In the

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Supreme Court of the United States

UNITED STATES,

Plaintiff,

v.

STATE OF MAINE, et al.,

Defendant.

No. 35 Orig

Washington, D. C.
February 24, 1975

Pages 1 thru 98

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Plaintiff,	:	
v.	:	No. 35, Original
STATE OF MAINE, et al., Defendant.	:	

Washington, D. C.,

Monday, February 24, 1975.

The above-entitled matter came on for argument at 1:01 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Plaintiff.

BRICE M. CLAGETT, ESQ., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D. C. 20006; on behalf of the Defendants.

C O N T E N T S

[Second day - pg. 87]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 35 Original, United States against the State of Maine.

Mr. Clagett, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. CLAGETT: Mr. Chief Justice, and may it please the Court:

The question before the Court this afternoon is related to, but a great deal broader than, the question you heard this morning.

The question this afternoon is whether it is the plaintiff, the United States, or the twelve defendant States which own the natural resources of the Outer Continental Shelf in the Atlantic Ocean, beyond internal waters, beyond territorial waters.

The case presents three issues.

First, do this Court's California and subsequent opinions require a decision in favor of the plaintiff wholly without regard to the massive evidence produced at trial?

Second, assuming, as we deny, that Continental Shelf rights first came into existence by virtue of the Truman Proclamation in 1945, did those rights arise in favor of the States or of the federal government?

Third, if the Court holds in favor of the States that federal ownership is not required by California, but rejects the State's argument that any Continental Shelf rights arising in 1945 would have arisen in their favor, then the question becomes: Whether the States have made out their claim to the resources on the basis of an historic title?

The first question, then, is whether the California line of cases compels a decision in favor of the plaintiff.

We think the very fact that this Court referred this case to a Special Master, in the face of the United States' argument that the result was preordained by California, strongly indicated that this Court wished the issues to be examined on their merits and not decided by an automatic application of precedent.

Nonetheless, the Master believed himself obligated to grant the plaintiff's original motion for judgment on the pleadings by applying what he believed to be the California doctrine.

There are a number of important distinctions between this case and California, and, we submit, California stands for somewhat less than is usually alleged.

The contention which the Court there declined to accept was that the original Atlantic States had held, prior to the Revolution, a uniform three-mile belt of territorial waters, a contention which is very different from the contention

the States made here.

In California, the Court looked into that contention that there was a three-mile belt prior to the Revolution, and found, quite correctly, that no one had ever heard of a three-mile limit or a three-mile belt prior to the Revolution.

Since that was the only contention that had been made to the Court, the Court quite naturally held that the contention had not been established, and that California had not provide its case.

Even as to that contention, the Court said only that on the basis of the materials it had then bee furnished, it could not say that pre-Independence, Colonial ownership of a three-mile belt had been made out.

It's notable also that Massachusetts, one of the defendant States before you today, sought leave to intervene in the California case. The Court denied intervention. That denial was presumably on the ground which the plaintiff, both there and here, had urged to the Court, that, and I quote, "Massachusetts cannot be affected by any judgment which may be entered in this suit."

It's unclear, perhaps, also whether the California Court believed that the federal interests in the Shelf, which it described, would prevail even over an established State historic title, or whether the Court merely believed that those federal interests would establish federal ownership in

the absence of a historic title on behalf of anyone.

The Court never reached the former question, whether the federal interest would defeat an established State title, because it held that the evidence before it had not established any State title.

And, finally, as I will argue in a few moments, in detail, developments have occurred since the California decision, both congressional action and subsequent decisions of this Court, which decisively undercut the California rationale.

In these circumstances, it is wholly understandable, I think, that when this case was brought, raising for the first time directly, with the appropriate parties before you, whether the Atlantic Coastal States own their Continental Shelf beyond the three-mile limit or not.

The Court would wish to consider the issue as a new matter, and on the basis of a complete record.

That record has now been made.

It's idle, perhaps, to debate whether some or much or most of the material now of record was before you in California.

I can assure the Court with confidence that a comparison of the record in the two cases will leave no doubt that the present record is immensely superior, not only in the volume, the scope, the completeness of the material, of the primary

materials, but in the depth and sophistication with which the bare bones of those primary materials have been analyzed.

In the previous cases, only those bare bones were before you. In none of those cases was there any reference to a Master. There were no trials. The cases were decided on the bare pleadings.

Our record, aside from a great wealth of documentary evidence, contains analysis by ten expert witnesses and extensive cross-examination of them.

The plaintiff appears to think less of its expert witnesses than we do of ours, when it argues that little of significance is now before the Court that was not before it in California.

One would think, given the extreme complexity of the questions of history, legal history, technology, international law, international legal history, and related subjects, one would expect the plaintiff to believe, as we do, that analysis by qualified scholars in the relevant fields would be of great assistance if not essential to the Court.

One reason why the plaintiff apparently thinks otherwise is that its own expert witnesses ended up agreeing with the defendants' position on many if not most of the relevant issues of fact and law.

I shall be referring to these concessions with some

frequency during the course of this argument, and I would suggest that in all the record that is before you today, both the original unprinted record, of which that is but part, and the printed record, perhaps the most important part is the last 15 or 20 pages of Volume I of our Appendix, from about page 520, 528 through to the end, 558, thirty pages.

And I would urge you to read those pages over and over again, because they contain the most crucial of the many concessions made by plaintiff's witnesses in the course of cross-examination.

Beyond any comparison of records, this would seem in every respect a case where the Court would deem it appropriate to take a fresh look, unfettered even by any presumption arising from its past decisions.

QUESTION: Which pages, Mr. Clagett? Beginning when? Where?

MR. CLAGETT: 528, Mr. Justice Stewart, --

QUESTION: 528.

MR. CLAGETT: -- through 558; it's the last thirty pages of Volume I of the Appendix.

QUESTION: Thank you.

Beginning with the cross-examination of Mr. Kavenagh?

MR. CLAGETT: Mr. Kavenagh, yes, sir.

Stare decisis is readily overcome in matters of transcendent, public, and constitutional importance, which

this case surely is.

California itself overruled many previous decisions of this Court, which it affirmed State ownership of land under navigable waters, whether inland or not.

Let us then consider the issue on its merits. The States claim they have an historical title to these Continental Shelf resources. The plaintiff, while contesting our version of the history, primarily argues that it is all irrelevant.

The Continental Shelf, plaintiff says, belongs to the federal government as a corollary of its external sovereignty, thus, plaintiff claims, even if the States would otherwise have perfect title to the Continental Shelf, it has been stripped from them by the Constitution's vesting of external sovereignty in the federal government.

That phrase "external sovereignty" doesn't appear anywhere in the Constitution, it's the jargon that's generally used to indicate the fact that it is the federal government and not the States individually which is an international person, a nation recognized by the world community as an equal member of the family of nations, with rights and responsibilities under international law.

But it in no way follows from that external sovereignty, we submit, that the United States, as distinct from the individual States, owns or must own these Continental

Shelf resources.

International law has nothing to say, one way or the other, about the ownership of Continental Shelf resources as between the States and the federal government, or about similar issues in any other federal system.

As an international matter, it's the United States, not the States, as distinguished from other nations which owns these resources.

But it's wholly compatible with international law and with the plaintiff's status as external sovereign for the States to own these resources as a matter of our own law.

I won't dwell on this point, because plaintiff's international law witness, Professor Henkin, conceded it, and I don't understand the plaintiff to be seriously contesting it, though there's a passage on page 55 of the plaintiff's brief which suggests that possibly it may still be contesting it.

There's nothing in the nature of external sovereignty which requires that in a federal system of government that entity which possesses external sovereignty be also the same entity which owns Continental Shelf resources.

The constitutional law of the federal system may determine that question any way it wishes. This Court expressly and clearly so held in the second Louisiana case in 1960.

There's no magic in the fact that these resources lie

outside our national boundaries, which means that the external sovereign has to own them.

Plaintiff's argument that there is, I have never been able to understand, except as a superficial play of words on the word "external". It's "outside", therefore the federal government must own it.

There's nothing to it.

One illustration that was used at the trial to explode this was a hypothetical parcel of land in Virginia -- excuse me, a hypothetical parcel of land in England, which Virginia owned before the Revolution; the Colony of Virginia.

Plaintiff's witness conceded -- this concession is at page 543 of the Appendix -- that Virginia would have retained that land once the federal government became the external sovereign, whenever that was.

No magic would have caused title to pass.

The situation is no different in any respect with regard to the Continental Shelf rights at issue here, we submit.

When plaintiff's argument is analyzed, it appears that what plaintiff is really claiming is not that plaintiff's bare status as external sovereign gives it these resources, plaintiff's real argument is that certain powers vested in the federal government by the Constitution, the foreign affairs power, the defense power, the power over foreign

commerce, cannot properly be conducted without federal ownership of the Continental Shelf.

Therefore, plaintiff argues, by vesting those powers in the federal government, the Constitution necessarily transferred ownership from the States to the federal government, assuming of course that the States had owned them before.

Plaintiff is rather cautious about making this argument, rather indirect about it, for excellent reasons, as I think we'll see in a moment.

But if that is not plaintiff's argument, if that is not the guts and the gist of it, then I am wholly at a loss to understand what the plaintiff's argument is.

When the argument is submitted to scrutiny, it is seen to be a mirage, wholly devoid of substance. Plainly, the federal government's foreign affairs, defense, and foreign commerce powers are both broad and paramount; they override any competing State interest. But these powers no more require federal ownership of the Continental Shelf resources at issue here than they require federal ownership of all the land or all the minerals in the land territory of the United States, where the federal government also has, both those and others, broad and paramount constitutional powers.

Let us take the foreign affairs power first.

The plaintiff has failed to give any illustration whatever of any way in which that power could possibly be

hindered, or embarrassed, by State ownership of Continental Shelf resources.

No one questions that the federal government has the power, by treaty with other nations or otherwise, to define the outer extent of the Continental Shelf which is under our exclusive national ownership.

If there were previous State rights out there, the federal government could cut them off by treaty or otherwise in the pursuit of the foreign affairs power.

By the Continental Shelf Convention of 1958, in agreement with other nations, the federal government did precisely that. No one doubts that that was a proper exercise of the foreign affairs power.

QUESTION: You say that even though property rights may have existed outside the three-mile limit, that the federal government, with its foreign affairs power, can cut them off?

MR. CLAGETT: Yes, Mr. Justice Rehnquist, unquestionably.

QUESTION: Would it have to pay compensation?

MR. CLAGETT: If it took them in the course of a genuine foreign relations settlement with other nations, I would say no. If it was done in the exercise of the foreign affairs power, I would analogize it to a boundary settlement which would not require compensation.

If the United -- if the treaty were nothing but a camouflage, if what was really being done was that the federal government wanted to cut those State rights off for non-legitimate foreign affairs purposes, then I would say yes.

Similarly, under the doctrine of Missouri vs. Holland, the federal government may, by treaty, accept international regulation of Continental Shelf activity for foreign policy ends. Such regulation would bind the States and would supersede any contrary State law.

If any State or State license to exploitation of Shelf resources interfered with the right of free navigation, over the superadjacent waters, which international law establishes, then the federal government would have both the duty under international law and the right under our own law to stop that interference.

Since 1953, the States have admittedly owned seabed resources out to three miles, and, indeed, out to ten miles in the case of some of the Gulf States.

No one claims that State ownership an exploitation of these resources has presented any international embarrassment whatsoever, or any foreign policy complication or problem.

Plaintiff's international law witness, Professor Henkin, conceded that no such problems had arisen. That concession,by an oversight, we didn't put in our Printed Appendix. It's on page 2647 of the transcript.

The defense power, likewise, has nothing to do with ownership of Continental Shelf resources. The United States can defend and has defended the land territory of the United States without owning all the land in the country. Why is the Continental Shelf one whit different?

Plaintiff has suggested no reason. Plaintiff's bare assertion that there is a difference is particularly implausible when it is remembered that the States here are claiming only the resources of the seabed. They make no claim to the waters above.

If it be said that the defense power may require the exercise of federal control over these resources, for example, to insure their more rapid and defective exploitation in time of national emergency or war, no one can doubt that the defense power permits precisely that. Just as it permits similar control over the resources, natural and human, of the entire country.

No one has ever proposed that the defense power requires federal ownership of everything in the country. Unchallenged testimony before the Master described how the federal government is readily able to marshal and direct all the resources of the nation, whenever that becomes necessary.

The same is true of the power over foreign commerce. If the federal government decides that the energy crisis or some other economic factor requires that Continental Shelf

resources be developed at a different pace or in a different manner from what the States are doing, the federal government plainly has the constitutional power to exercise all the control necessary to achieve that end.

I want to emphasize this point. It's critical. Because of fears expressed in some quarters, that the States, because of environmental concerns or parochial pressures of one sort or another, might retard or impede Continental Shelf development to the detriment of the national interest.

As I shall argue in a moment, the States have important legitimate interests in what happens off their shores, which can be implemented only through ownership of these resources.

But if the federal government found, and I repeat, that the national interest required overriding those State concerns and developing Shelf resources, faster or differently than the States are willing to permit, it is beyond question that the federal government could validly so act.

QUESTION: Would the federal government have more authority over the Shelf resources than it would over land resources that were the property of the State?

MR. CLAGETT: That would depend on whether the particular purpose involved the Shelf resources more than it involved land. I think there's no question that if a State owned a uranium mine on land, and the State refused to exploit

it, and the federal government needed it for the national defense, or whatever, that of course the federal government could require development of that mine.

QUESTION: With or without compensation?

MR. CLAGETT: I would say without compensation, if it were the State that was getting the revenues from it. In other words -- of course it could be taken by the eminent domain power; but the government, short of taking it, could say, We will require that it be developed; you will get the revenues. You're getting more money than you got before.

Of course, no compensation is due, nothing has been taken. It's simply a regulatory measure requiring a different manner of development from what the State would have chosen on its own, in order to accomplish some overriding national purpose.

QUESTION: Is that not rather a unique form of ownership, if that's the right term?

If it's subject to those burdens.

MR. CLAGETT: I would submit, Mr. Chief Justice, that it is precisely the same form of ownership that every acre, every building, every car, every tank, every truck in the country is subject to. And again I cite the case of the hypothetical State=owned uranium mine.

This is no different from anything else. I think there's nothing whatever that's unique about it.

The fundamental flaw, then, in our submission, in the plaintiff's argument is to assume that there is something special or unique about the Continental Shelf, which means, contrary to the situation everywhere else, that the exercise of constitutional power there requires ownership in property.

Plaintiff has steadfastly declined to tell us what that difference is, and in fact there is none.

As Mr. Justice Reed said, dissenting in the California case, State ownership, quote, "would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands, precisely as it is over every river, farm, mine, and factory of the United States." Unquote.

Justice Frankfurter's dissenting opinion was precisely to the same effect on that subject.

An argument similar to the plaintiff's argument here was made in United States vs. Bevans, decided in 1818. There the federal government argued that territorial sovereignty over the waters of Massachusetts Bay had been transferred from Massachusetts to the United States by virtue of the federal constitutional admiralty jurisdiction.

The Court, in an opinion by Chief Justice Marshall, said that it was incapable of feeling any doubt that this argument was wholly spurious. The Court made a sharp distinction between the paramount federal powers on the one hand and the

residual jurisdiction of the waters in the State.

The Chief Justice said that subject to the federal power that jurisdiction adheres to the territory as a portion of sovereignty not yet given away.

The holding Bevans was followed in Macready vs. Virginia and Smith vs. Maryland, and in 1890 in Manchester vs. Massachusetts.

We submit that this line of cases is plainly correct.

The Chief Justice's analysis applies just as much to the foreign affairs, the defense, and the commerce powers as it does to the admiralty jurisdiction.

All these federal powers are paramount when properly invoked over every State law, right, or title. But every one of those federal powers co-exist with and is fully compatible with the existence and boundaries of State territory, with State propery rights, and with the residual sovereignty of the State.

That, I submit, is what our federal system is all about, and it's just as applicable to the Continental Shelf as it is anywhere else.

The Constitution itself, we think, makes this abundantly clear. Article IV, Section 3, Clause 2, provides that nothing in the Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

The history of this clause makes it clear that the claims referred to were claims to territory and to property.

The cause arose out of the Western Lands controversy during the Revolution and Confederation Periods, in which the States which lacked Western Lands vigorously sought to appropriate those of the other States without their consent for the Union as a whole.

That attempt was repeatedly and unambiguously rejected.

While eventually some of the Western Lands were voluntarily ceded by the States -- some of them; not all -- this Court has repeatedly held that the federal title to those lands was derived solely from those voluntary acts of cession and was subject to the conditions, the very substantial conditions in some instances, which the States had articulated in the instruments of cession.

This was fully and universally understood with reference to all navigable waters and the land underlying them, from the beginning of the Union down to the California decision, in 1945. Every Court decision, every commentator, every scholar took it as unquestionable, that the States retained whatever territorial and property rights the antecedent Colonies or the Crown had had before the Revolution, over waters and submerged lands, just as over dry land; subject always to the paramount federal powers conferred by the Constitution.

The majority opinion, of course, in California itself admitted, if a bit grudgingly, that this had been the uniform prior understanding with respect to offshore waters and their subsoil, just as much as with respect to land territory and internal waters.

That admission was well taken. If, by deciding in favor of the States today, the Court believes it must overrule California, and that is by no means necessarily clear, it would then be returning to a much older and a much sounder doctrine reflected in Pollard's Lessee vs. Hagan, Martin vs. Waddell, Manchester vs. Massachusetts, United States vs. Bevan, Smith vs. Maryland, Macready vs. Virginia, and literally a host of other cases.

The alleged California doctrine is an aberration, we very much hope a temporary one.

The events that occurred after the California line of cases confirmed what I have said thus far. These events, indeed, fatally undermine the authority of California, if that decision held that the federal government owns Continental Shelf resources as a corollary of external sovereignty or of the foreign affairs, defense, and commerce powers.

The legislation of 1953, the Submerged Lands Act and the Outer Continental Shelf Act, restored to the States the seabed resources under the three-mile belt, which the

California decision had appeared to take from them.

In the case of the States bordering the Gulf of Mexico, of course, Congress allowed the Coastal States to recover their resources out to ten miles, if they could prove historic boundaries out that far.

QUESTION: Where do you get ten? I thought it was three leagues --

MR. CLAGETT: Three leagues --

QUESTION: -- or nine nautical miles.

MR. CLAGETT: -- Mr. Justice, it's nine nautical miles, 10.5 statute miles.

QUESTION: Nine nautical miles. Well, we're talking about nautical miles all the way through here, aren't we?

MR. CLAGETT: Nine nautical miles.

QUESTION: As versus three nautical miles.

MR. CLAGETT: Yes, Your Honor.

QUESTION: Right. So it's never ten miles.

MR. CLAGETT: I'm afraid I've used that as a shorthand, and you're quite right, sir, that it's inaccurate.

The legislative history makes it abundantly clear that Congress regarded the California decision as wholly wrong, and that it believed it was restoring to the States rights they had always had until California appropriated them to the federal government.

How is such a restoration possible if federal external sovereignty or federal constitutional powers required federal ownership?

The argument that it was not possible, based on precisely the grounds intimated by the California majority, was pressed in Congress very strenuously. But Congress rejected that argument. Its rejection perhaps is not of constitutional significance, but it is, of course, of very great constitutional significance that this Court ratified Congress' view.

In the second round of the Gulf States litigation, Texas and Florida claimed historic boundaries out to three leagues. The federal government argued there, just as it argues here, with equal vehemence, that such boundaries, such Continental Shelf ownership could not be recognized even in spite of the statute without doing violence to federal external sovereignty to the foreign affairs and defense powers and to the three-mile limit.

This Court rejected that argument and accepted Congress' judgment that it was perfectly possible for the States to own Continental Shelf resources, both within and beyond the three-mile limit, without doing any violence to federal powers or prerogatives.

The plaintiff here argues that in the second Gulf litigation this Court never said it was repudiating the

California rationale, and indeed that there was language in the opinions that seems to reaffirm California. That is true.

But it is equally true, we submit, that the California doctrine cannot co-exist with the later doctrine of the second Gulf litigation.

If the federal government owns sub-sea resources as a corollary of external sovereignty or a corollary of the foreign affairs and defense powers, as California seemed to suggest, then how could this Court countenance alienation of those necessary national rights by Act of Congress? Such an alienation would be just as invalid on the California theory as if Congress had passed a law abdicating the function of ratifying treaties, for example, to a committee of the State Governors.

Further proof of the repudiation of California by subsequent events is found in Alabama vs. Texas, decided in 1954, the year after the Submerged Lands Act was passed. This Court, in a brief per curiam opinion, upheld the constitutionality of the Submerged Lands Act by even refusing to allow a complaint to be filed challenging it.

The most interesting fact about Alabama vs. Texas, I submit, is that Justice Black, the author of the California opinion, vehemently dissented on the ground that the 1953 legislation did appear to be inconsistent with California's rationale, that federal ownership was essential for federal

external sovereignty and constitutional powers.

The legislation, Justice Black declared, and I quote, "raised serious and difficult questions with respect to the authority of Congress to relinquish elements of national sovereignty over the ocean."

I submit that Justice Black was wholly correct in perceiving that his California opinion and the Submerged Lands Act could not both stand. By upholding the Act, this Court necessarily rejected the California rationale.

In view of this history, we submit that stare decisis works more in our favor than in favor of the plaintiff. The California doctrine simply cannot co-exist with the rationale and the result of later litigation. Either California does not require federal ownership of the resources in question here, or, if it does, it has been overruled.

I've talked a great deal about federal interests, which supposedly require federal ownership of the Continental Shelf. I hope I have shown that they require nothing of the sort.

That should be enough to lead the Court to consider the States' historic claims on their merits. But, in addition, the States have constitutional interests in these resources, interests which, unlike the federal interests, require ownership.

These State interests are described skillfully in

the amicus brief of the Tidelands Committee of the National Association of Attorneys General.

I would draw the Court's attention also to a document called Outer Continental Shelf Oil and Gas Development and the Coastal Zone, issued last November by a Joint Committee of Congress, the National Ocean Policy Study. We have lodged ten copies of this with the Court, and I see that it's been distributed.

This document is a more comprehensive indication than any I could give of the States' real and practical interests in Continental Shelf resources and of the dilemma in which the States will find themselves if they are denied ownership of them.

Moreover, and this is a point not mentioned in our brief, so I'd like to emphasize it, while a decision in favor of the plaintiff would give it 100 percent of all the revenues to be derived from Continental Shelf exploitation, the opposite is by no means true of a decision in favor of the States.

If State ownership is recognized, the federal government will remain free to tax the resources to be extracted, both by means of income taxes on the lessees and by any other type of tax plaintiff desires; such as, for example, the excise tax on domestic and Continental Shelf production recently proposed by the Administration.

Section 638 of the Internal Revenue Code extends expressly the full federal taxing power to Outer Continental Shelf resources.

Thus, a decision in favor of the States here will give the States, indeed, the royalties and the bonus payments from leasing, but the federal government will have its full taxing power and could, by adjustments of that taxing power, effectuate virtually any apportionment of the total revenues of Shelf exploitation which was found appropriate.

Thus, a decision in favor of the States here, and only such a decision, will permit a reasonable allocation of revenues between the States and the federal government.

A decision for the plaintiff, on the other hand, will necessarily give the plaintiff 100 percent and the States nothing.

Thus, only by deciding this case in favor of the States can this Court safeguard any of the very real State interests and concerns in the Continental Shelf. The federal government already has its constitutional powers and its paramount control there, including the taxing powers. If it is given ownership as well, it will have everything and the States will have nothing.

Only by recognizing State ownership can the legitimate State interests be protected, and our dual system of government applied to this important natural resource.

I have, I hope, disposed of the argument that the Constitution means that the federal government necessarily owns these resources. I am now almost ready to turn to the historic title on which the States primarily base their claim.

However, what I have said so far supports another and independent basis for the States' claim to ownership.

Since the Truman Proclamation of 1945 and the Continental Shelf Convention of 1958, no one disputes that as a matter of international law every coastal nation owns its Continentanl Shelf resources. That's what the World Court has called an inherent appurtenance of its land territory.

Even if these resources were acquired for the first time in 1945, as plaintiff contends, they were not acquired as an independent or severable territory, like the Louisiana Purchase or Alaska or some such acquisition. They were acquired quite differently, by what you might call sort of a legal accretion. They follow from and are dependent upon sovereignt over the adjacent coast line.

No one doubts, for example, that if the United States were to cede a portion of its coast line to another country, the Continental Shelf adjoining that coast line would pass automatically to the new sovereign, without any express reference in the act of cession.

It is a corollary -- this is the first time the word "corollary" has cropped up where, in our submission, it's

sound.

The Truman Proclamation did not purport to claim the Shelf on behalf of the federal government as against the States. It carefully and explicitly left that question open.

We think that even if the States had had no historic title to the resources, and if property rights in them sprang up ex nihilo for the first time in 1945, as plaintiff contends, under our constitutional system they arose in favor of the States, not of the federal government.

These rights, as I have said, appertain inherently to the sovereign of the adjacent coast line. There is no dispute about that. Who is the relevant sovereign in the case of this country?

We have, of course, a divided sovereignty. The federal government has delegated powers, the States have the residuum. That residuum includes, normally, the ownership of public lands, and there is no dispute whatever in the case of these original Atlantic States, all public, ungranted lands belong to the State.

If the argument I made earlier is sound, that the delegated federal powers do not require federal ownership of Shelf resources, then it follows that the residual sovereignty of the States would attach to them.

Thus, the dual sovereignty of this country would simply expand outwards to embrace this allegedly new appurten-

ance when it was acquired by legal accretion or a change in the law on plaintiff's assumptions.

The delegated powers of the federal government would expand to embrace those resources, just as fully as they embrace the nation itself. But the reserve powers, the residual sovereignty of the States would likewise and equally expand to embrace them also.

And ownership of ungranted lands or resources is plainly a part of that residual sovereignty, not a part of the delegated federal powers which entail paramountcy but not dominion.

The Master never even considered this argument, because he believed himself precluded by California from doing so.

The plaintiff has not responded to it in any way, except to repeat the California incantation.

We urge the Court that this case can and should be decided in favor of the defendant States on this ground, without any necessity for examining the question of historic title at all.

QUESTION: Well, in 1945 or whenever it was that the United States claimed it first acquired title or an interest in the Shelf, what if the United States at the time had owned 100 miles of the coast line just as -- say it was 100 miles of the coast line was part of the public domain. Let's just

assume that.

MR. CLAGETT: As a territory, shall we say?

QUESTION: No, no, just as part of the public domain, that the United States just happened to own it, that's all.

MR. CLAGETT: Yes, I see.

QUESTION: It was within a State, but they just happened to own 100 miles of the coast line.

MR. CLAGETT: As a private owner?

QUESTION: Yes.

MR. CLAGETT: All right.

QUESTION: Well, why would the State -- why would the State acquire any interest in the Shelf, under your theory?

MR. CLAGETT: Well, I would say --

QUESTION: Rather than a private owner.

MR. CLAGETT: I would say, Mr. Justice White, because these rights are an appurtenance, not of private ownership but of sovereignty. The private owner would not get -- would not take them. The sovereign would.

Here we have two sovereigns, the question is which.

QUESTION: So your thought of conveying away part of the coast line to some other country --

MR. CLAGETT: Yes, that's what I meant, yes, sir.

QUESTION: You mean just because it was a sovereign rather than a private owner?

MR. CLAGETT: Oh, yes, that's clearly what the

international law is. If the United States ceded Maine to Canada tomorrow --

QUESTION: Unh-hunh.

MR. CLAGETT: -- and I hope my friend, the Attorney General of Maine, won't kill me after the argument --

QUESTION: Or of Canada.

MR. CLAGETT: Yes.

[Laughter.]

MR. CLAGETT: There's no question that if there were an act of cession doing that, there wouldn't be any need to say, We're also conveying the Continental Shelf. It's never done. It's never done with territorial waters, either. They go implicitly, automatically. They're appurentances to the sovereignty of the adjacent coast line.

QUESTION: So at least you agree it's not just an argument about property law but about sovereignty?

MR. CLAGETT: I do indeed, Your Honor.

QUESTION: Yes.

QUESTION: And when you speak of sovereignty, I take it you're referring to political sovereignty? Sovereignty in the political sense?

MR. CLAGETT: That's the only kind I'm aware of.

QUESTION: Well, I just wanted to be sure that you didn't have a special subdivision here.

MR. CLAGETT: No, sir. Clearly these rights are

a corollary of sovereignty. The question is which sovereignty. They are, in themselves, property rights; but they go with sovereignty, just as the ownership of ungranted land in Virginia, or any other of the States at the time of the Revolution. They had belonged to the Crown before that, in the case of a Crown Colony like Virginia.

QUESTION: On the 3rd of July 1776, they belonged, on your thesis, to the Crown, the British Crown?

MR. CLAGETT: Public lands in the Territory of Virginia?

QUESTION: Yes; up and down the coast.

MR. CLAGETT: You're not talking about seabed rights now?

QUESTION: I'm talking about the coastal land and whatever it is you say is appurtenant to it. That was Crown dominion ownership?

MR. CLAGETT: Ungranted public lands in Virginia belonged to the Crown through its vehicle the Colonial Government of Virginia. Ungranted lands in Maryland, by contrast, belonged to Lord Baltimore, as proprietor.

QUESTION: And then on the 5th of July?

MR. CLAGETT: On the 5th of July, the State of Virginia and the State of Maryland owned those ungranted lands.

QUESTION: I take it that in 1945 no single State

nor all the States together, by making declarations of ownership, could have acquired an interest in the Shelf, if it didn't already have it?

MR. CLAGETT: I find myself in the difficulty of being asked --

QUESTION: I would think you would.

MR. CLAGETT: -- of being asked to take plaintiff's hypothetical version of the facts seriously; which I find it hard to do -- but --

QUESTION: Well, I know, but you're suggesting it on this theory independently, on the historic claim, --

MR. CLAGETT: Yes.

QUESTION: -- you acquired ownership.

MR. CLAGETT: I was just --

QUESTION: So I'm putting the question to you on your own basis.

MR. CLAGETT: I would say, Mr. Justice White, that prior to 1945, or at any time since 1789, no State assertion of jurisdiction or title to these resources could be effective without at least the tacit consent of the United States as external sovereign.

QUESTION: And so it required an expression of the sovereign -- of the sovereignty of the United States?

MR. CLAGETT: At least tacitly; at least not in opposition --

QUESTION: Well, an expression, tacit or expressed, it required it nevertheless?

MR. CLAGETT: Yes, Your Honor.

QUESTION: But the only effect of that declaration by the United States would be the best title in the State?

MR. CLAGETT: Yes, Your Honor.

QUESTION: That's the upshot of your -- of this separate basis.

MR. CLAGETT: That's correct, sir.

I turn now to the question of historic title. The matter is necessarily complex. It involves the law and practice of two countries and, to some extent, others over several centuries, as well as international law, custom, and practice.

While the Master conceded some of the links in the States' chain of title, he resolved other questions, including the ultimate questions, against us. My discussion will necessarily be very brief, I can only hope to touch on a few of the principal points in dispute.

We have tried in our printed papers to put the record before you in as clear and as useful a fashion as possible. We are confident that an immersion in this record will lead you to the conclusion that the plaintiff and the Master are just plain wrong.

In the first instance, the States' historic claims

rest on their Colonial charters. The typical charter language grants, and I quote, "all Fishings, Mines, and Minerals, both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining." Unquote.

This language seems to us to be wholly categorical and unambiguous, as showing that the minerals rights and the adjoining seas were granted.

QUESTION: Is that language also used in the Canadian Charters? Do you know?

MR. CLAGETT: Yes, Your Honor. Other language was also used in the Canadian Charters. The language which the plaintiff concedes in the Canadian Charters did establish or grant the ownership of the seabed, is the language "all Seas and Islands within" so many miles or so many leagues.

Now, as I shall show in a moment, that language is in some of our Charters, too.

QUESTION: Do you know why the distinction among the Charters?

MR. CLAGETT: As I say, to some extent there's not a distinction, because that language is in some of our Charters as well; but the Charters differ among themselves. There was no one set form.

Apparently the Crown formulated what it wanted to grant anew each time. Some of the Charters seem to be based on each other, but there are many variations that don't seem

to have any particular significance or any reason for them.

The language I just read you specifically, for example, was from the New England Charter of 1620. The second Virginia Charter of 1609 says, and I'm paraphrasing now, but this is the gist of it:

All Fishings, Mines, and Minerals, and other Royalties within the said limits by sea and land.

The language varies. The intent and the gist and the result, we think, is the same.

The language I just mentioned, the plaintiff and the Master don't even -ention. While they talk about the Charters, they talk only about other Charter language which is much less to the point.

Some of the Charters expressly mentioned all the seas and islands within specified distances from shore. Plaintiff admits that that language created the Territorial Sea in the case of Canada.

But somehow fails to mention it when it analyzes the Charters in our States' chain of title.

There is much other language in the Charters which sheds additional light, and which we think provides a clear answer to the question of how far out exclusive rights were asserted and granted in the American marginal sea.

The language I read you first, from the New England Charter, we think beyond a doubt conveys fishings and minerals

in the sea adjoining. It does not equally expressly resolve the question how far out.

We have set forth in detail in our brief, and I won't go into here unless there are questions, our reasons for believing that in the legal context of the time, and given the procession of the Charters, the progression of them, and given the contemporaneous interpretation of them, as, for example, the interpretation during the 1620's by the Council for New England of its 1620 Charter which specified no outside limit. But the Council uniformly interpreted it as being 100 miles, and as conveying the seas and islands, not just the islands; given all this and much other background that's recited in our briefs.

And given also the fact that every Charter expressly states that its provisions are to be construed, in case of any ambiguity, in the light most favorable to the grantee. Which is not an idle provision, I submit.

We think the Charters are clear.

The Charter language must, of course, be read against --

QUESTION: How many Charters are we talking about?

MR. CLAGETT: Approximately -- for all the 12 States, Your Honor, approximately 25 of them. Most of the States had two or three Charters.

QUESTION: Unh-hunh.

MR. CLAGETT: Virginia had three. I think Maryland may be the only State that only had one.

QUESTION: Over what period?

MR. CLAGETT: From 1606, the first Virginia Charter, down through the Georgia Charter of 1730-something.

QUESTION: So it's well over a hundred years?

MR. CLAGETT: Well over a hundred years.

QUESTION: Total.

MR. CLAGETT: Yes, Your Honor.

QUESTION: Thank you.

MR. CLAGETT: Let me quickly summarize the States' assertions about the historical background, which we believe have been demonstrated beyond any question.

From a period long prior to and including the Seventeenth and Eighteenth Centuries, under English law the Crown possessed both sovereignty and dominion over the waters surrounding England, which were known as the four English Seas and their seabed.

That sovereignty and dominion included many rights, among those rights was the exclusive right to exploit Continental Shelf resources.

QUESTION: When you speak of dominion, do you mean in the sense of property ownership?

MR. CLAGETT: Yes. Yes, sir.

QUESTION: Well, wasn't it also just the de facto

control of the British Navy?

MR. CLAGETT: No, Your Honor, we think not. There were many periods during this history when the British Navy was quite weak. For example, some of King Charles' proclamations during the 1630's said: We need a large Navy so we can go out and take or retake possession of this part of our sovereign territory, of which, unfortunately, in part, the Dutch are now in possession.

Before that time, for some years, the British Navy had not been very strong at all. It was strong in Elizabeth's time, but in the later years of Elizabeth's reign and particularly under James, that it declined very badly. And yet it was --

QUESTION: James the First?

MR. CLAGETT: Yes, sir.

Yet it was James who perhaps took the English pretensions to their highest pitch.

QUESTION: When did he reign? 1603 to 1625, is that it?

MR. CLAGETT: Yes, sir.

The English Seas were defined uniformly, regardless of what the state of the English Navy was, as extending 100 miles from shore or to the mid-point between England and the opposite coast.

There were special exceptions to that, such as the

English Channel and the Bay of Biscay, which were regarded as belonging entirely to England, even beyond the midway line, because the King of England claimed to be the King of France.

He had admitted those were French waters, but French meant English as far as the English Crown was concerned.

After the American Colonies were established, England sometimes took the view that the English Seas embraced all the waters between the opposite coasts of England and North America, on the theory that whoever owned two opposite coast lines owned all the water in between.

But the more general view was that that was unreasonable, and that the Colonies had their own hundred-mile territorial seas, with international waters lying in the middle of the ocean.

The doctrine of maritime sovereignty and dominion was naturally, indeed inevitably, extended to this side of the Atlantic and incorporated into the Colonial Charters.

The Charters generally created territorial seas of 100 miles in width, in which the Colonies owned, among other rights, the right involved here.

In a few cases of specific Charters, less than 100 miles was granted. Sometimes the patentee or the grantee was less in favor with the Crown than at other times, and the Crown wanted to withhold some of that territorial sea for itself. That mainly happened in New England during the later

Charters when the Crown was beginning to see that the Puritans up there were not entirely friendly to Crown prerogatives.

So, in the case of Maine and New Hampshire, for example, the Crown said: All right, we'll just give you five leagues, and we'll keep the rest for ourself.

Throughout the Colonial Period, the Colonies exercised their rights in the marginal seas to the fullest extent practicable or necessary.

At the Revolution, the States individually inherited the rights of the Colonies, and also inherited whatever rights the Crown had retained in the marginal seas.

Thus, these States acquired the exclusive right of exploitation. That right has not been lost by any subsequent event or development. It was not ceded to the United States by the Constitution; it was not renounced to the world at large; it was not lost through any changes in international law. It remains intact.

Although the record with respect to English law and practice goes back far behind the Seventeenth Century, that Century is of particular importance for two reasons:

First, that was the Century when the defendant States were founded as English Colonies, and their Charters were granted.

Second, the Seventeenth is the Century where all the parties before you and the Master are closest to agreement

about English law and practice.

While there remains some differences between us, the Master acknowledged that by the middle of that Century, at any rate, English law fully recognized that the Crown owned the resources of the seabed of the English Seas, and indeed owned the seabed itself.

The plaintiff had disputed that before the Master, but plaintiff's witnesses largely conceded it.

In its brief to the Court, the plaintiff does not appear to dispute the point. Certainly plaintiff has not excepted from the Master's conclusion.

No one denies that during -- throughout the Seventeenth Century England was intensely concerned with rights in the seas surrounding England, including the seabed, and that this concern and the Crown's high view of its own sovereignty and dominion in the seas were fully incorporated into law, as well as carried out in policy.

If there were any dispute, the record is massive, conclusive.

This, then, is concededly the political and legal atmosphere in which the Colonial Charters of these defendant States were granted.

Now, the Master found the Crown ownership of the seabed became fully recognized in English law only toward the middle of the Century, with the publication of Selden's

official work, Mare Clausum, in 1635, and Lord Hale's later treatise.

The Master concluded that the doctrine does the States no good, since the earlier Colonial Charters antedated 1635.

There are several answers.

First, even if the Master were right, the change in the law which he thinks occurred about 1635 would have been applied on this side of the ocean as well as the other, unless there were some good reason for not so applying it. No one has suggested such a reason.

Plaintiff's witness, Professor Morris, admitted that there was no such reason. That's at page 538 of the Appendix.

Second, almost every Colony, including those which had earlier Charters, also had subsequent Charters issued between 1635 and 1700, a period when the Master admits the doctrine of Crown ownership of the seabed was fully embodied in English law.

Third, the record proves that the Master was wrong in his dating. Maritime sovereignty and dominion, which included the right here at issue, long preceded 1635 or even 1600.

At pages 64-65 of our brief we very shortly summarize the Court cases, works of jurisprudence, and State papers, including things like Acts of the King and Council, which

plaintiff's witness admitted had full legal force; which proved the law of the period 1600 to 1635.

Just, for example, in 1610, England's highest court, the Privy Council, in the case of the Royal Fishery of the Banne, held that the sea is of allegiance of the King and is also his proper inheritance. There is sovereignty; there is dominion: allegiance; inheritance.

And, therefore, the King shall have the land which is gained out of the sea, it's his before, so when it isn't sea any more it still is his.

Robert Callis, writing in 1622, repeatedly declared it to be the law of England that the seabed was the King's when it was covered with waters.

Selden's book itself was written by 1618, and was well known to the Crown and the Government from that time forward.

As to the pre- and post-Seventeenth Century periods, the Master and the plaintiff claim that English law allowed only for English jurisdiction in the English Seas, not for seabed ownership. In fact, there is evidence as far back as the Thirteenth Century, both that seabed ownership was recognized and that the English Seas were regarded as fully a part of the Realm of England.

However, taking plaintiff and the Master on their own terms, what was the content of the jurisdiction which they

more or less concede?

Plaintiff's witness, Professor Thorne, admitted that that jurisdiction included the right to grant exclusive fisheries in the sea; such grants included sedentary, that is seabed, fisheries.

He also conceded that the jurisdiction included the right to tax sea fisheries.

Undisputed documents of record show that the jurisdiction included the right both to define by statute and to punish in the courts crimes at sea, and the right to regulate the time, manner, and extent of fishing for conservation and other purposes.

Plaintiff's brief, at page 34,concedes that the jurisdiction included the power to regulate fisheries. That power plainly extended to sedentary fisheries and other seabed resources as well. And the power to regulate includes the power to license and to tax.

If plaintiff says that I've misunderstood them in thinking they're making these concessions, that I've been too broad, that they're not making them, or that they're retracting them; then the fact is that the concessions, whether they're still making them or not, are utterly required by the record, which is crystal-clear on all these points.

QUESTION: I'm not sure I understand what sedentary fishery is.

MR. CLAGETT: Like oysters, Your Honor; non-mobile fish --

QUESTION: A non-swimming fish.

MR. CLAGETT: Yes, sir.

QUESTION: Unh-hunh.

MR. CLAGETT: Plainly then, even if the Crown had not been recognized as owning title to seabed land, the jurisdiction which, by concession, existed and which, if not by concession,certainly exists by the record, embraced the right to regulate, to license, and to tax the private exploitation of maritime resources, both surface and seabed.

That, of course, is the precise right at issue in this case; whether it is called jurisdiction, ownership, sovereignty, or anything else, is of no consequence.

This, then, is the background of English law necessary to understand what happened when the American Colonies, the predecessors of these defendant States, were founded. And, as I've suggested, when you look at the Colonial Charters, you find precisely what you would expect to find in the light of that legal background.

The plaintiff and the Master have portrayed the Seventeenth Century English colonization of North America as fundamentally indifferent to maritime affairs and maritime resources. Nothing could possibly be further from the truth.

From the very beginning of colonization in

Elizabeth's reign, England's expansion into the New World focused largely, if not primarily, on control of the sea and exploitation of maritime resources: fish, pearls, and precious metals, if they could be found.

The very first act of the English colonization in North America was the expulsion of fishermen of other nations from the Newfoundland fisheries in 1582. And when King James asked the Pilgrims why they wanted to go to New England, they replied in one word: Fishing.

Every schoolchild --

QUESTION: It wasn't freedom of religion then, it was fishing?

[Laughter.]

MR. CLAGETT: That's what they said when they were asked, Mr. Justice Rehnquist. Apparently freedom of religion was something else.

Every schoolchild knows how heavily colonization focused on precious things like gold, silver, and pearls.

Seventeenth Century England, as we have seen, was, in the highest degree, conscious of the importance of exclusive rights of sovereignty and ownership in its waters. And the very persons, the individuals most active in the chartering and founding of the American Colonies, were the same people responsible for maintaining English maritime sovereignty at home.

We've given a long list of them, with short bio-

graphical descriptions.

Given this background, it is flatly incredible that English law did not extend to the American marginal seas the same principles of maritime sovereignty and dominion which were so fully established in English waters.

We have produced conclusive evidence that this is what did happen and what was recognized to happen. England expressly claimed and exercised sovereignty and dominion in American waters on many occasions.

I pass over briefly the evidence demonstrating that throughout the Colonial Period the Colonies and the home government were intensely aware of maritime rights of sovereignty and ownership.

They exercised control over the American marginal seas as fully as was either necessary or appropriate, in view of the limited opportunities for exploitation, which the technology of the time afforded.

In the nature of things, that control was primarily directed to fisheries, and the evidence is most extensive for the areas where the fisheries were richest and the threat of foreign incursion greatest.

That is, the waters of Canada and northern New England. In those waters there's no question that exclusive rights were claimed and foreigners were forcibly excluded. Plaintiff concedes that as to Canadian waters. There's no

difference as far as Maine goes.

Similar issues rarely arose south of Boston, where the fisheries were less rich, and there were no nearby French bases from which forays could be attempted.

No one steeped in this record, I assert, Your Honors, can doubt what position England would have taken if the French or anyone else had tried to come in. Even if the plaintiff were correct that to own the sea you must occupy it, these waters were in fact occupied by England and its Colonies to the exclusion of others.

In its own brief to the Master, page 143, the plaintiff conceded that during this era control of the adjacent land meant control of the fisheries.

The issue, of course, did not arise with specific reference to offshore mineral exploitation, because no minerals were discovered during the Colonial Period which were susceptible of exploitation. But the force and applicability of the law of a given period are not limited to the precise factual situations which arose.

Sometimes it is possible to say, with total confidence, on the basis of evidence in hand, that if a particular situation had arisen, a particular known legal and political system would have reacted to it in a particular, know-able way. That is the situation here.

Suppose that at any time during the Colonial Period

a valuable pearl bed or gold deposit had been discovered on a shallow but submerged bed, bank, or reef, say ten miles off the coast of any of these defendant States?

Plaintiff's position requires it to argue that England and the adjacent Colony would have asserted no exclusive right over that pearl bed or gold mine, but would have regarded the resources free to exploitation by all the world.

That position defies both common sense and everything that we know about the law, attitude, and practices of that period, and of every period before and since. Nations have never acted that way, they have uniformly acted the opposite way.

All four of plaintiff's witnesses who testified on the Colonial Period conceded that in the circumstances I've suggested the resource would have been claimed as an exclusive possession of the adjacent coastal sovereign. Any foreign incursion would have been driven off. The courts would have upheld that action as a legal right, if anyone had challenged it, which is unlikely.

We think these concessions by plaintiff's witnesses, which the record requires, are in themselves enough to make out the States' case.

I now come to the period of the formation of the Union. I've touched on this in the earlier portion of the

argument, to the extent the Constitution and the Western Lands controversy are involved. I shall only state our contentions in very summary form.

First, the historical record and the consistent decisions of this Court, with the sole exception of the dicta in the Curtiss-Wright case, are overwhelmingly to the effect that prior to the Constitution -- that is, from the beginning of the American Revolution through the Confederation Period -- the States were individually sovereign, up to and including being international persons subject to international law.

Chief Justice Marshall, for example, expressly so held in Gibbons vs. Ogden in 1824. And there are many other cases which are cited in our brief.

Second, be that as it may, each State was deemed to have succeeded to all the territorial and ownership rights of its predecessor Colonial Governments, as defined by its Charters, and to all ownership rights pertaining thereto which, prior to the Revolution, had been vested in the Crown.

It's hard to over-emphasize the explicitness of the documents of record in showing how zealously the Founding Fathers guarded the territorial and property claims of each State individually, and how categorically they rested on the individual rights of succession by each State separately to its Colonial Charters and to the Crown prerogatives, as continuing unimpaired.

This right, then, this exclusive right to exploit Shelf resources, was one of the maritime rights which these defendant States had by virtue of English law and their Charters long before the plaintiff here came into existence. They have never lost it. It remains intact.

As to plaintiff's argument that the right was abandoned or destroyed by virtue of the three-mile limit, I will have to rest on our briefs, because there is one final matter I need to mention.

That is the matter of possible further proceedings after the Court decides this case.

Whichever way the Court decides, certain questions will remain: of delimiting boundaries or base lines with respect to specific maritime areas.

The Court, of course, heard a case presenting such an issue just this morning.

The plaintiff apparently takes the view that a decree by this Court, deciding the issues argued today and declaring in general terms that either the plaintiff or the defendants own the Outer Continental Shelf, will terminate the case.

In its early pleadings, the plaintiff said that it sought only a decree which would settle the general issue, quote, "without determining the physical location of the area on the ground in any particular locality." Unquote.

QUESTION: Well, what's the case in the event we decided for you? Assume we overrule California.

MR. CLAGETT: If you decide from us -- for us, Your Honor, there would be left the question, first, of lateral boundaries between the States, --

QUESTION: Yes.

MR. CLAGETT: -- and also the question of the outer boundary of the Outer Continental Shelf. The dividing line would be between the rights of the States and the rights of the international community; but it still might need to be adjudicated at some time.

There would still also, perhaps, need to be decided, even in that event, Your Honor, the dividing line between internal and territorial waters, not for purposes of this case but simply because national --

QUESTION: Some other case, not this one?

MR. CLAGETT: Yes.

QUESTION: That last point missed -- eluded me.

MR. CLAGETT: For the purposes of some other case, not this case, there may need to be decided at some point the dividing line between internal waters, territorial waters, and the waters overlying the Continental Shelf, simply because the rights of the States, the federal government, and the world at large are different in each case, wholly without regard to the right to exploit seabed resources.

The right of innocent passage, for example.

QUESTION: Oh, in various -- in other areas of maritime commerce and so on?

MR. CLAGETT: Yes, that's right.

We agree with plaintiff's position on this point. While the Court's decision will leave certain specific questions undecided, the appropriate forum for those questions, we submit, is the district courts.

Under legislation enacted in 1972, the States can initiate quiet title proceedings against the federal government. The United States has been able to do the same against the States for many years.

The federal government has chosen that route, as you know, to litigate the question of the waters off Alaska; that case is now before you on certiorari.

QUESTION: Maybe they regret that route now.

MR. CLAGETT: They'll have to answer that.

In Massachusetts --

QUESTION: While I have you interrupted, just assure me: Connecticut is not among your clients because it has no Atlantic Ocean coast line?

MR. CLAGETT: Connecticut is not among my clients, Mr. Justice Blackmun, because the United States didn't sue them.

Now, I would have to speculate as to why they didn't

sue them, but I suppose the theory was that they are cut off by Long Island, and perhaps Long Island Sound. I don't know whether that's accurate or not.

QUESTION: Plus the fact they didn't hire you.

MR. CLAGETT: Well, that is plainly true.

[Laughter.]

QUESTION: Yes.

MR. CLAGETT: Massachusetts has now chosen the same route, by seeking a district court adjudication of the base line defining its internal waters.

Others of the defendant States here are considering bringing similar actions.

For mutual availability of this route, which was not the case until two years ago, makes it unnecessary for this Court to retain jurisdiction, as it did in prior cases, to work out these questions of detail by itself.

We think the district court proceedings are plainly a more appropriate forum to resolve, by evidentiary trial, these complex questions of geography and local history, which perhaps you've had your fill of already.

They are probably a more expeditious forum, also.

Massachusetts has filed a reply brief discussing this matter in detail, and I'm authorized to say that each of the other defendant States concur in the position espoused by Massachusetts and adopt it as its own.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Clagett.

Mr. Solicitor General.

Before you proceed, and if I may have your ear, Mr. Clagett, I overlooked announcing at the outset that Mr. Justice Marshall reserves the right to participate in this case on the basis of records and recording of the argument.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. BORK: Mr. Chief Justice, and may it please the Court:

The government submits that the law governing this case is clear and leaves, in our opinion, no room for doubt that the United States has the paramount right to the natural resources of the Outer Continental Shelf, under --

QUESTION: Mr. Solicitor General, this is way out of order, but I was wondering, while it's in my mind: Do you agree with your brother on the other side as to further proceedings in this Court, no matter -- further proceedings in this case --

MR. BORK: We would --

QUESTION: -- no matter how this Court decides the present aspect of the case.

MR. BORK: If we might, Mr. Justice Stewart, we would like to formulate a position on that and submit it to the

Court in the near future, before this case is decided.

QUESTION: For example, Mr. Solicitor General, is there any base line question in this -- if the federal government prevails here, is there any base line question here?

MR. BORK: Well, there certainly will be questions about the lines in various areas. I'm not familiar with the questionable --

QUESTION: Does this case present them?

MR. BORK: Right now, the case does not present it.

QUESTION: No.

MR. BORK: But we're merely discussing ownership and -- but there will come problems of drawing --

QUESTION: Drawing lines.

MR. BORK: -- drawing lines.

But this case does not present it at the present stage.

QUESTION: And there's no reason in this case to ask the Special Master to inquire into those issues, if the federal government prevails, is there?

MR. BORK: Well, it may have to be determined somewhere, and we would like, if we may, to reserve formulation and presentation of a position to this Court on whether it should go to the district court or to the Special Master.

QUESTION: Unh-hunh.

MR. BORK: We'll do that very shortly.

QUESTION: And Mr. Clagett specifically said that, in

his view, we should not retain jurisdiction of this case, as we have in previous similar cases; but that, instead, this line-drawing, however it's decided here, can be carried out by the district courts, which have jurisdiction since -- when? 1972, wasn't it?

And you haven't but will take a position on that?

MR. BORK: That is correct, sir.

QUESTION: Thank you.

MR. BORK: As I was saying, I think the case law here is -- the case law and the history is so clear that there is no doubt about the ownership of the Outer Continental Shelf, and that it inheres to the United States.

Now, defendants have an extended discussion of evidence, asserted to establish English law in its application to this country. I would point out that it's rebutted by our briefs; it was decided against them by the Special Master's careful report. But I think ultimately it can also be, if the legal principles governing this case are applied, that dispute about English law and so forth can be perceived as essentially irrelevant, and not to obscure the legal principles that control this case.

Although we have no doubt that the Special Master's findings on English law and their application to this country are quite right.

As a matter of fact, the Special Master's Report

shows, and as the briefs show, the position of the United States is supported by so many independent lines of argument, so many independent lines of law, that there's some difficulty in choosing the parts to stress.

And I will here today urge briefly four propositions. Acceptance of any one of these propositions requires that a judgment be entered for the United States.

For that reason, it is not necessary to review every factual finding made by the Special Master, although, as I say, we believe them all clearly correct.

I will urge first that as the Special Master concluded, the issue involved here has already been decided repeatedly in favor of the United States, by this Court in the California decision, in Louisiana, and the Texas case.

Application of the doctrine of stare decisis results in judgment for the United States.

Secondly, I will urge that the Special Master was correct in finding, upon the record made, that these States never acquired any property rights in the seabed off the Atlantic coast, and certainly didn't retain any such rights; a historical record which establishes that the California decision was correct in the first place.

Thirdly, it is completely clear, in any event, and the Special Master so found, that if there was any right in the Colonies or in the English Crown to the Outer Continental

Shelf, which we deny, that claim would have passed to the United States at Independence or upon ratification of the Constitution.

And, finally, the Special Master also found, and we believe correctly, that even if a claim to the Outer Continental Shelf once existed, and somehow passed to the States instead of to the national government, the national government constitutionally renounced the States' claims when it adopted the three-mile limit; which was its clear constitutional -- within its clear constitutional power.

The area was then reclaimed as against foreign nations in 1945 by President Truman's Proclamation and, as against the States, by the Outer Continental Shelf Lands Act of 1953.

Any one of these propositions, as I say, requires judgment for the United States, and I think it's demonstrable that all four are correct.

The argument for stare decisis, of course, turns upon United States v. California, a suit by the United States invoking provisional jurisdiction of this Court seeking ownership in the seabed in the three-mile belt adjacent to the cost of California.

California put in issue the precise question involved here, by defending on the claim that the original Thirteen States had acquired rights in the seabed. They said

three miles at least in the seabed; it wasn't just the three-mile belt that they asserted.

And, on the Atlantic shore, and that California acquired a corresponding property interest on the West Coast because it was admitted to the Union on equal feoting.

This Court held California not entitled to the seabed on the ground that the Original Thirteen Colonies, which includes all of the defendant States here, Maine, claiming through Massachusetts, never acquired ownership in the three-mile belt.

Justice Black's opinion for the Court held that the federal government rather than the States had paramount sovereignty and, as an incident to that, full dominion of the resources of the soil under the water area, including oil.

So that the precise legal principle involved here was decided in California. It should also be said that Justice Black made the statement in California that history did not support the claim that there was any right to ownership of the seabed, established in Colonial Days.

So it is not a case decided as if the Court had no evidence of ownership and title before it. The Court had many of these same documents before it. And made a finding that State ownership had not been shown.

Now, nothing, of course, turns upon the fact that California involved a three-mile belt, while this case concerns

the Continental Shelf seaward of the three-mile belt, because, of course, in United States v. Louisiana, the dispute was over a 27-mile area out from shore.

And this Court, in an opinion by Mr. Justice Douglas, said: "If, as we held in California's case, the three-mile belt is in the domain [sic] of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea."

Certainly it is not less so.

Well, that principle, of course, was applied in United States v. Texas as well, which was decided the same day as Louisiana.

I should pause here just a moment to say that I think it is not correct, as counsel for the defendant States suggests, that California was somehow an aberration in the law. There was dictum in prior cases that would have suggested, perhaps, State ownership of close-in waters. But only dictum. As the California Court pointed out, those were statements that were too broad; the courts in those cases were dealing usually with inland waters. So that there was no law which California suddenly overturned.

QUESTION: Mr. Solicitor General, what do you make of

Justice Frankfurter's comment in the Texas case, that in California the Court did amend the proposed decree submitted by the government to strike out the terms of proprietorship?

MR. BORK: I've been puzzled over that, Mr. Justice Rehnquist, because the decree gives dominion and full control and so forth, and I think later decrees given proprietorship in these State cases. And I'm not quite clear what the significance of that striking of those words is. We have never quite understood what the significance was.

And I think later decrees do give proprietary rights.

Now, these cases are well established, and there are two lines of attack that defendants make upon them, in an effort to get them overturned.

The first line of attack is that these cases have been repudiated by Congress in the Submerged Lands Act of 1953, and abandoned by this Court when it sustained the Submerged Lands Act. I think there's nothing whatever in that notion.

The Submerged Lands Act, and decisions under it, far from repudiating California and the progeny, the other cases it spawned, adopt it and proceed from it.

The Act, of course, relinquished these very States' proprietary rights within the three-mile belt of the Atlantic Ocean, but retained paramount federal powers -- defense, commerce, navigation and so forth. There's no mystery about that. Congress ceded national property to the Coastal States,

something it has a clear constitutional power to do under Article IV of the Constitution, as this Court said in the Alabama litigation.

The defendant States attempt to make out a repudiation of California by attributing to California a false rationale, a rationale it does not, I think, bear. They argue that California held, or at least that the Special Master thought it did, that ownership of the seabed is a necessary and indispensable and inseparable attribute of federal constitutional powers. Hence, their separation by Congress, agreed to by this Court in Alabama v. Texas, necessarily repudiates the California rationale.

It is clear, of course, that the Special Master did not read California that way, although the States did urge that reading upon him; now they impute it to him -- I guess for the purpose of importing into this Court's California opinion a meaning that could be said to be repudiated by the Submerged Lands Act.

But not a word in the California case or in the Special Master's report states that ownership of land and governmental authority over it are constitutionally forever inseparable.

The Court was engaged in attempting to decide ownership of an area between two contending governments; and aside from the evidence of governmental power over the area,

there was no particular evidence of ownership in the usual sense by either government.

The fact that one of the governments had crucial governmental functions in the area and the other had very few was reason enough to assign ownership to the former.

It would have been quite wrong for this Court to decide how much proprietary interest is essential to constitutional function; and it refused to decide that in the California case.

That is a question for political authorities of the government who have the constitutional authorities and questions to decide, and in the Submerged Lands Act the political authorities decided it.

But the political authority, the Congress in this case, also decided to accept the rationale of California and the explicit statement of Louisiana, that California's rationale, a fortiori, applied further out to sea, because it enacted the Outer Continental Shelf Lands Act within three months of the Submerged Lands Act, and expressly asserted federal ownership of resources in the seabed beyond the three-mile limit.

And that claim rests upon the rationale of California, Louisiana, and Texas. It certainly does not repudiate it.

And to put the cap on it, this Court of course stated in the second Louisiana case that the Act, the Submerged Lands Act, concededly did not impair the validity of California,

Louisiana and Texas cases, and that those cases were noticed to all the Coastal States.

Now, defendants' second attack on this group of cases is to say that they were wrongly decided because there is no logical nexus between sovereignty and ownership. In doing that, they adopt the stance of Justice Frankfurter's dissent in the California case.

He assumed, indeed he must have found, because he was willing to dismiss the bill without prejudice, that California had not shown ownership; but he argued that the United States had not shown ownership either. Because, he said, imperium did not imply dominium.

In that situation, said Justice Frankfurter, the contested area is to be deemed unclaimed land, and the determination to claim it on the part of the United States is a political decision, not for this Court.

And he went on: I have no doubt that the President and the Congress between them could make it part of the national domain and thereby bring it under Article IV, Section 3, of the Constitution.

And he would have dismissed the bill without prejudice, to let the political authorities of the nation decide the ownership of the land off the coast.

In this case, the political judgment that Justice Frankfurter called for has been made. By the Submerged Lands

Act and the Outer Continental Shelf Lands Act, Congress has allocated a three-mile belt along the Atlantic Coast to these defendant States, and claimed the remainder of the Continental Shelf for the United States.

So that even under the rationale of Justice Frankfurter's dissent in California, the United States would be entitled to judgment here.

But I think the majority opinions in California, Louisiana, and Texas remain the law and also completely foreclose the claims of defendants here.

The Special Master concluded that these cases require, as a matter of law, the entry of judgment for the United States on its motion. I renew that motion here.

The major purpose of the doctrine of stare decisis is to assure finality and certainty and hence the rapid disposition of future cases involving the same issue.

I would suggest that it is particularly appropriate that the doctrine be applied here, since the leasing program mandated by Congress in the Outer Continental Shelf Lands Act and an urgent aspect of the President's efforts to improve the energy situation must await the outcome of this litigation.

I think that is the basis for our motion for judgment. I think it's sound. The remainder of defendants' arguments are attempts to undercut the historical foundation of the California case by trying to prove that they obtained

title to the seabed of the Outer Continental Shelf in Colonial Times, and have retained it to this day.

Well, that effort is heroic. But the title they claim faces an endless series of hurdles, and I'm afraid to say that I don't think their arguments get over any one of them.

The first difficulty of the States' title, and I guess it wouldn't be proper to call it a fatal difficulty because the first difficulty is that it never existed. Neither the English Crown nor the American Colonies ever owned the seabed of the Outer Continental Shelf.

And the English law of the period lends no support to any such claim of territorial sovereignty. That conclusion, as I say, was reached by the Special Master here, was reached by this Court in the California case, as our brief shows it was reached by two Justices of the High Court of Australia in a case there, two Justices who reached the issue in that case, and it was reached by the Supreme Court of Canada in a case involving British Columbia's claims to the offshore land.

That's a rather awesome array of Judges and Tribunals, who have decided that defendants' basic premise, its basic historical premise here, is simply wrong.

Now, the Special Master's finding rests upon evidentiary detail, which is far too copious to be dealt with effectively in oral argument. And we will rely primarily upon

his report and upon our brief in this Court and upon our opening and reply briefs before the Special Master.

I want to say that if one gets into this historical record, it is indispensable that the briefs before the Special Master be read, because there are endless historical disputes in this case. I think I first decided that the historical evidence did not lend itself to extended oral presentation, when I found myself trying to distinguish between the various meanings one can attribute to Robert Callis's 1622 lectures on the statute of sewers.

But I do wish to say that we do not agree with counsel's characterization of this case, that his case is utterly crystal-clear.

I think it is utterly crystal-clear that the evidence is dead against the position he urges here.

Now, the defendants' brief is filled with assertions, a fact as settled or as conceded, that are actually disputed in detail. And I want to give one example.

This matter of the 100-mile limit that was said to be the plain English law of territorial sovereignty over the sea. That 100-mile territorial claim, I'm afraid is a figment of historical imagination. We think there are only two cases, two instances where it was put forward in that form.

?

One was by Professor Gentilly who, during the Stuart

era, argued a prize case in an English court. The Dutch had captured a Spanish ship, I believe it was, and, representing the Spaniards, Professor Gentilly urged the court that the ships which had been brought into an English port could not be prizes, because they had been taken within a hundred miles of the English coast. And that was an area which the English owned, and therefore must be respected as neutral.

The court rejected the argument and awarded the prizes to the captors.

The only other known evidence is a letter by the Earl of Salisbury suggesting that an Ambassador might make such an argument to the Spanish. That's all we know about it. It's not shown that anybody ever made such an argument.

The rest of these 100-mile limits occur in a variety of writers, and there are various limits suggested, 60 miles, 10 miles, 100 miles; but it's quite clear, if one examines them, that it is always a protective jurisdiction which is asserted to go out to 100 miles, not ownership of property, not territorial sovereignty. It is a jurisdiction for purposes of protection against pirates, regulation of navigation when it's important, and that sort of thing. It is not a territorial claim.

So that this 100-mile limit has to be looked at very carefully, in the sense of a territorial claim it is only advanced seriously once that we know of and rejected by the

court in that case.

In fact, it should be said, I think, that the States' case, in a sense, rests upon -- historical case, rests upon a confusion between maritime jurisdiction, a claim to exercise admiralty policy, a protective concept of jurisdiction; they are constantly confusing statements made in that context with statements of claims to ownership. And that's why a large part of this case is so confusing.

But once that confusion is eliminated, it is seen that indeed there is very little to the States' historical case.

To summarize briefly, English law made no claim to the ownership of even the English Seas and the seabed during the brief period of -- except during the brief period of the Stuart pretensions from 1603 to 1688. And that claims vanished with the Stuart dynasty.

Certainly there was no such pretense to legal ownership by 1776.

Moreover, there is not a shred of evidence that even the Stuarts claimed ownership of any part of the American Seas, much less the seabed of the American Outer Continental Shelf.

The Stuarts' claims to ownership in the English Seas rested quite simply upon naval domination, that was never approached in the American Seas. And here again there's a

source of confusion in this case.

We hear talk about claims to fisheries or sedentary fisheries. Of course there were claims, because it was then established that one could get property rights in an area of the sea or in the seabed by effective prescription, an occupation. And if you worked an oyster bed for a period of time and fenced out foreign fishermen, you had established ownership in that sense, but only to the area which you occupied, and only to the fishery as to which you had a right of prescription.

And so disputes about fisheries here show very little about the claim of broad territorial sovereignty.

The English thus never had ownership of the Outer Continental Shelf that could be passed on to the Americans, and, as the Special Master found, the Colonial Charters did not grant such rights.

Had English title existed as an attribute of governmental power and had it been passed in some form to the Colonies, that ownership would have reverted to the Crown before American Independence, because it is quite clear that by 1754 all but three Colonies had become Royal Colonies and were governed directly by the Crown.

And as to the others, most of their governmental powers had in fact reverted. The Crown repeatedly disposed of vacant and unappropriated lands in the Colonies without

regard to the boundaries set out in the original Charters.

A charter grant of lands was merely a grant of an opportunity to establish settlements and to appropriate land as incidence to government. And if the land was not settled or appropriated, even though it was within the grant, the Crown would sometimes take it back or reallocate it.

In most cases and I think in many cases -- powers, in many cases all powers had reverted to the Crown by the eve of Independence. And this was especially the case with respect to maritime matters, which were governed ultimately from England.

So that even the three Colonies that had not become Royal Colonies lost any dominion over the seabed which they might conceivably have gained as an attribute of external sovereignty.

It's perfectly clear, I think, that there were no seabed rights in the Colonies on the eve of Independence, and the Master so found.

But this is by no means the end of the difficulties with defendants' case.

Should we assume, for the sake of argument -- and I think it is only for the sake of argument -- that this Court, the Special Master and the Australian and Canadian Judges have all been wrong about English law, and hence defendants alone correct, I think there are two propositions that as a

matter of law establish the right of the United States to judgment here, and I pass to these now.

The Special Master found that if there were title to the seabed in either the Colonies or the English Crown, such rights passed to the United States at Independence, on July 4th, 1776, or, at the latest, upon ratification of the Constitution in 1789.

There never was a time when any of these States existed as independent sovereignties with external powers of government. The national government was formed and was in operation prior to the existence of any State.

The Special Master said: I find that upon the establishment of the First Continental Congress in 1774, the United States of America emerged.

And I --

QUESTION: Mr. Solicitor General, you would apply that statement to both Rhode Island and North Carolina?

MR. BORK: I would, indeed. I would, indeed, Mr. Justice Blackmun.

I think, as the Special -- in his conclusions, as I recall, the Special Master takes as the two effective dates when the rights to the seabeds, if any had existed, would have passed to the federal government, as Independence and ratification of the Constitution.

I think it's fair to say that there is in his report

a suggestion that one could equally have chosen two additional dates. One would be the formation of the First Continental Congress, and the second, the governing power that they assumed immediately; the other, I suppose, would have been the Treaty of Peace in 1783.

But it's important, I think, to realize just what the history of that period was. One of our witnesses, Professor Richard Morris, has written an article, consisting largely of matters he said in his testimony, and I think out of perhaps an excessive sense of delicacy we did not cite the article in our brief -- being less delicate, I would like permission to cite it now.

It appears in the Columbia Law Review, Volume 74, No. 6, it's October 1974. In which he considers the historical evidence about the forming of the Union. And it's really quite plain. It's also in his testimony.

It's also quite plain that a national government was formed with the First Continental Congress. Representatives were chosen by the people of the Colonies and not by the Colonial Governments, except in one instance, the --

QUESTION: Were all Thirteen States represented at the First Continental Congress?

MR. BORK: Twelve of them were represented in the First, I believe, Mr. Justice Rehnquist.

QUESTION: Which one wasn't?

A VOICE: It was Georgia.

MR. BORK: I beg your pardon?

I hear Georgia being --

QUESTION: Would Georgia be --

MR. BORK: I hear myself being supported in the Georgia claim.

QUESTION: Would Georgia be bound then by whatever the First Continental Congress said?

MR. BORK: I think Georgia submitted to its -- to the jurisdiction and the power of the First Continental Congress; and in that sense I think was bound. Certainly came into the Second Continental Congress.

But I'm describing a period before Independence, in which the Continental Congress -- for one thing, the Continental Congress initiated the formation of the States by resolution; first at ad hoc and then by general resolution, calling for State Governments.

The Continental Congress issued the Declaration of Independence, and in fact the Declaration is, in its own terms, said to be a declaration by the Representatives of the United States of America, in General Congress assembled.

And during this period of time, the Continental Congress took jurisdiction over admiralty cases, in the sense that it would hear appeals from the State Courts to a Committee of Congress. It asserted jurisdiction to make

treaties with foreign powers, it did, it assumed the powers of war and peace, it even passed laws about treason, requiring allegiance to the United States Government, not to the State Government.

So I think it's quite clear that there was a national government operating and claiming legal powers and exercising legal powers before the States had really come into existence.

QUESTION: Well, isn't it also true, Mr. Solicitor General, that in the period after 1776 and before the ratification of the Constitution that at least some of the States were purporting or trying to carry on their own foreign policies?

MR. BORK: I think there was some -- I think there was no successful effort at that. I think Russia and some other countries attempted at one point to deal with the States individually.

QUESTION: Andwasn't that really one of the very basic reasons for the Constitutional Convention in Philadelphia?

MR. BORK: Well, I think --

QUESTION: Wasn't that one of the big problems, and wasn't that one of the basic accomplishments of the Constitution?

MR. BORK: I think that --

QUESTION: That the foreign policy of these newly independent United or partly United -- newly independent States,

on this eastern shore of the North American Continent, to put the foreign affairs into one sovereignty rather than keeping it in thirteen?

MR. BORK: I think it was quite clear, even so, before that, Mr. Justice Stewart, that the United States insisted upon speaking for the States and not letting the States run their own foreign policy.

I think our diplomatic experience from 1776 on shows that.

QUESTION: What was the first mission that this Continental Congress authorized to --

MR. BORK: Its mission abroad? I don't know, and I was wondering if I had similar help from the Bench here.

I don't know the first mission abroad that they authorized.

But they did -- they did -- in 1775 the Continental Congress addressed messages to the Governments of Europe on behalf of the United States.

QUESTION: But there were many such missions between '76 and '87 or '89, were there not?

MR. BORK: Well, certainly -- certainly, the Peace Treaty of 1783 with England was negotiated on behalf of the entire United States, and claimed fisheries which seem to loom large in this case on behalf of the entire United States, the American people; not on behalf of any State.

The fisheries off our coast.

QUESTION: But the States were not only, as I say, making moves toward carrying on their own foreign policies, regardless of what the Continental Congress might have also been doing, and also they were coining money and asserting other aspects of absolute sovereignty, were they not?

MR. BORK: I have no doubt, Mr. Justice Stewart, that internal --

QUESTION: We all learned that in the Sixth Grade; that's the reason they sent their people to Philadelphia in that hot summer and worked out a new Constitution.

MR. BORK: That is quite true.

I think the coining of money is not an example that bears upon this case, and the other things the States did, such as directing that tariffs --

QUESTION: Yes, but it shows absolute sovereignty, though, or their thought that they were. That's what --

MR. BORK: I think they thought that there were absolutely sovereign internally, in internal matters. I think they did not have the same thought with respect to diplomatic matters and speaking abroad.

I think the United States, almost without exception, Congress had sent people abroad who dealt for the United States.

QUESTION: To sustain your position, are --

MR. BORK: I don't really think I can --

QUESTION: -- you going to show that the United States of 1774-5-6-7 exercised all the powers of sovereignty, including raising of armies and so on?

MR. BORK: No, I certainly don't. I was merely pointing out that I think there are other dates, even earlier than Independence, by which a national government was in existence and had external powers and precluded the States from dealing independently. And I don't think the States, Mr. Justice Stewart, never made a claim, any of them, to be recognized as independent nations in international law.

QUESTION: Well, do you say the Continental Congress removed the States from dealing independently? I think probably you could make a strong historical argument that the Continental Congress did deal for that State, but it had no authority of any kind up to the present time over the individual State, did it?

MR. BORK: Well, I think it did, in this sense: for example, there was repeated disputes about whether or not Congress could take and review admiralty cases decided in State courts. This was before the Independence and right after Independence.

And the States involved said no, and Congress said yes; and did review them and did reverse State decisions. And Congress made that admiralty jurisdiction stick before

Independence -- no, right around the time of Independence, I think it was just before.

I was asked the question before whether the first ssion.. commission -- and I'm informed the first commission was to Britain before 1776, and that Jefferson, Thomas Jefferson was a representative.

But this argument about when we became a nation, I think is not essential to my argument; I think it is prior to Independence.

In any case, aside from the historical evidence, it's quite clear that this Court, in Penhallow v. Doane, -- by the way, a finding of this Court, Mr. Justice Rehnquist, that New Hampshire did not possess admiralty jurisdiction during the Revolutionary War, on the ground that Congress, representing the States, was sovereign in external affairs.

So that it's, I think, judicial authority as well as historical argument. And of course it is well known in the case of United States v. Curtiss-Wright Corporation, this Court held that -- determined that external sovereignty had passed directly from the British Crown to the United States and had never lodged in the individual States.

That dominion follows sovereignty is well settled in some of the cases we've discussed, because the State's right to the seabed under the inland waters, in fact, were decisions that said dominion to the States follows the

sovereignty of the States.

The report of the Special Master here deals fully with this topic, and I shall not labor it further.

But we have these, Penhallow v. Doane and United States v. Curtiss-Wright Corporation, and other decisions, so that I think that, quite aside from historical evidence, the doctrine of stare decisis here requires judgment for the United States as well.

Now, I think, at the latest, the ratification of the Constitution in 1789 would have conferred this ownership upon the United States. I tend to think it occurred, myself, in 1774; but I don't think anything in this case turns upon that, and therefore I will not press that point.

Finally, I will assume -- for my final point I will assume that the State ownership of the Continental Shelf once existed and somehow survived the series of traumatizing events that we have been discussing.

It is then clear, I think, that the United States, when it adopted early in its history the three-mile limit, and certainly when it took the lead among nations in getting that limit established as international understanding, the United States, by that act, renounced sovereignty in the adjacent seas and seabed outside the three-mile limit; and . . . . it is quite clear, as counsel for the defendant States has said, the United States in international matters may cede a

part of a State's territory without the State's concent, alter its boundary, if it is acting in foreign relations and international matters.

And the Special Master so concluded that that act would have cut off any surviving State claim to any part of the seabed.

Now, the three-mile limit was maintained and enforced until 1945, when President Truman, of course, claimed the Continental Shelf, and in '53 Congress claimed the resources outside the three-mile limit for the United States as against the States; and as the California decision held, the assertion of national dominion over the sea and seabed is binding upon this Court.

It follows from this history that any right the States may have once had were extinguished with the adoption of the three-mile limit, and federal rights were later created. And this series of events, I think, standing alone, is sufficient to require judgment for the United States.

I suppose I should say a word about the equitable argument made by counsel for defendant States that only a judgment for his clients will allow sharing in the proceeds. I think that's not correct conceptually, because I take it a judgment for the United States would be used for the benefit of the entire United States, which is a form of sharing, a different allocation in the share perhaps.

But, in addition to that, it is worth saying that Congress has previously responded to decisions of this Court by giving these defendant States certain rights. There are proposals in Congress for that kind of allocation of revenues, perhaps -- I don't know if the proposals will pass, but they are being considered -- should the United States prevail in this litigation, to share the revenues with the States.

I have argued four propositions, which I think each, independently, requires judgment for the United States.

I respectfully urge that if it can be done, the United States' motion for a judgment be granted, because there is an urgent need to have this cloud on title settled so that, in one ownership or another, development of the -- the long process of development of the Outer Continental Shelf for energy needs can begin.

QUESTION: Mr. Solicitor General, Mr. Clagett suggested that the doctrine of the holding in the California case began to suffer some erosion, or at least a further erosion by the 1953 Submerged Lands Act. Do you have any comment on that?

MR. BORK: Yes, Mr. Chief Justice.

I think that, as I tried to touch upon, the -- this Court certainly didn't think so, because after the Submerged Lands Act, this Court said that, in the second Louisiana case, that the California decision remained unimpaired.

In addition to that, I take it that the connection between sovereignty and ownership, in the California case, is not inseparable, it's just inseparable by this Court. The political authorities having the sovereignty and the political power, that is Congress and the President, having the external sovereignty in their hands, may make a decision, a political decision, how much ownership is necessary to the exercise of that sovereignty; and they have made that political decision.

I don't think that impairs the California case in any way.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Clagett, you have 14 minutes left. If you would prefer not to divide it between three minutes now and tomorrow, we'll give you the option of doing it all tomorrow morning.

Would you prefer that?

MR. CLAGETT: Thank Your Honor; I'd prefer that.

MR. CHIEF JUSTICE BURGER: Very well.

[Whereupon, at 2:57 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, February 25, 1975.]