as understood for some years thereafter, related purely to neutrality jurisdiction, */ the three-mile belt later became considered as that maritime area over which the United States possessed full territorial sovereignty. However, that never meant, and was never said to mean, that the United States possessed no rights in the sea or seabed beyond three miles. Official United States articulation of the doctrine and the reasons therefor habitually based it on the principle of freedom of the seas for navigation. See, e.g., Crocker, op. cit. at 653-56; innumerable similar statements could be mentioned. In the 19th and early 20th centuries the three-mile limit was the favored doctrine of the principal maritime powers, especially Britain and the United States, their motive admittedly being to maximize those maritime areas which were regarded as free for navigation and naval operations.

*/ In 1800 France and the United States agreed by treaty that "neither party will interfere with the fisheries of the other on its coasts." Exhibit 742, p. 202; Tr. 503-04. The three-mile limit was not mentioned, and the extent of the exclusive right to coastal fisheries was left unspecified.

None of this has any bearing on the seabed, since there is no inconsistency between freedom of navigation and the exclusive right to exploit continental-shelf resources. While no such resources were discovered on the American continental shelf until this century, it can hardly be doubted that if that had occurred exclusive American rights would have been asserted and would not have been regarded as inconsistent with the three-mile limit or the principle of freedom of the seas. When the United States occupied the Philippines, it promptly prohibited unlicensed pearl fishing within three leagues of land. Tr. 592; Exhibit 345, pp. 213-17. Significantly, the United States, while often protesting against claimed extensions of surface territorial waters beyond three miles, never protested against the many claims by other coastal states to exclusive rights to continental-shelf resources in areas where such resources were discovered and exploitable.

The sole piece of evidence which plaintiff has been able to produce from all of American history, which it puts forward as indicating an abandonment or renunciation of exclusive continental-shelf rights, is a State Department letter to private persons in 1918 to the effect that "the United States had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast." Tr. 1921. The letter takes no position as to whether the adjacent coastal State has such jurisdiction; the letter is fully consistent with the position of the Common Counsel States in this

proceeding. Even if the letter could be interpreted as denying State as well as federal jurisdiction, a single such letter by a State Department official to private persons, relating to the Gulf of Mexico, could hardly be regarded as a lawful or effective renunciation of the rights of the Atlantic coastal States to their continental-shelf resources.

The position taken by the United States in the Bering Sea fisheries dispute demonstrates that the United States has not construed the three-mile limit as precluding exclusive claims even to surface fisheries in some instances, let alone to seabed and subsoil resources. */

*/ In the 1930's the United States took a similar position with respect to the Bering Sea salmon fisheries.

> "The American Government must also view with distinct concern the depletion of the salmon resources of Alaska. These resources have been developed and preserved primarily by steps taken by the American Government in co-operation with private interests to promote propagation and permanency of supply. But for the efforts, carried on over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development . . . . [T]he American Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries . . . ."

"The Alaska Salmon-Fishery Situation," 18 U.S. Dept. of State Press Releases (Jan. - June 1938) 412, 414, 416. By a proclamation

By legislation of 1869 Congress prohibited the killing of fur-bearing animals "within the limits of Alaska Territory, or in the waters thereof." Rev. Stat. § 1956. The Treasury Department interpreted that legislation as applying to all waters of the Bering Sea east of the maritime boundary established by the treaty of 1867 with Russia which ceded Alaska to the United States. Between 1886 and 1890, the Coast Guard seized British vessels fishing for fur seal in the Bering Sea at distances ranging from 15 to 115 miles from land. Exhibit 813, pp. 126-28; Swarztrauber, op. cit. at 87.

In 1889 the statute was amended to incorporate a declaration that it applied "to all the dominion of the United States in the waters of Bering Sea." 25 Stat. 1009.

In admiralty proceedings for the condemnation of the seized British fishing boats, and punishment of their officers, the juries were instructed that the territorial waters of Alaska included all the Bering Sea east of the treaty boundary, and the prisoners were found guilty and their vessels and cargoes confiscated. Crocker, op. cit. at 286. The Supreme Court declined to set aside the convictions in spite of vigorous arguments on behalf of the British that they violated international law and the three-mile limit. In re Cooper,

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of September 28, 1945, President Truman formally asserted exclusive United States control over these salmon fisheries. Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53, 54-55 (1946).

143 U.S. 472 (1892). The Court expressly held that in 1889 Congress had asserted dominion over the entire Bering Sea east of the treaty boundary and that the executive branch of the Federal Government had formally and officially taken that position. 143 U.S. at 498-99.

The federal admiralty courts, in decisions forfeiting both British and American ships for seal fishing far beyond the three-mile limit, held that international law did not prohibit the asserted jurisdiction and that, in any event, the courts could not question it. It was declared that "a nation having the power to do so may extend its dominion over the sea beyond the limits heretofore admitted by the powers of the earth to be lawful"; that probably territorial waters should be deemed extended because of the increased range of artillery; but that in any event the courts had no power to question on international-law grounds the acts of their government in asserting maritime sovereignty, dominion and jurisdiction. United States v. The James G. Swan, 50 F. 108, 110-11 (D. Wash. 1892). "[N]ations may prevent the violation of their laws by seizures on the high seas, in the neighborhood of their own coast, and . . . there is no fixed rule prescribing the distance from the coast within which such seizures may be made." United States v. The Kodiak, 53 F. 126, 128 (D. Alaska 1892), citing Church v. Hubbart, supra. Accord, The Alexander, 60 F. 914 (D. Alaska 1894).

The position taken by the United States in the subsequent arbitral proceeding with Great Britain is fully described in Judge Jessup's testimony. Tr. 622-640. While not claiming that the waters in question were within the territorial sea of the United States for all purposes, the United States vigorously asserted the right to regulate the seal fishery in those waters and to exclude foreigners therefrom. As Judge Jessup pointed out (Tr. 625), "the United States rested on the established doctrine that seabed resources could be the subject of ownership by the adjacent state -- which was not disputed -- and unsuccessfully attempted to reason from that fact to a sovereign right over surface fisheries." The United States thus attempted to extend to surface fisheries precisely the doctrine of proprietary rights over resources which had uniformly been recognized as to seabed and subsoil resources whenever they were capable of exploitation:

> "'These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other.'" Tr. 631.

> "'It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation, and in respect to which it enjoys peculiar advantages growing out of its proximity, and where, if it is permitted to establish and carry out a system of national

> regulation, it may furnish a regular, constant supply of a certain product of the seas, for the uses of mankind; which product, if it were thrown open to the whole world, would be destroyed.'" Tr. 631.

While the United States nominally lost the case, on the ground that its interference with surface navigation and fishery was not justified in view of the adherence of both parties to the three-mile limit, the arbitral tribunal prescribed regulations for the fishery, and these were later extended and expanded by negotiation and treaty. 1 Hackworth, Digest of International Law 792-98 (1940). Fulton described the results as follows:

> "Then the Tribunal, in terms of the treaty appointing them, prescribed the regulations above referred to, leaving to Great Britain the honours of the contest, and to the United States the advantage. The true lesson to be derived from this chapter of international diplomacy, is not that the high tribunal reaffirmed the three-mile limit as the legal boundary of the territorial sea, which they did not do (see letter from Baron de Courcel, the President, p. 661), but that that limit may be set aside and a much wider boundary fixed (in this instance 60 miles) if the protection and preservation of a marine fishery require it." Op. cit. at 696, n. 3.

The identity of the 60-mile line fixed by the tribunal and the 20-league boundary established by the Peace of Paris of 1783 in the Atlantic is notable.

In the Bering Sea arbitration we find both parties -- Great Britain and the United States -- recognizing that the three-mile limit

did not prevent the establishment of exclusive rights to exploit the resources of the seabed beyond three miles. And we find the United States seeking to extend that accepted doctrine to surface fisheries as well, and succeeding to a substantial degree. Given this history, it is hard to understand how the United States in the present litigation can seriously maintain that its adherence to the three-mile limit was or is inconsistent with the rights asserted by the Common Counsel States herein.

C. The States' Continental-Shelf Rights Were Not Extinguished by Any Obligatory Rule of International Law in the Period 1783-1945.

Plaintiff apparently concedes, as it must, that the continental-shelf rights claimed by the States in this proceeding have been fully consistent with, and affirmatively sanctioned by, international law since 1945 or thereabouts. Plaintiff contends, however, that the States' claims were inconsistent with principles of international law during the century and a half prior to 1945, and specifically with an obligatory rule thereof nullifying all territorial and proprietary seabed claims outside the three-mile limit except in a few special cases based on ancient use or prescription.

1. Even If Plaintiff Were Otherwise Correct, the International Law Against Which the States' Claims Should Be Judged Is Present Law, Not Past Law.

Even if plaintiff's contentions about international law were correct, they should not be held to wipe out the States' claims if,

as is plainly the case, the States never renounced or surrendered those claims. Even if for some period of years the State claims were repugnant to international law, in the end it was international law which gave way. On plaintiff's theory, international law changed in or about 1945 and since then has sanctioned precisely the rights in the continental shelf which the States were granted in their charters, claimed in earlier centuries and continue to claim. Today, therefore, there is concededly no conflict between the State claims and international law. Even if, during the heyday of the three-mile limit, a court might have held that State claims were overridden thereby, that furnishes no reason for any infirmity in the States' claims once the international law has changed. No court has ever held, or would hold, territorial or property claims unlawful by applying, not contemporaneous international law, but rather the superseded international law of some earlier period. In the second Gulf States litigation, the Court measured the claims of the States against international law as it then existed. United States v. Louisiana, 363 U.S. 1, 33-34 (1960).

If the lawfulness of the United States' asserted exclusive rights in the continental shelf, as against other nations, were today to come before a tribunal applying international law, it would not concern itself with the international law of the 19th or early 20th

centuries, but solely with the law of today.*/ There is no reason why any different treatment should be accorded to the claims of the States. If they can establish title under domestic law, no useful purpose or need is served by measuring that title against alleged international-law inhibitions of prior ages, when it is admitted that the international law of today presents no impediment to them.

Thus the Common Counsel States contend that it is unnecessary to examine the international law of the period 1783-1945. However, if that law is deemed relevant we submit that it furnishes no basis for rejecting the States' claims.

2. The Three-Mile Limit Never Became an Obligatory Rule of International Law.

Volumes have been written on the question of whether the three-mile limit, as applied to the surface of waters, ever became an obligatory rule of customary international law, binding even on those nations which declined to accept it. Judge Jessup, writing in 1927, believed that it had become such a rule, though he regarded the question as a most difficult one and was careful to point out that the three-mile limit was obligatory only as fixing a limit on full territorial sovereignty, not precluding exclusive rights in other portions of the sea for more limited purposes. Tr. 480-90. For an exhaustive

*/ The United States surely will accept this proposition; otherwise it will find itself arguing that its own claims are unlawful.

argument that the three-mile limit never became an obligatory rule even in that limited sense, see Exhibit 813, pp. 82-83, 147-240; see also Exhibit 668; U.S. Exhibit 7, pp. 31-58; U.S. Exhibit 17, 3d vol., second pagination, pp. 14-15 (Memorandum of Charles Cheney Hyde). Accord, e.g., Fulton, op. cit. at 663-64; Bartley, The Tidelands Oil Controversy 19-21 (1953).

A view frequently stated was that international law had crystallized to the extent of making it clear that claims of full sovereignty out to three miles were lawful, but had not crystallized on the question of whether more extensive claims were lawful. See, e.g., U.S. Exhibit 7, p. 34. The two nations most active in contending for the three-mile limit were Great Britain and the United States; however, even they were by no means consistent or uniform in their positions to that effect.

American courts in the late 19th century were far from certain that a three-mile maximum limit as applied to the surface of waters was an obligatory rule of international law:

> "The extent of these rights, that is to say, how much of the sea they cover, has been uncertain. Some nations claim a marine league; others more, even up to thirty leagues. Perhaps the best way of stating it is that every nation has the right to control so much of the seas adjacent to its shores as is necessary for all purposes of revenue or of defence." The Hungaria, 41 F. 109, 110 (D.S.C. 1889).

> "It has often been a matter of controversy how far a nation has a right to control the fisheries

> on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; . . . . More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, . . . ." Commonwealth v. Manchester, 152 Mass. 230, 236, 25 N.E. 113, 114 (1890).

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; . . . ." Manchester v. Massachusetts, 139 U.S. 240, 258 (1891).

> "Appellant's contention is based upon the old rule which limited jurisdiction over the waters of the ocean to a strip extending one marine league from shore, and considered inland waters a part of the main sea, when inclosed by headlands more than two marine leagues across. These arbitrary distances were fixed upon at a period when it was assumed that a marine league was the effective range of a heavy gun, and it may well be doubted whether they will not be extended by the courts to conform to changed conditions. Certainly it may be expected that every maritime nation will insist upon the control of its own coast waters to the extent to which it is able to dominate them from the shore." Middleton v. Compagnie Générale Transatlantique, 100 F. 866, 867 (2d Cir. 1900).

See also the cases discussed at pp. 449-50, supra.

The heyday of the three-mile limit was brief. As we have seen, it was virtually unheard of until 1793, and then and for some years thereafter it was generally applied to neutrality only. As the 19th century advanced, the doctrine was extended to other aspects of

jurisdiction over surface waters, including fisheries; but many nations never acquiesced in it, and other limits, such as cannon shot, six miles and three leagues, remained very much in vogue. Swarztrauber, op. cit., passim. As late as 1890-1910, Britain and the United States were both ignoring, or carving large exceptions out of, the three-mile limit whenever it suited their interests to do so. Fulton, writing in 1911, believed that the cannon-shot rule, but not the three-mile limit, had achieved obligatory status, and that the measure of cannon shot was not fixed but should increase as the range of artillery increased. Fulton, op. cit. at 573-603. Many other writers took the same view; see Jessup, The Law of Territorial Waters 65 (1927). The eminent publicist Charles de Visscher, reviewing the evidence in 1968, concluded that "the three-mile measure, as outside limit of jurisdiction, doubtless never acquired universal authority," and "represents only the minimum that the riparian state can claim." De Visscher, Theory and Reality in Public International Law 220, 221 (1968).

Fulton regarded three miles as wholly inadequate for the purpose of exclusive fisheries, op. cit. at 604-49, and Jessup agreed, op. cit. at 462. "In all the history of fishing disputes there is no case where a state has permitted damaging fresh foreign invasion of its coastal fisheries even outside the three-mile limit in simple voluntary recognition of a foreign claim of international-law right." Bingham,

Report on the International Law of Pacific Coastal Fisheries 6 (1938). It has long been recognized that even surface fisheries require much greater protection if these valuable resources are not to be wholly extinguished. Id. at 8. Raestad, an eminent publicist, believed it clear that exclusive-fishery claims which antedated the three-mile rule were not impaired by it. La Mer Territoriale 180-81 (1913). Many writers who adhered to the three-mile rule for other surface purposes rejected it as a limitation on exclusive fisheries.

By the 1920's acceptance of the three-mile rule had already passed its peak and a process of swift decline had set in. Swarztrauber, op. cit. at 131 et seq. An attempt to achieve recognition of the rule at the Hague Codification Conference in 1930 failed dismally; no rule limiting territorial waters could command a consensus. Bingham, op. cit. at 6; Riesenfeld, Protection of Coastal Fisheries Under International Law 120-24 (1942). In recent decades, of course, the three-mile limit has been virtually abandoned and no longer has any pretension to the status of an obligatory rule of customary international law.

> "To an unprejudiced student of history and of present world affairs, it is abundantly apparent (a) that there never has been and is not today [1938] any general agreement on the extent of territorial waters; (b) that no state ever has applied consistently a uniform limit for all purposes to the zone of its coastal sea jurisdiction, (c) that it always has been the opinion of realistic experts that if definite limits are set to marginal seas jurisdiction those limits should be different

> for different purposes, and (d) that there is no common or nearly common agreement on the matter of legality of control over coastal fisheries beyond a three-mile zone of marginal sea or other conceded territorial area." Bingham, op. cit. at 9.

During the period when the three-mile limit enjoyed its greatest vogue, its status as an obligatory rule was denied by the following respected publicists, among many others: Ullmann, Völkerrecht 181-82 (1898); Westlake, International Law 185 (1904); Cavarretta, Diritto Interstatuale 110 (1914): Hall, Outline of International Law 35 (1915); Anzilotti, Rivista di Diritto Internazionale 161 ff. (1917); Suarez, Diplomacia Universitaria Americana 155-75 (Suarez held that the limit of territorial waters was the edge of the continental shelf); Strupp, Grundzuge des Positiven Völkerrechts 70 (1921); Catellani, Lezioni di Diritto Internazionale 133 (1921); Hatschek, Völkerrecht 192 (1923); Bjorksten, Das Wassergebiet Finnlands in Völkerrechtlichter Hinsicht 68 (1925); 1 Fauchille, Traité de Droit International Public 180 (1925); Cavaglieri, Corso di Diritto Internazionale 314 (3d ed. 1934); Grey, "Des Eaux Territoriales," Revue de Droit International et de Legislation Comparée 123 (1927); Brierly, The Law of Nations 102 (1928); Masterson, Jurisdiction in the Marginal Seas xiii (1929); Sanchez de Bustamante y Sirven, The Territorial Sea 106 ff. (1930); Longo, Diritto Internazionale Pubblico e Privato 118-19 (1930); Jaureguiberry, La Mer Territoriale (1932);

2 Hold-Ferneck, Lehrbuch des Völkerrechts 68 (1932); 3 Gidel, Le Droit International Public de la Mer 151 (1934); Baldoni, Il Mare Territoriale nel Diritto Internazionale Comune 77 (1934); Meyer, The Extent of Jurisdiction in Coastal Waters 520 (1937); Bingham, Report on the International Law of the Pacific Coastal Fisheries 5-6 (1938); Riesenfeld, Protection of Coastal Fisheries Under International Law 278-82 (1942). Riesenfeld made an exhaustive survey of the literature, and found 114 writers who had dealt with the question between 1900 and 1942, of whom 41 believed the three-mile rule was obligatory, 21 favored different rules, and 52 believed that no limitation had achieved the status of a binding customary rule. Id. at 280. A thorough survey of state practice likewise led Riesenfeld to conclude that no binding limitation was in force. Id. at 127-263, 280-281.

3. No Obligatory Rule of International Law Prior to 1945 Barred the States' Seabed and Subsoil Claims.

The three-mile limit did not preclude territorial and property rights to the seabed and subsoil extending much farther than three miles. As already discussed at pp. 310-11 , supra, the basic reason for the "narrow limit" rules of territorial waters, culminating in the three-mile limit, was the insistence by the maritime powers on the right of free navigation, including belligerent navigation not protected by the doctrine of innocent passage, to the maximum possible extent in the seas. It was also believed by some (quite erroneously, as others pointed out) that surface fisheries were inexhaustible and thus that no nation could reasonably claim an exclusive right to them. None of this had any application to seabed and subsoil resources, and the three-mile limit did not apply to them.

We have little to add to Judge Jessup's testimony on this point, and for this portion of our brief we incorporate his testimony at Tr. 477-80, 506-644, 1148-94, 1209-15. See also Swarztrauber, op. cit. at 95-99. Much additional support could be adduced if necessary. Most writers have recognized that sedentary fisheries, as well as the mineral resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters or to the reasons therefor, but rather "require special treatment." Fulton, op. cit. at 612. Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally

restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." Id. at 697. Accord, the British Under-Secretary of State for Foreign Affairs, speaking in Parliament in 1923. Parliamentary Debates, May 30, 1923, cols. 1265-66. This has fairly consistently been the British view, as pointed out by Jessup in 1927. Op. cit. at 13-17.

In 1803 the continental-shelf doctrine was foreshadowed by Gérard de Rayneval:

> "The sea which washes the coasts of a state is considered to form part thereof. Its security and tranquility render this property necessary. The sea must take the place of a rampart for it. We may add that the seabed along the coasts can be considered as having formed part of the continent and for that reason is considered as still forming part thereof." Rayneval, Institutions de Droit de la Nature et des Gens 161 (1803).

Rayneval rejected the cannon-shot doctrine and denied that it had the force of an obligatory rule. Ibid. Many other 19th-century writers regarded the seabed of the continental shelf as a natural prolongation or appurtenance of the continent, and therefore as the property of the coastal state. 1 Nizze, Das Allgemeine Seerecht des Civilisirten Nationen 31 (1857); 1 Cussy, Phases et Causes Célèbres du Droit Maritime des Nations 91 (1856); 1 Massé, Le Droit Commercial dans les Rapports avec le Droit des Gens et le Droit Civil 113; 1 Cauchy, Le Droit Maritime International Considéré dans Ses Origines 39 (1862).

It is quite true that, as Professor Henkin has pointed out and as plaintiff's brief emphasizes, some writers have considered the three-mile limit as applicable to the seabed and subsoil, and have regarded the many cases of exclusive rights to sedentary fisheries claimed and exercised, usually without objection, by coastal states as exceptional in nature and based upon, in one sense or another, prescription or occupation. It is impossible, on the basis of these text writers alone, to derive a rule of customary law which ever had the required degree of acceptance and acquiescence by the international community to make it a binding and obligatory rule. In any event, plaintiff misconstrues the views of most of these writers.

The doctrine of occupation, properly understood, meant that, on the discovery of a new resource in the continental shelf, the coastal state must take steps to occupy or to exploit it; if it failed to do so, others could come in. But the doctrine of occupation, as applied in state practice, never meant that exclusive rights could exist only in those resources which had been known and exploited for centuries, and that on the discovery of a new resource an attempt by the coastal state to "occupy" it could be defeated by protests on the part of other nations that no ancient occupation, prior to the discovery, had been made of that portion of the seabed.

Edwin Borchard, an eminent international-law authority, writing in 1941 in defense of Florida's regulation of sponge fisheries

beyond three miles, was far from regarding occupation as the sole criterion:

> "But there is another type of claim -- riparian exploitation or licensing of the sedentary fisheries or subsoil mines or petroleum reserves close to the shore but outside the three-mile limit. Here other considerations enter the problem. Could a country tolerate a permanent foreign occupation or stationary works at its front door, especially if the operations occur on a shallow bank or shelf? Practical considerations would seem to dictate a negative answer. In English history the Crown laid claim to minerals won from mines and workings below the low-water mark under the open sea adjacent to the coast but outside the three-mile limit. So, the pearl fisheries of Bahrein and Ceylon, extending many miles from shore, have for centuries been regulated by local ordinances of the riparian States, and Vattel seems to have supported the ancient claim of monopoly in these sedentary fisheries. The claim may be said to rest on several theories -- the extension of the land to the shallow banks, the long historical use and presumption of acquiescence, the physical occupation, and the special fact that Palk's Bay, if not the Gulf of Manaar, which divides India from Ceylon, may be deemed a constituent portion of the British dominions. Even so, there would be no right to interfere with navigation and surface fishing beyond the three-mile limit."

* * *

> "The Florida claim to control the manner of taking sponges at a distance up to nine miles from the shore could therefore be justified on the theories of historical assertion of jurisdiction and acquiescence therein, protective jurisdiction for the preservation of a natural resource, and possibly occupation. The Florida statute escapes the more debatable but not necessarily unsustainable claims of licensing a national monopoly in the nine-mile zone or effective occupation of the bed of the sea. In any event, the Florida statute seems invulnerable to attack even if State sovereignty over the bed of the sea beyond three miles be denied." Borchard, "Jurisdiction over the Littoral Bed of the Sea," 35 Am. J. Int'l L. 515, 518-19 (1941).

If, contrary to our submission, superseded international law rather than present law should be used as a measure of the States' claims, the proper form in which to state the issue is: if in 1840 or 1920 an exploitable resource had been discovered in the continental shelf of one of the Common Counsel States more than three miles from the coast, and if the State had promptly asserted the exclusive right of exploitation (as it clearly would have done), and if no other nation had objected (and almost certainly no other nation would have objected), would a title valid in international law have been made out? We think the answer is plainly in the affirmative.

We think Judge Jessup's testimony has thoroughly exploded the notion that continental-shelf rights ever depended solely on occupation or prescription in the sense apparently urged by plaintiffs; that is, that only an anciently exploited resource, not a newly discovered resource, could validly be claimed by the coastal state. The fact is that whenever such a new resource has been discovered, it has been the coastal state which has successfully asserted the exclusive right to explore and to exploit. Professor Henkin conceded this:

> "Q . . . . Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A I don't know of any such examples." Tr. 2640.

The body of state practice thus admitted is conclusive. As Judge Jessup has observed, no one would take the trouble to occupy a portion of the continental shelf until a valuable and exploitable resource was discovered there. Tr. 1159-60. The question of occupation arises only on the discovery of the resource, and the requirement of occupation is met when the coastal state asserts and exercises its right promptly after the discovery. Never at any time has the doctrine of occupation or prescription as creating an exclusive right been applied in favor of any state other than the coastal state. It has always been that state alone which has been regarded as the state having the exclusive right to make, or to proclaim, an occupation of a newly discovered resource in its continental shelf. Any attempt by a state other than the coastal state to make an exclusive occupation would have met with immediate challenge and resistance by the coastal state; and no such attempt was ever made. And, as Professor Henkin conceded, the coastal state has never been willing to leave the resource to promiscuous exploitation by the world at large; it has always claimed an exclusive right for itself, and that right has been acquiesced in and thus vindicated by the international community.

Borchard summarized the law, after a review of the state practice on which it was based, as follows:

> "As is apparent, foreign countries near whose coasts were located natural valuable resources, found no difficulty, whatever their views as to the marginal sea, and met with no foreign objection, in putting to their

> own use these resources. . . . The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state and where resources were discovered, the rights of ownership exercised. . . .
>
> "But as to contiguous subsoil minerals under the sea and as to the sedentary resources attached to the bottom of the sea both statute and decision have claimed and foreign countries have recognized the propriety of riparian control, if not ownership. The Columbia Law Review, in a study on the subject, lists judicial and legislative instances which have supported the littoral states' jurisdiction or control of submarine petroleum, gold, and coal and such sedentary fisheries as oysters, pearls, and chanks. Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question. Property by prescription would alone have sustained the right to a resource already exploited. Assertion of jurisdiction and acquiescence therein--without entering upon the abstruse question of title--must explain the coastal states' jurisdiction over unexploited resources in the continental shelf." Borchard, "Resources of the Continental Shelf", 40 Am. J. Int'l L. 53, 59-60 (1946).

While the Truman Proclamation was indeed an important step in the formulation of a general doctrine which clarified and made much more explicit and uniform the rights of coastal states in their continental shelves, it was no sharp reversal of prior law, but was rather the natural outgrowth, in the light of vastly expanded potential uses of continental-shelf resources, of the substantial body of state practice

and customary law which had been applied for centuries to those resources whenever and wherever they had assumed practical importance. It is wholly unsound to say that customary international law ever at any time contained an obligatory rule which made it unlawful for a coastal state to claim and to exercise exclusive rights over a newly discovered, exploitable shelf resource. The exclusive right had always existed and was uniformly asserted whenever the occasion arose. The fact that such occasions became much more frequent in our century quite naturally gave rise to a legal principle stated in general terms where previously there had been some degree of doctrinal confusion. But we believe it clear that never at any time did international law prohibit claims of the type which the defendant States are asserting here. (Even if, contrary to our submission, it did contain such a rule at one time, that is no bar to recognition of the States' claims now that international law so clearly and conclusively sanctions them.)

If plaintiff's present position is correct, then President Truman and this country committed an internationally unlawful act by promulgating the Proclamation of 1945. See Tr. 1211-12, 1214. That proclamation, asserting the exclusive right to explore and to exploit all the resources of the continental shelf of the United States, was not a mere proposal offered for comment, acquiescence or objection by other countries. To the contrary, it was self-executing and took effect immediately; hence it was unlawful if not countenanced by the international law then in effect. Contrary to the position now taken by the

United States, we do not believe President Truman acted unlawfully at all; at most he was merely making more articulate, more systematic and more comprehensive what had always been the rights of coastal states.

To the extent that the law changed because of the Truman Proclamation and its aftermath, the principal change was that thenceforth shelf resources were recognized to be under the sole jurisdiction of the coastal state even if it took no steps to "occupy" and to exploit them, or even to claim them. This was a rather academic change, since as we have seen coastal states invariably have acted when an exploitable resource is discovered.

Lauterpacht's analysis quoted at Pl. Br. 249-51 expressly repudiates any requirement of "prescription" (Pl. Br. 249), and defends the lawfulness of the Truman Proclamation as fully consistent with principles of traditional international law (Pl. Br. 250-51). Lauterpacht regarded the alleged requirement of effective occupation as a requirement "to be applied only in a general and substantially figurative manner -- as, indeed, it has been applied in the past . . ." (Pl. Br. 251). A fair reading of the quotations from Lauterpacht selected and relied on by plaintiff itself makes it clear, in our submission, that he believed that the Truman Proclamation was not inconsistent with traditional international law. That was also the thesis of Lauterpacht's earlier article quoted by Judge Jessup at Tr. 538-554.

The "occupation" required by Lauterpacht, and by the other authorities quoted at Tr. 555-63, is "figurative" indeed, and is satisfied by the States' historic title deriving from their charters and the other evidence set forth herein. Indeed, in marine areas not claimed by any other state, a valid title is made out by "the bare existence of a claim." Tr. 541.

None of the members of the International Law Commission quoted at Pl. Br. 253-56 regarded the Truman Proclamation as a reversal or sharp break with prior law; they regarded it rather as a natural clarification or adaptation of prior law, as plaintiff's own quotations show.

Plaintiff claims (Pl. Br. 257) that the United States delegate to the 1958 Conference on the Law of the Sea "brought to the attention" of the Conference "the nature" of the "departure" of the new doctrine "from the principles of international law which governed the seabed and subsoil beyond territorial waters prior to 1945." What the delegate actually said was that "prior to very recent years, the legal status of the continental shelf, outside the recognized territorial seas was, in considerable measure, undefined." Ibid. That is, a principle or definition had become recognized where before there was none. This view, which has been shared by many others, is radically different from a belief that a new principle represents a "departure" from, or contradiction of, an old one. And if prior to 1945, as this view asserts,

international law was simply silent on the validity of continental-shelf claims, then it contained no rule which could make the States' claims defective. The first principle of international law is, of course, that a state may do anything it likes unless an obligatory rule prohibits it. Tr. 474-77; see pp. 289-90 , supra.

The opinion for the Court in the North Sea Continental Shelf Cases likewise regarded the Truman Proclamation as "the starting point of the positive law on the subject," where before there had been only "various theories." Pl. Br. 261. "Various theories" are, of course, the exact opposite of a customary rule enjoying the overwhelming consensus necessary to give it binding force. Thus plaintiff's assertion that the Court regarded the continental-shelf doctrine as a "departure from previous law," in the sense that previously there had existed a different or inconsistent obligatory rule limiting the freedom of action of states, is wholly unsound. Nor can plaintiff derive any comfort from the Court's reference to "maritime expanses which, during the greater part of history, appertained to no-one." Pl. Br. 261. Those "expanses" had indeed belonged to no one if the coastal state had never claimed them; now they belong to the coastal state even in the absence of a claim. The Court's language had no application to those seabed areas which had been previously brought under the sovereignty and dominion of the coastal state. For Judge Jessup's comments on the Court's language, see Tr. 524-35, 1161.

With the possible exception of Judge Ammoun's description of manifestations of the continental-shelf doctrine as "derogations" from the "freedom" of "the high seas," Pl. Br. 265, none of the language in the separate opinions quoted at Pl. Br. 263-67 states or implies that the continental-shelf doctrine reversed a prior inconsistent rule of positive law. Even Judge Ammoun, by plaintiff's own characterization, regarded the doctrine as a "progressive development of the law" rather than a break with prior inconsistent law. Pl. Br. 266.

The farthest one could possibly go in deprecating the States' title on international-law grounds would be to say that prior to the Truman Proclamation the States' title (fully perfected in domestic law) was inchoate and potential, and would have been perfected only upon the discovery of an exploitable resource and the steps the State would immediately have taken to establish control over it. That potential title was exclusive, since no one other than the coastal State could have perfected such a title. The effect of the Truman Proclamation, in these terms, was to perfect the States' title in advance of the discovery of exploitable resources and establishment of control thereover which, even without the Truman Proclamation, would have perfected them sooner or later. As Judge Jessup testified, however, Lauterpacht believed that to call titles of this sort "inchoate" is useful only with drastic qualifications; he regarded the coastal state as having an inchoate, perfectible title in the absence of any claim, and as having a perfected title once a claim had been made. Tr. 550-53.

Professor Henkin contends (Tr. 1920, 1923-24) that no one besides Judge Jessup has ever founded the right to a portion of the continental shelf on a survival of the seabed and subsoil portions of earlier expansive claims to wide territorial seas. That contention was refuted in 1923 by Sir Cecil Hurst, who declared that, so far as Great Britain was concerned, rights of ownership in the seabed are "the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea," and that by virtue of those older claims, which have been eroded only so far as the principle of freedom of the seas required it, British property rights in the seabed beyond the three-mile limit may be "valid and subsisting." Hurst, "Whose Is the Bed of the Sea?", 4 British Yearbook of International Law 34, 43 (1923).*/ Oppenheim flatly declared that the reasons for "the abandonment of the former claims to occupy the waters of the open sea . . . do not apply to the sea-bed. . . ." 1 Oppenheim, International Law 575 (6th ed. 1947).

Exactly the same contention was made by the Gulf Coast States of this country, based on their historic boundaries in the sea; and while rejected by the Supreme Court those claims were upheld by Congress, to which the Court then deferred. Those claims were advocated and

*/ There is likewise, of course, a continuity as to sovereignty of surface waters: "the sovereignty allowed by international law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean." Maine, International Law 78 (1888).

defended in a joint memorandum in support of rehearing in United States v. Texas, Exhibit 668, by ten of the most eminent international lawyers of that time: Joseph Walter Bingham, C. John Colombos, Gilbert Gidel, Manley O. Hudson, Charles Cheney Hyde, Hans Kelsen, William E. Masterson, Roscoe Pound, Stefan A. Riesenfeld and Felipe Sanchez Roman, and concurred in by another, William W. Bishop, Jr., who had been principally responsible for drafting the Truman Proclamation. Tr. 1178. The qualifications of these scholars are set forth in summary form at Exhibit 668, p. 320; see also Bartley, The Tidelands Oil Controversy 208-10 (1953). It is beyond dispute, Professor Henkin to the contrary, that Judge Jessup's views have been shared by many others. We submit that those views are wholly sound.

The present international-law situation, after the Truman Proclamation, the Continental Shelf Convention of 1958, and the decision of the International Court of Justice in 1969 in the North Sea Continental Shelf Cases, is that the exclusive right of a coastal state to its continental-shelf resources is fully recognized out to the 200-meter depth mark as a minimum, and may extend considerably beyond that mark if the resources in question are exploitable and are determined to be "adjacent" to the coast. The exact outer limit of exclusive rights in the continental shelf is presently the subject of discussion and negotiation. For a recent survey, see Krueger, "An Evaluation of United States Oceans Policy," 17 McGill L.J. 603 (1971).

As it happens, on the Atlantic coast of the United States the 200-meter depth mark corresponds rather closely in most areas to the 100-mile limit which is generally the measure of the historic claims of the Common Counsel States. U.S. Exhibit 7, p. 80 n. 195; U.S. Dept. of the Interior, Atlantic Continental Shelf and Slope of the United States, Geological Survey Professional Paper 529-J (1972). No problem or question under international law can arise as to those portions of the shelf which the States claim. The States freely recognize the authority of the Federal Government to determine, by treaty or otherwise, the extent of the continental shelf within which national rights are claimed.

As to portions of the shelf within both the 200-meter depth mark and the States' historic 100-mile boundaries, the States' claim rests on their historic title. As to portions of the shelf within the 100-mile boundaries but beyond the 200-meter depth mark, the States claim them conditionally on their eventually being determined by the Federal Government to be subject to national exclusive rights as a matter of international law and policy; if the Federal Government finally determines not to claim such areas as against other nations, the States' title will lapse. As to portions of the shelf within the 200-meter depth mark (or within such broader limit as the Federal Government may eventually adopt) but outside the 100-mile boundaries, the States claim them on the ground that the 100-mile limit was not regarded as precluding wider exclusive rights if exploitable resources were found outside it but still

adjacent to the coast, and on the ground that, as to any portion of the shelf which becomes recognized as subject to national exclusive rights, it is the States rather than the Federal Government which have the better claim, as owners of their public lands and as residual sovereigns over the coast to which the shelf is an inherent appurtenance. See pp. 502-08, infra.

## X.

## THE FEDERAL FOREIGN-AFFAIRS AND DEFENSE POWERS DO NOT REQUIRE FEDERAL OWNERSHIP OF THE EXCLUSIVE RIGHT TO EXPLOIT THE RESOURCES OF THE CONTINENTAL SHELF, BUT MERELY THE SAME PARAMOUNTCY WHICH THE FEDERAL GOVERNMENT ENJOYS ON LAND.

### A. The California Court's View that Exclusive Federal Proprietary Rights in the Continental Shelf Are Required by the Foreign-Affairs and Defense Powers Was Always Unsound and Has Been Repudiated by the State Department, by Congress, and by Subsequent Decisions of the Court.

In United States v. California, 332 U.S. 19 (1947), and the two cases which followed the principles it announced, the Supreme Court held that, as against a coastal State, the Federal Government possessed "paramount rights" in the offshore submerged lands seaward of the low-water mark and outside inland waters. United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). The controversy in the California case was limited to the three-mile belt off the coast. The Court's conclusion in that case was based partially on the finding that protection and control of the three-mile belt is a

function of national external sovereignty. The Court discussed at some length the existence of a marginal territorial sea and justified it as a "necessity" for a government next to the sea. "[A coastal country] . . . must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its shores." Id. at 35.

There can be little disagreement so far, for all the Court was saying is that the United States can claim, as against foreign nations, special dominion over the waters close to its shore. The difficulty came when the Court moved on from this proposition to a claim of "paramount rights," including property rights, in the offshore seabed for the United States as against the States. Two exceedingly vague arguments were presented as the means for jumping this logical gap. First, the Court declared that:

> "The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See Chy Lung v. Freeman, 92 U.S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." Id. at 35-36.

This statement reduces itself to the following argument: since wars may be fought in the ocean, and since the States possess neither navies nor large armies, therefore the Federal Government must have property rights in the offshore seabed. The argument is a complete non sequitur. It also proves too much, since it would lead to the same conclusion as to the land territory of the United States. If that territory were invaded by a foreign power, it is the United States, not the States, which would defend it; but that has never been considered to mean that the United States must have title to all the land in the country, or even to all public lands.

The Court's second argument was as follows:

> "And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations . . . . The very oil about which the state and nation here contend might well become the subject of international dispute and settlement." Id. at 35.

In effect, the opinion declares that the Federal Government must itself own property rights in the continental shelf because those rights may be the subject of international dispute or agreement. Again the Court's argument cuts too wide a swath. Property or other rights within the

or the Federal Government have the right to explore and to exploit the continental-shelf resources secured to the United States by international law and agreement.

Neither the foreign-affairs and defense powers nor the concept of external sovereignty*/ can create property ownership in the Federal Government; rather, they merely give authority for such activities as may be necessary and proper for the carrying out of these federal responsibilities. The States readily concede to the Federal Government the same rights and authority over the continental shelf as are properly exercised on land. "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, 332 U.S. 19, 42-43 (1947) (Reed, J., dissenting).

The majority in the California line of decisions may have been influenced by the fact that at the time of those decisions there was no international treaty which recognized and defined the exclusive continental-shelf rights claimed by the Truman Proclamation. In 1947-50, it was still possible that any property rights conceded to the States in the continental shelf might be objected to by other nations. While that possibility by no means required federal ownership, but only that

*/ It is difficult to understand why, if "external sovereignty" requires federal ownership of the seabed, it does not require such ownership of offshore islands as well. Each Atlantic State has such islands, some of which -- e.g., Nantucket -- are more than three miles from the coast.

State ownership be subject to the qualification that it might be defined, limited or even extinguished by federal action under the foreign-affairs power, the fact that in 1947-50 continental-shelf rights were a subject of considerable international controversy and uncertainty lent some faint color of reasonableness to the Court's holdings as of that time.

Any such justification, however, has long since disappeared. Since the conclusion of the Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. (Pt. 1) 471, let alone the International Court's decision in the North Sea Continental Shelf Cases, [1969] I.C.J. 1, there has been complete international agreement on the existence and nature of continental-shelf rights, at least out to the 200-meter depth mark. State possession of such rights is no more likely today -- indeed probably less likely -- to give rise to international controversy than the police or judicial powers of the States within their own boundaries. And if any such problems were to arise -- for example, problems concerning precisely which seabed and subsoil resources are subject to the States' exclusive rights -- the States would of course be bound by any international agreement concluded on the subject by the Federal Government.

The California opinion failed even to mention two squarely inconsistent prior decisions which must have been either ignored or overruled sub silentio. In United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1907) (Holmes, J.), the Court had held that Michigan had title, as against the United States, to the bed of the Sault

Ste. Marie River, through which the international boundary passed. The Solicitor General had argued that the river was not part of the internal waters of the State because of the international boundary, and that State ownership would interfere with the "international obligations" of the Federal Government. 52 L.Ed. 882-83. The Court thought these arguments so insubstantial that it did not even mention them in its opinion. Accord, as to the bed of Lake Ontario, Massachusetts v. New York, 271 U.S. 65 (1926). These international-boundary waters are obviously far more affected with an international or foreign-affairs interest than the submerged lands involved in California or in the present proceeding, which do not abut on the territory of any foreign nation. Until California, obviously, the Court had never doubted that federal concerns in such waters could be fully accommodated to State titles in the bed and subsoil.

As a reaction to the California line of decisions,*/ the Congress in 1953 adopted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C.

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*/ Not only were the decisions unsupported by precedent and disavowed by Congress; they were also strongly opposed by the great weight of scholarly opinion. See, e.g., Exhibits 668, 699, 738; Bartley, The Tidelands Oil Controversy: A Legal and Historical Analysis (1953); Hanna, "The Submerged Land Cases," 3 Stan. L.Rev. 193 (1951); Comment, "Constitutional Law -- Relation of Federal and State Governments -- Title of United States to Tidelands," 50 Mich. L.Rev. 114 (1951); Comment, "The Settlement of Conflicting State and Federal Claims to the Continental Shelf," 15 Albany L.Rev. 85 (1951); Note, "The Tidelands Decisions," 21 Tenn. L.Rev. 676 (1951); Hardwicke, Illig, & Patterson, "The Constitution and the Continental Shelf," 26 Tex. L.Rev. 398 (1948); Naujoks, "Title to Lands Under Navigable Waters," 32 Marq. L.Rev. 7 (1948); Comment, "United States v. California: Paramount Rights of the Federal Government in Submerged Coastal Lands," 26 Tex. L.Rev.

§§1301-1315. The Act relinquished to the coastal states all the rights of the United States in submerged lands at least to a distance of three geographic miles from the shore, and in the case of a Gulf Coast State, in certain circumstances, relinquished rights to a distance of three marine leagues, or approximately nine geographic miles, from the shore (§3; 43 U.S.C. §1311).

Congress clearly believed that it was not necessary for the resources of the relinquished seabed to be owned by the United States. The Secretary of the Navy, Robert B. Anderson, said as much before the Senate Committee considering the Submerged Lands bill:

> "Senator Long: Do you see any impediment to obtaining oil in time of national emergency by virtue of private or State ownership of some of that land on which that oil is located?
>
> "Secretary Anderson: No, sir.
>
> "Senator Long: Is private industry going to produce oil regardless of whether the oil is under State ownership or privately owned lands or federally owned lands?
>
> "Secretary Anderson: I would certainly assume it would, Senator.

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304 (1948); Note, "Real Property -- Ownership of California Tidelands," 21 S. Calif. L.Rev. 207 (1948); Keeton, "Federal and State Claims to Submerged Lands Under Coastal Waters," 25 Tex. L.Rev. 262 (1947); Note, "Submerged Lands: Conflicting Claims of Federal Government and States to Title in the Bed of the Ocean," 35 Calif. L.Rev. 605 (1947); Borchard, "Resources of the Continental Shelf," 40 Am. J. Int'l L. 53 (1946). Bartley found 43 articles on the decisions in legal journals, of which all but three were critical. Op. cit. at 247-48 n. 1.

"Senator Long: So, in any event, the oil would be produced by private enterprise.

"Secretary Anderson: I would certainly assume that. I doubt we would go into the drilling business." Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and Other Bills p. 560 (83d Cong., 1st Sess.) (hereinafter cited as 1953 Senate Hearings).

The nation's experience during World War II, which was mentioned frequently during the hearings, indicated that an efficient and practicable system of production quotas, industry allocations, rationing, and price controls could easily be introduced during wartime over the petroleum industry, as indeed over the entire national economy. See Executive Order 9276, dated December 2, 1942 (7 F.R. 10091), as amended by Executive Order 9319, dated March 23, 1943 (8 F.R. 3687), which created the Petroleum Administration for War and defined its functions. No mention was made in the continental-shelf hearings of any disputes between State authorities and the Petroleum Administration for War. Certainly, if significant problems had arisen, they would have been used as an argument for keeping all the submerged lands under federal ownership.

Similarly, Congress must not have believed that exclusive State rights to the continental shelf out to three or ten miles was inconsistent with federal powers over foreign relations or that federal proprietorship of this area was a necessary incident of national sovereignty. In the consideration of various submerged-land bills, it was contended that the United States might be embarrassed in its

dealings with other nations by permitting states to exercise rights in submerged lands beyond three miles. Mr. Justice Harlan's opinion in United States v. Louisiana, 363 U.S. 1, 30-31 (1960), explained why the Federal Government did not object to the bill on these grounds:

> "The first objection was laid to rest by the testimony of Jack B. Tate, Deputy Legal Adviser to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve."

The testimony referred to in the opinion was quite clear that ownership by the States of the entire continental shelf would cause no international difficulties, nor would it conflict with treaty obligations. Mr. Tate's testimony before the Senate Committee was as follows:

> "Mr. Tate. It depends upon what authority and jurisdiction you should grant. We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.
>
> * * *

> "Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the sea bed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by the President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?
>
> "Mr. Tate. The Chairman is correct in that statement." 1953 Senate Hearings 1067.

During the floor debate on the bill, Senator Cordon presented a statement by the sponsors which made the point crystal clear:

> "As shown by the evidence furnished by the State Department and by the Presidential proclamation and Executive order of September 28, 1945, the vesting or establishment of these proprietary rights in the States is a matter of domestic concern and will not interfere with international law or present and future international agreements and obligations, so long as they are vested or established subordinate and subject to the constitutional governmental powers of the national sovereign." 99 Cong. Rec. 4385.

The State Department did suggest that the United States might be embarrassed by Congress' recognition of State <u>boundaries</u> extending beyond the three-mile territorial sea. Congress rejected the argument, and it was put to rest by the Supreme Court's conclusion that a State territorial boundary beyond three miles for limited purposes is entirely consistent with the executive policy establishing a three-mile limit for the territorial waters of the United States. <u>United States</u> v.

Louisiana, 363 U.S. 1, 35-36 (1960). Similarly here, the Common Counsel States are asking only for those rights in the continental shelf which the United States claims as against other nations as a matter of international law. The congressional hearings and the review by the Supreme Court in the Louisiana case of the legislative history of the Submerged Lands Act demonstrate that Congress intended to overturn the underlying policy determinations in the California decision relating to defense and foreign policy.*/

In United States v. Louisiana, 363 U.S. 1 (1960), and United States v. Florida, 363 U.S. 121 (1960), the Court held that Texas and Florida had proved boundary claims of three maritime leagues and thus had qualified under the proviso in the Submerged Lands Act. As stated above, Justice Harlan's opinion discussed and dismissed objections

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*/ "Whether this jurisdiction ["jurisdiction and control over the resources of the continental shelf"] is exercised by a state of the United States or by the United States itself is purely a domestic matter." Restatement (2d), Foreign Relations Law of the United States (Tentative Draft No. 2, May 8, 1958, p. 22).

By Section 4(a)(2) of the Outer Continental Shelf Act, 43 U.S.C. §1333(a)(2) (1971), Congress also made the outer continental shelf subject to "the civil and criminal laws of each adjacent State . . . for that portion of the subsoil and seabed of the outer Continental Shelf . . . which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area."

> or private operators under the auspices of either, is an internal matter which would not affect the conduct of foreign relations." Tr. 73.

Professor Kirkpatrick also testified that this position -- that the allocation of shelf resources between the Federal Government and the States does not involve foreign-relations matters -- was explicitly adopted by the Department of State in the hearings on the Submerged Lands Act. Tr. 76-77. This assertion was unquestioned in cross-examination.

Professor Kirkpatrick also pointed out that operational control over the resources beyond the three-mile/three-league limit is in the hands of private individuals, since the Federal Government carries on no exploration or drilling itself but rather leases submerged lands to private concerns. He found it hard to understand how the foreign relations of this country could be affected by the fact that these leases would run from the States rather than from the United States. Tr. 78-80. Again there was no significant questioning of this conclusion by the United States in cross-examination.

The thrust of the cross-examination of Professor Kirkpatrick relative to foreign relations dealt with whether the States or the Federal Government had paramount authority to regulate various matters relating to offshore development: who should define which resources constituted the natural resources of the continental shelf; who should delimit the safety areas around surface platforms and should issue regulations to enforce them; who should give permission for scientific

exploration by foreign countries of the continental shelf. Professor Kirkpatrick's position throughout his testimony was that the Federal Government is vested with sufficient power to define the rights of the United States in the continental shelf and to regulate such activities as may touch and concern relations with other nations. However, he repeatedly emphasized that this was no more and no less power than the Federal Government has on land.

Professor Kirkpatrick ended this portion of his testimony by noting that during the extensive hearings on the Submerged Lands Act no mention was made of any significant foreign-policy objections to State ownership of seabed resources, and concluded that this was "powerful evidence that no such objection exists." Tr. 83. The record is wholly devoid of any examples of federal-State conflicts with respect to the seabed of the three-mile/three-league continental shelf. Professor Henkin knew of no such conflicts:

> "Q. Since the Submerged Lands Act, do you know of any grievous international problems or embarrassment to the foreign relations of the United States that have been caused by the alleged gift of some of the continental shelf to the states?"
>
> "A. I don't know of any." Tr. 2647.

Turning to the question whether the national defense or other military interests of the United States require federal ownership of the continental shelf, Professor Kirkpatrick was definite that they do not. Drawing on over thirty years' experience in defense policy, he testified that:

> "The powers exercised by the Federal Government which I have already referred to are in my opinion adequate, whether the Federal Government or the States own and develop the submerged lands in question, both to authorize activities by the military authorities in the ocean above the continental shelf and to prohibit activities by the States or by American citizens that are contrary to the defense interests of this country. In time of war or national emergency, and even in peacetime to the extent necessary for defense, local and private interests yield to the military needs of the nation.
>
> "In this regard, undue emphasis should not be placed on the need for Federal power. In my experience, the States of this country have cooperated significantly of their own volition where activity in the interests of national defense called for action or restraint by individual States." Tr. 87-88.

Professor Kirkpatrick specifically noted the cooperation between the States and the Federal Government since the enactment of the Submerged Lands Act. For example, although the States possess the seabed resources in the three-mile/three-league belt, the Secretary of the Army has absolute authority to prohibit placement of any structures in the coastal sea. Yet, this allocation of responsibilities between the States and Federal Government has not been a source of discord. Tr. 88-89. Professor Kirkpatrick concluded that there was every reason to believe that this cooperative approach, in the defense area, could operate as easily beyond the three-mile/three-league limit. Tr. 89-90. Neither his evidence nor his conclusion was questioned by the United States.

Cross-examination of Professor Kirkpatrick centered on questions relating to whether the Federal Government could continue to carry on military activities in the waters of the continental shelf if title to the seabed was in the coastal States. The Professor believed the United States has all the authority necessary for that purpose, as plainly it does. He minimized the extent of possible interference of military activity with exploration and exploitation by the States, and emphasized that federal military authority need be no different from that exercised by the Federal Government on land. See, e.g., Tr. 257-258. No evidence in the record indicates that the States have ever interfered with military operations in the three-mile/three-league belt, and nothing in the record indicates that the States would in the future inhibit such operations in the continental shelf. In cross-examination, Professor Kirkpatrick minimized the possibility of State interference:

> ". . . I think we are speculating on a very unlikely possibility that the states would inhibit or try to prevent an action for defense." Tr. 260.

And if they did attempt to do so, the federal defense power is obviously adequate to prevail.

Recognition of State property rights in the seabed of the continental shelf would not result in embarrassment to the United States in the conduct of its foreign relations, nor would it inhibit military activities on the seabed or in the waters over the seabed. To carry out its constitutional powers over foreign affairs and defense, the Federal

Government no more needs to own the continental shelf than it needs to own the three-mile belt, the three-league belt in the Gulf, or for that matter every acre of land in the United States or the air superjacent thereto.

The States, on the other hand, have substantial interests in the development and regulation of their continental-shelf resources. Besides their obvious fiscal interest, they have a duty to protect their waters and coastlines from pollution and other environmental damage which is threatened by irresponsible exploitation of continental-shelf resources, and which has occurred on a massive scale under federal leasing arrangements. Congress has expressed its preference for "local controls" with respect to exploitation of continental-shelf resources and its awareness of "the fixed, inflexible rules and the delays and remoteness which are inseparable from a centralized national control." Quoted in United States v. Louisiana, 363 U.S. 1, 98-99 n. 25 (1960) (Black, J.).

## XI.

## THE SUBMERGED LANDS ACT AND THE OUTER CONTINENTAL SHELF ACT ARE UNCONSTITUTIONAL IF THEY PURPORT TO DEPRIVE THE ATLANTIC STATES OF TERRITORY OR PROPERTY.

Plaintiff appears to contend, though this is not altogether clear, that the legislation of 1953 furnishes an independent ground for extinguishing the States' claims even if they were valid until then.

It may be possible to view the Submerged Lands Act and the Outer Continental Shelf Act in such a way that neither unlawfully appropriates to the Federal Government property rights or territory belonging to the States. As to the belt of land lying between three miles and three leagues, the Submerged Lands Act gave to the Gulf States the right to qualify for a claim of up to three leagues. This was founded on Congress' belief that those States had an historic basis for the more extensive claim, and the exception written into the Act for their benefit underscores that Congress had no wish unlawfully to deprive them of territory or property. The fact that no such provision was made for the Atlantic States merely evinces Congress' lack of knowledge as to the strength of their claims; and in accordance with the policy of the Act, it seems only reasonable to interpret it in such a way that the Atlantic States may also qualify. (See pp. 509-15 , infra.) So far as the right to exploit seabed resources beyond three leagues and to the edge of the continental shelf is concerned, Congress did not intentionally attempt

to transfer to the Federal Government rights which were vested in the States. The underlying purpose of the legislation was to reverse what was regarded as the Supreme Court's erroneous decision in the California case and to restore to the States all those submerged lands to which they had an historic title. See pp. 423-28 , supra.

If, however, these statutes did purport to divest the Common Counsel States of the exclusive right to exploit their continental-shelf resources beyond three miles, they are pro tanto unconstitutional. The right to seabed resources may be seen as proprietary, in which case the statutes deprive the States of property without due compensation in violation of the Fifth Amendment; or as territorial, in which they diminish the territory of the States in excess of the power granted to the Federal Government by the Constitution.

The rights possessed by the States are unquestionably property rights, though they have other aspects as well. The Federal Government has offered nothing in exchange for its attempted deprivation of these rights. Yet the Fifth Amendment explicitly states: "nor shall private property be taken for public use, without just compensation." It is well settled that the Fifth Amendment applies to State property taken by the Federal Government. While such property may indeed be taken under the power of eminent domain, the Federal Government is not relieved of its duty to pay just compensation. As the Court stated in United States v. Carmack, 329 U.S. 230, 242 (1946):

> "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."

See also Oklahoma v. Atkinson Co., 313 U.S. 508, 534 (1941); St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 100-01 (1893); Yalobusha County v. Crawford, 165 F.2d 867, 869 (5th Cir. 1947); Wayne County v. United States, 53 Ct. Cl. 417, 423-24 (1918), aff'd, 252 U.S. 574 (1920). Therefore, the purported divestiture of the States' rights, if there was such a divestiture, violates the Fifth Amendment. */

In reply, it may be urged that no compensation need be paid for the species of property involved here, i.e., submerged lands belonging to a State, perhaps on some public-use or trust theory. Such a reply would invoke Stockton v. Baltimore & N.Y. R.R. Co., 32 F. 9 (C.C.N.J. 1887), appeal dismissed, 140 U.S. 699 (1891). There the United States had authorized a railroad company to build a bridge across the Staten Island Sound, part of the internal waters of New Jersey. The

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*/ Quite a different question would be presented, of course, if the United States, rather than attempting to take the States' continental-shelf rights for its own use and profit, renounced them by treaty or by acquiescence in a change in international law by which they would no longer be recognized. Such federal action, pursuant to the foreign-affairs power, would indisputably be valid and binding on the States; the hypothetical question whether compensation would be due is not involved in this proceeding. Any such renunciation by the United States in the future is in the highest degree improbable.

Attorney General of New Jersey contended, inter alia, that because the piers of the bridge would rest on submerged lands belonging to the State just compensation was due. The court rejected the contention, holding that the submerged lands were held by the State in trust for public uses, and that when Congress pursuant to the commerce power used "a few square feet" (32 F. at 20) for the foundation of a bridge which was itself a public use, no compensation was due even if the submerged lands were "private property" within the meaning of the Fifth Amendment.

There are a variety of reasons why Stockton is not controlling and the above reply is inadequate. First, a very great difference exists between the "few square feet" of river bottom at issue in Stockton and the thousands of square miles of valuable submerged lands involved here. The Stockton opinion reveals some doubt as to whether any taking occurred by questioning whether the appropriation of a few square feet of river bed "is at all a diversion of the property" from its original use. Id. at 20. But the deprivation of rights to extremely valuable seabed resources is manifestly a taking of property, for which just compensation is required by the Constitution.

Second, a substantial difference in statutory purpose is involved. The statutes relating to the continental shelf purportedly grant the Federal Government the right to exploit natural resources such as oil and minerals; the purpose is fundamentally economic in character,

since the Federal Government would gain, and the States would lose, a substantial amount of revenue. By contrast, the small amount of river bottom acquired in Stockton was taken for the public purpose of supporting the piers of a bridge.

Third, any public-trust theory that might be applicable to the continental shelf must be carefully distinguished from that which applies to inland waters and other State property. Rivers are often used for navigation, and Congress in the exercise of the commerce power may appropriate some small amount of river bottom to erect a bridge over the river. However, it is not even superficially plausible to suggest that submerged lands in the continental shelf are held for public use in navigation or commerce, save insofar as Congress might decide to authorize the erection of a lighthouse or the laying of a telephone cable. No public-use or trust doctrine exists that would justify depriving the States of the entire seabed, for ends unrelated to navigation or commerce, without just compensation.

Fourth, some slight authority exists for saying that in some circumstances if land is dedicated by a State to one public use (e.g., as a park), the Federal Government can put it to another (e.g., as a place for a post office), if the latter use is superior, without compensating the State or one of its subdivisions. In re Certain Land in Lawrence, 119 F. 453 (D. Mass. 1902). But no such doctrine has ever been applied to the seabed. Further, the Federal Government and the States

propose here to put the land to the same use, so it can hardly be argued that the federal use is superior.

Fifth, the Stockton and Certain Land cases represent very much a minority view.

> "[T]he weight of authority is contrary to this view and supports the conclusion that the United States must make just compensation for any property taken by it under the power of eminent domain from a state or a political subdivision or agency thereof."

See Annotation, "Eminent domain: power of one governmental unit or agency to take the property of another such unit or agency," 91 L.Ed. 221, 224 (1947), and cases there cited.

The United States has recognized the obligation to pay just compensation for continental-shelf property it takes from the States. Under Section 6 of the Submerged Lands Act, 43 U.S.C. §1314 (1971), Congress provided as to the three-mile/three-league belt of land ceded to the States that the United States had the right to purchase undersea resources or portions of the ceded submerged lands, if required for national defense. The section explicitly provides that acquisition of the resources shall be "at the prevailing market price," and of the lands "by proceeding in accordance with due process of law and paying just compensation therefor."

The rights of exploitation possessed by the States should be seen alternatively, or additionally, as territorial. The power of Congress to diminish the territory of a State is very limited. Under

Article I, Section 2, Clause 17, it may acquire an area not to exceed ten square miles created by "cession of particular States" to serve as the seat of government, as well as lands purchased "by the Consent of the Legislature of the State in which the same shall be" for the erection of military bases and so on. No power is granted the Federal Government to deprive the States of thousands of square miles for use other than as the seat of the Federal Government, or other than for military or shipping purposes or the like. A fortiori no such power exists when the States have not consented or ceded land to the Federal Government. Cf. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). In view of the Tenth Amendment and the doctrine that the Federal Government has only those powers enumerated in the Constitution, Congress' attempt to deprive the Atlantic States of their territory in the continental shelf is unconstitutional.

XII.

## THE DEFENDANT STATES SHOULD PREVAIL EVEN IF EXCLUSIVE RIGHTS TO PART OR ALL OF THE CONTINENTAL SHELF ARE DEEMED TO HAVE SPRUNG INTO EXISTENCE DE NOVO IN 1945.

### A. The Atlantic States Are Entitled to the Shelf as Residual Sovereigns and Owners of Property of Their Land Territories, to Which Continental Shelf Rights Are an "Inherent" Appurtenance.

Let it be assumed that all the arguments advanced earlier fail and that prior to 1945 neither the Federal Government nor the States possessed any rights to exploit continental-shelf resources. Even under this assumption, the Atlantic States are still uniquely entitled to exploit those resources. Likewise, if the States are held to have historic rights to part, but not all, of the continental shelf adjacent to their coasts, the considerations mentioned below are sufficient to give them the better right to the remainder as against the plaintiff.

Proclamation 2667, made by President Truman on September 28, 1945, declared that

> "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." 3 C.F.R. 67, 68 (1943-48 Compil.).

The position taken by the Truman Proclamation has since been confirmed by international law. Article 2 of the 1958 Geneva Convention on the Continental Shelf, for example, recognizes the rights of a state, by virtue of its sovereignty over the land, to exploit seabed resources in the continental shelf. Such rights have also been acknowledged by the

International Court of Justice in the North Sea Continental Shelf Cases, [1969] I.C.J. 1, 22, where they are characterized as "inherent" and "exclusive" rights. Hence, under settled doctrine of international law, rights of exploitation in the continental shelf off the United States unquestionably exist.

To whom, then, do these rights belong? Do they appertain to the Federal Government, or to the coastal States, or to both? This question was left open by the Executive Order accompanying the Truman Proclamation; for though the resources were placed under the control of the Secretary of the Interior, it was explicitly stated that

> "neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." Exec. Order 9633, 3 C.F.R. 437 (1943-48 Compil.).

Nor does international law answer the question; international law recognizes the rights on behalf of the United States considered externally, but cannot and does not determine whether those rights are allocated to the States or to the Federal Government by our constitutional system.

Under that system, it is submitted, these rights of exploitation belong to the Atlantic coastal States. In light of the Ninth and Tenth Amendments, and more basically in view of the nature of the American federal system, the Federal Government is a government of limited powers. It has only such powers, sovereignty and territory as

have been granted to it by the States; all residual powers, sovereignty and territory are retained by the States. New rights in the continental shelf were, by hypothesis, acquired under international law after 1945. As argued earlier, these rights cannot be viewed as falling within the powers of the Federal Government to provide for defense and to conduct foreign affairs; and no other basis for federal ownership exists.

The United States will doubtless argue that continental-shelf rights were acquired by it for its own use, just as, for example, the Louisiana and California territories were acquired. There is, we submit, a profound difference. Continental-shelf rights were not acquired as new territory which bore no relation except that of geographical contiguity to the existing States. To the contrary, these rights were acquired through a development or crystalization of international law which recognized that the continental shelf appertains inherently and naturally to the adjacent coastal area:

> "[T]he rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources." North Sea Continental Shelf Cases, [1969] I.C.J. 1, 22.

The Truman Proclamation itself recognized the unique nature of the acquisition of continental-shelf rights by not even purporting to acquire them on behalf of the Federal Government as against the States, but

rather leaving that question open for determination by operation of law.

Under our constitutional system it is the States which are the residual sovereigns of their territory. Moreover, so far as the Atlantic States are concerned they are the residual owners of the soil as well. None of the Atlantic States, of course, ever ceded its public lands within its boundaries to the United States; and it is undisputed that those States remain the owners of all property within their boundaries that has not been granted or deeded out either by them or by their predecessor sovereigns. The United States has no title to land within any of the Atlantic States except so far as it has acquired it from them with their consent; as to such land the title of the United States derives from and depends upon the original title of the state or its predecessor, just like the title of any other property owner.

It follows from these undoubted facts, we think, that it is the defendant States which -- not as a matter of international law, but as a matter of analysis under our federal system -- possess the sovereignty and dominion over their land areas to which international law holds that the continental shelf appertains as "a natural prolongation." It follows, we submit, that it is the Atlantic States and not the Federal Government which possess exclusive rights of exploitation of the continental shelf, even on the assumption that those rights came into existence at the time of the Truman Proclamation or thereafter.

This argument is especially compelling when it is recognized that in fact such rights of exploitation plainly existed in the 17th and 18th centuries. Even if, as the United States contends, the United States allowed them to lapse or renounced them after formation of the Union, it cannot equitably be the beneficiary of its own inaction by now acquiring these rights for itself when they are again recognized as the subject of exclusive ownership.

The argument just made, in our submission, entitles the Common Counsel States to the exclusive right to exploit the resources of any portion of their continental shelf which is held to be outside their historic boundaries but is within the limits of the shelf as finally determined by the United States in the exercise of the foreign-affairs power.

* * *

The argument just made has consumed few pages in relation to the rest of our Brief, and it comes almost at the end of it. For these reasons it risks being lost in the shuffle, as a makeweight or an afterthought. That, we submit, would be unfortunate. We are persuaded that the argument is wholly sound. It can be stated briefly because the concept is simple and because there are no specific precedents or analogies, at least none that we have thought of, either for it or against

it, which require lengthy analysis.*/

We submit, nonetheless, that as a constitutional matter, assuming a tabula rasa of continental-shelf titles or claims prior to 1945, the States' better right is clear and decisive.

Plaintiff has, by its own admission and indeed assertion, no claim whatever antedating 1945. The States have very substantial and deeply rooted historic claims. Even if, arguendo, the States' claims are found somehow to fall short of establishing a vested title, they are surely better than plaintiff's claim, which has no historic basis whatsoever.

Historic claims aside, the argument made in this section goes to the simple foundation of our entire constitutional system: that the Federal Government is a government of limited, delegated powers, and that all inherent and residual sovereignty and dominion rest with the

*/ The closest analogy to the extension of territory by recognition of continental-shelf rights is the extension of a land territory by accretion or alluvion. Plaintiff will surely not deny that such extensions in this country accrue to the States, not to the Federal Government; a wealth of authority can be adduced for that proposition if it should be challenged. Professor Seidl-Hohenveldern, an eminent German publicist, used the alluvion analogy in arguing that in the German federal system continental-shelf rights accrue to the states. Annuaire Français de Droit International 723-24 (1964). Accord, Böhmert, Natur und Umfang der Bundesrepublik Deutschland am Kontinentalschelf Zustehender Rechte, im Internationales Recht und Diplomatie 128 (1967); Willeke, Der Festlandsockel Seine Volker und Verfassungsrechtliche Problematik in Deutsches Verwaltungsblatt 463 (1966). German law has accepted state ownership, and licensees of the states enjoy exclusive exploitation rights.

separate States. If there is a single proposition that underlies our Constitution, our basis of government, our historic accommodation of unity and diversity, the pledge offered and accepted upon which whatever we have achieved as a nation has been founded, it is that.

If that underlying principle is now to be repudiated in law, as having somehow been rendered inoperative by the march of centralized power, then this nation and this government have renounced their roots, and are no better, and have no better hope, than any squalid little dictatorship carried to power yesterday or last week on the ruins of whatever ephemeral system may have preceded it. That sort of usurpation accords ill with the genius that has made Anglo-American law the force for enlightened stability, for a sophisticated balance between the wisdom of the past and the needs of the present and the future, which has rendered it uniquely respected and envied throughout the world.

Under our constitutional system, if it still has any vitality in the courts, the separate States are the residual sovereigns of their coastlines and the owners in property thereof and of whatever seabed and subsoil rights depend thereon or are appurtenant or accrue thereto. The rights in dispute herein, never having been delegated, are plainly in that category. Therefore they belong to the States.

B. At the Very Least, the Atlantic States Are Entitled To Prove Historic Boundaries Out to Three Leagues Under Federal Legislation.

Even if every argument made hitherto is rejected, it is submitted that the Atlantic States should be allowed to establish ownership out to three leagues by proving historic boundaries on the same basis as the Gulf States, in order to avoid unconstitutionality of the Submerged Lands Act as discriminating among the States without rational basis.

All States have a right to be treated equally by the Federal Government in respect of their sovereignty and political rights. Though this doctrine of "equal footing" or "equal status" is not stated in so many words in the Constitution, that "equality of Constitutional right and power is the condition of all States of the Union, old and new" is well-established by judicial decision. Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1882). As emphasized in Coyle v. Smith, 221 U.S. 559, 567 (1911):

> "'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."

If equal status must be given all new States of the Union, it would be absurd to deny it to the original thirteen States.

The equal-footing doctrine has been said to apply to "political rights" rather than "property." Stearns v. Minnesota, 179 U.S. 223, 245 (1900). Possibly it might have been lawful for Congress simply to make a gift of a greater portion of the continental shelf to Texas and Louisiana than to all other states. But that is not what Congress did; rather, Congress gave to the Gulf States, but not to the others, the political or legal right to establish the existence of historic boundaries extending beyond three miles as entitling them to exclusive continental-shelf rights. The Act allows to the Gulf States, but denies to all other coastal States, the right to qualify under the three-league provision. Section 2(b), 43 U.S.C. §1301(b) (1971). This is a "political" right and is embraced by the equal-footing doctrine. It is surely a sovereign or political right of the Atlantic States to be able to show that they qualify for the possession of rights of exploitation when the Gulf States are afforded the opportunity so to qualify.

No rational basis exists for the distinction drawn by the Act. Although Congress could perhaps treat States unequally if some States had a substantially different historical background from all the others, it cannot do so when that difference is lacking -- even though there was a misapprehension of the facts by Congress. A fortiori no rational basis can be found for statutory discrimination which allows all States to demonstrate that they possess a seaward boundary greater than three miles but permits only some States to enjoy rights of exploitation in

consequence of any such demonstrated boundary. The three-league provision is thus underinclusive. It therefore violates the constitutional right of the Atlantic States to equal status.

It might be objected that the distinction drawn by Congress was reasonable because it was based on "the shallowness of waters in the Gulf and the alleged Spanish custom of claiming three leagues of territorial waters," United States v. Louisiana, 363 U.S. 1, 32 (1960), or on the "fact that the Gulf is very largely enclosed by land," id. at 32 n. 53. But even if the legislative history unequivocally supported such a view of why Congress allowed only the Gulf States to qualify, which it does not, it hardly endows the distinction with a rationality it has otherwise been shown to lack. Since the United States has claimed continental-shelf rights to a depth of at least 200 meters, it is hard to see what relevant difference obtains if the depth at which the rights of a State cease is ten meters, or 50, or 199; the "shallowness" of the Gulf is thus not in point. It is even more difficult to perceive why the fact that the Gulf is largely enclosed by land is germane, when the distance across it is still some hundreds of miles. And it is clear that the Gulf has never been regarded as an historic bay or something of that sort, which the United States could claim as internal waters or within which it could assert some other type of special status. 1 Hackworth, Digest of International Law 694 (1940). The reference to "Spanish custom" simply underscores congressional ignorance of the strength of the

English-law claims of the Atlantic States; it is wholly inadequate to make rational the divergent treatment of the Atlantic and Gulf States.

It may also be contended that the equal-treatment claim has been resolved adversely to the Atlantic States by Alabama v. Texas, 347 U.S. 272 (1954). To this there are several responses. First, the Supreme Court did not pass on the merits of any of the claims advanced in that case; it merely refused to allow the protesting States to file a complaint. Second, the Court in Alabama v. Texas did not pass on the precise claim being made here. Though equal-treatment arguments of a sort may have been made in that case, if so they were submerged in a welter of contentions which had little or nothing to do with equal treatment. The general posture of Alabama v. Texas was in any event quite different; there the equal-treatment claim was aimed at depriving the Gulf States of land beyond three miles, while in this instance the claim seeks to provide an equal opportunity for the Atlantic States to obtain submerged lands in the belt between three miles and three leagues. Third, if Alabama v. Texas did resolve the present equal-status claim, that case was wrongly decided. This Court is free to correct prior errors of law, particularly when the statutory distinction was made in ignorance of the historic claims of the Atlantic States. Consequently, Alabama v. Texas cannot foreclose a decision in this case that the distinction drawn between the Gulf and Atlantic States was without rational foundation and therefore unconstitutional.

There remains for consideration the question of remedy. As Justice Harlan pointed out in Welsh v. United States, 398 U.S. 333, 361 (1970) (concurring in the result), where "a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Cf. Schacht v. United States, 398 U.S. 58 (1970); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). The issue here is thus whether the rights acquired by Texas and Florida should be extinguished, or whether all coastal States, not merely the Gulf States, should be given the opportunity to qualify under the three-league provision.

The broad severability clause of the Submerged Lands Act should be taken to grant the Court wide discretion to fashion relief consonant with the underlying policy of the underinclusive provision. Section 11 of the Act, 67 Stat. 33 (1953), contains, in addition to the language usual for such a clause, a clause emphasizing the intention of Congress to hold valid the basic granting provisions of the Act, i.e., Sections 3(a), 3(b) and 3(c), should some provision included within them be held invalid. Although the absence of such a severability clause would not preclude the result we seek, see United States v. Jackson, 390 U.S. 570, 585 n. 27 (1968), its existence "discloses an intention to

make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." Champlin Refining Co. v. Comm'r, 286 U.S. 210, 235 (1932). See also Welsh v. United States, 398 U.S. 333, 364-65 (1970) (Harlan, J., concurring in the result).

In this case, the better alternative is to leave the Texas and Florida three-league limit untouched and to allow the Atlantic States the opportunity to qualify under the three-league provision. As pointed out in Justice Harlan's opinion in Welsh, the relevant criteria are (1) the "intensity of commitment to the residual policy" and (2) the "degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 398 U.S. at 365. In regard to the former, it is necessary to recall that Congress inserted the three-league provision for the Gulf States because it believed that owing to their history they might have some claim to the seabed beyond three miles. The policy behind this provision was that any State having some special preadmission history that would entitle it to rights of exploitation beyond three miles ought to have the opportunity of perfecting those rights. While Congress was wrong in thinking that only the Gulf States might have such an historic claim, this misapprehension should not deter the Court from giving force to the residual policy of the three-league provision. The intensity of congressional commitment to this policy is evidenced by the special clause it inserted into the severability

provisions of Section 11 whereby the basic granting clauses of the Act should to the greatest extent possible be upheld.

So far as Justice Harlan's second criterion is concerned, it is to be observed that abandoning the three-league provision altogether would not merely "disrupt" but would destroy the statutory scheme. Were that provision abrogated, Texas and Florida would be divested of the rights they acquired under the statute, in opposition to the directive contained in the severability clause. Moreover, all leases and other proprietary or contractual arrangements made by Texas and Florida with respect to submerged lands beyond the three-mile limit would lose their validity, thus creating uncertainty and confusion on the part of those who have rights under those arrangements. For all these reasons, the unconstitutional discrimination is best corrected by affording the Atlantic States the opportunity to qualify under the three-league provision.

## CONCLUSION

For the foregoing reasons, the Special Master is respectfully requested to find that the Common Counsel States are entitled as against the United States to explore and to exploit the resources of the seabed

and subsoil underlying the Atlantic Ocean adjacent to their coasts beyond three geographic miles therefrom.

Respectfully submitted,

/s/: Hugh B. Cox

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August 31, 1973

# APPENDIX

## BRITISH AND COMMONWEALTH LAW SINCE 1800

Post-1776 British law is, of course, not part of our law. If British law changed since 1776 in a fashion inimical to the Common Counsel States' contentions here, that would be irrelevant unless plaintiff could demonstrate that the same change occurred in our law as well. In fact, however, British law since 1776 has been generally faithful to the common law of maritime sovereignty and dominion as it existed prior to that date. An excellent summary of the subject is found in U.S. Exhibit 9, pp. 50-74.

Our review of 18th-century British law (pp. 137-55, supra) has carried the history down to 1800; this Appendix will very briefly cover the period since then.

### A. The Crown's Ownership of the Seabed and Subsoil of British Waters Has Continued Unchanged and Has Been Applied to the Continental Shelf.

From 1800 to 1876, the British courts uniformly continued to apply the traditional law that the crown owns in property the seabed and subsoil of the marginal sea. For this point the Common Counsel States incorporate by reference pp. 53-59 of U.S. Exhibit 9 and pp. 129-30 of U.S. Exhibit 17, where most of the relevant case law is quoted and summarized. These cases relied without question on Hale and the other older authorities with respect to the English law of

maritime sovereignty and dominion. None of these cases required a determination as to the outer limit of that sovereignty and dominion, and none of them mentioned the three-mile limit or the cannon-shot rule except for the Whitstable case, U.S. Exhibit 9, p. 58, which mentioned three miles but did not hold that the crown's ownership ended at that limit. In the Gammell case, U.S. Exhibit 9, pp. 57-58, which dealt with surface fisheries, the court held that the three-mile limit applied to such fisheries.

In Attorney General v. Tomsett, 2 Cromp. M. & R. 170, 5 Tyrwh. 514, 1 Gale 147 (1835), the question was raised in the Exchequer Court whether certain goods unshipped in the sea were unshipped within the United Kingdom as the term was used in a statute. The crown lawyers contended that they were, since "the narrow seas have always been considered as wholly within the kingdom of England." 2 Cromp. M. & R. at 172. Counsel for the defendant "submitted that the narrow seas are not part of the kingdom of England," whereupon Baron Alderson interjected that "the authority of Lord Hale is to the contrary: he says they are within the kingdom." Id. at 173. Defendant's counsel thereupon qualified his contention: "no doubt they are part of the dominions of the king of England, and so are the colonies; but it is submitted they are not within the kingdom of England. If they were, they would be within some county, but that is not pretended." Ibid. The court found resolution of the question unnecessary to decide the case.

For additional materials on the famous Cornwall Mines case, in which it was squarely held that the crown owned the mines and minerals lying below low-water mark under the open sea as part of the soil and territorial possessions of the crown, as against a claim by the Duke of Cornwall as first occupier, see Exhibits 166, 167, 168, 169; Tr. 189-90.

In Officers of State v. Smith, 8 Sess. Cas. (2d ser.) 711, 723 (1846), aff'd sub nom. Smith v. Earl of Stair, 6 Bell's App. Cases (House of Lords, 1849), Lord Cockburn declared:

> "I know nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown." U.S. Exhibit 17, p. 130.

In Duchess of Sutherland v. Watson, 6 Sess. Cas. (3d ser.) 199, 213 (1868), Lord Neaves said:

> "Coming to the question that we have here at issue, I think, in the first place, that the solum or fundus of the deep sea -- that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores -- belongs in property to the Crown, and does so as a patrimonial right. That it does so belong to the Crown, at least within narrow limits near the shore, such as are here in question, is clear; and that would be clearly seen if a question were raised as to any minerals which might extend under the sea, and which might be worked outwards from the shore to a point under the deep sea. I think that that right is a patrimonial one. It is not a right held by the Crown in trust for the public. There are rights held by the public that are burdens upon it so far. There is the public right of navigation; and there may or

> may not be rights of fishing in the public -- rights to catch fish that float in the public fundus or solum. These may be public rights, but the right of property in the solum of the sea I consider to be a clear patrimonial right of the Crown. And that right may be granted to one of the lieges subject always to those rights of navigation of which I have spoken, and it may be constituted by explicit infeftment, so as to make it a feudal estate."

The British treatise writers between 1800 and 1876 likewise affirmed the sovereignty and dominion of the crown in the British seas, and its ownership in property of the seabed and subsoil thereof. These writers included Schultes, Chitty, Hall, Woolrych and Jerwood. See U.S. Exhibit 9, pp. 61-65; Exhibits 446, 449, 451, 743; Exhibit 728, p. 668 ff.; Woolrych, A Treatise on the Law of Waters 4-5, 19-21 (1830); Jerwood, A Dissertation on the Rights to the Sea Shores 1-128 (1850). None of these writers believed that the crown's sovereignty and dominion were confined within a three-mile or cannon-shot limit. In general they adhered to the boundaries of the British seas as traditionally defined, and quoted Hale and the other older writers with approval. Schultes adopted Bodin's 60-mile limit, and mentioned pearls, coral and amber as among the subjects of maritime property. Exhibit 743, pp. 3-4.

The case of Queen v. Keyn, in 1876, has many times been exhaustively analyzed. On this subject we incorporate as part of this brief Professor Horwitz' testimony at Tr. 153-212. Professor Horwitz has demonstrated that the holding of the case was limited to

the thesis that the admiralty jurisdiction did not extend to foreigners in the English seas without a specific parliamentary enactment to that effect. Tr. 199. That holding was based on an erroneous analysis of the history of the admiralty jurisdiction. Tr. 161-67; see pp. 25-32, 102-07, 147-48, supra. All the judges acknowledged the existence of various crown rights in the marginal sea, and the majority of them believed that the marginal sea was part of the territory of England. Tr. 167-91, 199-201. The holding as to the admiralty jurisdiction was promptly overruled by Parliament, which pointedly declared that the jurisdiction "extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of her majesty's dominions to such a distance as is necessary for the defense and security of such dominions." Tr. 193-94; Exhibit 170. (Emphasis added.)

In Manchester v. Massachusetts, 139 U.S. 240, 257 (1891), the Supreme Court of the United States regarded the Keyn decision as dealing only with the admiralty jurisdiction, and refused to apply it as in any way casting doubt on sovereign jurisdiction in territorial waters or on the right of coastal States to control sea fisheries. For other authoritative comments on the Keyn case, see Tr. 514-17; Exhibit 747, pp. 138-39; U.S. Exhibit 7, pp. 109-11; U.S. Exhibit 9, pp. 65-71.

In decisions rendered since 1876, the British courts have, likewise, uniformly refused to allow the Keyn dicta to cast any doubt on the traditional law, and have uniformly reaffirmed the maritime sovereignty and dominion of the crown in the marginal sea. The case law has been exhaustively analyzed, and there is no need to discuss it in detail here. See Tr. 195-99; Exhibits 162, 163, 164, 165; Exhibit 747, pp. 141-42; U.S. Exhibit 9, pp. 51-53, 59-61, 71-73. These decisions, written between 1892 and 1916 -- during the heyday of the three-mile limit, especially in British opinion -- did not regard the crown's ownership of the seabed as necessarily limited to three miles. Rather, they used such formulas as "for some distance below low-water mark" (U.S. Exhibit 9, p. 60), or "whether within the narrow seas, or from the coast outward to the three-mile limit" (ibid.), or carefully pointed out that the status of the sea beyond three miles was not at issue and therefore need not be decided, Exhibit 165, p. 199.*/

In the most recent of these cases, Secretary of State for India v. Chelikani Rama Rao, 43 L.R. Ind. App. 192 (1916), the

*/ In cross-examining Professor Horwitz, plaintiff's counsel incorrectly suggested that one case, Lord Advocate v. Clyde Navigation Trustees, concerned Loch Lomond, which is an inland lake. In fact the case concerned Loch Long, which is an arm of the sea and a part of the Firth of Clyde. Exhibit 162. The decision did, however, treat Loch Long as internal waters and limited its holding to such waters.

Privy Council relied on Hale in holding that islands rising in the sea belong to the crown because "'they are part of that soil of the sea, that belonged before [i.e., while under water] in point of propriety to the king.'" The Privy Council had this to say about the Keyn case:

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of Reg. v. Keyn. The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. It should not be forgotten that that case had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
>
> "When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound." Id. at 199.

Thus in Chelikani the Privy Council, the highest court in Britain with respect to the colonies and dominions, squarely repudiated the dicta in Keyn and affirmed the traditional doctrine of crown ownership of the seabed.

In Croft v. Dunphy, (1933) A.C. 156, 162, the Privy Council upheld a statute authorizing seizures of ships in Canadian waters out to 12 miles from the coast. The court declared that "it has long been

recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

In Carr v. Francis Times & Co., (1902) A.C. 176, 181, it was declared:

> "For whatever purpose Queen v. Keyn was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the next session but one passed an Act of Parliament reversing that judgment--that is to say, affirming in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country." U.S. Exhibit 17, p.110.

The legal rule that the crown is prima facie the owner of the foreshore, which as we have seen derived from the crown's ownership of the seabed, and which Professor Thorne regarded as accepted only in a few cases of dubious authority in the 17th century, has remained in full force and effect, without a break, down to the present. Moore, op. cit. at 436-613. Likewise, the crown continued to regulate sedentary fisheries and, on occasion, to grant or to lease them to subjects. Exhibit 728, p. xlix; Exhibit 729, p. 181. And British law continues to recognize the exclusive right to surface fisheries in the

sea or arms thereof granted in earlier ages by the crown. Lord Fitzhardinge v. Purcell, (1908) 2 Ch. 139.

By the Continental Shelf Act, 1964, c. 29, s.1.(1), Parliament enacted that "any rights exercisable by the United Kingdom outside territorial waters with respect to the seabed and subsoil and their natural resources . . . are hereby vested in Her Majesty."

Two conclusions are inescapable: (1) English law has always, without exception and without any break except for temporary doubts raised by the dicta in Keyn, regarded the seabed and subsoil of the marginal seas around England as belonging to the crown in property; (2) English law has never limited those property rights to three miles from the shore.

B. Vis-a-vis Foreign Nations, British Adherence to the Three-Mile Limit Has Not Been Consistent and Has Not Been Generally Applied to the Seabed and Subsoil.

In 1800, in the case of the Twee Gebroeders, the British prize court referred to the three-mile belt as "lying within the limits to which neutral immunity is usually conceded." Exhibit 747, p. 144. The prize courts have not held that the three-mile limit is a maximum limit even for neutrality purposes; neither have they ruled on the extent of territorial waters as such.

At various times during the 19th century the king's chambers, which of course were far more extensive than any three-mile limit, were regarded as still in effect for neutrality purposes, and were

deemed to apply also for purposes of "exclusive property and jurisdiction." 1 Phillimore, International Law 213 (1854).

Diplomatically, the British position throughout the 19th and 20th centuries has usually (though not invariably) been to insist on the three-mile limit with respect to claims of various types by other nations relating to surface waters; but Britain has taken great care at most times not to commit itself to a three-mile maximum in its own waters.

In the first decade of the 19th century, the British refused to renounce their alleged right to impress foreign seamen found within the British seas as historically defined. Exhibits 713, 763; U.S. Exhibit 379, p. 369.

Throughout the period Britain has maintained its traditional customs jurisdiction over maritime expanses far beyond the three-mile limit, extending at times as much as 100 leagues from the coast. Masterson, Jurisdiction in Marginal Seas 67-173 (1929).

In negotiations with the United States in 1814-15, Britain, while eventually agreeing to an exclusive-fisheries treaty limit of three miles in Canadian waters, did so only after prolonged hesitation, and carefully avoided committing itself to a three-mile limit as a matter of general law. 1 British and Foreign State Papers Part II, p. 1580; 7 British and Foreign State Papers 93 ff.

In the 1820's, Britain was successful in persuading the Netherlands government to prohibit Dutch fishermen from coming within two leagues of the Scottish coasts; in practice the Dutch have generally remained more than 12 or 14 miles from shore. Fulton, op. cit. at 604-06; Crocker, op. cit. at 606.

In the 1830's it was widely believed in Britain that a three-league limit of exclusive fisheries was in force; however, in a convention with France in 1839 Britain adopted the three-mile limit for exclusive-fisheries purposes in return for similar privileges on the French coast. This three-mile treaty limit was not applied to the French sedentary fisheries, as to which a wider exclusive right of the coastal state was recognized. Fulton, op. cit. at 611-12.

The Territorial Waters Jurisdiction Act of 1878, overruling the Keyn decision with respect to the admiralty jurisdiction, specified a three-mile limit for that jurisdiction. As Lord Cairns pointed out, that statutory definition was not regarded as an abandonment of wider claims: "we have never limited our claim to three miles from the coast. The argument . . . is quite sound, that the improvement in modern artillery and other circumstances may entitle a country to protect and exercise rights over a larger margin of the high seas . . . . So far as concerned the procedure introduced by the [Territorial Waters Jurisdiction] Act, the power taken was limited to the three-mile line, but this in no way abandoned the larger claim . . . ." Exhibit 747, p. 205; Reisenfeld, Protection of Coastal

Fisheries Under International Law 149 (1942). Lord Salisbury, when Foreign Minister, likewise declared that "great care had been taken not to name three miles as the territorial limit." Fulton, op. cit. at 731; see also Riesenfeld, op. cit. at 151.

The Fisheries Act of 1889, 52 and 53 Vict. c. 23, provided for a closed season for herring trawling within the Moray Firth off Scotland, drawing a closing line of 80 miles between the two headlands. A subsequent act asserted jurisdiction over trawling in Scottish waters generally out to 13 miles. Riesenfeld, op. cit. at 156. Under these statutes foreigners were apprehended, tried and convicted for violating British fishing regulations far more than three miles out in Scottish waters, and the convictions were upheld. Poll v. Lord Advocate, (1897) 5 Scots L. T. 167, 3 British Int'l Law Cases 747 (1965); Peters v. Olsen, (1905) 4 Adam's Justiciary Reports 608, 3 British Int'l Law Cases 750; Mortensen v. Peters, (1906) 8 F. 93, 3 British Int'l Law Cases 754; Riesenfeld, op. cit. at 153-61; Crocker, op. cit. at 587-90; Fulton, op. cit. at 717-37. While the British government subsequently restored some of the fines imposed and released the prisoners, it did so only on extracting an agreement from the Norwegian government to prevent Norwegian trawling in the Moray Firth. Riesenfeld, op. cit. at 158-59.

Likewise, with respect to sedentary fisheries and other resources of the seabed and subsoil, British adherence to the three-mile

limit has been subject to many exceptions and limitations. Only two of these need be mentioned. With respect to the pearl fisheries of Ceylon, Britain has insisted on exclusive jurisdiction far beyond the three-mile limit. Since those fisheries have been exploited for many centuries, of course Britain has cited their historic character as one basis for the exclusive right. Tr. 575-83. Likewise, pursuant to the Irish Oyster Fisheries Act of 1856, 31 and 32 Vict. c. 45, § 67, and subsequent legislation, Parliament empowered the Irish Fishery Commissioners to regulate the dredging for oysters within 20 miles of the Irish coast, "and all such byelaws shall apply equally to all boats and persons on whom they may be binding." Exhibit 729, p. 295; Fulton, op. cit. at 716-17; Tr. 570-72.

In 1928, responding to the Preparatory Committee for the Conference for the Codification of International Law, the British government, while adhering to the three-mile rule as to the surface of territorial waters, continued as follows:

> "No claim is made by His Majesty's Government in Great Britain to exercise rights over the high seas outside the belt of territorial waters.
>
> "There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or bêches-de-mer on the sea bottom are practiced, and which have by long usage come to be regarded as the subject of occupation and property. The foregoing answer is not intended to exclude claims to the sedentary fisheries on these banks. The question is understood to relate only to claims to exercise rights over the waters of the high seas." Riesenfeld, op. cit. at 166.

While the British of course attempted to justify their exclusive sedentary fisheries beyond three miles on the ground of "long usage," they carefully specified that they were refraining from expressing an opinion adverse to seabed claims generally, and that their insistence on the three-mile limit related "only to claims to exercise rights over the waters of the high seas."

Australia responded to the Preparatory Committee as follows:

> "They make no claim to exercise rights over the high seas outside the belt of territorial waters. This answer is made on the understanding that the question relates only to claims to exercise sovereign rights over the waters of the high seas, and does not relate to claims to exercise jurisdiction over sedentary fisheries for pearl oysters and bêches-de-mer, etc.; on certain portions of the sea bottom outside the three-mile limit which, by long usage, have come to be regarded as the subject of occupation and property." Riesenfeld, op. cit. at 167.

While Australia likewise justified its claims on the basis of "long usage," that term could not with respect to Australia have been used in the sense of any ancient or immemorial occupation, since the Australian sedentary fisheries dated only from the late 19th century. Tr. 592. The Australian Pearl Fisheries Act of 1953 excluded foreign fishermen from the Arafura Sea and adjacent proclaimed waters. 4 Whiteman, Digest of International Law 804 (1965).

In 1942, three years before the Truman Proclamation, Britain and Venezuela by treaty divided between them the seabed and subsoil of the continental shelf, outside territorial waters, of the Gulf of Paria, and Britain unilaterally proclaimed that its portion of

the seabed and subsoil "shall be annexed to and form part of His Majesty's dominions." 2 Whiteman, op. cit. at 1162-63 (1963); 4 id. at 789-92 (1965).

By the Continental Shelf Act of 1964, c. 29, Parliament asserted the exclusive right to explore and to exploit the resources of the seabed and subsoil of the continental shelf of the United Kingdom.

C. The Canadian and Australian Cases Turned on the Allocation of Powers in Late 19th-Century British Constitutional Law Between the Imperial Crown and Unchartered Imperial Provinces, and Thus Have No Relevance to the Issues in the Present Litigation.

1. The Canadian Advisory Opinion

For an analysis of the Canadian advisory opinion, Re Off-Shore Mineral Rights of British Columbia, we adopt and incorporate by reference herein Professor Horwitz' testimony at Tr. 207-12. The case turned on the particular history of British Columbia -- a 19th-century, unchartered British administrative unit -- and thus has no application or relevance to the historic rights of the Common Counsel States.

The advisory opinion has not been accepted by the Atlantic provinces of Canada as extinguishing their ownership of seabed and subsoil rights; and the Canadian federal government has not attempted to extinguish those rights, though the prime minister has opined that the principles of the advisory opinion are applicable to the east coast.

The Atlantic provinces have asserted seabed and subsoil ownership and have, since the date of the advisory opinion, granted both exploration permits and licenses for exploitation of continental-shelf mineral resources. Exhibit 827.*/

That the Atlantic provinces' position is well founded is strongly suggested by the decision of the Quebec King's Bench in Re Quebec Fisheries, 35 D.L.R. 1 (1917), which held that the province of Quebec owned the soil of both its internal waters and its territorial sea, and in consequence had the right to grant exclusive fisheries in the waters thereof. The Privy Council had previously reached a contrary result with respect to British Columbia, holding that the fisheries of that province were the property of the dominion government because of British Columbia's particular history. Id. at 4-6. The dominion government then contended, just as the prime minister has recently asserted with respect to continental-shelf rights, that the principles held applicable to British Columbia should be applied to other provinces as well. Id. at 13.

But in the Quebec case, it was squarely held that the crown's ownership of the solum of internal waters and of the territorial sea

*/ Exhibits 823 through 827 have not yet been admitted in evidence. Plaintiff's counsel has advised that he will not object to Exhibits 824, 825 and 826, but will object to Exhibits 823 and 827. If his objection is sustained, the Common Counsel States will offer proof of the facts in question in some other form under these exhibit numbers.

and the fisheries of the waters thereof had passed to the province of Quebec prior to the creation of the dominion government in 1867, and had never been transferred.*/ The court refused to apply the Keyn dicta:

> "The Crown is owner of the soil and, consequently, the fisheries there belong to the province. Nevertheless a serious problem arises with reference to the area within the 3-mile limit. Although there is a controversy with regard to ownership by the Crown, it seems to me more logical to conclude in the affirmative, at least with reference to the profits of the fisheries. The weight of the authorities seems to me to be in that sense, notwithstanding the judgment in the case of (Reg. v. Keyn (1876) 2 Ex. D. 63) where the Judges were, nevertheless, divided. (Vol. 28, Hal's, Laws of England, vo. Waters and Watercourses, p. 360, No. 653 and notes).
>
> "The doctrine is there summed up as follows: The soil of the sea between the low-water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown, is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is prima facie the property of the Crown. The Crown also claims to be entitled to the mines and minerals under the soil of the sea within these limits." Id. at 19.

*/ This was the view of three of the five judges. Cross, J., dissented; Archambeault, C.J., declined to express an opinion on the territorial-sea issue on the ground that the Privy Council had previously regarded it as "a question of international law upon which the national or municipal Courts should not express an opinion," at least where the imperial government had not been made a party. Id. at 8. Subsequently the Privy Council made the same holding in the Quebec case. Attorney General for Canada v. Attorney General for Quebec, (1921) 1 A.C. 413, 431. This in no way impeaches the authority of the Quebec case for our purposes: (1) today there is no doubt about the relevant international law; (2) the United States is a party here; (3) our courts have never been

"Moreover, shortly after the judgment in Reg. v. Keyn, the Imperial parliament passed a declaratory Act, called 'The Territorial Jurisdiction Act,' 1878, 41-42 Vict., ch. 3, completely destroying the effect of that judgment." Id. at 20.

"The question is, moreover, of no importance even according to those who maintain that it is merely a matter of jurisdiction and not of proprietary right with regard to the soil; there is no controversy respecting the ownership of the fisheries. Even in England, where the King cannot exclude his subjects from that fishing, aliens are nevertheless excluded. (14 Hals. Laws of England, p. 633, No. 1411 and note)." Ibid.

"That question of the 3-mile limit must, like the others, be decided in the affirmative [i.e., in favor of the province]. It in nowise affects the rights of the federal government with respect to trade and navigation, nor respecting the regulation of the fisheries, even if we agree to decide for the case now before us, whether the fisheries in those territorial seas belong to the province as a domain which can be exploited to its own profit. Whatever alternative may be chosen, it seems to be that it must be said that they belong to it according to the spirit at least of the Confederation Act interpreted by the judgment of 1898, which says that the Dominion has no rights of ownership in the fisheries except in such as may be carried on in public harbours. This conclusion, naturally, does not exclude the Dominion's jurisdiction for all purposes within its competence. It seems to me, therefore,

subject to the doctrine of judicial restraint applied by the Privy Council with respect to international-law questions.

The Privy Council also held that Quebec did not have the right to grant exclusive surface fisheries, on the ground of the public right to such fisheries since Magna Carta. (See p. 43 , supra.) Id. at 428. But the Council affirmed the Quebec court's holding that the soil under tidal waters was vested in the province and therefore that the province had the right to grant exclusive fisheries requiring the affixing of "engines" to that soil. Id. at 428, 431-32.

> that it may be legitimately concluded that all existing rights in the fisheries, even within the three-mile limit, belonged to the province before Confederation and that the B.N.A. [British North America] Act has not had the effect of taking them away from it." Id. at 21.

If and when the continental-shelf question is determined by the Canadian courts, it would appear that the federal government will have considerable difficulty, in light of the Quebec decision, in achieving the application of the advisory opinion to the Atlantic provinces without a critical examination of the historic rights of those provinces. Moreover, the Quebec reasoning is a square precedent in favor of the position herein of the Common Counsel States, which like Quebec owned their marginal sea and seabed before their federal government was created and have never transferred or renounced them.*/

The issue in the Quebec case concerned only internal waters and the three-mile belt. Interestingly, the court found no need to examine whether international law had recognized such a belt prior

*/ The British North America Act of 1867, which created the dominion government, preserved the pre-existing boundaries of the Atlantic provinces, just as the Constitution of the United States preserved the boundaries of the States. The act also (§ 109) preserved to the Atlantic provinces "all lands, mines, minerals and royalties" belonging to them. In Attorney General for Canada v. Attorneys General for Provinces, (1898) A.C. 700, the Privy Council held that by that section the provinces preserved their proprietary rights with respect to fisheries and submerged lands, except for certain rights expressly transferred by other sections to the dominion government.

to the formation of the dominion government. The court's theory was that, since sea and seabed ownership was fully established in municipal law prior to that date, the province's ownership extended out as far as was allowed by international law at any particular time. Present, not past, international law was the only limiting factor. It seems plain that this reasoning would today vest continental-shelf rights beyond three miles in the provinces, and in the Common Counsel States, even if it were believed that such rights first arose by a recent change in international law.

If and when the continental-shelf rights of the Canadian Atlantic provinces are litigated, the provinces will also be able to derive substantial support from the opinion of Currie, J., in Re Dominion Coal Co., 40 D.L.R. (2d) 593, 606 (1963) (Nova Scotia Supreme Court). The case involved the right of the municipality of Cape Breton County to tax subsea coal mines. A majority of the court found it unnecessary to reach the question whether the mines in question were within the boundaries and dominion of the province of Nova Scotia; but Currie, J., did reach those questions and, rejecting the Keyn dicta, held as follows:

> "In my opinion the law is as stated in the more recent Chelikani case, which decides that the Crown owns the territorial waters and the subjacent land, the proprietary rights of which may be vindicated like other rights of property." Id. at 617.

"Before leaving The Queen v. Keyn, mention may be made of the Territorial Waters Jurisdiction Act passed by the Parliament of Great Britain, 1878 (U.K.), c. 73 the preamble of which would indicate that Parliament regarded the majority opinion as being in error that sovereignty of the Crown stops at low-water mark. The Act was passed to correct the unsatisfactory situation created by The Queen v. Keyn." Ibid.

"I have come to the following further conclusions:

"1. The Crown in the right of Great Britain, as expressed by many acts of Parliament, Crown grants, etc., exercised property rights and jurisdictional rights over the three-mile zone of the coast, territorial and inland waters. This, I think, was the common law. . . ." Id. at 619-20.

"2. Prior to Confederation of Canada, Nova Scotia exercised jurisdiction over an area of territorial waters three miles in width measured from its coasts, bays and rivers. See particularly the 'hovering' Act, 1836, 6 Wm. IV, c. 8, approved by the King in Council, thus recognizing that the control and administration of these waters reposed in the Province of Nova Scotia.

"3. By virtue of s. 109, B.N.A. Act, all property rights held by Nova Scotia before Confederation were retained: Re Provincial Fisheries (1896), 26 S.C.R. 444; (1898) A.C. 700. The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the B.N.A. Act. . . ." Id. at 620.

"4. Since Confederation Nova Scotia has exercised exclusive jurisdiction and administration over the submarine coal areas of the Province, as is evidenced by the many statutes, leases, grants, etc." Ibid.

2. Bonser v. La Macchia

For an analysis of this case the Common Counsel States adopt and incorporate by reference herein Professor Horwitz' testimony at Tr. 202-07.

As there shown, Bonser v. La Macchia did not purport to resolve, and did not resolve, any questions concerning either the territorial boundaries of the Australian states in the marginal sea or the ownership of the seabed and subsoil of the marginal sea as between the Australian states and the federal government. The federal government has introduced legislation on the latter subject, but no such legislation has yet been enacted. Exhibit 823.*/ On the question whether the territorial limits of the Australian states extend below low-water mark, Bonser v. La Macchia is wholly inconclusive: two judges (Kitto and Menzies) held in the affirmative, two (Barwick and Windeyer) held in the negative, and two (McTiernan and Owen) found it unnecessary to decide the question. The question of continental-shelf ownership was not addressed at all.

By agreement between the Australian federal government and the states, the states have exclusive management and licensing authority over all petroleum exploitation in the Australian continental shelf, both within and without territorial waters. Lumb, "The Off-Shore Petroleum Agreement and Legislation," 41 Australian Law Journal 453 (1968).

Both the territorial-limits issue and, aside from petroleum, the continental-shelf issue are still entirely open as a matter of Australian law. On May 31, 1973, the states of Tasmania and

*/ See footnote p. 533, supra.

Queensland petitioned the Queen to refer the continental-shelf question to the Privy Council for decision. Exhibits 823, 824, 825.*/ The other Australian states have joined in these petitions. Exhibit 826.*/ The states have received large numbers of applications for mineral licenses with respect to portions of the continental shelf, but have refrained from acting on them pending resolution of the legal issue.

In 1964, in language strongly reminiscent of the Territorial Waters Jurisdiction Act of 1878, the Queensland legislature declared that its exclusive jurisdiction over subsea mining extends and applies, and shall be deemed always to have extended and applied, to the adjacent seabed and subsoil out to the 200-meter depth mark or beyond that limit as far as exploitation is possible. Mineral Resources (Adjacent Submarine Areas) Act of 1964.

* * *

It is notable that in the present proceeding plaintiff has placed its primary reliance on four decisions in four different common-law jurisdictions: United States v. California, Queen v. Keyn, Re Offshore Mineral Rights and Bonser v. La Macchia. Not one of these decisions, to the extent that it dealt with the subject at all, has been regarded as finally and correctly determining the ownership of seabed and subsoil rights. The result in United States v. California was overruled

*/ See footnote p. 533, supra.

by act of Congress and its reasoning was repudiated by subsequent decisions of the Supreme Court. The holding of Queen v. Keyn, which was with respect to the admiralty jurisdiction, was overruled by act of Parliament. Both Congress and Parliament went out of their way to declare in pointed language their opinion that the California and Keyn decisions, respectively, had been erroneous when decided. Subsequent British decisions have refused to apply the dicta in Queen v. Keyn as in any way altering or casting doubt on the traditional English law of maritime sovereignty and dominion. The Canadian advisory opinion has been ignored by the Atlantic provinces, and the federal government has not felt confident enough of its position to attempt to extinguish their rights. Bonser v. La Macchia determined no seabed and subsoil issues; those issues, as between the federal government and the states, have been resolved as to petroleum primarily in favor of the states; otherwise they are still open for decision and have recently been presented by the states in seeking a determination by the Privy Council.