

In the

Supreme Court of the United States

United States Of America

Plaintiff

v.

States Of Florida And Texas

No. 54 Original

Washington, D. C.
January 17, 1977

Pages 1 thru 32

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UNITED STATES OF AMERICA, :
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Plaintiff, :
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v. : No. 54 Original
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STATES OF FLORIDA AND TEXAS :
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Washington, D. C.
Monday, January 17, 1977

The above-entitled matter came on for argument at
2:12 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
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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For Defendants
- WILLIAM F. SHEEHAN, III, Assistant to the Solicitor
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For Plaintiff
- SYDNEY H. MCKENZIE, III, Assistant Deputy Attorney
General of Florida, Tallahassee, Florida
For Defendants

C O N T E N T SORAL ARGUMENT OF:PAGE:

LEE C. CLYBURN, ESQ.
For Defendants

3

WILLIAM F. SHEEHAN, III, ESQ.
For Plaintiff

16

REBUTTAL ARGUMENT OF:

SYDNEY H. MCKENZIE, III, ESQ.

24

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 54 Original, the United States against Florida and Texas.

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

ORAL ARGUMENT OF LEE C. CLYBURN, ESQ.,

ON BEHALF OF DEFENDANTS

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

My name is Lee Clyburn. I am an assistant attorney general of the State of Texas. However, for purposes of the argument today, I will be representing the views of both the States of Texas and Florida since there are no divergent or independent views as to those two defendant states.

The issue before the Court today is whether the defendants in this Original proceeding will be allowed to file a counterclaim nominally against the United States of America.

The Special Master has filed a report recommending that the counterclaim not be filed because of the United States' Sovereign Immunity. The defendant states urge this Court to refuse to apply the Doctrine of Sovereign Immunity in the mechanical, uncritical manner advocated by the United States and to grant leave to file this counterclaim so that full justice may be done herein.

This is strictly a lawsuit for declaratory relief.

It was originally filed by the United States against the states of Florida and Texas seeking a declaration that neither defendant had any right to control fishing by foreign vessels or their crews in the seas more than three miles off their shores.

The states answered and opposed the United States' request for declaratory relief. The states each assert that they do possess the right to enforce their laws at all points within their boundaries, which boundaries in the case of each of these two states extend three leagues or nine geographical miles into the Gulf of Mexico.

It became clear as discovery progressed in this lawsuit that the United States' true position was, as the Defendants state, not only did ^{they} not have any right to enforce their laws outside of three miles, but indeed, the Defendant States of Florida and Texas had no rights to enforce their fisheries laws against foreign nationals, even in the three-mile zone between the shore and three miles out where the traditional territorial sea of the United States had been locating.

Now, in order to clear up the whole question of the respective rights of the parties with regards to this important issue of offshore law enforcement rights, the Defendants have filed their joint motion for leave to file

counterclaim.

By that counterclaim, the states seek only a declaration by this Court that they do have the authority to enforce their fisheries laws against foreign vessels and their crews within three miles from their shores.

United States opposes the filing of the counterclaim, relying primarily upon the Doctrine of the United States' Sovereign Immunity from suit.

The Special Master, in his report filed with this Court finds that the expeditious and orderly procedure in this lawsuit would dictate the allowance of the filing of the counterclaim but the Special Master felt that the decisions of this Court required him to recommend that the counterclaim not be allowed to even be filed because of the Doctrine of Sovereign Immunity.

The Defendant States fully concur with the Special Master's findings that, absent the issue of sovereign immunity, the counterclaim should be allowed. We strongly except, however, to the recommendation of the Special Master that the counterclaim should be barred by operation of the Doctrine of Sovereign Immunity.

No case known to the Defendants requires acceptance of the United States' position on this matter.

QUESTION: Is there anything that Legislation passed last October that has anything to do with the Doctrine of

Sovereign Immunity that Congress passed?

MR. CLYBURN: Your Honor, we feel not. It is my understanding that the Solicitor General is going to explicitly bring that statute to the Court's attention for whatever bearing it might have. I myself do not feel that it has bearing on the issue today of whether the counterclaim should be allowed.

We feel that only an absolutely uncritical adherence to the most technical views of the position of the Doctrine of Sovereign Immunity in our country would require or even allow the result urged by the United States.

On the other hand, the filing and adjudication of the counterclaim would allow the entire disagreement between the parties to be dealt with in this lawsuit and that full justice could be done herein to all parties to this lawsuit and not just to the United States.

QUESTION: Is there anything to the suggestion that if your counterclaim is allowed, other states will be implicated also?

MR. CLYBURN: Mr. Justice Blackmun, it is true that the issue that we raised in our counterclaim would probably be of interest to the other coastal states as well as merely to our two states that are defendants in this lawsuit.

It is, however, our position that that should

certainly not stand in the way of the filing, for the issue is of very great importance to these states in this lawsuit and it seems to us -- it seems to us almost incredible that the United States would say that the counterclaim should not be filed merely because other states' legitimate interests would be called into question by the counterclaim.

They have called it into question and now they refuse to allow the issue to even be adjudicated.

QUESTION: Well, you are not relying just on your status as a counterclaimant. You are saying that the other states who might be implicated, along the lines of Mr. Justice Blackmun's question, should also be allowed to intervene in the proceedings?

MR. CLYBURN: I really don't know what our position would be if other states sought to intervene, your Honor. I don't. What I am saying is, is that it is of interest to us. It is legitimately raised in this lawsuit and we should be able to adjudicate it by counterclaim.

If other states sought to intervene, the Court would have to deal with that question and the United States would have to respond to it at that time.

The United States in its brief to this Court makes the following statement that clearly demonstrates what we feel is the arrogance and unyielding nature of its position and I quote from page 7 of their brief:

"In sum, Defendants' arguments that adjudication of their counterclaim is imperative lest justice be denied misses the point."

Now, we point out to the Court that for reasons best known to the Government, they saw fit to put the word "Justice" in quotation marks in that passage from their brief.

Be that as it may, it seems to the Defendants that in this Court, inquiries into the justice and fairness of a given result never miss the point. To the contrary, that inquiry -- that inquiry as to what is fair and what is just -- should always be exactly the point and it is on that point that the United States' position completely fails.

QUESTION: Well, isn't that quote from the Government's brief largely based on our opinion last year in the Testan case where we pretty much took the same position, that it may be a more enlightened view that sovereign immunity be abrogated but it is not up to this Court to do it.

MR. CLYBURN: Your Honor, they do cite the Court's opinion immediately after the quote that I read. It is the states' position, however, that the cases cited, and all of the cases, indeed, reported and relied upon for the application of the Doctrine of Sovereign Immunity were cases that are distinguishable from this one in effect, the possible effect that the filing of the suit or the counterclaim might have on the United States.

In this lawsuit it is our position that the counterclaim could have no adverse effect or embarrassment to the United States whatsoever.

QUESTION: General Clyburn, might I ask you a question on the nature of the conflict between the United States and the two defendants within the three-mile limit?

Paragraph two of the motion for leave to file a counterclaim contains the allegation that the United States, through discovery, has denied the states authority to control fishing by foreign vessels and their crews within the -- in the area within three miles seaward of their coastline.

MR. CLYBURN: Yes, your Honor.

QUESTION: Two questions. Is there anything else in the record shedding any light on the nature of the conflict between the states and the government within the three-mile limit?

MR. CLYBURN: Yes, your Honor. In our motion for leave to file counterclaim we set out, and we quote from answers to interrogatories and from deposition testimony wherein the United States does deny that right.

Is that response sufficient?

QUESTION: Yes, I was wondering how -- it is in response to interrogatories and the like that they say -- there has been no conflict in -- is there anything in the record to indicate that there is any conflict in the sense

that patrol vessels are arguing with one another about who can make arrests or is there any actual physical conflict of any kind?

MR. CLYBURN: Mr. Justice Stevens, the answer to your question is no. And the answer to your question is no both as to the belt within three miles and as to the area outside of three miles, at least as far as the State of Texas is concerned and I would point out that we, the State of Texas, has filed in its answer an allegation that no justiciable case or controversy as to it exists and it is for precisely the reason that there has not been any clashes between patrol boats or the likes between the State of Texas and the United States that we raise that point in defense of this lawsuit.

So the state's position in a nutshell is that there is no justiciable case or controversy as to Texas with regard to the United States' original request for declaratory relief.

QUESTION: If you are right about that, there will never be need for the counterclaim, will there?

MR. CLYBURN: Absolutely, your Honor. If the United States' case is dismissed, we'll not be in a position or care to pursue our counterclaim.

QUESTION: Who -- I perhaps should ask Mr. Sheehan -- what do you understand to be the United States' theory with respect to the area outside the three-mile zone?

MR. CLYBURN: Well, your Honor, it is not clear in

my mind, to be honest with the Court, but it is my understanding that --

QUESTION: You are claiming your right out to three marine leagues?

MR. CLYBURN: Yes, sir.

QUESTION: And what do you think their position is?

MR. CLYBURN: As I can understand it, their position is linked to the notion that the territorial sea of the United States has traditionally been three miles and that action beyond that could have implications that they say would have more effect upon them than our actions within three miles.

QUESTION: If the difference, so if they deny your right within three miles it is for a different reason than outside?

MR. CLYBURN: Excuse me, your Honor, I think I may have not been plain in my answer. I think their distinction as to why they should --

QUESTION: I was just wondering if the grounds urged are different?

MR. CLYBURN: Not really, your Honor. Excuse me, I was confused in my earlier response. Apparently they don't think there is any difference in our rights within three miles and outside. At least, that is what they said repeatedly in the discovery that I have alleged, as I pointed out in my

brief.

QUESTION: But you think both within and without three miles their idea is that this has foreign relations implications?

MR. CLYBURN: Yes, sir. That is correct. That is what I understand and what they are saying to us is that although we feel that you don't have it anywhere, just for reasons best known to us we only want to let you litigate with us right now on the area outside of three, between three and nine. That is what we don't think is fair.

And examination of the effects of the filing of our counterclaim --

QUESTION: Did they draw a difference between navigation and fishing?

MR. CLYBURN: Fishing is the Only issue that they raise in their lawsuit or that we mention in our counterclaim. I think that the traditional law of the sea makes distinctions between the rights of fishing and the rights of navigation.

QUESTION: Do you, in terms of what your rights are?

MR. CLYBURN: Yes. Yes, your Honor. For example, we would never seek to prevent any --

QUESTION: To exclude a foreign ship.

MR. CLYBURN: Absolutely. If it were engaged in innocent passage and no one has ever alleged that we have or want to.

QUESTION: General Clyburn, let me just ask you again, I am a little puzzled about the prejudice to the State of Texas. If you win, you won't be hurt by not being able to file a counterclaim.

MR. CLYBURN: If we prevail on the merits of the lawsuit?

QUESTION: Yes.

MR. CLYBURN: Probably not. Probably not, Mr. Justice.

QUESTION: Then it is up to the government. And if you lose, don't you have two bites at the apple, in effect, with regard to the area within three miles?

You have only lost in the area three to nine and you still have all your arguments for within the three-mile zone.

I have a little difficulty seeing the prejudice.

MR. CLYBURN: The prejudice, your Honor, would come in in, we feel, in various ways. First, not of ultimate importance in this Court but a very real one to the states would be that it would subject us to the very real possibility of a repeat litigation of a few years from now when they decide to sue us on the inner belt. That would be unfair.

More fundamentally -- more fundamentally, were we to lose on the merits of their original complaint and be denied our right to file and litigate our counterclaim, we

would be in the position of not knowing whether we could legitimately enforce our rights within three miles and we would be in a position of doing so at our peril of, at the very least, having a lawsuit filed against us by the United States when they chose to do so.

QUESTION: But the peril --

QUESTION: And addition to every single other coastal state.

MR. CLYBURN: It would seem so.

QUESTION: That's right. That would just proceed along with every other coastal state except for Texas and Florida in the Gulf, wouldn't it?

QUESTION: Isn't that the same peril that has existed for the last 100 years?

QUESTION: For every coastal city.

MR. CLYBURN: We don't think so, your Honor, because to my knowledge, the recent developments in this lawsuit have been the first time the United States has come right out and told us, we don't think you have any rights at all to enforce your laws against foreign nationals anywhere offshore.

That is news to me and I think it is news to anyone who learned about it so it is not -- I just think in that regard it would be a different situation.

The filing of the counterclaim cannot possibly have any adverse effect upon the United States. Not one penny of

monetary judgment brought against us by means of the counter-claim. We don't seek to force them to deal in any particular way with any federal property, to deed it to us or to deed it to anybody else or to refrain from doing anything they want to with any of their property.

Very significantly, we don't seek to have them ousted from jurisdiction to enforce fisheries regulations at any point anywhere on the face of the earth.

It is the position of the states and always has been that the states and the Federal Government possess concurrent jurisdiction within the entire belt to enforce their laws against any violators. We are not seeking to hurt the United States.

I have already told you our view of the harm and prejudice that would come to us and the basic unfairness of letting the United States wave the banner of Sovereign Immunity without even attempting to give us or this Court or anyone any logical reason as opposed to a dogmatic assertion of it as a means of avoiding litigation of the full subject matter that they have brought into issue by filing this lawsuit.

QUESTION: Is it possible to infer that you may have raised the issue by asking certain questions on written interrogatories and all?

MR. CLYBURN: Well, your Honor, we are asking interrogatories to get at the distinction they had raised in their

lawsuit by assuming so many outside of three. We are asking them to try to find out a logical basis, for their choice of assuming it is only outside of three rather than all the way into the shore and it is in response that they said, you don't have any rights.

For the reasons that we have outlined, we urge the Court not accept the United States' dogmatic view of sovereign immunity and to allow the filing of this counterclaim so that the full issues can be litigated in this lawsuit.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Sheehan.

ORAL ARGUMENT OF WILLIAM F. SHEEHAN, III, ESQ.,

ON BEHALF OF PLAINTIFF

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

I do have in mind discussing the recent legislation that my opponent referred to.

With the Court's permission, I'll postpone that discussion until a more appropriate part of my argument.

The issue that is now before the Court is quite a narrow one. The issue is, simply, should the Court grant the motion of the defendant states for leave to file their proposed counterclaim?

QUESTION: Mr. Sheehan, I wonder if you would lift that microphone up a little bit. Will you?

MR. SHEEHAN: The states have taken the position that they do have those rights. They assert that their authority in this connection derives at least in part from the 1963 Submerged Lands Act. That Act, of course, granted to the states rights in the natural resources within the territorial sea, granted to all of the coastal states those rights in the territorial sea and as to the States of Texas and Florida, it granted those rights out to a distance of nine miles in the Gulf of Mexico.

The defendants states are, therefore, the only states that can assert a claim of jurisdiction over foreign vessels beyond the territorial sea on the basis of proprietary interests granted by the Submerged Lands Act. They are, indeed, the only states that have asserted in this fashion such a claim and they are, accordingly, the only states named by the United States as the defendants in this suit.

The counterclaim that the states would bring involves rights in the three-mile territorial sea. Those rights affect the concern of every coastal state.

We have objected to that counterclaim on grounds of immunity.

Our argument proceeds in four steps. First, that the United States may not be sued without its consent.

Second, that the rule applies with equal force when the plaintiff is a state.

Third, that the United States has not consented to this lawsuit by statute.

And, fourth, that it has not consented to this lawsuit by virtue of having initiated a complaint.

The first proposition needs, we think, very little elaboration. As the Court stated last term in Testan, it has long been established, of course, that the United States as a sovereign is immune from suit, save as it consents to be sued.

Likewise, the second proposition has established beyond doubt in our view, the exemption of the United States from being sued without its consent, extends to a state.

I think the last time this Court had occasion to state that rule squarely was in Hawaii against Gordon in 373 United States Reports.

Our third proposition is that the United States by statute has not consented to this suit and indeed, the states have never claimed otherwise.

In this connection I will raise the legislation enacted last October by Congress and I am referring to the waiver of immunity that Congress worked as an amendment to the Administrative Procedure Act. We have included a copy of the Amended Administrative Procedure Act as an appendix in our reply brief in Matthews against Mister Sanders.

That waiver of immunity has no effect in this case, which is not a suit to review agency actions brought under the

Administrative Procedure Act.

Another piece of legislation that is not referred to in the brief is the Act last year by Congress, the Fishery Conservation and Management Act of 1976. By that Act, Congress extended its exclusive fisheries jurisdiction to a limit of 200 miles from the coastline.

That Act leaves this lawsuit where it finds it. In Section 306 of the Act it says explicitly that nothing contained in the Act shall have any impact, either to enlarge or to diminish the jurisdictions of the states within their boundaries. That, of course, is the issue posed by the United States' complaint, what is the jurisdiction of the state within their boundaries in the three to nine-mile area?

There is a provision for suit in the Act extending the exclusive fisheries jurisdiction of the United States out to 200 miles. That provision for suit does not contemplate suits by states inasmuch as it provides for exclusive jurisdiction of cases or controversies arising under the Act in the District Court.

Congress could not have contemplated that states would sue under that provision inasmuch as the Constitution gives this Court original although not exclusive jurisdiction over actions in which a state may be a party.

That provision pursued also is of no aid to the states in this case because it provides only for suits in the district

court, not in the Supreme Court and finally, it is void to the states because it does not take effect until March 1st, 1977.

Thus, the United States has not by any statute consented to be sued in the manner that the states seek to do and so the issue becomes whether the United States, by initiating a lawsuit, consents to be sued. It clearly has not.

QUESTION: Do you have a case involving a counter-claim against the Federal Government?

MR. SHEEHAN: I'm sorry, Mr. Justice.

QUESTION: Do you have a case involving a counter-claim against the Federal Government and sovereign immunity?

MR. SHEEHAN: Yes, indeed, I have two. One is the United States against Shaw 309 United States Reports and another is United States against United States Fidelity Company.

QUESTION: 309 what?

MR. SHEEHAN: 309 U.S. Reports, page 495. And the second is United States against United States Fidelity Company 309 United States Reports 506.

There is, indeed, a third case, Nassau Smelting Works against United States 266 United States Reports page 101. I'll read from that -- I'll read one -- two sentences from that case.

"The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either

case does not exist unless there is specific Congressional authority for it." That is at page 6 of the Government's response to the defendants' exceptions to the Report of the Special Master and the other two decisions that I have just cited, Mr. Justice, the Shaw case and the Fidelity Corporation case, are also mentioned in our brief.

QUESTION: So you don't think the point is home.

MR. SHEEHAN: Well, I do think the point is home, Mr. Justice. I will add only one statement. There is one --

QUESTION: Would it be possible without this for the Master to say that in deciding your case he not only decides against you but he goes a little step further?

He couldn't do that.

I mean, could he give him this relief without them asking for it?

MR. SHEEHAN: No. The Special Master can decide the United States' complaint without reaching any of the issues posed by the counterclaim, in our view.

QUESTION: Well, I am saying it does grant all that the counterclaim asked for without the state asking for it.

MR. SHEEHAN: Well, to the degree that there is an identity of issues, as the state asserts, between the subject matter of its counterclaim and the subject matter of the Government's complaint, then there is no necessity for the counterclaim. Is that what you are driving at, Mr. Justice?

QUESTION: No, sir. I am saying that they did not file the counterclaim and the case went to judgment and the Special Master ruled against you and gave them the additional relief which they had not even asked for.

Would that be wrong?

Would that be a violation of the sovereignty?

MR. SHEEHAN: Well, I think that the United States would object and -- no, the United States -- no, the Special Master could not give them the relief that they are asking for in their counterclaim. They are seeking a declaratory judgment in their counterclaim.

If we were to lose our complaint, the result would be that we would not be entitled to a declaratory judgment in our favor. The Court could not or the Special Master could not in that case award a declaratory judgment that was not asked for by the state any more than he could award any affirmative belief on behalf of the state.

QUESTION: But if you lose on the merits of the claim that you asserted in your original complaint a fortiori you would, the merits of the counterclaim would be decided against you, wouldn't it?

You claim that the state has no power to regulate fisheries between the three-mile limit and the three-league limit, as I understand it. Is that correct?

MR. SHEEHAN: That is correct.

QUESTION: And if --

MR. SHEEHAN: And if we lose --

QUESTION: And if the Master says, and this Court ultimately says, "Sorry, the state does have the power to regulate the fisheries between the three miles and three leagues," well, then, a fortiorari it would have power to regulate fisheries within the three miles, would it not?

MR. SHEEHAN: I think that it would, at the very least, be very strong precedent against the subject suit by the United States.

QUESTION: That is true, yes.

MR. SHEEHAN: That is certainly true.

If there are no questions, that is all I have.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McKenzie.

ORAL ARGUMENT OF SYDNEY H. MCKENZIE, III, ESQ.,

ON BEHALF OF DEFENDANTS

IN REBUTTAL

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

If, in fact, sovereign immunity is, as the Federal Government asserts, absolute but for statutory waiver, then, indeed, we probably do lack the right to assert this counter-claim.

If, however, as we submit and as we have submitted

in our memoranda, the Thekla case decided by this Court does open the door, even a crack, to counterclaims in order to completely determine an issue where the Federal Government enters into litigation and where there is no danger to the public interest and this is a most appropriate case to apply that doctrine in Thekla.

In that case, this Court asserted, "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest."

QUESTION: What are you reading from?

MR. MC KENZIE: I am reading from Luckenbach Steamship versus the Norwegian barque, the Thekla.

QUESTION: Wasn't that pretty well-limited to admiralty cases by the Shaw case that was decided later?

MR. MC KENZIE: Your Honor, I submit that what the Shaw case did was simply state that this was not -- that the Thekla should not be interpreted as throwing the gates open wide to counterclaims against the Federal Government and I don't think it does and I don't think the language of it should be interpreted as doing so.

I don't believe that it did limit it to the -- it

distinguished it on the grounds that it involved a libel involving vessels but in distinguishing it on that factual basis, it simply said that the case does not throw the gates open to counterclaims.

I don't submit that it does throw the gates open to counterclaims.

Except, well, except this one as one unique circumstance, your Honor, and it is unique.

QUESTION: Well, what limits would you put on this?

MR. MC KENZIE: I would put on it the limits of a counterclaim which, one, doesn't involve the expenditure of public funds. Two, doesn't involve an assertion of a right regarding federal property and three, doesn't interfere with public administration.

QUESTION: What if the United States says that interferes with our control of foreign affairs?

MR. MC KENZIE: What if they say it involves --?

QUESTION: An interference with the federal control of foreign affairs?

MR. MC KENZIE: Well, but that isn't what they said, your Honor. And --

QUESTION: Well, what if they did?

MR. MC KENZIE: What if they did? I would submit that it still wouldn't --

QUESTION: What is your thought -- what do you

understand the government's theory is with respect to the area between three miles and nine marine leagues? Nine marine miles.

MR. MC KENZIE: Well, unfortunately, their arguments in their brief and their arguments, their statements by State Department officials run somewhere nonparallel to each other.

In their briefs they argue that really, the reason you don't want to bother with this is because if somebody comes in within the nine miles -- within three leagues, they are likely to be stopped by the Federal Government out there and they are not likely to come within three miles so it is not an issue that we should be bothered with at this time.

Their position there really one of, in effect, saying it isn't going to make any difference in foreign affairs.

On the other hand, the State Department officials who responded to interrogatories simply said that it is their understanding that the Federal Government has absolute and unilateral control over foreign nationals fishing in Florida waters or any other waters.

I submit that it is really on the basis of, in part, federalism that we come before this Court.

They have argued that -- in their argument on instituting the original suit that within the three-mile to three-league area, that they should, that it is imperative that this Court decide the issue and that they file their complaint, the

reason being that if we arrest a foreign national in that three-league -- three-mile area, that it may cause this Court to be faced with a situation -- or cause the Federal Government to be faced with a case where we have embarrassed the Federal Government in its international policy by arresting foreign nationals that they don't feel we should arrest.

However --

QUESTION: Well, don't you think there is something to be said for that? If any one of a half a dozen or more states is free to go out and put grappling hooks on a Russian fishing boat or a Panamanian or whatever and pull them into the shore and hold the crew in custody?

MR. MC KENZIE: Absolutely, your Honor, and that is exactly our point in bringing this counterclaim. What is true between three miles and three leagues is just as true between the coastline and three miles. If we can --

QUESTION: It all goes to the merits of this controversy. We are not here involved with that, are we?

MR. MC KENZIE: I am sorry, your Honor?

QUESTION: All these things go to the merits, of whether or not you are right or wrong on the merits.

MR. MC KENZIE: In order to determine whether we fall within what we feel is the exception to the rule, to the absolute prohibition against counterclaims as expressed in the Thekla case, I think you have to address the merits of our

relief, what relief are we seeking?

QUESTION: Yes.

MR. MCKENZIE: We are seeking a pure declaratory judgment. We are not seeking the -- if the declaratory judgment was decided, the limitations of the relief would be, if there were any limitations, it would be limitations on the states, not limitations on the Federal Government.

We recognize the Federal Government has concurrent power to exercise police power within this area so that no decision would be made limiting the Federal Government's police power, no monetary decision would be made against the Federal Government, no limitation of their administrative powers would be asserted, no embarrassment would come to the Federal Government as in some other cases.

This is a peculiar, unique case where the states of Florida and Texas need an answer. They need an answer to an issue that, in basics, was raised originally by the Federal Government. That is the basis of our coming into Court. That is the basis of our seeking this litigation.

We would be placed in a position where, even though a partial addressing of the issue had been made, where we wouldn't be able to properly direct our people as to what to do or not to do and they have indicated to me that they -- yes, your Honor?

QUESTION: Is it not possible that the Master and,

presumably, this Court, may accept the report, would rule that the same rule of law applies within the three-mile limit as applies between the three-miles and the nine-mile limit?

And if he does, then won't you get your answer when this case is all over?

MR. MC KENZIE: Your Honor, of course, something like that would be true in any case where there was a possibility of a counterclaim that a court might go beyond the declaratory relief of the original action but the result would be that by relying on happenstance and chance in that way, the positions of the parties would not be set forth for the benefit of the Master or for the benefit of this Court.

QUESTION: The only thing that you are really worried about is that if the Court rules with the Government, you can't even file a new suit because of Sovereign Immunity.

MR. MC KENZIE: Well, that is why I say it is a matter of these things. Of course that is what we are concerned with.

QUESTION: Weren't you considering filing this suit before the Federal Government did?

MR. MC KENZIE: Weren't we considering filing it?

QUESTION: Yes, and found out you could not. So you waited.

MR. MC KENZIE: Not to the best of my knowledge, your Honor.

QUESTION: That is not far from correct.

MR. MC KENZIE: Our people were -- our people were asserting their rights quite unequivocally and I think that is what inspired the Federal Government to bring this suit.

QUESTION: But the point is that right now, if Federal Government withdraws its suit.

MR. MC KENZIE: Yes, your Honor.

QUESTION: So will your counterclaim be gone.

MR. MC KENZIE: If they were to -- yes, I am saying that if the issue should be --

QUESTION: So the only way you have got a counterclaim is because they filed a suit.

MR. MC KENZIE: And that is exactly the language of the Thekla, where they said, "It is said that there is no statute by which the government accepts this liability. It joined in the suit and that carried with it acceptance of whatever liability the courts may decide to be reasonably incident to that act."

What we are asking is that if the Court decides that this is a suit that should be brought, if the issue of police power in the adjacent coastal waters is a proper issue to be before this Court, then it makes no sense to decide half the issue, that it is appropriate without any exposure to the Federal Government for the Master and this Court to decide the entire issue; that it is appropriate that it comes within all

adoptions of judicial expediency, one of which was a point which was raised by the Justice Department in an earlier case today, that multiple litigation is something that they abhor.

And I suggest that if they abhorred it in that case, that it is appropriate for this Court to abhor it in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:49 o'clock p.m., the case was submitted.]

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