In the

Supreme Court of the United States

James E. Douglas, Jr.,

Appellant,

v.

Seacoast Products, Inc., Et Al.,

Appellees.

No. 75-1255

Washington, D. C.
January 11, 1977

Pages 1 thru 53

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JAMES E. DOUGLAS, JR.,	:	
	:	
Appellant,	:	
	:	
v.	:	No. 75-1255
	:	
SEACOAST PRODUCTS, INC., ET AL.,	:	
	:	
Appellees.	:	
	:	

Washington, D. C.,

Tuesday, January 11, 1977

The above-entitled matter came on for argument at 11:12 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES E. MOORE, ESQ., Assistant Attorney General, Supreme Court-Library Building, 1101 East Broad Street, Richmond, Virginia 23219; on behalf of the Appellant.

JOHN J. LOFLIN, JR., ESQ., 25 Broadway, New York, New York 10004; on behalf of the Appellees.

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 next in No. 1255, Douglas against Seacoast Products.

Mr. Moore, I think you may proceed when you're ready.

ORAL ARGUMENT OF JAMES E. MOORE, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case involves questions regarding the constitutionality of two Virginia statutes under which the State of Virginia licenses corporations for the taking of fish in its territorial waters.

The statutes are set out in the Appendix beginning at page 114. The first of these statutes is Virginia Code section 28.1-60. I'll refer to that as Section 60, or the residency law.

By this statute Virginia regulates one of its fisheries, the Chesapeake Bay menhaden fishery. So that this statute is limited to one fishery and one body of water, an inland sea, Chesapeake Bay.

By virtue of this statute foreign -- excuse me, non-resident corporations are inelegible for licenses for the taking of menhaden in the Chesapeake Bay fisheries. They are eligible for the taking of menhaden in the

Atlantic Coastal waters of Virginia within the three mile territorial sea.

The appellees in this case, Seacoast Products, Incorporated, and its two subsidiaries, The New Smith Meal Company and Second Oceanic Corporation, are corporations located and having their principal places of business in New Jersey and New York, and they're not, under the Virginia statute, resident corporations. They are therefore denied licenses for the Chesapeake Bay menhaden fishery.

The second of these two statutes is found at page 117 in the Appendix. This is Title 28.1 of the Code of Virginia, Section 81.1. For ease of discussion, I'd like to refer to that as Section 81.

By this statute Virginia provides that all of its fisheries -- that foreign-controlled corporations shall be ineligible for licenses for any of Virginia's fisheries. The test of foreign control considers various factors including the President and Chief Executive officer or other chief executive officer and Board of Directors chairman. Also, the percentage of stockholding by United States citizens.

In essence, it requires that the control in the corporation through stockholders be in the hands of United States citizens.

The lower Court, upon request of the appellees, held that these statutes violated certain constitutional provisions. The lower court held first of all that the bay menhaden residency law violated the equal protection clause of the Fourteenth Amendment, and thereby restrained further enforcement of this Act.

The lower court held that Section 81, which bars foreign controlled corporations from taking fish in Virginia, was preempted by force of a federal act, the Bartlett Act. Now this statute is set out at page 118 of the Appendix.

I'll first turn to the question of preemption. And we would submit, of course, that the lower court's holding to the effect that Section 81 barring foreign controlled corporations in Virginia's fisheries, is not preempted either by the Bartlett Act or any other federal enactment.

The lower court held, of course, that the Bartlett Act, 16 U.S.C. Section 1081 preempted Virginia's rights to deny licenses to foreign controlled corporations within its territorial waters under Section 81.

But the Bartlett Act, it's clear, applies only to United States vessels -- excuse me, applies only to foreign flag vessels. These -- this act bars foreign flag vessels from fishing within 12 miles of the United

State Coast under current law.

Under the new provisions of the extended U.S. fishery zone, foreign flag vessels will be barred from fishing with two hundred miles of the United States coast.

In any event, the federal act clearly applies only to foreign flag vessels. The Virginia acts here clearly apply to United States flag, domestic fishing vessels, albeit operated by foreign controlled corporations. The waters affected are Virginia's waters, and therefore the two statutes cannot possibly, as a practical matter, conflict.

The United States, in its brief, has agreed with our position on that, and we take special note of that, because the United States, of course, is responsible for enforcement of the Bartlett Act. They find no preemptive effect or intent in the federal Bartlett Act.

QUESTION: Do you think that Virginia and the United States have the same view as to whether these vessels are foreign vessels or domestic vessels?

MR. MOORE: For purposes of the documentation laws.

QUESTION: Well, for purposes of the Bartlett Act.

MR. MOORE: For purposes of the Bartlett Act,

the United States position would perhaps be that they are U.S. vessels, the onesoperated by Seacoast in this case.

QUESTION: Yes.

MR. MOORE: For purposes of Virginia fishery regulation, which we contend is not reached by the documentation laws, they are, in effect, foreign vessels. Because foreign control is in fact involved.

QUESTION: Well, if the United States looked at these ships as foreign vessels, the same as Virginia does, then the Bartlett Act would apply.

MR. MOORE: That would be correct.

QUESTION: So then the Virginia law might be in some trouble then?

MR. MOORE: That's correct.

QUESTION: So the United States and Virginia have diametrically opposing views as to whether these ships are foreign vessels or not?

MR. MOORE: No, your honor, I don't think that's a correct --

QUESTION: Well, you say they're foreign vessels.

MR. MOORE: We say they are U.S. flag vessels operated by foreign controlled corporations. And that there are reasons to believe -- very strong reasons -- that foreign controlled corporations can operate a United States flag vessel and deplete fisheries in the same

manner that foreign flag vessels have in fact depleted our fisheries.

And that is the rationale which underlies Virginia's view of the foreign control being the decisive factor in whether or not they should be allowed entry to state fisheries.

QUESTION: Well, you're pitching it then on ultimate control rather than documentation.

MR. MOORE: That's correct, your honor. Our position is that the documentation laws do not take into account fishery preservation. They are for other purposes, and therefore, these statutes would in no way conflict with federal law, but in fact would supplement -- provide protection to Virginia's fisheries which is not provided by federal law at the present time.

You stated that we think the Bartlett Act itself has no preemptive effect. And further, the Seacoast and the United States have asserted certain theories of preemption under the documentation laws. And as I've just stated, our position is that the documentation laws have never been construed by this Court to affect fishing in state waters.

There's a series of cases beginning with the case of Smith v. Maryland, an 1855 case, followed by Manchester v. Massachusetts. In those two cases, federal

vessel licensees claimed that their federallicense of a fishing vessel exempted them from state fisheries laws. And in both cases, the Supreme Court said, fishing laws of the states are not affected, limited or preempted by force of the federal documentation of a vessel.

QUESTION: Does the Virginia statute place any limitation on the disposal of the catch?

MR. MOORE: No, it does not.

QUESTION: They can sell them anyway they want?

MR. MOORE: That's correct. They can be shipped wherever they want, processed wherever they'd like. It relates solely to the taking of fish in state waters. Which in several cases including Alaska v. the Arctic Bay this Court has said the act of taking fish is a localized activity not involved in the stream or flow of commerce.

That position clarifies the effect of the federal documentation laws. And in fact, these laws, passed under the commerce power of the Congress, cannot reach the taking of fish in state waters. They relate --

QUESTION: Well, let's suppose we got -- let's suppose that the United States would have power to control this matter. What do you say the licensing, the federal license, entitles these vessels to do, if anything?

MR. MOORE: The federal license was considered

in Huron Portland Cement v. Detroit. And in that case it was said that the federal vessel license is not preemptive of state fishery -- of state abatement of air pollution laws. The Manchester and --

QUESTION: I know, but I'm just asking you, what did this particular license -- this particular license was issued under a statute which said what?

MR. MOORE: Which said that a certain vessel shall be licensed for the fisheries.

QUESTION: And if it's licensed, is this a correct statement or a correct quote? Appellees' vessels have been enrolled and licensed and are therefore, quote, deemed the vessels of the United States, entitled to the privileges of vessels employed in the coasting, trade or fisheries, unquote.

MR. MOORE: That's correct, your honor. That's the language from 46 USC Section 251.

QUESTION: You say that isn't a federal license to fish?

MR. MOORE: That's their license, they assert, gives the right to take fish in state waters. And we contend, of course, it does not give the right to take fish in state waters. If the statute -- if I may -- passed upon the commerce power, which does not reach the taking of fish --

QUESTION: I know, but let's assume we disagreed with you on that. Would you say that this statute on its face purports to give a license to fish?

MR. MOORE: No, sir. No, your honor, I don't think it does. It has never been viewed by this Court as doing that in any case. It's been viewed as a license to navigate, in Gibbons v. Ogden. But the distinction between navigation and fisheries has always been maintained. The language --

QUESTION: Now you're talking the commerce clause, though. I'm talking about what this statute on its face purports to do. Does it purport -- whether the government's got power to do it or not, does the statute purport to or seem to give a right to fish?

MR. MOORE: It could in the coastal zone in which the federal government has exclusive authority over fisheries, between the -- the area between 3 miles and 200 miles, effective March 1, or 3 to 12 miles under present law. Yes, it could very well, because the federal government has exclusive fisheries control in that area.

Our position would be, at best, there is a concurrent requirement of state and federal licenses, and that federal licenses have never been preempted within their state waters.

QUESTION: You say state waters, you mean a 3 mile limit?

MR. MOORE: Three miles inward, yes, sir.

QUESTION: Do you suppose that after the Tidelands Act, the Submerged Lands Act, Congress could come along and say, we're exercising our exclusive jurisdiction to license people to drill for oil within the 3 mile limits?

MR. MOORE: I don't think they could, yourhonor. In the Submerged Lands Act the United States confirmed the state's ownership of all mineral resources, fisheries, shell fish within 3 miles of the United States coast and in their inland waters.

QUESTION: Do you think oil stands on any different footing than shell fish within those 3 mile limits?

MR. MOORE: We don't believe it does. The Submerged Lands Act treats them equally.

QUESTION: But the shell fish matter doesn't cover all fisheries. Do you think the Submerged Lands Act reaches fisheries generally?

MR. MOORE: Yes, we do. It treats specifically fish, shell fish, of all types with no distinction being made regarding the mobility of migratory -- the nature of the fish. It cedes and confirms the state's ownership of all these mineral resources and fisheries within 3 miles of the United States coast.

I'd like to read you the provisions from the Submerged Lands Act if I may. This is entailed at 43 United States Code Section 1311, subsection (a). It sets forth and says: confirmation and establishment of title and ownership of land and resources. It is determined and declared to be in the public interest that title to and ownership of the land in these navigable waters within the boundaries of the respective states, and the natural resources within such lands and water, and the right and power to manage, administer, lease, develop and use said lands and natural resources, shall be in the state.

QUESTION: Yes.

MR. MOORE: And they treat those resources equally.

QUESTION: Well, natural resources in the seabed.

MR. MOORE: And the water, your honor, I believe it says as well.

QUESTION: Youthink they granted ownership of the water?

MR. MOORE: I believe they did. And in fact, that was the question in -- natural resources as defined in the ACt, your honor, to say, natural resources -- this is subsection (e) of 1301, 43 U.S.C. 1301 (e) says, natural resources includes, without limiting the generality thereof, oil, gas and all other minerals; and fish, shrimp, oysters, clams, crabs, lobsters, sponges and so forth.

So there's unquestioned right in the states to own, manage and regulate these resources, including fish, shell fish.

QUESTION: Mr. Moore, I want to be sure of one thing. Has Seacoast never fished Chesapeake Bay?

MR. MOORE: They have never fished Chesapeake Bay in the past. The first statute I recalled to your attention, Section 60, requires residency for corporations, and they were barred --

QUESTION: To your knowledge, have they ever complained about this?

MR. MOORE: Not until --

QUESTION: Not until the new legislation has come along, and now they want both?

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MR. MOORE: That's correct.

QUESTION: Right.

MR. MOORE: We submit, then, that the Submerged Lands Act confirms that the documentation laws do not confer a right to fish, and reach only the vessel. The states have the free and clear right to license their fisheries. and determine who shall take the resources whith their boundaries.

An alternative theory of preemption has been offered, that the fact that Seacoast vessels, which they purchased from an American controlled corporation, the

fact that this transfer or sale was approved by the United States under a procedure of the Shipping Act, Sections 9 and 37, that this in fact preempts the right of Virginia under Section 81 to bar Seacoast as a foreign controlled corporation.

It's clear from several sources that these acts, the Shipping Act, Sections 9 and 37, have, as their sole purpose, control of the sale of vessels to foreign interests for the purpose of national defense and security.

Counsel for the Maritime Administration in recent hearings looking into foreign investment in American fisheries, has confirmed this. We've referred to it in our reply brief at page 11, footnote 3. In that case -- in that instance, he indicated that the sole purpose of these statutes is national defense, certainly not to preempt the right of the states to license the taking of fish within their borders.

We would submit therefore that no federal enactment cited by Seacoast or the United States in any way preempts or even purports to preempt the right of the states to license fisheries. If that be the case, the remaining question is whether or not the two statutes under consideration here license fishing in Virginia's waters under constitutional -- consistent with constitutional principles.

And we submit that both statutes do. The first statute, Section 81, is clearly a conservation of fisheries statute. The depletion of United States fishery stocks by foreign fishing interests is well documented. The findings of Congress in passage of the new federal act, Public Law 94-265, known as the Fisheries Conservation and Management Act, the findings of Congress in that case document the fact that foreign fishing interests, because of their self interest in economic gain, have depleted our fisheries in nearly every instance where they've been allowed to fish either outside the 12 mile limit or inside the 12 mile limit under permit and international agreement.

In those cases, they have violated agreements, made enforcement impractical, and in fact, this is the factor which has led the way in extending United States fishery zones out to 200 miles.

The Virginia law is premised upon the same finding. Virginia has suffered at the hands of foreign fishing. The entire river herring industryin Virginia was destroyed, virtually, in a period of two to three years of foreign fishing, scooping up the fish as they exited Virginia's waters to spawn, and depleting entirely the stock.

The Virginia law saw the advent of the new 200 mile law, and recognized that there would be a great attempt

by foreign fishing interests to avoid the new 200mile federal law by operating United States flag vessels. The federal law simply provides that foreign flag vessels may not enter beyond the line of 200 miles. But it does not in any way protect the states from foreign fishing interests who would set up shell corporations in any of the states, including Virginia, and thereby be eligible under federal law to license their vessels as domestic United States vessels -- the same situation thatpertains with Seacoast -- and fish with impunity in Virginia waters.

The evil has been established here, that the foreign fishing practices do deplete fisheries. And in fact Virginia law merely supplements federal law in seeking to protect its waters from possible dangers --and in fact very probable dangers -- of foreign investment in U.S. vessels setting up shell corporations to meet any residency requirements of the state, and to complete an utter destruction of our fisheries.

Seacoast has attempted to show this law as directed against them alone. But in fact this law applies to all of Virginia's fishing industry, all fisheries. And foreign controlled corporations are barred from all fishing in Virginia, not simply the menhaden industry, in which Seacoast has in fact been engaged.

And furthermore, Seacoast has presented no real competitive factor in the past, as we've outlined in our brief. Pages 36 and 37 of the Appendix indicate that Seacoast has done little or no fishing in recent years in Virginia. So it's very difficult to attach the motive of elimination of competition to this statute. It's clearly premised on the same findings and conservation purposes as the federal act.

And we submit that in that light it clearly meets the constitutional standards of the Fourteenth Amendment, consistent with the holdings of McGowan v. Maryland, and a series of other cases.

Turning now to the Virginia residency law, I would note first that if the application of Virginia's foreign control corporation law, barring the taking of fish in Virginia waters by foreign controlled corporations, Section 81, if that statute is upheld in this case as applied to seacoast, there is no need to reach the question of the validity of the second statute, about which I am ready to speak.

Section 60 would bar non-resident corporations in Virginia's Chesapeake Bay. It's proscription is much more limited in effect. This statute applies to an industry which it may be helpful if we discuss something about the menhaden industry with this statute in perspective.

Menhaden enter the coastal waters of the United States in the early spring, and begin migrating up the Atlantic Coast spawning in their migration. The newly spawned fingerlings enter Coastal waters, primarily the Chesapeake Bay and other large embayments, with estuaries which lead off, as protective nurseries for these fish.

The Virginia residency requirement, under Section 60, does not apply to the three mile Atlantic coastal menhaden fishery. And therefore there's no impediment to the migration of menhaden. Furthermore, the Virginia season on the taking of menhaden on the Chesapeake Bay does not in any way interfere with the migration of mature menhaden out of the Bay during the winter months, the early winter months and late fall.

When the fishing is done in Virginia, in the Bay by residents, it is on a relatively stable population of fish. The young fish are those that populate the Bay, and it's a rather fragile resource because they are two year old and less fish. The more mature fish migrate up and down the coastal waters in the more northern sections before returning and migrating south for the winter.

With that in mind, the Virginia statute is limited to the Chesapeake Bay, an inland body of water, and it simply provides that residents only, in terms of corporate residence, may take these fish.

We submit that this statute is consistent with the holding in McCready v. Virginia by this Court holding that the ownership of the inland waters and their natural resources supports the rights of the states to reserve those resources for its residents.

There is no reason, as a practical matter, to apply a different rule in this case with regard to menhaden.

QUESTION: Mr. Moore, is there anything in the record to indicate that Virginia does reserve the menhaden for Virginia residents? Can't a resident, after he took a catch, ship the menhaden to New York or someplace like that?

MR. MOORE: Yes, he may. Your honor, this statute only reserves the privilege of taking to residents. And we submit that that is one of the factors which clearly indicates that it's a limited statute, and it's not intended to in any way infringe upon commerce.

QUESTION: Would it be any different if it were reserving the privilege of being an architect, say, to residents? Or a privilege of mining coal or anything else?

MR. MOORE: I think it is, your honor.

QUESTION: What's the difference?

MR. MOORE: There's a very unique situation with regard to fisheries as a natural resource. Many natural resources, in fact, most natural resources, in order to take

them, a firm must in fact establish some commitment and connection with the community, establish some economic benefit for the community in terms of employment to mine ore or take clay or sand or gravel -- requires in fact some employment generated from the local community.

With fisheries, fisheries can be subject to the reaping and harvesting by out of state vessels with out of state crews with virtually no return for the re source to the state, and the complete depletion, in fact, if enough non-resident fishing is done, so that Virginia, in fact, economically would receive no benefit from a resource which the Submerged Lands Act --

QUESTION: Your purpose then is not to preserve the menhaden but to preserve the laborer -- the employment opportunities, is that right?

MR. MOORE: Your honor, this statute, we feel, has a conservation purpose as well. And as we've set forth in our brief the reason for that indicating that it meshes and eases enforcement of certain clearly conservation oriented statutes, namely, Virginia's net size regulation, Virginia's food fish limitation -- there's a limitation on the amount of food fish that can be taken in any menhaden catch. These are non-edible, industrial fish. And in that sense the food fish limitations and the net-size regulation are much more easily enforced against

residents who lands his fish in Virginia than the non-resident who potentially can come in, take the fish, and leave, virtually unenforced.

The peculiar nature of fisheries resources, however, I think, is the important reason why residency is a matter of fact with regard to many industries without being required by law. And in fact fisheries can be taken without any return to the community, which the Submerged Lands Act, the case of McCready v. Virginia say, the states own.

QUESTION: Could a state provide that nobody but residents shall pick certain agricultural products? Sometimes some states, you know, they have workers who come in temporarily and do the picking and then leave. Could they be prohibited from -- could they be limited to residents?

MR. MOORE: I think, in some sense, the same argument would apply, if in fact the predominant practice of non-resident pickers was to come in and leave without in fact any connection or economic benefit to the community.

But in fact, we would submit, that that characteristic is uniquely the case with fisheries, more than many other industries.

QUESTION: General Moore, I notice that you have a string of amicus briefs from the Atlantic coast states supporting your position.

MR. MOORE: That's correct.

QUESTION: New Jersey is absent. Is there -- do I imply anything from that absence?

MR. MOORE: I don't, your honor. I don't know -- they --

We would submit as a final thought in this matter that to the extent that McCready is in any way questioned as a result of Toomer, that Toomer case was a privileges and immunities case that the appellees here are not in any way -- cannot in any way be viewed as citizens protected by the privileges and immunities clause. And there's no authority in derogation of the McCready rule which is that the resources owned by a state may be reserved, particularly fisheries because of their unique nature, may be reserved to its residents.

These corporations are foreign controlled corporations domesticated in New York and New Jersey and in fact cannot qualify as citizens. The benefits, therefore, of the Toomer holding do not give them standing.

QUESTION: But of course the domestication long preceeded the foreign control.

MR. MOORE: That's true.

QUESTION: And I take it on your position, if foreign control and domestic control were about evenly balanced, the transfer of a few shares would change the

situation?

MR. MOORE: Well, we view the foreign control as critical. The stockholders, of course, dictate policy. And the line, of course, must be drawn at some point. But we think the Virginia statute draws that line at a reasonable place. In fact, the factors which are considered in determining corporate foreign controls were opted from a federal statute which applies to the coasting trade and the licensing of vessel s for that purpose.

QUESTION: What would you do if it was precisely 50 per cent foreign controlled and 50 per cent domestic?

MR. MOORE: The rule under the Virginia statute is that 75 per cent of --

QUESTION: All right. Suppose 75 and 25. Then under the statute, the 75 would meet it?

MR. MOORE: That meets the test, that's correct.

QUESTION: Does a corporation organized under one of the laws of the states of the Union entitled to claim under the privileges and immunities clause? Is there a holding in this Court on that point?

MR. MOORE: Not to my knowledge. A corporation could never, in my view, under any holding that I'm aware of, been viewed as citizens under the privileges and immunities clause.

QUESTION: I take it that issue isn't raised

here, is it? The P and I issue?

MR. MOORE: Not in this case. We do not think so in this case.

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

MR. MOORE: Thank you. I'd like to reserve the remainder.

MR. CHIEF JUSTICE BURGER: Mr. Loflin.

ORAL ARGUMENT OF JOHN J. LOFLIN, JR., ESQ.,

ON BEHALF OF THE APPELLEES

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

I represent the Appellee and its subsidiaries, Seacoast Products and the two other subsidiary corporations which, as the Court may know, are domestic corporations, controlled ultimately by a corporation of the United Kingdom, which is itself publicly held.

Now, much was made in the reply briefs here that because control of Seacoast does unquestionably rest in the hands of a foreign corporation owned by foreigners at least in large part, that somehow that arrangement alone deprived us of any claim for equal protection of the laws.

I think the claim is spurious, but I would like to note for the Court that, as stated in our brief, Hanson Trust is a publicly held corporation, and in fact some U.S. citizens own its stock. I do not suggest that they --

that there are enough U.S. citizens to meet the test just outlined by my friend as stated in the Virginia statutes.

I'm not here contending we have 75 per cent in the hands of Americans. But I just wanted the Court to know that if this is an issue, there are some Americans who have invested in this company whose rights and economic benefits would be affected by any detriment to Seacoast and, in turn, its parent company.

QUESTION: Does it make any difference to your case, Mr. Loflin, if there were no American stockholders?

MR. LOFLIN: I think not one bit, your honor. I think under the basis on which corporations are permitted to function in the states, and are under -- in this case are under in certain aspects -- very tightly controlled aspects of federal law, it would be most improper and baseless to say, well, we have one kind of corporation which has certain benefits and privileges under the U.S. constitution. We have other types of competing corporations engaged in the same line of business, following all the same laws, thathave these disabilities. That to me has no foundation in our traditions or in our law.

QUESTION: Then, for the purposes of this case if Saudi Arabia owned all of the stock of the parent corporation, all the issues would be the same in your view?

MR. MOORE: They would be, if your honor will

bear in mind that to get where we are we had to undergo the scrutiny of the federal government. And that scrutiny had input from various interested bodies of the government, including State, Fisheries, Maritime, NOAA. And as Mr. Moore pointed out, there are defense concepts that are built into the licensing and enrollment provisions. So whether Saudi Arabia would be approved or not, I do not know. But if it were, then yes, my position would be the same.

I would like to outline briefly the nature of the fishery that we're talking about, discuss the enrollment and licensing provisions which are critical here, the effect on -- I consider our foreign policy, and then deal in some detail with the two statutes.

We're here talking about competing companies engaged in the menhaden fishery. There are basically three companies . It's somewhat similar in its basic setup to the automobile industry in this country. By that analogy, which is fairly close, our principal competitor, Zapata-Haynie, is the General Motors of the menhaden trade. Our client would come in at the Ford level. And Standard Products would come in at the Chrysler level.

But for all practical purposes, the menhaden fishery really is run by these three large corporations, and we compete against each other all up and down the East

Coast and in the Gulf Coast states.

With that background, I think you can better understand the motivation that really was operative in the Virginia legislature when the two Virginia based corporations, that is, Zapata-Haynie and Standard Products, saw that there was an opportunity, because of the change in ownership of my client's company, to get the Virginia legislature to put through a restrictive statute. Zapata-Haynie in particular sponsored that statute, sent its lawyer in to testify about it, talked about the threatened Russian invasion of the Chesapeake Bay, and in that context, under emergency conditions, the statute saying you must be a citizen corporation, or owned by a citizen, was put through.

QUESTION: Mr. Loflin, does the record show how long Seacoast has been fishing in Chesapeake Bay?

MR. LOFLIN: The record shows that Seacoast through the years goes back to 1911 fishing on the East Coast and in Virginia waters. At one time it had a Virginia subsidiary which qualified as a resident so that it could fish in the Chesapeake Bay. I can't tell you the exact number of years.

QUESTION: But it went way back?

MR. LOFLIN: It was back sometime, but I believe within the last 15 years. But --

QUESTION: Well, I thought you said a minute ago that you'd been fishing all along, and all of a sudden they decided to go against you. But it's not true.

MR. LOFLIN: There are two fisheries that we are talking about. We haven't been fishing all along in the Chesapeake. We have been fishing all along along the East Coast, that is the ocean waters, running all the way up to Cape Cod and down through Carolina and, in fact, in the Gulfstream.

QUESTION: I misunderstood you. I thought you said that you'd been fishing in Chesapeake Bay continuously over a long period of years, and then when the corporation changed, suddenly they went after you.

MR. LOFLIN: If --

QUESTION: So that's not true?

MR. LOFLINE: -- perhaps I was misunderstood. As to the Chesapeake only, that aspect of it has for many, many years, I think since the latter part of the 19th century, been restricted to Virginia residents. In order to fish in the Chesapeake, and we did fish in the Chesapeake for a time, we had to set up a Virginia resident corporation, which we did. And we had a plant in Virginia at one time.

But at all the time that I'm talking about, which goes back for many, many years, the vessels of Seacoast wandered as the menhaden do, from state to state,

in the offshore waters, but within the 3 mile limit.

It is in the nature of menhaden to come into these inshore waters in the Spring and summer. They generally come into the more southern states first, and gradually migrate toward the North, up towards Cape Cod.

It is their characteristic -- and this makes the fishery commercially viable -- it is their characteristic to school up in massive schools only in these summer migratory paths, and only in inshore waters. Practically all of the menhaden that is captured for commercial purposes is taken in close to shore.

Now that takes care of the outlying shore areas, but there are important interior bays and river estuaries. For example, we've mentioned the Chesapeake. But the Delaware River is important. So is Long Island Sound. So is Narragansett Bay, and the waters around Cape Cod. These are all waters where the menhaden move on their travels. It is their nature to spawn in the open ocean, drift in toward shore when they are very tiny, almost little particles, and then grow in the estuarine waters of Virginia, North Carolina, Delaware, the other shore states.

QUESTION: They never get very big, do they?

MR. LOFLIN: Up to about 14 or 15 inches.

QUESTION: Do they?

MR. LOFLIN: And some of them will live as long

as 7 to 10 years, although that's a bit unusual.

QUESTION: Not if your clients can help it, they won't.

MR. LOFLIN: We bear them no real enmity. In fact,, to the contrary, we hope they thrive, prosper, multiply and we'd continue to have a fishery to work on. But we make our living capturing menhaden, yes.

The fishery in the Chesapeake Bay tends to be more of the younger fish, since that is in effect a nursery. And the record shows that one and two year menhaden are characteristic of the fish caught in that area.

QUESTION: And they're about -- this kind of size, aren't they?

MR. LOFLIN: That would be about right.

Also, it should be noted, I think, that the entire fishery depends upon a survival of a certain amount of these fish to the three year old's range, because that's when the females spawn for the first time. They will spawn at age three and thereafter, but not until.

Our company grew up as a domestic company. I say our company. I think it's been noted here that there are no briefs fromthe state of New Jersey, for example. Well, Monmouth, New Jersey -- FortMonmouth, New Jersey, is our headquarters. And I think it's fair to say that the State of New Jersey has not found our presence there

objectionable. In any event, they have not filed a brief against us here.

QUESTION: Did your lawyer call on the New Jersey Attorney General the same way your opponents lawyers called on the Virginia legislature?

MR. LOFLIN: Not to my knowledge. I didn't.

In any event, I would like now to address myself -- just a note on the --

QUESTION: Your name, though, was Seacoast?

QUESTION: No.

QUESTION: In New Jersey?

MR. LOFLIN: The Smith Meal Company was one of the names used in New Jersey.

QUESTION: That's the name I knew it by.

MR. LOFLIN: Well, I think it was known by that name at one time in Virginia also. But Smith Meal is probably the name that probably the older residents of the Fort Monmouth area would associate with. But Seacoast is the parent corporation of Smith Meal and Oceanic.

This company has been described in the same company as foreign predators somehow ravaging the fishery and then disappearing to go ravage some other fishery.

Characteristics attributed to us seem rather strange and I think totally inappropriate. We have exactly the same interest in conserving this resource as our

competitors do. We have an enormous investment in American documented vessels. We have shoreside facilities in New York, New Jersey, Delaware, Texas, Louisiana. And our competitors, as noted in the brief, are similarly situated. We're located where the fish are; there's no question about that. And we all know that this business, which is basically a very sound business, will be absolutely ruined if enough fish are not left to replenish the supply and keep it regular.

There is not one word in the record, and for that matter in the brief, characterizes the menhaden as an endangered species. We're characterized as a predator company simply because, apparently, we are now owned by a British parent.

QUESTION: Mr. Loflin, could I interrupt to get one historical matter straight in my mind?

As I understand it, the non-resident statute has been on the books for some time.

MR. LOFLIN: Yes, sir.

QUESTION: Thatis one of the two statutes that prevents you from fishing both in Chesapeake Bay and on the inland -- within the 3 mile -- on the ocean?

MR. LOFLIN: The resident statute, strictly speaking, just applies to the Chesapeake Bay.

QUESTION: Oh, the resident statute has no

application to waters -- to the ocean waters?

MR. LOFLIN: That's correct.

QUESTION: That answers my question.

MR. LOFLIN: The other statute, the alien or citizenship statute, applies to Virginia waters wherever. In other words, the ocean and the Chesapeake Bay. The residency statute, which goes back, I believe, to the 1890s, just applies to the Bay. The only way we could comply with that statute historically was to set up a resident Virginia corporation which we did at one point.

QUESTION: The language of the statute is, the waters of the Commonwealth or the waters under its joint jurisdiction. And I thought that perhaps included the ocean waters. But you say it does not.

MR. LOFLIN: There is a further definition of a geographical nature referring to, I believe, Cape Henry, and some other fixture --

QUESTION: I see.

MR. LOFLIN: -- that further delineates the area in question. But it is -- the residency statute is a Chesapeake Bay statute. The other statute will bar us entirely from any waters in Virginia.

QUESTION: The thing that's puzzling me is why this litigation got started. If they just passed a new citizenship requirement that applied only -- that wouldn't

have affected you. You were already barred. You couldn't go into the Chesapeake even before the new statute.

MR. LOFLIN: AS a non-resident corporation we could not go into the Chesapeake.

QUESTION: Right.

MR. LOFLIN: But we were fishing along the marginal waters of the Coast.

QUESTION: Right. And the fact that the non-citizen-- the citizenship requirement affects the marginal waters, that's why you were suddenly -- your business situation changed?

MR. LOFLIN: It's fair to say that that triggered this, because that meant we were out of Virginia entirely. Without a resident Virginia subsidiary, we were already out of the Chesapeake Bay fishery at that particular point. But it's --

QUESTION: And you would have been out of the entire Virginia area if that statute applied to the ocean waters, but it doesn't. I understand now.

MR. LOFLIN: That's right. Well, the -- I think it's fair to say as far as our thinking on the matter is when we found that Virginia had, in our view, suddenly adopted emergency legislation which only applied to us, we thought that we should try to straighten out both statutes if we could. And so we sued challenging both of

them.

The record shows, for example, that our competitors based in Virginia go out in to the open waters, go into the Chesapeake, and then they unload their catch wherever they wish, including neighboring states such as Maryland and North Carolina. We think we should have similar privileges. We should come down from New Jersey, fish the coastal waters of Virginia or the inland waters -- by that I mean the Bay. And then take the catch back to our processing plant in Fort Monmouth, New Jersey.

This is the pattern that characterizes the industry. The menhaden pay very little attention to state borders. They just migrate as the mood takes them. And the fishermen want to be where the fish are, quite obviously. And you can't, for economic reasons, have a plant every few miles up and down the coast. It involves quite a bit of investment.

If I could turn for just a moment to the foreign policy point here. It would not come as a surprise to anyone here that the United States has been a great advocate of free trade historically. We like to be free to make American investments in foreign countries. And the quid pro quo is, we invite foreign countries and their citizens to invest in the United States. When

a bill at the federal level was introduced that would have had the same effect nationally as the Virginia billhas in its state, which would have, in effect, put Seacoast entirely out of business in the Menhaden trade, the State Department came in, the Treasury Department came in, and they criticized the bill. The pointed out it was inconsistent with the federal government's position on free movement of investment. And that bill died.

It was after that bill died that our competitors, Zapata-Haynie, went into the Virginia legislature, and suceeded in Richmond where they had failed in Washington.

Now it has been pointed out in our brief that there was a hearing -- a hearing significant I submit despite the kind of casual brushing of it away in our opponent's reply brief -- there was a hearing under the auspices of the Federal Maritime Administration, conducted actually by NOAA, the National Oceanic and Atmospheric Administration. The factors that we were told were going to be considered for our enrollment and licensing in the menhaden fishery included such matters as the conservation of the resource, the employment of U.S. citizens, the effect on competition, and other social and economic factors in the United States.

Now there was a hearing, and our competitors came in and tried to oppose the issuance of our license.

NOAA heard the evidence. They satisfied themselves, I think it's fair to say, that we were not here as a predator about to wipe out a valued -- and it is a valued -- U.S. resource, and run away.

Only after that hearing were we enrolled. Now let's just pause with enrollment for a moment.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock then.

[Whereupon, the Court was recessed until 1:00 o'clock, p.m..]

MR. CHIEF JUSTICE BURGER: Mr. Loflin, you may pick up where you left off.

MR. LOFLIN: Mr. Chief Justice, Members of the Court:

At the point where we adjourned for lunch, I was just going to remark briefly on the subject of enrollment and licensing. These are two quite difference concepts, and I wanted to highlight them briefly.

The enrollment process is the process by which a determination is made that vessels should be allowed to fly the American flag. And that of course was critical here. Upon the transfer of the control of these corporations to the UK corporation, Hanson Trust, it was necessary to go into this enrollment and licensing procedure.

QUESTION: Mr. Loflin, do both enrollment and

licensing come up under the same statute?

MR. LOFLIN: Yes, basically that's the same statute.

QUESTION: That's the 1793 Act?

MR. LOFLIN: I'm not sure that they're both under that same section?

QUESTION: The old one?

MR. LOFLIN: Yes, that's right.

The enrollment aspect as distinguished from the licensing aspect is for the purpose of determining the American character of these vessels; now these ships are going to be plying in navigation up and down the coast, and they're going to be fishing up and down the coast in any one of a number of states.

To determine the American character of the vessel there are statutory requirements that the corporate form must involve a domestic corporation. We have in our instance, a Delaware corporation for example. Or a New York corporation. It could be any state, or it could be a U.S. corporation. But it must be first of all a domestic corporation.

In addition, the chief executive officer, the chariman of the board of the corporation, must be an American citizen. And next, as to the vessels themselves, the captains, the officers, and the crew must all be

American citizens.

Now those qualifications must be met. They have been met in this case. And our 68 vessels were transferred and were permitted to be enrolled in the American fishery.

As a matter of fact, although this isn't in the statute, we have approximately 450, 500 employees who work in our plants, and 95 per cent of them are American citizens as well.

QUESTION: Well, no one's contending you didn't comply with the federal statute, are they?

MR. LOFLIN: I go into it only to try and lay a foundation for claims I will later make as to the consequences that flow from complying with the statutes. I would like simply to outline the steps, and then I will try to persuade the court, show the Court, what consequences flow from this process.

QUESTION: It's your half hour.

MR. LOFLIN: We're into the enrollment phase, and let's say it's been determined that we are permitted to fly the American flag.

Next is licensing: and this is critical, because if a license is just a number that goes on the bow of a vessel, or a piece of paper that says, you are the Mary Jo, that would not be enough. We have Gibbons and Ogden in the absolute parallel language explaining what a license

is. It's a license to do something, not just to tell a passing Maritime patrol boat who you are.

In Gibbons and Ogden, the boat was licensed to ply the coastal trade. In our case, we are licensed to engage in the fisheries.

In the briefs submitted amicus by the --

QUESTION: Incidentally, is menhaden a form of mackerel?

MR. LOFLIN: No. For purposes of licensing, you have opportunity to register in the whale fishery, the mackerel fishery, or the cod fishery. And that's all. So you, for this purpose, are put in one or the other of those categories. And simply for administrative purposes, the menhaden is treated as part of the mackerel. fishery. But I think biologically, as far as I know, there isn't any connection, or if so, not a close one. But we are registered in the mackerel fishery, because that's the statutory format, their not being whales or cod, I guess.

But what does a license do? In the brief submitted by the solicitor general's office in the Appendix, at 3A, theyset forth the license. And it among other things states the following: license is hereby granted for the said vessel to be employed in carrying on the mackerel fishery for one year from the date hereof, and no longer. The license must be renewed annually.

Now we're licensed to carry on the mackerel fishery, in this instance the fishing for menhaden, which of course was the object of the whole thing. It is not simply to identify our vessels, but to carry on in that fishery .

QUESTION: Mr. Loflin, if Congress had passed a statute authorizing it, do you think you could be licensed by a federal authority to drill for oil within the three mile limits of Virginia without Virginia's permission?

MR. LOFLIN: If Congress passed a statute to that effect, I think we could.

QUESTION: Notwithstanding the Submerged Lands Act.

MR. LOFLIN: Well, I assume such a statute wouldn't be in conflictwith that or might be in conflict with it. Absent a new statute, I think that part of that law was triggered by some problems with oil rising out of the California cases. And evidently it was -- well, I won't contend it was confined to oil. Certainly the dispute over the oil rights gave rise to the statute. I think that's historically accurate. But what Congress can re-express or reallocate, they can take back .

QUESTION: Well, and if there's any conflict between the 1953 Submerged Lands Act and the 1793 Act you're relying on, I suppose the later statute would

take precedent.

MR. LOFLIN: If there were such a conflict, yes. And let me address myself to that now.

We're claiming -- because we think it's unavoidable -- that the license we obtained through the process I've just described entitles us to go into the various state waters and fish. It may also entitle us, and I think it does entitle us, to fish in offshore waters beyond the state territorial limit.

QUESTION: Suppose the state of -- the Commonwealth of Virginia passed a law that there shall be no fishing for this type of fish in the Chesapeake Bay by anybody.

MR. LOFLIN: As to that, I think we would have to be bound by that as well. Let me explain what I mean --

QUESTION: It's not an absolute right. It's a right subject to others.

MR. LOFLIN: It is a right subject to certain police controls exerted by the state in the name, perhaps, of conservation or health or what have you. When I say we have a right to go into the state and fish, I really mean we have the right not to be discriminated against unfairly in exercising our license. I'm not claiming here that by giving us this license, the federal government has wiped the books clean of every coastal state fishery regulation. Thatis not our position.

QUESTION: It's a license not to be discriminated against? It's a license not to be discriminated against?

MR. LOFLIN: It's a license to exercise the privileges of an American flag vessel. Which means you have the right to be treated the same as all other American flag vessels. And that includes the right not to be discriminated against. Our competitors are American flag vessels. We are an American flag vessel.

Now, if the State of Virginia decides, as it has, for example, that there should be certain closed seasons on menhaden, or that there should be certain tributaries that are off limit for fishing, I don't claim any right to run roughshod over those laws. Far from it. Those laws don't single out who is to be subject to them and who is not to be subject to them. We are here faced not with a regulation, as I see it. We're faced with an absolute bar. Virginia is saying to Seacoast, you cannot come into our waters because you're somehow tainted by your foreign ownership. We're going to let your competitors fish. We're not going to put any restrictions on how much fishing they do, the size of the catch. We're not going to require them to land their fish in Virginia. But we're going to say to you, you can't come in here and fish at all.

QUESTION: Mr. Loflin, what are the requirements to fish and how many

and all? Of course Virginia -- you can't fish anytime.

MR. LOFLIN: My remarks were addressed to how much fish you can take. There are closed seasons, and during those closed seasons, the Virginia boats cannot fish and we cannot fish.

There are, without question, statutes in Virginia which I would recognize as bonafide conservation measures. Closed seasons, I think, is a good example. And I'm not claiming here that the federal government has preempted that.

What the federal government has done, to restate it, is giving us the privilege of being in the American fleet. And that is not an empty gesture. It entitles us to be treated legally on the same basis as all other members of the American fleet engaged in the pursuit of menhaden.

QUESTION: And you say that no state can go behind that and make inquiry in the circumstances of your ownership once you have the flag.

MR. LOFLIN: Once we have that, the state cannot make an independent judgment on that subject. Because the superior right of the federal government is clearly at stake. Particularly --

QUESTION: Once you have that and the federal license.

MR. LOFLIN: Once you have the federal license.

The question of our foreign ownership was displayed to the federal government. The question of the impact on the registration of these vessels in the American fishery was gone into. The question of competition, employment, conservation. Those questions were addressed by the federal government. It wasn't an empty formality that we went through.

And after that process, I say those questions are precluded to the individual states. Otherwise, you go through all this, you get the license that entitles you to do nothing that's of any commercial value.

As a practical matter, commercial fishermen do not fish for menhaden to any extent offshore in the federal waters. The fish congregate in these tight schools up close to shore. They're in state waters. And if you can't fish for them there, you really can't be in the menhaden business.

In closing I would like to advert briefly to three recent decisions of this Court, decisions each of which came down after our brief was written.

One of these deals with commerce. It's the Boston Stock Exchange case. I'd like to quote briefly from that. That was the case where New York, my state, adopted a taxing program that tended to favor the New York

exchanges as against the regional exchanges. And this Court struck down that statute and said this: as we stated at the outset, the fundamental purpose of the clause is to assure that there be free trade among the several states. This free trade purpose is not confined to the freedom to trade with only one state. It is the freedom to trade with any state, to engage in commerce across all state boundaries. There has been no prior occasion expressly to address the question whether a state may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out of state businesses. But the clear import of our commerce clause cases is that such discrimination is constitutionally impermissible.

We have here in this Virginia bar -- it's not a tax, we'll admit that. It's much more fundamental than a tax. It's a complete exclusion. And it was done, I think without any doubt, to favor local interests --

QUESTION: Why shouldn't the federal statute referring to a fishery, or why shouldn't the federal license, be understood to mean a license just to fish outside the three mile limit?

MR. LOFLIN: The statute is parallel with the statute giving rights to navigation. And all of that was explored quite extensively in Gibbons against Ogden which

had to do with a boat that was going from Elizabeth, New Jersey, across the harbor into New York. These were up into state waters. The statute clearly --

QUESTION: You think Gibbons was just a discrimination against commerce case?

MR. LOFLIN: Well, there was much more involved in it than that. It put into a juxtaposition the power of the state government and the power of the federal government. But so does this case.

QUESTION: Well, why don't you argue then that the United States could, under its license, permit these ships to go into Chesapeake Bay, even if Virginia said nobody may fish for menhaden in Chesapeake Bay?

MR. LOFLIN: Well, I choose not to press my argument that far because --

QUESTION: But you want to press Gibbons against Ogden?

MR. LOFLIN: I do want to press Gibbons against Ogden --

QUESTION: As a discrimination case?

MR. LOFLIN: It is a form of discrimination. The man who had what he thought was a monopoly on the coasting trade in New York waters was trying to exclude someone who had a federal license. He was enrolled in the coasting trade under the same statute that we're claiming our rights

in the fishing trade. And in a sense, that's a strong discrimination. It was a burden. And it seems to me it sets the state rights of New York, or that New York thought it had, against the rights of the federal government.

Now, in closing, we have the two equal protection cases that have come down quite recently: Lefkowitz against CDR Enterprises on January 10th which had to do with the exclusion of aliens in New York from works of public projects. This Court had no trouble in guaranteeing aliens the right to work on public projects, and struck that on equal protection grounds.

In Craig against Boron, which had to do with the beer regulations, beer drinking regulations, in the State of Oklahoma --

MR. CHIEF JUSTICE BURGER: Well, we're familiar with those cases, Mr. Loflin. Your time --

MR. LOFLIN: I take some comfort from each of them. And I feel that the standards they have established are applicable respectively to the equal protection approach or the commerce clause to our situation. I bring them up only because they were recent. They're nowhere in our briefs. But I think they're very helpful and sustain our position.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

MR. LOFLIN: Thank you very much.

MR. CHIEF JUSTICE BURGER: You have a few minutes left, Mr. Moore.

REBUTTAL ARGUMENT OF JAMES E. MOORE, ESQ.,

ON BEHALF OF THE APPELLANT

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

First point we would like to address is the apparent reference to Virginia code Section 81, which has been cast in the light as if it were a statute which was specifically designed to exclude one competitor from competing with two Virginia corporations.

That fact is belied by the fact that this statute applies to every single fishery and fishing industry in Virginia. It does not confine itself to the menhaden fishery. Seacoast is involved entirely in the menhaden fishery. And had it been designed to eliminate Seacoast alone, it could have swept much less broadly and achieved the same purpose.

In addition, the entire fishing industry supported this law at the state legislature -- legislative level, not simply the menhaden fishers.

In addition, this particular statute --

QUESTION: All Virginia fishermen?

MR. MOORE: All Virginia fishermen.

QUESTION: Yes, but was it prompted by the

menhaden situation?

MR. MOORE: No, sir. It was prompted by the passage of a federal law which extended the federal fishery zone to 200 miles. The testimony in recent hearings before Congress referred to in our reply brief at page 27 indicates very clearly that Virginia's fears were real. The new law at the federal level is going to instigate a concerted effort by foreign fishing interests to get around that 200 mile limit through the use of American shell corporations and United States flag vessels.

QUESTION: In other words Seacoast and its competitors have nothing to do whatsoever with the new statute?

MR. MOORE: The new statute is not directed at Seacoast. It's directed at this national problem which the federal level protection does not afford complete protection for the states, nor has it been intended to.

QUESTION: Then Congress could take care of that by saying that no foreign corporations could operate?

MR. MOORE: It could, your honor, but it has not.

QUESTION: So I mean, your dire results don't have to happen.

MR. MOORE: If the federal government were to act in the same way that Virginia has acted to protect

its own fisheries, that's correct.

QUESTION: Well, not the same way, but some way.

MR. MOORE: Yes, that's correct.

QUESTION: Well, that's the way Congress acted with the 1916 amendments to the Shipping Act when the Germans were trying to buy up control of a great many American bottoms. Couldn't they do the same here?

MR. MOORE: They did in that case amend the Shipping Act as to the coast waters trade, that's correct, and require a 75 per cent ownership by United States citizens.

QUESTION: General Moore, do you agree with your opponent's construction of the residency statute, Section 60, as applying only to inland waters and not to coastal waters?

MR. MOORE: Yes, Mr. Justice Stevens, that's correct. The reference in that statute to joint jurisdiction or jointly controlled waters is to the Potomac River which is jointly controlled by Maryland and Virginia, and I -- it is not intended to go out into the three mile belt. The residency requirement applies only to the inland waters in the Chesapeake Bay.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:21 o'clock, p.m., the case in

the above-entitled matter was submitted.]