In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

No. 73-1888

Washington, D. C.
April 16, 1975

Pages 1 thru 42

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 73-1888
STATE OF ALASKA, Respondent.	:	

Washington, D. C.

Wednesday, April 16, 1975

The above-entitled matter came on for argument at 10:07 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:

A. RAYMOND RANDOLPH, JR., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the petitioner.

THOMAS M. PHILLIPS, ESQ., 30th Floor, One Shell Plaza, Houston, Texas 77002, for the respondent.

CHARLES K. CRANSTON, ESQ., 425 G Street, Suite 540 Anchorage, Alaska 99501, for the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 73-1888, United States against Alaska.

Mr. Randolph, you may proceed whenever you are ready.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR.

ON BEHALF OF THE PETITIONER

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court: This case is here on writ of certiorari to the Court of Appeals for the Ninth Circuit. The issue is whether a disputed area in lower Cook Inlet in Alaska constitutes historic inland waters, as the State claims, or constitutes areas of the high seas, as the United States maintains.

The issue arose in the following context:

In March of 1967, the State of Alaska offered for a competitive oil and gas lease sale 2500 acres of submerged land in the portion of Cook Inlet in dispute.

The United States brought suit shortly thereafter in the United States District Court for Alaska to quiet title and for injunctive relief, arguing that the State had no authority to lease submerged land in an area of the high seas.

QUESTION: Mr. Randolph, at that point, does your office have any knowledge of why they chose that route rather than an original action here?

MR. RANDOLPH: I inquired about that, Mr. Justice Blackmun, because I was not there at the time. My understanding

is that, without disclosing all the details, the idea was not to burden this Court with what appeared to be at the time a quite simple case. Personally, I think that prediction was not a very good one, and the case is now here.

Alaska claimed in response that Cook Inlet is historic inland waters and therefore the State had title to the submerged lands.

In the district court the parties compiled a record and after an 8-day trial, the district court issued a memorandum opinion holding for the State of Alaska dismissing the United States' complaint. The court instructed counsel for the State of Alaska to prepare findings of fact, conclusions of law, which counsel did and the court subsequently signed.

The United States appealed. On appeal the Court of Appeals for the Ninth Circuit affirmed in a per curiam opinion. The Court of Appeals subsequently stayed its mandate regarding foreign fishing in the disputed areas of Cook Inlet on motion of the United States, a matter which I will discuss later.

That the case is here at all, that there is any question whatsoever about the status of Cook Inlet is a function of its size. And for convenience I would like to refer the Court to the map in the back of our brief. I can't emphasize enough that this is a vast area, incredibly vast. There is a line, the Court will observe, at Kalgin Island to the north in Cook Inlet, which I will develop later, which is the 3-mile

closing line. From that line down through the line going across Cape Douglas, to the west, and Point Gore, to the east, as I said before, is a vast area of water. One could easily fit within that area all of the Chesapeake Bay, all of the Delaware Bay, and all of the Long Island Sound. In the area above the line at Cook Inlet, one could fit another Delaware Bay and another Long Island Sound.

QUESTION: Does the record give any square mile figures for the areas you are talking about?

MR. RANDOLPH: I have square mile areas that the geographer of the State Department gave me after using maps and overlays. I could give them to the Court.

QUESTION: Are they in the record?

MR. RANDOLPH: They are not in the record, other than by the maps, and these are material developed from the maps. The disputed area constitutes approximately 5400 square miles. The entire inlet is about 7400 square miles. Delaware Bay -- and this is in the 1940 Bureau of the Census report -- Delaware Bay is about 665 square miles; Chesapeake Bay 3200 square miles; Long Island Sound about 1300 square miles.

QUESTION: How big is Lake Michigan?

MR. RANDOLPH: I have absolutely no idea.

QUESTION: North and east of Kalgin Island, that's a juridical bay, isn't it,concededly?

MR. RANDOLPH: Yes. Yes.

QUESTION: And I suppose there are some juridical bays --

MR. RANDOLPH: There are juridical bays within --

QUESTION: Kachemak Bay, for example.

MR. RANDOLPH: Yes. And Kamishak Bay are juridical bays.

QUESTION: Although, the headlands, there may be more than Kamishak.

MR. RANDOLPH: There is a map in the second volume of the appendix, that is bound up in the volume, that clearly indicates that's the map the United States distributed to the foreign countries in 1971.

The question here is whether within the disputed area the State of Alaska owns the submerged land. The State entered the Union in 1959 on the same terms as the other States, subject to the Submerged Lands Act, in which the United States conferred title on the State three geographic miles from the seaward boundary of their inland waters.

The question thus becomes whether this area constitutes inland waters. And this Court in the California case instructed that one must look to the Convention on Territorial Seas for the definition of what constitutes inland waters.

At this point I would like to pause, and I know the Court is well aware of this, but in a summary fashion, the international law recognizes a threefold division of the sea:

inland waters or bodies of water that are partly within the territory of a nation. The nation has complete sovereignty over those waters. It can deny the right of entry to any foreign vessel and has the right to exclude foreigners from entering into those waters.

Moving out from the inland waters, one reaches the territorial sea, which is a specified distance seaward of the inland waters. For the United States it is traditionally three geographic miles. The nation has complete sovereignty over that area of the territorial sea, but it must allow innocent passage of vessels through that.

Beyond the territorial sea lies the high seas where normally a State may not exercise control. However, in light of the convention I have just mentioned, there is a contiguous zone that runs along the territorial sea and in the high seas, and for special purposes a nation may exercise control. The United States has done that. We have extended our exclusive fishery jurisdiction out nine additional miles from the three-mile territorial sea.

QUESTION: Beginning where?

MR. RANDOLPH: Beginning at the three-mile line. It's 12 miles from shore, from the low mean water mark. And that was done by statute and it is now the subject of negotiation, I understand, in the Law of the Sea Conference.

QUESTION: But "shore", as you say, might include

the --

MR. RANDOLPH: Inland waters.

QUESTION: -- inland waters.

MR. RANDOLPH: Yes. From the boundary, from the coastline.

QUESTION: Shore doesn't mean land.

MR. RANDOLPH: From the coastline.

QUESTION: What on this map shows what the United States says comprise inland waters in Cook Inlet?

MR. RANDOLPH: From Kalgin Island. The line across Kalgin Island, Mr. Justice, is 24 miles long straight lines.

QUESTION: Three miles seaward of that.

MR. RANDOLPH: Three miles -- well, that would be territorial sea.

QUESTION: Yes.

MR. RANDOLPH: But from Kalgin Island north would be what the United States claims is the only --

QUESTION: And what's the distance between that line and this lower line from Cape Douglas?

MR. RANDOLPH: Well, the line from Cape Douglas through Barren Island, across to Point Gore, is approximately 75 miles long.

QUESTION: What I was wondering is what is the distance from the Kalgin line to that line?

QUESTION: The Cape Douglas line.

QUESTION: Cape Douglas.

MR. RANDOLPH: Very approximately, 102 miles.

QUESTION: Now, the lease we are talking about, is any of that within the territorial sea, or is it all outside?

MR. RANDOLPH: No. It's all outside of the three-mile line.

Under the Convention, there is no question whatsoever that Cook Inlet is a bay. The Convention, in Article 7, defines bays as well-marked indentations whose penetration is such in proportion to the width of the coast that they contain landlocked waters. Cook Inlet meets that definition.

But under the Convention, just because a body of water can be defined as a bay does not mean that it contains inland waters. The Conventions perscribes a geographic test for determining whether a body of water is inland waters. The geographic test is whether the distance between the natural headlands -- and the natural headlands here, at least the district court said, were 47 miles wide. That is, that line is not shown on the map. It's from Cape Douglas to Cape Elizabeth, which is approximately 47 miles.

So if we drew a line across the natural headlands of Cook Inlet, one would not come to the conclusion that this is a juridical bay, and you would have to use a fallback line, you would have to move a 24-mile line up into the and penetrate

the Alaskan coast until you reach Kalgin Island. And at that point you could draw a 24-mile line enclosing the maximum area of water.

If one looked at only those provisions of the Convention, one would come to the conclusion obviously that the area in dispute here does not comprise inland waters. However, the provisions of the Convention, in Article 7, to which I have just referred, had as a last paragraph: "The foregoing provisions do not apply to so-called historic bays."

The question, therefore, is although Cook Inlet does not comprise a juridical bay in the area that we are talking about, does it nevertheless comprise an historic bay?

In determining that question, which is one of international law, this Court has looked to a comprehensive United Nations study entitled "The Juridical Regime of Historic Waters." Three broad fastors have to be taken into account in determining whether an area is historic waters, historic inland waters: One, the exercise of authority by the claiming nation; two, the continuity of that exercise, whether it's been done for a considerable length of time; and three, the attitude of other nations,acquiescence by other nations in the exercise.

The question becomes somewhat unreal before this Court, though, because what we are talking about is really a domestic dispute, and it's difficult to talk about the attitude

of other nations and claims being opposed when it is really an internal dispute within the United States between a State and the Federal Government. And therefore this Court has instructed that in looking at these questions, one must treat them as if made by the national sovereign and opposed by other nations. In that sense this Court approaches the problem as if it were an international tribunal adjudicating a claim asserted by the United States and opposed by other countries, interested countries, in the world.

In that light it's quite important to observe that the longstanding United States foreign policy has been to limit national claims, territorial claims in the oceans of the world, whether made by expanding inland waters or by extending the territorial sea, or in any other matter.

QUESTION: We have been pretty aggressive in claims to the Outer Continental Shelf, have we not?

MR. RANDOLPH: Yes, but the Outer Continental Shelf is not an exercise of territorial jurisdiction so as to exclude ships, for example. We may mine there. And we are in the process, Mr. Justice Stewart, of course, in the Law of the Sea Conference that is now going on of negotiating.

QUESTION: I know that. And our claims are quite extreme.

MR. RANDOLPH: We think that the definition of international boundaries that the United States has traditionally

asserted weighs heavily against Alaska's assertion that in the past certain actions or inactions of the United States gave rise to historic title. The other nations of the world are aware of our foreign policy in regard to jurisdictional boundaries, and only the most clear, direct, and longstanding action by the United States would alert them to a change of our normal posture attitude.

We think there is no such evidence here, and I would like to discuss in sequence three different incidents or groups of incidents on which the district court relied, we think, do not give rise to historic title.

First, there is the Shelikof Strait incident.

Second, I will discuss in general fisheries regulations.

And third of all, the Gharrett-Scudder line.

I might add that nearly everything in this case involving a claim or an assertion, or whatever, that was relied upon to establish sovereignty, involves in some way or another fishing regulations. There are some dealing in the 19th century with sea otters, but nevertheless, in the 20th century, they are mostly all fishing regulations.

QUESTION: Neither party gives much weight to when Russia was in control of --

MR. RANDOLPH: Neither party nor the court.

QUESTION: Although there is some history.

MR. RANDOLPH: There is some history. The Russian

fur trader --

QUESTION: In spite of the claims by the Czar.

MR. RANDOLPH: Yes, which were quickly retracted upon protest by the United States and Great Britain.

QUESTION: You are not going to deal with that at all?

MR. RANDOLPH: I am not. The district court, I don't believe, relied upon it, and I don't believe counsel for the other side has either.

QUESTION: Why do you stress the fact they were only disputes about fishing?

MR. RANDOLPH: Well, I would like to get to that. That's exactly what I am going to deal with.

In the Shelikof Strait incident, I think I can deal with it without talking in terms of fishing, but in fact it was a fishing incident. The district court termed this the clearest assertion of sovereignty, and I take it the clearest assertion that historic title had ripened as a result of this incident. It took place in April of 1962 when six Japanese ships arrived off of the Kodiak Island fishing grounds to search for schools of herring. Alaska knew ahead of time that the Japanese ships were coming. Indeed, the Governor of Alaska in March of 1962 wrote to Undersecretary of State George Ball, advising him of the entry into the area of the Japanese fishing vessels and asserting that Alaska was going to take action if they entered Alaskan waters, and got no response.

The fishing vessels went around Kalgin Island in a clockwise direction, the Japanese fishing vessels, once and caught no fish. And by this time the Governor of Alaska was becoming concerned. He telegrammed again to the State Department. The State Department sent a representative, a Mr. Yingling, to the Governor's office in Juneau, and Mr. Yingling advised the Governor that if they entered Cook Inlet there was nothing he could do about it because on an initial reading Cook Inlet comprised high seas.

The fishermen went into Cook Inlet on April 5th. They went around the Barren Islands and then down to the Shelikof Strait.

QUESTION: Where are the Barren Islands?

MR. RANDOLPH: The Barren Islands lie right in the middle of Cook Inlet, of the line.

QUESTION: Oh, yes, I have it.

MR. RANDOLPH: They went around the Barren Islands, and the next day sailed down into the Shelikof Strait. Ten days later, 75 miles from the nearest entrance point to Cook Inlet, they were seized and arrested by Alaskan fishing authorities. The captains of the three vessels were held and subsequently signed four days later an agreement stating -- and this is set out in the appendix on pages 1186 to 1188 -- that they would not fish in the Shelikof Strait until "final determination by a court regarding whether the Shelikof Strait

and adjacent waters are international waters."

There is no mention in the agreement that these fishermen signed as to Cook Inlet. Nevertheless, on May 3rd, Japan protested the seizure of these fishing vessels. Japan said these are not inland waters. The Shelikof Strait has been fished before. Indeed we have evidence that Japanese trawlers fished there in 1961. And although we understand that the questions to be resolved by a court, we consider this a unilateral assertion of sovereignty that we will not find binding.

The United States replied to the Japanese' note of protest on June 19th saying that this was a matter to be decided by the court. The United States pointed out that it was not clear whether all of the vessels that were seized were within three miles from the shore of Shelikof Strait, in which case, if they were within the three-mile limit, they were in territorial seas, and maybe the seizure was proper at that time. But in any event the United States in response to the protest said it is not clear to us whether they were in the high seas or in the territorial seas, and we will leave that to a court to adjudicate. The court never did adjudicate; the actions against the Japanese were subsequently dismissed.

The next significant event, I suppose, in this sequence is that in January of 1963 at a breakfast at the White House where a number of Governors of Western States were present, plus

Attorney General Robert Kennedy and the President John F. Kennedy, as an aside, the President of the United States said to the Governor of Alaska, "You did the right thing."

This the district court found to be a clear assertion of sovereignty over Cook Inlet. We think that's a mistake of law for a number of reasons. Number one, obviously, the seizure didn't take place in Cook Inlet. It's like arresting a ship up Cape Hatteras as an assertion of sovereignty over Chesapeake Bay.

QUESTION: Doesn't international law recognize the doctrine of hot pursuit?

MR. RANDOLPH: These ships were tracked from the time that they entered Alaskan waters until the time that they left. That was ten days later that they were seized in Shelikof Strait. I don't think there is any evidence in the record that says that Alaska could not have seized them sooner. They had gone through the Shelikof Strait already once.

QUESTION: The statement you quoted as an aside, do you suggest that refers to what the Governor did in bringing the suit or in dismissing the suit?

MR. RANDOLPH: The record is totally unclear on that. It's page 281 of the appendix.

QUESTION: Did the district judge undertake to sort that out?

MR. RANDOLPH: He made a finding of fact. The

finding of fact is, I believe -- no, I don't have it. Page 218 of the first appendix is where this was stated. He said the Governor was told by the President that he did the right thing in seizing the vessels.

That's not what the Governor's testimony was but we will accept that. We are not challenging the findings of fact. Even accepting that it's not clear that the vessels were -- where they were, whether they were in territorial sea or within the high seas.

More than that, we don't even think this was a clear assertion of sovereignty of the Shelikof Strait, let alone Cook Inlet 75 miles away because of the fact that it has never really been determined exactly where these vessels were, whether they were in the high sea otherwise known as the high sea area.

Second of all, and more important, I suppose, is that this could hardly be considered an incident to give rise to historic title. One of the requirements is that other nations acquiesce an assertion of sovereignty. So even if this were a clear assertion, which we do not think it is, even if this were an assertion of sovereignty of Cook Inlet, nevertheless, it is met by an immediate response of protest by the Japanese Government.

On top of that, in regard to the Shelikof Strait itself, since 1962 the evidence in the record is that Russian

trawlers have been in the strait. I cite appendix 206. Japanese ships have navigated through the strait; appendix 232. And Canadians regularly fish for halibut there.

QUESTION: The strait is not in issue here, is it?

MR. RANDOLPH: No, it's not. And the question --

QUESTION: I thought it was rather clear, at least for purposes of this case, that three miles out from Kodiak Island and from the mainland of Alaska, of course, is territorial sea in the Shelikof Strait, but otherwise the waters of the Shelikof Strait are international waters.

MR. RANDOLPH: Alaska asserts sovereignty of them, at least that is the intent of their seizure of the Japanese vessels.

QUESTION: But that's not -- the waters of the Shelikof Strait are not at all in issue in this case.

MR. RANDOLPH: That's precisely my position, Mr. Justice Stewart.

QUESTION: That's the point of my question, too.

MR. RANDOLPH: The point is that the district court said this was the clearest in the entire record, this was the clearest assertion of sovereignty over Cook Inlet, this particular incident that I have referred to.

Now, beyond that, there are other existing regulations that are involved in this case that apply to the Cook Inlet area from the years 1906 until Alaska became a State. The one

important factor that I would like to bring out about them is thatnot a single time in the entire history of this inlet, the disputed portion of this inlet, was a foreign vessel or foreign national ever arrested -- ever. Not one. Now, it could be, one could say that nevertheless there could be an assertion of sovereignty because Cook Inlet was so well recognized, so well respected by the other nations of the world that no nation dared enter, no nation dared put its ships into Cook Inlet without seeking specific permission.

That's not the case in regard to Cook Inlet, because the fact of the matter is that there has been foreign fishing by Canadians for halibut within the inlet. It's documented in the record, from 1943 through to 1970.

Now, I would like to refer the Court to one finding in the district court's opinion, because we don't dispute it, but I think it's rather misleading. It's Finding 101 on page 44a of the appendix --I'm sorry, petition for certiorari. Finding 101 says that the fishing for halibut by Canadians was de-minimis because there were possibly only two undetected instances before Alaskan statehood in 1959, and after that -- careful with the language -- only five Canadian vessels had fished for halibut in Cook Inlet.

That's absolutely correct. What the court has not mentioned is it happened on 20 different occasions for a total of 115 days.

Nevertheless, the point of the court's holding in this regard that one can disregard the entry of Canadian vessels into Cook Inlet because of their infrequency is in our view a direct contradiction of international law. The Juridical Regime that the court has referred to points out that it may be that no action is necessary, but whenever any action is necessary in order to assert sovereignty over a particular area, that action must be taken or historic title cannot ripen. So therefore, Alaska's, or the United States' when the United States had this territory, failure to take any action against the Canadian vessels, we think, stops, prevents historic title from ripening.

Now, the district court pointed out nevertheless there were a great many instances of action against Americans, United States citizens that were fishing in Cook Inlet. Let me point out that throughout the entire findings of fact in the district court's opinion, in the 20th century the district court documented six arrests of American citizens prior to statehood within the disputed area of the inlet, just six. After statehood, on one day, July 6, 1970, the district court documented two arrests of United States citizens.

There is some testimony in the record, and we think the district court could not rely upon this, of officials who at various times patroled Cook Inlet, who were asked, "What would you have done had you seen a foreign vessel?" They

testified, Well, we would have seized it or we would have done this or that. The district court, we think, improperly relied upon that testimony. The requirement of international law is that an assertion of sovereignty be open and notorious. It has to give other countries of the world an opportunity to respond. The inner intentions of officials who patrol Cook Inlet, we do not think, rises to that kind of open, notorious action, and the district court improperly relied upon it.

As far as fishing was concerned in general, the fact that the United States regulates fishing of its own citizens, even on the high seas, is of no consequence whatsoever to determining whether international sovereignty, sovereignty as over inland waters, has been asserted over a particular area. The United States can exercise sovereignty -- or exercise authority over its own United States citizens regardless of whether they are in the territorial sea, the contiguous zone, or even on the high seas itself. The fact that in the middle of Cook Inlet United States citizens, six of them, were arrested in the 20th century to us is meaningless. To the district court, quite important. We think that was clear error.

The court also relied upon various other particular actions: The Alien Fishing Act, which was passed in 1906. The district court said this was a clear assertion of sovereignty. I invite the Court to look at the Act, what it

says is that no alien can fish within the waters of Alaska. That doesn't tell you where the waters of Alaska are. That doesn't tell you whether the United States exercise jurisdiction.

Before I leave this point, I think the most important -- one of the most important facts is that in 195? and again in 1953, before Alaska became a State, there was a controversy, a question, developed within the Bureau of Fish and Wildlife that was patrolling the area, about whether they could arrest a foreign vessel within the middle of Cook Inlet. They said -- Director Day, the International Director of the Fish and Wildlife Service, determined and instructed the people in Alaska that they could not because the middle of Cook Inlet was high seas. Again, I think that undercuts any idea that this is a claim of sovereignty and it was error for the district court to rely upon these facts which occurred but nevertheless we think are not relevant.

QUESTION: You didn't get to the Gharrett-Scudder maps.

MR. RANDOLPH: Right now.

The State says that one of the most significant assertions of sovereignty over all of Cook Inlet were the Gharrett-Scudder maps. Curiously, in the memorandum opinion of the district court there is not a word about the Gharrett-Scudder maps. They are mentioned in the findings of fact, but in the opinion which sets forth the reasons why the district court reached its result, there is not a word about the Gharrett-

Scudder maps. The facts of the maps, which are reproduced as two maps 8502 in the supplemental material here, they were transmitted to Canada for the purpose of fisheries management. The idea was that Canada wanted to see where the high seas area would be, where the United States would prevent net fishing of salmon by its own United States citizens. The maps, if the Court looks at them, were drawn with straight lines.

The United States does not use straight lines to define its international boundaries. It uses --

QUESTION: What was that number, Mr. Randolph?

MR. RANDOLPH: 8502. There are two maps.

QUESTION: 8502.

MR. RANDOLPH: 8502. The United States does not use straight base lines, but uses sinuosities that follow the coast line, draws undulations.

On top of that, Canada could hardly have conceived this as an assertion of sovereignty if it looked at the straight base lines, which would be a sudden departure. The maps were drawn by two Department of the Interior employees, which makes it suspect immediately. How could that be? One would suspect that the geologist of the State Department would set the international boundaries.

But beyond that, they are not even straight base lines in conformity with the Convention because the Convention requires for straight base lines, the lines touch

land each time a straight line is drawn. If you look at this map, you will find islands that are ringed by square lines. So it doesn't even conform to that.

In point of fact, the district court relied upon this. We think it was a mistake. I won't mention the disclaimers. I think they are adequately dealt with in the record.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Phillips.

ORAL ARGUMENT OF THOMAS M. PHILLIPS ON BEHALF OF THE RESPONDENT

MR. PHILLIPS: Mr. Chief Justice, and may it please the Court: In the short time that I presume to take this morning, I would like to ask the Court, or invite the Court's attention to two points, two issues:

The first issue may be fairly stated, I think, in this inquiry: Has there been an expressed or explicit claim of jurisdiction over Cook Inlet? If so -- and Alaska claims it is so -- then the two following elements, we think, fall easily into patterns of continuity of the assertion, the acquiescence of foreign nations.

In 1924 Congress enacted what is popularly known as the White Act. The purpose of the White Act was to protect the fisheries of Alaska. The Act authorized the Secretary of Commerce, in subsequent years the Secretary of the Interior, and I quote, "to set apart and reserve fishing areas in any of

the waters over which the United States has jurisdiction." These are the key words "any of the waters over which the United States has jurisdiction." These words set the stage for what thereafter the executive department of the Government was to do. Was it to set apart Cook Inlet as waters over which the United States claimed jurisdiction? Was it to set aside only a part of the waters, for example, three miles from the coastline? What did the executive branch do?

It set apart 12 fishing areas, geographically, by name, by definition. In the arrival of those 12 areas, the Secretary was careful to limit the jurisdiction claimed by the use of the words "territorial coastal waters." It might be helpful to the Court to look at just how this was done. Page 1171 of Volume II of the Appendix, look at the definition, for example. I am selecting this at random, of Bristol Bay. The Bristol Bay area is hereby defined to include all territorial coastal and tributary waters of Alaska from Cape Newenham, et cetera.

Look at the definition of the Kodiak area. The Kodiak area is hereby defined to include the waters of the mainland shore extending, and so on, and the territorial coastal and tributary waters of Alaska.

Now, traditionally, and the Solicitor has argued this both here this morning and in his brief, and we don't dispute it, the United States has limited its claim of

territorial sea to the breadth of three miles. What then, is the significance of the use of this language, "territory coastal waters"? Secretary of Interior Udall in a letter dated April 20, 1962, to the Secretary of State explained the significance of these waters, and he said that the use of the territorial coastal waters indicated an intent to limit the claim of sovereignty in those districts to three miles. That's in line with the traditional assertion of three miles for territorial sea.

I have said this was done in eleven of the districts. Look at the definition of Cook Inlet, the twelfth, page 1171. Definition, Cook Inlet Area. The Cook Inlet area is hereby defined to include Cook Inlet, its tributary waters, and all adjoining waters north of Cape Douglas and West of Point Gore. The Barren Islands are included within this area.

Notice the absence of words "territorial coastal waters." In talking about territorial coastal waters, Secretary Udall, and properly so, said the use of that language, and I am quoting, "negates any assertion of jurisdiction over the entire water."

But what about Cook Inlet? We suggest, and the Government has never answered this argument, that if today the Federal Government, who was the author of that definition, was given the chore of asserging jurisdiction over all of Cook Inlet, he could not have chosen clearer or more precise words or

more encompassing words than the words "all of the waters."

QUESTION: What did you say this document was, Mr. Phillips?

MR. PHILLIPS: This, Mr. Justice Brennan, is the regulations put out each year for 33 years by, first, the Department of Commerce, the Secretary of Commerce, and then in later years the Secretary of Interior, defining, as the Act required him to do, to set apart certain areas.

In the lower court the Government's chief witness, a man named Howard Baltzo, who had testified that he had some experience and expertise in drafting these definitions. We asked him if he could draft one so far as Cook Inlet was concerned that could use words that would more clearly assert jurisdiction than the language I have read to you, and of course he said he could not.

Now, why, the Court may ask, was Cook Inlet singled out? It's not an accident, because it was done year after year after year for 33 years from 1924 to 1957. Why? There are three reasons, and they are undisputed: First, there was judicial precedent for this. In 1892 a Federal district court, sitting in Alaska, had held that no part of the waters of Cook Inlet were international waters.

Secondly, Cook Inlet, unlike any other of the submerged land cases that this Court has considered, though it be a large body of water, is uniquely surrounded by the lands of Alaska.

If the Court please, here, as I point, is Cook Inlet. When you look at the whole map of Alaska as it is depicted here, you see this area that I am pointing to, Cook Inlet, although surrounded by the lands of Alaska, and this geographic fact, undisputed, was of significance to the district court in the Kodiac decision in 1892 and it was dealt with at length by the lower court in this case.

A third reason why Cook Inlet was singled out, the evidence is undisputed and the lower court found in its findings of fact that from the very beginning all of the waters of Cook Inlet have been vital to the interest of the inhabitants of the shores of Cook Inlet.

QUESTION: What you are telling us about the effect of the White Act is certainly strongly controverted by the Secretary entrusted with its enforcement, that is, then Secretary Udall, back in April of 1962 who says, these regulations were not intended to enlarge or extend the territorial waters of Alaska in a legal or jurisdictional sense. He also says that they were enforced only in three years -- '57, '58, '59, and never enforced against any foreign nationals.

MR. PHILLIPS: I know, you are looking at page 831 of the record.

QUESTION: Yes, the letter of April 20th, page 831.

MR. PHILLIPS: Now, in the first place, you will notice that he is not talking about Cook Inlet, and he is

stressing, as I pointed out a moment ago, the use of the words "territorial coastal waters." Now, if it's fair for him to say these words limit jurisdiction, and it is fair for him to say it, it's fair for us to say when those words are not put in the definition of Cook Inlet, but the words are "all the waters", then I think Secretary Udall's reasoning reinforces the claim, Mr. Justice Stewart, that Alaska makes here. At least that is our argument.

QUESTION: It is true, is it not, that the White Act was not ever enforced against non-Americans?

MR. PHILLIPS: Enforced in this sense, and we claim this is enforcement, that there were -- it was distributed throughout the world. It was the basis upon which repeated arrests had been made of American citizens. The lower court found these patrols were open and notorious, and that any foreign nation would have been put on notice --

QUESTION: It had to do with netting salmon, didn't it?

MR. PHILLIPS: Sir?

QUESTION: Didn't it have primarily to do with netting of salmon?

MR. PHILLIPS: Yes. Salmon was the important fishery.

The third reason that Cook Inlet was singled out was that which the trial court found, and based on undisputed

evidence, as far as we are concerned, not accepted by the Federal Government, is that if this fishing had not been controlled for the benefit of the American people, those fishing areas would have been destroyed to the economic disaster of the people of America and the citizens and residents of Alaska.

One final point. Chesapeake Bay is a historic inland bay. It has substantially the same words that were seized upon by a court that recognized Chesapeake Bay; the language that described a district, Chesapeake Bay, "over all the waters, shores, bays, harbors and .. comprehended within the lines drawn from Cape Henry to the mouth of the James River." If it's logical that Chesapeake Bay was held to be by this language a historic inland bay, by the same language, it's logical that the trial court found that Cook Inlet was a historic inland bay.

Let me pass to the second issue that I want to talk about, the claim that all Alaska has done has been to prove that this is a historic territorial sea rather than a historic inland bay. We say that argument is wrong, both legally and factually. First the Juridical Regime.

QUESTION: Your paper covers up the signal, but you are now in your colleague's time. I will leave that up to you.

MR. PHILLIPS: The Juridical Regime points out that a state which forbids foreign ships to fish therein

indisputedly demonstrates by such action its desire to act as a sovereign. Of course, where a nation's laws have been so clearly stated, as a Judicial Regime also recognizes, the foreign nations can recognize those laws and not come in, and in that even, of course, there is no occasion to enforce the law, and the findings bear on that.

Let me legally address that argument, however, the argument that we have shown only a territorial sea. The Juridical Regime states that the dominant opinion is that when you talk about historic bays, you are talking about inland waters. The Convention on Territorial Sea and Contiguous Zone, Article 7, permits a line to be drawn between the entrance points of a bay where the entrance points are not further than 24 miles apart. That line encloses inland waters. Section 6 excepts historic bays from that 24-mile restriction. So that if you draw a line across the entrance points on the exception of historic bays, that line necessarily encloses inland waters.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cranston.

ORAL ARGUMENT OF CHARLES K. CRANSTON ON BEHALF OF RESPONDENT

MR. CRANSTON: Mr. Chief Justice, and may it please the Court: This Court in the second Louisiana case indicated

that historic bay cases such as these raise principally factual issues, and that since the doctrine of historic bays is somewhat imprecise, it is to the tryer of fact to which this Court leaves the initial determination. Therefore, the evidence as to what constitutes a historic bay is in Alaska's opinion extremely important and is the claim upon which this case will actually turn.

Therefore, I would like to comment briefly on the evidence. As this Court is aware, and as there is no dispute, there are three criteria evidentiarywise upon which a bay status is characterized as historic. That is to say, the exercise of sovereignty over considerable period of time with the acquiescence of foreign nations.

With respect to sovereignty, the striking fact of this case is that witness after witness, without objection by the United States--incidentally, relative to this petition for writ of certiorari, no objection was made as to the introduction of any of this evidence in the petition. Witness after witness testified to continual patrols, continual arrests, continual boardings of vessels, and continual vessel arrests from the year, to begin with the Kodiak case, 1892, up to 1971, and the boardings and patrols were testified to by the principal witness of the United States, Mr. Howard Baltzo, as being a very significant act of enforcement.

And what was the enforcement to do? Principally

two things: One, witness after witness, uncontradicted, and the court so found, testified that Cook Inlet, from the line drawn by the court, that is to say Point Gore, Barren Islands, Cape Douglas, was patrolled for the purpose of enforcing the Alien Fishing Act, an act which specifically prohibited aliens from fishing in waters of Alaska under the jurisdiction of the United States.

The United States tends to disregard this evidence and say that the definition of "waters of Alaska" was unclear in the Alien Fishing Act. It is important to recognize that the act was passed only six years after the Kodiak decision of which Congress must have been presumably aware, which defined all of Cook Inlet as inlands waters of the United States, not international waters. That definition was incorporated into the Alien Fishing Act and enforced by agents and patrol officers of the United States. It is important that testimony on this point is clear and uncontradicted, and the lower court found this to be so.

Secondly, as to continuity, two expert witnesses called by the State of Alaska testified that based upon their historic research, again uncontradicted, and found by the lower court, that the usage or that the activities by the United States over all of Cook Inlet were such as to have developed into usage. This is the criteria specifically set forth by the legal document which no one to this date has

objected to and all agree is the criteria by which historic bay status is achieved, that is, the jurisdiction of the United States had established a usage over all of Cook Inlet. Two expert witnesses in the field of history again Alaska complied with what this Court has set to be the evidentiary standard in cases of this sort, that is, they are principally factual cases left to the discretion of the tryer of fact to determine. Based upon undisputed evidence, the tryer of fact in this case found that the sovereignty of the United States had been exercised, had developed into usage over all of Cook Inlet for a considerable period of time.

Perhaps the most interesting feature of this case is the third requirement, and that is the requirement of acquiescence. First, I would like to deal, since it was dealt at length in the Solicitor's argument, with the Shelikof Strait incident.

Contrary to the United States position, and this is unrefuted again in the facts, consistently throughout this case, both in the trial court, the Court of Appeals, and now this Court, the Government has refused to recognize the significance of this incident with respect to Cook Inlet. One need only refer to the Japanese note of protest, which appears at page 3A of the Appendix to the United States brief. The Japanese, notwithstanding what the United States now says, certainly believed that the sovereignty asserted by the State of

Alaska was over Cook Inlet. They certainly believed that the agreement entered into by the Japanese fishermen not to fish in Shelikof Strait and Cook Inlet applied to Cook Inlet. The note itself says the commitment made by the East Pacific Fisheries Company to the Alaska State authorities to abstain from operations in the Shelikof Strait and the Cook Inlet was made without knowledge of the Government of Japan.

QUESTION: What was that appendix reference?

MR. CRANSTON: Mr. Justice, that is appendix 3A on the brief of the United States.

QUESTION: 3A?

MR. CRANSTON: Yes, it's the last -- it's the page right before the map.

QUESTION: Paragraph 4.

MR. CRANSTON: The arrest of the ships was important. However, more significant are the actions of Japan and the United States subsequent to the arrest. Faced with the agreement not to fish in waters of Cook Inlet, what did the Japanese do? The Japanese did, it is true, and the record is undisputed, enter a protest. However, in response to this protest, the United States never at any time recognized or admitted to Japan or proclaimed to Japan that the waters involved, to wit, Shelikof Strait, and Cook Inlet, were international waters. In fact, it said this is a question which is more properly left to the decision of a court. And

this was done -- this response, incidentally, was done contrary to the advice of Mr. Yingling who was then the responsible attorney in these matters in the Department of State. That is what the United States did.

But even more significant is what did the Japanese do? From that time, the Japanese have not fished in Cook Inlet --

QUESTION: The problem with this Japanese seizure ... was it was not in Cook Inlet, but was in Shelikof Strait, and that's all spelled out in Japan's protest, and any reference to Cook Inlet is equivalent or analogous to what we call casual dicta in the Court opinion, it seems to me, it had to do with the seizure in Shelikof Strait which is not in issue here in this case at all. That's what the protest was about.

MR. CRANSTON: Mr. Justice, I fully agree that the arrest had to do with Shelikof Strait, but what is important was the agreement entered into after Shelikof Strait upon which the Japanese note commented, and the actions of Japan in face of that agreement, after the agreement was entered into and after its note of protest complaining about the agreement's application to Cook Inlet.

QUESTION: Are you referring to the agreement that the captain or the crew made after they had been, their ship had been seized?

MR. CRANSTON: That is correct, Mr. Chief Justice.

And that is the agreement which was referred to and complained about in the Japanese note.

QUESTION: Don't you think there might be some question about the status of a note secured under, an agreement, as you call it, from the crew of a small fishing vessel under those circumstances? Might you not have some Miranda problems and a few others like it?

MR. CRANSTON: Aside from the fact that we are dealing in what is essentially a civil case, Mr. Chief Justice, I would not rely on the agreement as acquiescence by the Japanese. We do rely on the response of the Japanese Government after the agreement was entered into and after the protest was made, that being the fact that in face of continuing State of Alaska jurisdiction over Cook Inlet, as expressed through its regulations, which the testimony again uncontestedly points out, was disseminated to Japan, that is, regulations which state all of Cook Inlet within the line Gore-Douglas-Barren Islands are waters of Alaska for over which it asserts jurisdiction. In the face of those agreements the Japanese have not entered Cook Inlet. They have refrained from entering Cook Inlet, and this, we feel, is the significant fact. The Governor of Alaska testified that the Japanese had not entered Cook Inlet, and the evidence bears this point out.

QUESTION: Had they gone into Cook Inlet before that?

MR. CRANSTON: The only recorded incident of their entering Cook Inlet is Mr. Ichimura's testimony at the trial where for approximately six hours the Japanese fleet was in an area north of the Barren Islands enroute to Shelikof Strait. There is no other reported incident, and that incident, may it please the Court, was not observed by officials of the State of Alaska. So we contend that the actions of Japan subsequent to the agreement clearly are acquiescence.

There is one other point I should like to make.

QUESTION: Has the Japanese fishing fleet ever come into Chesapeake Bay?

MR. CRANSTON: Mr. Justice, I --

QUESTION: I draw that. I'm not trying to trap you. It's never been in this inlet. Now, how do you draw from the fact they haven't been in since this letter is so great if it's never been in there at all?

MR. CRANSTON: The fact, Mr. Justice, is that the Japanese protested the application of the agreement to Cook Inlet, and they expressed concern over that, apparently, and in the face of their protest, they have abstained from fishing in Cook Inlet. They thus felt it was .. Americans but they have not followed up.

QUESTION: They haven't stopped.

MR. CRANSTON: Yes, they have.

QUESTION: They can't stop what they never started.

MR. CRANSTON: They felt that apparently, Mr. Justice, they had a right to do so or else they would not have protested. They have abdicated that right by discontinuing their protest. That coupled with the absence of their fishing is the important fact demonstrating acquiescence.

QUESTION: Mr. Cranston, I want to be sure. Has Alaska now abandoned its claim that sovereignty at one time was exercised by the Russians? You no longer rely on this?

MR. CRANSTON: We feel, Mr. Justice, that that is not crucial to the disposition of this cause. We do not admit nor do we feel the record does indicate that the Russians at any time ever abandoned sovereignty to Cook Inlet. However, since the assertions of jurisdiction by the United States and the State are so longstanding since that time that it has no bearing upon what this Court should decide with respect to this case.

QUESTION: On the Japanese situation, you are taking the position, I take it, that the absence of Japanese shipping in Cook Inlet equates with a positive acquiescence in the claim of sovereignty.

MR. CRANSTON: That is our position, your Honor. We feel that it equates with acquiescence.

QUESTION: Do you have any other instance of any other foreign nations' acquiescence?

MR. CRANSTON: Yes, we do, although I would be very

glad to answer that question, if I may.

We feel that the Gharrett-Scudder line is an indication of Canada's acquiescence in Cook Inlet, and I would briefly state why. The line was drafted upon Canada's recognition, and this is important, it recognized the regulation which had been drafted by the United States relative to fishing in Alaska. This particular regulation defined the waters of Alaska as extending three miles, which can only relate to territorial sea, from lines extending from headland to headland across the entrances of bays. This regulation adopted in 1957 was apparent to Canada since they asked for charts which delimited the line in Alaska described by the regulation, which in fact defined waters of Alaska. The charts were prepared and transmitted to Canada from the United States Embassy in Ottawa in 1957, showing Cook Inlet to be within the line from which the three-mile line was measured. The testimony of William Terry indicated that as to Cook Inlet the Japanese had no quarrel and there has never been an objection registered by Canada as to the placement of the Gharrett-Scudder line with respect to Cook Inlet. There is some minor dispute as to something down in the Strait of Juan de Fuca and something in southeastern Alaska, but not as to Cook Inlet. This we consider to be acquiescence by Canada as to the assertion of sovereignty by the United States through a regulation determining the 3-mile limit in Cook Inlet.

QUESTION: But the fact is that Canadian fishermen, mullet fishermen have been in there since.

MR. CRANSTON: The record, Mr. Justice, and the finding of the court is that this was done in 1957 subsequent to statehood. There have been five vessels undetected in Cook Inlet.

QUESTION: If they were undetected, how does anybody know they were there?

MR. CRANSTON: That's correct.

QUESTION: How do we know they were there?

MR. CRANSTON: The records of the Pacific Halibut Commission when a vessel enters any waters under the jurisdiction of the Halibut Commission, it must file records with that commission as to where it has fished. And some of those records, Exhibit 78 and 80, indicate --

QUESTION: Show they were in Cook Inlet.

MR. CRANSTON: Yes. But more important, Mr. Justice, is that some of the records also indicate clearly that the Canadian vessels were within the three-mile limit of Cook Inlet. There is one which indicates it was within Chugach Island. The record also indicates that as to Canadian halibut vessels, the policy of the United States Fish and Wildlife Service was to be lenient, and the record also indicates that in the case of more serious fisheries where jurisdiction, where sovereignty is clearly threatened, Howard Baltzo

indicated that in the case of a Canadian salmon vessel, enforcement action would probably have been taken.

QUESTION: Back in this 1962 Japanese seizure incident there seems to be some -- nobody seems to have known where the Ohtori Maru was seized. Was that ever established? One of the vessels.

MR. CRANSTON: Mr. Justice, there were three vessels involved, the Banshu Maru, and I believe two mother ships, or two other sister ships. One of the ships was clearly within three miles. One of the ships was clearly outside of the three miles. I believe the record is clear. And there is no dispute that one of the ships seized was outside the three-mile limit at the time it was seized. Governor Egan's testimony again is unrefuted on this point.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:14 a.m., the oral argument in the above-entitled matter was concluded.)