IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.,

Tuesday, February 25, 1975.

The above-entitled matter was resumed for argument at 10:07 o'clock, a.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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Clagett, you may continue. You have 14 minutes remaining.

REBUTTAL ARGUMENT OF BRICE M. CLAGETT, ESQ.,

ON BEHALF OF THE DEFENDANTS

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

I have one or two things to say about each of the Solicitor General's four arguments.

First, the alleged preclusion by California.

He says, if I understood him correctly, that California holds only that if a State has no historic title and the Court must decide, in the absence of such a title, then the federal interest are stronger and would prevail.

He disclaims, as I understood him, any argument that the federal interests would require overriding an historic title because the Shelf is a necessary appurtenance of federal constitutional powers.

This flies in the face, however, of his other argument that even if the States had an historic title at the ratification of the Constitution, they then lost it.

They would lose it, surely, only if it was necessary for the federal government to have it, to protect its constitutional interests. And if it is thus necessary, how can Congress give it away?

The Solicitor General, I submit, cannot have it both ways. If Congress was free to give part of the Shelf to the States in 1953, then Shelf ownership is not necessary to federal powers, as he admits. And since it is not necessary, then the Constitution would not have taken an historic State title away.

QUESTION: In your view, then, it is not within the power of the sovereign to decide in what particular instances it might be necessary and in other instances that it could be yielded in part? That that is not within the broad sovereign power?

MR. CLAGETT: Not in the event of an antecedent historic title, Mr. Chief Justice.

It seems to me that a title to property which was vested in a State before and at the time of the Revolution could only be taken if there was some constitutional necessity for taking it.

QUESTION: But Congress, in passing that Act, assumed and of course acted on the assumption that it had the title, did it not?

MR. CLAGETT: Yes, Your Honor, and that's precisely why the Act has to be unconstitutional if Congress was wrong on that point. There's no dispute here, as I understand it, that if the States did have a vested title in property, then the Outer Continental Shelf Act is unconstitutional.

I take it the plaintiff concedes that.

I might add that the Congress did its best to restore to the States all the title which it was then aware that the States had. Probably because no valuable resources, as of that time, had been discovered in the Atlantic Ocean, nobody has done his homework, and nobody knew what the history was, and the States were not then articulating their claim very well.

So Congress passed that Act under a misapprehension. It intended to, and it thought it was restoring to the States all the title they had.

QUESTION: No, which Act, the Outer Continental Shelf Act?

MR. CLAGETT: Both Acts taken together, would --

QUESTION: Both acts taken together?

MR. CLAGETT: Yes.

QUESTION: Right.

MR. CLAGETT: I would add that there is no need for you to overrule the holding of California, in order to decide for the States here. That holding, of course, was that California did not own the three-mile belt.

If you hold in our favor on the basis of an historic title, then that holding would not apply to any State which, like California, lacks such a title.

To be sure, California and other States might renew

their claim that the equal footing doctrine would require them to have the same amount of shelf as the Atlantic States.

But the Court could well hold, as it did in Alabama vs. Texas, quite clearly, that the equal footing doctrine requires nothing of the kind. It does not require that every State own an equal amount of Continental Shelf, any more than it requires that every State have as large a land territory as the State of Texas or the State of Alaska.

I think I failed to make myself altogether clear yesterday as to the circumstances in which, if the Court should decide in our favor, federal intervention in the Shelf would require compensation to the States, and the circumstances in which it would not.

There are, as I see it, three possible situations:

One, the federal government takes oil or other Shelf resources owned by the States for its own use; that plainly would be a taking and would require compensation.

Two, the federal government, by treaty, agrees with other nations that the Continental Shelf under exclusive American ownership is not as large as it is now considered to be, thereby cutting off State ownership as to some parts of it. That would be a federal Act adjusting boundaries or settling international law in the exercise of the foreign affairs power, it would not, in my submission, be a taking and it would not require compensation.

I might add that that question is wholly academic, at least as to the foreseeable future, because the whole tendency in international law and policy at the moment is to expand the Continental Shelf rights, not to cut them back.

Three, the federal goverment in the interest, either of national defense or for economic reasons, tells the States that they must develop Shelf resources faster or differently from what they are doing. The States retaining ownership and still receiving the revenues.

That would not be a taking, quite clearly, and would not require compensation, any more, for example, than federal resources allocation during World War II did, or any of the other kinds of paramount powers the federal government habitually asserts, especially in times of national emergency, over all the resources of the country.

It would be perfectly proper federal regulation.

Thus, a decision for the States here will in no way retard or hamper Continental Shelf exploitation or development if the national interest is found to require that.

Next, as to the Solicitor General's argument that the States never acquired any property interest in the Shelf, it is hard to respond to this because it was stated almost entirely in conclusory terms, without reasons or facts. The Solicitor General did make one specific statement, however. He said that the 100-mile rule was recognized on only two

occasions by Gentilly and the Earl of Salisbury.

To the contrary, the 100-mile rule was declared by, among others, the following eminent British authorities:

William Welwood, in 1613; Gerard Malynes in 1632; Thomas Neal in 1704; Sir Charles Hedges, Admiralty Judge and Secretary of State, in formal legal opinion of 1713; and Josiah Burchett, Secretary of the Admiralty, in 1720.

Further proof is found in the Colonial Charters themselves, beginning with the Charter of 1606, which created a hundred-mile territorial sea all up and down the coast of these very defendant States.

As shown in our Supplemental Brief in detail, in addition, the overwhelming consensus of internationa law suthority, throughout the Seventeenth and Eighteenth Centuries, was in favor of 100-mile territorial sea.

Finally and perhaps conclusively, 30 leagues, which is virtually identical to 100 miles, was the boundary asserted and enforced by Britain throughout the Seventeenth and Eighteeenth Centuries for its territorial sea and exclusive fishing rights in these very waters here under dispute in North America.

As to Nova Scotia, that boundary was incorporated into the Treaty of Utrecht of 1713. But Britain regarded the 30-league limit as applicable all up and down the coast of these States as well. The proof is our Exhibit 327 in Map

Volume III of our Appendix, which is the British copy, the very British map used in the Peace Negotiations at Paris in 1782-83.

Tha map shows the 30-league boundary drawn all the way down the coast of these defendant States.

I can only -- I have no time to discuss the Solicitor General's assertions about the Australian and Canadian cases, I can only say that we submit they are wildly inaccurate.

I can only beg the Court to study pages 477 through 85 of our Supplemental Brief on that subject.

Next, the Solicitor General contends the federal government would have succeeded to any Continental Shelf rights then in existence at Independence, or some time around there.

I confess, as I heard the Solicitor General wax eloquent about the sovereignty of the First Continental Congress, I was wondering why we were not celebrating the bicentennial this year, instead of waiting for some later, wholly ancillary, event.

On the point of whether the States were ever fully sovereign, the key to understanding the events of that period, we submit, is that the States were regarded as identical to the United States, not the United States being a distinct, separate national government in any sense; it was the United

States of New Hampshire, Massachusetts, et cetera. The term was always spelled out in full in that fashion.

Of course the States carried on foreign relations, not only separately, which they did to a quite considerable extent, but primarily through their joint representatives. Congress was the States. Congress was made up of Ambassadors from the States, known as Congressmen.

Every Treaty that Congress made was made in the name of each one of the States, enumerated separately.

The nature of the Confederation was exactly what the Articles of Confederation, in carefully chosen language, said it was: a firm league of friendship.

And it was universally recognized that a federal league or confederation was a group of several sovereign States which retained their full individual sovereignty, that Talman Montesquieu, the international lawyer best known to the Founding Fathers, expressly so stated.

Chief Justice Marshall agreed, as I mentioned yesterday, in Gibbons vs. Ogden, he declared that the States, quote, "were sovereign, were completely independent, and were connected with each other only by a league."

There's nothing to the contrary in Penhallow vs. Doane, which merely holds that Congress had the power to erect an admiralty court with appellate jurisdiction from the State prize courts, for the reason that the States, and in

particular New Hampshire, the State which was there contesting it, had consented to it. There is not a word in the case of any inherent federal sovereignty derived from the Crown, or of any federal powers other than those granted by the States.

QUESTION: There is something to the contrary in the Curtiss-Wright opinion.

MR. CLAGETT: Yes, indeed there is, Your HOnor.

QUESTION: You think that's wrong?

MR. CLAGETT: Yes, sir. And of course it purports to cite Penhallow, but as Julius Goebel said, in his first volume of the history of this Court, some slightly sloppy language in Penhallow was then used in Curtiss-Wright to support -- I've forgotten his exact words; an utterly inadmissable version of historical events.

Even if the Solicitor General were right about sovereignty, even if he were right, which he isn't, the historical record and the decisions of this Court show beyond any question whatever that the United States was never regarded as acquiring any territory or property other than in right of one of the individual States, and nothing was ceded to the federal government but what was expressly ceded.

The Constitution draws the sharpest possible distinction between the territory and property of the States, which remained intact, and the paramount rights of the federal government which were superimposed upon them.

The ratification of the Constitution transferred no territory and no property.

Finally, as to the Solicitor General's claim that our Continental Shelf rights were destroyed by the three-mile limit:

Our briefs and the testimony of the trial, particularly that of Judge Jessup, who is the world's leading authority on the subject, proved beyond a shadow of a doubt that the Solicitor General's argument is wrong.

The three-mile limit applied only to surface waters, never to the seabed.

As this Court itself said in the second Louisiana case, maritime boundaries to different distances are recognized for different purposes.

The United States never construed the three-mile limit as cutting off seabed rights. Wholly to the contrary, in the Bering Sea arbitration, the United States took it as a fundamental principle that the three-mile limit had no application to seabed rights. And the United States, like every other nation, asserted exclusive ownership of seabed resources beyond three miles, wherever they existed, and were exploitable, as in the case of the Philippine pearl fisheries.

QUESTION: How was the three-mile limit established?

MR. CLAGETT: The three-mile limit was first mentioned

by anyone as a boundary for neutrality purposes only, by Thomas Jefferson in his Letters to the Ambassadors within a year or two of 1790, 1791. It was never applied to anything more than neutrality purposes for some decades thereafter, and it was never applied to the seabed.

Finally, I must say that we would of course like the opportunity to respond to whatever the Solicitor General may say about further proceedings in this paper he's going to file.

We would therefore ask the Court to set a short time limit for his paper, and one for our response.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Clagett.

When the Solicitor General, and if he files further proceedings, you will have ten days to respond to it.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:22 o'clock, a.m., the case in the above-entitled matter was submitted.]

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