No. 35, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF MAINE, ET AL.

BEFORE THE SPECIAL MASTER

REPLY BRIEF OF THE UNITED STATES

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This brief sets forth the reply of the United States to defendants' post-trial briefs.[1/] The organization of this brief is based upon our proposed conclusions of law, proceeding in numerical order. We omit for this purpose our proposed summary conclusions of law 1 and 19, that the United States is entitled as against the defendant States to the natural resources

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1/ The principal contentions of the three Southern States are covered in the brief of the Common Counsel States. Most of our reply is therefore addressed to the latter brief without specific reference to the brief filed by the Southern States.

of the seabed underlying the Atlantic Ocean beyond 3 geographic miles from the coastline and that the United States is entitled to judgment as prayed for in its complaint. We therefore begin our reply to defendants' briefs with a discussion of our proposed conclusion of law 2.[2/]

2. The claims of the defendant States are invalid under the Supreme Court's decisions in United States v. California, 332 U.S. 19; United States v. Louisiana, 339 U.S. 699; United States v. Texas, 339 U.S. 707 (Br. 8-16). In those cases the Supreme Court has determined that:

(a)-(c) English law of the 17th and 18th centuries did not recognize general property rights to the seas and seabed beyond the low water mark (332 U.S. at 32-33); the original 13 colonies did not acquire ownership of the adjacent seas or seabed or the resources of those lands under their original grants or charters (332 U.S. at 31); international law in the 17th and 18th centuries did not recognize general property rights to the adjacent seas and seabed (332 U.S. at 31-32). (Br. 9).

2/ The following abbreviations will be used throughout: "Br." refers to our opening brief; "C.C. Br." refers to the brief of the Common Counsel States; "S.S. Br." refers to the brief of the three Southern States.

Defendants do not contend that their claims here can be upheld consistently with this Court's decision in United States v. California, 332 U.S. 19. Indeed, the holding in that case would appear to foreclose completely the relief defendants seek here. As a necessary, but not sufficient, prerequisite of success in this litigation, defendants must establish that their predecessors, the original colonies, possessed and retained ownership of the soil under the marginal seas. This Court in California, after reviewing essentially the same evidence that has been presented here, held that those colonies never acquired ownership even of the soil under the immediate offshore seas. Defendants here, of course, press a far more extravagant claim to the seabeds extending 100 miles off their shores. 3/

3/ In opposing our proposed conclusion of law 2, Common Counsel defendants rely, inter alia, on pages 518-541 of their brief. Those pages deal with post-1800 developments in British and Commonwealth law--developments which, as defendants concede (C.C. Br. 518), are irrelevant to the issues in this case. It is, nevertheless, instructive to note that the evidence reviewed there indicates that the extent of English claims over ownership of the marginal seas has historically rested on the range of shore-based artillery. See C.C. Br. 528.

Faced with this difficulty, defendants here argue (C.C. Br. 1-7, 423-428, 477-494; S.S. Br. 83-90; 13-16)[4/] that the Court's factual determination in California was incorrect and has subsequently been repudiated by both the Court and Congress. We discuss the correctness of the Court's factual determination in connection with our proposed conclusions of law 6 through 18, and defendants' assertion that Congress has repudiated that determination is discussed in connection with our proposed conclusion of law 3. We discuss at this point only the subsequent tidelands litigation in the Supreme Court.

In United States v. Louisiana, 363 U.S. 1, 7, the Court expressly reaffirmed the validity of its decisions in California, United States v. Louisiana, 339 U.S. 699, and United States v. Texas, 339 U.S. 707, and stated that those decisions are "applicable to all coastal States." Moreover, in language which is dispositive of the issue involved here, the Court has determined that the United States, through enactment of the Submerged Lands Act, "relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." United States v. Louisiana, 363 U.S. 1, 6-7. We claim nothing more here.

4/ The brief of the three Southern States is divided into two parts: proposed findings of fact and conclusions of law of those States and comments upon objections to the proposed findings and conclusions of the United States, each part separately paginated. Throughout this brief we shall indicate the separate pagination by a semicolon between references to the two parts as above.

Defendants nevertheless suggest (C.C. Br. 488-489; see also C.C. Br. 489-494) that the second Louisiana decision and United States v. Florida, 363 U.S. 121, undercut the California decision by holding that a state may own the subsoil of the marginal seas without endangering vital national defense or foreign policy interests. That contention is based on a misunderstanding of the doctrinal basis of all three decisions. The decision in California was grounded in historical analysis: the Court determined that the original colonies had not acquired ownership of the subsoil of the marginal seas in the Atlantic Ocean either prior to or upon independence (332 U.S. at 31-32), that dominion over the marginal seas was established only by the national government after independence (332 U.S. at 33-34), and that this dominion has since been maintained by the federal government as "a function of national external sovereignty." 332 U.S. at 34. Federal defense and foreign policy considerations were relevant to that analysis because such considerations had led to the establishment and maintenance of federal maritime sovereignty.

The subsequent decisions in the second Louisiana case and the Florida case were also grounded in historical analysis, but the history being analyzed was that of boundary claims in

the Gulf of Mexico. The Court reviewed that history and determined that Texas and Florida, unlike the Atlantic Coastal States, had historic boundaries extending into the adjacent seas. Once that determination had been made, it was unnecessary for the Court to decide whether the federal government had exercised protection and control over those waters as an incident of national external sovereignty, for in the Submerged Lands Act the federal government had granted those States the natural resources of the seabed within their historic boundaries (to the extent of no more than 3 leagues into the Gulf). Since the Court had no occasion to consider whether the federal government had exercised sovereignty within the controverted waters, its failure to do so obviously does not indicate rejection of the California decision or rationale.

3. In enacting the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 et seq., and the Outer Continental Shelf Lands Act, 67 Stat. 420, 43 U.S.C. 1331 et seq., Congress assessed the respective interests of the United States and the States in the natural resources of the seabed and concurred in the determination implicit in the Supreme Court's decision in United States v. California, 332 U.S. 19, that the United States is entitled as against the States to the natural resources of the seabed of the

Atlantic Ocean beyond 3 geographical miles from the coastline (Br. 16-17).

Defendants assert (C.C. Br. 423-429, 482-489; S.S. Br. 86-90; 16-17) that Congress repudiated the alleged rationale of the original California decision that federal ownership of the submerged lands was required by the foreign affairs and defense powers of the federal government. As we have shown, however, that was not the basis of this Court's decision in California; the congressional severance of ownership of immediate offshore tidelands from national external sovereignty was in no way inconsistent with the California rationale. This Court itself has properly evaluated the Congressional response to the California decision:

> * * * Congress accepted our holdings as declaring the then-existing law--that these States had never owned the offshore lands--but believed that all coastal States were equitably entitled to keep all the submerged lands they had long treated as their own, without regard to technical legal ownership or boundaries. [United States v. Louisiana, 363 U.S. 1, 86.] 5/

5/ In a footnote to that statement, the Court set out the passages from the legislative history upon which it relied. Id. at footnote 4.

Indeed, by limiting the grant of seabed rights to the defendant States to 3 miles and retaining the rights in outlying seabeds for the United States, Congress in fact affirmed the basic California holding:

> * * * By [the Submerged Lands Act] the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits. [United States v. Louisiana, 363 U.S. 1, 6-7 (emphasis added).] 6/

4. The previous determinations of the Supreme Court and of Congress create a heavy burden on the defendant States in this case to introduce new arguments and new evidence to support their claims (Br. 25-29).

The Supreme Court has already decided the issue defendants raise here. United States v. California, 332 U.S. 19. Even though defendants, some of whom participated in that case as amici curiae, are not barred by res judicata from asserting their claims

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6/ Defendants contend (C.C. Br. 495-501) that the Submerged Lands Act and the Outer Continental Shelf Lands Act are unconstitutional to the extent that they purport to deprive them of offshore property. It is their position that, from colonial times down to the present, they have historically and continuously owned the marginal seas and that they may not be deprived of such ownership by Act of Congress. We submit, however, that no such ownership has been established.

here, the doctrine of stare decisis imposes upon them a heavy burden of showing that this Court's earlier determinations of mixed fact and law were erroneous. Defendants have not shown why that doctrine, which is rooted in considerations of judicial economy and fairness, should not have its normal force here.

Contrary to defendants' suggestion (C.C. Br. 6; S.S. Br. 83-87; 16), this Court in California had before it most of the authorities and relevant evidence which defendants have presented here. See Br. 11-14.

Defendants argue (C.C. Br. 6-7) that the defendant States have never in any fashion "acquiesced" in any surrender of their title. But the rights in question were not claimed by defendants even as late as their participation in the California case. It would be difficult to show acquiescence in the surrender of a title that historically had never been claimed or established.

Finally, defendants argue (C.C. Br. 7) that there are no outstanding leases with respect to the seabeds at issue and therefore no justifiable federal reliance on the California decision. This is, to say the least, an ironic argument, since the

cloud which defendants have cast over the federal government's title is one of the principal obstacles to effective exploitation of the potential mineral reserves in these seabeds. Moreover, if the California decision is overturned with respect to the Atlantic Coastal States, perhaps California, which had rested on its entitlement to "equal footing" with those States, would be able to reopen its case. The United States has relied on the California decision with respect to the Pacific Ocean and has received millions of dollars from leases of its offshore property there.

5. The defendant States have failed to introduce new arguments and new evidence sufficient to justify overruling the Supreme Court's prior decisions, or sufficient to show any legal or factual basis for departing in this case from the rationale of those decisions.

This proposed conclusion of law in effect summarizes our proposed conclusions of law 6 through 18, discussed below.

6. English law before and during the 17th and 18th centuries did not recognize a general property right to the seas and seabed of the English seas (Br. 30-98).

This proposed conclusion of law summarizes our proposed conclusions 7 through 9, which are discussed in greater detail below. In this section of our brief, we address ourselves only to the defendants' misuse or misunderstanding of the concept of maritime sovereignty as known under English law before and during the 17th and 18th centuries. Throughout their discussion of the English law of this period, defendants assume that an assertion of "sovereignty" over the British seas necessarily includes a claim of ownership, in a property law sense, of those seas and the underlying seabed. Defendants' assumption is ill-founded. We have already shown (Br. 35-37, 57, 59-66) that the term "sovereignty," was not used in a proprietary sense during that period. As Fulton said:

> One thus finds in English history a great deal which refers to the sovereignty of the sea, although the words were not always used to signify the same thing. Most commonly perhaps they meant a mastery or supremacy by force of arms, -- what is now so much spoken of as sea-power. [Fulton, The Sovereignty of the Sea 2.]

Both "sovereignty" and "dominion," as applied to the seas before and during the 17th and 18th centuries, referred primarily to control of a political nature, resting on military dominance, and only incidentally to certain specific property interests

acquired by additional acts of appropriation. Moreover, the jurisdiction exercised pursuant to such sovereignty and dominion was initially only protective in nature, and largely remained so even during the 17th and 18th centuries. Defendants, by construing "sovereignty" and "dominion", when found in early writings, in a property law sense, have simply assumed away one of the issues presented in this litigation. See C.C. Br. 10, footnote. This issue--whether the concept of maritime sovereignty comprehended property ownership of the seabed under English law--is discussed in the following sections.

7. English law and practice during the period between 1300 and 1600 A.D. viewed sovereignty of the seas in a protective sense, connoting no general property right to those seas (Br. 35-52).

(a) English claims relating to fishing during the period between 1300 and 1600 were manifestations of the concept of sovereignty as protective jurisdiction (Br. 37-41).

Common Counsel defendants address this point at pages 11-13, 18-25, 37-39 and 42-48 of their brief. See also S.S. Br. 6-19; 20. Defendants rely in part upon evidence relating to the

crown right to royal fish, arguing (C.C. Br. 11-13; S.S. Br. 8) that certain prerogative rights in royal fish were based upon sovereignty over the British seas in a territorial or property sense. But the pre-17th century sources cited by defendants do not support that proposition. As Professor Thorne indicated (Tr. 2444-2445) Bracton viewed the seas as they were perceived under Roman law, i.e., res communes.[7/] According to Bracton the crown was entitled to royal fish as ownerless property found on or drifting toward a nearby coast, without regard to any concept of sovereignty over the adjacent seas. See 2 Thorne (ed.), Bracton 41, 58, 166-167, 293, 339.

Similarly, Britton described royal fish as "sturgeons taken within our land [and] whales found within our jurisdiction." 1 Nichols (ed.), Britton 68 (1865). He further stated that treasure found on land (whoever the owner of the actual

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7/ Bracton was, of course, the major authority of his time and wrote by commission of the crown. Although defendants suggest (C.C. Br. 21) that Bracton recognized the power to levy tolls as stemming from ownership of the sea, it is clear that Bracton in fact regarded the seas as res communes. See Gould, The Law of Waters, 7, footnote.

property) belonged to the king, but treasure found on the sea belonged to the finder. Nichols (ed.), Britton 56 (1901). This demonstrates that the king's prerogative to royal fish was not an indicium of ownership of the sea or seabed itself, but merely an example of the crown's overriding rights in ownerless property found by its subjects.

Subsequently, in the 17th century, Hale sought to extend the king's claim to royal fish throughout the English seas. See C.C. Br. 12. Hale believed that the crown had obtained sovereignty over those seas in a manner which entitled it to certain prerogative rights, including that to royal fish as ownerless property. But he did not believe that English sovereignty over those seas was of a proprietary nature. See p. 36, infra.

Certainly, De Prerogativa Regis, which grants to the king certain royal fish "taken in the sea or elsewhere within the realm" (C.C. Br. 11), does not advance defendants' position. The quoted phrase could as easily imply that the sea is outside the realm as that the sea is within the realm; and if the latter, the word "sea" could have been used narrowly to refer only to bays, rivers, ports, havens, and arms of the sea which under common law were a part of the realm. This

narrow meaning apparently is the one understood by Britton and Bracton. 8/

Defendants further rely (C.C. Br. 17-18) upon royal grants of fisheries during the reigns of Henry III and Edward I as showing crown ownership of the seas. It is by no means clear that these fisheries were in the open sea. It appears that most related to "weirs all around the coasts" (C.C. Br. 19). Weirs can be erected only in tidal waters; the weir traps fish within an enclosed area that has been left dry or quite shallow by the falling of the tide. See Moore, A History of the Foreshore 730. Generally speaking, regulations affecting fishing were limited to inland waterways. See 1 Black Book of the Admiralty 165. Jurisdiction over these weirs was based on the obligation to preserve freedom of fishing and navigation in those waters, not upon ownership of the submerged lands on which they were erected.

8/ For a highly readable, if less than authoritative, account of the royal fish doctrine, see Melville, Moby Dick ch. 90. That account is fully consistent with our understanding of the territorially limited nature of the crown's claim. We especially commend the last paragraph, which comments with some levity on the share of the royal fish allocated to the king. (Presumably Victorian sensibilities prevented the author from commenting in complementary fashion with regard to the portion allocated to the queen.)

With reference to the immediately preceding chapter of the same work, it is our position in this litigation that the seabeds in question have long been "fast-fish," whereas defendants, ignoring the "waif" affixed by this Court's decision in United States v. California, 332 U.S. 19, persist in regarding them as "loose-fish."

Moreover, as defendants concede (C.C. Br. 43, footnote), the grants of fisheries upon which they rely were in fact invalid under English law: "an exclusive fishery in English waters must antedate Magna Carta to be valid" (ibid.). Thus, after Magna Carta, the crown lacked any authority at all to grant exclusive fisheries. Moreover, the crown did not claim to own the fisheries. See Fulton, supra, 65-66.

Defendants' evidence and arguments therefore establish only that, during the period in question, the crown exercised protective jurisdiction over nearby seas. This protective jurisdiction rested not on proprietary rights, nor even upon a concept of sovereignty which would have permitted close regulation of the fisheries, but merely on naval power.

(b) The flag salute at sea during that period was a manifestation of a protective concept of sovereignty (Br. 41-42).

The only evidence introduced by defendants relating to the flag salute during the period of the so-called older legal tradition (C.C. Br. 13-14, 36) are the writings of two 20th century authorities, Colombos and Halleck. Colombos, like Fulton, suggests that the flag salute originated as an exercise

of protective jurisdiction and was met by significant opposition by other nations as Britain's imperial ambitions grew in the 17th century. See Colombos, The International Law of the Sea, 45, 52-55 (1967). Halleck merely says that England during the 17th century claimed the right to a flag salute and other nations contested it. See Crocker, The Extent of the Marginal Sea 83 (1919). The evidence concerning this practice falls far short of showing the assertion of an effective territorial claim.

(c) - (e) English admiralty jurisdiction during that period did not recognize a general property right to the sea; the origins of the admiralty court during that period reflect a concept of protective jurisdiction; the exercise of criminal jurisdiction by the admiral during that period was not territorial (Br. 43-47).

As we have shown (Br. 35-52), during the period of the so-called "older legal tradition" English law denied the concept of property ownership of the adjacent seas or

the seabed. On the other hand, English law has traditionally provided that the common law holds jurisdiction over the arms of the sea, where a man could see to the far shore. 8 Halsbury's Laws of England 468. Those waters have always been viewed as within the boundaries of counties, where, for example a coroner could by virtue of his common law jurisdiction investigate a death on a ship--which he could not do if the ship were on the high seas. Rex v. Solgard, 93 Eng. Rep. 1055 (1738). English law has always recognized the rights of the crown in these waters both for purposes of fishing and navigation and in a property sense. The crown could and did grant rights to the sea and subsoil within such bays and inlets. Moore, A History of the Foreshore 111-138 (1888).

As the government showed through the testimony of Professor Wroth, the statute of 1389, 13 Rich. 2 c. 5, 2 Statutes of the Realm 62 (1816), demonstrates that in the 14th century the admiral's jurisdiction was understood to be outside, not within, the realm. That statute--which provides that the admiral shall "not meddle from henceforth with anything done within the realm, but only of a thing done on the sea"--was enacted to curb the practice of the admiral of taking jurisdiction over cases arising within the arms of the sea and other inland waters within the bodies of the counties; the statute restricted the admiral's jurisdiction to cases arising beyond the waters of the bodies of the counties. O'Connell, "The Juridical Nature of the Territorial Sea," 45 British Yearbook of International Law 372-374 (1971). As Professor Wroth testified, it has been the view of several generations of English lawyers that the statute thereby barred the exercise of any admiralty jurisdiction "within the realm." See 1 Holdsworth, A History of English Law 548 (1936); Marsden, "Select Pleas in the Court of Admiralty," I Selden Society L (1892); Regina v. Keyn, L.R. 2 Exch. Div. 63, 167-169 (1876);

W. Prichard, An Analytical Digest of All Reported Cases Determined by the High Court of Admiralty 5 (1849); Finch, Law or a Discourse Thereof in Law Books 778 (1613).

To refute this historic understanding that the "realm" as such did not embrace the British seas, defendants rely (C.C. Br. 15-18) almost exclusively on a Latin pleading. Defendants contend that the Latin pleading establishes that the statute should be read as "anything done within the realm except with respect to a thing done on the sea." That pleading is of course merely a translation of the statute into Latin; the original statute was in French. Marsden, supra, at 1. The critical phrase in French was "mes seulement," which has always been translated into English as "but only" and never as "except" or "unless". See Marsden, supra at 1; Pulton, Collection of the Statutes, 1225-1629, 225 (1640); 2 Statutes of the Realm 61-68, 72-82 (1963);[9/] I Halsbury's Laws of England 47 (1952); Prichard, supra, at 5.

Defendants also rely (C.C. Br. 26) upon De Superioritate Maris as evidence of ancient sovereignty of the crown over the English seas in a territorial or proprietary

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9/ The Statutes of the Realm is the authoritative source for pre-1713 statutes. Winfield, The Chief Sources of English Legal History 94, 96-97 (1925).

sense. That document, which in any event asserts only a protective jurisdiction, was of course nothing more than a draft pleading which is not authoritative as a territorial claim. See Meadows, Observations Concerning the Dominion and Sovereignty of the Sea 29. As Meadows points out (id. at 31), De Superioritate Maris was merely a compilation of allegations made by English advocates to support an English case.

Defendants further rely (C.C. Br. 27) upon the writings of Marsden and Baldus to establish the territorial nature of admiralty jurisdiction in the British seas. But those writers support our concept of admiralty jurisdiction as a reflection of protective jurisdiction. See Marsden, supra at 1; Maine Ex. 690 at 76; Benedict, Maine Ex. 667 at 362, 369-370. Baldus was described by Fenn as asserting that the sea, even of a port or harbor, is not part of the territory of the kingdom but an area in which admiralty jurisdiction may nevertheless be exercised for the suppression of piracy and punishment of offenses. Fenn, The Origin of the Right of Fishery in Territorial Waters 76.

Defendants contend (C.C. Br. 25-32) that admiralty jurisdiction was "territorial," apparently meaning that the sea was a province of the realm which was, in terms of the nature of the sovereignty being exercised, indistinguishable

from the land. There is no basis for this contention. Defendants' proposition is easily tested: did the admiral's jurisdiction extend, for example, to a murder of one foreigner by another, committed on a foreign ship while passing through English seas? As we have shown (Br. 46-47) it is clear that English admiralty jurisdiction did not extend to such crimes; it was exercised only over British subjects, British ships, and cases of piracy. The admiralty jurisdiction was exercised as an incident of protective jurisdiction, i.e., to protect British persons and property and to prevent piracy. The crown did not pretend to exercise exclusive jurisdiction over crimes--including even piracy--committed in the nearby seas.[10/] Moreover, admiralty jurisdiction was asserted throughout the high seas and was not territorial in any meaningful sense.

None of defendants' evidence is to the contrary, and only their reference (C.C. Br. 31-32) to the 1536 admiralty statute, providing that offenses committed at sea shall be tried as if such offenses had been committed upon land, requires further discussion here. This statute was enacted because, under

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10/ We do not see how defendants (C.C. Br. 29) can cite Fenn for the contrary proposition; Fenn never intimates that the English courts had exclusive jurisdiction over acts of piracy in the adjacent seas.

admiralty procedure, either two witnesses or a confession were required for conviction of piracy. This rule hampered piracy prosecutions, for pirates were generally unwilling to confess and witnesses were generally scarce after a piratical attack. The 1536 statute remedied this defect by providing for the application of common law procedures to piracy trials. The statute did not increase or diminish the criminal jurisdiction which the admiral otherwise exercised on the adjacent seas; it only changed the rules pertaining to the quantum of evidence necessary for conviction.

(f) English law relating to derelict or emerged lands during that period did not recognize a general property right to the seas or seabed (Br. 48-52). The evidence upon which defendants rely in opposing this conclusion (C.C. Br. 32-35, 39-41) relates almost entirely to inland or tidal waters within the bodies of counties. Thus, for example, the 1286 case relied upon by defendants (C.C. Br. 32-33) involved merely the taking of submerged stone from the inland waters of the county of Gloucester (Maine Ex. 728 at 95-96). Likewise, the Toppesham case (C.C. Br. 33) involved only the inland waters of the Port of Exeter. Similarly, cases relating to fishing

weirs (C.C. Br. 33-34) are not evidence of a general property in the sea, since by their very nature weirs are not employed in open seas (see p. 15, supra). Thus the soil of the sea referred to by Hale and Moore was merely the soil underlying sea waters within the bodies of the counties.

Defendants also rely (C.C. Br. 39-40) upon the works of Thomas Digges. Digges was the only English authority before 1600 who claimed that England owned the seabed, and he understood that right to accrue only when lands emerged from the sea.

Plowden, who denied that the adjacent seas or seabed could be owned in a property sense, was, as we showed in our opening brief, more representative of English legal thinking during this period.

8. English law in the 17th and 18th centuries did not recognize a general property right to the seas and seabed (Br. 52-98).

(a)-(d) English admiralty jurisdiction in the 17th and 18th centuries did not recognize a general property right to the English seas or seabed; the basis of admiralty criminal jurisdiction in the English seas did not differ from

the basis of admiralty criminal jurisdiction on the high seas beyond; under English law the criminal jurisdiction of the admiral over offenses other than piracy beyond the low-water line has been limited to English vessels and English nationals; the views of admiralty authorities as to sovereignty over the seas are consistent with the concept of protective jurisdiction (Br. 44-47, 66-77).

Common Counsel defendants address these proposed conclusions of law at pages 102-107, 130-133, 147-148 and 151-152 of their brief. See also, S.S. Br. 6-18; 21-22. None of the evidence supports their contrary assertion that the admiralty jurisdiction was based upon the incorporation of the adjacent high seas into the territory of the crown or that it was exclusive in the same manner as the land-based criminal jurisdiction of the common law. Our view of admiralty jurisdiction is the traditional one, upheld in Regina v. Keyn, L.R. 1 Exch. Div. 63 (1876). In effect urging an overruling of that decision, defendants rely on "hitherto unpublished documents demonstrating the indictment, trial and conviction of a number of foreigners for crimes other than piracy committed in the English seas" (C.C. Br. 104). But those documents

cast no doubt on the historic validity of Keyn; no one has ever denied that the admiral had at least a limited jurisdiction over foreigners. That jurisdiction, however, existed, and was exercised, only for the protection of British subjects and property, including the keeping of the peace on British ships, and to prevent piracy. The admiral asserted no jurisdiction over crimes committed by foreigners against foreigners on foreign ships. This of course is one of the great distinctions between admiralty and common law jurisdiction, and it illustrates that admiralty jurisdiction was based on sovereignty of a protective rather than territorial nature.

Only Selden equated sovereignty over the seas with sovereignty over the land. The other authors cited by defendants recognized that maritime sovereignty was primarily protective and did not embrace matters of exclusively foreign concern. See Jenkins, Maine Ex. 762 at xc; W. Wynne, I The Life of Sir Leoline Jenkins lxvii, lxxxiv (1724); Exton, Maine Ex. 685 at 10; Molloy, Maine Ex. 726 at 120; Zouch, Maine Ex. 212 at 16-18; Blackstone, I Commentaries on the Laws of England 110 (1765); Justice, Maine Ex. 710 at 158. Although a number of these

writers described the admiralty jurisdiction as "exclusive" in the British seas,[11/] according to Meadows such jurisdiction was exclusive only in the sense that British subjects were triable only in British admiralty courts. See Meadows, supra, at 28-29.

Defendants suggest (C.C. Br. 105) that regulatory measures in the British seas existed throughout the 17th century and are evidence of the crown's territorial claims to the seas. The items defendants offer cover only the years 1633 to 1635, and do not recognize any general territorial or property right in the sea. Defendants' exhibits (Maine Exs. 676-679) relate to the sale of fishing licenses to the Dutch, control of piracy, discussions of the proposed fishing articles with Scotland (which never materialized), and internal trade regulations prohibiting the exportation of oysters or fish out of England. Of these items, only the issuance of fishing licenses could even suggest a territorial claim, yet, as we have shown (Br. 57), the English issued fishing licenses to the Dutch not

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11/ Selden, Maine Ex. 680 at 39-40; Justice, Maine Ex. 710 at 128-129, 137, 142; Burchett, Maine Ex. 675 at 22, 26.

as a matter of territorial sovereignty but in return for protecting the Dutch from the Dunkirk pirates. Moreover, jurisdiction over fisheries was based not upon a concept of general ownership of the seas, but upon prescription and occupation of fishing rights. See Br. 37-41.

Defendants claim (C.C. Br. 130-133) that the flag salute was insisted upon as an attribute of English sovereignty during the 17th and 18th centuries. Even assuming arguendo the correctness of that claim, it falls short of showing that admiralty jurisdiction was territorial. It is true that in the 17th century coastal nations commonly asserted protective jurisdiction within certain defined seas. But there is virtually no evidence to support the proposition that such jurisdiction was based on the incorporation of those seas into the territory of the nation in a general property sense or that the entire criminal jurisdiction of the common law was made applicable to those seas.

(e) Under common law, the realm of England ended at the low-water mark and thus the English seas were not within the realm (Br. 78-82).

Common Counsel States discuss this point at pages 53-80 and 140-143 of their brief. See also, S.S. Br. 9-18. Defendants offer three cases as their principal evidence that the English seas were within the realm: Rex v. Oldsworth, dealing with derelict lands in the Thames River; Royal Fishery of the Banne, dealing with riparian rights in the River Banne in Ireland; and Rex v. Hampden, known as the Ship Money Case, dealing with the prerogative power to levy a tax. Only the last mentioned bears in any way on the issue here.

The Ship Money Case dealt with the king's prerogative to levy a tax without Parliamentary consent. The tax in question was an ancient one formerly levied only on coastal towns for the construction and arming of ships for the defense of those towns. The case arose when Charles I, contending that the whole realm benefited from maritime commerce and therefore had a duty to contribute to the defense of the adjacent seas, levied the tax on inland counties as well. The prerogative allowed the king to tax for defense of the realm and the crown argued that the English seas were part of that realm for purposes of the tax. See 6 Holdsworth, A History of English Law

51-53 (1924). This position was not, however, based upon an assertion of territorial rights but rather upon an assertion of protective jurisdiction, i.e., the obligation to defend and protect the nation's maritime commerce. In upholding the tax, the court was upholding the king's prerogative to levy a tax to defend such interests on the seas. That holding did not establish that the seas were part of the realm in any territorial or proprietary sense, and any language to that effect in the separate opinions of the justices was obiter dictum.[12/]

12/ The sequel to the Ship Money Case is instructive as to the political and jurisprudential reliability of that decision. The judges rendering the decision have long been characterized as mere tools of the king (see V Holdsworth, supra, 351-352); two of them, Berkley and Finch, were impeached (3 Howell, State Trials, 826, 1283) for corruptly pressuring for a decision favorable to the crown (see Berger, Impeachment 3, n. 16 (1973)); altogether, six of the judges were charged with corruption by the House of Commons. See Articles of Impeachment [Against Ship Money Case Judges] (1641). Moreover, the decision in the case "was seen as a move 'to dispense forever with the representative body of the Kingdom'" and it was among the precipitating factors leading to the Civil War. See generally Berger, supra, at 31. Thus the Ship Money Case occupies a similar place in English jurisprudence to that occupied by the Dred Scott decision in our own.

Defendants further rely (C.C. Br. 66-70; S.S. Br. 11-12, 16-18) upon the writings of Callis and Selden. But Callis was arguing only for application of the Statute of Sewers to Wales, the Isle of Mann, and the Channel Isles; he was not asserting any territorial or property right to the intervening seas or seabed. Moreover, according to Fulton, supra, at 54, Callis asserted England's sovereignty in the English seas primarily in terms of protective jurisdiction:

> * * * The jurisdiction extended only to the keeping of the peace and the security of the sea--duties exercised by other princes and states in like manner, and indeed now exercised by all countries within the waters under their control. This view is supported by the interpretation of Callis, who stated that the king ruled on the sea "by the laws imperial, as by the roll of Oleron and others," in all matters relating to shipping and merchants and mariners.

Selden in his later writings did contend that the English seas were within the realm in a general property sense, but he apparently was alone in this view. Sir Philip Meadows, erroneously relied upon by defendants (C.C. Br. 74), limited "territorial" sovereignty in the seas to inland water. See Meadows, supra, at 44. He did not recognize any "territorial" rights in the English seas. Id. at 12, 14. Certainly Meadows

never understood other states to have acknowledged that the English seas were within the realm. Id. at 19. More specifically, Meadows stated that the term "British seas" did not indicate a property interest, that it was merely a geographical description. Id. at 9.

Defendants cite (C.C. Br. 140-143) a number of 18th century writers for the proposition that the British seas were regarded as "a part of British territory." An analysis of those writers shows that they did not believe that the seas were part of the realm in a territorial sense. They were speaking, rather, of the areas in which British admiralty jurisdiction and naval power traditionally held sway. The same is true of the majority of the modern commentators cited (C.C. Br. 76-78) by defendants. Fulton, for example, repeatedly denied that England ever obtained sovereignty over the so-called English seas in anything other than a protective capacity. See, e.g., Br. 38-40. Similarly, Fenn explains that the doctrine of territorial waters or seas became accepted only after the period here in question. See Fenn, supra, at 133, 222.

Defendants also purport to show (C.C. Br. 78-80) that England made territorial claims to the sea which were recognized by other states.[13/] The only direct assertion which they make to establish that proposition is that "the Spanish Government expressly recognized English sovereignty in the English seas" (C.C. Br. 79). In fact, defendants' exhibit (Maine Ex. 609) is merely a note from the English Secretary of Foreign Affairs to the English negotiator with the Dutch in Holland--an internal English document--stating that the Spanish Ambassador in England did not object to England's assertion of the right to license Dutch herring fishing. The message noted that Spain acquiesced in such jurisdiction because Spain and Holland were at war at the time. There is no indication that Spain recognized England's sovereignty in the English seas in any "territorial" sense.

13/ Treaties between England and Algiers and Tripoli, cited at C.C. Br. 80, 141, granted the ships of Algiers and Tripoli certain rights of visitation on vessels in seas other than those pertaining to his majesty's dominions. This agreement was designed to protect shipping in the English seas and so is evidence only of an exercise of protective jurisdiction, not of territorial sovereignty. The treaties between England and Sweden and Denmark (C.C. Br. 79, 80, 141) do not define or establish territorial seas.

In contending that the seas were in fact part of the realm, part of British territory, defendants have undertaken the substantial burden of attempting to disprove the soundness of Regina v. Keyn, a decision which would seem conclusive from the point of view of legal theory. Their fragmentary evidence has cast little doubt on the correctness of that authoritative decision.

(f) English law relating to emerged or derelict lands during the 17th and 18th centuries did not recognize a general property right to the English seas or seabed (Br. 82-93).

Common Counsel defendants discuss this issue at pages 107-130 and 148-151 of their brief. See also, S.S. Br. 9-18; 22. The defendants' evidence relates, for the most part, to litigation over derelict lands and sedentary fisheries, generally located in inland waters; defendants also cite certain commentators on the law of the period.

Defendants rely principally upon the Philpot, Oldsworth and Farmer cases, which we discussed at pages 87-92 of our opening brief.[14/] Defendants incorrectly suggest

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14/ Defendants also rely on certain other cases involving inland waterways, ports, and so forth, such as Royal Fishery of the Banne, Johnson v. Barrett, Whittaker v. Wise, and Blustrode

(C.C. Br. 108-110) that both Moore and the judges in Philpot recognized crown ownership of the soil under the adjacent sea. Baron Denham and the other justices in the Philpot case based their decision upon crown "interests" in navigable rivers and arms of the sea, which are at common law within the body of a county. See Moore, supra, at 264. Examination of the language from Philpot relied on by defendants shows no recognition of a property interest in the open sea or seabed. Moore describes this case as being the first judicial articulation of a prima facie theory of prerogative ownership of emerged lands, a theory that treats the bed of the seas as ownerless until it emerges. Moore, supra, at 262. Moreover, Moore regarded the decision, which was never enforced, as "doubtful authority." Id. at 266. Hale apparently was of the same view. See Br. 89.

Defendants also incorrectly suggest (C.C. Br. 110-112; S.S. Br. 12-13, 18) that both the Attorney General and the court in the Oldsworth case recognized crown ownership

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14/ (Cont'd)

v. Hall, which obviously have nothing to do with seabeds of the adjacent seas. The common law has always distinguished ports from the high seas, classifying them together with tidal rivers and inland arms of the sea. See Hale, De Portibus Maris, in Moore, supra, at 318-369.

of the adjacent seas and seabed. The Attorney General actually argued that since the Crown controlled the sea, the crown was entitled to the first right of ownership of lands when they emerged. Hale, who argued on behalf of the crown, doubted whether the bed of the sea belongs to the king while it is still covered by water. See Br. 86. The position Hale took in this case is similar to the position he subsequently took in De Jure Maris: the king in his governmental capacity controlled the sea and as an incident of that power he was entitled to ownership of lands which emerged. See Br. 90-91. Baron Weston's opinion reflects this view. Weston in no way indicates that the crown is entitled to the property of the seabed prior to emergence; he relies upon the crown's prerogative right in derelict lands. The issue in the case was whether a subject had established a right in the emerged land by prescription; Weston held that the facts there did not support the claim of prescription, but he recognized that emerged lands were proper objects of prescription. See Moore, supra, at 300-301. Baron Treavor's opinion similarly relied upon the king's prerogative over ownerless property. He did not recognize a crown right to the property of the seabed while still submerged; his view

was that when submerged land became part of dry land, the king would be "preferred" as against subjects claiming ownership; this "preference" clearly indicates that a real property interest did not materialize until the land emerged. Id. at 303.[15/]

Defendants assert (C.C. Br. 116-117) that Professor Thorne conceded that an English court would recognize crown ownership of the resources of the adjacent sea or seabed as against foreigners. In fact, Professor Thorne testified (Tr. 2709-2710, 2711-2712) that any crown claim of ownership of the sea and seabed would have been untenable but that an English court might have enforced the exclusivity to fisheries and sedentary resources. This statement is consistent with our position that the crown claimed, at most, protective jurisdiction and an appropriation of specific rights.

15/ Moreover, to the extent that these cases, together with the Farmer case, stand for crown ownership of the seabed in the late 17th century, it is clear both that that ownership of emerged lands was subject to prescription and ownership of lands which have not yet emerged could be conveyed by the crown only in express terms and by precise geographical description. See Br. 91-93.

Defendants also rely (C.C. Br. 116-118) upon pronouncements and acts of state to establish that English law recognized crown ownership of the seabed of the adjacent seas. The document and acts cited do not support that proposition. The Reglement for "Preventing Abuses in and About the Narrow Seas and Coasts" promulgated by Charles I made no claim of ownership to the seas, but merely announced an intention to enforce neutrality obligations in inland waters and the king's Chambers. (The Reglement was ineffective and the attempt to enforce it with armed vessels failed. See Fulton, supra, at 252-253). Similarly, the deed of Dunkirk by Charles II did not purport to convey, or recognize crown ownership of, offshore submerged lands in the Channel. That deed passed the soil in tidal waters of the harbor and, at the very most, foreshore at Dunkirk. U.S. Ex. 4, p. 33.[16/]

16/ Defendants also discuss the grant of derelict lands to the Earl of Bath and the crown's claim of ownership to emerged land in the River Humber, neither of which shows crown ownership of seabeds while still submerged.

Defendants rely upon a number of 17th and 18th century English legal commentators, including Callis and Hale, to establish crown ownership of the seabed of the adjacent seas. In our opening brief (at pp. 84-87), we showed that neither Callis nor Hale recognized crown ownership of the seabed of the English seas in a strict property sense, that they both recognized that the crown exercised sovereignty over the seabed only in a nonproprietary governmental capacity. Defendants' discussion of Hale (C.C. Br. 121-122; S.S. Br. 16-17) evidences considerable misunderstanding of his work. For example, defendants suggest (C.C. Br. 123) that Hale wrote numerous versions of De Jure Maris when, in fact, he wrote only two versions--one in connection with his arguments for the crown in the Oldsworth case (circa 1637), and then his final work (circa 1667). Moore, supra, at xl-xli. Moreover, defendants quote indiscriminately from Hale's separate discussions of rights in the foreshore, rights in islands arising in the adjacent seas, and rights to soil in inland waters and in harbors and ports, without distinguishing

between them.[17] In both passages from which Professor Thorne testified, Hale affirms that the basis of the crown's prerogative right, both to islands rising in the sea and the foreshore, was the crown's right to ownerless property, i.e., "bona caduca or vacantia, as flotsam" (C.C. Br. 123), and "bona vacantia" (id. at 124). Such property is of course on a different footing from the soil of inland waters, which belonged to the king "if it be not derived out of him by some sufficient title" (id.).

Defendants' discussion of other commentators is similarly misleading. For example, the statement of Rolle upon which defendants rely (C.C. Br. 126) was made in the context of a discussion of the crown's ownership of the soil of a tidal river bed left dry by the changing of the river's channel; the sea and channel to which Rolle was referring were inland waters. Also, whereas defendants suggest (C.C. Br. 127) that Moore believed that an effective claim of crown

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17/ Thus, the first passage cited by defendants (C.C. Br. 123) is from Hale's discussion of islands rising in the sea while the second passage (id. at 124) is from his discussion of the foreshore. Both passages came out of Hale's first version of De Jure Maris, not, as defendants erroneously state, from two different versions of that work.

ownership to the seabed had been made during the 17th and 18th centuries, in fact Moore established that English law has never recognized such a right in the open seas and that ownership rights even in the foreshore were not recognized until the 19th century. See Moore, supra, at xxxiii - xlii.

Defendants similarly misrepresent (C.C. Br. 127-128) Fulton and Fenn. Fulton merely described the controversy over ownership of the seabed without passing judgment on the merits of the crown's claim as a matter of English law. However, he did state, in connection with the theories of Digges and Callis and the other writers preceding Selden, that:

> * * * [N]one of the works on the rights of England in the adjoining seas, which had appeared when the new policy of Charles began to be fashioned, was sufficently profound or authoritative to furnish reasonable justification for that policy in the eyes of the world. [Fulton, supra, at 364.]

Contrary to defendants' suggestion, Fenn did not state that English law of the period recognized authority in the crown to grant exclusive rights to the resources of the adjacent seas. Fenn simply indicated that English and international law was developing in that direction during the 17th century (see Fenn, supra, at 122).

All but one of the modern judicial authorities relied upon by defendants (C.C. Br. 128) relate to harbors and other inland waters. Dunham v. Lamphere, 3 Gray 268 (Mass., 1855), was the only case which involved the "open sea," and that involved the power of Massachusetts to regulate fishing within one mile of shore.

Even Commonwealth v. Roxbury, 9 Gray 451 (Mass., 1857), extensively quoted by defendants (C.C. Br. 128-129), was a case involving inland water and submerged soil within the inner harbor of Boston.[18/]

Defendants assert (C.C. Br. 149) that Blackstone affirmed that the crown owned the soil of the adjacent seas while still submerged. But in the passage relied upon by defendants, Blackstone discusses only the right of the crown to newly risen islands and derelict lands. And it is noteworthy that even as late as 1765, Blackstone justified the crown's right to such islands and lands in part on the theory that the king is entitled to ownerless property. See Br. 93.

18/ The opinion in that case, like the opinions in Martin v. Waddell, 16 Pet. 367, and Massachusetts v. New York, 271 U.S. 65, support the argument that if rights were held in the sea and seabed, whether in inland waters or in the adjacent seas, those rights were an incident of governmental powers over those seas.

9. Under English legal theory of the 17th and 18th centuries, sovereignty over the adjacent seas and seabed could be obtained only by effective occupation (Br. 98-103).

In our opening brief, we argued that any sovereignty over the seas and seabed which 17th and 18th century English legal theory may have recognized derived solely from effective occupation.[19/] Defendants expressly address this point only at pages 96 and 188-192 of their brief (see also, S.S. Br. Obj. 22-25), although they frequently make the implicit assumption that sovereignty over the seas flows automatically from sovereignty over the adjacent land mass, i.e., that every coastal nation was entitled to exercise jurisdiction in the adjacent seas out to a distance of 100 miles without first occupying those seas. See, e.g., C.C. Br. 63-64, 66, 72-75, 93-94, 96-100.

In contending that sovereignty over the seas is a necessary incident of sovereignty over the land, defendants apparently rely exclusively on scattered quotations from Welwood,

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19/ The corollary, that since the colonies never effectively occupied the American seas they obtained no sovereignty over those seas, is discussed in the next section.

Borroughs, and Selden. Not even these authors, read in context, support defendants' unhistorical proposition. Welwood and Borroughs expressly rested the crown's claims on prescription and possession through occupation. See Br. 101. Indeed, Welwood's theory of maritime sovereignty was based upon occupation: he stated that sovereignty over the sea accrued through intention to occupy coupled with acts of occupation. See Welwood, Abridgment of All Sea Laws 67.

Furthermore, as defendants' expert on English law has testified (see Br. 102), and as defendants in fact concede (C.C. Br. 97), Selden based sovereignty over the seas on "prescription, appropriation and occupation."[20/] Although defendants assert (C.C. Br. 98) that "Selden is unusual in the emphasis which he placed on prescription and appropriation" and insist that "the more common tendency * * * was to regard territorial waters as belonging to any state, by virtue of its land sovereignty," defendants have been unable to produce any authority of the period who based England's claim to sovereignty over the seas on the concept of inherent sovereignty over the adjacent seas.

20/ Defendants apparently overlooked this concession in subsequently attempting to argue (C.C. Br. 188-192) that Selden based sovereignty on discovery plus symbolic acts. We discuss this issue further at pp. 55-56, infra.

Sir Philip Meadows apparently is the only commentator who recognized the concept of inherent sovereignty over adjacent seas. However, the only portions of the sea to which Meadows believed this sovereignty extended were the King's Chambers and other inland coastal waters; Meadows postulated that sovereign rights beyond such waters could be determined only by contract among nations. Meadows, supra, at 44. Meadows specifically stated that the term "British seas" did not import any legal dominion. Id. at 8-9.

No English authority has grounded England's claims to sovereignty over the open seas on any theory other than that of prescription and occupation.[21/] As Professor O'Connell has described, by 1700 the central question was not one of theory but rather of what constituted effective occupation. O'Connell, supra at 316. In the early part of the 18th century, it was thought occupation by ships might be sufficient, but control by land-based cannon ultimately emerged as the accepted form of

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21/ In addition to the authors cited in our opening brief, see, e.g., Justice, Maine Ex. 710 at 128; Burchett, Maine Ex. 675 at 28; Malynes, Maine Ex. 197; Craig, in O'Connell, supra at 309.

occupation. Id. at 316. The early 18th century writers who advocated that rule viewed it not as a landward restriction of an older rule but rather as the most easily applied, and therefore most feasible, rule for determining effective occupation. Id. at 321.

The 100-mile theory relied on by defendants throughout their brief was conceived by Bartolus not as a sovereignty right but as an obligation of the coastal state to curtail piracy; it was never sanctioned in that or any other form by the usage of nations. See Fulton, supra at 541. Defendants cite (C.C. Br. 63) as evidence of English practice, only a letter from the Earl of Salisbury to the English ambassador in Spain which suggested that the 100-mile theory might be advanced as additional support for England's claim to the British seas, disputed by Spain. There is no evidence that the theory was in fact advanced by the ambassador, let alone recognized as valid by either Spain or England. Salisbury was clearly suggesting only a post hoc rationalization for claims already asserted on other grounds, i.e., prescription and occupation. 22/

22/ Defendants also rely (C.C. Br. 66, 72-75, 140-142; S.S. Br. 14) upon references to the 100-mile theory by English writers, such as Borroughs, Welwood and Meadows. Although these writers did refer to the 100-mile theory in their discussions of maritime sovereignty, in no instance did they single out that theory for approval. To the contrary, as we have shown (Br. 59-66, 113-115) these writers recognized that maritime sovereignty could be obtained only through effective occupation.

Indeed, England's maritime claims in the English seas, although not territorial in nature, were geographically more extensive than a 100-mile rule would have allowed. There is no evidence that England ever accepted or applied any version of the 100-mile theory itself. To the contrary, when Albert Gentili, arguing in English prize cases on behalf of Spain, advanced the theory that all waters within 100 miles of England were part of English dominion or territory, the court decisively rejected that argument. (We discuss Gentili's arguments more fully in the following section. See pp. 53-54 , infra.) See Fulton, supra, at 359-360. Thus, it is clear that English practice did not recognize crown dominion and ownership over the adjacent sea on any basis other than effective occupation.

10. Regardless of whether English law recognized a general property right to the English seas and the seabed in the 17th and 18th centuries, no such right under English law to the seas or seabed adjacent to the colonies in North America was either recognized or claimed (Br. 113-115).

As we showed in our opening brief (Br. 98-103), English law prior to the 19th century recognized only one method of obtaining sovereignty over adjacent seas--effective occupation. We further showed (Br. 113-115) that there is no evidence in English

legal treatises or the official actions of the crown (other than grants and charters, which are discussed in the following sections) that England ever occupied the American seas in a manner which would have supported a claim of sovereignty or that England ever claimed such sovereignty. This is, of course, a crucial point of law in this case, and Common Counsel defendants apparently discuss it only at pages 180-184 and 188-196 of their brief. Defendants there contend that English law recognized the acquisition of sovereignty over the seas by discovery and symbolic actions and that the crown made "general claims regarding maritime sovereignty" or the "corollaries thereof" in North American waters in the 17th and 18th centuries.

Defendants' thesis is that discovery and symbolic acts were sufficient under English law during the colonial period to obtain sovereignty not only over the mainland but over the adjacent seas as well. But defendants' assimilation of land and sea sovereignty is without historical basis. As Professor Henkin testified (Tr. 2615-2616), international law has always distinguished between claims of sovereignty over land areas and similar claims to the seas, and the question in the 17th century was not <u>how</u> but <u>whether</u> maritime sovereignty could be obtained. It is

significant, therefore, that the text from Keller, Lissitzyn, and Mann, Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800, relied upon by defendants (C.C. Br. 180-181; S.S. Br. 34-35) to establish that maritime sovereignty during that period was obtained through discovery and symbolic acts, deals entirely with title to land areas. In fact, as we showed in our opening brief (Br. 98-103) and have discussed further above (pp. 44-47 , supra), discovery and symbolic acts were not sufficient to establish maritime sovereignty under English law.

Moreover, both English and international law during the colonial period required something more than mere discovery and symbolic acts even for sovereignty over land areas. Queen Elizabeth made this clear when objecting to the claims of Spain and Portugal. 1 Andrews, The Colonial Period of American History 14-15, 19-21 (1934); Wernham, Before the Armada 286 (1966). Thus, the English charters and grants at issue in this litigation provided that Englishmen should venture into the new world and there obtain lands by exploration and settlement. See 1 Documentary History of Maine 126, 184-185 (Willis ed., 1869). Even the authors principally relied upon by defendants acknowledge that

actual occupation, of more than a merely symbolic nature, was necessary to establish sovereignty. See Keller, Lissitzyn and Mann, supra, at 111-112, 120. The extent of the occupation required was subject to controversy, and it varied according to the nature of the area claimed and the circumstances under which the claim was asserted. Ordinarily the disputes arose with respect to claims to lands contiguous to actual settlements, such as the hinterland of the African, Latin American and North American colonies. See, e.g., Brownlie, Principals of Public International Law 128-135 (1966); 1 Oppenheim, International Law 506-514 (1947). We have found no instance in which such a dispute was resolved on the basis of nothing more than discovery and symbolic acts.

Defendants nevertheless suggest (C.C. Br. 181) that less was required to establish sovereignty over sea areas than over land areas. There is no foundation for that proposition. Since a claim of sovereignty over the open seas necessarily infringes upon international commerce and the rights of the community of nations to navigation and fishing, the requirements of effective occupation of the seas have always been more stringent

than those for land. Thus, even exclusive fishing rights--which fall far short of full-blown sovereignty--could be acquired and maintained only through long continued use and acquiescence by other nations. See Br. 32-34, 37-41; see also pp. 12-14 , supra. When England claimed exclusive fisheries in the English seas and off Nova Scotia, Newfoundland and Cape Breton, it did so on the basis not merely of discovery but of appropriation and actual occupation. William Bollan, agent for the Massachusetts colony, based his claim to the fisheries of the American seas not upon discovery but upon settlement and the effective establishment of a fishing industry. See Maine Ex. 673. The ultimate English success in excluding the French and Spanish from the fisheries in Nova Scotia, Newfoundland and Cape Breton, was based on the use of naval force, not on symbolic acts and discovery. See McFarland, A History of the New England Fishery, 86-94 (1911).

In view of this history, it is difficult to understand the point of defendants' discussion (C.C. Br. 182-184) of the reception of the common law by the colonies. Since the common law principle of maritime sovereignty required effective occupation, adoption of that principle by the colonies avails defendants nothing here. Indeed, defendants' rigorous insistence on

the reception of unaltered English common law principles serves only to defeat their claim here, for the essence of that claim is that the colonies, acting contrary to the accepted international and common law principles of the day, adopted a principle of automatic maritime sovereignty in the coastal state. Apparently defendants have confused a legal principle (that maritime sovereignty flows from effective occupation) with its application under English common law (that the crown, because of occupation and use, exercised sovereignty over the adjacent English seas); it is of course only the principle which would have been received as the common law of the colonies; the application of that principle would depend upon facts peculiar to the American seas where, as we maintain, these was no effective occupation by either the crown or the colonies (except possibly in the seas adjacent to the Canadian maritime provinces).

We turn now to a point-by-point refutation of defendants' contentions (C.C. Br. 188-196) that England claimed sovereignty over the American seas south of the Canadian maritime

provinces.[23] It is our position here that far from effectively occupying those seas, England did not even make a serious claim of sovereignty.

First, the statements of Albert Gentili relied upon by defendants (C.C. Br. 188-189) were made on behalf not of the English but of the Spanish Government. Gentili was arguing in the English Prize Court for the return to Spain of Spanish vessels taken by the Dutch and recaptured by the English; the Spanish claim was that under treaty it was entitled to recover all ships taken within the dominion of the English crown, and in connection with this claim Gentili argued inter alia that the joint sovereignty of Spain and England extended clear across the Atlantic Ocean. See Fulton, supra, at 359-360. However, the prize court rejected Gentili's arguments and awarded Spain only the ships which had been captured within the King's Chambers, and not those captured elsewhere within the adjacent English seas (id.); it is therefore clear that the court refused to recognize even the entire English seas as part of the dominion of the crown.

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[23] We ignore, in this review of defendants' contentions, the quotations from Needham and Codrington (see C.C. Br. 192-193) with respect to crown maritime sovereignty; those quotations are not evidence of or authority for claims by the crown.

Gentili's inability to persuade an English court of full-blown crown sovereignty over even the English seas seriously undercuts defendants' attempt to show such sovereignty over the distant American seas.

Second, England did not, as defendants erroneously suggest (C.C. Br. 189), base its claim to the Greenland whale fishery on mere discovery of the fishery or on possession of the nearest land mass. Indeed, it was Denmark, not England, that claimed sovereignty over Greenland and the adjacent seas. See Fulton, supra at 527. Both England and the Netherlands opposed the Danish claim to those seas and advocated free fishing throughout them. Id. at 527, 530. See id. at 183-184. To the extent that England claimed exclusive whale fisheries, as it did at Spitzbergen, it was on the basis of prescription and effective occupation of the fishery. Id. at 183, 193.

Third, Sir John Coke's passing references to fisheries in the American seas, relied upon by defendants (C.C. Br. 189), were made in the course of debates over rights in the herring fisheries off Scotland. See id. at 232-239. Those statements obviously do not establish a claim of crown ownership to the American seas, especially in those seas south of Canada, where there were no significant fisheries at the time.

Fourth, although the meaning of the quotation from Sir John Borroughs at Common Counsel Br. 190 is far from clear--and defendants make no attempt at explication--the most likely interpretation is that on account of England's control of the West Indies, which were vital to the international trade of that time (1632), all traders at some point, "first or last," in England or the West Indies, "will come within the compass of [the king's] power and jurisdiction." This is not a claim of maritime sovereignty.

Fifth, the passage quoted from Selden (see C.C. Br. 190-192) merely expresses Selden's doubt whether symbolic taking of possession was sufficient to convey dominion of the seas. Thus, Selden accepts the acquisition of sovereignty over the mainland of Newfoundland through discovery and symbolic acts, but he is unwilling to assert more than that such a method of taking "may relate to seas, as well as lands * * *" (emphasis added). Apparently Selden was unwilling to rely upon such a tenuous theory, for he went on to recount evidence of actual occupation of the American seas, citing the "customs of the officers belonging to the High Admiral of England * * * to demand tributes of such as fished also in the sea." Selden concluded, as we

noted in our opening brief (Br. 115), that he had not yet learned to what extent the American colonies "have possessed themselves of the sea there." This strongly suggests an understanding that sovereignty could only follow, and not precede, actual possession. In any event, the passage in its entirety does not represent a claim of crown ownership of the American seas.

Sixth, the report of the admiralty commissioners to Charles I, misleadingly quoted out of context by defendants (C.C. Br. 192), pertained not to the American seas but to "the seas of England, Scotland and Ireland from which Charles I sought to exclude the Dutch." Fulton, supra, at 762. The full text of the statement quoted from by defendants is as follows:

> Wee therefore thought itt (and do most humbly offer it to y^{r} Majesty as our opinion) that vnto the Minister or Ministers of the States residing here, it may be intimated and declared, that yo^{r} Majesty doth no way relinquish that just right and clayme of inheritance to the Royall fishings, so divolved unto you from yo^{r} Royall Predecessors, but are resolved to defende it as the hereditary right and possession of any other yo^{r} Dominions.

Clearly the reference to "Dominions" does no more than compare the fishery of the English seas to other valuable crown possessions. The admiralty commissioners had been asked to comment on the use of the Ship Money fleet to suppress unlicensed fishing on

the British coasts. Fulton, supra, at 762. Their response cannot fairly be construed as encompassing a claim to the American seas.

Seventh, the treaty provisions quoted by defendants (C.C. Br. 193-194) were merely provisos, intended to ensure that those treaties, which dealt with European matters, would not be construed as affecting any existing rights in American waters. The treaties themselves did not establish or define any such rights; they do not even show that England claimed any maritime rights at all south of the Canadian colonies.

Eighth, defendants' reliance upon admiralty commissions (C.C. Br. 194) is entirely misplaced. The fact that admiralty jurisdiction extended to the American seas does not support defendants' claims in this case. The admiral's jurisdiction embraced the entire open sea, without distinction between English or American seas or even the Indian Ocean (see Ex. 640),[24/] but England never claimed sovereignty over the

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24/ Notwithstanding defendants' assertion to the contrary (C.C. Br. 194), commissions of the admiralty judges made no express reference to the North American colonies. See Ex. 640.

entirety of the high seas. Such jurisdiction amounted to considerably less than effective occupation in a territorial sense. The exercise of admiralty jurisdiction was not equivalent to, dependent upon, or an incident of, a territorial claim of sovereignty.[25/]

Ninth, the exclusive fisheries which are the subject of the exhibits cited by defendants (C.C. Br. 195) are the fisheries of Newfoundland, Nova Scotia, and Greenland--waters not at issue in this proceeding. It is, however, significant that the British claims to those fisheries were based upon appropriation and occupation, not on mere discovery or mainland sovereignty, and that no similar claims were recognized with respect to the seas off defendants' coasts. See Burchett, Maine Ex. 675 at 35; Lediard, Maine Ex. 718 at 36.

25/ Furthermore, one of the specific commissions on which defendants rely in fact demonstrates that the high seas were considered outside the colonial territories. The patent of the Vice Admiral of Jamaica (Ex. 639) grants jurisdiction over the "maritime parts" of Jamaica and the seas adjacent thereto; since the maritime parts of Jamaica are defined as "Sea Shores, Publick Streats, Ports, Fresh Waters, Rivers, Creeks and Arm's" (id. at 2), the adjacent high seas were clearly regarded not as part of the colony but only as seas within the general admiralty jurisdiction of that colony. Presumably the same delimitation of colonial maritime territory was intended by the 1688 grant to Sir Robert Holmes.

Tenth, the determination that criminal trials in admiralty may be held only on land or in the seas within "his majesty's islands, plantations, colonies [and] dominions" (C.C. Br. 195, 196), i.e., in bays, harbors, or other inland waters, has nothing to do with colonial territorial claims to the high seas. Furthermore, even if that determination was contemporaneously understood as permitting trial anywhere offshore--and defendants offer no evidence which would support such a construction--that would not establish that the colonies exercised sovereignty over such offshore waters. Since colonial admiralty jurisdiction extended to offshore waters, such waters could have been considered "sea * * * in * * * his majesty's * * * colonies" for purposes of venue for criminal trials in admiralty without being regarded as part of the territory of those colonies in a sovereignty sense.

Finally, defendants rely (C.C. Br. 275-278) upon a number of maps of North America from the colonial period. We believe, of course, that any designation of areas of the sea by reference to the adjacent state (e.g., the "Virginia Sea") was

done as a matter of geographical convenience and does not reflect a claim of sovereignty. (The logic of defendants' argument to the contrary suggests, for example, that sovereignty is asserted by Mexico over the Gulf of Mexico, and by India over the Indian Ocean.) In any event, the official maps introduced into evidence--the 1763 map which accompanied a Lords of Trade report to the king describing the British dominion in America (Ex. 822), and the Mitchell map used in peace negotiations in 1782 and relied upon by Canada and the United States in determining their boundary--refer to the offshore seas as the Atlantic Ocean and not the more quaint 17th century designations on which defendants rely.[26/]

26/ Defendants also rely upon two maps drawn up in connection with the Massachusetts-New Hampshire boundary dispute. C.C. Br. 275. The lines extending into the adjacent sea on these maps (Maine Exs. 615- 616) are lines of latitude which were used in the original grants and charters to designate the area of mainland granted to the colonies. See Maine Ex. 11, p. 1829; Tr. 706. On both of these maps the adjacent seas are designated as the Atlantic Ocean. Moreover, as the United States has already demonstrated, both of these colonies described their eastern boundaries in such boundary disputes as the Atlantic Ocean. Br. 133.

11. Property rights to the adjacent seas and seabed were neither claimed nor conveyed to the colonies under the original grants and charters (Br. 104-154).

(a) - (b) The grants and charters conveyed to the colonies lands on the mainland upon which to establish settlements and sufficient powers to govern those settlements; the conveyance of islands in the original grants and charters did not by implication convey the intervening seas, since English law in the 17th and 18th centuries did not recognize implied conveyances of intervening seas from conveyances of islands (Br. 104-108, 117-126).

Common Counsel defendants rely upon pages 156-231 of their brief to rebut our proposed conclusion that property rights in the adjacent seas and seabed were neither claimed nor conveyed to the colonies under the original grants and charters. See also, S.S. Br. 23-38; 25. A large part of the argument and evidence relied upon by defendants (C.C. Br. 156-188) relates to the so-called "legal and political climate" in which the charters were issued. Specifically, defendants baldly assert that the crown, and the men who issued and received the colonial grants and charters, must have been as intent upon claiming sovereignty over the American seas as they were in advocating the Stuart claims to sovereignty

over the English seas. But defendants introduce no evidence supporting their assertion, and the facts point in the opposite direction: although during the period of the colonial grants there was an aggressive extension of English claims to the English seas, the English paid little or no attention to, and expressed little or no interest in claiming sovereignty over, the American seas. Although defendants show that the establishment of the colonies coincided with English claims to the English seas and that many of the principles in the setting of crown maritime policy were also involved in the colonization of North America, defendants are unable to produce any evidence of official action by the crown or its representatives recognizing or asserting a claim of sovereignty to the seas adjacent to the defendant States.[27/] This, we submit, is because no such claim was made (and surely, for purposes of this case, defendants have not sustained their burden of proving the contrary). The readiest explanation of the failure to make such a claim is that Englishmen of the 17th century understood and accepted that sovereignty over the seas could be established only by effective occupation and

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27/ To the contrary, during Parliamentary debates on fishing rights in the American seas, Lord Oxford, an original patentee of the Virginia Company, contended that colonies and foreigners alike possessed the right to fish in these seas. Maine Ex. 720 at 80.

that whereas such occupation was arguably achieved in the English seas and sovereignty could accordingly be asserted there, it had not yet been achieved or even attempted in the American seas.

The reasons for this comparative lack of interest in the American seas are of course many. The English seas were vital to English commercial, military and political security; the American seas were not. The fisheries of the English seas were enormously important to English well-being; contrary to defendants' apparent suggestion (C.C. Br. 184-188), the fisheries off the shores of the defendant States were virtually nonexistent. See Tr. 1636, 2055-2058, 2283-2284. Although the fisheries of Nova Scotia and Newfoundland were commercially significant and were an important factor in the establishment of those colonies, fishing played little or no role in the establishment of the colonies in what is now the United States. To the extent that the establishment of the American colonies was commercially motivated, the commerce in question was mineral exploration and agriculture--primarily the raising of tobacco--and therefore exclusively land-based. See, e.g., Maine Ex. 663 at 300, 321. The commercial objectives of colonization never raised the question of

sovereignty over the seas. England expressly asserted exclusive rights in North American seas only in connection with the fisheries in Nova Scotia and Newfoundland.[28] In every instance, these rights were limited in scope to the maritime areas which England claimed to have occupied by virtue of an established fishery. Those areas varied from 30 leagues off the southern coast of Nova Scotia to 3 leagues around the rest of Nova Scotia and Newfoundland and 15 leagues in the Gulf of St. Lawrence.[29] Nowhere else did England claim rights in the seas off its colonies in America.

We turn now to a discussion of the colonial grants and charters themselves. Defendants attempt to show (C.C. Br. 197-224) that those charters conveyed sovereignty and ownership of the sea out to 100 miles from shore. We respond here only to the evidence and arguments of defendants not covered in our opening brief.

28/ Although the crown never claimed exclusive fisheries in the waters off New England, the Council of New England did make such a claim at one point. However, that claim was rejected by the Privy Council and was later abandoned by the Massachusetts colony. The history of that claim is discussed further below. See pp. 94-97 , infra.

29/ Thus the passage from Exhibit 683, quoted by Common Counsel defendants at pages 187-188 of their brief, refers only to Newfoundland, where the English were making claims to the fisheries in the adjacent seas, based on their effective occupation of those fisheries. This quotation is an example of defendants' attempt to generalize from British claims off Nova Scotia and Newfoundland, where fishing was important. Since the Canadian maritime colonies were primarily fishing colonies and the American colonies were not, there is no basis for such a generalization.

Initially defendants suggest (C.C. Br. 197-199; S.S. Br. 31-32, 35-38) that certain terms found in the colonial charters and grants were well understood to comprehend the sovereignty and ownership of the adjacent seas and seabed. In this respect, defendants rely upon language in the charters which generally grants to the colonies all jurisdiction, franchises, and royalties, by sea and land. Such a general grant is not evidence that the crown claimed or conveyed sovereignty and ownership of the adjacent seas out to 100 miles. Jurisdiction, franchises, and royalties comprehend rights which are independent of any claim to ownership or sovereignty of the adjacent seas. This is clearly true with respect to jurisdiction, as we have shown above (pp. 10-12, supra) and in our opening brief (Br. 32-35, 43-48). It is also true, as we now proceed to show, of "royalties" and "franchises." The term "jura regalia", "regalia," or "royalty," comprehends those specific rights which are described in the De Prerogativa Regis, such as wreck and treasure trove. The sovereignty and ownership of the adjacent seas, seabed and subsoil have never been included in the listing of rights commonly referred to as "royalties." As Professor Thorne testified, ownership of the seabed of the adjacent sea was unknown

in English law during the period of the older legal tradition and there thus was no reference to the crown's right to the seabed in De Prerogativa Regis. As we have shown, English law did not begin to recognize crown ownership of the adjacent seabed, even in a limited sense, until after most of the charters relevant to this litigation were granted, and it is a fundamental canon of construction that words in a grant are to be construed according to the usages of the time when the grant was issued. 7 Comyns, A Digest of the Laws of England 328 (1st Am. ed., 5th London ed. 1825).

But even if ownership of the seas was itself a "royalty," it would not have passed by general grant. The general terms "royalties" and "franchises" did not pass a specific prerogative which was not itself enumerated. See Basket v. University of Cambridge, 96 Eng. Rep. 59, 64 (1758); Grabham v. Gaeles, 81 Eng. Rep. 995 (1619). Rights of the crown were jealously guarded and, as Professor Wroth testified (Tr. 2531-2532), general terms in a grant were said to pass nothing. See 17 Viner, A General Abridgment of Law and Equity 130, 137 (2d ed. 1793). General words, such as "royalties," "franchises," and "liberties" would not convey ownership to land, whether or not under the sea. Since even defined portions of the seabed could not pass without a specific grant of lands under water, it is clear that such lands

would not pass by general words. Thus, in Attorney General v. Trustees of the British Museum [1903] 2 Ch. 598, 614, the court stated:

> * * * [w]hen the crown desired to grant any of these flowers of the crown they were expressly mentioned--e.g., waived chattels and outlaws, and wreck, flotsam and jetsam. The true inference is that treasure trove would have been also specified if it was intended to grant it.

This, of course, was the understanding of the crown's law officers in 1729, when they held that a colonial charter granting all "franchises" and "royalties" as well as "mines" was not sufficient to grant "royal mines."[30/] See Br. 116-117. As the evidence indicates, the crown knew how to grant exclusive

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30/ Defendants have suggested (C.C. Br. 216) that this opinion of the Attorney General and the Solicitor General is not reliable because they probably overlooked the references to "royalties" in the New Jersey charters. This unsupported attempt to discredit the opinion merely illustrates how dispositive that opinion is of the point here in question. There is no reason to believe that the Attorney General and Solicitor General "overlooked" the numerous references to "royalties" in the New Jersey charters.

The opinion shows that such royalties were not strictly speaking property rights but were incidents of governmental powers, as Gould and Angell recognized (see C.C. Br. 216-218). Gould suggests that the rights to the seabed and subsoil of navigable waters passed as an incident to "Civil and political powers." The only two examples of colonial practice cited by Gould relate either to the foreshore or to "an arm of the sea." Angell speaks of the "political power" and the "political character" of the colonies and asserts that the colonial grants included arms of the sea. Thus, both Angell and Gould viewed the rights to the seabed and subsoil as primarily governmental rights and had only arms of the sea or inland waters in mind when discussing such rights.

rights in adjacent seas and it used explicit language to do so when that was its intention. Thus, the 1610 charter of Newfoundland conveyed "the seas and islands lying within 10 leagues of any part of the seacoast of the country aforesaid" (C.C. Br. 208; Maine Ex. 179, p. 53); the 1621 grant of Nova Scotia conveyed "islands or seas lying near or within six leagues from any part of the mainland on the west, north and east sides and to the south * * * within forty leagues of the said shore (C.C. Br. 209); and the 1622 charter of Nova Scotia conveyed "30 leagues into the sea" (C.C. Br. 209; Maine Ex. 240, p. 101). Significantly, these charters, spanning the period 1610 to 1622, cover the period in which many of the grants and charters at issue in this litigation were made. Yet the crown failed specifically to grant the sea or seabed as such in any of the defendants' charters. The absence of any explicit grant of the seas or seabeds in defendants' charters clearly indicates that no such grant was contemplated or intended.

Defendants attempt to explain (C.C. Br. 199-200) the omission in the charters of any express grant of the adjacent seas and seabed by referring to "unarticulated assumptions, which * * * may not be wholly obvious to later generations." In making this contention, defendants assert--without any proof--that the

seas out to 100 miles from shore were "an accessory or appendant of territorial sovereignty on land." We have shown above (pp. 43-47, supra) and in our opening brief (Br. 113-116) that sovereignty over the seas could at that time be obtained only through effective occupation, and that it was not an inevitable consequence of sovereignty over the mainland. Defendants' assertion to the contrary has no historical basis. Thus, there is no reason to believe that the "unarticulated assumptions" on which defendants rely were ever in fact made by the men issuing and receiving the colonial charters. But even if those men had believed that maritime sovereignty flowed automatically from mainland sovereignty, since they were engaged in the transfer not of mainland sovereignty but rather of property rights and ownership, they would nevertheless have been specific about the property rights being conveyed. It is therefore telling that the charters conveyed islands in the sea but not the seas or seabeds themselves. Thus, even assuming that the crown and its subjects shared the unarticulated assumptions attributed to

them by defendants, there is no basis for reading the colonial charters as conveying ownership of the seas or seabed.[31/]

Defendants next contend (C.C. Br. 201-204) that a grant of islands off the coast "was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland." They incorrectly suggest that Callis, Hale, Selden and Justice support this view. As far as we can determine, none of those authors asserted that ownership of islands necessarily entails ownership of the intervening seas. To the contrary, Selden and Justice, at least, both recognized that sovereignty over the seas comprehended sovereignty over islands located in those seas but that such maritime sovereignty is obtained through prescription and possession (see pp. 26, 43-45, 56-57, supra).

31/ Defendants suggest (C.C. Br. 200) that nations rarely refer to their territorial seas and therefore that a conveyance of such seas may be implied even though a charter is silent with respect to them. But the grants of the seas of Nova Scotia and Newfoundland, where England through effective occupation had acquired rights, demonstrate that when the crown intended to convey such rights it did so expressly. See p. 73, infra.

Defendants also rely (C.C. Br. 201-202; S.S. Br. 33) upon Bartolus, who expressed the view that the coastal states were entitled to sovereignty to all islands within 100 miles of shore, and upon De Superioritate Maris. The latter document merely states that England has been in peaceable possession of the sea of England as well as of the islands of that sea; it does not support defendants' view that ownership of intervening seas necessarily follows from ownership of offshore islands. Furthermore, Bartolus did not recognize any right of ownership in the adjacent seas or seabed at all. As we stated in our opening brief (Br. 118), Bartolus took the position that the sovereign could assert only a protective power over those seas. This is exactly how Fenn construed Bartolus:

> * * * He [Bartolus] is unable to see any reason why a state should not have exclusive rights of jurisdiction within its territorial waters. He has not postulated a new power or a new source of power. It is to the interest of a state to protect its coasts, and to make the neighboring sea safe for navigation. It would be more difficult for him to deny such a right to the state than it is for him to advocate it. There is no right of sovereignty over these waters; there is merely a right of jurisdiction over them.
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> In the second case, that of islands, there is a property right involved. But it is a property right in the islands, not in the sea. [Emphasis added; Fenn, supra, at 102.]

Defendants further assert (C.C. Br. 203-204) that "at least two of the subsequent charters" confirm their position that a grant of islands conveys by implication the adjoining seas. Defendants apparently rely on the 1632 charter of Maryland and the 1673 lease of Virginia to Arlington and Culpepper, and they suggest that the language in those charters conveying islands within 10 leagues of shore also conveyed the seas out to that distance. But as Professor Kavenagh testified (Tr. 1483, 1496, 1489), what was granted the colonies was an area of mainland, and nearby islands, including what would today be called inland waters; also granted was sufficient power and jurisdiction to govern the settlements expected to be undertaken there, including a limited admiralty jurisdiction extending into the adjacent seas. Thus, the phrases "sea * * * within the premises" and "sea * * * of the province" to which defendants call attention refer to inland or tidal waters and to the portions of the sea over which admiralty jurisdiction was exercised. If, as defendants assert, the charters had in fact conveyed the seas to a distance of 10 leagues, there would have been no need for the charters to convey in carefully drawn terms both existing islands and islands to be formed in the sea within that distance

and "the Ports, Harbors, Bays, Rivers and Straits belonging to the Region or Islands aforesaid." Maine Ex. 141, p. 1678. Since it was necessary expressly to convey ports, harbors, and bays, it seems clear beyond debate that the encompassing sea itself was neither conveyed nor even thought to have been conveyed. In contrast, the 1630 deed of Nova Scotia, to which defendants refer (C.C. Br. 204), expressly conveyed the seas as well as islands out to 10 leagues and so is proof that the adjacent seas were not understood to pass by mere implication.

Defendants also rely (C.C. Br. 204) upon the language of the preamble of the third Virginia charter to establish that a grant of islands was regarded as conveying sovereignty and ownership of the intervening seas. That language states that the purpose of the charter was to create a more ample extent of the colony's limits and territories "into the seas adjoining to and upon the coast of Virginia." The purpose of the charter was to annex the Bahama Islands to the Virginia colony. See Tr. 890-892. It was the acquisition of these islands, not of the intervening sea and seabed, which created a more ample extent of the colony's limits and territories. Professor Smith, defendants'

witness, denied that the grant of islands in the Virginia charter was regarded as conveying the ownership and sovereignty of the intervening seas.[32/] See Br. 129.

Defendants further contend (C.C. Br. 205-210; S.S. Br. 25-26), that the New England charter of 1620 expressly conveyed sovereignty and ownership of the adjacent seas, impliedly out to 100 miles from shore. However, the charter language itself does not support such a reading. The charter describes the territory conveyed as "all that Circuit, Continent, Precincts, and Limits in America," within the fortieth and forty-eighth degrees latitude, "throughout the Main Land, from Sea to Sea, with all the Sea, Rivers, Islands, Creeks, Inlets, Ports,

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32/ When asked whether the grant of all islands within 300 leagues in the third Virginia charter was a grant of the intervening seas and seabed, Professor Smith testified that he had seen nothing to indicate to him that the language of that charter also extended sovereignty over the sea from 100 miles to 300 leagues. If ownership of islands was understood to mean ownership of the intervening seas, it would not be necessary for Professor Smith to see anything apart from the charter. He relied on identical language in the second Virginia charter and in other charters to conclude that sovereignty and ownership had been granted. The only significant difference between the charters is the distance in which islands were claimed. If defendants were correct in their construction of the significance to be attached to the conveyance of islands, Professor Smith should have maintained that sovereignty and ownership extended to 300 leagues unless there was something in the charter to prevent this.

and Havens within the Degrees, Precincts, and Limits of the said Latitude and Longitude * * *" (see C.C. Br. 205). We do not understand this language as conveying the high seas, but only tidal and inland waters. Surely the language would have been far more specific if an extensive grant of the high seas had also been contemplated. Apparently defendants contend that the further grant of "Royalties, Privileges, Franchises, and Preeminencies * * * within the * * * Seas adjoining" supplies the necessary specificity (see C.C. Br. 205-206; S.S. Br. 25-26). It is unclear whether anything more than inland and tidal waters was intended by the phrase "adjoining seas." But, as we have shown above (p. 65, supra), the mere grant of royalties, franchises, and the like, even in the high seas, falls far short of a grant of ownership of the seas themselves. Moreover, the very reference to "seas adjoining" implies that if the adjacent high seas were intended, those seas merely adjoined, and were not part of, the colony. What is missing from the grant is not, as the defendants argue (C.C. Br. 206), a "specification of 100 miles or any other distance from shore," but any grant at all of sovereignty or ownership of the adjacent seas. The grants by the Council of New England to its members relied upon by defendants (C.C. Br. 206-208) do not, and cannot, supply the grants of sovereignty and ownership of the adjacent seas omitted by the crown in its charter to the Council.

Admittedly, the Council's grants purport to confer "the seas and islands lying within 100 miles of any part of the said coast of the country aforesaid" (C.C. Br. 207). However, that expression is not, as defendants assert, a construction by the Council that its 1620 charter included a grant of sovereignty and ownership of the seas out to 100 miles. That expression is a paraphrase of the provision in the Virginia charter of 1606 which described the area granted to the Virginia Company. The United States has already demonstrated, supra, pp. 73-74, that the relevant provisions of the 1606 Virginia charter described only a portion of the mainland plus islands out to 100 miles, including inland waters. Neither the paraphrase of the 1606 Virginia charter nor any other provision in the grants by the Council of New England necessarily suggest that by the term "seas" the Council intended more than inland and tidal waters. This conclusion is reinforced by other provisions of the grants made by the Council. For instance Gorges and Mason are granted "all that part of the main land in New England lying upon the sea coast betwixt the river of Merrimack and Sagadahock * * * together with all the islands and isletts within five leagues distance of the premises and abutting upon the same * * *."

Maine Ex. 2, pp. 1622-1623. After granting harbors, ports, and rivers, the grant goes on to convey all prerogatives, rights, royalties, jurisdiction, franchises, and marine power in and upon the said seas and rivers. Id. at 1623. In our view the "said seas" refer to the harbors and ports and other inland portions of the sea previously mentioned in the grant as opposed to the adjacent seas out to 100 miles.

Although the Council described its grant as being bound by the shore (but including islands), in its first division it allocated "tracts of land" with boundaries 3 leagues into the sea. U.S. Ex. 73, p. 62. The apparent inconsistency between the Council's description of the boundary of its own grant and its division of that grant into tracts of land extending into the sea is clarified by other provisions of the Council's division. According to the Council's divisions, both the Duke of Lennox and the Earl of Arundel were to have tracts reaching "3 leagues into the sea." Id. at 61, 62. However, the Council further defined what it had granted to Lennox and Arundel as the area on the coast "with all ye fishings, Bayes, Havens, Harbours and Islands lyeing or being within 9 miles directly into the sea."

Id. at 63. There is no indication of an intent to convey the "sea" or "seas;" the waters actually intended to be conveyed were those which today would be viewed as inland waters.

Defendants also refer (C.C. Br. 208) to the patent of Mariana and the grant of the Piscataway area. The Council's Mariana grant conveyed an area on the mainland whose complex boundaries are set out in great detail; in addition to the mainland area, the Council granted the "Isle Mason lying Neere or before the Bay, Harbor, or ye river of Aggawon alsoe togeather with all the Seas, Isles or Islands adjoyning to any part of ye precincts of the Lands aforesaid or lying within 3 miles of ye same." Maine Ex. 12, p. 21. We believe that the tidal and inland waters of the mainland and outlying islands were intended by this reference to "adjoining seas." This construction is supported by contrasting the Mariana patent with the grants of Newfoundland and Nova Scotia; the latter grants were intended to embrace all the seas within a certain distance of shore, and they did so expressly without qualifying the description of the seas by use of the adjective "adjoining," a word suggesting marginal tidewaters. In our view, use of the term "adjoining" in

the Mariana grant reveals an intention of limiting the grant to the bays, harbors, creeks, coves, straits and other inland waters conveyed by the crown charter. The Piscataway grant, as we construe it, conveyed not the seas within 15 miles of shore but the "fishings thereabouts" in and of those seas. See Maine Ex. 16, p. 41.

The defendants then discuss (C.C. Br. 208) the crown's charters and grants pertaining to Newfoundland and Nova Scotia. Those charters were of course intended to convey rights in the high seas. But the difference between the Canadian and American charters was not accidental; it reflected the different circumstances of the colonies and the different claims which the crown asserted in the seas adjacent to them. The New England fisheries during this period were relatively insigificant and conducted principally in tidal and inland waters. The Newfoundland and Nova Scotia fisheries, however, were commercially valuable, consisted of offshore as well as inshore fishing, and were competed forby several European nations. England sought to establish control over these fisheries by chartering colonies and granting to those colonies not only a portion of the mainland on which to settle but, more importantly, the valuable fisheries in the adjacent high seas. It is for this reason that the charters relating

to Newfoundland and Nova Scotia differed significantly from defendants' charters. Moreover, the fact that the crown made grants expressly comprehending rights in the high seas out to 6, 10 and even 30 leagues off Newfoundland and Nova Scotia contemporaneously with the grants at issue in this case is further evidence that the crown did not grant adjacent seas by implication, but only by express terms.[33/]

Defendants, directly challenging the validity of the Supreme Court's decision in United States v. California, supra, 332 U.S. 19 (C.C. Br. 210-213) a number of early American decisions which, as they apparently concede, "had reference only to internal waters, i.e., rivers, harbors and perhaps bays" (C.C. Br. 212). Even Weston v. Sampson, 62 Mass. 347, on which defendants particularly rely, involved only the land between the low-water and high-water marks, although the court spoke in dicta

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33/ In our view, the crown grant with respect to the seas off Nova Scotia and Newfoundland was not a grant of maritime territory as we know it today but only exclusive fishing and trading rights. The history of these fisheries show that the disputes over them concern mostly the use of the shores which were required to conduct the fisheries, and over the carrying trade operating out of the bays and harbors of the colonies by which the fish were shipped to foreign markets. See our proposed finding of fact 6. Both Newfoundland and Nova Scotia submitted briefs and argued before the Supreme Court of Canada in Re Offshore Mineral Rights of British Columbia, Can. L. Rep. 796, 65 D.L.R. (2d) 353 (1967), where that court held that the territory of the maritime Provinces never extended beyond the low-water line.

with respect to the seabed as well. Moreover, these cases were before the Supreme Court in the California case and were recognized by the Court as not involving "the question of state-federal rights to the seabed beyond inland waters." 332 U.S. at 36.

Defendants suggest (C.C. Br. 213-219; S.S. Br. 35, 38) that on the basis of credentials, knowledge of the relevant areas of law and history, cogency of reasoning, and behavior on cross-examination, the testimony of their witnesses merits far greater weight than does that of the witnesses for the United States. The credentials and qualifications of all of the witnesses in this case are of course matters of record and need not be discussed here.[34/] We believe that the testimony of the witnesses for the United States was highly probative and needs no elaborate defense here.

34/ We note, however, that some of defendants' witnesses revealed a surprising unfamiliarity with the subject matter to which they testified. For example, Professor Horwitz, defendants' expert witness on English legal history as it related to the sea and seabed, did not know the meaning of the term "quator maria," did not know who Britton was, and testified that the only reference to the King's Chambers which he had seen was in Fulton. See Tr. 307, 327-328, 329, 346, 350, 387, 413. Defendants' arguments (C.C. Br. 11-12, 110) and evidence (Maine Exs. 194; 693 at 539. See also, Fulton, supra, at 65-66) suggest the importance of these concepts and authorities to English law of the sea. See also, Professor Flaherty's testimony at Tr. 1354-1355, 1356, 1374, 1376, and Professor Smith's testimony at Tr. 1223, 1258.

Defendants assert (C.C. Br. 214; S.S. Br. 28-29) that Professor Kavenagh, as an expert on colonial history, was not qualified to testify on the construction to be given to the colonial charters and grants since that involves a knowledge of English law. Yet throughout their arguments with respect to the charters and grants, defendants have relied upon the judgments of colonial historians, such as Charles M. Andrews, with qualifications similar to those of Professor Kavenagh. Moreover, Professor Kavenagh demonstrated during his testimony that his conclusions with respect to the grants and charters were based on a familiarity with relevant English legal authorities. Thus, Professor Kavenagh based his construction of the grants and charters, as they relate to the adjacent seas, in part upon his understanding of Glanvil, Britton, Bracton and Hale (Tr. 2133-2135, 2155-2156), and the sources relied upon by Professor Kavenagh support his conclusions.

Professor Kavenagh's discussion of sedentary fishing in the colonies, contrary to defendants' assertion (C.C. Br. 214-215), is not inconsistent with our position in this litigation. The Professor conceded at most (Tr. 2145-2146) that if sedentary fisheries had been discovered off the colonies, they could have

asserted exclusive rights to those fisheries, but he indicated that a colony would have been successful in making such a claim only by taking positive action to bring the fishery under the control of the colony, i.e., by effectively occupying the fishery. Thus the burden of Professor Kavenagh's testimony on that point was simply that the jurisdiction or power to occupy such sedentary fishing banks may have been encompassed in the jurisdiction and powers granted to the colonies by the crown for the purposes of ensuring good government.[35/]

Defendants, quoting Professor Morris out of context, claim (C.C. Br. 219) that his understanding of the 18th century concept of territorial waters is inconsistent with the English and international law of that time. During cross-examination Professor Morris made it clear (Tr. 2269) that in responding to defendants' questions regarding the territorial sea in the 18th century he was speaking of the position of the United States in 1793. With respect to his earlier conclusion that the only

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35/ The testimony of Professor Kavenagh at Tr. 2162, also cited by defendants (C.C. Br. 215), involved the right of the colonies to exclude or license foreign fishermen in "Pemaquid waters," i.e., inland waters, such as harbors, bays, creeks, coves, gulfs, straits, etc.

right under that concept of territorial waters which was clear to him was the right to exclude vessels, Professor Morris testified (Tr. 2275) that this right was limited only to the right of protection and defense and specifically did not include the right to prohibit free navigation. There is nothing inconsistent or contradictory in recognizing that in the 18th century territorial seas existed for purposes of neutrality and defense but were nevertheless free fishing or navigation areas. Moreover, contrary to defendants' assertion (C.C. Br. 219), Professor Morris never testified that the coastal fisheries belong to the proprietor of the coast; he merely stated (Tr. 1861-1684) that the French claimed that the coastal fisheries belonged to the coastal proprietor. It was Professor Morris' consistent position that fishing in the open sea was free to all nations except to the extent that a nation had limited itself by treaty. Thus he testified that the exclusive fishing rights which England asserted against the French and Spanish in Newfoundland and Nova Scotia were by treaty and not by any general principle of inherent rights. This was, of course, the position which Congress also took in its negotiations with the British over the North American fisheries.

Congress declared that the use of the sea, except such parts thereof as lie in the close vicinity of the shore and are deemed appurtenant thereto,[36/] is common to all nations, except those who have either by positive convention, or by long and silent acquiescence, renounced that common right. See Tr. 1790.

Defendants apparently (C.C. Br. 221-224) rely on the free-fishing clauses in the colonial charters as proof of a claim to sovereignty and ownership of the adjacent seas out to 100 miles. But the existence of such clauses in defendants' charters is not inconsistent with our position that the colonies had been granted bays, harbors, coves and other areas of the sea which we today regard as inland waters, and in which the colonies might have claimed exclusive fishing rights in the absence of a free-fishing clause. Thus, Angell, in the passage relating to free fishing quoted by defendants (C.C. Br. 218), referred solely to "tide waters" and "arms of the sea."

36/ Congress was willing to recognize English claims to exclusive fisheries only within 3 leagues of shore, and even those claims were recognized only because of the "positive convention" between England, France and Spain and "long acquiescence under exclusion." See Tr. 1793-1799.

To summarize the evidence with respect to the colonial charters and grants, England expressly conveyed a portion of the adjacent seas, or exclusive rights in those seas, to only two of its North American colonies--Newfoundland and Nova Scotia. The grants to Newfoundland and Nova Scotia illustrate that when the crown intended to grant the adjacent seas, or exclusive rights in these seas, it did so explicitly. There is, therefore, no basis for implying such a grant elsewhere; in the absence of an express grant, it should be presumed that no conveyance was intended.[37/] The only evidence which defendants have introduced which arguably supports their contention that the crown conveyed portions of the adjacent seas to any of the colonial predecessors of defendant States are two grants by the Council of New England. This evidence is, as we have shown (pp. 75-76 supra), ambiguous at best. But, in any event, evidence of what the Council purported to grant is

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37/ Of course, England had, through effective occupation and by treaty, obtained exclusive rights in the waters off Newfoundland and Nova Scotia, whereas it had obtained no such rights in the waters off defendant states (see pp. 50-51, supra). This suggests that where the crown had maritime rights to convey, it did so, but that it did not purport to grant territorial rights it did not possess.

not evidence of what the crown granted to the Council. The Council, by referring to the adjacent seas in its grants to members, was presumably endeavoring to bolster its claims to exclusive fishing rights off the New England coasts--claims which, as we showed in our opening brief (Br. 142-143), were denied by the Privy Council. For these reasons, the early actions by the Council hardly serve as the basis for construing even the crown's grant to the Council, much less subsequent grants to the Council's successors or to the other colonies whose history is at issue in this litigation.[38/]

Defendants conclude their argument with respect to the colonial charters by summarizing (C.C. Br. 224-226) the distances into the sea which under their construction of the charters each of the colonies obtained.[39/] The evidence with

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38/ In any event, the Council of New England was obsolete by the times the colonies relevant to this litigation were formed, and it is the laws of Massachusetts and the other colonies which succeeded the Council which would prevail. Massachusetts, far from making claims of exclusive fishing rights, recognized by statute the right of foreigners to fish even in inland waters. See Tr. 2287. Moreover, all the colonies which succeeded the Council construed their eastern boundaries to be the Atlantic Ocean. See Br. 132-137.

39/ Even accepting defendants' theory that a grant of islands is equivalent to a grant of sovereignty and ownership of the adjacent seas, the defendants have incorrectly described the seaward boundaries which would have resulted under such a theory. See Br. 121-123.

respect to these charters has been reviewed above (pp. 64-77, supra) and in our opening brief (Br. 126-130), and we believe that it is clear that the American colonies (i.e., the predecessors of defendant States) were in fact granted neither ownership nor sovereignty of the seas and seabeds, nor even exclusive fishing rights. Moreover, even defendants concede that those charters generally conveyed the adjacent seabed not out to the 100 miles which they claim in this litigation, but only out to 5 or 10 leagues. To remedy this deficiency, defendants rely (C.C. Br. 227) upon succession to crown maritime sovereignty upon independence.[40/] This argument, in turn, rests in part on the contention that England claimed such sovereignty out to 100 miles in the American seas. Although defendants repeatedly assert (see, e.g., C.C. Br. 224-231) that England claimed such sovereignty, they have failed to adduce any evidence establishing that fact; this substitution of a bald assertion for proof is not surprising for, as we have shown (see pp. 46, 71-72, supra, and pages 104-126 of our opening brief), England made no such claim.

40/ We discuss this general argument of succession below (pp. 110-114, infra) and in our opening brief at pages 169-174.

12. Colonial law and practice does not support a claim that rights to the adjacent seas or seabed were conveyed to the colonies in the grants and charters (Br. 137-154).

Common Counsel defendants rely upon arguments and evidence at pages 232-278 of their brief to rebut the arguments and evidence of the United States under this conclusion. See also S.S. Br. 23-43; 25-76. Since even defendants concede (C.C. Br. 224-231) that most of the colonial charters which specified any distances granted rights extending no more than 10 leagues into the sea,[41/] rights within those limits are the most that evidence relating to colonial law and practice under the charters can ever suggest. But as we have already demonstrated (pp. 47-52, supra, and Br. 104-136), sovereignty and ownership of the seas were not claimed by England or conveyed to the colonies, even within the narrow limits mentioned in the charters, and we now show that the colonial law and practice are consistent with our construction of the original grants and charters.

41/ Virginia was granted islands out to 100 miles in 1606, and further out to 300 leagues in 1611-1612 (to incorporate the Bahama Islands); Georgia was granted islands out to 20 leagues. Maine Exs. 43, 274.

(a)-(b) Colonial legislation regulating fishing does not show that the crown claimed or conveyed a general property right to the seas or seabed adjacent to the colonies; colonial legislation relating to whaling and other fishing, including sedentary fishing, was based upon the colonies' control over colonists and their vessels or over activities within the mainland boundaries of the colonies, including activities on the shores, and in the bays and inlets (Br. 138-146, 149-151).

Most of defendants' arguments and evidence with respect to exclusive fishing rights pertain to Canadian rather than American colonies (see C.C. Br. 238-252). In relying primarily upon evidence relating to colonies whose legal status is irrelevant to these proceedings, defendants assert, without any attempt at justification, that "[p]recedents from Canada are equally relevant as those from the Common Counsel states themselves" (C.C. Br. 232). As we have shown (pp. 63-65 , supra), there were critical differences between the Canadian colonies, where fishing was all-important, and the American colonies, where fishing was of secondary or no significance. We will briefly recapitulate those differences here.

First, the fisheries in Newfoundland and Nova Scotia were the subject of international competition from the very beginning of the colonial period. England claimed them for herself, for strategic as well as economic reasons, and the extensive charter grants covering those fisheries were made in furtherance of that claim. As defendants concede (C.C. Br. 252, 253; see also Tr. 2125-2126, 2283, 2290) little competition existed for the fisheries of the American colonies, and the competition which did exist apparently was tolerated by the colonists. Second, fishing was conducted in Newfoundland and Nova Scotia not only in the bays, harbors, and other inland waters of the mainland and adjacent islands but also on the offshore fishing banks, generally ranging out to three or six leagues from shore. There was one fishing area of importance, Sable Island, located beyond six leagues off the southeastern coast of Nova Scotia; in order to assert control over the fishing banks of that area, England extended the boundaries of Nova Scotia at that particular place to 30 leagues. The distance of 30 leagues was chosen not on the basis of any general rule of international law but on the basis of the existence of an important fishery. By contrast, fishing in the American colonies was conducted close to the shore, in the bays, coves, harbors,

and other inland waters. This was true throughout the major part of the charter-granting period, even in New England. This is clear from the 1641 and 1648 statutes of Massachusetts, which regulated fishing in the bays, creeks, and coves of that colony, but not on the adjacent seas. See Br. 145-146. Defendants cite (C.C. Br. 253; Ex. 499, p. 113) other similar examples, such as a 1646 Massachusetts statute which relates to fishing in its "harbors." For these reasons, the United States believes that the evidence relating to exclusive fisheries in Newfoundland and Nova Scotia is irrelevant to the question whether the American colonies operated exclusive fisheries in the high seas off their coasts.

The defendants have introduced relatively little evidence (C.C. Br. 252-255) relating to the fisheries in the colonial predecessors of defendant States, and this evidence pertains almost entirely to the New England colonies. We have already shown (see pp. 86-87, supra; see also C.C. Br. 253-254) that the New England colonies for the most part permitted fishing by foreigners in those portions of the seas within their boundaries, i.e., in the bays, harbors, and other coastal

waters.[42] Thus in 1646, the Massachusetts colony enacted a statute explicitly recognizing the fishing rights of foreigners (Maine Ex. 499, p. 113).[43]

Defendants contend (C.C. Br. 234-238) that the New England fishing controversy and its resolution in 1621 show the creation and possession of exclusive fishing rights in the high seas off the coasts of defendant States. Of course, even the possession of such exclusive fishing rights would not carry with it the ownership and sovereignty over the sea and seabed which defendants seek to establish here. But, as we shall now show, the Privy Council's order with respect to the New England fisheries in fact barred the colonies from asserting exclusive fishing rights even within inland waters, let alone the high seas.

42/ The 1683 instructions for the settlement of the Pemaquid colony (see C.C. Br. 254) did prohibit foreign fishing vessels from embarking for herring fisheries at Mount Niles, a provision apparently based on the colony's control of ports and harbors.

43/ In attempting to explain away that statute, defendants state (C.C. Br. 253) that a 1667 statute described the earlier statute as in accordance with the Massachusetts Bay charter of 1629. In fact, the 1667 statute did not say that the provision with respect to foreign fishing was in accordance with the king's grant but rather that certain lands were disposed of in accordance with that grant.

The Privy Council's order related primarily if not entirely to bays, harbors, and other tidal and inland waters. Certainly the award of the Privy Council emphasized the land-based nature of colonial fishing (see Br. 142-143). Defendants contend (C.C. Br. 235) that the order is nevertheless "interesting" because it suggested that the colonies had limits and bounds "at sea." In our view, the reference in the Privy Council's order to limits "at sea," if indeed there was any such reference,[44/] pertained to the bays, harbors, and other inland waters provided for in the colonial fishing statutes to which we referred in our opening brief. It would appear from defendants' own evidence that this is what the New England Company had in mind. In arguing for exclusive fisheries jurisdiction, Gorges equated his claims to exclusive fishing in coastal waters to the claims of lords of manor in their counties. Exhibit 734, p. 101. The counties, of course, included what are today known as inland waters but did not include the high seas. The subsequent

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44/ Although the expression "at sea" is found in the copy of the order quoted by defendants, it is not in the copy of the order quoted by the United States (Ex. 71, p. 4).

Massachusetts fishing statutes, which regulated fishing only in bays, coves, harbors and the like, also suggest that the fishing controverted by the colonists took place in inland waters. Moreover, the Privy Council's order denied rather than recognized exclusivity.[45/]

Defendants assert (C.C. Br. 236-237) that the 1620 charter of New England conferred a monopoly of fishing on Gorges and the other grantees, and they infer therefrom that the Council was successful in maintaining a monopoly. In fact, the evidence relied upon by defendants in this matter (Maine Exs. 663, 683, 740, 777, 465 and 719) reveals that the crown repudiated Gorges' monopoly and that he was unsuccessful in maintaining it even for a short while. Charles M. Andrews concludes his discussion of the monopoly aspects of the Gorges patent by noting that Gorges never profited from his monopoly and that a free fishing clause was specially inserted in his charter of 1639. Maine Ex. 663, p. 325. Indeed, after 1624 "the exclusive fishing clause was tacitly allowed to lapse." Ex. 704, p. 43. It is generally

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45/ Defendants' suggestion (C.C. Br. 235) that the Privy Council's order by implication excluded Englishmen from the New England fishery is utterly without foundation. The provision in the order limiting reciprocal colonial fishing to that "for the sustentation of the people of the colonies there" was evidently designed only to limit colonial competition with British fishers for the European trade.

recognized that free fishing was secured under Charles I. See Ex. 719, p. 50. Although defendants assert (C.C. Br. 238) that the arguments in the Privy Council and before Parliament in favor of free fishing were based merely on preserving established fishing rights, it is clear that Coke, whom defendants cite, advocated free fishing by all nations. Indeed the Virginia Company objected to the monopoly provision as a violation of the principle that the sea was as free as the air. See Ex. 466; Ex. 663, p. 324; Ex. 734, p. 99.

We have carefully reviewed the statutes cited by defendants (C.C. Br. 255-257) as examples of the colonial licensing of fishing, and they in no way alter out conclusion that (Br. 146) "colonial legislation relating to fisheries was based upon the control which the colonies exercised over their own colonists or control of activities on shore or in inland waters."[46/]

Similarly, the grants of exclusive fisheries discussed by defendants (C.C. Br. 257-260) related, in the American colonies, solely to shore or inland water fisheries or to

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46/ For example, defendants rely (C.C. Br. 255) in part on a 1682 Pennsylvania charter which in fact granted 20,000 acres of land and free fishing within the province; Pennsylvania, of course, did not border on the open seas and the grant of non-exclusive fishing rights in Pennsylvania waters can hardly be construed as a claim to sovereignty over the high seas.

shore-based activities. Thus the leases of exclusive fishing rights issued by the Plymouth colony covered only shore fisheries. See Ex. 720, pp. 33, 64; Ex. 731, p. 140; Ex. 732, p. 228; Ex. 734, p. 478. Indeed, vessels were not even used in this fishery until the close of the 18th or beginning of the 19th century. Ex. 742, p. 354. The "rich * * * bass fisheries" to which defendants refer (C.C. Br. 257) were of course located in rivers and creeks. Ex. 742, pp. 275-276.

Defendants' remarks (C.C. Br. 260-261) with respect to the colonial regulation of fisheries also require little discussion. A review of the American legislation cited by defendants reveals that the colonial governments were regulating only activities on the shore[47/] or in bays, harbors, and other inland or tidal waters,[48/] or exercising jurisdiction generally over persons within the colonies. This is also true of the legislation affecting the whale fishery. Despite defendants' declaration (C.C. Br. 256-257, footnote) that they know of no basis

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47/ E.g., the drying, salting, and curing of mackeral. Maine Exs. 499, 503, 724.

48/ E.g., fishing for bass or mackeral in inland waters or on or near shore (Maine Exs. 503, 719, 731, 732; U.S. Ex. 9, p. 92); throwing garbage or ballast into harbors or bays (Maine Exs. 719, 731, 732, 741, 804, 812).

for asserting that colonial whaling statutes regulated shore-based activities, virtually all the evidence pertaining to such statutes related to "drift" (i.e., dead) whales "cast" or "driven" on shore[49/] or found within a short distance of the shore and brought ashore.[50/] The remaining evidence with respect to whaling regulations shows only that the colonial governments asserted jurisdiction over other activities within the mainland territory and inland waters[51/] or over the vessels and residents of the colonies.[52/]

None of the American legislation cited by defendants represents a colonial attempt to assert sovereignty or ownership over the adjacent high seas; apparently none of these statutes would apply to foreigners fishing in the open seas unless they were utilizing the shore or shore-based facilities of some kind within the colony whose legislation was in question.

49/ Maine Exs. 374, 483, 484, 485, 493, 501, 538, 724, 732, 748; U.S. Exs. 199, 200, 208.

50/ Maine Exs. 493; 731, p. 213; 748, p. 16; U.S. Exs. 9, 208.

51/ E.g., cutting up or trying whales on shore (Maine Exs. 482; 483; 484; 721, p. 253; 732; U.S. Exs. 199, 200), or the taking of whales in inland or tidal waters (Maine Exs. 276, 476).

52/ E.g., regulating whaling by Indians (Maine Ex. 478).

Nor does the regulation of oyster-gathering (see C.C. Br. 261-262) indicate a claim of ownership over the open seas. As we indicated in our opening brief (Br. 141-142), shellfish were harvested only in inland or tidal waters. Although statutes regulating oyster-gathering may indicate an intention of asserting jurisdiction over nearby tidal waters, such jurisdiction is of course a very different matter from the extensive ownership of the high seas defendants assert here. Oystering in New York took place only in inland waters (Tr. 1633-1634, 1637), and the New Jersey statute was limited by its terms to oyster beds within the colony. Moreover, the statutes themselves indicated that the oyster-gathering took place in shallow, protected waters, for they govern the "raking up" of oysters. See Maine Exs. 277, 278.

Apart from evidence relating to sedentary fishing, the only other evidence of colonial law and practice introduced in these proceedings which may have bearing on ownership of the adjacent seabed related to grants of derelict and submerged lands.[53/] Derelict or reclaimed lands, of course, become part

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53/ Defendants also refer (C.C. Br. 264) to colonial grants of salt ponds; such ponds were, of course, located above the low-water mark.

of the territory of the colony upon emerging from the sea. And every grant of submerged lands mentioned or described by defendants relates to land under rivers, bays, and similar waters. The 1641 and 1647 Massachusetts statutes relied upon by defendants grant only the foreshore to the littoral owner, nothing beyond. Specifically, the statutes actually grant only up to 100 rods of the foreshore "in all Creeks, Coves and other places, about and upon Saltwater, where the sea ebbs and flowes." Maine Ex. 533. Defendants apparently lay great stress on the phrase "though any sea" in that part of the statute which prohibits interference of the use of the foreshore for navigation. The statute actually provides that the use of the foreshore shall not interfere with passage of boats "in or through any sea, creeks or coves." The statute regulates only uses of the foreshore. Consequently, "any sea" means any portion of the seas overlying the foreshore at high tide.

(c)-(d) The exercise under colonial legislation of prerogative rights to valuables in or near the sea does not constitute evidence that the crown claimed or conveyed property rights to the adjacent seas or seabed, since under English common law treasure trove, wreck, flotsam, jetsam, lagan, and royal fish (i.e., whales) belong to the crown as ownerless property; the exercise of the prerogative under colonial legislation was limited to valuables found in or brought into the colonies (Br. 146-151).

Defendants argue (C.C. Br. 11-13, 58; S.S. Br. 39-43) that the crown prerogative right to wreck, treasure trove, and royal fish in the American colonies was based under English law upon sovereignty over the adjacent seas. In this respect, defendants have relied upon evidence that royal fish in the English seas were claimed on the basis of sovereignty or ownership over those seas to establish that royal fish were claimed on a similar basis in the seas adjacent to the colonies. Defendants have not shown that if they are correct about claims to royal fish in the English seas, the same law applied in the colonies. Even if during the 17th and 18th centuries rights to royal fish, wreck and islands arising in the sea may have been claimed in the

English seas as incident to sovereignty over those seas, it does not follow that the coastal sovereign could not claim such valuables on another basis in seas over which he lacked sovereignty. As we showed in our opening brief (Br. 146-149), the right to such valuables was traditionally based upon the crown's claim to ownerless property found or brought into the realm. It is clear from the evidence in this case that the colonies asserted a right only to whales found within inland waters, cast up on shore, or found floating near and taken onto shore. See, e.g., Br. 139-140; Tower, infra at 27; Starbuck, A History of the American Whale Fishery 9, 19. Thus any semblance of the crown's prerogative to royal fish exercised by the colonies was based on sovereignty not of the seas but of the land. Although colonial legislation regulated distant whaling, such regulation was not based upon a royal prerogative or dependent upon a claim to sovereignty and ownership of the waters in which the whale was captured; it was based either upon the personal jurisdiction exercised by the colonies over their residents or upon the territorial jurisdiction they exercised over activities on the mainland or inland waters such as ports and harbors.

The evidence relating to wreck and other admiralty droits relied upon by defendants (C.C. Br. 272-273) does not show that the crown or the colonies based the exercise of their

prerogative interest in those droits upon sovereignty over and ownership of the seas. The 1713 and 1717 Parliamentary Acts dealt with wreck found upon the coasts or shores of England or her dominions. Similarly, the 1766 New Jersey Act applying those Acts related to "such ships and goods which shall happen to be forced on shore or stranded on coast." The 1692 Maryland appointment apparently relates only to drift whales on shore or in inland or tidal waters. The royal grants of right of wreck, which cover not only the seas of North America but those of Central and South America as well, clearly were not based upon claims to sovereignty and ownership of the seas in which those wrecks were located. And the finding of ambergris on the coast of Bermuda is wholly irrelevant to sovereignty and ownership of the adjacent seas.

(e)-(f) The exercise of admiralty or maritime jurisdiction under colonial legislation does not show that the crown claimed or conveyed in the grants and charters property rights to the seas or seabed adjacent to the colonies; the exercise of admiralty jurisdiction (other than over piracy) under colonial legislation was based either upon the English or colonial nationality of the vessels or crews, the presence of a vessel or its crew within the mainland boundaries of the colony, including the internal waters, or the implied consent of the vessel to such jurisdiction (Br. 151-154).

Defendants rely (C.C. Br. 269-271) upon grants of admiralty jurisdiction to establish that the admiral's jurisdiction in the seas off the American colonies was territorial. The United States has already demonstrated (see Br. 66-77; pp. 17-23 , supra) that the jurisdiction of the admiral in the English seas was not territorial in nature; in view of this there is certainly no basis for believing that the jurisdiction exercised by the admiral in the seas adjacent to the colonies was territorial.

In our view, the broad patents to the English admirals (Maine Exs. 642, 675), which included generally the plantations as well as England, merely described the geographical area of responsibilities of the admiral. Even so, the terms of these patents, as well as the patents to various vice-admirals (Maine Exs. 323, 324), clarify that no claim of maritime sovereignty was involved, for they granted jurisdiction over both the maritime parts of the colonies and the seas adjacent thereto. The patents indicate that the "maritime parts" of the colonies were ports, harbors, and other inland or tidal waters.

A grant of admiralty jurisdiction, whether explicitly delimited or indefinite in extent, is unrelated to territorial maritime sovereignty. For example, the Maine Charter of 1639, cited by defendants (C.C. Br. 271), granted admiralty jurisdiction out to 20 leagues even though it granted islands out to only five leagues. If a grant of admiralty jurisdiction in fact represented or was dependent upon maritime sovereignty, it would have been either unnecessary, or inconsistent, or both, to grant only those islands within five leagues of shore.

Finally, even assuming, as defendants contend (C.C. Br. 271), that in some instances the admiral enforced colonial rights to exclusive fishing areas, this does not show that the exercise of admiralty jurisdiction was based upon sovereignty. Exclusive fisheries were based solely upon effective occupation (see Br. 37-41, 56-59; pp. 63-64, supra), but admiralty jurisdiction could be exercised whether or not fisheries had been established. In any event, defendants have not shown that any of the colonies successfully occupied any fishery in an adjacent sea beyond inland or tidal waters. All of defendants' evidence of enforcement of exclusive fisheries, as far as we have been able to determine, relates to fisheries within bays, harbors, and other inland waters. Cf. Maine Ex. 810, pp. 1, 2, 6, 7; Maine Ex. 802, p. 3; Maine Ex. 798.

Defendants also rely (C.C. Br. 274) upon fishery regulations dealing with marine pollution such as the throwing of ballast or garbage overboard as evidence of maritime sovereignty. As we have demonstrated (pp. 91-95, 97-99, supra) in our discussion of fishery regulations, these statutes applied almost entirely to ports, harbors and other inland waters. The Massachusetts statutes cited by defendants (C.C. Br. 274; Maine Exs. 507, 531, 532) are simply examples of the land-based nature of

the activities affected by such regulations. The only statutory reference to the adjacent high seas are provisions requiring fishermen to dump whale carcasses at least three leagues off shore after processing. Maine Ex. 748, pp. 45-46; Maine Ex. 801, p. 13. Since the processing of whales took place on land, those statutes are evidence only of regulation of shore-based activities.

Defendants also rely (C.C. Br. 274-275) upon customs enforcement in the adjacent seas to establish ownership of those seas. Both English and American law have historically recognized that a coastal state may exercise jurisdiction beyond its territorial seas for customs enforcement. Such exercise of jurisdiction is therefore not evidence of a claim to sovereignty and ownership of the seas in which it occurs.

Defendants have introduced no evidence that the crown, either apart from or in conjunction with the colonies, claimed sovereignty or ownership beyond the areas which it conveyed to its colonies. Moreover, defendants have introduced no evidence of colonial law and practice which supports the proposition that the colonies which had been granted islands under their charters believed that they had been granted sovereignty or ownership of

the adjacent seas within the five or ten leagues which determined the grant of islands. In sum, the evidence as to colonial law and practice fully supports the determination of the Supreme Court in the California case that the territorial jurisdiction of the colonies did not extent into the adjacent seas.

13. Regardless of whether the crown conveyed property rights to the adjacent seas or seabed to the colonies in the original grants and charters, the defendant States do not currently possess those rights (Br. 155-218).

The United States believes that it has fully demonstrated that the crown did not claim and did not convey to the colonies sovereignty or ownership of any portion of the seas adjacent to the defendant colonies. Nonetheless, it is the position of the United States that had rights to the adjacent seabed existed under English law and been granted to the colonies under their grants and charters, the defendant States do not currently possess such rights. Our proposed conclusion of law to this effect summarizes our proposed conclusions 14 through 16, which are discussed below.

14. If property rights to the adjacent seas and seabed were conveyed to the colonies in the original grants and charters, those rights reverted to the crown before independence (Br. 155-174).

(a)-(c) With the exception of lands in Massachusetts, Rhode Island, Maryland and New Jersey, vacant and unappropriated colonial lands reverted to the crown when the colonies became royal colonies; there is no evidence that Massachusetts, Rhode Island, Maryland or New Jersey claimed the adjacent seabed as vacant and unappropriated land; to the extent that English law recognized any property rights in the adjacent seabed as an incident of governmental powers and to the extent the rights were conveyed to the colonies in the original grants and charters, those rights reverted to the crown before independence (Br. 155-174).

Defendants assert (C.C. Br. 279-280; S.S. Br. 38) that a reversion to the crown of rights in the adjacent seabed does not assist the United States in these proceedings because: (1) the reversion of these rights was the principal cause of the revolution; (2) in any event, upon the revolution the states succeeded to the same rights which had reverted to the crown;

and (3) there is no evidence that rights to the seas and seabed reverted to the crown. Of course, the assertion that the reversion of such rights was a principal cause of the Revolutionary War--an assertion which defendants fail to support with evidence or argument--does not deny that such a reversion occurred. Defendants' contention that they succeeded upon independence to the rights which had reverted to the crown is discussed below (pp. 116-121, infra). We discuss here only whether colonial rights to the seabed, if any, reverted to the crown prior to independence.

The United States has consistently maintained that property rights to the seabed of the adjacent seas generally did not exist during the colonial period under English or international law. However, we will assume for the purposes of our discussion here that such rights did exist and had been conveyed to the colonies by their charters.

Since it is clear from the evidence discussed in connection with our proposed conclusion of law 11 that the seabed out to five or ten leagues or even 100 miles, if granted to the colonies, was never effectively occupied, that adjacent seabed had the same status as vacant or unappropriated lands in the colonies. See Br. 156-160. Apparently defendants do not deny

that by 1754, with few exceptions, the vacant unappropriated lands of the colonies reverted to the crown. The thrust of defendants' argument (C.C. Br. 280-286; S.S. Br. 28; 28) appears to be instead that despite the royalization process whereby the crown obtained title to the vacant and unappropriated lands of the colonies, it could not and did not dispose of such lands. Thus defendants assert that the crown could not and did not interfere with private property rights in the colonies. Apparently defendants are suggesting that title to the vacant and unappropriated lands was such a property right. However by definition vacant and unappropriated lands were not the subject of private ownership or private property rights. See Br. 155-163.

Defendants treat our argument with respect to crown control and management of vacant and unappropriated lands as resting merely on the Albany Plan of Union of 1754, the Royal Proclamation of 1763, the Board of Trade proposal of 1768, and the Quebec Act of 1774. This overlooks the most important evidence upon which the United States relied--the dismemberment and assumption of control of the colonies by the crown. See Br. 163. More specifically, it also overlooks the control which the crown exercised over unappropriated natural resources. See Flaherty, Tr. 1361-1362; Morris, Tr. 1700, 1714; Kavenagh, Tr. 2143.

In denying that the Albany Plan of Union was evidence of a curtailment of colonial rights in the western lands, defendants overlook the main purpose of the proposed Albany federation--the administration of territorial expansion by regulating new settlements in the western lands until new governments could be formed. See Tr. 1701-1704. Defendants, relying upon references in the plan to the charter boundaries of Virginia and Massachusetts, assert that the plan recognized colonial claims to the western lands. The plan "recognized" such claims only to reject them. The plan referred to those boundaries to establish "that not only the right to the sea coast, but to all the inland countries, from sea to sea has at all times been asserted by the Crown of England." U.S. Ex. 366, pp. 885-886 (emphasis added). The plan specifically provided:

> That the bounds of these Colonies which extend to the South sea, be contracted and limited by the Alleghenny or Apalachian mountains, and that measures be taken for settling from time to time Colonies of His Maj" protestant subjects, westward of said Mountains in convenient Cantons to be assigned for that purpose; and finally: That there be a Union of His Maj" several Governt' on the Continent, that so their Councils, Treasure and strength may be employed in due proportion ag" their common Enemy. [Id. at 888.]

Although the Albany Plan was rejected by the colonies and not adopted by the British government, this did not imply disagreement with the land policy therein enunciated. Referring to a subsequent expression of the same policy by the Connecticut Assembly, Professor Morris stated (Tr. 1703-1704) that the notion of central control of the great western tracts continued to be pressed by the crown and the colonies, was embodied in later actions of the British government, and culminated in the relinquishment of the western lands during the confederation period.

Although the Royal Proclamation of 1763 may not have formally changed the boundaries of the colonies, it did, as Professor Morris testified (Tr. 1707), effectively reduce the rights of the coastal colonies in the vacant western lands beyond the Appalachian Mountains. Moreover, as Professor Morris further testified (Tr. 1704-1706), this policy was advocated by people such as the Governor of the Massachusetts Bay Colony and the former governor of the Georgia Colony. The crown, acting pursuant to the Proclamation, continued to assert control over this area until the outbreak of the Revolution. See Tr. 1707-1714. As the Report to the King from the

Lords of Trade on the State of Indian Affairs (U.S. Ex. 368) indicates, the purpose of the Proclamation was to restrict the colonies to the lands east of the Appalachians and to provide for the establishment of new colonies in the western lands. Professor R. A. Humphreys, a leading authority on the British Empire, described the Proclamation in the following terms:

> This [Proclamation of 1763], amongst other provisions, defined the territory of three new colonies on the continent of North America, prescribed their immediate and their future forms of government, and restricted by a boundary line the westward extension of the old provinces. [R.A. Humphreys, "Lords Shelburne and the Proclamation of 1763," 49 English Historical Review 241.]

Defendants contend that the Quebec Act of 1774 should be disregarded because it was one of the causes of the Revolution. Despite colonial objections, that Act was valid under English law, as were the earlier revocations of colonial charters and the dismemberment of the colonies by the crown.

Defendants argue that there is no evidence that the crown ever attempted to curtail any colonial rights on the surface of the seas. In doing so, defendants fail to note that there was little colonial activity beyond inland and inshore coastal waters, and therefore there was no need for the crown to "curtail" activities in those waters. Moreover, even before the royalization of the colonies, the crown exercised extensive control over those seas. See Br. 137-154. From the beginning, the crown exercised control over fishing and navigation: the Navigation Acts controlled every aspect of navigation and trade to the colonies. See Tr. 1684-1685, 1690. Although this British control over colonial use of the American seas did not amount to a British claim of sovereignty over or ownership of those seas, it did preclude colonial assertion of such claims.

15. Any property or governmental rights to the seas or seabed adjacent to the colonies, which existed at the time of independence, passed from the crown directly to the United States upon independence (Br. 175-209).

Defendants contend that crown maritime rights of a territorial or property nature passed at independence to the States individually. It is our position, of course, that the crown had not possessed such rights at all. This is also the position taken by the Court in United States v. California, 332 U.S. 19, where it was held that the maritime rights here in question did not exist prior to the independence of this country and that when they did subsequently come into being they belonged to the federal government. But assuming, arguendo, that the crown did possess such rights prior to independence, we submit that those rights passed to the national government and not to the individual States. Any rights held by the crown were held by it as incidents of national sovereignty, and they therefore would have passed to the United States as the national sovereign and not to the separate States.

(a) The United States collectively, and not the individual States, was recognized upon independence as an independent nation under international law with full sovereignty

over all external or international matters (Br. 176-193). United States v. Curtiss-Wright Corp., 299 U.S. 304.

Defendants contend (C.C. Br. 314-351, 409-414) that no national government capable of exercising external national sovereignty and of receiving the indicia of such sovereignty existed prior to ratification of the Constitution in 1789. See also S.S. Br. 45-51; 28-30. As we demonstrated in our opening brief (Br. 176-193), neither the founding fathers nor foreign nations took this view of the formation of the United States. To the contrary, every foreign nation, and most of the founding fathers, [54] viewed the United States upon independence as a single national sovereignty for purposes of international relations. Defendants' evidence showing that the separate States were recognized domestically as sovereigns is not inconsistent with our position. The States did exercise an internal sovereignty and, in a more restricted manner, they continue to do

54 / Defendants incorrectly assert (C.C. Br. 324) that Professor Morris' testimony with respect to the views of the founding fathers relies primarily on John Jay's Circular Letter to the States. In fact, that letter was not relied upon by Professor Morris in his direct testimony at all. It was only cited (Tr. 2381), along with other authorities, in response to a request by opposing counsel for additional references.

so. But all international aspects of sovereignty--all external national sovereignty--was centralized from the beginning and lodged in the national government. The proper relationship of state to national powers was controverted from the very beginning of the revolutionary period, but the question mooted was not whether a national government existed but rather how the powers of that government were to be defined. The defendants' multiple references to the States as sovereigns must be understood in this context. We now turn to a discussion of defendants' specific contentions.

In our opening brief (Br. 176-184), we showed that the history of the first Continental Congresses demonstrated that a government possessing the attributes of external sovereignty came into being at independence. In asserting the contrary, defendants apparently rely (C.C. Br. 317-318) upon the theory that although sovereignty resided in the people, it resided in the people of each State rather than of the nation as a whole. But, as we have shown, the people as a whole was declared sovereign; the people, and not the "provinces" or "States," organized revolutionary machinery and sent delegates to the two Continental Congresses.

Defendants suggest (C.C. Br. 319) that, prior to the American Revolution, the colonies were treated by the

crown as nation-states.[55] Even assuming the correctness of that proposition, it does not follow that those colonies remained nation-states after independence.[56] Defendants also suggest (C.C. Br. 321) that John Adams viewed the States after independence as separate sovereigns for purposes of negotiations with the British. But Adams' position concerning the integrity of the United States as one nation following independence is well known; he consistently asserted that England and other nations could negotiate only with the United States, not with the separate States.[57] See Br. 192.

55/ It is unclear in what way defendants believe the colonies were treated as "nation-states." The quotation from the political science text on which they rely suggests that Parliament and the colonial legislatures were co-equal legislative bodies, whereas the colonies were in fact subject to the legislative authority of Parliament. See R. G. Adams, Political Ideas of the American Revolution 51; see Dutton v. Howell, 1 Eng. Rep. 17, 21-23 (1693); and see An Act for the better securing the dependency of his Majesty's dominions in America upon the Crown and parliament of Great Britain, 6 Geo. 3, c. 12 (1766).

56/ Defendants also refer (C.C. Br. 319) to passages from the works of James Brown Scott to advance their theory that the colonies were separate nation-states. But Scott there recognized that upon independence the colonies became a single entity, citing Respublica v. Sweers, 1 Dall. 41 (Pa. Sup. Ct. 1779), holding that from the moment of independence "the United States necessarily became a body corporate" (id. at 44).

57/ Defendants, by quoting Adams out of context (C.C. Br. 321), attempt to attribute to him a view he never held. The meeting between Lord Howe and the committee of Congress, to which that quotation relates, was viewed by the participants on both sides as constituting negotiations between the "two countries." Maine Ex. 758, pp. 141-145.

Defendants argue (C.C. Br. 321-323) that Congress had no existence apart from the States and possessed no powers except by their delegation and acquiescence. This does not deny, however, the existence of a central government. Moreover, contrary to defendants' claims (C.C. 323-326), that central government had legislative and judicial powers. Thus, Julius Goebel, in his History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, points out (at p. 146) that although the resolves of Congress were ordinarily cast as recommendations, they apparently had binding force on the States when issues affecting maritime jurisdiction were involved. Furthermore, as Professor Morris testified (Tr. 1763-1764), Congress asserted judicial authority as well, and not merely over prize cases: 58/ under the Articles of Confederation, Congress was the final arbiter of all disputes arising between two or more States. Congress also had

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58/ Defendants attempt to dismiss the prize appeal court established by Congress as merely being the equivalent of today's international courts. See C.C. Br. 325, footnote. This presumably is based on the assumption that the States were independent nations in an international law sense--a question at issue here. In any event, defendants' assertion overlooks the history of congressional action regarding prize appeals, a history which originates in the period prior to independence. Maine Ex. 694; Goebel, supra, at 147-148.

executive and enforcement power within the States, and this power was frequently exercised by General Washington during the war. See "Court Martial Proceedings" in XIX Washington Papers (Library of Congress); VII Journals of the Continental Congress 268, 269 (April 15, 1777); V The Writings of George Washington 182 (Fitzpatrick, ed.). Moreover, General Washington enforced an oath of allegiance to the United States in 1777. Despite protests made by one delegate in Congress, the oath was defended by a committee headed by John Adams, and Congress refused to repudiate it. VII The Writings of George Washington 61-62 (Fitzpatrick, ed.); II Letters of Members of the Continental Congress 242-243 (Burnett, ed.). Even the oaths of allegiance that were taken in the States often included an oath to obey the Congress of the United States. See "Minutes of the Committee and of the First Commission for Detecting and Defeating Conspiracies in the State of New York," in LVIII New York Historical Society, Collections 427; Hyman, To Try Men's Souls: Loyalty Tests in American History 64-68, 70-73, 75-78, 84-89, 95.

Moreover, defendants ignore the powers which Congress assumed in the areas of foreign relations. During the period of confederation Congress entered into eight treaties with foreign nations. These treaties were not submitted to the

States for ratification but rather were transmitted to the States for their observance. Congress had the exclusive power of war and peace and its treaties were binding on the States. See Rutgers v. Waddington, N.Y. Mayor's Ct. (1784), in 1 Law Practice of Alexander Hamilton 282, 289-425 (Goebel ed.); see also Select Cases of the Mayor's Court of New York City, 1647-1784 57-59, 322 (Morris ed.). This point was also stressed by Alexander Hamilton in "A Letter to Phocion," in III The Papers of Alexander Hamilton 489 (Syrett, et al., eds.). Thus in 1787 Congress, pursuant to Jay's recommendations,[59/] resolved that treaties were part of the law of the land and that no State could validly abridge these obligations. XXXII Journals of the Continental Congress 178 (April 12, 1787); see Goebel, supra, at 197. The refusal of the American Peace Commissioners to accept a treaty provision relating to the return of confiscated property of British subjects (see C.C. Br. 337) was based not on the incapacity of Congress but on the reluctance of the American citizens themselves

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59/ Jay expressed the view that the 13 States had "no more authority to exercise the powers, or pass Acts of Sovereignty [in matters of war and peace] than any thirteen individual Citizens." XXXI Journals of the Continental Congress, 1774-1789 802 (October 13, 1786).

to accept such a clause, due to "the wanton devastation these citizens have experienced." Ex. 761, p. 793.

We showed in our opening brief (Br. 187-189) that the Supreme Court in Penhallow v. Doane, 3 Dall. 54 (involving the pre-1789 jurisdiction of the prize court), reaffirmed the transmission of external sovereignty from the British crown to the United States. There is nothing in Julius Goebel's work, cited by defendants (C.C. Br. 326), which denies that the congressional establishment of the prize court was an exercise of national sovereignty. 60/

Defendants rely (C.C. Br. 326-330; S.S. Br. 59-63) upon general references to the "sovereignty" and "independence" of the States found in the Articles of Confederation and the

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60/ Goebel in fact appears to acknowledge that Congress was exercising national sovereignty in establishing the prize court. The congressional resolve establishing the jurisdiction of the court "was a patent attempt to reconcile emerging national and colony interests, for although only those persons commissioned by the Continental Congress or its agents would be entitled to cruise for prizes, it was recommended to the colonies that they erect courts or confer jurisdiction upon existing tribunals for the determination of prize captures * * * . To secure the 'common' interest it was provided that in all cases 'an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals.'" Goebel, supra, at 147-148.

deliberations of Congress during the revolutionary period. However, as we noted above, the term "sovereignty" was often used only to denote the powers of the States to govern internal matters, without necessarily encompassing external or international sovereignty; the States were "independent" of England but not necessarily of each other.[61] Many of the most ardent nationalists of the period thus referred to the sovereignty and independence of the States without intending to detract from the external sovereignty of the national government.[62]

Defendants attempt to compare (C.C. Br. 331-333) the United States, at the time of revolution, to the Dutch, Swiss, and German confederations of that time, and they assert

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61/ The Amendment to the Articles of Confederation on which defendants rely (C.C. Br. 327), providing an express declaration of the "sovereignty" and "independence" of the States, is an example of the use of those terms in a purely internal sense. It was obviously not intended that the States would be sovereign with respect to external and international matters.

62/ Defendants rely (C.C. Br. 329-330) upon references by Hamilton, speaking in the New York legislature, to Vermont as "a country" to substantiate their position. Hamilton in fact refers to Vermont as "a country, part of ourselves" (Maine Ex. 698, p. 55), and as "the district or territory in question." Id. at 45. By referring to "a country," Hamilton was simply designating an area within the State of New York which was in rebellion.

that the States, like the members of those confederations, were sovereign and independent under international law. But as Professor Henkin stressed in his testimony (Tr. 1942-1951), that analogy presumes the fact at issue--whether the colonies obtained sovereignty separately and delegated it to the Congress or, as Alexander Hamilton and James Wilson thought (see Tr. 1752), they became independent unitedly as a single national sovereign. Professors Morris and Henkin both testified (Tr. 1729, 1943) that, unlike the constituent members of the Dutch, Swiss, and German confederations, none of the States ever attained international recognition as a separate sovereign. This testimony was not based upon the assumption 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; both Professors testified that what is required is for a State to be recognized by foreign nations as having the power to conduct its own foreign relations (Tr. 2650). At no period in our history have individual States been recognized abroad as possessing that power. From independence, this power was internationally recognized as residing exclusively in the Continental Congress. See Br. 190-193. Even the evidence relied upon by defendants (C.C. Br. 334-337) supports this

conclusion. Thus even though the instructions to foreign commissioners of the United States listed the States individually they were issued by Congress and speak in terms of "both nations" and "both countries," not of the several nations or countries.[63/] Maine Ex. 705, pp. 521, 522 footnote; U.S. Ex. 351, 1169; Maine Ex. 706, p. 547. Similarly, although the treaties entered into by the United States named each State separately, they also spoke in terms of "one nation" or the "two nations." E.g., Treaty of Amity and Commerce Between Sweden and the United States, April 3, 1783, in 2 Treaties and Other Internal Acts of the United States of America 123, 141 (Miller, ed., 1931).

63/ Defendants assert (C.C. Br. 334-335) that certain "letters of credence" issued to Franklin and other Commissioners to France did not even mention Congress as such. The letters of credence actually stated that "secrecy shall be observed until the further Order of Congress; and that until permission be obtained from Congress to disclose the particulars of this business, no member be permitted to say anything more upon this subject, than that Congress have taken such steps as they judged necessary for the purpose of obtaining foreign advance." 5 Journals of the Continental Congress 827 (emphasis added).

In addition, it was resolved "that the Commissioners should live in such style and manner at the court of France, as they may find suitable and necessary to support the dignity of their public character, keeping an account of their expenses, which shall be reimbursed by the Congress of the United States of America." Id. at 833.

Defendants contend (C.C. Br. 338) that the individual States engaged in foreign affairs but, as defendants' evidence indicates, the States merely sent agents abroad to obtain arms and borrow money. Maine Ex. 757, p. 540; Maine Ex. 700, p. 290. Significantly, in no case did any State secure a treaty of alliance or recognition. Even today some States have commercial representatives abroad.

Defendants apparently contend (C.C. Br. 338-339) that because European nations were aware that the United States was a federal system composed of constituent States, those nations recognized the external sovereignty of the individual States. The logic of that argument would lead to the conclusion that the separate States are recognized as sovereign in an international sense even today, as, of course, they are not.

Defendants dispute (C.C. Br. 340) whether there was a common United States citizenship during the revolutionary and confederation periods. The evidence concerning this is fragmentary, but Benjamin Franklin apparently understood there to be a common citizenship for he administered many oaths of United States citizenship throughout those years. See U.S. Ex. 388. Certainly the Constitution recognized such citizenship--notwithstanding defendants' claims to the contrary

(C.C. Br. 340)--for it confers upon Congress the power to establish a uniform rule of naturalization. Article I, Section 8, Clause 4. 64/

Defendants assert generally (C.C. Br. 340-347) that the Constitution was an entirely new government--a new compact among the States--and in no sense the legal successor of the Confederation or the inheritor of any power from it. However, it is clear from defendants' evidence that all those who attended the 1787 Convention recognized that the purpose of that convention was, as the Constitution declares, "to establish a more perfect Union," not to create an entirely new government. See, e.g., Maine Ex. 703, p. 127; Maine Ex. 607, p. 283. Defendants nevertheless purport to weigh the credentials of professional historians (C.C. Br. 345-352) in an attempt to discredit those cited by Professor Morris as supporting his views. Professor Morris is himself an eminent authority on American history, and he testified that

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64/ This was one of the first powers used by Congress. A naturalization statute (1 Stat. 103) providing for common United States citizenship was enacted in 1790; this statute superseded all State naturalization laws. Collet v. Collet, 2 Dall. 294. Shortly thereafter, the Supreme Court held that State expatriation statutes would not affect United States citizenship. Talbot v. Jansen, 3 Dall. 133.

the national government from the time of independence has possessed internationally recognized external sovereignty. The authorities cited by Professor Morris, like those relied upon by defendants, must of course stand upon their reputations for expertise in the revolutionary, confederation, and constitutional periods of American history.[65] We believe that the views of Story, Pomeroy, von Hold, and Bergess, all cited by Professor Morris in his testimony (see, e.g., Tr. 2371), are entitled to great weight.[66] And they are not the only authorities who support Professor Morris' conclusions.

65/ Thus defendants' reliance on Bartley, Hardwickes, and Quarles--none of whom was an authority on early American history--is misplaced. Conversely, the fact that some of the authorities upon whom we rely were writing in the 19th century, rather than the 20th, obviously has little adverse bearing on their understanding of the 18th century.

66/ Defendants cite (C.C. Br. 351) passages from Story and the other authorities relied upon by Professor Morris as evidence that these authorities denied that the United States was sovereign during the confederation period. However, in that passage Story merely commented upon the internal weakness of the Union--not its lack of sovereignty in any international sense. The same may be said of the passages from Bergess, Pomeroy, and von Holt relied upon by defendants. Moreover, the passages from Pomeroy's Treatise on the Law of Water Rights relied upon by defendants expressly relate only to inland waters, including the tidal waters above the foreshore, not to the adjacent seas.

Professor Henkin, both in his testimony and in his recent treatise, Foreign Affairs and the Constitution, reaches the same conclusions about the locus of external sovereignty after 1776. Professor Morris' view is also substantiated by Curtis Nettels, a leading early American history scholar. See Nettels, "The Origin of the Union and of the States," in LXII Massachusetts Historical Society, Proceedings 68-83 (1957).

Moreover, a number of the authorities relied upon by defendants acknowledge that the international community recognized the federal government as the sole external sovereign during the revolutionary and confederation periods. Thus E. B. Greene, although referring at times to the sovereignty of the States, concluded that the Continental Congress was a de facto federal government:

> * * * Without a formal constitution, Congress managed to organize extensive departments for war, foreign affairs, and finance, as well as a general postal service. It even organized a court for the trial of appeals in prize cases. From this practical point of view, it can hardly be denied that the Continental Congress, with all its obvious limitations, was a de facto federal government, acting for a real political entity known to the outside world as the United States of America. [Greene, The Foundations of American Nationality 558-559 (emphasis added).]

Similarly, Thomas A. Bailey asserted:

> The British naturally chose to treat the United States as the foreign nation it had so ardently desired to become. Specifically, they sought to strengthen the Empire by reserving its benefits for those colonies, such as Canada, that had remained loyal. [Bailey, A Diplomatic History of the American People 40 (7th Ed. 1964; emphasis added).]

Although the United States believes that the opinion of recognized authorities in a particular field of history may be useful, it is not clear to us that historical issues should be decided on the basis of the number of authorities on one side or another. In our view, any decision should be based primarily upon the evidence presented.[67/]

67/ Defendants also rely (C.C. Br. 343-345) on two resolutions in the Senate in the years 1837 and 1860 and a statement by Daniel Webster. Those Senate resolutions, adopted substantially after the period under discussion as an effort to bolster the position of states' rights advocates in the disputes over slavery, do not represent evidence of the locus of external sovereignty between 1776 and 1789. And nothing in the arguments which Webster made in Bank of Augusta v. Earle, 13 Pet. 519, is inconsistent with his earlier reply to Calhoun concerning the sovereignty of the United States; Webster recognized that the States were sovereign, but only in a "municipal" sense. Indeed, the case itself had nothing to do with international law.

As we discussed in our opening brief (Br. 184-190), our view of the national government's reception of external sovereignty is the one taken by the Court in United States v. Curtiss-Wright Corp., 299 U.S. 304. We do not believe that defendants' evidence warrants rejection of the historical views expressed by the Court in its opinion in that case. Although, as defendants observe (C.C. Br. 409-411; S.S. Br. [Obj.] 29-30) the Curtiss-Wright opinion has been criticized by a number of scholars, their criticism has been levelled not at the Court's determination that the national government possesses inherent foreign affairs powers as an incident of an external sovereignty which passed directly to the United States from the crown, but at the Court's views concerning the constitutional disposition of those powers as between Congress and the Executive. 68/

68/ Defendants suggest (C.C. Br. 409) that consistent application of the Curtiss-Wright doctrine, i.e., that the national government possessed inherent foreign affairs powers prior to 1789, would lead to the elevation of treaty obligations over constitutional mandates such as the Bill of Rights. But the purpose of the Bill of Rights was to limit the otherwise extensive powers of the sovereign, and nothing in Curtiss-Wright is to the contrary. See Henkin, supra, at 25 note 26, 253-254.

The decision in Curtiss-Wright was not, as defendants seem to suggest (C.C. Br. 382-409), a departure from the Supreme Court's earlier decisions. None of the decisions cited by defendants is inconsistent with the view adopted in Curtiss-Wright that only the United States was sovereign for external purposes during the revolutionary and confederation periods.

Defendants rely (C.C. Br. 382-385) first upon passages from the opinions in Chisholm v. Georgia, 2 Dall. 419. We have already demonstrated (Br. 186) that the opinions in that case strongly support the soundness of Curtiss-Wright, and the passages quoted by defendants are not to the contrary. Thus the passage from Justice Wilson's concurring opinion recognizes that national sovereignty sprung from the people of the United States, not from the States, and emphasizes that the Constitution was established to form a more perfect union--not a new union, as defendants would assert. Defendants' suggestion that Wilson held that the States were sovereign in any external sense before 1789 is not only inconsistent with the passage they quote but with Wilson's position on this question at other times: in the debates on the Constitution at the 1787 Convention, "Mr. Wilson could not admit the

doctrine that when the colonies became independent of Great Britain they became independent also of each other." I Farrand, Records of the Federal Convention of 1787 324. And Chief Justice Jay expressly stated in Chisholm that upon independence, the national sovereignty passed to the people of the 13 colonies as one people united. Chisholm v. Georgia, supra, 2 Dall. at 470.

Defendants further rely upon the opinions of the Justices in Penhallow v. Doane, 3 Dall. 54. These opinions, especially that of Justice Paterson, also support our position here. As Justice Paterson declared unequivocally, "the states, individually, were not known or recognized as sovereign by foreign nations." Id. at 80.[69/] And we showed in our opening brief (Br. 189) that Justice Iredell recognized the locus of external sovereignty in the United States. Thus, Justice Iredell refers, in the passage cited by defendants, to the

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69/ Justice Paterson's suggestion that New Hampshire could have withdrawn from the Confederation is not evidence that New Hampshire possessed external sovereignty absent such withdrawal. Justice Paterson himself stated in strong terms his belief that only the Congress possessed such sovereignty.

"national sovereignty" over prize cases and suggests that the people in the "first instance" chose to resist in unison. In Ware v. Hylton, 3 Dall. 199, discussed by common counsel defendants at pages 390 through 394 of their brief, the Court held merely that the States, during the revolutionary period, were possessed of sufficient internal sovereignty to enact legislation affecting foreign nationals, in the absence of congressional action or international law to the contrary. This decision does not support defendants' position that Congress itself lacked external sovereignty. Indeed, the Court determined that subsequent federal action superseded earlier State statutes. Moreover, as Professor Henkin has noted, even today it is possible for the States to exercise their internal powers in such a way as to affect foreign interests. Tr. 2645-2646.

The other early Supreme Court decisions which defendants cite related to questions of succession to sovereignty over the territory of the States. These cases, although referring generally to the independence and sovereignty of the States, are concerned entirely with the concept of internal sovereignty as it is understood in our federal

system; they are not relevant to a discussion of the locus of external sovereignty during the revolutionary and confederation periods. Thus the decision in Curtiss-Wright was fully consistent with prior adjudications.

Moreover, contrary to defendants' contentions (C.C. Br. 412-413), the Court has never repudiated the historical views stated in the Curtiss-Wright opinion. Defendants rely foremost on the decision in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579. But that case did not involve the federal government's inherent powers over foreign affairs. The issue in Youngstown was whether the President had power as commander-in-chief to seize domestic property. The Court held that he did not --not because of any lack of power in the federal government to do so, but because the matter was legislative in nature and thus congressional authorization was required. The Court explicitly stated that "[t]he power of Congress to adopt such policies as those proclaimed by the [Presidential] order is beyond question." 343 U.S. at 588. The decision thus has no bearing on the inherent foreign-affairs powers of the national government as against the States, and it in no

way repudiates the proposition for which we cite Curtiss-Wright. Nor do defendants' scattered quotations from later opinions show that the Court has reevaluated and rejected the historical reasoning on which the Curtiss-Wright decision was based.

(b)-(c) The possession of rights to the adjacent seas and seabed is an incident of international sovereignty (United States v. California, 332 U.S. 19; United States v. Louisiana, 399 U.S. 699; United States v. Texas, 339 U.S. 707); the United States has always possessed the attributes of external sovereignty to which rights to the adjacent seabed would be incident (Br. 8-15, 194, 200).

The United States has asserted that rights to the adjacent seas and seabed are an incident of international or external sovereignty; specifically, our position is that if a right to the adjacent seas and seabed existed at all during the colonial period, it existed as an incident of governmental powers or sovereignty, not as a property right.

Under English law, there was of course no occasion for distinguishing between internal and external sovereignty.

However, it is our position that where such a distinction must be made, any internationally recognized right to adjacent seas must inhere in the external or international sovereign. We have demonstrated that only the national government has been externally sovereign since independence and therefore that only that government possessed the attributes of external sovereignty to which rights of the adjacent seas and seabed would be incident. In denying these conclusions, defendants argue that the adjacent seas and seabed were received by the States upon independence as recognized territory and that since the rights they claim can be exercised without interferring with the external sovereignty of the United States, those rights are not an incident of such sovereignty.

Defendants' argument (C.C. Br. 352-360; S.S. Br. 65-75) that they received territorial ownership of the adjacent seas and seabed at the time of independence is based upon two broad alternative assumptions which we have already refuted--that the boundaries of the original colonies automatically extended 100 miles into the Atlantic Ocean, and that a grant of islands in the ocean (whether to five

or ten leagues or to 100 miles) indicated ownership of and not merely protective jurisdiction over, the intervening seas and seabed. With this underlying consideration in mind, we now turn to a discussion of the specific points raised by defendants.

Defendants assert (C.C. Br. 352) that "[t]he 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 the marginal sea and seabed."[70/] In our view (see

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70/ Defendants' reference to "property rights" presumably does not refer to property outside the boundaries of the colonies; their evidence relates solely to property which was indisputably within colonial territorial boundaries. It is of course our position that sovereign rights outside the colonial territorial boundaries could be obtained only by the exercise of the external sovereignty of the United States under international law. It was in this manner that the United States acquired fishing rights in the North American seas following independence. See Br. 201-206. Contrary to defendants' assertion (C.C. Br. 353), Professor Henkin did not take a position inconsistent with the one we assert here; he "conceded" only that a State could acquire foreign property in the same capacity as a private individual, e.g., by purchase, and that such property would be governed by the law not of the State but of the foreign sovereign. Tr. 2645-2646.

Br. 175-206) the United States, and not the States individually, succeeded to all unappropriated and unoccupied lands--whether in the west or (accepting defendants' basic assumptions for purposes of discussion) under the adjacent seas. 71/

71/ Defendants claim (C.C. Br. 353) that Professor Morris conceded that the States succeeded individually to all the public land within the boundaries of the colonies. To the contrary, Professor Morris testified that the colonial lands which passed to the States were the inhabited areas; he specifically denied that the western lands passed to the colonies. Tr. 2303-2307.

Defendants rely (C.C. Br. 353) on Article IX of the Articles of Confederation to establish that the States never impliedly conveyed rights in the adjacent seabed. This contention, of course, begs the question whether the States had in fact ever received those rights in the first place, for Article IX refers only to the "territory" of the States. It is, nevertheless, instructive that the only unoccupied and unappropriated lands recognized at the time of the Confederation, i.e., the western lands, were claimed by the United States. See XIX Journals of the Continental Congress 208 (March 1, 1781). If the adjacent seas and seabed out to 100 miles had at that time been considered within the boundaries of the States, we see no reason why they would not have been dealt with in the same manner as the western lands, i.e., claimed for the common benefit of the nation and not just of those States with extended coastlines.

The disposition of the western lands at the time of the Confederation requires comment here, for defendants' description (C.C. Br. 353-356) of the dispute over those lands is inaccurate in several respects. Congress never affirmed that the colonies were entitled to the western lands. Congress remained

studiously neutral on the issue of ownership--neither expressly recognizing nor expressly rejecting colonial western land claims. However, the Articles of Confederation became effective only after those lands had been recognized to belong to the United States. See Tr. 851-852. Even in voting to adopt Virginia's cession of western lands, Congress refused to affirm the validity of Virginia's claim of ownership to those lands. See XXV Journal of the Continental Congress 562-565 (Sept. 13, 1783). Maine Ex. 662, p. 272. Thus, although legal theory under which Congress assumed possession of the western lands was never clearly formulated, the political reality is that the unoccupied and unappropriated lands at independence were taken by the national government and not by the separate States. 72/ Any rights to the seabed of the adjacent seas should be presumed to have also devolved upon the national government.

72/ Madison praised the assertion of national control over the western lands as "national stock" and condoned congressional action in administering those lands. The Federalist No. 38.

As defendants' witness Professor Smith explained (Tr. 852; C.C. Br. 357), the Confederation held the western lands for the establishment of new states. The fact that these western lands were thus held as "incorporated territory," pending the establishment of new states (see C.C. Br. 357-360), stemmed in part from their very character as land territories; the "incorporated territory" theory in no way conflicts with a theory of permanent federal ownership of the seabeds of the adjacent seas, where no new states may be expected to arise. Indeed, since it is clear that the national government may hold even land territories without intending to form new states therefrom (e.g., the Philippine Islands and Puerto Rico), there is, a fortiori, constitutional power to hold the seabeds for the national benefit. Moreover, contrary to defendants' contention (C.C. Br. 359), this governmental right to acquire lands without stipulating incorporation was recognized long before the Spanish-American War. See Downes v. Bidwell, 182 U.S. 244, 322 (quoting from Thomas Jefferson).

In addition to Article IX of the Articles of Confederation, defendants also rely (C.C. Br. 337-379) upon Article IV, Section 3, Clause 2 of the Constitution. That clause expressly

states that nothing in the Constitution shall be construed to prejudice any claims either of the United States or of any particular State; thus the only relevance it has to the decision in this litigation is to show that there is no constitutional presumption in favor of either party. Certainly that clause has no bearing on whether it was the United States or the individual states which obtained possession of the seabed of the adjacent seas prior to adoption of the Constitution. Nor are the other constitutional provisions discussed by defendants (C.C. Br. 379-381) relevant to that issue.

The Supreme Court decisions with respect to territorial rights cited by defendants (C.C. Br. 294-409) do not bear upon the question of the reception of the adjacent seas either. Most of those cases are clearly irrelevant to the issue in this case; only a few require discussion here. United States v. Bevans, 3 Wheat. 336, involved the question whether the constitutional grant of admiralty jurisdiction to the federal government divested Massachusetts of its territorial sovereignty over Massachusetts Bay, an inland water within the boundaries of the original colony; the decision in that case does not touch upon the question whether the United States, as

external sovereign, assumed possession of the external waters of the adjacent sea.

Chief Justice Marshall's opinion in Johnson v. McIntosh, 9 Wheat. 543, observed that the landed States had ceded the western lands to the United States, without describing the underlying legal ambiguity and political struggle over the ownership of those lands which we have briefly set forth above. However, that opinion is not authoritative recognition that title was ever lacking in the United States after independence. As Chief Justice Jay observed in Chisholm v. Georgia, 2 Dall. 419, 470, "[i]t was not then [i.e., during the revolutionary and confederation periods] an uncommon opinion that the unappropriated lands, which belonged to the crown, passed, not to the people of the colony or states within whose limits they were situated, but to the whole people."

The passage from Harcourt v. Gaillard, 12 Wheat. 523, 525-526, emphasized by defendants (C.C. Br. 401) is of course dictum with respect to a point which apparently was not argued and which the court itself conceded to be unnecessary to its decision. In any event, that quotation merely states the proposition that the boundaries of the United States were the external boundaries of the original colonies; that proposition is not inconsistent with our position that if the colonies previously

possessed the adjacent seas, upon independence the United States as external sovereign assumed those rights.

Defendants also rely (C.C. Br. 404-409) upon Martin v. Waddell, 16 Pet. 367, involving lands under inland waters. That decision supports our position here. As we showed in our opening brief (Br. 166-167), Martin v. Waddell held that subaqueous lands passed, under English law, as an incident to the crown's sovereignty over the superadjacent waters. In other words, the Court there, and also in Massachusetts v. New York, 271 U.S. 65 , affirmed state ownership to lands beneath inland waters on the same theory which the United States advocates in these proceedings, i.e., that rights to submerged lands are incident to sovereignty over the superadjacent waters. When the United States assumed external sovereignty, including sovereignty over the adjacent seas, it obtained whatever rights were naturally incident to that sovereignty. As the Court noted in United States v. California, 332 U.S. 19, 34, actions in the adjacent seas affect not only our own citizens but the citizens of all other nations:

> * * * The belief that local interests are so predominant as constitutionally to require state dominion over lands under its landlocked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations.

Thus, the California decision, contrary to defendants' contentions (Br. 415-420), was fully compatible with the earlier inland water cases.[73] We agree with defendants that there is no need to "rehash" (C.C. Br. 417) those cases here.[74]

73/ Contrary to defendants' suggestion (C.C. Br. 417), the Supreme Court in California did not purport to overrule a long tradition of law and practice. The Court did recognize that dicta in a number of its decisions could be construed as affirming state rights to the seabed beyond the coastline, but it emphasized that that issue had not previously been decided. 332 U.S. at 36-37.

74/ Defendants suggest (C.C. Br. 419) that the United States recognizes the inherent right of the coastal States to regulate fisheries in the adjacent seas. The United States recognizes the right of the States to regulate fisheries only as an exercise of the police power of the States and then only in the absence of conflicting federal regulation of those fisheries. Manchester v. Massachusetts, 139 U.S. 240, 258. Cf., Toomer v. Witsell, 334 U.S. 385, 393; United States v. California, 332 U.S. 19, 36-38; United States v. Texas, 339 U.S. 707, 719.

Defendants also suggest (C.C. Br. 420) that such state fishery jurisdiction was held to exclude federal jurisdiction within the State's territorial limits, citing The Abbey Dodge, 223 U.S. 166. That case merely held that a federal statute purporting

Apparently defendants' discussion (C.C. Br. 477-494) of the relationship between federal foreign affairs and defense powers and ownership of the seabed is based upon the assumption that the Supreme Court in California treated rights to the seabed as an inseparable incident of external sovereignty. As we have shown above (pp. 3-5, 132, supra) and in our opening brief (Br. 9-10), the Court did not hold that external sovereignty and

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74/ Cont'd:

to regulate the landing, delivery, cure and sale of sponges entirely within the State of Florida would be unauthorized as prohibiting purely internal commerce in that State. The Court in that case did not pass on the question whether the federal government could enact legislation for control of fisheries within State boundaries. But in a subsequent decision involving a Florida statute regulating fishing for sponges, the Court observed:

> * * * If a statute similar to the one in question had been enacted by the Congress for the protection of the sponge fishery off the coasts of the United States there would appear to be no ground upon which appellant could challenge its validity. [Skiriotes v. Florida, 313 U.S. 69, 74.]

Furthermore, as we have shown (Br. 54-55), the question of jurisdiction over fisheries is very different from the question of title to lands under the high or open seas. See generally, United States v. California, supra, 332 U.S. at 37-38.

seabed ownership are inseparable. The Court did recognize, and properly so, that seabed rights are an appropriate incident of the national government's external sovereignty. But the Court's reasoning was not that seabed rights are inseparably related to external sovereignty but that the national government had acquired seabed rights through the historical exercise of its foreign affairs and defense powers.[75/] Defendants' argument that they could possess seabed rights out to 100 miles from shore without interfering with the federal government's current exercise of its foreign affairs and defense powers is irrelevant to the Court's historical analysis. Moreover, as we shall now show, defendants err in claiming that their exercise of ownership rights over those seabeds would not interfere with the national government's external sovereignty.

Defendants equate (C.C. Br. 477-482) the adjacent seas and seabed with the mainland territory of the States and assert (C.C. Br. 489-494; S.S. Br. 72) that the United States needs no more control of the adjacent seas and the seabed than it exercises

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75/ That reasoning, we submit, is especially pertinent to seabeds, such as those here at issue, underlying international waters.

under the Constitution over its mainland territory. However, this assimilation of the adjacent seas and seabed beyond the 3-mile territorial limit to the nation's mainland territory ignores the legal and factual differences between the two areas. Under long-established principles of international law, the United States possesses, within its mainland territory, plenary jurisdiction over aliens (with the exception, of course, of persons entitled to diplomatic immunity). Similar jurisdiction does not exist beyond the territorial sea; international waters are areas of international, not purely national, concern. As the Court noted in the California case, international rights and expectations exist throughout such waters in a manner which makes the exercise of state rather than national jurisdiction inappropriate (332 U.S. at 35):

> * * * whatever any nation does in the open sea, which detracts from its common usefulness to nations * * * is a question for consideration among nations as such, and not their separate governmental units. 76/

76/ Defendants claim (C.C. Br. 482-483) that the Court's treatment of the 3-mile belt in California, which is part of the open sea, was inconsistent with the treatment of navigable inland waters in United States v. Chandler-Dunbar Water Powers Co., 209 U.S. 447, and Massachusetts v. New York, 271 U.S. 65. The treatment differed because the historical pattern of ownership differed. Moreover, inland waters are not subject to the principle of freedom of the seas long advocated by this nation with respect to the open sea, and the waters at issue in those cases affected only Canada and the United States, not the international community at large.

These considerations remain relevant and persuasive today. Defendants' assertions (C.C. Br. 482) to the contrary notwithstanding, questions pertaining to maritime rights continue to be controverted in the international community. A United Nations Conference is now examining the entire field of the law of the sea, specifically including the nature and scope of continental shelf rights, in an attempt to resolve some of those questions. See Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Gen. Ass., Off. Rec., 28th sess. Supp. No. 21 A/19021. Among the unsettled issues with respect to continental shelf rights are the determination of the boundaries of the continental shelves of contiguous nations,[77] the definition of natural resources subject to exclusive exploitation,[78] and the setting of international standards concerning the freedom to

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77/ The United States and Canada currently dispute their boundaries into both the Atlantic and Pacific Oceans. See LXIII Bulletin, Department of State 247 (1970), 35 Fed. Reg. 3301 (1970).

78/ Thus, in the so-called French-Brazilian Lobster War of 1963, Brazil claimed that lobsters were a natural source of the continental shelf subject to its exclusive exploitation. See 13 Int'l Comp. L.Q. 1453 (1964). The United States similarly has claimed that king crabs constitute such a natural resource and has attempted to exclude Japanese fishermen from Pacific waters adjacent to our coast. See Whiteman, 4 International Law 1223-1230; L Bulletin, Department of State 936 (1964); LI Bulletin, Department of State 892 (1965).

conduct scientific research in continental shelf waters, and to construct structures on or above the continental shelf. 79/ Individual efforts by the separate States to license exploration for and exploitation of the natural resources under the international waters adjacent to them would inevitably inject the United States into international disputes with respect to these and other issues. Moreover, the lack of coordination inherent in state control would make it more difficult for the United States to maintain a uniform national position on these questions of international law, and would thereby complicate the current efforts of the international community to resolve those questions amicably and expeditiously.

State actions against foreign vessels would be an especially likely source of international controversy. As defendants' witness Professor Kirkpatrick testified (Tr. 266-267), the seizure of Cuban fishing vessels by the State of Florida, against the express order of the federal government, endangered relations with Cuba at a time when the United States was concerned

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79/ For example, the Netherlands, in a move which has been widely criticized, asserted jurisdiction over radio stations operating from platforms in international waters above the continental shelf. See Straatsblad 1964, No. 447, 60 Am. J. Int'l L. 340 (1966); Panhuys and Emde Boast, Legal Aspects of Pirate Broadcasting, 60 Am. J. Int'l L. 303 (1966).

about air piracies to Cuba and the welfare of American servicemen stationed in that country. Florida is not alone in having asserted jurisdiction over foreign fishing vessels in a manner inconsistent with United States policy; for example, Massachusetts enacted a 200-mile territorial sea statute at a time when the United States was protesting claims by other countries to territorial seas greater than 3 miles. See Tr. 277. Incidents of this kind could be expected to multiply as the separate States acted to protect their claims to continental shelf resources.

Defendants' assertion (C.C. Br. 489-494) that no defense or foreign affairs difficulties would result from recognition of state property rights in the seabed and subsoil of the continental shelf ignores both the entire history of the law of the sea and the recent disputes involving continental shelf rights. Moreover, the use of the continental shelf and the waters above it significantly affects the security and foreign affairs interests of the United States (Tr. 256), and those interests would be jeopardized by state control. Professor Kirkpatrick testified (Tr. 249-251) that the Department of Defense uses those waters to conduct classified activities pertaining, inter alia, to submarine and underwater warfare. He acknowledged (Tr. 257-

259) that such activities could interfere with exploration for and exploitation of the resources of the seabed and that it would be necessary to obtain the consent of the States to use the seabed for military purposes. The function of balancing the need for various military and commercial uses of the continental shelf area is, we submit more appropriately performed by the federal government than by the States.

Finally, even if state rights to the natural resources of the seabed were recognized internally, it would be the United States, not the individual States, which would be responsible to the international community for almost every aspect of exploration for and exploitation of those resources. Thus, the United States would remain internationally responsible in disputes over boundaries, natural resources, scientific research, pollution, navigational hazards, and so forth. See Tr. 256-257, 267, 283-284. It is this nexus between seabed rights and foreign affairs which prompted the Court in the California case to conclude (332 U.S. at 35):

> * * * 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. See United States v. Belmont, 301 U.S. 324, 331-332.

(d) - (e) Following the war of independence, the Continental Congress negotiated for the resources of the North American seas with the British for the United States collectively, not for the individual States; the negotiations of the peace commissioners with respect to the lands west of the Appalachian Mountains also support the proposition that the negotiators for the United States, if the occasion had arisen, would have argued that rights to the property of the adjacent seas and seabed belong to the United States collectively, rather than to the States individually (Br. 201-209).

Common Counsel defendants discuss these points at pages 360-376 of their brief. They do not appear to deny that the negotiations for the resources of the North American seas were conducted by Congress on behalf of the United States collectively. They claim (C.C. Br. 360-367) instead that the titles to the western lands asserted by the Congressional negotiators did press for recognition of ownership of the western lands described in colonial charters, but defendants misconstrue the significance of that fact. First, it is clear from the fact that the negotiators were appointed by Congress rather than by the separate States that, as we have shown above (p. 126,

supra), it was the United States alone which possessed internationally accredited external sovereignty after independence. Second, although Congress rested its claims in part upon colonial charters, it relied more heavily upon an asserted common title of the United States.

We demonstrated in our opening brief (Br. 207-208) that Congress and the negotiators rested American claims to the western lands upon the Treaty of 1763, upon the claim of the United States to the benefits of the French cession to Britain, and upon military conquests in the northwest. Thus, the separate congressional instructions to the negotiators, John Adams and John Jay, mentioned by defendants (C.C. Br. 360-361), did not refer to colonial charters and grants or even mention the states by name. Maine Ex. 745, p. 226. 80/ Defendants place substantial reliance (C.C. Br. 361-363) on Congress' subsequent letter of October 17, 1780, to Jay, but that letter lists the colonial charters merely as the third of five

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80/ Defendants also rely (C.C. Br. 364-365) upon instructions dealing extensively with the charters, which Congress in 1782 decided not to send. If anything, this would seem to show a Congressional purpose of emphasizing only arguments based upon claims of common title.

arguments to be used by the negotiators in claiming the western lands. Only one short paragraph (Ex. 745, pp. 331-332) is devoted to that argument.[81] By contrast the first argument suggested to Jay by Congress was based upon claims of common title, specifically the Treaty of 1763 and the common efforts of the United States.[82] Ex. 745, pp. 327-331. Thus, as Professor Morris testified (Tr. 2407-2408, 2314-2321, 2347-2354), the letter to Jay gave priority to arguments based upon a claim of common title.[83]

81/ Two of the three passages quoted by defendants (C.C. Br. 362-363) in fact pertained to arguments other than that respecting colonial charters. The first quoted passage (C.C. Br. 362) is taken from the argument that the United States succeeded to the rights held by Great Britain under the Treaty of 1763. The second quoted passage (ibid.) is part of one of a series of arguments intended to show why Spain did not, by occupying small parts of the western lands, acquire title to the entire area. See Maine Ex. 745, pp. 329-331.

82/ Defendants erroneously assert (C.C. Br. 363, 366) that the letter to Jay excluded any reliance on a common title, citing Irving Brant's work on Madison. We do not understand what basis defendants have for that assertion. It is clear from a reading not only of the letter but also of Brant's discussion that the letter placed primary reliance on a claim of common title in the United States. See also, U.S. Ex. 392, p. 96.

83/ Moreover, the terms of the final treaty demonstrate that it was those arguments, and not the arguments based on colonial charters, which prevailed. As defendants themselves stress (C.C. Br. 372-376), the treaty established American ownership of all Atlantic islands within 20 leagues of the mainland. Since that distance is greater than that mentioned in most charter grants of islands, but less than that mentioned in the Virginia charter, it is clear that the negotiators were pressing a uniform claim for the United States and not separate title claims of the individual States.

Defendants misdescribe the Peace of Paris negotiations in other respects as well. Thus, whereas defendants claim (C.C. Br. 368-372) that there was no American "disagreement" with the concept of territorial seas 100 miles or 30 leagues in width, it is clear that Congress would have refused to recognize any such expansive maritime claims had they been asserted on any basis other than occupation and acquiescence by other nations. The Congressional understanding was that England had historically claimed only 14 miles--and that only for exclusive fisheries and not for territorial ownership--and Congress explicitly declared that "it is the aim of the maritime powers to circumscribe, as far as equity will suffer, all exclusive claims to the sea." Br. 205; Tr. 1797. 84/ A slightly earlier report of Congress on that subject had taken the same position, adding (Tr. 1789-1790):

> * * * A common right of taking fish cannot be denied to America beyond 3 leagues without a manifest violation of the freedom of the seas, as established by the law of nations, and the dictates of reason.

84/ Although defendants contend (C.C. Br. 369-372) that Congress intended to circumscribe only fishing rights, Congress in fact was indicating that whereas fishing rights should be limited to 3 leagues, other territorial rights should be even more closely restricted to inland waters. See Br. 205.

Moreover, contrary to defendants' claims (C.C. Br. 369-370, 372-376), the final peace treaty did not recognize either a doctrine of inherent ownership of the adjacent seas or a 20-league maritime territorial boundary. Defendants refer to the provision of the treaty granting United States citizens the "liberty" of fishing in Canadian "coastal waters;" this provision does not show an understanding of an inherent right in the coastal sovereign to ownership of the adjacent seas. The provision presumably was inserted in the treaty to protect against a possible English claim of exclusive fisheries in the Canadian seas on the basis of occupation and use. Moreover, the language of the treaty, which refers to "the coasts, bays, and creeks" and "the unsettled bays, harbors and creeks," strongly suggests that "coastal waters" referred only to inland and tidal waters, not to the open sea off the coast.

The treaty also granted the United States all islands within 20 leagues of its coast. See note 83, supra. As we have shown at length (see Br. 117-126; pp.107-108, supra), a grant of islands does not encompass a grant of territorial ownership of the intervening seas. Nor can the grant of islands reasonably be construed as creating even an exclusive American

fishery, for such a construction would be directly contrary to the express purpose of Congress of circumscribing all exclusive claims to the sea and limiting such claims to at most 3 leagues. See p. 158 n. , supra.

16. Even if property rights to the adjacent seas and seabed beyond 3 geographic miles from the coastline existed and passed to the States upon independence, those rights were lost through the ratification of the Constitution and through the exercise by the United States of its authority over foreign affairs (Br. 209-218).

(a) The Constitution confirmed that the United States collectively possessed all attributes of external sovereignty (Br. 209-210).

Defendants do not appear to contest this proposed conclusion of law and we therefore do not discuss it further.

(b) The United States prior to the Truman Proclamation of 1945 did not recognize any inherent, exclusive right of a coastal nation to the resources of the sea and the seabed beyond 3 geographic miles from the nation's coastline (Br. 211-218).

Common Counsel defendants discuss the issues raised by this proposed conclusion of law principally at pages 428-453 of their brief. Their basic position is that "adherence to the three-mile limit was never understood to entail renunciation of all rights of every kind out beyond three miles, and particularly was never understood as a renunciation of the right * * * of exclusive exploitation of the resources of the continental shelf" (C.C. Br. 430). In a purely technical sense, defendants are correct: adherence to the 3-mile limit was never understood to entail renunciation of an inherent right of exclusive exploitation of all outlying continental shelf resources, because no such right had been understood to exist under international law prior to 1945. But even assuming for purposes of discussion that such a right had existed during the 18th century, defendants have failed to show why adoption of and adherence to a 3-mile limit by the United States would not have implicitly terminated any pre-existing inherent exclusive rights to the resources of the seabed beyond. The underlying theory for which defendants contend here is that the coastal sovereign has inherent rights to the adjacent sea; any rights under that theory would, we contend, necessarily be delimited by this nation's repeated and consistent public assertions of a 3-mile limit to its maritime sovereignty.

Defendants' contention to the contrary is based, first, on the argument (C.C. Br. 431-434) that the federal government, even in the exercise of its foreign affairs powers, lacked constitutional authority to cede State territory without State consent. Defendants, however, do not establish a constitutional basis for that proposition. Indeed, it is clear that the federal government can, in the conduct of the nation's foreign affairs, cede the territory of a State without its consent and that it has done so several times in connection with boundary disputes. See Henkin, Foreign Affairs and the Constitution 160-161, 409 n. 102; 3 Selected Essays on Constitutional Law 403-404 (Maggs ed., 1938). See also, Tr. 1915. Far from being only a recent constitutional development, as defendants try to suggest, this plenary authority of the federal government was recognized by the founding fathers. See Maine Ex. 698. It would, of course, have been dangerous constitutional doctrine to permit the withholding of State consent to invalidate federal foreign policy actions.

Defendants next assert (C.C. Br. 435-446) that the United States' adherence to the 3-mile limit has not been consistent or unqualified. In doing so, defendants in effect

renounce the testimony of their witness Dr. Jessup; both Dr. Jessup (Tr. 1141-1155) and Professor Henkin (Tr. 1913) testified that the United States adopted the 3-mile limit in the late 18th century and has adhered to that limit ever since. Moreover, as we shall now show, the evidence does not support defendants' position.

Defendants cite (C.C. Br. 435-436, 444-446) instances in which the United States asserted jurisdiction beyond 3 miles for customs purposes. International law has long authorized the exercise of coastal State jurisdiction beyond territorial waters for these purposes, and in 1958 a United Nations Law of the Sea Conference codified the right to exercise customs jurisdiction outside the territorial sea. See Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606. The exercise of customs jurisdiction over outlying waters has never been viewed as inconsistent with the concept of a 3-mile territorial sea. See United States v. California, 332 U.S. 19, 34 n. 18. Chief Justice Marshall in Church v. Hubbart, 2 Cranch 187, 234, recognized the distinction between territorial sovereignty and customs jurisdiction in 1804:

> The authority of a nation, within its territory is absolute and exclusive * * *. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, * * *; so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself, which it may prevent and it has a right to use the means necessary for its prevention.

This distinction was more recently recognized in official Department of State instructions issued to the American Embassy in Manila by the then Acting Secretary of State, Christian A. Herter:

> Under its basic customs legislation, the United States, since 1790, has claimed a strictly limited jurisdiction to a distance of twelve miles from its coast for the sole purpose of taking reasonable measures to enforce its customs and fiscal laws. The distinction between territorial jurisdiction or sovereignty in the three mile territorial sea and the strictly limited anti-smuggling jurisdiction within twelve miles is firmly grounded in traditional international practice. [Quoted from 4 Whitman, supra, at 489.]

Defendants also rely (C.C. Br. 436-441) on statements made in the late 18th and early 19th centuries to the effect that the United States "could" or "should" claim more than 3

miles. These statements do not show that the United States ever did claim more than 3 miles or that its international position with respect to the 3-mile limit ever wavered; they show at most differences of opinion during the time the 3-mile limit was first evolving. Moreover, the opinion by Attorney General Randolph, from which defendants infer (C.C. Br. 437-438) a broad claim of extensive maritime territory, explicitly disavows such a claim, on the ground that the open seas, unlike enclosed waters such as the Delaware Bay, are not susceptible of ownership. Crocker, The Extent of the Marginal Sea 633.[85/]

Defendants similarly misdescribe (C.C. Br. 439) an 1804 instruction from President Jefferson to the Secretary of the Treasury. Contrary to defendants' suggestion, that instruction did not propose a 28-mile neutrality belt along the coast. Jefferson was in fact discussing the delimitation of the inland

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85/ The treaties of that time which adopted the cannon shot as the measure of neutral waters (see C.C. Br. 438-439) confirm the United States' consistent adherence to a 3-mile rule for, as Jefferson stated when Secretary of State, the "utmost range of cannon ball is usually stated as a sea league," i.e., 3 miles. Crocker, supra, at 636. Moreover, by the Act of June 5, 1794, 8 Stat. 116, the United States established its neutrality zone at 1 marine league.

waters of a bay. Such waters are delimited where one can see across from one headland to another, and Jefferson estimated that an opposite shore would be visible from 25 miles and that this would justify treating a bay with a 25-mile wide entrance as enclosed inland waters. See Crocker, supra, at 641. Thus, Jefferson proposed merely that the 3-mile neutrality zone would be measured from the closing line of the bay. And in discussing Kent's views on maritime jurisdiction (C.C. Br. 441), defendants ignore the fact that Kent drew a distinction between territorial jurisdiction and jurisdiction for defense and customs purposes; thus Kent recognized that the United States claimed "general territorial jurisdiction" only out to 1 marine league and he proposed a more expanisve jurisdiction merely for purposes of "fiscal and defense regulations." Crocker, supra, at 441.

Defendants assert (C.C. Br. 442) that by the Treaty of Guadalupe-Hidalgo the boundary between the territorial waters of Mexico and the United States was defined as extending 3 leagues from land. But in the conduct of its foreign affairs, the United States has consistently taken the position, from the time that treaty was first entered into, that the 3-league boundary under the treaty did not establish a 3-league territorial sea. See

Crocker, supra, at 649, 664-665; 1 Moore, Digest of International Law 730.

Defendants next assert (C.C. Br. 442-443) that the Supreme Court in United States v. Louisiana, 363 U.S. 1, held that the United States, by maintaining a 3-mile international boundary, could not divest a coastal state of territorial rights beyond that boundary. But all the Court held in that case, insofar as is relevant to defendants' assertion, was that Texas had established that its maritime boundary lay beyond the 3-mile line at the time of its admission to the Union and that it therefore was entitled to the seabed rights within that historic boundary under the Submerged Lands Act. The Court did not hold, or even suggest, that Texas would have been entitled to such rights in the absence of that Act. To the contrary, the Court expressly stated that historic maritime boundaries were relevant to seabed rights only as a consequence of the Submerged Lands Act. 363 U.S. 1 at 30 . This observation was consistent with the Court's holding in United States v. Texas, 339 U.S. 707, decided prior to enactment of the Act, that Texas possessed no seabed rights beyond the low-water mark.

Similarly, the maritime boundary set forth in the Florida Constitution of 1868, discussed by Common Counsel defendants at pages 443-444 of their brief, is relevant to Florida's claims of ownership of the seabed only to the extent that it is made so by the Submerged Lands Act. United States v. Florida, 363 U.S. 121. The decision in Skiriotes v. Florida, 313 U.S. 69, is not to the contrary.[86/]

Defendants assert (C.C. Br. 444) that the United States in 1863 took the position that the invention of the Armstrong rifled cannon fixed a neutrality belt of 6 miles. That position was taken by the United States Counsel to South Africa in a letter to Cape Town authorities, but the Counsel was apparently unaware that in negotiations with Spain during the preceding year the United States had expressly disavowed that position. Secretary of State Seward had written to the

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86/ In Skiriotes, a Florida citizen objected to the application of a Florida statute prohibiting sponging within the Gulf of Mexico on the ground that the criminal jurisdiction of the courts of Florida could not extend beyond the international boundaries of the United States. The Court rejected that contention, holding that a State may regulate the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest; the Court did not consider whether the conduct in question was within or without Florida's territorial boundaries.

Spanish Minister in 1862 criticizing Spain's pretentions to a greater jurisdiction on the basis of the newly developed cannon:

> * * * it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvement of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast. [Crocker, supra, at 654.]

This position was reiterated by the Secretary of State in 1863. Id. at 656. In 1864 the United States denied that France's neutrality zone had been extended by the increased range of shipboard cannon. Id. at 649-650. This position was consistently maintained in correspondence with other countries as well. Id. at at 664-665. 87/

87/ Although, as defendants indicate (C.C. Br. 444), the United States did in 1874 and 1896 express interest in the possibility of extension of the international maritime boundary limit, it always conditioned its acceptance of any such extension upon international agreement (which was never reached). See Crocker, supra, at 427, 680-681.

Defendants further argue (C.C. Br. 446-453) that the 3-mile limit did not apply to the seabed and subsoil, but they have produced no historical support for that argument. Defendants' evidence with respect to seabed resources--the licensing of pearl fisheries in the Philippine Islands (C.C. Br. 447)--involves, as we showed in our opening brief (Br. 215) recognition of a prescriptive right, established by occupation and use, not the claim of inherent right by virtue of coastal sovereignty on which defendants rely. The only other evidence produced by defendants--the Bering Sea Arbitration (C.C. Br. 448-453)--was also an instance where the United States claimed that prescriptive rights could exist outside the 3-mile limit. See Br. 213. These instances do not suggest that the United States ever recognized an inherent seabed ownership extending beyond that limit.

(c) The Truman Proclamation of 1945, claiming the right of the United States to the resources of the continental shelf, was not based on a principle of customary international law recognizing the inherent, exclusive right of a coastal state to the natural resources of the seabed beyond its territorial sea (Br. 216-218, 234-268).

Defendants do not directly contest this proposed conclusion. They argue instead that the 3-mile rule never became an obligatory rule of international law (C.C. Br. 455-462) and that no obligatory rule of international law prior to 1945 barred the States' seabed and subsoil claims (C.C. Br. 462-447). We respond to those arguments in connection with our proposed conclusions of law 17 and 18.

17. The claims of the defendant States that they or their predecessor colonies acquired in the 17th or 18th centuries general property rights to the natural resources of the seabed beyond 3 geographic miles from the coast are inconsistent with international law as it then existed (Br. 219-270).

The rights at issue in this case are to be determined on the basis of American and English legal principles. But where the evidence concerning those principles or the rights created thereunder is ambiguous or lacking in clarity with respect to a given historical period, illumination is provided by the principles of international law which prevailed at that time. See, e.g., Jones v. United States, 137 U.S. 202, 212; Fong Yue Ting v. United States, 149 U.S. 698, 707-711; United States v. Wong Jemj Ark, 169 U.S. 649, 666-667. See, generally, Wright, Conflicts of International Law with National Laws and Ordinances (1917); Wright, International Law in Its Relation to Constitutional Law, 17 Am.J. Int.L. 234 (1923). This is especially true in a case such as this where the rights in question directly affect other nations and depend to a large extent upon international law for their content.

(a) International law did not recognize sovereignty over the adjacent seas or seabed in either a territorial or general property sense during the 17th or 18th centuries (Br. 225-227).

Defendants assert (C.C. Br. 304) that "every jurist and publicist recognized as an international law authority between 1670 and 1800 recognized the existence of the territorial sea" in the sense we know it today. We submit, however, that defendants have not refuted the demonstration, in our brief in the original California case (U.S. Ex. 7, pp. 115-120), that the concept of sovereignty over the adjacent seas, in a territorial sense, did not become an accepted principle of international law until after the Constitution was adopted in 1789. See also, Fenn, supra, at 198 et seq.; Fulton, supra, at 537-539; Jessup, supra, at 115-119.

(b) In any event, international law did not recognize sovereignty over the adjacent seas or seabed beyond 3 geographic miles from the coastline of the English colonies in North America in either a territorial or general property sense during the 18th century (Br. 224, 228-229).

Defendants contend (C.C. Br. 289-313) that prior to the adoption of the 3-mile limit, international law sanctioned far broader maritime territorial claims. See also S.S. Br. 18-23, 44-45; 23. That contention directly conflicts with the decision in United States v. California, 332 U.S. 19, which rested upon a determination that prior to the adoption of the 3-mile rule, in the late 18th or early 19th century,[88/] international law did recognize claims of maritime territory. Since the Court in the California case had before it most of the evidence pertaining to the development of the 3-mile limit under international law and practice which has been introduced here, and since we discussed this issue at length in our opening brief (Br. 229-270),[89/] it requires little further discussion at this point. We stress, however, that the 100-mile theory, on which

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88/ Defendants' witness Dr. Jessup testified (Tr. 1142) that the 3-mile limit became established as a general principle of international law in the 18th century.

89/ For a general discussion of the views of publicists with respect to the extent of maritime sovereignty, see U.S. Ex. 7, pp. 116-121.

defendants extensively rely, was a theory of protective jurisdiction--not of territorial ownership--which originated as a basis for Venice's assertion of control over the Adriatic, that it was never adopted by any nation outside the Mediterranean area, and that it was endorsed by only a handful of continental publicists. See p. 46 , supra. We also point out that, contrary to defendants' assertion (C.C. Br. 299), there is substantial evidence that the cannon shot was considered the limit of a coastal State's inherent exclusive right in the adjacent sea. See U.S. Ex. 7, p. 26, note 25; Crocker, supra, at 518-519, 535-538, 596-597, 608-609.[90/]

18. Prior to the Truman Proclamation in 1945, rights to the resources of the seabed beyond territorial waters could be obtained under international law only by prescription or occupation (Br. 229-270).

90/ Crocker refers to a 1756 treaty between Denmark and Norway (p. 518), a statement by the French ambassador to Denmark-Norway (p. 519), England's treaties with Tunis and Algiers (pp. 535-538), a regulation of the Grand Duchy of Tuscany (p. 596), a 1779 edict of the Pope (ibid.), edicts of Genoa and Venice (p. 597), and Norwegian fishing and prize statutes (pp. 608-609).

(a) The writings of publicists on international law recognize that exclusive rights in the seabed beyond territorial waters before the Truman Proclamation could be obtained only on the basis of prescription or occupation (Br. 231-242, 247-268).

Defendants rely (C.C. Br. 462) almost entirely upon Dr. Jessup's testimony to refute this proposed conclusion. The United States submits that Dr. Jessup is virtually the only authority on international law who contends that, prior to 1945, coastal nations had an inherent right to exclusive possession of the natural resources of the seabed beyond their territorial waters.[91/] Moreover, Dr. Jessup's testimony on this point conflicts with his earlier writings. See Br. 212.

Defendants claim (C.C. Br. 463) that many 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 State, but the writers

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91/ Defendants cite (C.C. Br. 462) Swartztrauber as also supporting their position, but in the passage relied upon by defendants he explains Britain's claims to exclusive jurisdiction over sedentary fisheries beyond the territorial sea as deriving from long-standing prescriptive rights. Swartztrauber, supra, at 95-99.

they cite do not support that proposition. For example, Rayneval did not advocate a continental shelf or seabed doctrine; his contention was merely that the portion of the adjacent sea and seabed within cannon range was properly a part of the coastal State. See Fulton, supra, at 596-597. The other writers relied upon by defendants--Cussy and Masse--were also concerned only with immediate territorial waters. See Crocker, supra, at 48-52; Fulton, supra, at 602.

Nor do the 20th century authors cited by defendants support their position. Thus Lauterpacht, whom defendants cite (C.C. Br. 470-471) as believing the doctrine of prescription could be satisfied by a mere proclamation, in fact stated that a proclamation would create an inchoate title which could be perfected only by taking further action toward occupation; moreover, Lauterpacht held the view that until the coastal State proclaimed its ownership, any nation was free to exploit the offshore resources, a view directly contrary to defendants' position here. See Br. 248-251.

Similarly, Sir Cecil Hurst, upon whom defendants rely (C.C. Br. 474), strongly supports our position that, prior to 1945, the coastal State lacked inherent ownership

of the continental shelf seabed. The full passage from Hurst's 1925 article, from which defendants selectively quoted, is as follows:

> To sum up: so far as Great Britain at any rate is concerned, the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea. The claims have become restricted by the silent abandonment of the more extended claims. Consequently, where effective occupation has been long maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States. [Hurst, "Whose Is the Bed of the Sea?", 4 Brit. Y.Int.L. 33, 42.]

Hurst therefore verifies Professor Henkin's testimony (Tr. 1920, 1923-1924) that prior to the Truman Proclamation ownership of the seabed beyond the territorial sea was valid and subsisting only "where effective occupation had been long maintained." As can be seen, Hurst also supports our proposed conclusion of law 16, that adoption of the 3-mile rule effected the termination of "more extended claims." 92/

92/ Maine and Oppenheim, also cited by defendants (C.C. Br. 474), likewise support our position. See. Br. 232-233; Maine, International Law 78 (1888).

Defendants' reliance (C.C. Br. 474-475) upon the joint memorandum for rehearing in United States v. Texas, 339 U.S. 707, is also misplaced. That memorandum sought to demonstrate that Texas, unlike California or the defendant States, had possessed both sovereignty over and property in the adjacent seas as an independent nation prior to its admission into the Union and that, as one sovereign contracting with another for the Union of the two, it had specifically, "by an international agreement," retained its property in the seabed when ceding its sovereignty over those seas to the United States. Ex. 668, pp. 329-330. The Supreme Court rejected this argument, holding that when Texas entered the Union it did so on an equal footing with the other States.

(b) The only international judicial precedent before the 1958 Continental Shelf Convention took effect relating to seabed resources beyond territorial waters held that traditional international law recognized an exclusive right to such resources beyond the territorial sea only on the basis of prescription or occupation (Br. 242-247). Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi, I Int'l Comp. L. Q. 247 (1952).

Defendants have introduced no evidence to deny this conclusion. Furthermore, since defendants have relied elsewhere upon judgments in international arbitrations as sources of international law (see C.C. Br. 470-477), they presumably accept such arbitrations as authoritative. 93/

(c) The practice of nations prior to the Truman Proclamation recognized exclusive rights to the resources of the seabed beyond territorial waters only on the basis of prescription or occupation (Br. 268-270).

93/ The three Southern States apparently do not accept international arbitrations as international judicial precedent. S.S. Br. 34-35.

Defendants' principal contention (C.C. Br. 287-313; S.S. Br. 44-45; 33-35) appears to be that the practices relating to the 3-mile or cannon-shot rule were concerned only with the creation of a coastal neutrality zone and not with the delimitation of a territorial sea. Yet their witness, Dr. Jessup, both in his writings (Jessup, supra, at 4-5) and in his testimony (Tr. 1138-1139), recognized that the modern concept of a territorial sea arose primarily out of assertions of coastal neutrality zones. As Professor Henkin indicated (Tr. 2584-2585), referring to the cannon-shot limitation, "I think it is fair to say that a court during that time [1793] would be hard put to find complete territorial sovereignty on the basis of wider claims."

The founding fathers recognized the importance of neutrality obligations under international law and almost from the beginning provided for a 3-mile neutrality belt in the adjacent seas. 94/ See Crocker, supra, at 632, 636-638. See also, Tr. 2597. Defendants apparently rely upon 17th and 18th

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94/ Alexander Hamilton asserted that a nation had an obligation under international law to prevent belligerent acts within its territory and noted that international law extended the jurisdiction of a coastal nation into the adjacent seas for such purposes. Maine Ex. 697.

century claims of exclusive fisheries beyond the range of cannon in contending that the 3-mile limit did not apply to the resources of the sea and seabed. But those claims, when examined, merely confirm our position that exclusive fisheries were, at that time, based upon occupation and use, not upon a theory of inherent ownership in the coastal sovereign. See Br. 214, 230-231, 269-270.[95/]

Defendants suggest (C.C. Br. 466-467) that only coastal nations have acquired exclusive fisheries in adjacent seas and therefore that the underlying legal theory must have been one of inherent ownership. Professor Henkin answered that contention as follows (Tr. 264):

> * * * [I]n every case where there was a controversy about sedentary fish, referred to in Jessup and other places, there was another state claiming it. It was not another coastal state who happened to be there. And the coastal state won in the cases we have because they were able to show they had had a prescriptive right. They did not win because they were able to show we happened to be the coastal state. I can't even find claims to that effect by those states, let alone conclusions by arbitrators or whoever decided those cases.

95/ Defendants erroneously assert (C.C. Br. 466) that our view excludes ownership of outlying sedentary fisheries not occupied prior to adoption of the 3-mile rule. Although we believe that, prior to the Truman Proclamation, long-continued occupation and use would have been necessary to perfect a claim to exclusive fisheries, we do not contend that such occupation would have to have been of "ancient" origin.

In fact, coastal states have frequently been unable to sustain their claims to exclusive rights in the resources of their continental shelves. For example, the United States, prior to the Continental Shelf Convention, was unsuccessful in its attempt to exclude the Japanese from the king crab fishery in Alaska. See U.S. Dep't Interior, Fish and Wildlife Service, Bureau of Commercial Fisheries, "Japanese, Soviet, and South Korean Fisheries off Alaska, Development and History Through 1966" 9-11 (Circular 310). Australia likewise failed in its attempt to claim exclusive rights in the sedentary fisheries off its coast. See O'Connell, International Law in Australia, 280-283. Thus, the evidence is fully consistent with and supports our contention that prior to the Truman Proclamation a coastal nation could acquire exclusive rights beyond its territorial waters only through prescription or occupation.

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OPPOSITION OF UNITED STATES TO ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS

Almost all of the findings of fact and conclusions of law proposed by the defendants are in response to the findings and conclusions proposed by the United States and have been discussed above. However, defendants raise four arguments which bear no direct relationship to our specific proposed conclusions, and we discuss these arguments here.

1. Common Counsel defendants assert (C.C. Br. 502-508) that, even if continental shelf rights first arose following the Truman Proclamation, they and not the Federal Government are entitled to such rights. This argument is, however, foreclosed by the tidelands decisions of the Supreme Court.

In United States v. California, 332 U.S. 19, the Court held that the rights to the seabed in the territorial sea belonged to the Federal Government rather than to the States because it was the national government which had first acquired (and retained) the three-mile belt. Since the rights to the continental shelf resources beyond the three-mile belt were also acquired by the national government in the exercise of its foreign-affairs power, it follows that those rights also inhere in the federal government; President Truman claimed these rights

for the United States, not for the special benefit of the coastal States.

Because of the potential for conflict between the coastal sovereigns' exercise of continental shelf rights and the exercise by foreign nations of their rights to use international waters, the protection and control of the continental shelf is a function which properly belongs to the national external sovereign. See United States v. California, supra, 332 U.S. at 34-35. As the Supreme Court observed in United States v. Louisiana, 339 U.S. 699, 705-706:

> * * * If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including the oil.

See, also, United States v. Texas, 339 U.S. 700, 720.

2. Common Counsel defendants also argue (C.C. Br. 509-515) that they are, at a minimum, constitutionally entitled to seabed rights within their historic boundaries out to three leagues from shore.[96/] The defendants recognize that the Submerged Lands Act grants rights out to three leagues only in the Gulf of Mexico, but they claim that that restriction to the Gulf States unconstitutionally denies Atlantic and Pacific coast States "equal footing" or "equal status."

Defendants acknowledge (C.C. Br. 510) that the "equal footing" doctrine applies only to political rights, not to property rights. Stearns v. Minnesota, 179 U.S. 223. The seabed rights which defendants seek are property rights subject to the Federal Government's plenary power to dispose of its property as it sees fit. Alabama v. Texas, 347 U.S. 272. Defendants attempt to transmute these property rights into political rights by claiming they have been denied the "political" right to "qualify under the three-league provision" (C.C. Br. 510). That

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96/ This contention, of course, rests upon the assumption that defendants can establish historic boundaries beyond three miles into the sea, an assumption which we have shown to have no basis. See Br. 104-155; and pp. 68-70, 89-108, supra.

is simply another way of saying that defendants have been excluded from the category of potential property right recipients; no political right is involved.

Defendants further contend (C.C. Br. 512) that Alabama v. Texas should be overruled. In response to that contention, we repeat here what we said in our brief in opposition to Alabama's motion for leave to file a complaint in that case (at pp. 16-17):

> * * * The mere fact that this Court has held such rights to belong in the first instance to the United States as an incident of its national sovereignty (United States v. California, 332 U.S. 19) demonstrates that they are not a constitutional attribute of state sovereignty. Consequently, there can be no constitutional guarantee of equality among the States regarding them. So far as the States are legally concerned, Congress, assuming it otherwise has power to dispose of these lands, can give them to some States and not to others, just as in 1846 it gave to Tennessee, alone of the public land States, all the public lands within its borders (Act of Aug. 6, 1846, 9 Stat. 66, amending the Act of Apr. 18, 1906, 2 Stat. 381), and from time to time relinquishes federal enclaves or public lands to some states while retaining others. "Equal footing" gives Alabama no standing to complain that its marginal sea is less valuable or less extensive than Louisiana's or California's. The doctrine "does not, of course, include economic stature or standing. There has never been equality among the States in that sense." United States v. Texas, 339 U.S. 707, 716. [Footnotes omitted.]

Justice Reed, concurring in Alabama, specifically noted that the power of Congress to cede property to one State without corresponding cessions to other States has been consistently recognized. 347 U.S. at 275.

3. North Carolina argues (S.S. Br. 76-77) that it was an independent sovereign entitled to adjacent seabed resources prior to its delayed ratification of the Constitution. There is no evidence that North Carolina, or any of the other three States which ratified late, were recognized as external sovereigns at that time, or at any other time, by foreign nations. 97/

Moreover, as we argued in our brief in support of motion for judgment on the pleadings (at pp. 29-30), even if North Carolina, like Texas, had for some period possessed an external sovereignty which included as an attribute the right

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97/ Nor did Congress regard those States as wholly independent and sovereign. Thus, the Revenue Act of 1789, on which North Carolina relies, distinguished between importations from North Carolina "into any other part or place within the United States" and importations from "without the limits of the United States." 1 Stat. 48.

to the natural resources of the adjacent seabed, when North Carolina became a member of the Union all the elements of external sovereignty, including the right to such resources, would have passed to the United States. See United States v. Texas, 339 U.S. 707, 715-720.

4. Georgia argues (S.S. Br. 73-75) that it is entitled to the resources of the seabed beyond three miles under the terms of the 1802 cession to the United States of its western lands. The United States has responded to this argument in its brief in support of motion for judgment on the pleadings (at pp. 33-39).

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REPLY TO DEFENDANTS' OPPOSITION TO THE FINDINGS OF FACT PROPOSED BY THE UNITED STATES

We reply here, to the extent we have not done so above, to defendants' contentions with respect to our twelve proposed findings of fact, which we discuss seriatim.

1. England was unsuccessful in asserting sovereignty over the English seas during the 17th and 18th centuries (Br. 56-59).

Common Counsel defendants rely upon arguments and evidence at pages 50-155 of their brief to answer the contentions and evidence of the United States in support of this finding. Defendants argue that England claimed and attempted to exercise sovereignty over the English seas. But that argument is not inconsistent with our proposed finding that England failed to establish sovereignty over the English seas under international law, and defendants have not refuted the evidentiary basis for that proposed finding.

2. The crown was not aware in the 17th and 18th centuries either of the existence or of the importance of mining beneath the open seas (Br. 95-98).

Common Counsel defendants rely upon arguments and evidence at pages 117-118 and 264-268 of their brief with respect to this proposed finding of fact. We have already

responded (Br. 95-98; see pp. 36-38, 67-68, supra) to defendants' evidence relating to mining beneath the open seas. Defendants' further evidence, pertaining to the exploitation of amber, ambergris, copperice, jet, pearls, fine pebbles and flint (C.C. Br. 118), does not relate to such mining. Those resources were gathered from along the shore or beneath inland or shallow coastal waters. Maine Ex. 460, p. 373. Defendants' evidence of mining in the colonies (Maine Exs. 232, 751, 752) relates only to mining generally and not to mining beneath the open seas. Indeed, defendants concede (C.C. Br. 265) that they have found no evidence of any undersea mining in the colonies.

3. In construing their boundaries under these grants and charters, the colonies viewed their coastlines on the Atlantic Ocean as their seaward boundary (Br. 131-137).

Common Counsel defendants rely upon the arguments and evidence at pages 206-210, 219-221 and 232-278 of their brief to answer the arguments and evidence of the United States in support of this finding. In its opening brief, the United States cited not only the opinions of governors of the colonies but also the positions which the colonies took in certain boundary disputes. We have fully discussed (pp. 90-100, supra) defendants' rebuttal evidence, respecting colonial fishing and grants by the Council of New England.

4. The harvesting of shellfish during the colonial period took place either within the mainland boundaries of the colonies (i.e., on the shores, or in bays and coves) or in shallow waters close to the shore (Br. 141-142).

The defendants have introduced no evidence to rebut this proposed finding of fact. The only evidence which they offer at all (C.C. Br. 261-267)--a New Jersey Act of 1719 and four 18th century New York statutes regulating oystering in shallow waters--is consistent with our contention. See Rep. Br. 99, supra.

5. Whaling was conducted by the colonists throughout the world (Br. 139-140).

Defendants have neither denied nor introduced any evidence to rebut this proposed finding of fact.

6. During the colonial period, the fishing industry in North America was dependent upon the utilization of shore-based facilities (Br. 142-146).

Defendants introduce no evidence to rebut this proposed finding of fact. Indeed, their evidence supports our contention. See, e.g., Maine Ex. 663, p. 324; Ex. 465, pp. 39-40; Sabine, Report on the Principal Fisheries of the American Seas

109; Tower, A History of American Whale Fishery 29; Maine Ex. 719, pp. 55-57.

7. The crown disposed of vacant and unappropriated lands within the colonies without regard to the boundaries set out in the original grants and charters (Br. 163-164).

Common Counsel defendants rely upon arguments and evidence at pages 279-286 of their brief to answer the arguments and evidence of the United States under this finding. We discuss their contentions at pages 113-114, supra.

8. Following the war of independence, the Continental Congress negotiated for the resources of the North American seas with the British for the United States collectively, rather than for the individual States (Br. 201-207).

Defendants do not deny that Congress negotiated collectively for the resources. Defendants treat (C.C. Br. 372, 376) these negotiations as irrelevant because they related to the Canadian fisheries rather than the resources of the seas adjacent to their coasts. But there were, of course, also negotiations culminating in the uniform 20-league

boundary for islands in the Treaty of 1783, which, since it deviates from the individual charter claims of the separate States, is further evidence that Congress negotiated collectively for the United States. Although defendants contend (C.C. Br. 368-376) that the treaty did not impair the earlier more extensive charter grants to Virginia, that contention has no basis; under defendants' reasoning, Virginia would still claim the Bahama Islands, which of course it does not.

9. The negotiations of the peace commissioners with respect to the lands west of the Appalachian Mountains support the proposition that the negotiators for the United States, if the occasion had arisen, would have argued that rights to the property of the adjacent seas and seabed belong to the United States collectively, not to the States individually (Br. 207-209).

Common Counsel defendants rely upon the arguments and evidence at pages 360-366 of their brief to answer the arguments and evidence of the United States with respect to this proposed finding of fact. We have discussed defendants' contentions at pages 155-157, supra.

10. The United States did not assert any sovereign rights in the 18th century over the adjacent seas beyond 3 geographical miles from its coastline (Br. 209-218).

Common Counsel defendants discuss this proposed finding of fact at pages 368-376, 428-431 and 435-439 of their brief. We have responded to defendants' contentions at pages 158-159, 161-167, supra.

11. The United States has been a leading proponent of a 3-mile territorial sea from the 18th century to the present (Br. 211).

This proposed finding of fact is uncontested.

12. Prior to the Truman Proclamation in 1945 the United States recognized inherent, exclusive rights to the resources of the sea and seabed only out to 3 miles from the coastline (Br. 209-218).

With the possible exception of the position of the United States in the Fur Seal Arbitration dispute (see C.C. Br. 448-449), defendants have introduced no evidence that the United States on any occasion ever departed from its adherence to a 3-mile limit to inherent, exclusive rights in the adjacent seas. In that arbitration the United States contended that exclusive rights could be acquired outside the 3-mile limit, not that they necessarily inhered in the coastal sovereign. See Br. 213 and pp. 170-171, supra.

* * * * * *

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the Special Master should find that the United States is entitled as against the defendant States to the natural resources of the seabed underlying the Atlantic Ocean beyond 3 geographical miles from the coastline.

Respectfully submitted.

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January 1974.