IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 74, ORIGINAL

STATE OF GEORGIA,

Plaintiff,

V.

STATE OF SOUTH CAROLINA,

Defendant.

SECOND AND FINAL REPORT OF SPECIAL MASTER

WALTER E. HOFFMAN
Special Master
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SECOND AND FINAL REPORT OF SPECIAL MASTER

Your Special Master, Walter E. Hoffman, respectfully submits his Second and Final Report in the above-captioned case.

A. PURPOSE OF SECOND REPORT

The sole purpose of this Second and Final Report of the Special Master is to recommend a line which will mark the lateral seaward boundary between the States of Georgia and South Carolina.

Neither the Charter of the Colony of Georgia in 1732, nor the Treaty of Beaufort in 1787, made any reference to the lateral seaward boundary. Since the language of the several Conventions and the remarks by the expert commentators all urge agreements between the interested parties, one may wonder from an examination of the record in this case why some attempt has not been made to bring about more efforts by the

parties to reach an agreement of the lateral seaward boundary. It does appear, however, that in 1969 the States reached a tentative agreement upon a boundary projecting due east from the mouth of the Savannah River, 1969 Ga. Laws 677; 1970 S.C. Acts 2051; Christie, C.E.I.P. *Boundaries on the Atlantic Coast*, 19 Virginia Journal of International Law, 841, at 869. The agreement was never ratified by Congress and never came into effect. The details of the proposed agreement are not in the record, nor have they been revealed to the Special Master other than to the extent that the article by Christie is included by the parties along with many other articles and purported authorities together with the briefs submitted.

The Special Master concludes, therefore, that efforts to reach an agreement as to the location are to no avail, probably becasue of an inability to determine the location of the "mouth of the Savannah River." Nevertheless, if, prior to final action by the Supreme Court in this case, the parties do reach an agreement as to the location of the lateral seaward boundary, the Special Master recommends that said agreement be approved if it is timely submitted.

B. THE POSITION OF THE UNITED STATES

On page 112 of the First Report of Special Master, it was indicated that the lateral seaward boundary was of particular importance to the United States; the United States not being a party to this action.

Subsequent to the filing of the First Report of Special Master on April 21, 1986, counsel for Georgia and South Carolina conferred or corresponded with the Solicitor General of the United States of America, the Honorable Charles Fried, as a result of which the two States entered into a stipulation, approved by the Solicitor General, and filed on October 27, 1986. The stipulation is a part of the Appendix following the tab entitled STIPULATION. In effect, the two States agreed that for the purpose of this proceeding, no interest of the United States would be affected by the Supreme Court's ultimate determina-

tion as to the location of the lateral seaward boundary between the States of Georgia and South Carolina. This is a significant factor as the United States, acting through its Baseline Committee, had, during the early 1970's, drawn a baseline or closing line between the southern end of Hilton Head in South Carolina and the northern end of Tybee Island in Georgia.[96] Throughout the trial both States expressed a willingness to be bound by the location of the baseline or closing line, and the Special Master has treated this phase of the case as an agreement. Since the United States, under this stipulation, cannot be adversely effected by any recommendation of the Special Master, or any ruling by the Supreme Court as to the location of the lateral seaward boundary line, the United States of America is not a necessary party.

C. THE LATERAL SEAWARD BOUNDARY LINE

(1) *Basic Principles of Law.*

Boundary delimitation questions cannot readily be resolved because there is no universally accepted formula. We know, of course, that any lateral seaward boundary line established in this case must be derived by the use of international law. *Wisconsin v. Michigan,* 295 U.S. 455 (1934). The only time the lateral seaward boundary line has been considered by the Supreme Court was in *Texas v. Louisiana,* 426 U.S. 465 (1976), in acting upon the exceptions to the report of Special Master Van Pelt. The Superme Court held, *inter alia,* that where there

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[96] The last footnote in the First Report of Special Master is 95. The Second and Final Report of Special Master will number its footnotes beginning with 96. Exhibits introduced on the lateral seaward boundary issue will be referred to by using the Roman numeral "II," thus indicating that it was the second phase of the trial of the case, i.e. "Ga. Ex. II-8," or "S.C. Ex. II-8." Reference to the two volume transcript of the trial on the issue of the lateral seaward boundary will also contain Roman numeral "II," followed by the page number.

Dr. DeVorsey, Georgia's expert during the first phase of the trial, had testified that the line between Hilton Head and Tybee Island was the "mouth" of the Savannah River. The Special Master disagreed with the witness, but indicated that the line in question could possibly be established as a baseline. See p. 104, First Report of Special Master.

has never been an established offshore boundary between the States, the Court should apply the Convention on the Territorial Sea and Contiguous Zones, (1964) 15 U.S.T. (pt.2) 1606, T.I.A.S. No. 5639, with particular reference to Article 12. As in *Texas v. Louisiana, supra,* no lateral seaward boundary has been drawn by Congress and there has never been an established offshore boundary between Georgia and South Carolina.

Texas v. Louisiana, supra, teaches us that the lateral seaward boundary shall be constructed by reference to the median line, or equidistant principle. We therefore turn to the 1958 Geneva Convention, discussing the respective contentions of the two States, and how the Geneva Convention applies to each of the suggested proposals.

(2) *Georgia's Contention.*

Accepting the baseline or closing line as drawn by the Baseline Committee in the 1970's, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (C.T.S.C.Z.), 15 U.S.T. 1607, T.I.A.S. No. 5639, is cited by Georgia with particular references to Article 12, paragraph 1, which reads:

> Where the coasts of two States are opposite or adjacent to each other, neither of the States is entitled, failing agreement between them to the contrary, to extend the territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

When the Baseline Committee drew its line between Hilton Head Island and Tybee Island, this automatically made all waters west of the baseline or closing line, looking in a south-

erly direction from Hilton Head Island, inland waters belonging to South Carolina, southerly to the inland boundary line between the two States. Conversely, all waters to the east of the baseline or closing line comprised the territorial sea, sometimes referred to as the three-mile[97] area over which the States are given control by the passage of the Submerged Lands Act, 43 U.S.C. §§ 1301-1314 (1953).

Georgia estimates the total distance between Tybee Island and Hilton Head Island to be six miles. Actually, it is more precisely determined to be five and nine-tenths miles, but the Special Master will use Georgia's estimate of six miles as it is more convenient by referring to this figure.

In the First Report of the Special Master it will be noted that the "mouth of the Savannah River," as provided by the Treaty of 1787 to be the commencement of the inland boundary line between Georgia and South Carolina, is only approximately a mile north of the extreme southern end of the baseline or closing line at Tybee Island.[98] However, in drawing the lateral seaward boundary line, we are controlled by international law and, therefore, it does not follow that the starting point of the lateral seaward boundary must merely be an extension of the land boundary between the states, although such a factor must be considered as highly persuasive.

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[97] Three miles from the coastline became nine miles with respect to Texas and the Gulf Coast of Florida. It is clear that the three miles territorial seas is applicable to Georgia and South Carolina, subject to the legal effect of the Proclamation of President Reagan dated December 28, 1988.

[98] Georgia urges the Special Master to review his First Report and determine where the "mouth of the Savannah River" would have been if Georgia had prevailed in its contention. The Special Master respectfully rejects this request. It would, in effect, be an advisory opinion and not an alternative decision. However, it may be said that, had Georgia prevailed as to the location of the "mouth of the Savannah River," Georgia's proposed lateral seaward boundary would be an approximate extension of the land boundary. In a post-argument letter dated May 28, 1987, urging that the Special Master make an alternative ruling, counsel for Georgia stated, *inter alia*, "In *Georgia v. South Carolina*, the starting point for the lateral seaward boundary depends entirely upon the boundary in the mouth of the Savannah River, a matter disputed by Georgia and not yet determined by the Supreme Court."

Georgia's starting point for its lateral seaward boundary is at a point halfway between Hilton Head Island and Tybee Island. Thus, it is about two miles north of where the land boundary, if slightly extended eastwardly, would meet the baseline or closing line. All persons concede that Georgia is attempting to get a starting point for the lateral seaward boundary as far to the north as could possibly be considered by any court. Georgia, pointing to "special circumstances" under Article 12 of C.T.S.C.Z., argues that the equities of the case call for an adjustment in the area of the territorial sea beacuse Georgia has slightly less than 100 miles of coastal front, whereas the coastal area of South Carolina is approximately 187 miles. The "special circumstances," calling for a variance from the basic rule stated in Article 12, are attributed by Georgia to the low-tide elevation existing in an area south of Hilton Head Island. Article 11 of C.T.S.C.Z. defines a low-tide elevation as follows:

> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as a baseline for measuring the breadth of the territorial sea.

Attached to this report will be found a chart showing a point "Z", slightly south of Hilton Head Island and east of the baseline or closing line. The chart or map will be marked Ga. Ex. II-A, and is referred to as Appendix A. This map or chart shows, in part, the suggested lateral seaward boundary lines as advanced by both Georgia and South Carolina.[99]

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[99] Many charts and overlays were received in evidence, but Ga. Ex. II-A is sufficient to explain the contentions of the parties and the Special Master's conclusion. While South Carolina has suggested several other lateral seaward boundary lines, these suggested lines do not merit any extended discussion. S.C. Ex. II-8 lists seven lateral seaward boundary lines, six of which are suggested by South Carolina, with only Line 7 showing Georgia's position. This last exhibit has been partially reproduced and is attached as Appendix B.

The Baseline Committee took cognizance of the shoal area near point "Z" in establishing the territorial sea in that area. Point "Z" was apparently used as a baseline point from which the territorial sea was measured. While the Special Master agrees with Georgia to the effect that the low-tide elevation at point "Z" did create a "special circumstance" permitting a variance in the breadth of the territorial sea, the Special Master fails to see how and why this fact could justify Georgia insisting upon a starting point at the halfway point between Hilton Head Island and Tybee Island.

Dr. Lewis M. Alexander, an expert witness called by Georgia, is Professor of Geography and Marine Affairs at the University of Rhode Island. He has served as a consultant to the State Department on the subject of land and sea boundaries, the latter involving international law. For about three years, 1980 to 1983, Dr. Alexander served as the Geographer for the State Department in the Intelligence and Research Bureau. He is the Executive Director of the Law of the Sea Institute, formerly located at the University of Rhode Island but more recently moved to the University of Hawaii. This undoubted expert when asked his opinion of the equitable resolution of the boundary line, replied:

> I think the territorial sea boundary between the two states should be based upon the principles of equidistance, but it should also come to a point where there is a reasonable proportion of maritime area awarded to each of the states in the contested area.

Dr. Alexander then proceeds to explain that, contrary to what some people feel, the starting point should not start at the baseline point, but should commence at the terminal point.[100]

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[100] Shalowitz, in his treatise on Shore and Sea Boundaries, Vol. 1, p. 234, tends to support Dr. Alexander in this conclusion. But this argument does not permit any point on the outer limit of the territorial sea to be selected as a starting point. Fig. 50, *id.* at p. 235, demonstrates the complexity of determining a median line boundary, and it ultimately goes back to the land boundary.

Thus, taking Appendix A, Dr. Alexander argues that the beginning point whould be where the letter "N" appears, and then work landward. The difficulty, according to the witness, is that "somehow one has to connect 'X' which is there on the closing line, with 'N', which is out on the three-mile territorial sea."[101] For some reason, Dr. Alexander deems it important for the land boundary to be some relevance, although he argues that point "N" is a necessity to assure an equitable division of the waters. However, on cross-examination, Dr. Alexander agreed that the coastal front theory, i.e., the proportional theory, was only one factor to be considered. That the witness rests the support for his position on the principles of equity is obvious as, when questioned whether he knew of any decision enabling one to "slide up the closing line" to arrive at a point to start the lateral seaward boundary line which may be equidistant to the baseline, the witness responded in the negative. When questioned as to the location of the *true* equidistant line, the witness testified that it ran from "X" to "F" to "G" (probably, according to Appendix A, from "X" to "R" to "F" to "G"), and that the major porition of the *true* equidistant line runs approximately parallel with the navigation channel leading to the mouth of the Savannah River.

The agreements between the coastal states vary according to the peculiarities of each state's coastline. Most of them provide for lateral seaward boundary lines running due east of the land boundary. Such is the situation with respect to Georgia and Florida, South Carolina and North Carolina, North Carolina and Virginia. The extension of the land boundary is not the result of judicial decisions; it has been employed by agreement in many instances. It has some advantages in the adoption of a degree of uniformity and, if the territorial seas are extended — as they well may be — it will serve as a guide for the added area.

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[101] The letter "X" on Appendix A is on the baseline or closing line and is the approximate location of the north jetty as extended from the point where the Special Master found the northernmost point of the "mouth of the Savannah River." While Georgia originally contended that its line would run from "X" to "K" to "L" to "O" to "M" to "N," Georgia later changed its line from "X" to "R" to "F" to "S" to "N." These markings, selected by Georgia, are meaningless to the Special Master.

Finally, Dr. Alexander stated that, in his definition of equity, he disregarded "Z" as a material factor, and also disregarded the fact that "half of the line is in South Carolina."

The Special Master must reject Georgia's proposed lateral seaward boundary line, same being "H" to "L" to "O" to "M" to "N" as shown on Appendix A. First and foremost, the acceptance of Georgia's proposed lateral seaward boundary would be an open invitation for a continuation of what occurred on June 29, 1977 which branded this case as the "Shrimpers" case. See First Report of Special Master, footnote 83, page 101. The baseline, as Dr. Alexander explained, is an artificial line which is used for the purpose of measuring the outer limit of the territorial sea and is also the line which marks the seaward extension of the internal waters of South Carolina and Georgia. From the standpoint of the two states, it has little or no effect as they own the living and non-living resources out to the three-mile territorial sea.[102] The baseline or closing line does, however, mark the limit of internal waters and Dr. Alexander concedes, as indeed he must, that any state should resist a coastline with another state's waters immediately off the coast. Thus, if Georgia's lateral seaward boundary line is accepted, the Georgia law enforcement officers will have "field days" arresting South Carolina fishermen who are north of the "mouth of the Savannah River" but are west of the baseline and in inland waters. As the baseline is not a visual marking, it seems better to worry over one line, the lateral seaward boundary line, and not the baseline or closing line.

Barely touched upon by Georgia is any justification for deviating from the equidistant principle because of "historic title." Dr. Alexander testified that the equidistant line is already influenced by historic title, i.e., the Treaty of 1787, by reason of which it became impracticable to start at the midpoint of the closing line. That the Treaty of 1787 referring to the "mouth of the Savannah River" influenced the determination of the land boundary between the two states must be conceded by

[102] The record contains no suggestion of known resources, except for fishing. Presumably, there are resources of sand and gravel but, if they exist, there have been no indications of commercial development.

the Special Master. But the fact that the historic title influenced the land boundary line does not, in and of itself, affect the lateral seaward boundary line. Able counsel for Georgia makes little or no mention of the "historic title" influence as justifying a deviation from the equidistant principles.[103] There is no evidence of long usage or effective occupation by one state over the other even if it were possible to acquire any title to any portion of a territorial sea.

Lastly, we turn to the issue of proportionality. Even South Carolina's expert witness, Professor Jonathan I. Charney, an unquestioned expert in the field, has had occasion to write upon the subject in *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context,* 75 American Journal of International Law, p.28 (1981), which date was presumably prior to his employment by South Carolina as an expert in this case.[104] Professor Charney recognizes that the equity or inequity of an equidistant line may be established by comparing the areas allocated to each state to the relevant coastlines of the respective states.

By way of example Charney points to the situation confronting Delaware with New Jersey to its north and Maryland to its south. The Delaware coast faces directly east but the seaward thrust of New Jersey caused the equidistant line to run in a southerly direction, thereby cutting off the benefits of Delaware from the seabed to the east. The consultants, working under the Assistant Administrator of the C.E.I.P., said:

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[103] The use of the words "historic title" as applied to territorial sea waters may have been affected by the recent opinion in *United States v. Maine, et al.,* 475 U.S. 89, decided February 25, 1986, involving the Nantucket Sound.

[104] In 1976, Congress established the Coastal Energy Impact Program (C.E.I.P.) giving financial assitance to coastal states of this country off whose shores resource development was being conducted on the outer continental shelf. The amount of money was dependent upon the activity conducted "adjacent" to a particular state where the lateral seaward boundaries had been established by agreement or judicial decision but, in the absence of agreement or judicial action, the lateral seaward boundary would be drawn by the Assistant Administrator solely for C.E.I.P. purposes.

> For these three reasons, it is apparent that Delaware has been caught in a squeeze between New Jersey and Maryland, causing Delaware to realize from the equidistant lines less than its equitable share of the adjacent seabed. The special circumstances and inequities here present justify a divergence from the equidistant line in order to produce a more equitable result.

Of course, the above quoted language while applicable to a C.E.I.P. allocation does not necessarily apply to the establishment of a lateral seaward boundary line, although it should be noted that the panel of consultants considered five ocean boundaries, all on the basis of international law, even for domestic law purposes. The panel leaned upon the *North Sea Continental Shelf Cases,* (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969 I.C.J. Rep. 3, and the *Anglo-French Continental Shelf Arbitration,* HMSO Comnd. 7438, Misc. No. 15; 18 I.L.M. 398 (1979). In the last matter, the Court somewhat equalized the importance of the equidistant principle and the "special circumstances" exception, by saying:

> The rule there stated in each of the two cases is a single one, a combined equidistant — special circumstances rule. This being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of special circumstances. The fact that the rule is a single rule means that the question whether "another boundary is justified by special circumstances" is an integral part of the rule providing for application of the equidistance principle.

In the *North Sea Continental Shelf* cases the International Court of Justice (I.C.J.) held that there was no limit to the special circumstances which could be considered. It is suggested that when the coastline is concave or convex, the use of an equidistant line leads to unreasonable results which require remedial action. As will be mentioned in the discussion of South

Carolina's contentions, the concept of direction as a principle does not necessarily apply to the equidistant "principle" and the C.E.I.P. consultants rejected the idea that such a direction or azimuth would be the "principle" referred to in the statute.

While there is something to be said as to the proportionality rule, Georgia has never explained to the Special Master how any nexus can be established between point "N" on the outer limit of the territorial sea and the fact that Georgia's inland boundary line does not go any further north than point "X". Dr. Alexander emphasized that there had to be a connection, and the Special Master agrees. If, however, the low-tide elevation point in the area of "Z" can be shown to have any relevancy in the establishment of an equidistant line serving as the lateral seaward boundary, the Special Master would be inclined to ignore it, as was done in the Libyan/Tunisia case (Case Concerning The Continental Shelf) 1982 I.C.J. 18.

(3) *South Carolina's Contentions*

South Carolina contends that the boundary line must start at the point where the inland boundary, if extended, intersects the baseline between Hilton Head Island and Tybee Island. From this starting point South Carolina urges that the boundary should be delimited seaward in a southeasterly direction running substantially parallel to the channel providing the entrance to the Savannah River.

South Carolina suggests that a line within a range of 110° azimuth to 155° azimuth,[105] all running to the southeast with the higher numbers running more to the southeast than the lower ones, would be the only acceptable lateral seaward boundary.

Shalowitz, an acknowledged authority on the subject, has written extensively on the subjects of baselines and median lines in *Shore and Sea Boundaries,* Vol. I, pp. 203-236. He points

[105] An azimuth of 180° would be approximately a north-south line. An azimuth of 90° would be approximately an east-west line.

out that the International Law Commission supports the rule of the low-water line as a baseline where there is a normal baseline. Where, however, the coast is deeply indented (as in this case) or is fringed with islands, the Commission urges the use of a straight baseline.[106] In Article 4, paragraph 2 of C.T.S.C.Z., it is provided:

> 2. The drawing of such [straight] baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

When the Baseline Committee drew its straight baseline from "A" to "B" (Tybee Island to Hilton Head Island) it must have had in mind that the line did not deviate to any "appreciable extent" from the "general direction" of the coast. Thus, in this case where South Carolina emphasizes the coastal configuration, the Baseline Committee did not feel that such a variance was of major importance.

Article 6 of C.T.S.C.Z. provides that the outer limit of the territorial sea is a line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.[107]

Shalowitz discusses the difficulties as to any extension seaward of the lateral boundary lines. Although he does not

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[106] Georgia's counsel contends that it was irregular to draw a baseline over a shoal area. Shalowitz states: "Straight baselines may not, however be drawn *to and from* drying rocks and shoals." This means that drying rocks or a shoal cannot be the termination point of any baseline unless a lighthouse or other permanent installation is located thereon. It does not mean that a *straight* baseline cannot be drawn *through* an area where there are drying rocks or shoals.

[107] In this case there is an additional problem. The territorial sea to the east of the baseline is about four miles in breadth because the Baseline Committee took cognizance of the low-tide elevation at and near point "Z" as set forth in Article 11 of C.T.S.C.Z. Areas to the north and south have only a three mile breadth.

specifically so state, there is a strong suggestion that the location of the lateral seaward boundary line must be directly related to the land boundary. As he writes: "If coastlines were relatively straight, and the land boundary between adjacent coastal states reached the shore at right angles, the problem of delimiting the boundary between them through the territorial sea would a simple one — an extension seaward of the last land frontier would be a logical conclusion." It is true that coastlines are rarely straight, but with the use of a straight baseline or closing line from which the equidistant measurements are taken, it is indeed a rarity to see any lateral seaward boundary line so far removed from a land boundary line as Georgia has promoted.

If, as it appears, the Baseline Committee gave no particular emphasis to the configuration of the coast in establishing a baseline or closing line, why should a court place so much importance upon the direction of the coastline and the degrees azimuth that various lines may be shown as set forth on S.C. Ex. II-8, a reproduction of a portion of which is attached as Appendix B, together with a legend as prepared by South Carolina reflecting what the various lines represent? Professor Charney, in his article *supra,* states that the consultants handling the C.E.I.P. matters rejected the idea that a direction or azimuth would necessarily be considered as the "principle" referred to in the statute, although recognizing that the direction would always be applicable to a limited extent. The Special Master therefore concludes that the direction or azimuth is a factor for consideration as is the general configuration of the coastline.[108] Neither factor, however, persuades the Special Master to conclude that the lateral seaward boundary should

[108] The International Court of Justice found ([1969]) I.C.J. Rep. 50, para. 93: "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing — up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others."

be the channel leading to the mouth of the Savannah River.[109]

While the Special Master does not understand that South Carolina contends that the lateral seaward boundary should follow the *thalweg,* it has been mentioned in the briefs. While the *thalweg* principle has been invoked with respect to internal waters, the general consensus of opinion is that it has no application with respect to boundaries in a territorial sea[110] where the freedom of navigation exists. While specifying the channel of the entrance to the Savannah River has its appeal to South Carolina, as it would eliminate the cost of marking the lateral seaward boundary by putting this cost upon Georgia, there are other valid objections such as traffic congestion, *etc.*, which convinces your Special Master that designation of channels should be avoided in determining lateral seaward boundaries.

We come then to a consideration of what *Texas v. Louisiana, supra* refers to as the "equidistant principle" which, the Supreme Court indicates, is the "median line." The *true* equidistant line, according to South Carolina and Dr. Alexander, Georgia's expert witness (and apparently not disputed by anyone) is Line 5, on S.C. Ex. II-8, Appendix B. At approximately halfway across the territorial sea, the *true* equidistant line veers to the southeast. This is because that, up to the point where the line veers to the southeast, the baseline or closing line (A to B) was equidistant or perpendicular to the median line. Where the line veers, and from there to the outer limit of the territorial sea, the A to B closing line is no longer a measurement point for the equidistant principle.

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[109] As noted from the charts, this channel runs in a rather distinct southeasterly direction through what would otherwise be Georgia waters. Thus, a lateral seaward boundary line established along the channel tends to cut off the Georgia residents living on Tybee Island. This last statement may not be entirely correct if we look solely to the direction of the coastline but, from a practical standpoint, it is an effective cutoff.

[110] There have been two suggestions mentioned in reports filed which indicate that the *thalweg* may possibly be relevant when the territorial attributes of internal waters require territorial rights in order to exercise navigation rights. Such does not exist in this case.

While the Special Master feels disposed to adopt the equidistant principles, he also accepts the argument that a balancing test should be applied under international law. It is obvious that all international tribunals have avoided any specific formula in determining boundary delimitaton questions. Where some nations, referred to as states, assert territorial seas or resource zones up to 200 miles from their coasts, it is clear that overlapping contentions will arise and any tribunal, when confronted with this overlap, must let equitable principles be the guiding factor. What may be equitable in one situation, may be grossly inequitable if applied to another case.

That there should be some nexus with the land boundary is apparent as, in the *North Sea Continental Shelf Cases,* involving the continental shelves and not the territorial sea, the I.C.J. stated, in part:

> [D]elimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.

North Sea Continental Shelf, Judgment, I.C.J. Reports, 1969, para. 101 (C)(1), p. 53. It follows that if the natural prolongation of the land territory is important in determining the continental shelf, it is of even greater importance with respect to the territorial sea area.

Counsel seems to be in accord with the belief that while the equidistant principle may be a slightly preferred method of delimitation, it does not reach the stature of a rule of law. In the final analysis it is the principles of equity which should guide the conclusion in each particular case.

D. RECOMMENDATION OF SPECIAL MASTER

Following Georgia's position in the application of equitable principles, we find:

(1) Consideration should be given to the fact that it is the Treaty of 1787 which compels a finding that the internal boundary line (the "mouth of the Savannah River") is as far south as it is.

(2) To a lesser extent, the proportionality rule allocating territorial sea waters to Georgia should be given some consideration, although not merely because of the length of the coastline of each state.

(3) If the *true* equidistant line should be a major factor, consideration should be given to that portion of said line which swerves southwardly, essentially parallel to the channel leading to the "mouth of the Savannah River," merely because the measurement then becomes the actual Georgia coastline rather than the baseline or closing line.

Tending to support the contentions of South Carolina are the following:

(1) The importance, as a general rule, of the territorial sea lateral boundary line being consistent with a natural prolongation of the internal boundary line.

(2) The general direction of the coastline.

(3) Following the equidistant principle as stated by the Supreme Court in *Texas v. Louisiana.*

(4) The avoidance of permitting territorial sea waters claimed by one State to run back-to-back with inland waters of the other State.

Balancing these factors, together with others heretofore mentioned by the Special Master, or by the parties in their briefs, the Special Master makes the following **RECOMMENDATION**

as to the location of the lateral seaward boundary:

> Assuming that Line 5 on S.C. Ex. II-8, Appendix B, is drawn at right angles to the point "X" on the baseline or closing line, let Line 5 continue in a general easterly direction, remaining at right angles to the baseline or closing line, until it reaches the outer limit of the territorial sea as said outer limit existed on December 27, 1988.

It will be noted that this line partially deviates from the *true* equidistant line in that the recommended lateral seaward boundary line disregards the swerving of this line to the south substantially parallel to the channel leading to the mouth of the Savannah River. The Special Master feels that where the *true* equidistant line involves measurements partially taken from a baseline or closing line and partially from the low-water of the actual coastline, there is ample room for an adjustment of equitable principles which also include a minimal adjustment of the proportionality rule occasioned mainly by the fact that a historic title brought about the location of the inland boundary line.

The Special Master has not attempted to draw the extension of the portion of the equidistant line to the outer limit of the territorial sea on any exhibit, but recommends that, if accepted, the parties shall attach to the final decree an exhibit showing the lateral seaward boundary, and that the states be required to suitably mark the lateral seaward boundary in the water area at the joint expense of the two states.

E. PROCEEDINGS FOLLOWING FILING OF SPECIAL MASTER'S FIRST REPORT

Remaining for consideration are several matters which may be classified as (1) outgrowths of the Special Master's conclusions in his First Report, and (2) motions with respect to the proceedings to be conducted in determining the lateral seaward boundary.

(1) *Georgia's Motion to Clarify and South Carolina's Cross-Motion To Reconsider.*

On September 17, 1987, Georgia filed its Motion to Clarify the First Report of the Special Master. This motion relates to the status of Pennyworth Island and Bird Island.

In the First Report of the Special Master (p. 103) reference is made to App. F which constituted the Special Master's estimate of the true boundary line existing in 1787, with some modifications as mentioned. It was also recommended that a detailed survey was necessary to establish any precise lines.

When the Special Master's designation of the boundary line was superimposed upon the present day conditions, it was discovered that the line drawn by the Special Master cut across the upstream or western end of Pennyworth Island and also cut a small triangle out of the upland of Bird Island. Georgia then filed its motion to clarify in order to provide that the boundary lines should not encroach upon either island as they now exist. South Carolina responded by essentially agreeing to Georgia's motion, but adding a motion to reconsider that portion of the First Report which relates to the Special Master's consideration of the area known as Southeastern Denwill. For the following reasons Georgia's Motion to Clarify should be granted and South Carolina's Motion to Reconsider should be denied.

(a) *Pennyworth Island.* When this action was first filed, South Carolina did claim that Pennyworth Island was located within the State of South Carolina. However, at the commencement of the trial, South Carolina conceded that it never exercised any control or dominance over Pennyworth Island. Since Pennyworth Island was claimed by South Carolina in its counterclaim on which South Carolina carried the burden of proof, the Special Master (footnote 1, p. 3, First Report) found that Pennyworth Island was an island in the State of Georgia. South Carolina does not controvert these statements. However, an explanation is readily apparent, if necessary. The 1855 chart of the Savannah River (App. F., Ga. Ex. 156) clearly shows what

appears to be a potential accretion on the western end of Pennyworth Island, but the accretion was neither shown nor proven as South Carolina had conceded that the island belonged to Georgia.[111] Since there is no evidence of any avulsion or avulsive processes in the Pennyworth Island area from 1787 to this date, it is a fair assumption that the added land to Pennyworth Island was due to accretion, which would not aid South Carolina's claim to Pennyworth Island.

Subsequent to the last hearing on the issue pertaining to the lateral seaward boundary, counsel, by agreement, forwarded to the Special Master, what have been designated as Special Master's Exhibit A and Special Master's Exhibit B. They are respectively attached as App. C and App. D. Special Master's Exhibit A shows the boundary line established by the First Report of the Special Master, also indicating the boundary line drawn by the Special Master at the western end of Pennyworth Island. Special Master's Exhibit B is substantially identical except that it shows the boundary line as corrected, i.e., to include the area at the extreme western end of Pennyworth Island, and also the sliver of land on Bird Island, to be parts of the State of Georgia.

(b) *Bird Island.* Bird Island has not been previously discussed as it has always been considered as a part of Georgia. It was not put in issue by South Carolina, and it was not until counsel transposed the boundary line as determined by the Special Master on a modern-day map that counsel were alerted that a sliver of Bird Island had been included within South Carolina's water area. The location of this very minute area is on the northern side of Bird Island approximately opposite the middle area of Jones Island. Special Master's Exhibit A shows the boundary line as it cuts across Bird Island. Special Master's Exhibit B literally reverses the northern boundary of Bird Island

[111] See First Report of the Special Master, p. 30, where the Special Master, in discussing the unnamed island west of Pennyworth Island, said: "The island in question, emerging shortly after the 1855 chart was prepared, is slightly upstream from the area evidencing accretion to Pennyworth Island."

and the boundary line as found by the Special Master. In effect Special Master's Exhibit B demonstrates that the boundary line does not encroach upon Bird Island.

Once again, South Carolina does not make any claim to Bird Island, or any part thereof. South Carolina has never advanced any argument that any part of Bird Island was now or ever in South Carolina. The argument is used to support South Carolina's contention that Southeastern Denwill should be reconsidered.

(c) *Southeastern Denwill.* South Carolina, while not protesting to any appreciable extent as to the correction of the boundary lines as they affect Pennyworth Island and Bird Island, argues that the Special Master should reconsider his ruling on Southeastern Denwill, especially that portion fronting on the northern bank of the Savannah River. By reason of the avulsive processes of dredging, and the creation of landfill areas, the Special Master had predicted in his First Report that "it is probable that Georgia may now claim ownership of at least a portion of Southeast Denwill, including probably the area now fronting on the northern bank of the Savannah River" (First Report of the Special Master, pp. 72-75). When the Special Master's boundary line as shown on App. F (First Report) was transposed to a modern-day map, it was discovered that the Special Master was correct in his prediction. (See Special Master's Exhibits A and B, App. C and D., attached). It now appears that Georgia may be the owner of a small area of land fronting on the northern (or South Carolina) side of the Savannah River. It must be remembered that when the Special Master drew the inland boundary line, he did not enjoy the luxury of having a modern-day map upon which the line could be drawn. The line is shown on the 1855 chart (App. B, First Report-Ga. Ex. 156), and admittedly there may exist some inaccuracies by the draftsmen of the 1855 chart or by the Special Master in drawing said line at Bird Island. The line drawn by the Special Master around the western end of Pennyworth Island was deliberate in that it sought to comply with the 1922 Supreme Court opinion in *Georgia v. South Carolina*, 257 U.S. 516 (1922), by adopting the right-angle principle (See: First

Report of Special Master, pp. 23-29).

South Carolina's main argument is that Georgia failed to specify the Southeastern Denwill area as being within the State of Georgia. In the precise language used, this contention may be correct, but the prayer for relief in its amended complaint asks that a decree be entered "declaring the true and correct boundary line between the State of Georgia and the State of South Carolina in the lower reaches and the mouth of the Savannah River and in the territorial sea to the three-mile limit." This request should be sufficient to permit Georgia to claim what was formerly a water area which has now been converted to land, a small portion of which may now be south of what the boundary line was in 1787.

Georgia has always conceded that Denwill, as contrasted with Southeastern Denwill, is now and has always been in the State of South Carolina. In its briefs, the evidence, and argument, Georgia's interest in Southeastern Denwill has been confined to the fill area in the Savannah River. South Carolina has never attempted to claim the fill area by any action on its part.

The Special Master adheres to the position stated in the First Report of the Special Master (pp. 67-75), and denies South Carolina's motion to reconsider.

RECOMMENDATION: That Special Master's Exhibit B (App. D) be accepted as the boundary line between the States of Georgia and South Carolina, same being a slight modification of App. F (First Report), and Special Master's Exhibit A (App. C) attached hereto.

(2) *The Admissibility of Professor Charney's Testimony.*

A short time prior to the trial of the issue involving the lateral seaward boundary line, Georgia filed a motion in limine to exclude, or in the alternative to limit, the testimony of Professor Jonathan I. Charney who South Carolina proposed to offer as an expert witness in the area of international law. As an alternative, Georgia moved to limit his testimony to matters of ap-

plicable international law and its interpretation. Professor Charney is an attorney. In effect, Georgia contends that an attorney should not be permitted to step from the podium to the witness stand and make arguments as though they were sworn evidence.

South Carolina filed its response to the motion stating, in effect, that Georgia had been notified in September 1986, or perhaps earlier, that Professor Charney would be South Carolina's expert witness and, on October 3, 1986, provided to Georgia a summary of Charney's proposed testimony, and his discovery deposition was taken by Georgia on December 5, 1986. On January 6, 1987, Georgia's motion in limine was mailed to South Carolina. The trial date on the issue of the lateral seaward boundary line was scheduled for January 12, 1987.

When the trial on the issue of the lateral seward boundary commenced on January 12, 1987, the Special Master had not had an opportunity to research the matter. South Carolina, while conceding that Dr. Louis M. Alexander was not an attorney although obviously well versed in the field of international law, argued that both the testimony of Dr. Alexander and Professor Charney would attempt to show how international law is applied in various methodologies used in setting boundaries in such cases. Of course, while Professor Charney is an attorney, he is not counsel of record in this case, South Carolina relies upon Rule 702, Fed. R. Evid., and the Restatement of Foreign Relations Law (1985 revision, p. 75), where the argument is made that since treaty law is domestic, in a technical sense, says:

> No rule precludes the practice, and the courts tend to reject challenges to them based on the argument that international law must be treated like domestic law for this purpose.

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge

will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In disposing of this issue the Special Master made the following ruling (II Vol. 1, p. 9, Tr.):

> THE COURT: Well, I will adhere to my prior tentative ruling, that is to say, when it is offered by South Carolina, of course, as far as South Carolina is concerned, it will be offered as evidence to be treated as in the case, and it will be understood that there will be an objection by Georgia to any questions that are directed to law, that is, the applicable law phase of it, and the Court will make a ruling in connection with its final report at the appropriate time. That will give me an opportunity to look into it.

The foregoing ruling of the Special Master appeared to be satisfactory to both parties. There may, indeed, have been some misunderstanding as to the basis for a further objection as the Special Master assumed that Georgia would later object to such specific questions propounded to Professor Charney which may have been applicable to the law of the case. Since there were no specific objections on either direct or cross-examination, the Special Master feels obliged to briefly discuss such questions as may touch upon the law to be applied.

That Professor Charney is clearly an expert under Rule 702, Federal Rules of Evidence, is without doubt. Upon his graduation from law school, he was employed by the Department of Justice specializing in ocean boundary matters, and he enumerated various cases in which he was the active trial counsel or perhaps served only as a consultant. Serving as a member of the Law of the Sea task force, Charney was charged with developing the United States Law of the Sea policy in prepara-

tion for the 1982 Conference of the Law of the Sea. He served among the first of the members of the Baseline Committee. He has also served as a consultant for the United States (1) at the Law of the Sea Convention, (2) in the Gulf of Maine case, and (3) the C.E.I.P. under the Coastal Zone Management.

At the Law School at Vanderbilt University where he has served since the early 1970's, his principal course taught by him has been Public International Law with emphasis on the Law of the Sea including, of course, ocean boundaries. He is a member of the Executive Council of the American Society of International Law, and is one of the twenty-one elected members of the Board of Editors of the American Journal of International Law.

There is hardly any field of law, domestic or international, which is in a greater state of confusion with respect to drawing the lateral seaward boundary extending from the states or nations across the territorial seas. With the exception of the guidance provided by *Texas v. Louisiana, supra,* there is very little authority which may be used in guiding the discretionary power of the federal judiciary. As Professor Charney suggests, courts have sought to simplify and abstract the coastline in a given area by various geometrical techniques, including (1) the establishment of a *true* equidistant line measured from the baseline from which the territorial sea is measured, (2) the consideration of the coastal fronts by seeking to identify the direction seaward that the coastlines of each of the contesting states is facing, (3) the continuation of the general trend of the land boundary, and (4) the area which is reasonably in dispute between the parties which includes a consideration of the first three principles.[112]

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[112] The Special Master has avoided any extended discussion as to the area reasonably in dispute. This is due largely to the bifurcation of issues, leaving for final decision the drawing of the lateral seaward boundary line, after the inland boundary line had been determined. If we are to consider the location of the "mouth of the Savannah River," the area in dispute did include the northernmost lateral seaward boundary line as suggested by Georgia, but now that the Special Master has made his finding as to the location of the "mouth of the Savannah River," the area of the territorial sea reasonably in dispute could not extend as far north as Georgia contends. In a bifurcated case such as *Georgia v. South Carolina,* the Special Master deems it inappropriate to consider the area reasonably in dispute unless the entire area, without regard to the location of the "mouth of the Savannah River," be similarly considered.

The Special Master is cognizant of the rule that a lawyer, representing a party in a law suit, should not endeavor to testify in that case in the absence of a charge against the attorney of such non-controversial matters as may involve the mailing of a letter, *etc.* As stated in Weinstein's Evidence, Vol. 3, § 702[02], p. 702-33:

> The question of the admissibility of testimony given by an "expert" attorney has also been raised. Generally, an attorney may not instruct the jury as to the law. However, an attorney may testify concerning the facts surrounding contract negotiations, or the ordinary practices of those engaged in the securities business, such as how to register a corporation.

A review of Professor Charney's testimony leads to a conclusion that, except for advancing the theory that the lateral seaward boundary should essentially follow the channel leading away from the "mouth of the Savannah River" (an argument not accepted by the Special Master), the expert witness attempted to distinguish the facts and conclusions of the courts relating to boundary delimitation. Indeed, dealing with problems of the law in the field of determining an appropriate lateral seaward boundary may become part of a factual pattern in a given case.

In considering foreign-country law now covered under Rule 44.1 of the Federal Rules of Civil Procedures, we learn that foreign law is to be treated with all the flexibility now accorded domestic law and the courts may "consider any relevant material or source." In the view of the Special Master, international law should be equally available to the courts. At the very least the receipt of Professor Charney's testimony was in the wide discretion of the Court. As the Special Master sees this problem, the receipt of testimony from both Dr. Alexander and Professor Charney stands on an equal footing — each is an expert in his field. The mere fact that Professor Charney is also an attorney fails to impress anyone analyzing his testimony. Lawyers do not acquire their knowledge or expertise in a given field merely because they may have successfully passed an ex-

amination required for admission to the bar.

It may well be that certain questions were propounded to Professor Charney which may have been objectionable but, if such occurred, the particular answer did not impress the Special Master. Moreover, Georgia's able counsel cross-examined Charney at great length and successfully brought out any deficiencies in his testimony. There is no merit to the argument that Charney's testimony should be totally rejected merely because he was an attorney. That Professor Charney may have invaded the court's function as an interpreter of legal issues is of little or no consequence in this non-jury Special Master proceeding, bearing in mind the circumstances as this issue was presented.

F. THE PROCLAMATION OF DECEMBER 28, 1988

While this Report was scheduled to go to the printer, President Reagan issued a proclamation on December 28, 1988, extending or creating a territorial sea of twelve (12) miles, rather than three (3) miles as heretofore existing. The proclamation makes no statement as to the extension of state jurisdiction over the nine miles added to the territorial sea. Because the President has the constitutional power over foreign relations it is believed that he has the power to assert jurisdiction over the teritorial sea on behalf of the United States. *United States v. Louisiana,* 363 U.S. 1 (1960).

It may be argued by the coastal states that since the territorial sea has now been extended to a twelve (12) mile limit, it follows that the respective states are entitled to the same jurisdictional rights over the breadth of the territorial sea that these states previously had for a breadth of three (3) miles. Such an argument is not, however, any foregone conclusion.

The press release covering the proclamation of December 28, 1988, is attached as App. E. In addition to the press release, the Special Master obtained a copy of a memorandum prepared for the legal Adviser of the Department of State by the Office of Legal Counsel of the Department of Justice, same being

dated October 4, 1988, which 38 pages will be found as App. F.

The memorandum prepared by the Office of Legal Counsel clearly demonstrates the legal problems confronting the coastal states with respect to the assertion of jurisdiction over the waters of the expanded portion of the territorial sea. *See,* App. F. pp. 27, 29.[113]

Until Congress has studied the possible effects of expanding the state court jurisdiction over the entire twelve (12) mile territorial sea, the Special Master has concluded not to extend the state court jurisdiction and, consequently, the lateral seaward boundary line will terminate at the outer limits of the original three (3) mile territorial sea. The matter has not been briefed nor argued and, in addition, consideration of an extended lateral seaward boundary line would exceed the reference to this Special Master.

Respectfully submitted,

Walter E. Hoffman
SPECIAL MASTER
314 United States Courthouse
Norfolk, Virginia 23510

[113] Senator Hollings of South Carolina is quoted on p. 29 as saying in 1972:

> We have been trying to reconcile the amendments so that we would not interfere with any legal contention of any of the several states at the present time involved in court procedures. At the same time we wanted to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea.

Senator Hollings continues to represent South Carolina in the United States Senate.

STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES

No. 74, Original

STATE OF GEORGIA,

Plaintiff,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

STIPULATION

The Plaintiff, State of Georgia, and the Defendant, State of South Carolina, in the above entitled action, do hereby stipulate and agree as follows:

For the purposes of this action, the parties do hereby stipulate that the location of the seaward limits of their grants or rights pursuant to the Submerged Lands Act of 1953, 43 U. S. Code §§ 1301, et seq., the seaward limits of the territorial sea, the contiguous zone, and the exclusive economic zone as established by the United States of America are not in

contention in this litigation and the interest of the United States will not be affected by the Supreme Court's ultimate determination as to the location of the lateral seaward boundary between the States of Georgia and South Carolina.

It is understood by the parties hereto and by the United States that this Stipulation does not prevent either Georgia or South Carolina from contesting the position of the United States with respect to the location of those limits in some future litigation in which the United States is a party.

STATE OF GEORGIA

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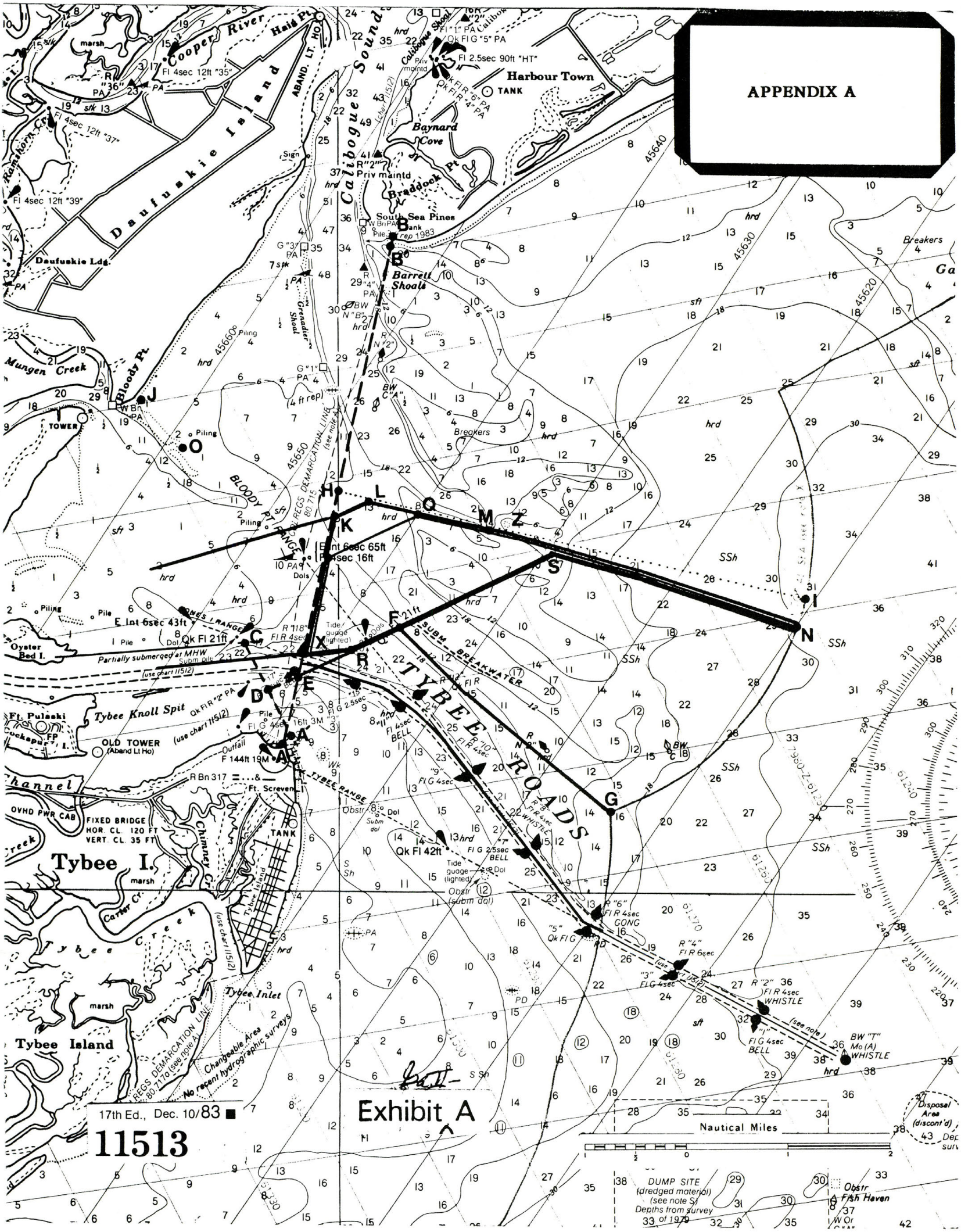
APPROVED:

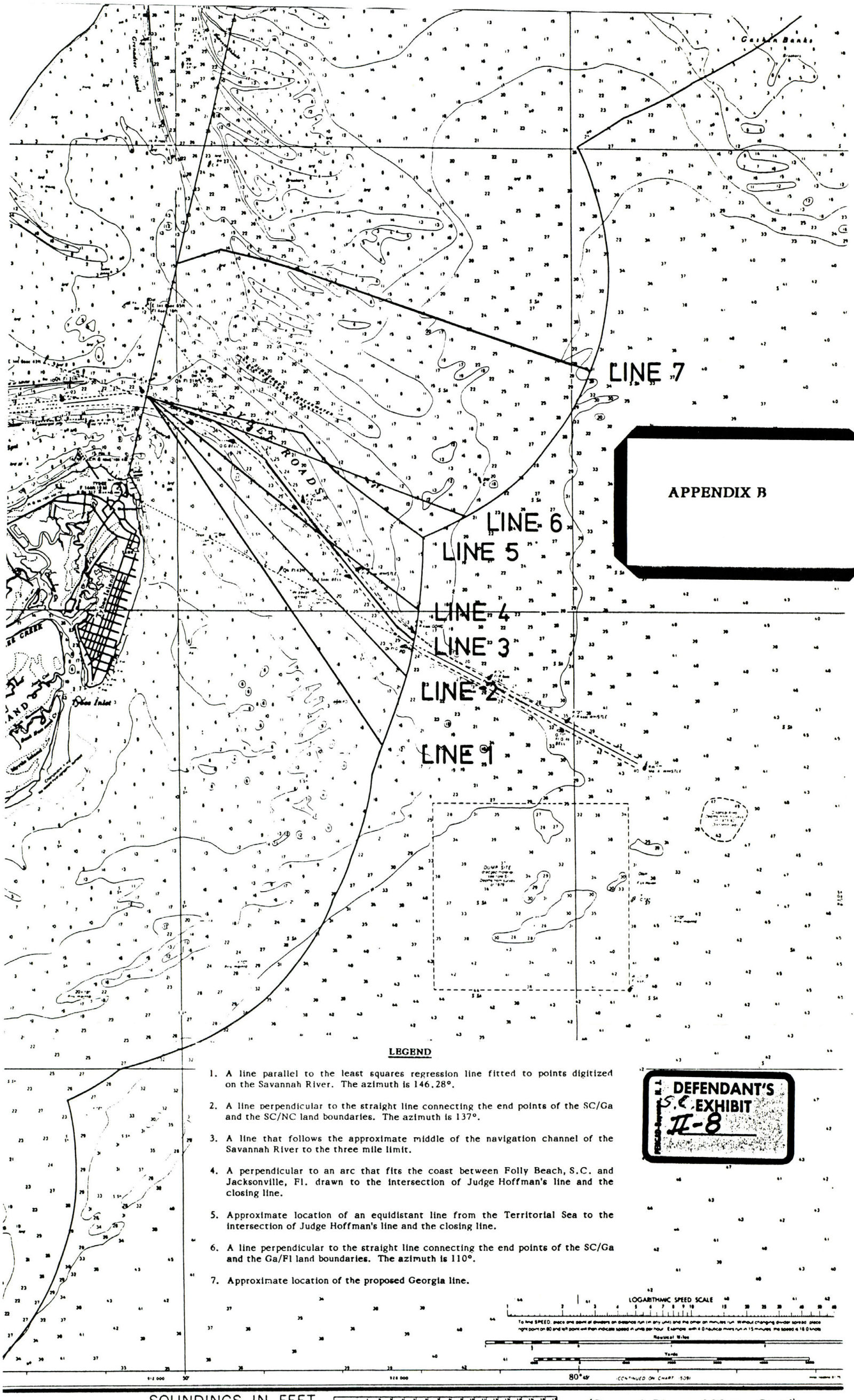
Charles Fried
CHARLES FRIED
Solicitor General of the
United States of America

APPENDIX A

APPENDIX A


Cooper River
Haig Pt.
Daufuskie Island
ABAND. LT. HO
Calibogue Sound
Harbour Town
TANK
Baynard Cove
Braddock Pt.
South Sea Pines
Barrett Shoals
Greenadier Shoal
Daufuskie Ldg.
Mungen Creek
Bloody Pt.
TOWER
BLOODY PT RANGE
Oyster Bed I.
Partially submerged at MHW
Tybee Knoll Spit
OLD TOWER
(Aband Lt Ho)
Ft. Pulaski
Cockspur I.
Outfall
F 144ft 19M
TYBEE ROADS
TYBEE RANGE
SUBM BREAKWATER
Ft. Screven
OVHD PWR CAB
FIXED BRIDGE
HOR. CL. 120 FT
VERT. CL. 35 FT
Tybee I.
Carter Cr.
Chimney Cr.
Tybee Creek
Tybee Inlet
Tybee Island
Changeable Area
No recent hydrographic surveys
REGS. DEMARCATION LINE
Nautical Miles
DUMP SITE
(dredged material)
(see note S)
Depths from survey
33 of 1979
Obstr
A Fish Haven
Disposal Area (discont'd)
17th Ed., Dec. 10/83
11513
Exhibit A

APPENDIX B


LINE 7
LINE 6
LINE 5
LINE 4
LINE 3
LINE 2
LINE 1
TYBEE ROADS
APPENDIX B
LEGEND
1. A line parallel to the least squares regression line fitted to points digitized on the Savannah River. The azimuth is 146.28°.
2. A line perpendicular to the straight line connecting the end points of the SC/Ga and the SC/NC land boundaries. The azimuth is 137°.
3. A line that follows the approximate middle of the navigation channel of the Savannah River to the three mile limit.
4. A perpendicular to an arc that fits the coast between Folly Beach, S.C. and Jacksonville, Fl. drawn to the intersection of Judge Hoffman's line and the closing line.
5. Approximate location of an equidistant line from the Territorial Sea to the intersection of Judge Hoffman's line and the closing line.
6. A line perpendicular to the straight line connecting the end points of the SC/Ga and the Ga/Fl land boundaries. The azimuth is 110°.
7. Approximate location of the proposed Georgia line.
DEFENDANT'S EXHIBIT
S.C. II-8
LOGARITHMIC SPEED SCALE
80°45'
SOUNDINGS IN FEET
(Savannah River and Wassaw Sound)
SOUNDINGS IN FEET - SCALE 1:40 000

APPENDIX C

AND

WASSAW SOUND

Mercator Projection
Scale 1:40 000 at Lat. 32°00'
North American 1927 Datum

SOUNDINGS IN FEET
AT MEAN LOW WATER

CAUTION
The Tide Gate will operate automatically; therefore, the areas upstream and downstream of the gate have been designated restricted areas and are marked by a line of buoys.

INTRACOASTAL WATERWAY
The project depth is 12 feet from Beaufort S C to St Catherines Sound Ga
The controlling depths are published periodically in the U S Coast Guard Local Notice to Mariners

SAVANNAH

JONES ISLAND

TURTLE ISLAND

CURRENTS

TIDES

SPECIAL MASTER'S

EXHIBIT A

APPENDIX C

APPENDIX D

AND

WASSAW SOUND

Mercator Projection
Scale 1:40 000 at Lat. 32°00'
North American 1927 Datum

SOUNDINGS IN FEET
AT MEAN LOW WATER

CAUTION
The Tide Gate will operate automatically; therefore, the areas upstream and downstream of the gate have been designated restricted areas and are marked by a line of buoys.

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SPECIAL MASTER'S

EXHIBIT B

APPENDIX D

APPENDIX E

APPENDIX B

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release December 28, 1988

TERRITORIAL SEA OF THE
UNITED STATES OF AMERICA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

RONALD REAGAN

NOTE: Due to poor copy quality, the above is a typewritten reproduction of President Reagan's Proclamation of December 28, 1988.

APPENDIX F

Office of Legal Coun

APPENDIX F

Office of the
Assistant Attorney General

Washington, D.C. 20530

OCT 4 1988

MEMORANDUM FOR ABRAHAM D. SOFAER
Legal Adviser
Department of State

Re: Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea

Introduction and Summary

This responds to the requests, made by your Office and an inter-agency working group, for analysis of the constitutional and statutory questions raised by a proposed presidential proclamation to extend the territorial sea of the United States from its present breadth of three miles to twelve miles.[1] In particular, we have been asked to address the following questions: First, does the President have the authority to declare, by presidential proclamation, the proposed extension? Second, assuming the President does have the authority, what effect would such a proclamation have on domestic legislation, such as the Coastal Zone Management Act? Third, can the President limit the effect the proclamation will have on domestic legislation? We have also been asked to comment on H.R. 5069, a bill that would extend the territorial sea by legislation.

We conclude that the President can extend the territorial sea from three to twelve miles by proclamation. While the most legally secure method of doing so would be by entering into a treaty with other nations on this issue, we believe that the President may extend the territorial sea by virtue of his constitutional role as the representative of the United States in foreign relations. The President's foreign relations authority under the Constitution clearly permits his unilateral assertion on behalf of the United States of jurisdiction over the territorial sea. Whether the President may individually assert sovereignty over the territorial sea is open to some question,

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[1] Letter to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, from Michael J. Matheson, Acting Legal Adviser, Aug. 15, 1988. See also Memorandum for Michael A. Carvin, Deputy Assistant Attorney General, Office of Legal Counsel, from Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy, June 20, 1988 (raising similar questions on behalf of the inter-agency working group).

although on the basis of several long-settled, historical examples of Presidents unilaterally claiming territory in this fashion, we believe that he may. Finally, we conclude that while Congress may establish state boundaries, there is serious question whether it has constitutional authority either to assert jurisdiction over an expanded territorial sea for international law purposes or to assert sovereignty over it.

With respect to the statutory issues, we believe that the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451-1464, the statute that has been identified to us by the inter-agency working group as being of special concern. It must be acknowledged, however, that the effect of the proclamation on the CZMA is not entirely free from doubt and that the effect of the expansion on other federal statutes raises complex questions. We therefore recommend that the President seek legislation stating that federal statutes that rely upon the concept of the territorial sea are not affected by the President's proclamation extending the territorial sea from three miles to twelve miles. For your convenience, we include draft legislation to achieve this objective as an Appendix to this memorandum.

Analysis

I. The Territorial Sea

In order to understand the legal issues raised by the proposal to extend the territorial sea, we begin by examining three concepts: the meaning of the "territorial sea" as that term is used in international law; the nature of the other areas of the sea over which a nation may assert some control under international law; and, finally, the distinction between a claim of sovereignty over the territorial sea and claims of jurisdiction over other areas of the sea.

The territorial sea is the belt of water immediately adjacent to the coast of a nation. See, e.g., Restatement (Third) of The Foreign Relations Law of the United States sec. 511(a) (1986) (Restatement Third); 1 L. Oppenheim, International Law sec. 172, at 416 (H. Lauterpacht 7th ed. 1948) (Oppenheim). The territorial sea extends from the nation's coast to a distance of up to twelve miles from the coast, the maximum breadth now permitted by international law. Restatement Third, sec. 511(a). Although the United States and some other nations continue to follow the historical practice of adhering to a

three-mile territorial sea, most nations now assert sovereignty over a twelve-mile territorial sea.[2]

A nation is sovereign in its territorial sea. See Convention on the Territorial Sea and the Contiguous Zone (Convention on the Territorial Sea), Apr. 29, 1958, part 1, art. 1, 15 U.S.T. 1607, 1608.[3] Indeed, a nation has the same sovereignty over the

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[2] "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders." United States v. California, 332 U.S. 19, 32 (1947). By the beginning of the nineteenth century it was generally agreed that the territorial sea extended as far as a cannon could shoot: three miles. See The Ann, 1 F. Cas. 926 (C.C.D. Mass. 1812) (No. 397) (Story, J.). See generally S. Swarztrauber, The Three-Mile Limit of Territorial Seas 23-35 (1972) (describing the history of the cannon-shot rule) (Swarztrauber). In the twentieth century, however, the international agreement on the three-mile territorial sea collapsed. Swarztrauber, supra, at 131-251. The 1958 Convention on the Territorial Sea and the Contiguous Zone (Convention on the Territorial Sea), Apr. 29, 1958, part 1, art. 3, 15 U.S.T. 1607, 1608, failed to establish an accepted limitation on the extent of the territorial sea. One hundred four nations now claim a twelve-mile territorial sea, while only thirteen maintain the three-mile limit. U.S. Dep't of State, Summary of Territorial Sea, Fishery, and Economic Zone Claims 1 (1988).

[3] The Convention on the Territorial Sea, to which both the United States and the Soviet Union are parties, provides, "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Convention on the Territorial Sea, part 1, art. 1, 15 U.S.T. at 1608 (emphasis added). The character of the territorial sea as territory in the same sense that land is territory has not always been free from doubt. See United States v. Louisiana, 363 U.S. 1, 34 (1960) (Harlan, J.), ("a [maritime] boundary, even if it delimits territorial waters, confers rights more limited than a land boundary.) Similarly, Oppenheim observed in 1937 that "a minority of writers emphatically deny the territorial character of the maritime belt." Oppenheim, supra, sec. 185, at 442-43. These statements, however, have given way to the modern view that a nation exercises the same full sovereignty over its territorial sea as it exercises over its territory on land. Convention on the Territorial Sea, part 1, art. 1, 15 U.S.T. at 1608; Restatement Third, sec. 513(1)(a). The notion that a nation is less than fully sovereign over its territorial sea is now considered archaic. See Restatement Third, sec. 512, reporters' note 1.

territorial sea as it has over its land territory. See Restatement Third, sec. 512 (sovereignty is the same over the territorial sea as it is over land territory); Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall, C.J.) (a nation exercises absolute and exclusive authority within its own territory, including the territorial sea); The Ann, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, J.) (the territorial waters "are considered as a part of the territory of the sovereign").[4]

By contrast, a nation is not sovereign over the high seas, which are the remainder of the ocean beyond the territorial sea,[5] and include areas such as the contiguous zone, the continental shelf, and the Exclusive Economic Zone (EEZ).[6] Rather, a nation may assert more limited forms of jurisdiction in such areas. In the contiguous zone, for example, a nation may only exercise control incident to the application of its customs, fiscal, immigration, and sanitary regulations in the territorial sea. Convention on the Territorial Sea, part II, art. 24, cl. 1, 15

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[4] The only qualification on a nation's sovereignty within its territorial sea is that all ships enjoy a right of innocent passage. Convention on the Territorial Sea, part 1, art. 14(1), 15 U.S.T. at 1610; Restatement Third, sec. 513(1)(a). The right of innocent passage is extended to warships so long as their passage is not prejudicial to the peace, good order, or security of the coastal state. Convention on the Territorial Sea, part 1, arts. 14(4), 22, 23, 15 U.S.T. at 1610, 1612. The right of innocent passage also extends to submarines as long as they are navigating on the surface and show their flag. Id., part 1, art. 14(6), 15 U.S.T. at 1610.

[5] The high seas are open to all nations; no nation may claim sovereignty over any part of the high seas. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2313, 2314. Both the United States and the Soviet Union are parties to the Convention on the High Seas.

[6] The contiguous zone is the part of the high seas that borders the territorial sea. Convention on the Territorial Sea, part II, art. 24, cl. 1, 15 U.S.T. at 1612; Restatement Third, sec. 511(b). The continental shelf includes the sea-bed and the subsoil of the submarine areas that extend from the coast to the outer edge of the continental margin (or, if the continental margin does not extend so far, to a distance of not more than two hundred miles). Restatement Third, sec. 511(c). The EEZ extends from the coast to no further than two hundred miles from the coast. Id., sec. 511(d).

U.S.T. at 1612.[7] A nation's authority over its continental shelf is restricted to the exploration and exploitation of natural resources. Restatement Third, sec. 515(1). A nation's authority within its EEZ is restricted to activities for economic exploration and exploitation, scientific research, and the protection of the environment. Id., sec. 514(1). Outside these areas, a nation has no jurisdiction over the activities of other nations. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2313, 2314.

In sum, the United States may exercise full sovereign power within its territorial sea, while exercising more limited kinds of jurisdiction in three overlapping portions of the high seas -- the contiguous zone, the continental shelf, and the EEZ.[8]

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[7] The Convention on the Territorial Sea provides that "[t]he contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." Convention on the Territorial Sea, part II, art. 24, cl. 2. The proposed proclamation, however, states that "[t]he outer boundary of the contiguous zone of the United States henceforth extends 24 nautical miles from the baselines from which the territorial sea is measured." Although customary international law now permits a nation to claim a contiguous zone up to twenty-four miles from the baselines, see, e.g., Restatement Third, sec. 511(b), the United States has declined to ratify the Law of the Sea Convention in which this new norm is codified and remains bound by the provisions of the 1958 Convention. Therefore, the provision extending the contiguous zone should be deleted from the Proclamation.

It may be true that most countries have adopted the new twenty-four mile contiguous zone by ratifying the Law of the Sea Convention or would waive their right to protest such an extension. Nevertheless, such a proclamation would be inconsistent with our treaty obligations if the new contiguous zone were asserted against another party to the 1958 Convention on the Territorial Sea who wished to protest. We have been advised informally by the Department of State that the likelihood of protests is small.

[8] Jessup best explains the difference between sovereignty over the territorial sea and limited jurisdiction over other areas of the sea:

> There is a vital distinction between that maritime belt which is claimed as a part of the territory of the state and the limited rights of control or jurisdiction claimed upon the high seas. The confusion is intensified by the disagreement among text writers as to the

(continued...)

II. Constitutional Authority to Extend the Territorial Sea

The question of where the power to extend the territorial sea resides under our constitutional scheme is novel and complex. The Constitution does not discuss the matter and there has been no direct precedent since President Washington first claimed a three-mile territorial sea in 1793. The proposed extension raises issues of the ways in which the United States, through the executive and legislative branches, may acquire territory and assert sovereignty over it, as well as questions about the President's foreign relations power.

With these concerns in mind, we conclude, for the reasons stated below, that the President undoubtedly has the power to assert jurisdiction over the territorial sea so as to establish a new territorial sea for the United States under international law. We also believe, although the issue is not entirely free from doubt, that he has the power to assert sovereignty over the territorial sea as a function of his power to acquire territory on behalf of the United States. Finally, we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.

A. The President's Power to Assert Jurisdiction

The President's power to assert jurisdiction over the territorial sea is based on his constitutional power over foreign

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[8](...continued)
nature of the control or jurisdiction exercised over territorial waters. If one starts with the proposition that the littoral state has only a "bundle of servitudes" over the territorial waters, one is naturally unable to see much distinction between claims to a three-mile and to a twelve-mile zone. Similarly if one posits merely certain rights of control or jurisdiction therein. But if, on the other hand, one maintains that each maritime state may rightly claim as a part of its territory a certain maritime belt, then the distinction becomes clear. It is this latter hypothesis which is believed to be sound, historically, theoretically and according to international practice.

P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction xxxiii - xxxiv (1927).

relations.[9] The President's constitutional role as the sole representative of the United States in foreign relations has long been recognized. In the words of John Marshall, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800).[10] Thus, it is not surprising that Justice Sutherland explained the nature of the President's authority in expansive terms:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.
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> . . . .
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> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be

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[9] It is axiomatic that under our Constitution the President has been given broad authority over the conduct of the Nation's foreign relations. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-22 (1936). This authority arises from a number of the President's constitutional powers: as Commander-in-Chief of the Nation's military forces, Art. II, sec. 2, cl. 1; as the individual charged with the power to negotiate treaties, Art. II, sec. 2, cl. 2; and as the individual who receives ambassadors and other foreign representatives, Art. II, sec. 3. Of course, these specific provisions are supplemented by the general provision of Art. II, sec. 1, cl. 1, which provides that "[t]he executive power shall be vested in a President of the United States of America." Additionally, the United States obtained inherent sovereign authority over foreign relations when it secured its independence from Great Britain, Curtiss-Wright, 299 U.S. at 318, and the President exercises many of the powers that were formerly vested in the British crown, and that are not enumerated in the Constitution as belonging to Congress. See, e.g., 1 W. Blackstone, Commentaries on the Laws of England 257 (1771 ed.).

[10] Marshall made this remark as a member of the House of Representatives during a debate concerning an extradition ordered by President John Adams. See E. Corwin, The President: Office and Powers, 1787-1984 207-08 (R. Bland, T. Hindson & J. Peltason 5th ed. 1984).

exercised in subordination to the applicable provisions of the Constitution.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1935). As a leading constitutional scholar concluded, "[T]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations." E. Corwin, The President: Office and Powers, 1787-1984 214 (R. Bland, T. Hindson & J. Peltason 5th ed. 1984) (emphasis original) (footnote omitted).

The Supreme Court addressed the difficult issue of the relationship between the President's foreign relations power and his power to assert jurisdiction over the territorial sea on behalf of the United States in United States v. Louisiana, 363 U.S. 1 (1960) (Louisiana) (Harlan, J.). In that case, which involved rights under the Submerged Lands Act, the Court considered the power to fix state boundaries for domestic purposes and the power to fix them for international purposes. The executive branch had argued that no state could have a boundary of more than three miles because a state boundary must coincide with the three-mile limit of our claim to the territorial sea in order to avoid international embarrassment. The Court rejected that argument as an oversimplification of the issue. Justice Harlan described the relationship between the constitutional powers of the executive and the legislature branches as follows:

> The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States. The exercise of Congress' power to admit new States, while it may have international consequences, also entails consequences as between Nation and State. We need not decide whether action by Congress fixing a State's territorial boundary more than three miles beyond its coast constitutes an overriding determination that the State, and therefore this country, are to claim that much territory against foreign nations. It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter.

Id. at 35 (emphasis added).

The Court thus established two principles: first, that determination of the scope of the territorial sea as against foreign nations is one of the President's constitutional powers, and second, that establishing state boundaries is one of Congress' constitutional powers. The Court left unanswered the question of whether congressional action fixing a state boundary could result in a claim on behalf of the United States for the purpose of international law. The Court proceeded to carefully distinguish between the state boundaries established for domestic purposes by the Submerged Lands Act and the boundary of the territorial sea established by the President for international purposes. Id. at 33-36. The Court then held that the state boundary for domestic purposes can be established by Congress irrespective of the limit of the territorial sea. Id. at 35-36.

Thus, it is clear that under Louisiana the President may use his power in the realm of foreign affairs to assert jurisdiction over the territorial sea on behalf of the United States as against other nations. We understand that this is the central purpose of the proposed proclamation and we have no doubt that the President may issue such an assertion of jurisdiction.

Indeed, history supports the Court's statement in Louisiana that the President's constitutional position as the representative of the United States in foreign relations authorizes him to make claims on behalf of the United States concerning the territorial sea. The primary example, of course, is the first claim of a three-mile territorial sea made on behalf of the United States by then-Secretary of State Jefferson in 1793. France, Great Britain, and Spain -- all of which held territory in North America -- were engaged in maritime hostilities off our Atlantic coast, an extension of wars ongoing in Europe. As part of an effort to undermine our policy of neutrality, France pressured us to state the extent of our territorial sea. See S. Swarztrauber, The Three-Mile Territorial Sea 56-59 (1972). In response, and although "neither Washington nor Jefferson wished to be hurried" into establishing the limit of our claim, President Washington instructed Jefferson to make an initial claim for the United States. Id. at 57.[11] Jefferson sent letters to both the French and British Ministers fixing a provisional limit. The letter to the British minister states:

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[11] One month before Jefferson did so, President Washington observed, "Three miles will, if I recollect rightly, bring [the captured Brigantine] Coningham within the rule of some decisions; but the extent of Territorial jurisdiction at Sea, has not yet been fixed, on account of some difficulties which occur in not being able to ascertain with precision what the general practice of Nations in this case has been." Washington to Governor Thomas Sim Lee, Oct. 16, 1793, quoted in 33 The Writings of George Washington 132 (J. Fitzpatrick ed. 1940) (emphasis in the original).

> SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the mean time to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been theretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upward of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league or three geographical miles from the sea-shores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

Letter from Mr. Jefferson to British Minister George Hammond, Nov. 8, 1793, reprinted in H.R. Doc. No. 324, 42d Cong., 2d Sess. 553-54 (1872) (emphasis added).

Secretary of State Jefferson's letters, stating the President's determination, have traditionally been viewed as the vehicle by which the United States claimed a three-mile territorial sea. See, e.g., United States v. California, 332 U.S. 19, 33 n.16 (1947). Thus, the President was responsible for the initial assertion of jurisdiction over the territorial sea on behalf of the United States. Moreover, Jefferson indicated that the executive reserved the right to extend the territorial sea in

the future.[12] We believe that the context makes it clear that the assertion of a claim over the territorial sea was done as a function of the President's power as the representative of the United States in foreign relations, and that the power to do so has been confirmed by the Supreme Court in Louisiana.

The actions of two other Presidents who individually asserted control over sections of the high seas provide further support for the argument that the President's constitutional power as the representative of the United States in foreign relations includes the authority to claim portions of the sea for the United States for purposes of international law. In 1945 President Truman issued two proclamations, one concerning the continental shelf and another establishing a fisheries conservation zone. In the Continental Shelf Proclamation, President Truman stated that the "Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf . . . subject to its jurisdiction and control." Proclamation No. 2667, 3 C.F.R. 67 (1943-48 Comp.). This Office approved the Proclamation and advised that it was lawful both as a statement of national policy in foreign affairs and as an expansion of the territorial jurisdiction of the United States. Memorandum for Harold W. Judson, Assistant Attorney General, Office of Assistant Solicitor General, from William H. Rose, Sept. 16, 1945. On the same day, President Truman also issued a proclamation which stated that the United States regarded it as proper to establish fishery conservation zones in certain areas of the high seas contiguous to the United States. Proclamation No. 2668, 3 C.F.R. 68 (1943-1948 Comp.). Where the fishing was by United States nationals alone, "the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." Id. The Proclamation then went on to declare that the United States' policy with respect to zones where nationals of other countries also fished would be determined by agreements between the United States and foreign states. This Proclamation, with its explicit statement of how the issue would be resolved with respect to other nations, was clearly based on the President's constitutional power to represent the United States' interests in the international arena. Finally, in 1983 President Reagan used the same power when he proclaimed "the sovereign rights and jurisdiction of the United States" to an exclusive economic zone extending two

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[12] Not only does the letter imply as much, but also Jefferson as President reportedly proposed to claim a broader territorial sea, emphasizing that in the 1793 letter he had "taken care expressly to reserve the subject for future consideration, with a view to this same doctrine for which he now contends." 1 Memoirs of John Quincy Adams 375-76 (C. Adams ed. 1875) (quoting a conversation with Jefferson).

hundred miles from the coast of the United States. Proclamation No. 5030, 3 C.F.R. 22 (1984 Comp.).[13] All of these precedents illustrate that the President's constitutional role as the representative of the United States in foreign relations permits him to proclaim jurisdiction over certain areas of the sea, consistent with international law, on behalf of the United States.

B. The President's Power to Assert Sovereignty

The more difficult issue is whether the President may assert sovereignty over the territorial sea.[14] The key difference between this and an assertion of jurisdiction is that an assertion of sovereignty means that the territorial sea would be considered a part of the territory of the United States -- i.e., as much a part of the continental United States as a piece of land. While originally subject to doubt by some, the modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea.[15] The issue therefore becomes whether the President has the authority to assert sovereignty over territory on behalf of the United States. As indicated below, Presidents have asserted this authority. Based on this historical record, we conclude that the President acting alone may assert sovereignty over an extended territorial sea on behalf of the United States, as a matter of discovery and occupation.

The Constitution does not specifically address the power to acquire territory on behalf of the United States.[16] Nonetheless,

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[13] The President is also authorized to establish "defensive sea areas" by executive order for purposes of national defense. 18 U.S.C. 2152. See also U.S. Naval War College, International Law Situation and Documents -- 1956 603-04 (1957) (listing defensive sea areas established by the President).

[14] We believe an assertion of sovereignty over the territorial sea would be tantamount to, and would raise the same considerations as, the acquisition of land territory. See note 3, supra. Because we believe that the territorial sea is probably territory in the same sense that land is territory, we must examine the means by which the United States may acquire territory.

[15] See note 3, supra.

[16] As Senator (later Justice) Sutherland observed, "There is no provision in the Constitution by which the national government is specifically authorized to acquire territory; and only by a great effort of the imagination can the substantive power to do

(continued...)

it is now agreed that the United States has the power to acquire territory as an incident of national sovereignty. See, e.g., Mormon Church v. United States, 136 U.S. 1, 42 (1890).[17] The United States has acquired territory through cession, purchase, conquest, annexation, treaty, and discovery and occupation.[18] These methods are permissible under international law[19] and have been approved by the Supreme Court.[20] The executive and the

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[16](...continued)
so be found in the terms of any or all of the enumerated powers." G. Sutherland, Constitutional Power and World Affairs 52 (1919).

[17] The authority of the United States to acquire territory was seriously questioned in the years immediately following the adoption of the Constitution. The argument against federal authority to acquire territory relied upon the Tenth Amendment provision that the powers not delegated to the federal government are reserved to the states or to the people. 2 J. Story, Commentaries on the Constitution of the United States sec. 1317 (2d ed. 1851). The Louisiana Purchase afforded the most urgent occasion for the consideration of the issue. Secretary of the Treasury Gallatin advised President Jefferson that "the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union." Letter from Gallatin to Jefferson, Jan. 13, 1803, reprinted in 1 Writings of Albert Gallatin 114 (H. Adams ed. 1879). Jefferson himself was more concerned about his authority to incorporate the territory into the United States than the authority to acquire the territory. See Letter from Jefferson to Gallatin, Jan. 1803, reprinted in 1 Writings of Albert Gallatin, supra, at 115. See also Downes v. Bidwell, 182 U.S. 244, 322-33 (1901) (White, J., concurring). As the United States continued to acquire large areas of land, the power to acquire territory was taken to have been settled during the nineteenth century. See 2 J. Story, supra, sec. 1320.

[18] Territory is acquired by discovery and occupation where no other recognized nation asserts sovereignty over such territory. In contrast, when territory is acquired by treaty, purchase, cession, or conquest, it is acquired from another nation.

[19] See, e.g., Oppenheim, supra, sec. 211, at 498.

[20] The Supreme Court has acknowledged the authority to acquire territory by these methods. See, e.g., Curtiss-Wright, 299 U.S. at 318 ("The power to acquire territory by discovery and occupation . . . exist[s] as inherently inseparable from the conception of nationality"); American Ins. Co. v. Canter, 26 U.S.
(continued...)

legislature have performed different roles in the acquisition of territory by each of these means. Unfortunately, the historical practice does not supply a precise explanation of where the Constitution places the power to acquire territory for the United States.

1. Assertion of Sovereignty by Treaty

The clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. Const. Art. II, sec. 2, cl. 2. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either purchase or conquest.[21] Thus, "[i]t is too late in the history of the United States to question the right of acquiring territory by treaty." Wilson v. Shaw, 204 U.S. 24, 32 (1907). There is no doubt that the United States can acquire territory, including the territorial sea, by treaty.

2. Assertion of Sovereignty by the President Acting Alone - Discovery and Occupation

The more difficult issue is whether the President, acting alone, may acquire territory for the United States. Because of

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[20](...continued)
(1 Pet.) 511, 542 (1828) (Marshall, C.J.) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.").

[21] See Treaty Between the United States and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 200, 201 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, Feb. 22, 1819, art. 2, 8 Stat. 252, 253 (cession of Florida by Spain); Treaty with Great Britain, June 15, 1846, art. 1, 9 Stat. 869 (Oregon Compromise); Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, Feb. 2, 1848, art. 5, 9 Stat. 922, 926-27 (cession of California by Mexico); Treaty with Mexico, Dec. 30, 1853, art. 1, 10 Stat. 1031, 1032 (Gadsden Purchase); Treaty with Russia, March 30, 1867, art. 1, 15 Stat. 539 (cession of Alaska by Russia); Isthmian Canal Convention, Nov. 18, 1903, arts. 2 & 3, 33 Stat. 2234, 2234-35 (cession of Panama Canal Zone by Panama); Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, art. 1, 39 Stat. 1706 (purchase of the Virgin Islands from Denmark).

several venerable, and unchallenged, historical examples of such acquisitions, we believe that he can, even though the practice may be subject to some constitutional question. First and foremost, it can be reasonably argued that President Washington and Secretary of State Jefferson in making the original claim to the territorial sea relied on the President's constitutional power as the representative of the United States in foreign affairs to proclaim sovereignty, and not simply jurisdiction, over unclaimed territory. Although we have not found any evidence of Jefferson's view of the nature of the rights of the United States in the territorial sea, both Chief Justice Marshall and Justice Story viewed the territorial sea as part of the territory of the United States. See Church v. Hubbart, supra, 6 U.S. (2 Cranch) at 234 (Marshall, C.J.); The Ann, supra, 1 F. Cas. at 296-27 (Story, J.).

Similarly, there are two instances in which the President acquired territory acting alone by discovery and occupation.[22] In 1869, "[t]he Midway Islands . . . were formally taken possession of in the name of the United States . . . by order of the Secretary of the Navy." S. Rep. No. 194, 40th Cong., 3d Sess. 1 (1869). See also S. Exec. Doc. No. 79, 40th Cong., 2d Sess. (1868). And "[t]he United States claim[ed] jurisdiction . . . over . . . Wake's Island . . . possession of which was taken by the U.S.S. Bennington on January 17, 1899." Letter from Mr. Hill, Assistant Secretary of State, to Mr. Page, Feb. 27, 1900, 243 MS Dom. Let. 246, quoted in 1 J. Moore, International Law Digest sec. 111, at 555 (1906) (Moore).[23]

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[22] There is a third example of unilateral acquisition by the President by executive agreement. In this regard, President Fillmore entered into an executive agreement in 1850 in which Great Britain "cede[d] to the United States such portion of the Horseshoe Reef as may be found requisite" for a lighthouse in Lake Erie near Buffalo. Protocol of a Conference Held at the Foreign Office, Dec. 9, 1850, 18 Stat. (Part 2) 325-26. See also 5 Treaties and Other International Acts of the United States of America 905-28 (H. Miller ed. 1937) (describing the acquisition of Horseshoe Reef). The acceptance of the cession appears to have been made pursuant to the President's power as representative of the United States in foreign affairs.

[23] The acquisition of American Samoa is frequently cited as evidence of the executive's independent authority to acquire territory for the United States. See, e.g., 1 W. Willoughby, The Constitutional Law of the United States sec. 240a (2d ed. 1929). President McKinley did assert control over American Samoa by Executive order in 1900. He acted, however, one month after the Senate ratified a treaty in which Great Britain and Germany renounced "in favor of the United States of America" any rights

(continued...)

The acquisition of Midway and Wake Islands by the Navy confirms that the President has the constitutional authority to acquire territory by discovery and occupation. Professor Henkin, for example, has stated that the President can "acquire territory by discovery or prescription." L. Henkin, Foreign Affairs and the Constitution 48 (1972) (footnote omitted). Another writer concluded that "[t]he President is competent to recognize the acquisition of territory by discovery and occupation." Q. Wright, The Control of American Foreign Relations sec. 197, at 274 (1922). Moreover, it appears that the power to acquire territory by discovery and occupation "flows from [the President's] constitutional position as the representative organ of the government" for purposes of foreign affairs. Id. sec. 73, at 134 n.12.[24]

Practical considerations also illuminate why the President's power to assert sovereignty as a matter of discovery and occupation has gone unchallenged. As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation. With Midway and Wake Islands, for example, the President -- through the Navy -- acted

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[23](...continued)
they had to claim the islands. Convention between the United States, Germany, and Great Britain, Dec. 2, 1899, art. II, 31 Stat. 1878, 1879 (1900). Prior to the treaty, the United States, Great Britain, and Germany had failed in an effort to jointly manage the Samoan Islands. See generally American Samoa: A General Report by the Governor 22-43 (1927); Moore, supra, sec. 110. The existence of the treaty partially undermines the claim that the acquisition of American Samoa is as an example of acquisition by executive action alone.

[24] One writer, however, has concluded that the President cannot acquire territory without congressional approval. See Reno, The Power of the President to Acquire and Govern Territory, 9 Geo. Wash. L. Rev. 251, 285 (1941). Reno did not discuss the acquisition of Horseshoe Reef. He believed that legislative approval, albeit sometimes implicit, accompanied each of the other acquisitions of territory by the executive. He explained that the United States' sovereignty over Midway derived from the annexation of Hawaii, which had been sovereign over the island before annexation. Reno, supra, at 275-76. He also asserted that the acquisition of Wake Island was unimportant because of the uncertainty surrounding the occupation by and claims of the United States in those territories. Id. at 276-77. Finally, he justified the United States' sovereignty over American Samoa as supported by implied congressional approval. Id. at 279-81.

because there was no other governmental representative present who could assert sovereignty on behalf of the United States.

The President's authority to acquire territory by discovery and occupation suggests to us that the President may assert sovereignty over the contemplated extension of the territorial sea. When territory is acquired by discovery and occupation, it is acquired by the assertion of the acquiring nation that it is henceforth sovereign in that territory. Similarly, when a nation asserts sovereignty over an extended territorial sea, it acquires territory which is not subject to the sovereignty of another nation. Accordingly, the considerations which explain why the President's constitutional position as the representative of the United States in foreign affairs allows him to acquire territory by discovery and occupation counsel that the same constitutional status allows him to proclaim sovereignty over an extended territorial sea.

Justice Harlan's statement for the Court in Louisiana that the power to assert territorial rights in the sea derives from the President's power as the constitutional representative of the United States in foreign affairs also appears to affirm the President's authority to assert sovereignty over the territorial sea. Even though Justice Harlan expressed doubt whether the territorial sea was "territory,"[25] he clearly indicated that the President has the power "to determine how far this country will

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[25] Justice Harlan wrote, "The concept of a boundary in the sea," as opposed to one between two states on land, "is a more elusive one." Louisiana, 363 U.S. at 33. He explained:

> The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and assertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a "national boundary."

Id. at 34 (footnote omitted). Justice Harlan's view of the nature of the territorial sea as being something less than territory has since been rejected by the United States as well as modern international law scholars, see note 3, supra.

claim territorial rights in the marginal sea as against other nations."[26]

In sum, we believe that the President may assert jurisdiction over an expanded territorial sea. Further, we believe that he may also assert sovereignty over an expanded territorial sea. To be sure, the historically more prevalent practice of territorial acquisition has been by treaty, but this in itself does not deny the authority of the President to make an assertion of sovereignty as a matter analogous to discovery and occupation. Nevertheless, to bolster the sufficiency of the proposed proclamation, we strongly recommend that the proclamation state both that it is asserting jurisdiction and that it is asserting sovereignty over the expanded territorial sea.[27] We believe that this formulation provides the best defense to any hypothetical challenge to the President's exercise of power; a challenge which, judging by the historical record, we would anticipate to be unlikely.

C. Congress' Power to Assert Sovereignty over the Territorial Sea

We next consider whether H.R. 5069, which provides for the establishment of a territorial sea twelve miles wide, is within the constitutional power of Congress. H.R. 5069 states, "The sovereignty of the United States exists in accordance with international law over all areas that are part of the territorial sea of the United States." Sec. 101(b). Congress, however, has never asserted jurisdiction or sovereignty over the territorial

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[26] There may also be an argument that President Washington's unilateral assertion of sovereignty over the original territorial sea is now underpinned by longstanding congressional acquiescence. In addition, when the Senate ratified the Convention on the Territorial Sea, it agreed that the United States should have a territorial sea and it did not place a limit on its breadth. Further, it agreed that the United States was sovereign over the territorial sea -- which as a matter of fact, for the United States, was the sea that President Washington had claimed on behalf of the United States. Thus, there is at least arguable recognition by the legislature of the President's power in its explicit desire that the United States exercise full sovereignty over the territorial sea claimed by our first president.

[27] For example, the proclamation might state: "In order to assert jurisdiction as against foreign nations and to assert sovereignty on behalf of the United States . . . ."

sea on behalf of the United States.[28] Because the President -- not the Congress -- has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for international law purposes only if it possesses a specific constitutional power therefor.[29]

We have identified two instances in which the United States acquired territory by legislative action. In 1845, the United States annexed Texas by joint resolution. Joint Res. 8, 5 Stat. 797 (1845). Several earlier proposals to acquire Texas after it

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[28] Congress has occasionally considered legislation to extend the territorial sea of the United States. E.g., H.J. Res. 308, 91st Cong., 1st Sess. (1969); S.J. Res. 84, 91st Cong., 1st Sess. (1969); S.J. Res. 136, 90th Cong., 2d Sess. (1968); H.R. 10492, 88th Cong., 2d Sess. (1964). None of these bills has been enacted.

Of course, Congress has enacted statutes with respect to aspects of the United States' jurisdiction over the territorial sea and the high seas. A 1794 federal statute provided for federal court jurisdiction within the three-mile territorial sea. Act of June 5, 1794, ch. 51, sec. 6, 1 Stat. 384. Many federal statutes govern conduct in various areas of our offshore waters. See, e.g., 14 U.S.C. 89 (Coast Guard authority within waters over which the United States has jurisdiction for law enforcement purposes); 19 U.S.C. 1581(a) (Customs authority within the "customs waters" as defined by 19 U.S.C. 1401(j)). Additionally, Congress acted to implement President Truman's continental shelf proclamation for domestic law purposes by enacting the Outer Continental Shelf Act, 43 U.S.C. 1331-1356, which claimed submerged lands for the federal government. However, all these statutes were enacted after the President's initial proclamations of sovereignty or jurisdiction within the area on behalf of the United States.

[29] Congress has certain constitutional powers that can affect the claims of the United States over the seas. For example, Congress has the power to regulate foreign commerce, Art. I, sec. 8, cl. 3, the power to define and punish crimes committed on the high seas and offenses against international law, Art. I, sec. 8, cl. 10, and the power to declare war, Art. I, sec. 8, cl. 11. Congress also exercises considerable authority over the territory of the United States. The Constitution authorizes Congress to admit new states, Art. IV, sec. 3, cl. 1, and to dispose of and regulate the property of the United States, Art. IV, sec. 3, cl. 2.

gained its independence from Mexico in 1836 had failed. In particular, in 1844 the Senate rejected an annexation treaty negotiated with Texas by President Tyler. 13 Cong. Globe, 28th Cong., 1st Sess. 652 (1844). Congress then considered a proposal to annex Texas by joint resolution of Congress. Opponents of the measure contended that the United States could only annex territory by treaty. See, e.g., 14 Cong. Globe, 28th Cong., 2d Sess. 247 (1845) (statement of Sen. Rives); id. at 278-81 (statement of Sen. Morehead); id. at 358-59 (statement of Sen. Crittenden). Supporters of the measure relied on Congress' power under Article IV, section 3 of the Constitution to admit new states into the nation. See, e.g., id. at 246 (statement of Sen. Walker); id. at 297-98 (statement of Sen. Woodbury); id. at 334-36 (statement of Sen. McDuffie). These legislators emphasized that Texas was to enter the nation as a state, and that this situation was therefore distinguishable from prior instances in which the United States acquired land by treaty and subsequently governed it as territories. Congress' power to admit new states, it was argued, was the basis of constitutional power to affect the annexation. Congress approved the joint resolution, President Polk signed the measure, and Texas consented to the annexation in 1845.

The United States also annexed Hawaii by joint resolution in 1898. Joint Res. 55, 30 Stat. 750 (1898). Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again, Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report pronounced, "The joint resolution for the annexation of Hawaii to the United States . . . brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." S. Rep. No. 681, 55th Cong., 2d Sess. 1 (1898). This argument, however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, "the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition." A. McLaughlin, A Constitutional History of the United States 504 (1936). Opponents of the joint resolution stressed this distinction. See, e.g., 31 Cong. Rec.

5,975 (1898) (statement of Rep. Ball).[30] Moreover, as one constitutional scholar wrote:

> The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force -- confined in its operation to the territory of the State by whose legislature it is enacted.

1 W. Willoughby, The Constitutional Law of the United States sec. 239, at 427 (2d ed. 1929).

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. The stated justification for the joint resolution -- the previous acquisition of Texas -- simply ignores the reliance the 1845 Congress placed on its power to admit new states. It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can

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[30] Representative Ball argued:

> Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution to admit new States. Opponents of the annexation of Texas contended that even that express power did not confer the right to admit States not carved from territory already belonging to the United States or some one of the States forming the Federal Union. Whether, therefore, we subscribe to the one or the other school of thought in that matter, we can find no precedent to sustain the method here proposed for admitting foreign territory.

31 Cong. Rec. 5,975 (1898). He thus characterized the effort to annex Hawaii by joint resolution after the defeat of the treaty as "a deliberate attempt to do unlawfully that which can not be lawfully done." Id.

serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.[31]

We believe that the only clear congressional power to acquire territory derives from the constitutional power of Congress to admit new states into the union. The admission of Texas is an example of the exercise of this power. Additionally, the Supreme Court in Louisiana recognized that this power includes "the power to establish state boundaries." 363 U.S. at 35. The Court explained, however, that it is not this power, but rather the President's constitutional status as the representative of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. Id. Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect. Id. at 51.

In the time permitted for our review we are unable to resolve the matter definitively, but we believe that H.R. 5069 raises serious constitutional questions. We have been unable to identify a basis for the bill in any source of constitutional authority. Because of these concerns, we believe that, absent a treaty, the proposed proclamation represents the most defensible means of asserting sovereignty over the territorial sea.

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[31] Additionally, Congress has authorized the extension of United States' control to guano islands discovered and occupied by citizens of the United States. The Guano Islands Act provided:

> Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

48 U.S.C. 1411. In Jones v. United States, 137 U.S. 202 (1890), the Supreme Court held that the statute was valid and that Navassa, a guano island claimed under that statute, "must be considered as appertaining to the United States." Id. at 224. The Guano Islands Act does not appear to be an explicit claim of territory by Congress.

III. The Proclamation's Effect on Domestic Law

In this section, we consider what effect the proposed proclamation will have on domestic law. By its terms, the proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent.[32]

A. Statutory Intent

The statutes potentially affected by the proclamation are too numerous to consider individually in the time permitted. However, we can discuss some of the considerations relevant to a determination whether Congress intended the application of a statute to be affected by a change in the breadth of the United States' territorial sea, and then make such a determination with respect to the particular statute of interest to the inter-agency working group -- the Coastal Zone Management Act, 16 U.S.C. 1451-1464 (CZMA or Act).

The most important consideration in determining whether Congress intended a statute to be affected by a change in the breadth of the territorial sea is the language of the statute. If a statute includes a provision that simply overlaps or coincides with the existing territorial sea -- such as the provision "three miles seaward from the coast of the United States" -- the operation of the statute will probably not, in the absence of special circumstances, be affected by a change in the territorial sea. Indeed, the statute does not appear to invoke the concept of the territorial sea at all, except for denoting an area that coincides with the territorial sea. A similar case is presented by a statute that uses the term "territorial sea" but then defines it as "three miles seaward from the coast of the

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[32] While the Constitution provides the President with the power to represent the United States in foreign affairs and thus to assert a claim under international law, see supra, at 6-18, the Constitution grants Congress the power to enact statutes with domestic effect within the areas of its enumerated powers. Congress could enact legislation stating that the area affected by a statute could be expanded either by presidential or congressional action. The President can be delegated the authority to fill in the details of a statute, such as determining the extent of a statute's jurisdiction. Congress can always amend a statute, through passage of a new law, to expand its coverage.

United States." Although the statute refers to the territorial sea, the definition reveals that Congress understood the area involved as the three-mile territorial sea in existence when the statute was enacted.

Of course, the more difficult cases will arise where Congress has used more ambiguous language. The best example is a statute which refers to the term "territorial sea" without further defining it. Congress could have intended the term to refer to the three miles that history and existing practice had defined or Congress could have intended the statute's jurisdiction to always track the extent of the United States' assertion of territorial sea under international law. A determination of congressional intent in these circumstances will therefore require further inquiry into the purpose and structure of a particular statute, and may include reference to the legislative history, the interpretation of the statute by the executive branch and the courts, and the meaning of similar statutes governing the same subject matter.

B. Coastal Zone Management Act

The CZMA was enacted in 1972 to provide a program of federal grants to the states for the purposes of (1) preserving and developing the Nation's coastal zone and (2) encouraging and assisting the states in exercising their coastal zone responsibilities through the development of management programs designed to achieve wise and coordinated use of coastal zone resources. 16 U.S.C. 1452. Under the Act, the Secretary of Commerce may make various grants to states for the development, implementation and protection of management programs. 16 U.S.C. 1454-1464.

The states establish management programs, subject to the approval of the Secretary, within the area of the coastal zone. The CZMA defines "coastal zone" as

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states . . . . The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is

held in trust by the Federal Government, its officers or agents.

16 U.S.C. 1453(1) (emphasis added). Thus, the CZMA defines the coastal zone partly in terms of the "United States territorial sea."

The text of the CZMA does not expressly indicate whether Congress intended the coastal zone to be affected by an expanded claim of territorial sea under international law. Inferences from the purposes, structure, and legislative history of the Act, however, suggest that the better view is that Congress intended the coastal zone to be stationery.[33]

1. Statutory Purpose and Structure

There are several purposive and structural reasons why we believe Congress intended the reference to "territorial sea" in the CZMA to refer to the existing three mile area. First, Congress made numerous findings when enacting the CZMA. Congress stated that the coastal zone is rich in natural resources, that it is "ecologically fragile," that it has experienced a loss of living marine resources and nutrient rich areas, and that present institutional arrangements for planning and regulating the coastal zone are inadequate.[34] 16 U.S.C. 1451. These findings were based on empirical observation and investigation of the coastal zone that existed at the time the CZMA was enacted, and it was the coastal area out to three miles that was the focus of Congress' concern. These factual findings indicate that it is unlikely that the coastal zone was intended to change with the expansion of the territorial sea. Congress could not have known whether these findings would also be true of other areas over

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[33] In interpreting the CZMA, there are both the Act as originally passed in 1972 and the subsequent amendments to the Act to consider. See Pub. L. Nos. 94-370 (1976), 90 Stat. 1013 & 96-464, 94 Stat. 2061 (1980). The definition of coastal zone was included in the original Act, and has not been amended in any substantive respect. We accordingly look principally to the original Act in determining Congress' intent, and only consider the amendments to determine whether they were intended to alter the meaning of the original definition. See Secretary of Interior v. California, 464 U.S. 312, 330 n. 15, 331-332 (1984) (relying principally upon legislative history of the original CZMA, but also considering later provisions).

[34] See also S. Rep. No. 753, 92d Cong., 2d. Sess. 4 (1972) ("Why single out the coastal zone for special management attention? . . . The fact is that the waters and narrow strip of land within the coastal zone is where the most critical demands, needs and problems presently exist.").

which the United States might assert its jurisdiction or sovereignty. Different conditions obviously could hold depending upon whether the President asserted a territorial sea of three, twelve, or two hundred miles.

Second, it is unlikely that Congress would have intended the CZMA's scope to expand beyond the clear limit of the states' jurisdiction. The central purpose of the CZMA was to assist and encourage the states to regulate use of the coastal zone,[35] and there is serious question whether the states can extend their regulatory jurisdiction beyond the limit of the three-mile belt. In this regard, there are two reasons why the states would not be able to regulate an expanded section of the territorial sea in the comprehensive way contemplated by the CZMA: the states do not have jurisdiction over the soil beneath the nine miles of the expanded territorial sea and it is very uncertain whether the states could assert jurisdiction even to regulate the waters of that section. We discuss these points in turn.

States had for decades generally assumed that they at least controlled the land beneath the territorial sea. However, in United States v. California, supra, the Supreme Court held -- contrary to many states' assumption -- that "the Federal Government rather than the state has paramount rights in and power over [the three mile marginal] belt, an incident to which is full dominion over the resources of the soil under that water area." 332 U.S. at 38-39. In response to vigorous state protests to this opinion, Congress in 1953 enacted the Submerged Lands Act, 43 U.S.C. 1301-1315, which granted to the states the lands beneath the navigable waters within their boundaries, 43 U.S.C. 1311(a), which boundaries were at a minimum to be set at "a line three geographical miles distant from [a state's] coast line . . . ." Id. sec. 1312.[36] In the same year, Congress also passed

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[35] See 16 U.S.C. 1451(i), 1452(2). Moreover, section 1455(d) of Title 16 requires the Secretary of Commerce, prior to approving a state management program, to find that the State "has authority for the management of the coastal zone in accordance with the management program," including the power to administer land and water use regulations, to control development, and to condemn property, for the purpose of achieving compliance with the management program.

[36] More precisely, the Submerged Lands Act conferred land on the states based on state boundaries as they existed at the time the state became a member of the Union, or as approved by Congress. 43 U.S.C. 1301(b). States that had not asserted seaward boundaries of three miles were authorized to do so. 43 U.S.C. 1312. Moreover, the Act did not prejudice the existence of a further seaward boundary if one existed when the state was

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the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356 (OCSLA), which established claims for the federal government over the submerged lands which lay seaward of the submerged lands controlled by the states, i.e., the submerged lands beyond the three-mile limit.[37] 43 U.S.C. 1331(a), 1332(1) & 1333(a)(1). Accordingly, if the President extends the United States' territorial sea to twelve miles, the states could not exercise jurisdiction over the submerged lands of that area. These lands are controlled by the federal government pursuant to OCSLA.

Second, it is not clear whether the states could assert jurisdiction even over the waters of the expanded portion of the territorial sea. "[A]n assertion of a wider territorial sea by the United States . . . would not itself give rights in the additional zone to the adjacent States. Unless Congress determined otherwise, the zone between three and twelve miles would be under the exclusive authority of the Federal Government." Restatement Third, sec. 512, reporters' note 2. It is therefore reasonable to assume that the states' boundaries and regulatory jurisdiction are fixed at their existing limits, and that states have no more power to assert jurisdiction over the expanded portion of the territorial sea than they do over other territories that are acquired by the United States. See also Louisiana, 363 U.S. at 35; United States v. Maine, 469 U.S. 504, 513 (1985).[38]

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[36](...continued)
admitted to the Union or if the boundary had been approved by Congress, but limited the extent of seaward boundaries to three miles into the Atlantic and Pacific Oceans, and to approximately nine miles into the Gulf of Mexico. See Louisiana, 363 U.S. 1 (historical evidence supported Texas' claim to lands beneath navigable waters within nine miles of its coast in the Gulf of Mexico).

[37] President Truman had asserted jurisdiction over the continental shelf on behalf of the United States in 1945. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Comp.). See supra at 11.

[38] However, this is not to say that the states might not attempt to expand their regulatory jurisdiction. The states might assert this power as an aspect of their sovereignty retained under the Tenth Amendment, at least to the extent that the jurisdiction did not conflict with international law, or the states might attempt to found the jurisdiction on historical grounds. See Manchester v. Massachusetts, 139 U.S. 240, 264 (1891); Skiriotes v. Florida, 313 U.S. 69, 77 (1941). But see United States v. California, 332 U.S. at 37 (distinguishing Manchester v. Massachusetts); United States v. California, 381 U.S. 139, 168-169 (1965) ("Although some dicta in [Manchester] (continued...)

However, it is not necessary for present purposes to decide whether the states could assert jurisdiction to regulate the waters of the expanded section of the territorial sea. Thus, given the absence of any clear state authority over the soil beneath an expanded territorial sea and the uncertainty of state authority over the expanded water area, it is most unlikely that the Congress that enacted the CZMA would have simply assumed that state authority would expand if the United States' territorial sea expanded.

2. Legislative History

An examination of the legislative history of the definition of coastal zone also supports this conclusion. In particular, the CZMA represented a compromise between Senate and House bills. The bill reported by the Senate Committee on Commerce included a definition of the coastal zone similar to the final Act. It provided:

> The zone terminates, in Great Lake waters, at the international boundary between the United States and Canada and, in other areas, extends seaward to the outer limit of the United States territorial sea.

S. Rep. No. 753, 92d Cong., 2d Sess. 47 (1972).

The only relevant discussion of this provision in the Senate Report states that "[t]he outer limit of the [coastal] zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act." Id. at 9. Thus, the Senate Report is consistent with the conclusion that the coastal zone was intended to extend only to the limit of the existing three mile territory sea, the limit of state jurisdiction.

After issuance of the Report, however, the definition of coastal zone was amended on the floor of the Senate. Senator Spong was concerned that the bill "might have a prejudicial effect upon the matter of United States against Maine,"[39] in which the United States was seeking a determination against the

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[38](...continued)
may be read to support" the view that "a State may draw its boundaries as it pleases within limits recognized by the law of nations regardless of the position taken by the United States," "we do not so interpret the opinion. The case involved neither an expansion of our traditional international boundary nor opposition by the United States to the position taken by the State.").

[39] Cf. United States v. Maine, 420 U.S. 515 (1975).

thirteen Atlantic coastal states concerning control over the submerged lands "of the bed of the Atlantic Ocean more than three geographic miles from the coastline." 118 Cong. Rec. 14185 (1972). Thus, he proposed an amendment, "the sole purpose of which is to assure that the bill will have no prejudicial effect upon the litigation." Id. The amendment changed the definition of coastal zone to the following:

> The zone terminates, in Great Lake waters, at the international boundary between the United States and Canada and, in other areas, extends seaward to the outer limit of the legally recognized territorial seas of the respective coastal states, but shall not extend beyond the limits of State jurisdiction as established by the Submerged Lands Act of May 22, 1953 and the Outer Continental Shelf Act of 1953.

Id. at 14185 (emphasis added to indicate changed language). Senator Hollings also spoke in support of the amendment. He stated:

> We have been trying to reconcile the amendments so that we would not interfere with any legal contention of any of the several States at the present time involved in court procedures. At the same time we wanted to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea.

Id.[40] Thus, the change in the Senate bill language was not intended to have significant effect on the issue at hand, but was only included to avoid affecting pending litigation.

The language in the House bill was virtually identical to that in the original Senate bill. The House bill provided:

> The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea.

H.R. Rep. No. 1049, 92d Cong., 2d Sess. 2 (1972). The House Report, however, adopted a different understanding of the

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[40] Senator Moss stated that "This makes clear that this bill focuses on the territorial sea or the area that is within State jurisdiction, and preserves the Federal jurisdiction beyond, which is not to be considered or disturbed by the bill at this time. If we want to do something about that later, we will have another bill, and another opportunity." 118 Cong. Rec. 14185 (1972).

provision. The House Report stated that the coastal zone extends outward

> to the outer limit of the territorial sea which, under the present posture of international law, means three miles from the base line from which the territorial sea of the United States is measured. Should the United States, by future action, either through international agreement or by unilateral action, extend the limits of the United States territorial sea further than the present limits, the coastal zone would likewise be expanded, at least to the extent that the expanded water area and the adjacent shore lands would strongly influence each other, consistent with the general definition first referred to above.[41]

Id. at 13-14 (emphasis added). This language in the House Report expresses an intent that, at least in certain circumstances, the definition of coastal zone could be extended by a change in the breadth of the territorial sea.

The difference in the language between the House and Senate bills was resolved by the Conference Committee. The Conference Report stated:

> The Managers agreed to adopt the House language as to the seaward extent of the coastal zone, because of its clarity and brevity. At the same time, it should be made clear that the provisions of this definition are not in any way intended to affect the litigation now pending between the United States and the Atlantic coastal states as to the extent of state jurisdiction. Nor does the seaward limit in any way change the state or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act.

H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 12 (1972).

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[41] The "general definition" to which the House Report refers is as follows: "'Coastal Zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states." H.R. Rep. No. 1049, supra, at 2.

While it might be argued that the Conference Committee's adoption of the House bill language also adopted the explanatory language in the House Report, the Conference Report did not say so. Rather, it stated that the language was taken because of its "clarity and brevity." Moreover, the Conference Report then immediately went on to state what is in effect a paraphrase of the Senate bill -- saying that the bill is not intended to affect the pending litigation and that the seaward limit is understood in accordance with the Submerged Lands Act and the OCSLA. Thus, the Conference Report appeared to make a special effort to clarify that despite its choice of the House language (which was also the language of the original Senate version), it accepted the Senate's understanding of the provision.[42]

Moreover, the Conference Report would appear to be inconsistent with the House Report's language concerning extension of the coastal zone. The third and final sentence in the Conference Report discussing the definition reiterates the congressional concern that CZMA do nothing to affect the statutory allocation of state and national responsibility in the area. Id. If the CZMA permitted an expansion of the coastal zone, and states asserted regulatory jurisdiction over the extended territorial sea, however, that balance of authority would be affected.[43]

This understanding of the legislative history is bolstered by the Supreme Court's decision in Secretary of the Interior v. California, 464 U.S. 312 (1984). This case involved the interpretation of section 307(c)(1) of the CZMA, 16 U.S.C. 1456(c)(1), which requires federal agencies to conduct activities "directly affecting the coastal zone" consistently with approved

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[42] The House bill had included various provisions extending the scope of the CZMA beyond the three-mile limit, but the Conference Committee had rejected all the provisions. The language in the House Report may therefore be understood as indicative of the House's intent that the CZMA extend beyond the three-mile limit in certain circumstances. See Secretary of Interior v. California, 464 U.S. 312 (1984) (discussed below). But because rejection of these provisions indicates that this intention was not adopted by the Conference Committee, we believe the better view is that the language in the House Report, like the provisions eliminated in the House bill, does not reflect the final congressional intent.

[43] Extension of the coastal zone to the land and sea beyond the three-mile limit would have provided the states with additional control over OCS resources. States would have the authority under section 307(c)(3) of the original act, 16 U.S.C. 1456(c)(3)(A), to veto (subject to a limited federal override) OCS activities that affected the waters of the new, extended coastal zone.

state management programs. The Court held that the only federal activities "directly affecting" the coastal zone were those conducted "on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act," and did not include activities conducted beyond the three-mile seaward limit of the coastal zone, as California had argued. 464 U.S. at 330. The Court based its holding that the ambiguous "directly affecting" language did not apply to activities seaward of the three-mile limit on a review of the legislative history. The Court concluded that "[e]very time it faced the issue in the CZMA debates, Congress deliberately and systematically insisted that no part of CZMA" was to extend beyond the three-mile limit. Id. at 324.

The Court noted the "repeated statements" in the floor debates in Congress that "the allocation of state and federal jurisdiction over the coastal zone and the [outer continental shelf] was not to be changed in any way" by the Act. Id. The Court listed nine statements, including: "This bill covers the territorial seas; it does not cover the Outer Continental Shelf.", 118 Cong. Rec. 14180 (1972) (remark of Sen. Stevens); "[T]his bill attempts to deal with the Territorial Sea, not the Outer Continental Shelf.", id. at 14184 (remark of Sen. Moss); "[W]e wanted to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea.", id. at 14185 (remark of Sen. Hollings); "[T]he Federal Government has jurisdiction outside the State area, from 3 to 12 miles at sea.", id. at 35550 (remark of Rep. Anderson).

Moreover, the Court relied upon the fact that Congress "debated and firmly rejected" four proposals "to extend parts of CZMA" to the outer continental shelf. 464 U.S. at 325. The most significant of these proposals was contained in section 313 of the House bill, which would have required the Secretary of Commerce to develop a management program for "the area outside the coastal zone and within twelve miles" of the coast. This provision, however, was eliminated by the Conference Committee because, as explained in the Conference Report, "the provisions relating thereto did not prescribe sufficient standards or criteria and would create potential conflicts with legislation already in existence concerning Continental Shelf resources." Id. at 327 (quoting H.R. Conf. Rep. No. 1544, supra, at 15 (emphasis supplied by Supreme Court)). Congress also rejected proposals to permit the Secretary of Commerce to extend established state coastal zone marine sanctuaries beyond the coastal zone, to require approval of state governors when federal agencies sought to construct or to license construction of facilities beyond the territorial sea,[44] and to invite the National Academy of Sciences to investigate environmental hazards

[44] 118 Cong. Rec. 14183-14184 (1972).

attendant on offshore drilling on the Atlantic Outer Continental Shelf.[45] Viewing this evidence in its totality, the Court concluded[46] that "Congress expressly intended to remove control of [outer continental shelf] resources from CZMA's scope." Id. at 324.[47]

The Supreme Court's understanding of Congress' intent also applies to the present issue. Congress' intention to exclude outer continental shelf resources from the scope of the CZMA, which required that the "directly affecting" provision be applied only to activities within the three-mile coastal zone, was based on a desire to limit the applicability of the CZMA to the three-mile limit. Therefore, the legislative history, as interpreted by the Supreme Court, also indicates that Congress did not intend for the coastal zone itself to be expanded beyond that three-mile limit.

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[45] 118 Cong. Rec. 14180-14181, 14191, 35547 (1972).

[46] We also believe that section 307(c)(3) of the original Act, 16 U.S.C. 1456(c)(3)(A), did not, as originally enacted, apply to activities seaward of the coastal zone. Section 307(c)(3) required activities "affecting land or water uses in the coastal zone" to be subjected to review for consistency with state management programs, and was a sister provision to section 307(c)(1) construed in Secretary of Interior v. California. Based on the logic and language of that case, the Court's statement that the Congress that passed the original CZMA "expressly intended to remove control of [outer continental shelf] resources from CZMA's scope" also applies to section 307(c)(3). We need not decide, however, whether the scope of this provision has been changed by amendments to the Act. See e.g., Pub. L. No. 94-370, 90 Stat. 1018 (1976), codified at 16 U.S.C. 1456(c)(3)(B).

[47] It is clear that Congress was concerned with more than whether a provision violated international law. The Conference Committee rejected section 313 of the House bill because it would have created potential conflicts with existing legislation governing the outer continental shelf, not because it would violate international law. H.R. Conf. Rep. No. 1544, 92nd Cong., 2d Sess. 15 (1972). Thus, Congress' decision to extend the coastal zone seaward only three miles was in part the product of its conscious coordination of the CZMA with other statutory provisions governing the outer continental shelf, provisions which would be unaffected by a change in the United States' territorial sea.

3. Subsequent Amendments

Since 1972, Congress has passed legislation affecting the relationship between the federal and state authority contemplated by the original CZMA. While these amendments are of limited significance in interpreting the original CZMA, we discuss them because they are consistent with a continuing congressional intent to consider carefully any change in the balance of state and federal authority in this area.

The CZMA has been amended several times,[48] and OCSLA has also been substantially modified. In contrast to the original CZMA, these amendments expressly give the states a role concerning the federal governance of activities on the OCS. The amendments establish a complex, interconnected statutory scheme, which contains precise and detailed limits on state authority, varying in different circumstances. That Congress has enacted such a scheme suggests that it has considered and legislated on the role of the states very carefully, and would not desire any modification of that role in the CZMA in the absence of new legislation. We describe the amendments below.

The CZMA was first significantly amended by the Coastal Zone Management Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (1976) (1976 Amendment). The 1976 Amendment effected two important changes in the role of the states, both of which recognize and attempt to address the effects of OCS activities on the coastal zones of the states. First, Section 6 requires federal licenses for OCS exploration or development to attempt to conform to management plans of affected states. The Secretary of Commerce may override the state's determination that an activity is inconsistent with its plan only upon finding that the proposed activities are consistent with the objectives of the CZMA or are necessary in the interest of national security. 16 U.S.C. 1456(c)(3)(B). Second, Section 7 of the 1976 Amendment establishes a Coastal Energy Impact Program that provides financial assistance to states to meet needs resulting from and reflecting the impact of coastal energy activities, including OCS activities, which for technical reasons must be sited in or near the state's coastal zone. 16 U.S.C. 1456a.

In 1978, Congress further modified the allocation of federal and state responsibilities through enactment of the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-

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[48] The CZMA has been amended at least seven times. Here, we focus on the 1976 amendment because it contains the principal changes in federal and state authority. See also Coastal Zone Management Improvements Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (1980).

372, 92 Stat. 629 (OCSLA Amendment). This amendment substantially changed the original OCSLA by including numerous provisions requiring state participation in OCS activities.[49]

Thus, the amendments to both the CZMA and the OCSLA establish a complex and detailed statutory scheme concerning the limits of state authority to affect OCS activities.[50] Over the years, Congress has provided the states with grants to respond to the effects of OCS activities, with the authority to review and make recommendations concerning OCS activities, and with the power to veto OCS activities subject to limited federal override. These detailed amendments to the CZMA and OCSLA are thus consistent with a congressional understanding of a coastal zone and state authority which would not automatically expand with the expansion of the territorial sea.

To summarize, on the basis of the purpose, structure and legislative history of the CZMA, we conclude that Congress did

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[49] The OCSLA Amendment provides for various levels of state participation in the process of developing offshore oil. Secretary of Interior v. California, 464 U.S. at 337. The Secretary of Interior must, while preparing a schedule for proposed lease sales on the OCS, solicit comments from states that might be affected, and must explain, in a report to Congress and the President, why a state recommendation was not accepted. 43 U.S.C. 1344(c) & (d). Second, the Secretary must accept state recommendations concerning the size, timing or location of proposed lease sales, if he determines that they reasonably balance national and state interests. 43 U.S.C. 1345(a) & (c). Third, an applicant's exploration plan must certify that the proposed activities are consistent with state CZMA management programs unless the Secretary of Commerce finds that the proposed activities are consistent with the objectives of the CZMA or are necessary in the interest of national security. 43 U.S.C. 1340(c). Finally, the Secretary of Interior must accept state recommendations concerning development and production plans if they provide a reasonable balance between state and national interests. The plans must also be consistent with state CZMA management plans and will only be approved, absent state consent, if the Secretary of Commerce finds that the proposed activities are consistent with the objectives of the CZMA or are necessary for national security. 43 U.S.C. 1351.

[50] Writing of the relationship between the OCSLA Amendment and CZMA, the Supreme Court stated that "Congress has thus taken pains to separate various federal decisions" in the process of granting authority to conduct OCS development and to subject only the third and fourth stages to review for consistency with state management plans. Secretary of Interior v. California, 464 U.S. at 340.

not intend the coastal zone to be affected by an expansion of the territorial sea under international law. The language in the House Report might suggest a contrary conclusion, but that language was not accepted by the Conference Committee and, in any case, is outweighed by the structure of the Act and the legislative history, as interpreted by the Supreme Court.

We recognize, however, that this conclusion is not free from doubt and that a court could construe the coverage of the CZMA -- or other statutes which refer to the territorial sea -- as expanding with the extension of the territorial sea. Such a result can be avoided. As discussed, whether the coverage of a statute which refers to the territorial sea is affected by the extension of the territorial sea is a question of legislative intent. Therefore, Congress could foreclose an individualized judicial assessment of each federal statute by enacting legislation which negates the expansion of the coverage of any domestic statute by the extension of the territorial sea for international purposes. An express declaration by Congress that the presidential proclamation extending the territorial sea has no effect on the operation of domestic statutes which rely upon the concept of the territorial sea would provide a simple and decisive rejoinder to any claim of automatic expansion. Thus, although we do not believe that the coverage of the CZMA should be construed to expand as a necessary result of the presidential proclamation, we recommend that the President seek legislation to conclusively preclude any contrary decision on the CZMA or any other statute by the courts. For your convenience, we include draft legislation as an Appendix.

Conclusion

We believe that the President may make an extended jurisdictional claim to the territorial sea from three to twelve miles by proclamation. We also find venerable historical evidence supporting the view that the President's constitutional role as the representative of the United States in foreign relations empowers him to extend the territorial sea and assert sovereignty over it, although most such claims in our nation's history have been executed by treaty. It is more doubtful, however, that Congress, acting alone, may extend the territorial sea beyond the present boundary for international purposes.

The domestic effect of the extension of the territorial sea on federal statutes that refer to the territorial sea must be determined by examining Congress' intent in passing each relevant statute. We have concluded that the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act, the statute which was identified to us as presenting special concern. However, we recognize that the effect of the proclamation on the CZMA and numerous other federal statutes will continue to be uncertain until final

judicial resolution. We therefore recommend that the President seek legislation providing that no federal statute is affected by the President's proclamation to extend the breadth of the territorial sea from three miles to twelve miles.

Please let us know if we can be of further assistance.

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APPENDIX

A BILL

To provide for the extended territorial sea and contiguous zone.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Territorial Sea Extension Act of 1988."

SECTION 2. FINDINGS.

The Congress finds that -

(1) the extension of the United States territorial sea to twelve nautical miles from the baselines of the United States, in conformity with international law, by Presidential Proclamation Number _____ of _____, is in the national interest;

(2) the possible extension of the legal rights and interests of the States of the United States and the authority of federal agencies in the area beyond the previous three nautical mile territorial sea merits careful and separate consideration.

SECTION 3. PURPOSE.

The purpose of this Act is to ensure the orderly implementation in domestic law of the extension of the territorial sea of the United States.

SECTION 4. FEDERAL AND STATE AUTHORITY.

Except as provided in any law enacted after the date of enactment of this Act, the authority of any federal agency pursuant to statute and the legal rights, interests, jurisdiction or authority of the States of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the overseas territories and possessions of the United States shall not be extended beyond its previous geographical limits by the extension of the territorial sea of the United States.