No. 35, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Plaintiff*,

VS.

STATE OF MAINE, ET AL. (RHODE ISLAND AND NEW YORK), *Defendants*.

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

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INTEREST OF THE STATE OF ALASKA

The State of Alaska is before this Court in another action (*United States v. Alaska*, No. 84, Original) to determine the extent of the submerged lands owned by the State along its north slope. That action is currently scheduled to go to trial before the Special Master on July 16, 1984. Owing to the significant impact that the Court's decision and statements in this case may have on Alaska's case, the State has a substantial interest in the outcome of this proceeding and must contest certain arguments advanced by the United States that are perceived to be misleading or flawed.

INTRODUCTION AND SUMMARY

The United States confirmed in Alaska upon the State's admission to the Union rights equal to those enjoyed by most other coastal states in its offshore territory. Pub.L. 85-503, 72 Stat. 339 (1958). The United States has sued Alaska, in this Court's original jurisdiction, over those rights, and the case has been referred to a special master. 444 U.S. 1065. As pleaded, the *Alaska* case concerns the northern seaward boundaries of the State of Alaska from Icy Cape, southwest of Point Barrow, to the Canadian border. The length of that segment of Alaska's coastline approaches that of California's coastline, which has been the subject of litigation in this Court since 1945. *See United States v. California,* 447 U.S. 1 (1980).

The Alaska coastline question will be tried by the Special Master, as presently scheduled, beginning July 16, 1984. The Special Master's report will be tendered to this Court in due course thereafter. If history is precedent, one or both of the parties will except to the report, and the Court will be asked to adjudicate that coastline.

The national Government has been accorded in these cases exceptional deference[1]—some would say inordinate deference—to the position it elects on the particular occasion to take. Given that fact, and given the pendency of the *Alaska* case, which raises questions that cross or run tangent to the question raised by the United States in its Exception in this case, Alaska desires to correct certain flawed or misleading points in that Exception lest they

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[1]Charney, "Judicial Deference in the Submerged Lands Cases," 7 Vand. J. Trans. L. 383 (1974).

go unquestioned now and cause unnecessary problems in the *Alaska* case.

First, we challenge the Solicitor General's casual suggestion that this case has "international implications." The case involves dividing natural resources between the federal and various state governments, which is a matter of domestic law. There is no question that the United States has rights over such resources vis-à-vis foreign nations under international law; whether such resources are exploited by the federal or state governments is a purely domestic concern of no consequence to foreign nations. The Solicitor General's suggestion to the contrary is simply an attempt to manufacture judicial deference where none is due.

Second, the Special Master mistakenly states in his report that the coastline of the Alexander Archipelago in southeastern Alaska has not been the subject of litigation. The Solicitor General understandably neglects to correct this error; thus we point out that this coastline was involved in the arbitration between the United States and Great Britain in 1903 regarding the boundary between Alaska and Canada.

Third, the Solicitor General employs the Equal Footing Doctrine to advantage in a rather simplistic fashion. We explore the argument to its logical conclusion. Under the suggestion of the United States, each of the coastal states would be entitled to a nine-mile band of submerged lands such as owned by Texas and Florida, obviating most or all of the submerged lands issues before the Court.

Fourth, to the extent that the United States may suggest that any territorial losses suffered by a coastal state as a consequence of the United States ratification of the 1958

Convention on the Territorial Sea and the Contiguous Zone are somehow validated by other territorial gains achieved under that treaty, we point out that the Constitution prohibits ceding the territory of a state by treaty. In the absence of action by the Congress as a whole, the territory of a state may not be disclaimed.

ARGUMENT

A. Division of the Submerged Lands Between the Federal and Various State Governments Is a Matter of Domestic Law Which Does Not Merit the Judicial Deference Reserved for Foreign Policy Matters

The Solicitor General understandably is concerned about the ramifications of this case on the case involving Mississippi Sound and on the case involving the north coast of Alaska. *See* Exception of the United States, p. 6. We are, obviously, no less concerned. But it is less than ingenuous of the Solicitor General to suggest that this Court's decision will have "international implications." *Id.*

The executive branch disclaimed such a possible international effect when the Submerged Lands Act was before Congress. In hearings before the Senate Committee on Interior and Insular Affairs, Jack B. Tate, Deputy Legal Advisor to the State Department, testified at length concerning the domestic nature of the Submerged Lands Act:

> Mr. Tate. . . . We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.
>
> . . . .
>
> Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the

Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the seabed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by the President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?

Mr. Tate. The Chairman is correct in that statement.

. . . .

Senator Kuchel. So you would find no conflict between the traditional policy of the State Department and the paramount rights holdings in the Texas and Louisiana cases?

Mr. Tate. I am aware of none.

Senator Kuchel. If there is no conflict, then for the purpose of the committee in considering the claims of the States in these various bills, any action by Congress to restore or give to the States any or all of the paramount rights which the United States Supreme Court holds that the Federal Government has, would not in any respect violate the policy of the State Department.

Mr. Tate. That is correct. I assume that as far as our international relations are concerned, the United States could divide up with the States any rights which it had, and those rights would be certainly the traditional right to the 3 miles, plus the right to the Continental Shelf as set forth in the 1945 proclamation.

Senator Kuchel. And to the extent that the Court held in each of those cases that the paramount rights doctrine went considerable seaward of the 3-mile-belt?

> Mr. Tate. Whatever the United States has as far as the international aspect is concerned, it may divide up with the States as it pleases.

Hearings before the Senate Comm. on Interior and Insular Affairs on S. J. Res. 13, 83d Cong., 1st Sess. 1066-1067, 1086 (1953).

This case, the *Missisippi Sound* case, and the *Alaska* case entail no more than the domestic division, between nation and state, of the continental shelf. The differences between what Congress has seen fit to confirm to the states by the Submerged Lands Act and what the Government has chosen to claim as territorial sea in its foreign relations are manifest. *United States v. Louisiana (Texas Boundary Case),* 363 U.S. 1 (1960); *United States v. Florida,* 363 U.S. 121 (1960). In those cases, the Court confirmed Congress' 9-mile grant of submerged lands to Texas and Florida on its Gulf Coast. The United States, of course, claims but a 3-mile territorial sea on those coasts. Similarly, Congress has granted Puerto Rico the submerged lands around that island to an extent of nine miles from the coastline, while the United States has maintained its policy of claiming a 3-mile territorial sea around the island. 48 U.S.C. § 749. As illustrated by these cases, the division of the submerged lands of the continental shelf between the federal and state governments is manifestly a domestic matter, independent of United States foreign policy.

B. The Coastline of the Alexander Archipelago was the Subject of the Alaskan Boundary Arbitration with Great Britain in 1903

While the Solicitor General understandably does not quarrel with the point, we would note a pronounced error in the Special Master's report which, if uncorrected, might be argued to have consequences in the *Alaska* case. In his Report, the Special Master writes on page 31:

> The United States presented evidence of how coastal islands in other areas have been treated for baseline purposes to support its position that islands cannot generally be used to form bays and that the *Louisiana* exception is limited to its specific situation. One area cited by the Government is the southern coast of Alaska. . . . The southern coast of Alaska is made up of numerous coastal islands which the United States has *not* utilized to form judicial bays.[21]

The footnote then reads:

> This portion of the Alaskan coastline has not been the subject of any litigation.

On the contrary, that portion of the Alaskan coastline has been the subject of the highest order of litigation. It was raised during the arbitration between the United States and Great Britain in 1903, concerning the common boundary between Alaska and Canada. There the United States, through its agent Hannis Taylor, asserted in the most vigorous way that the waters of the Alexander Archipelago, the very area of which the Special Master writes, contained no high seas. Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 162., 58th Cong., 2d Sess., Vol. VII, pp. 608-611 (1904). Mr. Taylor's unstinting logic and eloquence on behalf of the United States attest not only to the status

of the Alexander Archipelago, but to that of Stefansson Sound in Alaska, Mississippi Sound, and quite possibly Block Island Sound. (While we have not yet read the United States' disavowal of Mr. Taylor's authority to speak in the premises, given the imminence of the *Alaska* case and the Government's disavowal of the authority of other Government officials who have uttered similar principles over the course of our history, we will not be surprised to read of it.)

C. Application of the Equal Footing Doctrine in the Simple Manner Proposed by the United States Would Entitle All Coastal States to a Nine-Mile Band of Submerged Lands

We would make one observation of the facile assertion of the Solicitor General that Long Island cannot be considered an extension of the mainland because, "of course, the Equal Footing Doctrine prohibits disparate treatment of the States on this score." Exception of the United States, p. 7. Were that true, there would likely be no present case, no *Mississippi Sound* case, and no *Alaska* case. That would be so were all the coastal states held to own those same portions of the continental shelf as has been held by this Court to be owned by Texas and Florida—a nine-mile breadth off their Gulf Coasts. *See United States v. Louisiana* (*Texas Boundary Case*) *supra,* 363 U.S. 1; *United States v. Florida, supra,* 363 U.S. 121.

With such true parity in the division of the nation's continental shelf resources (this is, again, no case of American territorial claims, except as the United States may elect to apply the decision), boundary delimitation questions of the present sort are eliminated. The charts drawn by the

Solicitor General to accompany the Exception illustrate the result of such true parity. Were bands of nine miles' width drawn about each of the islands and along the coastline of Rhode Island and Long Island, it can be seen that the issue of the status of Block Island Sound would be moot. No closing lines would need to be drawn and the status of Long Island as an extension of the mainland would be irrelevant, because the resources of Block Island Sound would belong to the states under any theory.

D. Only Congress Has the Constitutional Power to Fix the Coastal Boundaries of the States; the Executive May Not Unilaterally or in Conjunction with the Senate Alone Disclaim State Territory

The United States may well suggest that any territorial losses a coastal state suffered by the United States ratification, and the entry into force, of the 1958 Convention on the Territorial Sea and the Contiguous Zone ought, psychologically at least, to be offset by territorial gains it assertedly realized thereby. This was its position before the Special Master in the *Mississippi Sound* case. The argument is, briefly, that certain American practices in maritime boundary delimitation that produced more territorial sea than is generated under the rules of the 1958 Convention became "outlawed" by the entry into force of the Convention. At the same time, the United States asserts, the states gained by such new rules as the 24-mile closing line for bays; previously, the United States asserts, it recognized only a 10-mile closing line.

This line of argument seems not to have been, to date at least, explored by the parties or the Master in the present case, but it is clearly joined in the *Alaska* case and in

the *Mississippi Sound* case. We hope to have our day before this Court on this assertion. But, in the apprehension that the Solicitor General's eloquence will win the point without proof, we offer the following observations.

Even if the entry into force of the 1958 Convention produced certain United States territorial gains benefitting the states, it does not follow that as a matter of domestic constitutional law, application of the Convention necessarily divests the states of Congressionally-granted submerged lands, belonging the day before to the coastal states.[2] Only the whole Congress can establish a state's boundaries, not the federal Executive with the advice and consent of the Senate alone ostensibly acting in the name of foreign relations. *United States v. Louisiana, supra,* 363 U.S. 1, 35. Such a rule would permit the national Government to disclaim the territory in question—vis-à-vis the states only—and thereby reserve for itself, through the wartime Truman Proclamation, the continental shelf resources of these newly disclaimed areas of "high seas." *See* Convention on the Continental Shelf, Article 2, 15 U.S.T. 471, T.I.A.S. 5578.

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[2]For example, we will adduce evidence at trial that the United States assimilated "objectionable pockets of high seas" to the territorial sea prior to the entry into force of the Convention. The United States now asserts that the Convention compels the conclusion that such pockets are high seas and, as a result, outside state boundaries even when completely surrounded by submerged lands which, it is conceded, belong to the state. Similar evidence was presented in the *Mississippi Sound* case.

CONCLUSION

Whatever may be decided by this Court in this purely domestic controversy, the federal Government is free to go its own way in foreign relations. It may recognize territorial seas of 12 miles' breadth (as it has), or of two miles' breadth, and so forth. If this case has an "international aspect," it is only because the United States has preferred, for domestic reasons pertaining to the Submerged Lands Act, to give it one.

We note that the dispute which precipitated this case was pending upon a petition for writ of certiorari for eight years. *Ball v. Dunlap,* Docket No. 75-6990; Report of the Special Master, p. 2. In the circumstances, it may be appropriate to defer decision of the present case until the *Mississippi Sound* and *Alaska* cases have been fully tendered, on the reports of the special masters hearing those cases, to this Court.

Dated June 14, 1984

Respectfully submitted,

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