

OFF-SHORE GOVERNORS' FORUM

FEBRUARY 1991

SURVEY ON THE EXPANDED TERRITORIAL SEA (3 TO 12 MILE ZONE)

PART 1. — PLEASE RETURN BY JUNE 1, 1990

This part of the survey is aimed at soliciting information from state and territorial officials on the importance of the 3 to 12 mile zone adjacent to their jurisdictions.

1. Please rate the following ocean resources/activities occurring in the 3 to 12 mile zone adjacent to your state or territory as:

1. very important, 2. important, 3. not very important, 4. unimportant, 5. don't know.

Commercial fishing

Sand and gravel

Recreational fishing

Waste disposal

Mariculture

Marine transportation

Marine mammals

Recreation (boating, etc.)

Marine plants

Energy production (OTEC, etc.)

Oil and gas

Marine research

Hard minerals

Environmental monitoring

2. Has your state or territory developed a position regarding the extension of the territorial sea?

☒ 1. yes ☐ 2. no ☐ 3. not yet, but we are planning to ☐ 5. don't know

(IF YES)

- 2a. What position has your state or territory adopted? (PLEASE EXPLAIN AND ATTACH A COPY, IF AVAILABLE)

Public Law 15-114 proclaims Territorial interest in the ocean area and
resources to 200 miles. The Draft Commonwealth Act reconfirms this
perception and seeks federal recognition over Guam's inherent rights as
a Territory to control the historic ocean rights of Guam's people.

3. In your view, what factors were (or will be) most important in determining your state's or territory's position on the extended territorial sea?

(Please rank the top 3, with "1" being the most important)

A. The resources and potential uses of the 3 to 12 mile zone are seen as important to the state.

B. The state feels that it must insure the environmental protection of the 3 to 12 mile zone.

- ☐ C. The costs of a stronger state role in the 3 to 12 mile zone appear to outweigh the benefits that are likely to accrue to the state.
- ☒ D. The state feels that the protection of the 3 to 12 mile zone is imperative if the state is to fulfill its resource management responsibilities in its own 0 to 3 mile zone.
- ☐ E. The existence (or lack thereof) of federal financial assistance for planning and managing the 3 to 12 mile zone.
- ☐ F. The fact that pending legislation reauthorizing the Coastal Zone Management Act is likely to strengthen the consistency provisions, and hence give the states the necessary leverage over the 3 to 12 mile zone.
- ☐ G. Other _____ (PLEASE EXPLAIN)

4. If you feel that a stronger state or territorial role in the 3 to 12 mile zone is needed, which of the options listed below best describes your view as to what that role should be? (PLEASE CHECK YOUR TOP CHOICE ONLY)

- ☐ A. Full state jurisdiction and ownership of the 3 to 12 mile zone
- ☐ B. The sharing of planning and management responsibilities and duties with the federal government in the 3 to 12 mile zone (i.e., a joint management approach)
- ☐ C. Extend the coastal zone to 12 miles for federal consistency purposes under the Coastal Zone Management Act
- ☐ D. Other _____ (PLEASE DESCRIBE)

Thank you very much for your participation in this important survey. Please return the survey in the attached envelope to Phil Shimer, Western Governors' Association, Suite 526, 444 No. Capitol, Washington, D.C. 20001, telephone (202) 624-5402, by June 1, 1990.

OFF-SHORE GOVERNORS' FORUM

The Heads of Government of:

American Samoa
Guam
Northern Mariana Islands
Puerto Rico
US Virgin Islands

PROCLAMATION

Inalienable Right to the Resources of the Exclusive Economic Zone

BE IT PROCLAIMED by the Governors' Forum, comprised of the Governors of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands (herein after, Flag Islands) as follows:

TAKING NOTE that the 1982 Convention on the Law of the Sea made it possible for the United States and other coastal states to establish 200-nautical-mile exclusive economic zones to control the use and conservation of resources within them; and

MARKING that on March 10, 1983, the U.S. exclusive economic zone (EEZ) was established by U.S. Presidential Proclamation No. 5030; and

CONCERNED about the emerging claim of the United States Government to exclusive jurisdiction and federal control over living and no-living resources within the Exclusive Economic Zones of the Flag Islands; and

PARTICULARLY CONCERNED about the emerging federal claim as expressed in proposed federal legislation such as the Territorial Sea Extension Act, the Hard Seabed Minerals Act, and the Fishery Conservation Amendments Act; and

ANXIOUS that a comprehensive federal policy, with dire consequences for Flag Islands' inalienable rights in the EEZ, will soon be proposed and promulgated by federal officials without the participation of the Flag Islands; and

CONFIDENTLY STATING that the ancestors of the current inhabitants of the Flag Islands exercise dominion over the ocean and its resources as an extension of their land; and

KNOWING that for centuries we have traditionally explored, exploited, conserved, managed and controlled the resources of the sea around our islands as a natural resource, a resource that to this day continues to be culturally and economically vital to our peoples; and

RECOGNIZING that while the Flag Islands are unique political entities within the U.S. political family, with different historical and legal basis for their rights to the EEZ, all the Flag Islands have historically and traditionally made use of their offshore ocean resources and are vested with the inherent right to explore, exploit, control and manage their EEZ resources through customs and convention of international law and as derived through the will of their peoples and the laws of nature and God; and

HOLDING TO BE SELF-EVIDENT that the federal Government must derive its powers over the EEZ from the consent of the peoples of the Flag Islands;

AFFIRMING that our peoples have never voluntarily nor knowingly consented to the proposition that the Federal Government should have the permanent or exclusive right to explore, exploit, conserve, manage or control the resources within our EEZs; and

WHILE PLACING GREAT VALUE on our relationship with the United States, the Flag Islands need the flexibility to pursue objectives in their respective EEZs which are unique to their geographical circumstances, consistent with their cultural imperatives, and appropriate to their political setting; and therefore:

- (1) **PROCLAIM** jurisdiction and the exclusive inalienable right to explore, exploit, conserve, manage and control the living and non-living resources within their respective exclusive economic zones for the benefit of their inhabitants; and
- (2) **CALL ON** the United States of America to recognize and respect traditional rights of the Flag Islands to the resources of the EEZ, defer to locally enacted Flag Island laws regarding their resources, and adhere to international law, customs, and conventions to confirm that the Flag Islands have the inherent right to ownership and control over the resources within their EEZs; and
- (3) **URGE** the United States to treat each Flag Island as the unique political entity that it rightly is; and
- (4) **IN THE CAUSE OF DEMOCRACY**, ASK that the United States assume world leadership and ring in a new era of flexible

political arrangements for the 21st Century that encompasses the issue of EEZ's of the respective Flag Islands; and

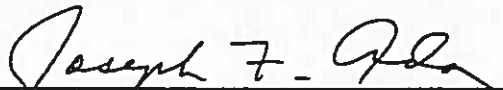
- (5) RESPECTFULLY REQUEST that the Flag Islands be invited to participate in any discussions of the Federal Government that encompasses the issue of EEZ's of the respective Flag Islands; and

DIRECT that copies of this Proclamation be transmitted to the President of the United States of America; to the Speaker of the U.S. House of Representatives; to the President of the U.S. Senate; to the Chairman of the U.S. House of Representatives Committee on Interior and Insular Affairs; to the Chairman of the U.S. Senate Committee on Energy and Natural Resources; to the Chairman of the U.S. House Committee on Merchant Marine and Fisheries; to the Secretary, U.S. Department of Interior; to the Secretary, U.S. Department of State; to the Secretary, U.S. Department of Commerce; to the Secretary-General of the United Nations; to the Chairman, United Nations Special Committee on Decolonization; and, to the President, United Nations Security Council.

PROCLAIMED in Washington, District of Columbia, this 3rd day of February, 1991.



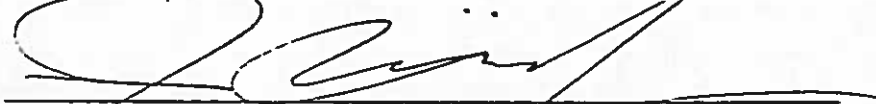
The Honorable Peter Tali COLEMAN
Governor, American Samoa



The Honorable Joseph F. ADA
Governor, Guam



The Honorable Lorenzo I. DE LEON GUERRERO
Governor, Commonwealth of the Northern Mariana Islands



The Honorable Rafael HERNANDEZ-COLON
Governor, Commonwealth of Puerto Rico



The Honorable Alexander FARRELLY
Governor, United States Virgin Islands

Ocean, Coastal, and Great Lakes Protection Policy

Suggested Amendment: NGA Policy on the Exclusive Economic Zone (D-48.3)

Offered By: Commonwealth of the Northern Marianas
Governor Lorenzo I. De Leon Guerrero

Guam Governor Joseph F. Ada

American Samoa Governor Peter Tali Coleman

United States Virgin Islands Governor
Alexander Farrelly

Date:

[new language is underlined]

48.3 Exclusive Economic Zone

Paragraph 3

"Today, by force and effect of the Proclamation, the conservation, exploration, and development of the U.S. EEZ resources are domestic concerns, separate and distinct from international uses such as the high seas freedoms of navigation and overflight. Management of these resources will no longer affect relations with foreign nations. Thus, the conservation, exploration, and development of resources in the U.S. EEZ are now legitimately the joint concern of the Federal government and the states [territories, and commonwealths of the United States]."

Paragraph 5

"This partnership should be based upon the recognition that the States have inherent and responsibilities pertaining to the conservation, exploration, and development of the resources in the U.S. EEZ stemming from their constitutional sovereignty, and the state and local impacts of exploration and development in the U.S. EEZ. This partnership should also be based upon the recognition that all of the island territories and commonwealths of the United States have inherent jurisdictional rights and responsibilities pertaining to the conservation, exploration, and development of the resources in their respective EEZ's, stemming from traditional rights, local statutes, international laws customs and conventions and/or federally approved covenants which confirm the inherent jurisdictional

rights of such island territories and commonwealths to exclusive ownership and control over resources within their respective EEZ's, subject only to federal responsibilities for national defense and foreign affairs. Further, subject to the recognition of the jurisdictional rights of island territories and commonwealths, the partnership should be based upon the recognition that the Federal Government has rights and responsibilities pertaining to the conservation, exploration, and development of the resources in the U.S. EEZ, stemming from its constitutional authorities and responsibilities and by virtue of the unique nature of some of the U.S. EEZ resources. Finally, the partnership should be based upon the recognition that the states, including the island territories and commonwealths, and the Federal Government have trust responsibilities for citizens of the nation as a whole in the extraterritorial area of the U.S. EEZ."

DRAFT

FILLING IN A JURISDICTIONAL VOID:
THE NEW U.S. TERRITORIAL SEA

by David M. Forman, M. Casey Jarman,
and Jon M. Van Dyke

I. INTRODUCTION

On December 27, 1988, President Ronald Reagan issued a Proclamation extending the U.S. territorial sea from three to twelve nautical miles for international purposes.¹ Reagan was advised by the Department of Justice that, by virtue of his role as the sole representative of the United States in foreign affairs,² he had the power to acquire sovereignty over this territory, despite the absence of any express constitutional or statutory authority. The Justice Department also analyzed the impact of this proclamation on federal statutes regulating offshore waters and federal-state jurisdictional divisions. They recognized that the intent of Congress is the key factor in determining whether domestic statutes would be affected by this territorial sea extension, but concluded that the "better view is that the expansion of the territorial sea will not extend coverage"³ of the Coastal Zone Management Act (CZMA).⁴ In an apparent attempt to

¹ Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (hereinafter Territorial Sea Proclamation).

² Douglas W. Kmiec, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 1 Terr. Sea J. 1, 16 (1990), a reprint of a memorandum prepared for Abraham D. Sofaer, Legal Adviser, Department of State, from the Office of Legal Counsel, U.S. Department of Justice (October 4, 1988).

³ Id. at 37.

⁴ 16 U.S.C. Sections 1451-64 (1988).

prevent the proclamation from expanding coastal state jurisdiction under the CZMA, President Reagan included a proviso stating that "[n]othing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom...."⁵

The constitutionality of this Proclamation has come under fire from several commentators⁶ who argue that acquisition of territory is a legislative not a presidential power. Others have argued that even if the President had the authority to assert sovereignty over an extended territorial sea, the proviso quoted above is ineffective absent express congressional approval.⁷

These contrasting views illustrate the ambiguous nature of the ocean management regime now governing the territorial sea. The Proclamation has apparently created a zone without clear jurisdictional authority, where a case-by-case analysis is needed to determine the rights, duties, and responsibilities of citizens, the government, and foreign nationals and nations. This situation is not only inefficient, but absurd. Although Congress recently

⁵ Territorial Sea Proclamation, supra note 1.

⁶ See infra notes 46-83 and accompanying text.

⁷ See infra notes 48, 52, 55, 72-74, 77, 80, 83, and accompanying text. Congress did not expressly give effect to the proviso in either of the sessions of the 101st Congress; H.R. 1405 (Section 4) would have made it clear that:

[each state's] jurisdiction or authority ... shall not [be] extend[ed] beyond ... [the] previous geographical limits by the extension of the territorial sea of the United States.

agreed that the CZMA should not apply in this area,⁸ questions remain, for instance, whether jurisdiction is conferred under the Endangered Species Act in the 3-12 mile zone or if several other protectionary measures⁹ can be applied throughout a 12-nautical-mile territorial sea.

This paper examines these constitutional and statutory ambiguities, considers historical and current federal-state tensions surrounding the management of nonliving and living resources, and suggests several alternative approaches Congress could take to produce a comprehensive ocean management regime for the United States. The federal government currently argues that the Proclamation extending the territorial sea has no legal impact on the proprietary status of submerged lands beyond those boundaries.¹⁰ Prior to the Proclamation, coastal state concern for protection of its coastal zone and a continuing desire to realize benefits from the exploitation of living and nonliving resources off coastal shores prompted several suits between coastal states

⁸ The 1990 Coastal Zone Management Act Amendments struck references to "the United States territorial sea" (16 U.S.C. Section 1453(1)), and inserted in lieu thereof "the outer limit of State title and ownership under the Submerged Lands Act..."

⁹ Among other statutes made ambiguous by the Proclamation are the Ocean Dumping Act; the Deep Water Ports Act; the International Regulations for Preventing Collisions at Sea; the Prevention of Pollution from Ships; Shore Protection from Municipal or Commercial Waste; and the Independent Safety Board Act. See infra notes 89-103 and accompanying text.

¹⁰ The "no impact" view is based on the fact that the Submerged Lands Act (43 U.S.C. Sections 1301-15) refers to specific boundaries. Management and regulatory authority issues regarding nonmineral uses, however, are not definitively stated. See infra, Part IV, note 114.

and the federal government.¹¹ The uncertainty regarding the status of the 3-12 nautical mile zone will, in all likelihood, lead to a heightening of these federal-state tensions. Although the potential for friction between fisheries management carried out under the Magnuson Fisheries Conservation and Management Act (MFCMA)¹² and state coastal zone management under the Coastal Zone Management Act (CZMA) was corrected by the 1990 CZMA amendments,¹³ other issues remain unanswered.

The primary need for clarification of the legal status of the extended territorial sea is one more example of the result of the federal government's failure to develop and enact a comprehensive ocean policy. Affirmative Congressional action is preferable to resorting to the judicial process, and is the best way to resolve these problems. Thus it is in the best interests of coastal states to push for legislation that would clarify the nature of this zone.

* * * *

¹¹ See *infra*, notes 115-127, 132, 161, 169, 173, 175 and accompanying text.

¹² 16 U.S.C. Sections 1801-1861 (1988).

¹³ 16 U.S.C. § 1456(c)(3)(B) was amended to require that any area leased under the OCSLA ... affecting any [land use or water use in] land or water use or natural resource of the coastal zone of the state ... must be consistent ... [with] the enforceable policies of the coastal state's management plan. This amendment effectively overturned *Secretary of the Interior v. California*, 464 U.S. 312 (1984) (holding that the act does not apply to oil and gas leases) because of the undeniable impact leasing will have on the natural resources of the coastal zone.

§ 1456(d) was also amended to clarify the Act's application to federal activities whether "in or outside of the coastal zone" which affect any land or water use or natural resource of the coastal zone.

II. THE CONSTITUTIONALITY OF THE UNILATERAL PRESIDENTIAL EXTENSION OF THE U.S. TERRITORIAL SEA TO 12-NAUTICAL-MILES

Introduction

President Reagan's 1988 Territorial Sea Proclamation purported to extend the U.S. territorial sea from three to twelve miles. The Proclamation explicitly addressed only the United States' foreign relations and expressly disclaimed any domestic effect.¹⁴ Several commentators have examined the constitutionality of unilateral executive action in this area.¹⁵ Some questions regarding the President's exercise of power in this fashion remain in dispute. This section begins with a historical background of the evolving concept of the territorial sea. It then examines the sources and examples supporting unilateral acquisition of territory by the President, and contrasts these with the arguments for a more restrictive interpretation of Presidential powers.

A. The Territorial Sea. An Evolving Concept

In 1793, Secretary of State Thomas Jefferson presented the first official claim to the marginal seas. The rationale for the

¹⁴ Territorial Sea Proclamation, supra, note 1:
Nothing in this Proclamation: (a) extends or
otherwise alters existing Federal or State law
or any jurisdiction, rights, legal interests,
or obligations derived therefrom....

¹⁵ See e.g., Kmiec, supra, note 2; Jack H. Archer & Joan M. Bondareff, The Role of Congress in Establishing U.S. Sovereignty Over the Expanded Territorial Sea, 1 Terr. Sea J. 117 (1990); Richard E. Burns, A Discussion of the Constitutional Issues Raised by Executive Extension of the Territorial Sea Limit (unpublished student paper prepared for Second-year Seminar at the University of Hawaii, William S. Richardson School of La, April 1990).

claim was a desire to protect the newly formed nation from foreign attack. Although Jefferson's letter to the British Crown was termed an assertion of jurisdiction, the claim is now recognized as establishing U.S. sovereignty over a three-mile territorial sea.

Early cases such as Martin v. Waddell,¹⁶ The Abby Dodge,¹⁷ Skiriotes v. Florida,¹⁸ Pollard's Lessee v. Hagan,¹⁹ and Louisiana v. Mississippi²⁰ suggested that the states owned the submerged lands and natural resources of the territorial sea. The state also had plenary jurisdiction over activities within the seaward limit of the territorial sea, qualified only by the constitutional power of the federal government over navigation. The status of this regime changed, however, after the U.S. Supreme Court's United

¹⁶ 41 U.S. (16 Pet.) 367 (1842) (the beds and banks of the tidal and navigable waters are held by the sovereign, one of the 13 original states in this case, in trust for the benefit of the public.)

¹⁷ 223 U.S. 166 (1912) (construing a federal statute, which made it unlawful to take sponges from the Gulf of Mexico, to apply only outside Florida's territorial limits; the court believed that the United States was without power to regulate the traffic in sponges obtained within Florida's territorial limits.)

¹⁸ 313 U.S. 69 (1941) (holding that Florida has a clear interest in proper maintenance of sponges so that application of police power to illegal conduct within its territorial waters is proper in the absence of conflicting federal legislation.)

¹⁹ 44 U.S. (3 How.) 212 (1845) (extending Wadell to those states subsequently admitted to the Union, by virtue of the Equal Footing doctrine.)

²⁰ 202 U.S. 1 (1906) ("The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls ... or other products of the sea.")

States v. California²¹ decision (California I). In this decision, the court declared that the federal government has paramount rights over the U.S. territorial sea: "whatever any nation does in the open sea, which detracts from its common usefulness to nations ... is a question for consideration among nations as such, and not their separate units."²² Although California I clearly rejected state ownership, some uncertainty remained because the Court did not specifically determine that ownership of the area rested with the federal government.²³

Three years later, the Court resolved that issue, again in favor of the federal government. In United States v. Texas,²⁴ the Court denied Texas' claim that upon entering the Union, the state surrendered only its "imperium", not its "dominion",²⁵ over its offshore lands. The Court reached this conclusion despite strong historical claims to the area arising from Texas' prior status as an independent republic. Following a change in administration

²¹ 332 U.S. 19 (1947).

²² Id. at 35.

²³ Id. at 43-46 (Frankfurter, J. dissenting) (noting that the majority did not treat the 1945 Truman Proclamation on the Continental Shelf as an assertion of ownership; national interest in peace and world commerce gave the umbrella justification for federal powers of imperium and regulation, but these powers are not equivalent to dominion or ownership.)

²⁴ 339 U.S. 707 (1950). The Court also dismissed a claim by the state of Louisiana, United States v. Louisiana, 339 U.S. 699 (1950) (Louisiana I) based on continuous, undisturbed and unchallenged sovereignty since admission in 1812, and upon a 1938 state statute declaring a southern boundary 27 miles from shore.

²⁵ Dominion refers to ownership, while imperium refers to control.

resulting from the 1952 national election, Congress responded to mounting state protest of the California I and Texas decisions by passing the Submerged Lands Act (SLA).²⁶ The Act recognized the title of the coastal states to the submerged lands out to three nautical miles, and further to the seaward boundaries of states bordering the Gulf of Mexico at the time they entered the Union, to a limit of nine nautical miles.²⁷

In United States v. Louisiana²⁸ (Louisiana II), Justice Harlan's majority opinion apparently ascribes something less than sovereignty to the territorial sea.²⁹ The court recognized that nations may claim and exercise broad, if not complete, "dominion" over its adjacent territorial sea,³⁰ but still characterized a nation's relationship to its ocean space as different from its

²⁶ Ch. 65, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§1301-15 (1985 and 1990 Supp.)).

²⁷ Id., §§ 1302, 1312. These Gulf states were required, however, to prove their claims in court, see infra note 122 and accompanying text.

²⁸ 363 U.S. 1 (1960) (the court was unconvinced by the state's historical claims, refusing to extend Louisiana's maritime boundaries beyond three nautical miles; the court also stated that the controversy was a wholly domestic matter that was within the power of Congress to resolve).

²⁹ Kmiec, supra note 2, at 17 n.50, citing to Louisiana II, at 33. Burns, supra note 15, discusses this language and summarizes Justice Harlan's view as: "the territorial sea boundary confers more limited rights than a land boundary."

³⁰ Id. at 33. By virtue of national external sovereignty, "a nation may extend its national authority into the adjacent sea" including the right to fish, control smuggling, and enforce sanitary measures. Id. at 34.

absolute sovereignty over its land territory.³¹

Today, international law, as codified in the 1982 Law of the Sea Treaty,³² allows countries to extend their territorial sea to a limit of 12 nautical miles and (contrary to the understanding of the territorial sea expressed by Justice Harlan in Louisiana II), recognizes the coastal nations' "sovereign" rights in their territorial sea, limited only by other nations' right to innocent passage. This new approach to the meaning of the territorial sea arguably diminishes the importance of the cases mentioned above and may require a reexamination of the rights of states to offshore resources in relation to the federal government. The Territorial Sea Proclamation must, consequently, be examined carefully to determine its impact upon domestic ocean policy. The remainder of this section addresses that task by considering the sources of Presidential power and examples of historical territorial acquisitions.

B. Sources of Presidential Power

The Territorial Sea Proclamation states that the U.S. territorial sea is extended to 12 nautical miles for international purposes. In its memorandum prepared prior to the issuance of this

³¹ See id. at 33, 38-39, citing to California I, 332 U.S., at 35 (1947).

³² United Nations Convention on the Law of the Sea, art. 3, done Dec. 10, 1982, Montego Bay, U.N. Sales No. E.83.V.5 (1983), reprinted in 21 I.L.M. 1261 (1982). Except for Part XI of this Treaty on deep seabed mining, the provisions of this treaty have been recognized by the United States as being generally reflective of customary international law.

proclamation, the Department of Justice characterized the President's action as constitutional.³³ Other commentators, however, have criticized this analysis, challenging the constitutionality of executive acquisition of territory without the participation of Congress.³⁴ This section analyzes the assertion of sovereignty over new territory based on several grounds: the President's foreign affairs power, the President's role as commander-in-chief, the President's implied powers through Congressional acquiescence, and powers that arguably exist in the current nuclear age.

1. Foreign Affairs Power

Although the most legally secure method of extending the territorial sea would be by treaty, the President's authority to act alone through a Presidential Proclamation can arguably be justified by virtue of the President's constitutional role as the sole representative of the United States in foreign relations.³⁵ Although the Constitution does not specifically address the power to acquire territory on behalf of the United States, the Supreme Court in Mormon Church v. United States³⁶ stated that the powers

³³ Kmiec, supra note 2.

³⁴ See Archer & Bondareff and Burns, supra note 15.

³⁵ Kmiec, supra note 2.

³⁶ 136 U.S. 1, 42 (1890); see also American Ins. Co. v. Canter., 26 U.S. (1 Pet.) 511, 542 (1828) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or

of the several branches of government to make war, to make treaties, and to govern the territory of the union provide the necessary authority. Some commentators focus on practical considerations to support the President's authority to assert sovereignty: "As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation."³⁷

The same constitutionally derived authority that arguably allows the President to acquire territory by discovery and occupation has been cited as additional justification of Presidential power to proclaim sovereignty over an extended territorial sea. This power was judicially recognized in Louisiana II,³⁸ where the court stated that the President has the power "to determine how far this country will claim territorial rights in the marginal sea as against other nations."³⁹ United States v. Curtiss-Wright Export Corp.⁴⁰ also seems to authorize Presidential assertion of sovereignty in the absence of a specifically enumerated constitutional power.⁴¹

by treaty").

³⁷ Kmiec, supra note 2, at 16.

³⁸ See supra, notes 28-31 and accompanying text.

³⁹ Louisiana II, 363 U.S. at 34.

⁴⁰ 299 U.S. 304 (1935).

⁴¹ The President's foreign relations power arises from both "the inherent sovereign authority over foreign relations [obtained] when [the United States] secured its independence from Great

The only definitive Constitutionally-based power authorizing Congress to acquire territory, on the other hand, derives from the constitutional power of Congress to admit new states into the union. Congress has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States.⁴² Congressional assertions of jurisdiction or sovereignty in areas of the ocean⁴³ were all enacted after initial Presidential proclamations on behalf of the United States.⁴⁴ This history arguably illustrates the operation of constitutional restraints on the power of Congress to proclaim jurisdiction or sovereignty over offshore areas.⁴⁵

The propriety of a President's unilateral assertion of "sovereignty" (as opposed to claiming "jurisdiction" alone) over

Britain" (Curtiss-Wright, 299 U.S., at 318), and the fact the President exercises many of the powers formerly vested in the British crown that are not enumerated in the Constitution as belonging to Congress. See Kmiec, supra note 2, at 6 n.16.

In Curtiss-Wright, the court stated that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." 299 U.S. at 318.

But see infra, note 48 and accompanying text for a criticism of this language as mere dicta.

⁴² Kmiec, supra note 2, at 18.

⁴³ Specifically, the Neutrality Act of 1794, 51 U.S.C. sec. 6; other federal statutes relating to customs authority, 14 U.S.C. sec. 89 and 19 U.S.C. sec. 1581; and the OCSLA, 43 U.S.C. secs. 1331-56.

⁴⁴ Kmiec, supra note 2, at 18 n.54.

⁴⁵ Id. at 18 (at least for international purposes).

this area is, however, not free from doubt.⁴⁶ It can be argued that neither express nor implied constitutional authority for unilateral executive extension of the United States' territorial sea exists.⁴⁷ Under this view, the extension of the territorial sea limit can be properly achieved only by congressional action, whether or not in conjunction with an executive initiative. The broad language used by Justice Sutherland in Curtiss-Wright relating to Presidential powers can be characterized as dicta because the facts of the case reveal that Congress gave the President the power to ban the sale of arms to certain countries.⁴⁸ Curtiss-Wright cannot be cited as holding that the President has authority to exercise foreign affairs initiatives, such as asserting sovereignty over new territory, in the absence of specifically enumerated constitutional power. The implied powers justifying unilateral acquisition of territory by the President simply do not apply to the territorial sea.⁴⁹

⁴⁶ The advocates of Presidential authority acknowledge this doubt themselves. Id. at 36.

⁴⁷ See, e.g., Burns, supra note 15, at 1.

⁴⁸ Curtiss-Wright, 299 U.S. at 319-20.

⁴⁹ Other possible modes of acquiring territory are clearly inapplicable to the present territorial sea extension. The most usual method of acquiring territory is through a treaty, but that approach requires participation of the Senate. Purchase and cession are typically accomplished through a treaty. Conquest cannot be relied upon because the necessary factors are not present; in The American Insurance Co. v. Canter, 26 U.S. 511, 542-43 (1828), it was held that the holding of conquered territory is only a temporary military occupation until a treaty is entered into. Furthermore, in Fleming & Marshall v. Page, 9 Howard 603, 614 (1849), the court held that extension of the boundaries of the United States can be accomplished only through the treaty-making

The need for caution, secrecy, swift action, and specialized information in the negotiation process (better accomplished by the President than by Congress) generally justifies expansive foreign relations powers for the President. These concerns are "simply inapplicable to the territorial sea issue," however, because "[t]here is no need for secrecy, swift action or specialized information in extending the territorial sea."⁵⁰ The practical consideration that the President is best situated to announce the assertion of U.S. sovereignty⁵¹ is also irrelevant to the question of how territory is actually acquired. The President could satisfy his role in foreign affairs by simply announcing previously-made Congressional decisions to the world.⁵² If Presidential power is to be relied upon, therefore, it must be found in other parts of our Constitutional structure.

2. Commander-in-Chief

The apparent purpose of the territorial sea extension was to provide a greater defense perimeter for the United States, specifically to keep foreign intelligence-gathering and naval vessels farther off the coast of the United States.⁵³ Because the

power or by legislative authority. Annexation has never been exercised by the President alone, but has been utilized by Congress twice. Burns, supra note 15, at 4-7.

⁵⁰ Burns, supra note 15, at 11.

⁵¹ Kmiec, supra note 2, at 16.

⁵² Burns, supra note 15, at 16.

⁵³ Archer and Bondareff, supra note 15, at 117. See also U.S. Naval War College, International Law Situation and Documents 603-604 (1957) (listing defensive sea areas established by the

U.S. Constitution places control of the nation's defenses in the Chief Executive, unilateral Presidential action appears to be justified at first glance. The Territorial Sea Proclamation, however, goes beyond merely establishing new boundaries necessitated by modern technology. Although it might be argued that the President's assertion of sovereignty over an extended territorial sea was not intended to intrude into legislative affairs,⁵⁴ the President's powers as Commander-in-Chief do not automatically confer authority to act without participation by

President pursuant to 18 U.S.C. § 2152), cited in Kmiec, supra note 2, at 11 n.32.

⁵⁴ See Kmiec, supra note 2. The Department of Justice's interpretation of the effect of the Presidential Proclamation on the Coastal Zone Management Act may not necessarily have been crucial to the President's designs.

One commentator has stated that the language of the Proclamation prohibiting domestic impact "... avoids the awkward domestic political and legal consequences that would follow a unilateral Presidential attempt to modify Congressional allocation of authority between federal and state governments concerning the coastal zone." See John E. Noyes, United States of America Presidential Proclamation No. 5928: A Twelve-Mile Territorial Sea, 4 Int'l J. Estuarine & Coastal L. 142, 146 (1989).

Similarly, in the ABA's Law of the Sea Committee Newsletter, vol. 3, no. 2 (1989), Donald Carr stated that the President "recognized that the domestic legislative consequences involved the authority of Congress" (at 10) and that common sense suggested that each of the statutes should be considered separately. According to Carr, therefore, the proclamation was merely an exercise of the President's foreign affairs authority, leaving domestic legislation unchanged.

On the other hand, the Coastal States Organization has interpreted the President's attempted limitation on domestic statute as going farther than the Justice Department was willing to go. Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcommittee on Oceanography and Great Lakes of the House Committee on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 64, 70 (1989) (statement of Chris Shafer, Chair, Coastal States Organization).

3. Congressional Acquiescence

The Territorial Sea Proclamation might be defensible as a valid executive acquisition of territory in the face of congressional acquiescence. Congress may have already yielded authority to the executive branch through acquiescence "over time" since the assertion of territorial sea jurisdiction in 1793 or specifically with regard to the President's Proclamation in 1988.

a. Acquiescence "Over Time"

The initial assertion of jurisdiction over the territorial sea by Secretary of State Thomas Jefferson in 1793 has ripened into a claim of sovereignty over time, even though such rights were not clear when the executive branch made its original unilateral claim.⁵⁶ It has been noted, however, that Congress acted quickly

⁵⁵ But see infra note 63 and preceding text for a potential argument to the contrary based on implied "Nuclear Age" powers.

⁵⁶ See Archer and Bondareff, supra note 15, at 126: "it is not clear whether Jefferson and the Washington administration intended to assert U.S. jurisdiction to one sea league for defensive purposes only or to acquire new territory subject to U.S. sovereignty three miles seaward." (Emphasis added.) See also Kmiec, supra note 2, at 9-10 nn.24-25 and accompanying text: "the extent of Territorial Sea jurisdiction at Sea, has not yet been fixed." Compare with Kmiec at 17 n.51:

There may be an argument that President Washington's unilateral assertion of sovereignty over the original territorial sea is now underpinned by longstanding congressional acquiescence. ...[T]here is at least arguable recognition by the legislature of the President's power in its explicit desire that the United States exercise full sovereignty over the territorial sea claimed by our first president.

to affirm the Jefferson claim by passing the Neutrality Act of 1794. Passage of the Submerged Lands Act in 1953 also suggests that Congress has not deferred to the executive with regard to the territorial sea. Other historical events show that Congress has not previously acquiesced in unilateral executive acquisition of territory. Most United States acquisitions have been accomplished by treaty. Congress has twice asserted its own authority to acquire territory by annexing Texas and Hawaii. Congress displayed an intention to participate in the acquisition of territory through the Guano Islands Act of 1856. And the Senate has voted to cut off funds for construction of military bases overseas as a means of protesting the President's acquisition of those bases by executive agreement rather than by treaty.⁵⁷ As discussed below, it also does not appear that Congress has yielded to Presidential authority as exercised in 1988.

b. "Specific Case" Acquiescence

The Territorial Sea Proclamation is "in legal limbo until such time as Congress either passes legislation to give it effect or

⁵⁷ Burns, supra note 15, at _____ nn.80-83. See also, Protocol of a Conference Held at the Foreign Office, Dec. 9, 1850, 18 Stat. (Part 2) 325-26:

There is a third example of unilateral acquisition by the President by executive agreement. In this regard, President Filmore entered into an executive agreement in 1850 in which Great Britain "cede[d] to the United States such portion of the Horseshoe Reef as may be found requisite" for a lighthouse in Lake Erie near Buffalo[;]

5 Treaties and Other International Acts of the United States of America 905-28 (H. Miller ed. 1937) (describing the acquisition of Horseshoe Reef), reprinted in Kmiec, supra note 2, at 15 n.44.

fails to act, in which case their acquiescence would soon be interpreted as impliedly authorizing the Proclamation to take effect."⁵⁸ Congressional failure to act in the near future may lead to an interpretation of implied authorization of executive power by acquiescence.⁵⁹ The necessary time period for congressional action is "probably very short."⁶⁰ The effect of Congress's refusal to pass H.R. 1405⁶¹ does not definitively refute the assertion of congressional acquiescence, but Congress's recent attention to this issue suggests that it does not intend to acquiesce.⁶²

⁵⁸ Burns, supra note 15, at 32.

⁵⁹ Id. at 22.

⁶⁰ Id.

⁶¹ The Territorial Sea Extension Act, introduced by Representative Shumway, would have given effect to the Territorial Sea Proclamation, including the proviso limiting its effect upon domestic legislation:

Section 2(2) -- the possible extension of the legal rights and interests of the States of the United States and the authority of Federal agencies in the area beyond the previous three miles merits careful and separate consideration.

Section 4 -- ...jurisdiction and authority ... shall not extend beyond ... previous geographical limits by extension of the territorial sea of the United States.

See also H.J. Res. 308, 91st Cong., 1st Sess. (1969); S.J. Res. 84, 91st Cong., 1st Sess. (1969); S.J. Res. 136, 90th Cong., 2d Sess. (1968); H.R. 10492, 88th Cong., 2d Sess. (1964). None of these bills has been enacted (cited in Kmiec, supra note 2, at 18 n.54).

⁶² See supra notes 8, 13 and accompanying text for Coastal Zone Management Act reauthorization amendments, which suggest that Congress has not yielded authority to legislate with regard to domestic jurisdiction in the U.S. territorial sea.

4. Nuclear Age Powers

In the nuclear age, the imminent and unpredictable threat to national security interests suggests the need for broad Presidential authority in the defense of our country. The President must be allowed to take swift action in response to nuclear attack, because in such situations insufficient time will be available for Congress to deliberate. This power cannot be cited as a source for unilateral Presidential action, however, because such immediate need exists for an extension of the territorial sea. The Territorial Sea Proclamation is instead, a "momentous break with tradition [that should have] require[d] lengthy debate at the highest levels of government."⁶³

C. The Separation of Powers Issue

The Constitutional structure on the foreign affairs power suggests that neither the executive nor legislative branch was intended to have exclusive authority. The uncertainty concerning the proper source of authority for asserting sovereignty over an extended territorial sea creates a "classic separation of powers conflict."⁶⁴ The quintessential separation of powers case, Youngstown Sheet & Tube Co. v. Sawyer,⁶⁵ although primarily a domestic affairs case, can be validly used to examine separation of

⁶³ Burns, supra note 15, at 1.

⁶⁴ Id. at 9.

⁶⁵ 343 U.S. 579 (1952) (The Steel Seizure Case).

powers conflicts in foreign affairs.⁶⁶

Under Youngstown, the President's unilateral extension of the territorial sea (performed in the absence of any congressional grant or denial of authority) falls in a twilight zone where he can rely only upon his independent powers. Once in this zone, either (i) congressional inertia, indifference or acquiescence, or (ii) a consistent administrative policy, can be said to authorize executive action.⁶⁷ The potential argument that the original territorial sea claim represents a consistent administrative policy is not dispositive.⁶⁸ The real issue is the executive policy toward unilateral acquisition of territory. Proper consideration of this issue necessitates an analysis of historical examples of U.S. territorial acquisitions.

D. Historical Examples of Territorial Acquisition

In our nation's rich history, both Congress and the President have played significant roles in the acquisition of new U.S. territory. The historical examples below will shed some light on the constitutionality of the Territorial Sea Proclamation.

⁶⁶ See, e.g., G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, Constitutional Law 414 (1986).

⁶⁷ See e.g., Kent v. Dulles, 357 U.S. 116 (1958); Zemel v. Rusk, 381 U.S. 1 (1965); and Haig v. Agee, 453 U.S. 280 (1980).

⁶⁸ See supra notes 69-77 and accompanying text, showing that administrative policy toward the territorial sea has not been consistent.

1. Executive Acquisitions

The executive branch arguably acted without participation by Congress in asserting the original claim to the three-nautical-mile territorial sea in 1793 by President Washington and Secretary of State Jefferson.⁶⁹ Sovereignty is the "indispensable concomitant" of a nation's territorial sea, however, and therefore prevents the extension of the territorial sea (without changing the definition of "territorial sea" itself) for jurisdictional purposes only.⁷⁰

Past Presidents acquired, by discovery and occupation, the Midway Islands and Wake Island.⁷¹ "The record of U.S. territorial

⁶⁹ See supra note 56; Archer and Bondareff, supra note 15, at 124; and Burns, supra note 15, at 17. Archer and Bondareff acknowledge the independent claim of territorial sea jurisdiction by the executive branch, but qualify its precedential value by reference to its limited purposes: (1) to preserve U.S. neutrality, and (2) to provide "territorial protection." These authors also note that Congress acted quickly to affirm the Jefferson claim by enacting the Neutrality Act of 1794. Burns also acknowledges the lack of Congressional participation in the 1793 claim. He feels, however, that Jefferson's reference to "Territorial jurisdiction at Sea" was not meant to be an assertion of sovereignty. (Emphasis added.) Burns, at 17.

⁷⁰ Burns, at 11.

⁷¹ The precedential value of Wake Island is unclear because of a continuing controversy over true ownership of the three atolls that make up Wake Island. See Dwight Heine & Jon A. Anderson, Enen-Kio: Island of the Kio Flower, 19 Micronesian Reporter 34 (1971). Although the claim has been dormant from 1885-1986, the Marshall Islands claim the atolls as Enen-Kio, by virtue of discovery and traditional use centuries prior to U.S. occupation. The Marshalls have no written ancient history with which to support their claim, but Enen-Kio is claimed by one of their chiefs. The long, hard voyage to Enen-Kio was motivated by fear, because Marshallese custom called for human sacrifice to provide bones to be used in the tattooing process. Potential victims' lives were spared only if they could provide a substitute bone as strong as a human bone. The wing of a large sea bird found on Enen-Kio was thus their only way to escape death. The Marshallese apparently stopped going to Enen-Kio after the arrival of Christianity, but

acquisitions," however, "does not authoritatively determine whether the executive branch of government may exercise this right [of acquisition] independently of the Congress."⁷² Instead, the record shows the necessity of action by both the Executive Branch and Congress to acquire new territory.⁷³ The Midway Islands claim was not acted upon by Congress until after the annexation of Hawaii; in other words, the acquisition is traceable through the Republic of Hawaii, and not to a claim based on discovery and occupation. Similarly, the 1899 claim to Wake Island was not acted upon by Congress until 1934.⁷⁴ Wake Island appears to be the only clear instance⁷⁵ when the Executive has asserted a right to acquire and govern territory without some color of legislative approval. But

still feel strongly that the atolls will forever be theirs.

Cf. D. Leff, Uncle Sam's Pacific Islets (1940); and Pacific Islands Yearbook (J. Carter ed., 14th ed. 1981). The United States attempted to take formal possession of Wake Island on January 17, 1899, through the claim of Commander Edward D. Taussig of the U.S.S. Bennington. In a 1923 scientific expedition, the only signs of life found was an abandoned Japanese feather gatherers living site. In 1934 Wake Island was formally placed under Navy Department jurisdiction, and is now the responsibility of the Air Force, which requires permission of its Hawaii office before any aircraft may land on the island. There are currently about 400 people living at Wake in a variety of facilities for recreation and living quarters. A weather station and a branch of the National Oceanographic and Atmospheric Administration are located there.

⁷² Archer and Bondareff, supra note 15, at 122.

⁷³ Id. at 124.

⁷⁴ See Lawson Reno, The Power of the President to Acquire and Govern Territory, 9 Geo. Wash. L. Rev. 251, 255-75 (1941). Lawson states that apparent executive assertion of sovereignty over Midway and Wake was actually gained by virtue of the annexation of Hawaii by Congress.

⁷⁵ But see supra note 71.

the discovery and occupation of relatively small atolls and islands in the Pacific in the nineteenth century is arguably irrelevant to the unilateral Presidential extension of the territorial sea.⁷⁶ Even if unilateral executive action were assumed in these cases, their precedential value is diminished substantially by analogy to the much more significant acquisitions of territory by Congress of every other piece of territory in America;⁷⁷ at most, "acquisition of the islands represents nothing more than an exception to the rule."⁷⁸

2. Congressional Acquisition⁷⁹

The historical precedents of treaty acquisitions,⁸⁰ the

⁷⁶ Archer and Bondareff, supra note 15, at 130.

⁷⁷ See supra notes 79-83 and accompanying text.

⁷⁸ Burns, supra note 15, at 16.

⁷⁹ See supra notes 42-43 and accompanying text.

⁸⁰ See Treaty Between the United States and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 200, 201, T.S. No. 86 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Feb. 22, 1819, art. 2, 8 Stat. 252, 253 (cession of Florida by Spain); Treaty with Great Britain, June 15, 1846, art. 1, 9 Stat. 869, T.S. No. 120 (Oregon Compromise); Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the Mexican Republic, Feb. 2, 1838, art. 5, 9 Stat. 922, 926-27, T.S. No. 207 (cession of California by Mexico); Treaty with Mexico, Dec. 30, 1853, art. 1, 10 Stat. 1031, 1032, T.S. No. 208 (Gadsden Purchase); Treaty with Russia, March 30, 1867, art. 1, 15 Stat. 539, T.S. No. 301 (cession of Alaska by Russia); Treaty of Paris Between the United States and Spain, done Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343; Isthmian Canal Convention, Nov. 18, 1903, arts. 2 & 3, 33 Stat. 2234, 2234-35, T.S. No. 431 (cession of Panama Canal Zone by Panama); Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, art. 1, 39 Stat. 1706, T.S. No. 629 (purchase of the Virgin Islands from Denmark).

annexations of Texas and Hawaii, and the Guano Islands Act illustrate the existence of a congressional role in the acquisition of new territory by the United States. The U.S. Constitution expressly gives Congress the power to admit new states into the Union. That power was clearly exercised in the annexation of Texas. The precedential value of the annexation of Hawaii, on the other hand, is inconclusive because Hawaii was not annexed as a state but as a territory.

Perfunctory dismissal of the impact of the Guano Islands Act,⁸¹ through the bare statement that "[the Act] does not appear to be an explicit claim of territory by Congress,"⁸² is not warranted. The Act clearly provides a mechanism for legitimizing territorial claims entered by U.S. citizens on behalf of the U.S. government. Quoting Justice Sutherland, "[n]o action or lack of action on the part of the President could destroy [the] potentiality...[of an existing law]. Congress alone could do

See also Cession of Tutuila and Aunuu, Chief of Tutuila to United States Government, April 17, 1900, reprinted in American Samoa Code Annotated 2 (1981), and Arnold H. Leibowitz, American Samoa: Decline of a Culture, 10 Cal. Western Int'l L.J. 220, 229-30 n. 76 (1980); the Manua Islands were ceded in a separate document in July 1904, reprinted in American Samoa Code 9-11 (1973). Congress did not formally accept this cession until 1929, 43 Stat. 1253 (Feb. 20, 1929), now codified in 48 U.S.C. sec. 1431. Swains Islands became a part of American Samoa by joint resolution of Congress, approved on March 4, 1925. H.R.J. Res. 244, 68th Cong., 2d Sess., 43 Stat. 1357 (1925); Guam was acquired by the United States through a treaty of cession concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 1754, T.S. No. 343.

⁸¹ 48 U.S.C. sec. 1411 (1988).

⁸² Kmiec, supra note 2, at n.65, 21.

that."⁸³

E. Conclusions

Under international law, the United States has jurisdiction over a twelve mile territorial sea but under the U.S. Constitution and domestic law, a new undefined zone from three to twelve nautical miles appears to have been created, along with significant confusion with regard to the application of federal legislation.⁸⁴ The new zone from three to twelve miles was not "discovered," but

⁸³ Archer & Bondareff, supra note 15, at 136, citing Curtiss-Wright, 299 U.S. at 322. See also Argentine Republic v. Amerasia Shipping Corp., 488 U.S. 428, 441 n.8 (1989), in which the Supreme Court suggests that extension of the U.S. territorial sea to twelve miles may affect how domestic laws are interpreted.

⁸⁴ The final section of Archer & Bondareff's paper considers the options open to Congress:

The territorial sea extension could be affirmed through legislation, either codifying the status quo prior to the proclamation or extending state ownership and control to twelve miles. A joint federal-state mechanism could be created to manage the space and resources of the new nine-mile zone cooperatively. Archer & Bondareff, supra note 15, at nn.115-116, 138, citing to Knecht, Cicin-Sain & Archer, National Ocean Policy: A Window of Opportunity, 19 Ocean Dev. & Int'l Law 113-142 (1988), and Eichenberg & Archer, The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism", 14 Ecol. L.Q. 9 (1987). The latter provides a partial listing of articles examining federal-state conflicts in coastal and ocean resource management.

Archer & Bondareff also propose to revive consideration of a National Oceans Policy Commission (as proposed in H.R. 5069, 100th Cong., 1st Sess. (1988)). In addition to providing a quick congressional response, such action would reduce the level of intergovernmental conflict in a comprehensive fashion. Well-coordinated amendments to existing legislation could resolve current coastal and marine resource management conflicts without necessitating substantial changes in existing programs. Id. at 139-40.

A more detailed consideration of these issues is reserved for other workshop commentators. See particularly the paper presented by Tim Eichenberg.

is the result of evolutionary change in international law.⁸⁵

The warning against congressional acquiescence echoed both by Archer & Bondareff and by Burns,⁸⁶ is underscored by the uncertainty of interpretation with regard to acquisition of an expanded territorial sea zone by the United States. The dangers of individualized judicial assessment of each federal statute referring to the territorial sea should be heeded;⁸⁷ but Congress need not accommodate the Justice Department's suggestion that legislation be passed negating the expansion of domestic coverage. An alternative suggestion of well-coordinated amendments⁸⁸ represents a better opportunity to develop a comprehensive national oceans policy with a minimum of intergovernmental resource management conflicts. Such a resolution would save countless taxpayer dollars by avoiding federal-state litigation of competing ownership and management claims. More importantly, it would enable the nation to provide proper stewardship of the resources in the 12-nautical-mile territorial sea (as well as those of the adjacent exclusive economic zone) by clarifying the currently fragmented management and enforcement responsibilities.

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⁸⁵ Archer & Bondareff, supra note 15, at 130.

⁸⁶ See supra notes 58-62 and accompanying text.

⁸⁷ See supra note 13 and accompanying text.

⁸⁸ See infra notes 89-108 and accompanying text.

III. A SURVEY OF STATUTES REFERRING TO THE TERRITORIAL SEA

Introduction

This section lists and analyzes the references to territorial seas or waters in the United States Code. Some statutes using "coastal waters" or similar terms are also included when they appear to refer to the territorial sea. The statutes have been organized according to the level of ambiguity created by the uncertain status of the waters in the 3-12 nautical mile zone resulting from President Reagan's Territorial Sea Proclamation on December 27, 1988.⁸⁹ Some statutes specifically limit the extent of their applicability to a three-mile territorial sea, others do not address the width of the territorial sea at all. Another group of statutes apparently were intended to apply to the expanded territorial sea, whatever its breadth might be.

In the statutory materials that follow, the name and title of the act is followed by the language relevant to this problem. This material is followed by a commentary on the ambiguity or relative clarity of the reference to the territorial sea. For selected statutes, amendments to remove uncertainty are suggested.

A. Serious Ambiguities

ENDANGERED SPECIES ACT

Title 16,

Section 1538(1)(B) and (D) state that it is "unlawful to

⁸⁹ Territorial Sea Proclamation, supra note 1.

take" or "possess, sell, deliver, carry, transport and/or ship" "any such species within the United States or the territorial sea of the United States."

ANALYSIS: The territorial sea is not defined in the Act so it is not clear if the act can be enforced in the 3-12-nautical-mile zone.⁹⁰ The ambiguity is particularly relevant to the protection of nonmammals such as turtles and seabirds (compare the Marine Mammal Protection Act, discussed below).

* * * *

MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

Title 16,

Section 1802(3) defines the Continental Shelf as:

the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea...."

Section 1811:

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone, whose inner boundary is a line coterminous with the seaward boundary of each of the coastal states and extends to 200 nautical miles.

ANALYSIS: Amendments define the MFCMA in relation to the United States' EEZ, but the Continental Shelf definition is still operative with respect to fishery resources and possibly to sedentary species that are immobile or under the seabed. It cannot be assumed that the continuing reference to the continental shelf

⁹⁰ Although it is the policy of the National Marine Fisheries Service to enforce the Act in the 3-12 mile zone (and further to the limits of the United States' exclusive economic zone), that authority is not expressly granted by the text of the Act. (Phone interview with Gene Witham, NMFS enforcement agent, November 20, 1990.)

and territorial sea are inadvertent.⁹¹ Recent amendments to the Coastal Zone Management Act specifically refer to the Submerged Lands Act in defining the limits of state boundaries;⁹² it could be argued therefore, that state "seaward boundaries" means something different here.

Section 1812 applies to activity within any foreign nation's territorial sea.

Section 1822(e) states that the United States will not recognize the claim of any nation beyond such nation's territorial sea.

ANALYSIS: The references to the territorial seas of other nations are not directly relevant to the issue at hand.

(Sub-title: Atlantic Striped Bass Conservation Act)

Section 1851 (Historical Notes) "Section 3(3)(A):

coastal waters means-- all waters, whether salt or fresh, of a coastal State shoreward of the baseline from which the territorial sea of the United States is measured.

ANALYSIS: The territorial sea is mentioned only in reference to the baseline used for measuring it; the statute is not affected by the breadth of the territorial sea.

Section 1856(2):

jurisdiction and authority of a State shall extend-- (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the

⁹¹ Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcommittee on Oceanography and Great Lakes of the House Committee on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 64, ___ (1989) (statement of Chris Shafer, Chair, Coastal States Organization).

⁹² See supra note 13.

United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party.

ANALYSIS: Richard Hildreth of the University of Oregon Law School recalls that this provision was directed at islands in Southeast Alaska, in the Juneau area near the Canadian border.⁹³ The legislative history should be investigated to determine if other areas were considered by Congress, but it appears that the extension of the territorial sea would fill in any pockets of water. Because no new pockets would be created, this statute does not need amendment.

* * * *

SALMON AND STEELHEAD CONSERVATION AND ENHANCEMENT ACT

Title 16,

Section 3302(4):

the term "Columbia River conservation area" means-- ... (B) (i) the fishery conservation zone over which the Pacific Fishery Management Council has jurisdiction, and (ii) the territorial seas of Oregon and Washington.

Section 3301(a)(4) and (b)

to combat the excess fishing capacity of non-Indian fishers resulting from the decisions in United States v. Washington⁹⁴ and Sohappy v.

⁹³ Phone conversation on August 13, 1990.

⁹⁴ 520 F.2d 676 (9th Cir. 1976). A treaty recognizing off-treaty fishing rights for certain Indian tribes within the State of Washington was held to preempt state regulatory efforts in specific circumstances. State regulations, however, were allowed where reasonable and necessary for conservation; where conservation goals cannot be attained by restricting only citizens other than treaty Indians; where the regulations do not discriminate against treaty Indians; and provided that appropriate due process standards are

Smith,⁹⁵ a cooperative program involving the United States, the States of Washington and Oregon, the treaty tribes acting through the appropriate tribal coordinating bodies, and other parties [is organized to] ... encourage stability in and promote the economic well being of the treaty and nontreaty commercial fishing and charter fishing industries....

ANALYSIS: It is unclear whether Section 3302(4)(B)(ii) was intended to encompass an extended 12-nautical-mile territorial sea. Had the statute referred to the "seaward boundary" of Oregon and Washington, then it would be likely that a three-mile territorial sea was envisioned (particularly if the Submerged Lands Act was specifically mentioned). The extent of the ambiguity depends upon the boundaries of the fishery conservation zone over which the Pacific Fishery Management Council has jurisdiction. If the fishery conservation zone encompasses the 3-12 nautical mile zones off Oregon and Washington then the issue is moot, because Section 3302(4)(B)(i) will have already conferred jurisdiction over the area. Whichever is the case, this act could be clarified to remove any possible ambiguity.

* * * *

met. On a theory of cotenancy the state may interfere when it is necessary to prevent destruction of a run.

Apparently, Congress was concerned that Sohappy and Washington (discussed in the note below) gave the state too much discretion, and that nontreaty commercial fishers were given more than their fair share of the treaty resources.

⁹⁵ 529 F.2d 570 (9th Cir. 1975). The court upheld the amendment of a previous decree providing the Indians with a 50% entitlement to the harvest of the Chinook salmon run on the Columbia river, limited by the right of the State of Washington to establish nondiscriminatory regulations as reasonable and necessary for conservation of fishery resources.

LONGSHORE AND WORKERS' COMPENSATION

Title 33,

Section 902(a):

the term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

Section 903(a) states that the Act only applies if injury occurs upon navigable waters of the United States.

Section 905(c) includes the Outer Continental Shelf and artificial structures fixed thereon, as applicable to the Act.

ANALYSIS: The act provides coverage for injury occurring on the navigable waters of the United States is extended in The Outer Continental Shelf Lands Act⁹⁶ extends coverage of the Longshore and Workers' Compensation Act to injuries that occur in association with oil and gas operations conducted on the OCS. Whether injuries that occur in the 3-12 nautical mile zone, other than outer continental shelf mining activity (covered in Section 905(c)), is covered under the act is not entirely clear.

* * * *

OCEAN DUMPING ACT

Title 33,

Section 1401(c):

It is the purpose of this chapter to regulate (1) the dumping of material from the United States or United States' vessels, aircraft, or agencies, and (2) the dumping of material transported by any person from a location outside of the United States if the dumping occurs in the territorial sea or the

⁹⁶ 43 U.S.C. Sections 1333-56 (1988).

contiguous zone of the United States.

Section 1402(b):

"Ocean waters" means those waters of the open seas lying seaward of the baseline from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and Contiguous Zone.

Section 1411(b):

Except as authorized by permit ... no person shall dump any material transported from outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States extending to a line twelve nautical miles from the baseline from which the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

Section 1416(c):

if it appears to the Administrator that the disposition of material, other than dredged material, may adversely affect navigation in the territorial sea of the United States...the Administrator shall confer with the Secretary and no permit shall be issued if the Secretary determines that navigation will be unreasonably impaired.

ANALYSIS: Because the purpose of the act, as reflected in Section 1401(c), is to regulate dumping in both the territorial sea and the contiguous zone, regulation out to 12 nautical miles is clearly permitted. Section 1411(b), however, prohibits dumping without a permit "to the extent that it may affect the territorial sea." This language creates significant uncertainty as to whether a three- or twelve-mile territorial sea is involved.

Also, under Section 1416(c), it is not clear if the Administrator will be able to cite adverse impacts on navigation in

the 3-12 mile zone to deny a permit.

* * * *

DEEPWATER PORTS ACT

Title 33,

Section 1502(10):

"deepwater port" means any fixed or floating manmade structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States....

Section 1518(2):

Except as otherwise provided in this chapter, nothing in this chapter shall in any way alter the responsibilities and authorities of a State or the United States within the territorial seas of the United States.

ANALYSIS: It is not clear whether a particular structure will be considered a deepwater port in the 3-12 nautical mile zone.

A restrictive reading of Section 1518(2) might prevent the extension of jurisdiction under the act in the 3-12 mile zone (state or federal) without action by Congress, unless, of course, extended territorial sea coverage is found to be "otherwise provided in this chapter."

* * * *

INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA

Title 33,

Section 1601(2):

"high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of any nation.

Section 1604(a):

the International Regulations do not apply to vessels while in the waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States.

ANALYSIS: It is not clear whether the international regulations apply in the 3-12 nautical mile zone.

* * * *

PREVENTION OF POLLUTION FROM SHIPS

Title 33,

Section 1902(a)(1) applies to ships of United States registration, nationality, operating authority, ~~wherever~~ located.

Section 1902(a)(2) applies to ships of any MARPOL country while in the navigable waters of the United States.

ANALYSIS: Although the act clearly applies to ships under U.S. jurisdiction, whether or not they are located in the 3-12 nautical mile zone, the term "navigable waters" does not appear to be defined in the Act; it is unclear whether this Act was meant to apply to the 3-12 mile zone under section 1902(a)(2).

The International Convention for the Prevention of Pollution from Ships (MARPOL) is designed to reduce intentional and negligent pollution incidents through regulation of ships' operating procedures.⁹⁷ Under Article 5, both the flag state and a coastal state in which a violation occurs may proceed against an offending vessel. Although some ambiguity exists on the international level,

⁹⁷ Convention for the Prevention of Pollution From Ships, done November 2, 1973, T.I.A.S. 10561, 12 I.L.M. 1319 (1973); Protocol to the Convention with Annexes, done February 17, 1978, 17 I.L.M. 546 (1978).

a clear trend is emerging that favors preventing the ocean from becoming an unrestricted reservoir for human waste materials.⁹⁸ It appears that this Act would, therefore, apply to a ship from a MARPOL country that illegally dumps waste in the 3-12 mile zone. This conclusion depends, however, upon the constitutionality of the Territorial Sea Proclamation.⁹⁹

* * * *

SHORE PROTECTION FROM MUNICIPAL OR COMMERCIAL WASTE

Title 33,

Section 2601(2) defines "coastal waters" as the territorial seas of the United States.

Section 2602(a):

A vessel may not transport municipal or commercial waste in coastal waters without (1) a permit from the Secretary of Transportation
...."

ANALYSIS: It is unclear whether expansion of the territorial sea was anticipated when this Act was passed. It would appear that this extension will obligate those who dump commercial waste to obtain permits for the 3-12 nautical mile zone, but Congress should act to clarify this ambiguity.

* * * *

DEATH ON THE HIGH SEAS BY WRONGFUL ACT

Title 46,

⁹⁸ M. Casey Jarman, Disposal of Waste and Right of Passage 15 (paper presented at the 24th Annual Conference of the Law of the Sea Institute, Tokyo, Japan, July, 1990; publication forthcoming).

⁹⁹ See supra, notes 14-88 and accompanying text (Section II).

Section 767:

... Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State.

ANALYSIS: The fundamental question of the domestic impact of the Territorial Sea Proclamation is raised here. An argument might be made that the reference to state limits manifests congressional intent to limit application of the act to state jurisdiction as it existed when the act was passed (under the Submerged Lands Act).¹⁰⁰ On the other hand, if the Presidential Proclamation did not succeed in limiting its effect to the international arena, then the territorial boundary of the states may have been extended to 12 nautical miles.

* * * *

INDEPENDENT SAFETY BOARD ACT

Title 49 App,

Section 1903(a)(1)(E) provides for Board examination of major marine casualties except those involving only public vessels) occurring on the navigable waters or territorial sea of the United States.

ANALYSIS: It is unclear whether jurisdiction under this Act can be claimed by the Board in the 3-12 nautical mile zone.

* * * *

VESSELS IN UNITED STATES TERRITORIAL WATERS

Title 50,

Section 191:

[In times of national emergency,] the Secretary of the Treasury may make, subject to

¹⁰⁰ See supra notes 114, 121-122, 129 and accompanying text.

the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States....

ANALYSIS: It is unclear whether the Secretary's authority to make rules and regulations applies in the 3-12 nautical mile zone.

* * * *

B. Other Ambiguities Needing Clarification

TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY--RESTRICTIONS AND PROHIBITIONS ON ALIENS

Title 8,

Section 1185(a) makes it unlawful, during times of war or national emergency:

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations as the President may describe.

Section 1185(d):

The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

ANALYSIS: Not much of practical significance is at stake here, but clarification of United States territory and waters would be helpful.

* * * *

TARIFF ACT OF 1930

Title 19,

Section 1401(j):

the term "customs waters" means, in the case of a foreign vessel subject to a

treaty...[allowing U.S. enforcement on the high seas], the waters within four leagues of the coast of the United States [or] the waters within such distance of the coast of the United States as the said authorities are...permitted by such treaty or arrangement...to board, examine, search, seize or otherwise enforce upon the high seas.

Section 1401(k)(2)(B) extends applicability of the act to vessels that have received merchandise while in customs waters beyond the territorial sea.

ANALYSIS: Under Section 1401(j), authority is established beyond the 12-mile line. Under 1401(k)(2)(B), however, a nontreaty vessel, whether in or out of customs waters (the contiguous zone), will fall within the authority provided by this act in certain circumstances. An ambiguity results when a nontreaty vessel receives merchandise in the 3-12 nautical mile zone; if the Proclamation did not have any affect on domestic law, it appears that the nontreaty vessel could not be boarded under this act.

The concept of sovereignty over the territorial sea would seem to demand that foreign vessels receiving merchandise within the United States' 12-mile territorial sea, and not just the three mile zone, should be subject to the authority of the Tariff Act. The ambiguity could be removed through the amendment suggested after the analysis of Section 1590(g), below.

Section 1590(g):

For purposes of imposing civil penalties under this section, any of the following acts, when performed within 250 miles of the territorial sea of the United States, shall be prima facie evidence of unlawful possession....

ANALYSIS: The ambiguity here is less severe, but present nonetheless; application of this section will extend either 253 or

262 miles seaward of the coast depending upon the definition of the territorial sea.

SUGGESTED AMENDMENT: Amend Section 1401, as follows:

the term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of twelve miles.

* * * *

FOREIGN SOVEREIGN IMMUNITIES ACT

Title 28,

Section 1603(c):

the "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

ANALYSIS: It is not clear whether the 3-12 nautical mile zone comes under the territory or waters covered by the act.

* * * *

DEEP SEABED HARD MINERALS ACT

Title 30,

Section 1403(2):

"Continental Shelf" means-- (A) the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea...to a depth of exploitability.

ANALYSIS: There is no language similar to the Submerged Lands Act specifically defining the territorial sea according to Congressional grant; it is thus unclear if this act applies in the 3-12 nautical mile zone.

* * * *

OCEAN THERMAL ENERGY CONVERSION

Title 42,

Section 9101(a)(1) [It is the Congressional Purpose to]:

authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion facilities connected to the United States by pipeline or cable, or located in the territorial sea of the United States consistent with the Convention on the High Seas, and general principles of international law.

Section 9102(9):

"high seas" means that part of the oceans lying seaward of the territorial sea of the United States and outside the territorial sea, as recognized by the United States, of any other nation.

ANALYSIS: It is not clear whether the 3-12 nautical mile zone can be considered "high seas" under this act, but other provisions make the distinction relatively insignificant.

Section 9111(c)(13):

[licensing prerequisite: must] ...prevent its thermal plume from impinging so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation unless the Secretary of State approves such impingement after consultation with such nation.

Section 9119(b):

the Administrator shall promulgate regulations specifying under what conditions and in what circumstances the thermal plume of an ocean thermal conversion facility or plantship licensed under this chapter will be deemed-- ...to impinge on so as to adversely affect the territorial sea or area of natural resource jurisdiction, as recognized by the United States, of any other nation.

ANALYSIS: Sections 9111(c)(13) and 9119(b) tie the territorial sea with "area[s] of natural resource jurisdiction;" the 3-12 nautical mile zone is therefore covered by implication.

Section 9163(a)(2):

Ocean thermal conversion facilities and plantships...do not possess the status of islands and have no territorial seas of their own.

ANALYSIS: This provision does not create an ambiguity.

Section 9163(b)(1):

Except as may otherwise be provided by this chapter, nothing in this chapter shall in any way alter the responsibility and authorities of a State or the United States within the territorial seas of the United States.

Section 9163(b)(2):

The law of the nearest adjacent coastal State to which an ocean thermal conversion facility located beyond the territorial sea...is declared to be the law of the United States.... Provided, however, that the application of State taxation laws is not extended hereby outside the seaward boundary of any State.

ANALYSIS: Whether this act contemplated the extension of the territorial sea to 12 nautical miles needs further investigation.

* * * *

OUTER CONTINENTAL SHELF LANDS ACT(OCSLA)

Title 43,

Section 1331(e):

the term "coastal zone"...extends seaward to the outer limit of the United States territorial sea.

ANALYSIS: Although the 1990 CZMA reauthorization made it clear

that Congress intends to require that federal actions outside the territorial sea be consistent with state management efforts, the OCSLA could be amended to clarify matters further.

The purpose of the act is to provide federal assistance to states for protection of the coastal zone, and to allow for state participation in policy and planning decisions (Section 1332(4)(A) and (B)). Jurisdiction over areas of outer continental shelf activity is analogized to areas of exclusive federal jurisdiction within a state. Section 1333(a)(2) allows for the adoption of state laws where not inconsistent with federal laws.

In Section 1332(4)(C), it is declared to be the policy of the United States that:

States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf. (Emphasis added).

A potential source of confusion involves the designation and sharing of common pool resources under Section 1337(g). This process will necessarily be affected by the interpretation attributed to the United States' territorial sea. The explicit links to Submerged Lands Act boundaries in Section 1331 might diffuse any argument for a 12-nautical-mile territorial sea under the OCSLA, but the existence of the term territorial sea (without definition in the Act itself) could nonetheless be considered an ambiguity. In other words, judicial assessment might be required to determine whether Congress intended the OCSLA coastal zone to

expand with the impending extension of the U.S. territorial sea.

* * * *

OFFSHORE OIL SPILL POLLUTION FUND

Title 43,

Section 1811(9):

"oil pollution" means--

(A) the presence of oil either in an unlawful quantity or which has been discharged at an unlawful rate...(ii) on the waters of the contiguous zone established by the United States under Article 24 of the Convention on the **Territorial Sea and Contiguous Zone** (15 UST 1606); or

(B) the presence of oil in or on the waters of the high seas outside the **territorial limits** of the United States --(i) when discharged in connection with [OCS] activities...(ii) causing injury or loss of natural resources belonging to, appertaining to, or under the exclusive management authority of the United States; or

(C) the presence of oil in or on the **territorial sea**...of a foreign country....

Section 1813(b)(6)(A) entitles a foreign claimant to assert a claim if oil pollution occurred in or on the **territorial sea**, navigable waters or internal waters or adjacent shoreline of a foreign country of which the claimant is a resident.

ANALYSIS: The references to foreign territorial seas and the 1958 Convention are not directly affected by the President's proclamation.

Section 1811(9)(B), however, concerns the territorial limits of the United States. It is not clear whether the presence of oil in the 3-12 nautical mile zone will provide a cause of action under this act.

* * * *

C. Housekeeping Changes Needed, But Not Much Is at Stake

ATLANTIC TUNAS CONVENTION

Title 16,

Section 971(4):

the term "fisheries zone" means the waters included within a zone contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, ... [to] two hundred nautical miles

Section 971c(b):

Enforcement under such an agreement [between any contracting party and the Secretary of State--in consultation with the Coast Guard--relating to cooperative enforcement ... and United States enforcement of convention provisions with respect to persons under that party's jurisdiction] may not take place within the territorial seas or fisheries zone of the United States.

Section 971g(d)(1):

nothing in this chapter shall be construed so as to diminish or increase the jurisdiction of any state in the territorial sea of the United States.

ANALYSIS: Exactly what the seaward boundaries of each State are may be in doubt after the Proclamation declaring a 12-nautical-mile territorial sea. Although there does not appear to be any significant problem with regulation under the Convention because of the broad scope of authority provided in Section 971c(b), clarification of the extent of the territorial sea would help to avoid potential confusion and conflict.

* * * *

JELLYFISH..., PESTS, AND SEAWEED...ELIMINATION

Title 25

Section 1201:

For the purpose of protecting fish and shellfish resources in the coastal waters of the United States ... the Secretary of Commerce is authorized to cooperate with, and provide assistance to, the States in controlling and eliminating jellyfish ... in such waters.

ANALYSIS: Because coastal waters are not defined in the Act, it is not clear whether the Secretary of Commerce is authorized to cooperate or provide assistance with coastal states in the 3-12 nautical mile zone. The broad purpose of the act, however, suggests that such authority extends out into the ocean as far as necessary (which is probably less than 12 miles).

* * * *

NAVIGATION RULES

Title 33,

Section 151(b):

The [Coast Guard] shall also establish appropriate identifiable lines dividing inland waters of the United States from the high seas for the purpose of determining the applicability of each statute that refers to this section or this section, as amended. These lines may not be located more than twelve nautical miles seaward of the baseline from which the territorial sea is measured.

ANALYSIS: On its face, this provision does not reflect any ambiguity since the Coast Guard's authority is not tied to the territorial sea. In relation to 33 U.S.C. § 1602 (codifying the International Regulations for Preventing Collisions at Sea), however, the application of this provision renders jurisdiction in the 3-12 nautical mile zone ambiguous. Although Section 151(b) of

the present act permits a limit of 12 nautical miles, it is not a compulsory limit, and, as discussed below, the lines actually drawn (by Coast Guard regulations) do not extend that far seaward.

33 CFR 2.05-1(a):

Except as provided in paragraphs (b) and (c) of this section, "high seas" means all waters which are neither territorial seas nor internal waters of the United States or of any foreign country.

...(c): "High Seas", as used in section 2 of the Act of February 19, 1985, as amended, 33 U.S.C. 151, and all laws referring thereto, means the waters seaward of the lines described in Part 82 of this chapter.

Paragraph (c) contains the operative language for interpretation of this act. The dividing lines established by the Coast Guard are within the territorial sea boundary.¹⁰¹ Although the Navigation Rules Act, 33 U.S.C. §151 et seq., merely refers to the baseline from which the territorial sea is measured, ambiguous and conflicting use of terminology becomes obvious through investigation of the Act's implementation.¹⁰²

¹⁰¹ The lines separating inland waters from the high seas are set forth in 33 CFR 80, which reveals that the lines are drawn from point to point on United States land, well within the territorial sea.

¹⁰² The interaction of other statutes with 33 U.S.C. 151(b) complicates interpretation of the statutory language therein. See the Marine Mammal Protection Act; the Marine Protection, Research and Sanctuaries Act, Section 302; the Coastal Zone Management Act, Section 307(c); the Endangered Species Act; the Federal Water Pollution Control Act, Sections 401 and 402-permits; the Deepwater Ports Act; the Ocean Thermal Energy Conversion Act. The preceding list can be found in 33 CFR 320.3 "Related Laws," other statutes, which do not refer to territorial seas or navigable waters, are excluded here.

The implementation of the Clean Water Act (FWPCA) relies on 33 CFR 328, which defines the "waters of the United States" as

meaning:

(1) [those waters] currently, or in the past, used or susceptible to use in interstate or foreign commerce...;

(2) all interstate waters;

(3) all other waters..., the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) [used]...by interstate or foreign travelers for recreational or other purposes; or

(ii) from which fish or shellfish are or could be taken and sold in interstate and foreign commerce; or

(iii) [used]...for industrial purpose by industries in interstate commerce;

(4) all impoundments of waters otherwise defined as waters under the United States definition;

(5) tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) the territorial seas;

(7) wetlands adjacent....

The Rivers and Harbors Act and MPRSA are implemented through 33 CFR 329.12:

The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends includes all ocean and coastal waters within a zone three geographical (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the Outer Continental Shelf (see 33 CFR 320.2(b) and 322.3(b) requiring Corps permits ... to the seaward limit of the Outer Continental Shelf). (Emphasis added.)

Several of the implementing regulations of Acts that refer to §151 specify a three-nautical-mile territorial sea, but more uniform regulation of United States waters could be applied through use of more precise language. The application of the term "high seas" to territorial sea areas should be abandoned. The resulting confusion merely accentuates the disarray that will characterize regulation of ocean waters if both 3- and 12-nautical-mile territorial seas are recognized. Either a new term should be developed to describe state jurisdiction out to three miles (and to three leagues for Florida and Texas in the Gulf of Mexico), with an adjacent federal territorial sea, or the states should be given jurisdictional authority out to twelve miles. Where the states do not have the resources, ability, or desire to enforce regulations that far seaward, the federal government could assume those responsibilities through a partnership arrangement or through some

Other pertinent provisions include

33 CFR 2.05-5(a):

With respect to the United States, "territorial seas" means the waters within the belt, three nautical miles wide, that is adjacent to its coast and seaward of the territorial sea baseline. (Emphasis added.)

33 CFR 2.05-10:

"Territorial Sea Baseline" means the delimitation of the shoreward extent of the territorial seas of the United States drawn in accordance with principles, recognized by the United States, of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606....

form of reserved authority.¹⁰³

* * * *

COMPREHENSIVE ENVIRONMENTAL RESPONSE AND CIVIL LIABILITY ACT
(CERCLA)

Title 42,

Section 9601(8):

The term "environment" means-- (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the Fishery Conservation and Management Act.

Section 9601(15):

"navigable waters" means the waters of the United States, including the territorial sea.

Section 9601(30) sets the territorial sea and contiguous zone as defined by 33 U.S.C. Section 1362; therein, the territorial sea is measured by a three-nautical-mile limit and the contiguous zone is as set forth in article 24 of the Convention of the Territorial Sea and Contiguous Zone (practically speaking, the adjacent nine nautical miles).

ANALYSIS: Because this Act applies to both the Territorial Sea and the Contiguous Zone, jurisdiction does not appear to be affected by the 12-nautical-mile extension. It may be simpler to delete references to the Contiguous Zone and define the territorial sea as having a 12-mile limit.

Section 9601(1) states that a foreign claimant may assert a claim if--:

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent

¹⁰³ See supra notes 200-212 and accompanying text (Section VI(B)).

shoreline of a foreign country of which the claimant is a resident.

...
or (3) is discharged from an OCSLA facility.

ANALYSIS: The territorial sea of another nation is not pertinent to our analysis.

* * * *

UNINSPECTED COMMERCIAL FISHING INDUSTRY VESSELS

Title 46,

Section 4501 suggests the presence of a jurisdictional void where fish processing vessels--subject to coastwise regulation--could operate without being either on the navigable waters or the high seas.

ANALYSIS: Coastwise regulation takes place on the navigable waters of the United States, or with regard to vessels owned in the United States and operated on the high seas. Definitions of these terms, and the resulting confusion, are provided in the analysis of the Navigation Rules Act (33 U.S.C. 151(b)), supra.

Section 2101(11B) defining fish processing vessels

Section 4101 regulating uninspected vessels, generally, on the navigable waters

Section 4301 regulating recreational vessels, on waters subject to United States jurisdiction.

ANALYSIS: Same as above.

* * * *

D. No Problem Presented

These statutes do not present a problem of ambiguity for one of several different reasons. The statute may provide such broad authority that the reference to the territorial sea (whether 3 or 12 nautical miles) is encompassed within a much larger area of

jurisdiction. Another possibility is that the statute merely refers to the Convention on the Territorial Sea and Contiguous Zone, without raising any substantive issue needing clarification. In some, the reference is merely to the territorial sea of a foreign nation, not to an ambiguous United States zone. Finally, the act might specifically limit its application to a precise zone (such as 12 nautical miles) free from any ambiguity.

EASTERN PACIFIC TUNA FISHING

Title 16,

Section 972(2):

... but the Agreement Area does not include the zones within twelve nautical miles of the baseline from which the breadth of the territorial sea is measured and the zones within 200 nautical miles

Section 972f(a):

It is unlawful for any person subject to the jurisdiction of the United States--(1) to engage in fishing for a designated species of tuna within the Agreement Area unless issued a license....

ANALYSIS: The territorial sea is referred to only as a result of its association with the baseline from which its extent is measured; furthermore, the exclusion of the entire 12-nautical-mile zone makes the Presidential extension of the territorial sea irrelevant to this act.

* * * *

MARINE MAMMAL PROTECTION ACT

Title 16,

Section 1362(14) describes the "waters under the jurisdiction of the United States" as (A) the territorial sea of the United States, and (B) the waters included within a zone, contiguous to the territorial sea, to a distance of 200 miles.

ANALYSIS: This broad definition renders the 12-mile extension irrelevant to jurisdiction under this Act.

* * * *

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA)

Title 16,

Section 1432(3):

"marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, consistent with international law.

ANALYSIS: Because some National Marine Sanctuaries have already been designated beyond the previous three-mile U.S. territorial sea, it is apparent that the extension of a 12-mile territorial sea does not affect the operation or interpretation of this act.

* * * *

NORTH ATLANTIC SALMON FISHING ACT

Title 16,

Section 3606(a):

It is unlawful for any person, or any vessel, subject to the jurisdiction of the United States-- (1) to conduct directed fishing for salmon in waters seaward of twelve miles from the baselines from which the breadths of territorial seas are measured....

ANALYSIS: The 12-mile application of this act is not affected by the Presidential extension of the territorial sea.

* * * *

TRADE ACT OF 1974: NON-TARIFF BARRIERS TO AND OTHER DISTORTIONS OF TRADE

Title 19,

Section 2112 (Annotation to 1990 Supp.): United States-Canada Free Trade Agreement Implementation Act of 1988:

Section 202(f)(7)(B): the term "territory" means--

...(iii) any area beyond the territorial seas of the United States within which, in accordance with international law and its domestic laws, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

ANALYSIS: Territorial seas here are linked to the resources of submerged lands, therefore it might be assumed that the Submerged Lands Act definition of territorial seas must be applied (three miles, except for Texas and Florida in the Gulf, where state jurisdiction extends to three marine leagues). A consistent definition of the territorial sea would eliminate this ambiguity.

* * * *

PROTECTION OF VESSELS ON THE HIGH SEAS AND IN THE TERRITORIAL WATERS OF FOREIGN COUNTRIES

Title 22,

Section 1972 applies if any vessel of the United States is seized by a foreign country on the basis of claims in territorial waters or the high seas which are not recognized by the United States.

ANALYSIS: No federal-state controversy exists here because U.S. territorial waters are not at issue; rather, this Act is concerned with ships in other nations' territorial seas.

* * * *

INTERNATIONAL NARCOTICS CONTROL ACT

Title 22,

Section 2291(c)(4):

With the agreement of a foreign country, [prohibition of an officer or employee of the United States making an arrest as part of any foreign police action] does not apply with respect to maritime law enforcement operations in the territorial sea of that country.

ANALYSIS: Although reflective of the United States' willingness to recognize other nations' 12-nautical-mile territorial seas, the United States' territorial sea is not at issue here.

* * * *

TAX, DEEP SEABED HARD MINERALS

Title 26,

Section 4496(d):

"Continental Shelf" means-- (1) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea...(to the depth of exploitability).

ANALYSIS: The Act imposes a tax on the removal of hard mineral resources from the deep seabed, which is defined as being either:

outside the continental shelf of any nation,
or outside a nation's recognized area of
resource jurisdiction.

This alternative language establishes that the continental shelf will extend beyond 12-miles in all instances,¹⁰⁴ so there is no overlap created by the territorial sea extension.

¹⁰⁴ In Hawaii, where the geological definition of a continental shelf does not apply, U.S. jurisdiction over mineral resources is nonetheless clearly recognized beyond 12 nautical miles.

* * * *

SEA GRANT ACT

Title 33,

Section 1122(b):

the term "marine environment" means the coastal zone as defined in 16 U.S.C. Section 1453(1); the seabed, subsoil, and waters of the Great Lakes and the territorial sea of the United States; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas; and the seabed and subsoil of and beyond the outer Continental Shelf.

ANALYSIS: The broad definition in this act does not depend upon either a 3- or 12-nautical mile territorial sea definition.

* * * *

PORTS AND WATERWAYS SAFETY ACT

Title 33,

Section 1223(c)(1):

...the Secretary shall designate necessary fairways and traffic separation schemes for vessels operating in the territorial sea of the United States and in high sea approaches, outside the territorial sea, to such ports or places.

Section 1223(c)(5)(B):

...make the use of designated fairways and traffic separation schemes mandatory for specific types and sizes of vessels, foreign and domestic, operating in the territorial sea of the United States and for specific types and sizes of vessels of the United States operating on the high seas beyond the territorial sea of the United States.

ANALYSIS: No real problem is presented here under domestic law because the traffic separation schemes are to be created wherever

needed, without regard to the status of the waters.

* * * *

FEDERAL WATER POLLUTION CONTROL ACT(FWPCA or the "Clean Water Act")

Title 33,

Section 1311(h):

For purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone.

Section 1343(a):

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone or the oceans shall be issued...except in compliance with such guidelines (see below).

Section 1343(c):

the Administrator shall promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans.

Section 1344(c):

...each such disposal site shall be specified for each such permit...guidelines shall be based upon criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c).

Section 1362(7):

the term "navigable waters" means the waters of the United States, including the territorial seas.

Section 1362(8):

the term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of

inland waters, and extending seaward a distance of three miles.

ANALYSIS: Any ambiguity is resolved by reference to Section 1362(8) which specifically defines the territorial sea as extending seaward a distance of three-nautical-miles for the purposes of this act. Nonetheless, Congress may want to consider changing the definition to the new 12-mile limit in order to protect a larger area.

* * * *

OCEAN POLLUTION RESEARCH

Title 33,

Section 1702(4):

the term "marine environment" means the coastal zone; the seabed, subsoil, and waters of the territorial sea of the United States; exclusive areas of fishery management authority; high seas waters; seabed and subsoil of and beyond the outer Continental Shelf.

ANALYSIS: Because the application of this Act is so broad, it does not appear that the extension of the territorial sea to 12 nautical miles will have any appreciable impact.

* * * *

VESSELS AND SEAMAN ACT

Title 46,

Section 12108(c):

A fishery endorsement to engage in fishing in the territorial sea and fishery conservation zone adjacent to Guam, American Samoa, and the Northern Mariana Islands may be issued to....

ANALYSIS: The breadth of the fishery conservation zone makes the

distinction between a 3- and a 12-mile zone irrelevant.

* * * *

JONES ACT

Title 46 App,

Section 883:

No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise...between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws...or vessels to which the privilege of engaging in coastwise trade is extended by section 13 or 808 of this title.... Provided further, That this section applies to the transportation of valueless material or any dredged material regardless of whether it has commercial value, from a point or place in the United States or a point or place on the high seas within the Exclusive Economic Zone...to another point or place in the United States or a point or place on the high seas within the Exclusive Economic Zone.

ANALYSIS: Despite the absence of a specific reference to the territorial sea, the boundary issue could potentially arise in the phrase highlighted in the section above, if, for instance, an artificial island located six miles offshore were used as a transshipment point. It is unclear whether the Territorial Sea Proclamation was a constitutionally valid acquisition of territory¹⁰⁵ that conferred U.S. sovereignty over the 3-12 nautical mile zone.

* * * *

DRUG ABUSE PREVENTION ON BOARD VESSELS

Title 46 App,

¹⁰⁵ See supra, notes 14-88 and accompanying text.

Section 1903(c) (1):

"vessel subject to the jurisdiction of the United States" includes...

(D) a vessel located in the customs waters of the United States, and

(E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

ANALYSIS: This reference is not affected by the President's Proclamation.

* * * *

TRUST TERRITORY

Title 48,

Section 1681 (Proclamation No. 4726 -- Application of certain United States laws to the Northern Marianas Islands):

...prevent citizens of the Northern Marianas Islands and the government of the Northern Marianas Islands from using foreign-built United States registered fishing vessels owned by such citizens or owned by or in the custody of the government of the Northern Marianas Islands to fish in the territorial sea and fishery conservation zone around the Northern Marianas Islands and to land their catch of fish in the Northern Marianas Islands.

ANALYSIS: The breadth of the fishery conservation zone makes the distinction between a 3- and a 12-mile zone irrelevant.

* * * *

E. Resolved Ambiguities

COASTAL ZONE MANAGEMENT ACT (CZMA)

Title 16,

Section 1451(f):

New and expanding demands...in the Great Lakes, territorial sea, and Outer Continental Shelf are placing stress on those areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters.

Section 1453(1):

the term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands The zone extends ... seaward to the outer limit of the United States territorial sea.

Section 1456(A) mentions that the principles of the Convention on the Territorial Sea and Contiguous Zone shall determine the lateral seaward boundaries between States, for application under the Coastal Energy Impact Program.

ANALYSIS: Although section 1456(A) itself is not a substantive reference to the territorial sea, the absence of a definition for the territorial sea caused confusion with respect to application of this act until recently; the 1990 reauthorization of the CZMA resolved several ambiguities.

Section 1453(1) was amended by striking the reference to the U.S. territorial sea and replacing it with the following language:

the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.), the Act of March 2, 1917 (48 U.S.C. 749), the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 (48 U.S.C. 1681 note), or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705, as applicable).

The competing interpretations¹⁰⁶ of the Act's previous federal

¹⁰⁶ The Department of Justice felt that "the better view" was that Congress did not intend the expansion of the territorial sea to extend the coverage of the CZMA beyond the clear limit of state jurisdiction under the Submerged Lands Act (43 U.S.C. §§1301-15

consistency provisions¹⁰⁷ have also been rendered moot. Section 1456 (c)(1) has been amended, it now reads:

Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management policies.... (Emphasis added.)

Amendments to other provisions make it even more clear that Congress intends the Act to apply to federal activity whether in or outside the coastal zone, and also to cover impacts upon the

(1986)). The Justice Department noted the U.S. Supreme Court decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), holding that the section 307(c)(1) consistency requirements apply only within the coastal zone, bounded by a three mile seaward limit, and does not apply to Outer Continental Shelf leasing. See generally Kmiec, supra note 2.

The Attorney General for the State of California, on the other hand, argued that Congress intended the CZMA to be affected by a change in the breadth of the territorial sea. He felt that *Secretary of the Interior v. California* never addressed the 3-12 mile zone, and that the Court did not examine the legislative history of the act. The California Attorney General notes that Congress could have, but did not, explicitly exclude the territorial sea and contiguous zone from the "outer continental shelf," and that there is no evidence that the "empirical observations" that motivated the CZMA were based on an assumption of a three-nautical-mile territorial sea. See generally Saurenman, The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand, 1 Terr. Sea J. 39-79 (1990).

A more thorough examination of the CZMA will be presented by other workshop participants.

¹⁰⁷ For a representative example, see 16 U.S.C. Section 1456(c)(1) (1988):

Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

natural resources of the coastal zone.¹⁰⁸

* * * *

IV. MANAGEMENT OF NONLIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

Introduction

Historically, both the federal and state governments have made competing claims to ownership (dominium) and regulatory authority (imperium) over resources in offshore areas. Initially, lack of assertion of authority by the federal government left management of offshore mineral resources in the hands of the adjacent states. President Truman's 1945 claim of United States jurisdiction and control over the resources of the subsoil and seabed of the continental shelf¹⁰⁹ set the stage for federal encroachment. Even though a press release accompanying the 1945 Proclamation stated that the policy established United States jurisdiction "from an international standpoint" and "does not touch upon the question of Federal versus State control,"¹¹⁰ the federal government soon asserted claims against the states with valuable offshore mineral

¹⁰⁸ See amendments to §§1456(c)(3)(A), 1456(c)(3)(B), and 1456(d). Note, however, that in the "thresher shark" case (originally filed October 11, 1985, Exxon v. Fischer, Civ. No. 84-2362, C.D. Cal.) the California Coastal Commission's consistency review authority was limited to effects on natural resources of the coastal zone, this authority does not encompass economic impacts on industries based in the coastal zone. (cited in Keeney, infra note 157, at 76.)

¹⁰⁹ Proclamation No. 2667, 10 Fed. Reg. 12303 (September 28, 1945).

¹¹⁰ White House Press Release, September 28, 1945, reprinted in 13 Dep't St. Bull. 484 (1945).

resources, suggesting that the Proclamation served a dual purpose: establishing an international claim and altering the balance of state/federal relations.¹¹¹ Although the Submerged Lands Act (SLA)¹¹² specifically granted title to the submerged lands adjacent to coastal states out to a certain distance¹¹³ (and thus not to the extent of an expanding U.S. territorial sea),¹¹⁴ the history of competing federal-state claims suggests the possibility of renewed state claims beyond the three-nautical-mile limit.

Previous Federal-State Conflicts

In the landmark case of United States v. California,¹¹⁵ the U.S. Supreme Court held that the federal government has paramount rights in the submerged lands, flowing from the foreign policy

¹¹¹ Carolyn Nicol, Hawaii's Territorial Sea and Exclusive Economic Zone: Analysis and Assessment of the State's Right to Manage Resources in Extended Ocean Zones 11 (unpublished student paper prepared for Second Year Seminar, University of Hawaii Law School, April 1987).

¹¹² 43 U.S.C. Sections 1301-1315 (1988).

¹¹³ See supra, notes 121-122.

¹¹⁴ It is not clear whether the SLA grants to states ownership of the water column and water surface. See 43 U.S.C. section 1314(a), infra, note 129. The language reserving federal rights refers to the navigable waters, but the language granting state ownership, use, and management rights speaks only of "lands and natural resources." Section 1311(d), infra note 121, expressly preserves federal authority over navigation, flood control, and production of power; the awareness of Ocean Thermal Energy efforts at that time suggests that Congress considered water column uses, but that inference is not convincing in light of the Act's focus on development of the energy resources of the seabed.

Resolution of this uncertainty would have a direct impact upon the interpretation of statutory ambiguities, discussed supra in Section III.

¹¹⁵ 332 U.S. 19 (1947).

power of the sovereign federal government. The Court was persuaded that no previous case decided conflicting claims between a state and the federal government to the three-mile belt in a way that required extension of the Pollard's Lessee v. Hagan¹¹⁶ inland-water rule to the ocean area.¹¹⁷ The Supreme Court also rejected the State of California's historical claim to the three-mile marginal sea because the concept of the territorial sea was not settled in the international community at that time. The original U.S. territorial sea claim was made by Secretary of State Thomas Jefferson after the formation of the union; therefore, none of the original 13 states ever owned the submerged lands of the marginal sea (and consequently neither did California).

In United States v. Texas,¹¹⁸ the U.S. Supreme Court maintained that the "national external sovereignty" rationale of California was compelling, despite strong historical claims of dominium resulting from Texas's prior status as an independent nation. The Texas Court held that where property interests are so subordinated to the rights of sovereignty, as here, they will follow sovereignty. Furthermore, consistency with California, Louisiana,¹¹⁹ and the equal footing doctrine required the national

¹¹⁶ 44 U.S. (3 How.) 212 (1845) (holding that the states owned the inland navigable tidewaters in trust for their people, and that because Alabama was admitted to the union on an equal footing with the other states it thereby became owner of the tidelands within its boundaries).

¹¹⁷ California I, 332 U.S. at 31.

¹¹⁸ 339 U.S. 707 (1950).

¹¹⁹ United States v. Louisiana, 339 U.S. 699 (1950).

government to prevail.¹²⁰

Initial Congressional Response Failed to Resolve Conflict

In 1953, the SLA overturned the California, Louisiana, and Texas decisions, giving coastal states exclusive rights to the resources of the seabed within three miles of their coasts.¹²¹ In addition, states bordering the Gulf of Mexico were provided the opportunity to extend boundaries to three marine leagues (nine

¹²⁰ Texas, 339 U.S. at 719.

¹²¹ 43 U.S.C. Section 1311(a) (1988):

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States....

Section 1311(b):

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources....

Section 1311(d):

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power.

nautical miles) if they could prove that such a boundary was either previously approved by Congress or existed prior to admission to the union.¹²²

The federal government's resistance to Gulf State claims of submerged lands beyond three miles from shore prompted suits by Louisiana, Texas, Mississippi, Alabama,¹²³ and Florida.¹²⁴ Only Texas and Florida succeeded in persuading the court to recognize three-marine-league boundaries.

The ambiguity of the SLA with respect to inland boundaries has also sparked litigation. The SLA grant contains the following limiting language: "in no event...[t]o be interpreted as extending

¹²² 43 U.S.C. Section 1312 (1988):

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

¹²³ United States v. Louisiana, 363 U.S. 1 (1960).

¹²⁴ United States v. Florida, 363 U.S. 121 (1960).

from the coast line more than three geographical miles...."¹²⁵ The "coast line" was defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."¹²⁶ The term "inland waters," however, was not defined in the Act. In United States v. California¹²⁷ (California II), the court defined inland waters by reference to standards found in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. This Convention allows either a) straight baselines or b) baselines determined by the arcs and circles method. Accepting the federal government's position that application of straight baselines, a method the United States was opposing internationally, would hurt its international posturing, the court applied the arcs and circles test. The California II decision has been criticized for abandoning the consideration of historical evidence which guided the Court in California I and for maintaining the "fiction" of national external sovereignty.¹²⁸ In the opinion of Professor Milner S. Ball, the protection of national interests would be best achieved by state ownership with a concurrent federal government interest in those rights as outlined in the Constitution--power over commerce, navigation, national defense, and international

¹²⁵ 43 U.S.C. Section 1301(b) (1988) (emphasis added).

¹²⁶ 43 U.S.C. Section 1301(c) (1988).

¹²⁷ 381 U.S. 139 (1965).

¹²⁸ Milner S. Ball, Good Old American Permits 12 Env. L. J. 623 (1982).

affairs.¹²⁹

President Reagan's Territorial Sea Proclamation appears to have eliminated the security interests behind the federal government's claim to control the offshore waters beyond three miles, and undercut the rationale of earlier court decisions. Coastal state control of areas in the 3-12 nautical-mile zone would not now present any significant problems for national security. A strong argument can be made, therefore, that the states should now have substantial powers over the 3-12 mile area.

Secondary Response Also Ineffective

State opposition to federal offshore development activities prompted 1978 amendments to the Outer Continental Shelf Lands Act (OCSLA) that make numerous references to federal-state cooperation.¹³⁰ Read with their accompanying rules, the OCSLA

¹²⁹ Id. at 635. Consider also 43 U.S.C. Section 1314(a) (1988):

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

¹³⁰ 43 U.S.C. Section 1332(4)(C) (1988):

such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government

relating to exploration for, and development and production of, minerals of the outer Continental Shelf. (Emphasis added.)

43 U.S.C. Section 1332(5):

the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be **considered and recognized**. (Emphasis added.)

43 U.S.C. Section 1344(c)(1):

During the preparation of any proposed leasing program under this section, the Secretary shall **invite and consider suggestions** for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program. The Secretary may also invite or consider any suggestions from the executive of any affected local government in such an affected State, which have been previously submitted to the Governor of such State, and from any other person. (Emphasis added.)

43 U.S.C. Section 1345(a):

Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan....

43 U.S.C. Section 1345(e):

The Secretary is authorized to enter into **cooperative agreements with affected States** for purposes which are consistent with this chapter and other applicable Federal law. Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 1352 of this title), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore. (Emphasis added.)

43 U.S.C. Section 1346(c):

amendments obviously were intended to give the states an opportunity to participate more extensively in federal offshore decisions. For example, section 8(g)¹³¹ requires the Department of Interior to consult with the governor of a state adjacent to a proposed lease of submerged lands where a possibility of common pools or fields exists (recognizing the problem of drainage of hydrocarbons from beneath state lands through wells located in the federal outer continental shelf). Disagreeing with the Interior Department's position that it is not required to act on the governor's recommendations, the states of Louisiana and Texas each brought suits to enjoin certain offshore lease sales by the Interior Department.¹³² This action represented a drastic step for Louisiana, a producing state whose economy is directly linked to oil and gas revenues. The federal government won the suit and proceeded with the sale of the contested lease, but all monies received from 8(g) common pools (as part of the lease) were placed in escrow by court order. Congress responded to the drawn-out litigation with 1986 amendments to the OCSLA¹³³ providing for lump sum payment of \$1.4 billion from the Section 8(g) fund to the

The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in cooperation with affected States.... (Emphasis added.)

¹³¹ 43 U.S.C. Section 1337(g)(1)(B) and (D) (1988).

¹³² Mary Ellen Leeper, Offshore Oil and Gas, in Proceedings: National Conference on the States and an Extended Territorial Sea 58, 62 (Lauriston R. King and Amy Broussard, eds. 1987).

¹³³ Pub. L. No. 99-272, 100 Stat. 148, 150 (1986) (43 U.S.C. Section 1337(g)).

coastal states.

Uncertainties regarding Congressional intent and statutory interpretation have had a detrimental effect upon the already tense federal-state relations in other states as well.¹³⁴ The history of federal-state conflicts illustrates the willingness of the states to fight for their rights in the marginal sea. It is likely, therefore, that the territorial sea extension will lead to renewed litigation of both regulatory (particularly with respect to federal-state cooperation) and proprietary¹³⁵ issues. Potential impacts upon other legislation¹³⁶ present even further prospects for litigation. These inconsistencies could be addressed through the process of statutory construction, but a much better solution would be for Congress to resolve the uncertainties on a comprehensive public policy basis.

Equities Favoring Coastal State Control

The Territorial Sea Proclamation has arguably tilted the balance of offshore resource interests toward the states.¹³⁷ If accepted, this view provides a rational basis for extending state

¹³⁴ See, e.g., Note, The Seaweed Rebellion: Federal-State Conflicts over Offshore Oil and Gas Development, 18 Willamette L. Rev. 535 (1982); Note, The Seaweed Rebellion Revisited: Continuing Federal-State Conflicts in OCS Oil and Gas Leasing, 20 Willamette L. Rev. 83 (1984); *Secretary of Interior v. California*, 464 U.S. 312 (1984).

¹³⁵ See supra notes 114-134 and accompanying text.

¹³⁶ See supra, Section III "Statutory Ambiguities."

¹³⁷ See supra notes 128-129 and accompanying text, and subsequent paragraph.

ocean boundaries. At the very least, the Proclamation provides an opportunity to reevaluate the balance of power in offshore resource management. Some of the equities to consider are that the coastal state not only must supply sites and facilities for construction, transportation, processing, and storage but also must bear the environmental burden of these support industries. The coastal state must also provide a governmental and social infrastructure for the offshore workers, a costly undertaking.

Congress should also consider the practical effectiveness of the OCSLA's Section 8(g) and consultation provisions. Evidence indicates that these provisions have not sufficiently protected state interests. Throughout years of contention with the federal government, state frustration has been compounded by the Interior Department's apparent refusal to adequately address state concerns. Despite diligently following the cooperative provisions of the OCSLA, states sometimes receive a mere paragraph in response from the Interior Department stating that their concerns were noted but rejected.¹³⁸

The Department of the Interior's lack of responsiveness created such political pressure from the State of California that Congress has established a moratorium on federal leases off the

¹³⁸ Leeper, supra note 132, at 65. In one case, a state provided input at each stage of the process, and filed over 500 pages of comments to the Interior Department's draft environmental impact statement, and did not cause a single change to Interior's planning.

California coast.¹³⁹ In addition to affecting oil and gas development, the shutdown has retarded ocean mining efforts, with a likely continuing negative impact on future mining efforts in the area. The mechanisms in place are ineffective. Without a meaningful right to consultation for the state,¹⁴⁰ the federal government has little incentive to act in a manner that takes into account state interests and concerns.

Political and economical advantages are to be gained by making concessions to the coastal states. For example, the Interior Department and the State of Hawaii have entered into a Joint Planning Agreement over offshore hard mineral mining in the EEZ surrounding Hawaii. Interior's willingness to give Hawaii a

¹³⁹ See e.g., sections 110-113 of Pub. L. 100-446, 102 Stat. 1774, 1801 (1988) (moratorium on offshore federal oil and gas leasing included in appropriation measure).

¹⁴⁰ But see Lowry, Jarman & Maehara, *infra* notes 205-207 and accompanying text. This study could be interpreted to show that consultancy has been effective in some circumstances. In 1983, only 432 (or six percent) of the federal consistency reviews were objected to by the states; six percent of the consistency reviews in states responding to a 1988 survey were objected to. *Id.* at 6.

The 1983 and 1988 surveys indicate that state and federal agency officials do resolve many disputes through informal negotiation. Of 41 filed appeals, four state objections were overridden, three upheld, two stayed pending further negotiations, 17 withdrawn by mutual consent, one withdrawn on procedural grounds, eight currently pending approval, and six dismissed for good cause. *Id.* at 14. This apparent even-handedness, however, may be misleading. In five of the six cases in which a state agency has sought mediation, the federal agency has refused to participate (the sixth case led to litigation, *Secretary of the Interior v. California*). *Id.* at 13. The Secretary's written opinions on formal appeals have construed "competing national interest" broadly against the states, finding that the national interest benefits of OCS energy development outweigh potential adverse environmental impacts. *Id.* at n.2, 14, citing Eichenberg & Archer, The Federal Consistency Doctrine: Coastal Zone Management and 'New Federalism' 14 *Ecol. L. Q.* 9, 41-46 (1987).

substantial role in the preparation of the environmental impact statement and subsequent decision-making has paved the way for future mining efforts. This experience provides a stark contrast to California's experience with offshore oil and gas leasing. Interior's reticence to cooperate fully under the Coastal Zone Management Act created additional political and economic costs, further exacerbating federal-state tension in the offshore area. Interior's refusal to provide consistency certification for oil and gas leases offshore California¹⁴¹ led to protracted litigation that ultimately reached the U.S. Supreme Court.¹⁴² In Secretary of the Interior v. California,¹⁴³ the Court agreed with Interior. Although the case vindicated the Interior's legal position, it did nothing to alleviate the political problems. Moratoria continue in waters off California and at the end of its 1990 session, Congress overturned the Supreme Court by extending the CZMA's consistency provision to activities within and outside the coastal zone, including oil and gas leases.

The SLA, OCSLA, and CZMA all recognize the significance of state interests in offshore mineral resource decision-making. Interior's continual ignoring of these interests, coupled with diminished federal security interests in the zone, suggest the need for re-ordering of decision-making in the extended territorial sea.

¹⁴¹ See supra, note 134.

¹⁴² 464 U.S. 312 (1984).

¹⁴³ Id.

Prospects for Cooperation -- Revenue Sharing

Should the federal government be unwilling to relinquish its control over nonliving resources in the 3-12 mile zone, several other options can be pursued. One remedy is for Congress to implement some form of revenue sharing between the state and federal governments. Coastal states would be more supportive of offshore development if they had the financial wherewithal effectively to research, plan, manage, and propose mitigation measures concerning OCS leasing impacts, and particularly if they had a positive financial stake in OCS development. The costs of revenue-sharing would be offset by the increased federal receipts that would flow from a more orderly leasing process. More than simply correcting long-standing inequities, revenue-sharing represents a small, but critical investment that will ensure timely production and a sound marine/coastal resource management scheme.

In support of their claim¹⁴⁴ for a 50% share of section 8(g) common pool revenues, coastal states analogized their situation to that of states that receive 50% of all revenues derived from mineral leasing of federal lands within their borders. Coastal states, therefore, should receive comparable payment for the inclusive federal leasing of the states' (common oil field)

¹⁴⁴ Leeper, supra note 132, at 63. Texas was ultimately successful in obtaining a 50% share where the state was the original lessor, reserves were proven, and the federal lease brought a significantly higher bid as a result of the information obtained from state leasing. The court did not, however, take into account Louisiana's argument regarding the possibility of a state's lands being devalued as a result of unsuccessful adjacent federal exploration.

submerged lands.¹⁴⁵

To counter foreseeable opposition by land-locked inland states, Richard Littleton has proposed a modified revenue-sharing plan.¹⁴⁶ He believes that unified support for coastal state expansion, via sharing with all 50 states, would increase the chances for a veto override in the Senate, if necessary. The states could be convinced by the argument that coastal resource money going directly into state treasuries would be more secure than federal appropriations. The federal interests in Congress could be appeased by stressing that the proposal changes none of the established rights and duties of the states and the federal government vis-a-vis each other; rather, the proposal is merely a reallocation of revenues. And it creates an added benefit: increased ocean awareness. A nation-wide move to institute stronger resource and energy conservation measures would develop naturally out of the realization by inland states that wasteful or careless production procedures reduce the amount of revenues flowing to their individual states.

The Littleton proposal would create a "Zone of Shared Resources" between the former seaward boundary and the 12-mile limit.¹⁴⁷ A provision earmarking 25% of each state's yearly share for educational purposes is included to help gather popular

¹⁴⁵ Id., pursuant to the Mineral Leasing Act of 1920.

¹⁴⁶ Richard K. Littleton, Coastal States, Inland States and a 12-Mile Territorial Sea, 17 J. Mar. L. and Comm. 539 (1986).

¹⁴⁷ Id., at 561.

support.¹⁴⁸ Between three and twelve miles, the coastal state would continue to receive 27% of the direct government revenues (royalty, bonus, and rent payments) from common pools, with the remaining 73% comprising the revenues to be shared by the 50 states.¹⁴⁹ Beyond the 12-mile boundary the states, collectively, would receive 27% of the common pool resources and the federal government would be entitled to the remaining 73%.¹⁵⁰ According to Littleton, the federal government would be giving up merely 0.18% of the federal income under this plan.¹⁵¹ Distribution of these direct revenues would be accomplished on a per capita basis and administered by the adjacent coastal state, which would charge the other 49 states a pro rata payment for its administrative costs.¹⁵² Littleton feels that this plan has several advantages: (1) it provides an immediate and concrete mechanism for organizing the coastal zone rather than an abstract framework for future federal-state cooperation (which has been attempted in various forms in the past, without success); (2) establishing a single decision-maker out to 12 miles will resolve directly some of the disruptive differences that have existed historically; (3) other disputes can be resolved indirectly by moving the focus of tension 12 miles from the shore where the intensity of the issue is

¹⁴⁸ Id., at 545, 563.

¹⁴⁹ Id., at 545, 563.

¹⁵⁰ Id.

¹⁵¹ Id., at 548.

¹⁵² Id., at 546.

reduced; and (4) the proposal could help direct discussion of resource management capability toward the actual state management experience of the Great Lakes states, Alaska, Florida, Texas, and Puerto Rico.¹⁵³

Prospects for Cooperation -- Joint Partnerships

The Joint Planning Agreement between Hawaii and the Department of the Interior mentioned earlier demonstrates that a mutually acceptable agreement which accounts for respective interests of states and the federal government can be reached. Although this example may not work in other areas,¹⁵⁴ it is a model for successful federal-state interaction. The state and federal governments had identical interests in this situation; where environmental concerns produce conflict between the two divisions of government, similar cooperative efforts will be less likely to succeed.

Conclusions

Ownership of submerged lands out to three miles was granted by the SLA to all coastal states, with the exception of Texas and Florida who have three leagues in the Gulf of Mexico. The federal government argues, and probably correctly, that the December 1988

¹⁵³ Id., at 559.

¹⁵⁴ See supra, note 202. The isolation of the Hawaiian islands eliminates conflicts that otherwise exist between adjacent states. The distance from the continental U.S. also presents a problem of overextension for federal management agencies, thereby providing an incentive to seek cooperation from the state.

Proclamation extending the territorial sea has no legal impact on the proprietary status of submerged lands beyond those boundaries. However, uncertainty regarding the status of this new U.S. territory presents a compelling opportunity for a comprehensive re-examination of federal ocean policy and for reconsideration of the states' role in territorial sea management. These important policy matters should not continue to be accomplished in piecemeal fashion or by default, but in an integrated manner. As Congress has already recognized in the CZMA, "the increasing and competing demands upon the lands and waters of our coastal zone ... have resulted in ... permanent and adverse changes to ecological systems."¹⁵⁵ Mere consultative rights, which are often ignored anyway, do not prevent the coastal states from being subjected to the whims of the federal government. Although no single geographic definition will satisfy the needs of all coastal states, a new functional approach to resource management is needed.

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¹⁵⁵ 16 U.S.C. Section 1452(1) (1988).

V. MANAGEMENT OF LIVING RESOURCES IN THE EXTENDED TERRITORIAL SEA

Introduction

Proper management of living resources in United States waters is clearly a matter of crucial importance. Nearly 90% by weight and 70% by value of our fishery resources are caught within 12 miles of the coast.¹⁵⁶ Technological advances over the years have improved the efficiency of the fishing industry, but have also decimated our finite and nonexpanding fishery resources. Contrary to the guiding principles of prior fisheries management efforts, the collapse of some of our managed fisheries have taught us that we have no "under-utilized" species.¹⁵⁷ Consequently, existing management theories must be restructured to incorporate higher conservation standards and encourage the development of enhancement programs. Any proposed alternative approach to living resource management must acknowledge present confusion regarding regulatory authority in the 3-12 nautical mile zone.

Sources of Conflict, Past and Potential

Under existing statutory arrangements, states have

¹⁵⁶ Thomas R.E. Keeney, Impact of Extended Territorial Sea on NOAA's Marine Resource Responsibilities, in Proceedings: National Conference on the States and an Extended Territorial Sea [hereinafter Proceedings] 73, 75 (Lauriston R. King and Amy Broussard, eds. 1987).

¹⁵⁷ Donald F. Squires, Existing and Potential Resources in Offshore Waters of the United States, in Proceedings, supra note 156, at 27.

jurisdiction over the resources in the first three miles offshore,¹⁵⁸ but a state can effectively exercise jurisdiction beyond this area with federal acquiescence.¹⁵⁹ The federal government can preempt state authority in the territorial sea in exceptional cases involving fisheries found predominantly outside the territorial sea. This action has been taken only twice since 1976,¹⁶⁰ indicating that relations between the states and the federal government under the Magnuson Act have been generally successful.¹⁶¹ Subsequent to the extension of the territorial sea, the potential for friction between fisheries management carried out under the Magnuson Fisheries Conservation and Management Act (MFCMA)¹⁶² and state coastal zone management under

¹⁵⁸ See e.g. Fishery Conservation and Management Act, 16 U.S.C. 1801-1861 (1988); Submerged Lands Act, 43 U.S.C. Section 1301-1315 (1988).

¹⁵⁹ See e.g., Bundrandt, 546 P.2d 530 (Alaska, 1976); Skiriotes, 212 U.S. 69 (1941). See also, Jeff Ballweber & Richard Hildreth, "Summary of Fishery Management Implications of the Territorial Sea Extension" (Draft for Comment, May 31, 1989).

¹⁶⁰ See Milner S. Ball, The States and the Territorial Sea, in Proceedings, supra note 156, at 11. Citing the following two cases for the proposition that the line drawn on water at three miles is not an effective division between state and federal interests:

1) Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (a federal statute was found to prevent Virginia from enforcing certain of its fishing laws); and

2) California v. Zook, 336 U.S. 725 (1979) (holding that where there is a need for national uniformity, federal interests prevail; where there is a need for diversity and local approaches, then state interests should dominate).

¹⁶¹ Keeney, supra note 157, at 75.

¹⁶² 16 U.S.C. Sections 1801-1861 (1988).

the Coastal Zone Management Act (CZMA)¹⁶³ was temporarily increased.¹⁶⁴ This ambiguity has become moot, however, as a result of amendments enacted in the 1990 reauthorization of the CZMA.¹⁶⁵

Problems Arising From Exclusive State Control

Any proposed management alternative must be carefully considered. Attempting to resolve federal-state conflict by granting coastal states control of the 12-nautical-mile territorial sea could create its own problems. The MFCMA Regional Councils are concerned that their authority will be limited if states are granted jurisdiction over the three to 12 mile zone. Similarly, commercial fishers are afraid that states will use the extended coastal zone to exclude nonresident commercial fishers from state waters. Federal officials have warned that the grant of full

¹⁶³ 16 U.S.C. Sections 1451-1464 (1988).

¹⁶⁴ The tension that existed until recently, see infra note 166, is summarized by the following positions:

1) State coastal zones for purposes of the CZMA, including federal consistency, now arguably extend seaward 12 nautical miles to the seaward limit of the territorial sea. See Saurenman, The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?, 1 Terr. Sea J. 39-79 (1990);

2) For fisheries management and most other purposes, on the other hand, state ocean waters still extend only three miles. See Jeff Ballweber & Richard Hildreth, "Summary of Fishery Management Implications of the Territorial Sea Extension" (Draft for Comment, May 31, 1989).

¹⁶⁵ See supra notes 8 and 13.

fishery management authority to the states would prompt a return to interstate "beggar-thy-neighbor" squabbles.¹⁶⁶ Cooperative interstate management efforts prior to the MFCMA failed largely because each state sought to protect its own fishing industry at the expense of its neighbors. The clear danger is that narrow-minded and uncoordinated management efforts could have a devastating impact on the operation of sound conservation programs.

Problems Arising From Preemptive Federal Control

The problems foreseen in the previous paragraph are not necessarily determinative. Practice has illustrated that the leniency of the federal government has been a cause of major problems in the management of living resources.¹⁶⁷ The Baldrige cases¹⁶⁸ showed that as long as federal regulations allow the use of gear prohibited by state law, the state will be unable to enforce its own prohibition unless actual use of prohibited gear in state waters is observed. In Baldrige, a suit was brought by the State of Florida against the U.S. Department of Commerce seeking to prevent implementation of parts of the federal management plans addressing mackerel and grouper fisheries in the Gulf and Atlantic. Florida's claim was based on the fact that the federal plans were in direct conflict with Florida law (which prohibits the use of

¹⁶⁶ Keeney, supra note 156, at 75.

¹⁶⁷ Charles R. McCoy, Observations on a Twelve-Mile State Fisheries Jurisdiction, in Proceedings, supra note 156, at page 48.

¹⁶⁸ Id. at 47, originally filed as Florida v. Department of Commerce (cite not provided).

purse seines and fishtraps to take fish); therefore, the Department of Commerce was in direct violation of the consistency provisions of the CZMA.¹⁶⁹ The obstruction of preventive measures resulted in the collapse of the particular fishery involved in the Baldrige cases, dramatically illustrating the practical effect of divergent management approaches.¹⁷⁰ The clarification of the federal consistency requirement through the 1990 CZMA reauthorization¹⁷¹ will probably prevent a conflict like Baldrige from happening in the future.

Another example of conflict between federal and state management of living resources involves the Tortugas Shrimp Bed off the coast of Florida. More permissive federal regulations allowing certain kinds of fishing gear that state regulations prohibit have hampered state law enforcement. State officers can only enforce state law when it can be shown that the offensive fishing gear was used in state waters because the less restrictive federal regulations justify mere possession (the fishers need only say that they are headed for federal or unregulated waters). Extension of Florida's jurisdiction to 12 miles would resolve some of the existing confusion by narrowing (but not eliminating) the band of unregulated waters sandwiched between Florida territorial waters and the northwestern corner of the federal marine sanctuary boundary. A 12-mile limit would certainly be more uniform than the

¹⁶⁹ 16 U.S.C. Section 1456 (1988).

¹⁷⁰ McCoy, supra note 167, at 47.

¹⁷¹ See supra note 13.

three and nine-mile limits currently in place. Alternatively, amendments to federal statutes could remove some of the inherent difficulties by declaring that the federal law out to 12 miles is the same as the law that would apply within the adjacent state's territorial waters.

An even better option would be to apply minimum federal standards to state and federal waters and allow the more restrictive state regulations to apply in federal waters as well. This approach would enable coastal states to manage their migratory resources more effectively; consistency would at least require federal prohibition of fishing gear prohibited by state law, effectively eliminating the problems encountered in the Tortugas and Baldrige conflicts.

The Legal Regime of High Seas Living Resource Management

The conflicts discussed above do not reflect the norm for management of living ocean resources. For the most part, the absence of federal regulatory efforts permits states to exercise jurisdiction beyond three miles from shore. This right was established in Skiriotes v. Florida,¹⁷² a case where the state prosecuted some of its citizens for violating Florida's prohibition on shrimping, despite the fact that the act was committed outside state waters. The United States Supreme Court held in Skiriotes that there was "...no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with

¹⁷² 212 U.S. 69 (1941).

respect to matters which the State has a legitimate interest and where there is no conflict with acts of Congress."¹⁷³ Later, the Alaska Supreme Court, in State v. Bundrant,¹⁷⁴ interpreted the Outer Continental Shelf Lands Act (OCSLA) to create an intended distinction between the inorganic resources of the subsoil and seabed (principally oil), which were within the exclusive domain of the federal government, and the living marine resources, which were not affected by the act.¹⁷⁵ The court thus permitted the State of Alaska to regulate the taking of Alaskan King Crab beyond its territorial waters.

The federal government typically acquiesces where a state has a legitimate stake in the specific resource involved and shows through the investment of money and talent that it is willing to manage the resource with some sophistication and care. For example, the Alaskan government in particular has made significant expenditures to regulate fishery resources.¹⁷⁶ As a result of these efforts, the interests of both the federal and state governments have been advanced through the state's salmon management and enhancement program. At the same time, the two governments have avoided rivalries regarding jurisdictional limits. Alaska has also had success regulating crabbing far beyond the three mile limit and into the high seas.

¹⁷³ Id., at 77.

¹⁷⁴ 546 P.2d 530 (Alaska, 1976).

¹⁷⁵ Id., at 546.

¹⁷⁶ See infra, Section VI, notes 197-98 and accompanying text.

Advantages of Increased State Control

The state is the most logical administrator of these resources as the entity most directly affected by management efforts and closest to the resource. The federal government, however, maintains a significant role in negotiating treaties with foreign nations and by exercising primary responsibility for administration of the MFCMA, through the Department of Commerce and the Coast Guard and the Regional Fishery Management Councils created by Department of Commerce regulations. The impact on foreign relations must be considered in evaluating any proposal for altering fishing rights in the exclusive economic zone (EEZ). Although little foreign fishing occurs within 3 to 12 miles from shore, some important factors need to be weighed. Amendment of the MFCMA to prohibit foreign fishing throughout the extended territorial sea will destroy the potential for foreign-processing/domestic-harvesting joint ventures in the 3-12 mile zone. Additionally, the symbolic effect of further reducing the area within the U.S. EEZ in which foreign nationals may harvest surplus stock must also be considered.¹⁷⁷

In the final analysis, however, the more compelling state interests predominate. The direct impact of management efforts on state lands, waters, and inhabitants, and the proximity to the area make the state the most logical administrator. The state has much greater interests at stake and is, therefore, more likely to enforce appropriate regulations.

¹⁷⁷ Ballweber & Hildreth, supra note 164.

Modification of other living resource management regulations would be less controversial. An extension of state authority from three to 12 miles would be an effective way to promote the purposes of the Endangered Species Act,¹⁷⁸ because state regulations are often more protective than their federal counterparts. Similarly, an extension of state jurisdiction could enhance the protection provided by the Marine Mammal Protection Act,¹⁷⁹ particularly if a renewed interest in the return of marine mammal management authority is pursued by states like Alaska, Oregon and California.

The remaining living resource, highly migratory species, may also present a problem now that the federal government has changed its position; Congress recently amended the MFMCA to bring highly migratory species under its regulatory authority.¹⁸⁰

Increased state control should be seriously considered, especially in light of the Department of Commerce's past determination that the issuance of uniform federal fishing regulations applicable beyond state territorial waters would not be appropriate.¹⁸¹ The substantial differences in both the kinds of

¹⁷⁸ 16 U.S.C. Section 1531-1543 (1988). See supra, note 90 and accompanying text.

¹⁷⁹ 16 U.S.C. Section 1361-1407 (1988). See supra, Section III(D).

¹⁸⁰ Different versions of a proposed amendment eliminating the classification of tuna as the sole highly migratory species exempt from control have been passed by the U.S. House (H.R. 2061) and Senate (S. 1205). The proposals have been submitted to a Senate-House conference committee to work out the differences between the two versions. (Honolulu Advertiser, at A-4, October 24, 1990).

¹⁸¹ See Bundrant, 546 P.2d 530 (Alaska, 1976), citing to a 1974 report by the Department of Commerce.

fish caught and the different fishing methods employed throughout the states¹⁸² undoubtedly present a significant challenge to federal regulatory efforts. Those states with the ability to manage living resources effectively should, therefore, be given the opportunity to adopt regulatory measures appropriate for its special circumstances.

Conclusion

Federal-state conflict can be successfully addressed by applying minimum federal standards to state and federal waters while allowing more restrictive state regulations to extend into federal waters. In those states where the capacity, interest, and commitment necessary for efficient management of living resources is apparent, there is no need to divide the territorial sea into two zones (0-3 and 3-12 nautical miles offshore). These states will be able to implement management policies, carefully tailored to their own special needs and circumstances, through laws that are necessarily more stringent than the federal minimums. The arbitrariness of the three-mile limit, on the other hand, would be appropriate where a coastal state lacked the resources needed for designing and implementing rational management of the area. Minimum federal standards would protect fragile resources in the entire 12-mile zone without unduly infringing upon state sovereignty. Granting states authority in the entire territorial

¹⁸² Van Dyke, Bennett, Storch, & Turbeville, The Legal Regime Governing Alaskan Salmon 40 (A Report to the University of Alaska Sea Grant Program, June 1988).

sea, to twelve miles, would eliminate many of the conservation problems that have occurred in the past. At the same time, minimum federal standards would provide protection in those areas where the adjacent state is unable or unwilling to act, as well as insuring against exploitation of resources by greedy state fishing industries.

* * * *

VI. CONGRESSIONAL ALTERNATIVES FOR ADDRESSING OCEAN RESOURCE MANAGEMENT IN AN EXTENDED TERRITORIAL SEA

Earlier sections of this paper identified constitutional and statutory ambiguities created by the President's Proclamation unilaterally extending the U.S. territorial sea. Investigation of these uncertainties revealed intergovernmental and interagency conflicts that will require important policy decisions. In formulating an appropriate management regime, the legislative branch must consider the following issues: equity, political feasibility, management capability, technical merit, and administrative complexity.¹⁸³

Under the heading of equitable considerations, it is important to note that 180,000 square miles of new "stateless" U.S. territory (approximately the size of Texas) was created by the Territorial Sea Proclamation.¹⁸⁴ Nearly all previous expansions of United States territory have led to statehood or incorporation into existing states. The five current exceptions are island communities that have local governments as authorized by Congress, either as a commonwealth (Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico) or a territory (Guam, Virgin Islands, American Samoa). In only a few instances has federally

¹⁸³ See, e.g., letter from Robert W. Knecht to Marc Hershman et al., regarding a Western States Territorial Sea Study, March 11, 1989.

¹⁸⁴ See Extension of the Territorial Sea: Hearings on H.R. 1405 Before the Subcommittee on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess. 64, 65 (March 21, 1989) (Statement of Chris A. Shafer, Chairman, Coastal States Organization) [hereinafter CSO Testimony].

acquired territory remained totally in federal hands. Midway, Johnston, and Wake Islands are administered by the Department of Defense; these sites are exceptional because they are quite small, resources are not being developed there, and they are of tremendous national security value. The uninhabited guano islands of Navassa, Swan, Howland, Baker and Jarvis can also be distinguished because of their relative isolation. These islands lack an obvious administrative body other than the federal government; the same can be said for Palmyra and Kingman Reef. The extended territorial sea is very different from these situations.

Several commentators have argued convincingly that control over the extended territorial sea is now a purely domestic question, despite the fact that national security interests prompted President Reagan to expand the U.S. territorial sea to twelve miles.¹⁸⁵ The extended territorial sea is undeniably

¹⁸⁵ Although the following two statements were made with regard to the 200-mile exclusive economic zone, they apply a fortiori to the extended territorial sea.

In a study prepared by the Coastal States Organization, Coastal States and the U.S. Exclusive Economic Zone [hereinafter CSO Study] (April 1987), it was stated that the question of how to manage the resources of the EEZ is an internationally recognized sovereign (i.e. domestic) matter. "In terms of U.S. federal law, this is a fundamental change with potentially profound domestic consequences," Id. at 14.

In Bruce A. Harlow & Richard J. Grunwalt, Recognition of Hawaiian Jurisdiction and Control Over the Resources in its Exclusive Economic Zone: Challenge and Opportunity (Report to the State of Hawaii, January 1986 [hereinafter Harlow Report]), the authors argue that the delinkage of the EEZ resource regime from other rights recognized in the international community has invalidated the premise upon which federal dominance was founded.

Also, in Edward A. Fitzgerald, The Tidelands Controversy Revisited, 19 Env. L. 209, 253 (1988), it was noted that international considerations were irrelevant to the domestic purposes of the Submerged Lands Act. Resource management that does

linked to the adjacent coastal states. These states have direct and inherent interests in the management of adjacent seas. The impacts of ocean development effect these states on ecological, social, economic and political levels. Under the current regulatory scheme, the burdens of development appear to be falling disproportionately upon the coastal states.

A proper consideration of political feasibility and administrative complexity must first acknowledge existing inadequacies in federal ocean management. Present inefficiencies in coastal and ocean management have produced conflicts that have delayed the orderly survey and development of promising ocean resources. According to Biliiana Cicin-Sain and Robert Knecht, this growing intergovernmental complexity and conflict exists because priorities have not been established.¹⁸⁶ The polarized efforts of development and conservation interest groups have created a disjointed approach to management that lacks both clearly articulated over-arching policies and coordination among the several agencies with planning and management responsibilities.¹⁸⁷ The problem of clashing legal mandates was well-illustrated when local governments seeking to enforce air quality standards onshore

not conflict with the rights of other nations is, therefore, a wholly internal matter.

¹⁸⁶ Biliiana Cicin-Sain & Robert Knecht, The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone, 15 Ocean Dev. & Int'l L. 289, 301 (1985).

¹⁸⁷ John E. Noyes, United States of America Presidential Proclamation No. 5928: A 12-Mile Territorial Sea, 4 Int'l J. Estuarine & Coastal L. 142 (1989), citing Knecht, Cicin-Sain & Archer, infra note 189, para. 2.

under the Clean Air Act¹⁸⁸ were unable to control air emissions from offshore oil and gas projects that are solely regulated by Interior under the OCSLA.¹⁸⁹

Knecht, Cicin-Sain, and Archer,¹⁹⁰ warn that undue delay, or outright failure to act, will prolong existing confusion and undermine the effectiveness of existing federal ocean law. Similarly, the American Bar Association's Law of the Sea Committee presented a unified call for congressional action in order to ensure the orderly, uniform implementation of the territorial sea extension.¹⁹¹ In other words, the state of national ocean policy requires that some form of change be implemented. The question is which of several approaches should be taken?

The technical merit and management capability of the different proposals for ocean resource management are evaluated in the remainder of this paper. The political feasibility and administrative complexity of each approach are also addressed, where appropriate.

¹⁸⁸ 42 U.S.C. Sections 7401-7626 (1988).

¹⁸⁹ 43 U.S.C. Section 1331-1357 (1988). See generally, Robert Knecht, Biliiana Cicin-Sain & Jack H. Archer, National Ocean Policy: A Window of Opportunity, 19 Ocean Dev. & Int'l L. 113, 122 (1988). The authors cite the Secretary of Commerce's, Findings and Decisions in the Matter of the Appeal by Exxon Co., USA to the Consistency Objection by the California Coastal Commission to EXXON's Proposed Development of the Santa Ynez Unit by Means of Development Option A (February 18, 1984).

¹⁹⁰ Id., at 125.

¹⁹¹ Law of the Sea Committee Newsletter: Section of International Law and Practice, vol. 3, no. 2 (American Bar Association, Summer 1989).

A. Coastal State Control

"It is neither feasible nor desirable for the national government to attempt to represent all of the public interests in ocean activities beyond the territorial sea."¹⁹² This position, adopted by the Coastal States Organization (CSO), is tied directly to its interpretation of the following Executive Order on Federalism issued by President Reagan: "In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level."¹⁹³ Although the CSO tempered its recommendation to include the possibility of an equal federal-state partnership, it implicitly considered primary state control to be the way to govern the extended territorial sea for the broadest and best public good.¹⁹⁴

The demonstrated competence of coastal states in managing both living and nonliving resources in the adjoining ocean justifies extension of state authority to 12 miles. In its testimony to Congress, the CSO provided a lengthy account of the coastal states' wide-ranging experience in ocean resource management.¹⁹⁵ The

¹⁹² From a Policy Statement of the Coastal States, appended to CSO Testimony, supra note 184.

¹⁹³ CSO Testimony, supra note 184, at 73, referring to Executive Order No. 12612 (October 26, 1987).

¹⁹⁴ Id., at 14.

¹⁹⁵ Id., at 11-12:

[A]ll states bordering the territorial sea have

statutes governing mineral exploration and mining on State lands.... Ten States are currently participating with the Interior Department in joint federal-state task forces.... The Governors of American Samoa, Guam, the Commonwealth of Northern Marianas Islands and Hawaii have completed an assessment of the importance of the resources in the 200 mile Exclusive Economic Zone (EEZ) off their shores, and are in the process of establishing an EEZ Coordinating Council. For the last twelve years the coastal States have cooperated with the federal government and the private sector ... [under] the Magnuson Fishery and Conservation and Management Act.

Some coastal States have long-standing laws for the development of oil and gas resources within their coastal and territorial waters, ... long-standing expertise in a variety of pollution programs, ... coastal or ocean sanctuary programs, ... [29] States, and possibly 30 by next year, have federally approved coastal zone management programs. Historic shipwrecks have been managed by many coastal states for years, and under the Historic Shipwreck Act of 1988 all coastal States are now managing these "national treasures."

Several states have developed specific ocean resource policy or management initiatives. For example, North Carolina in 1984 completed a comprehensive ocean policy analysis, and is presently preparing a report on the economic feasibility of mining phosphate deposits.... Oregon is in the midst of preparing an ocean resources management plan.... Hawaii has legislatively authorized ... implementation of an updated Ocean Resources Management Plan..., has also initiated a program to evaluate potential impacts of marine mining industry, and has prepared an environmental impact statement on ocean mining for the recovery of cobalt-rich manganese crusts off its shores. Legislation is pending in the legislatures of Alaska and California to inventory ocean resources and establish state ocean Management programs.

Since entering the Union the Great Lakes States have had exclusive management authority over extensive areas of water and submerged lands, and the aquatic resources found there ... the shortest State territorial water boundary is 21 miles offshore of Pennsylvania in Lake Erie ... Michigan ... manages resources out, in some locations, more than 72 miles ... [and] alone owns 37,500 square miles of submerged lands.

Thus from the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles. Further, we have done so in concert with a foreign

testimony mentioned several areas of demonstrated coastal state ability, including ocean mining, fisheries management, joint federal-state task forces, pollution control, sanctuary programs, and coastal zone management. "[F]rom the perspective of Great Lakes States, States can and have managed aquatic resources very successfully over areas extending far beyond 12 miles."¹⁹⁶

Suzanne Iudicello testified before the House Committee on Oceanography and Great Lakes that the State of Alaska has demonstrated particular competence in balancing the goals of protection, conservation, and utilization through joint efforts with the U.S. State Department to reduce foreign interception of salmon; through exclusive management of shelf commercial rockfish, king and tanner crab, and troll salmon in federal waters (spending ten times the outlay of the federal government in the management of its regional fisheries); and through accumulated negotiation experience with other states and foreign nations with regard to anadromous species.¹⁹⁷ Further testimony indicated that the management capability of the Alaskan government has also been superior to that of the federal government in some instances. The Alaskan government has issued nine active and 200 prospective ocean

country ... the international institutions created by the Great Lakes States and Canada are testimony to our ability to manage our own resources.

¹⁹⁶ Id., at 12.

¹⁹⁷ Extension of the Territorial Sea: Hearings on H.R. 1405 Before the House Committee on Oceanography and Great Lakes of the House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess. 82, 85 (March 21, 1989) (Statement by Suzanne Iudicello, Associate Director for Fisheries and the Environment for Alaska).

mining leases off the Alaskan coast; the federal government has not issued any. The Alaskan government also has a two-to-three year waiting period for a predictable and consistent leasing schedule, while it takes five years for an oil and gas lease sale to be issued in the 3-12 mile zone. In addition to reducing administrative complexity (to the benefit of oil companies), Alaskan management incorporates better environmental protection of the area. With regard to oil and gas development, "Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government."¹⁹⁸

Alaska also cites, through Iudicello, the sound policy behind the 1953 Submerged Lands Act grant, stating that state ownership of the extended territorial sea is equally valid. Furthermore, unified jurisdiction and ownership of the 0-12 mile zone makes sense for the coherent exercise of police power. Otherwise enforcement can be complicated by the cross-purposes of federal and state agencies. To avoid the problems of interstate squabbles, where each state seeks to protect its own resources at the expense of other states, minimum federal standards could be developed. If these standards were also required to be consistent with state law, enforcement would be greatly enhanced.¹⁹⁹

¹⁹⁸ Id., at 5.

¹⁹⁹ See Charles R. McCoy, Observations on a Twelve-Mile State Fisheries Jurisdiction, in Proceedings, National Conference on the States and an Extended Territorial Sea 46 (Lauriston R. King and Amy Broussard, eds., Texas A&M Sea Grant College Program, 1987).

B. Coastal States as Equal Managing Partners

As noted above, many coastal states have been willing to devote money and talent to ocean resource management; the success of their efforts illustrates that some states are quite competent to manage the vast resources of an extended territorial sea. The variation in need among the coastal states, however, might warrant legislation providing for optional participation by states in the planning and management of the 3-12 mile zone.²⁰⁰ Optional participation by a state that has demonstrated ocean management capacity would be consistent with the principles of the Coastal Zone Management Act. For coastal states like Hawaii, Alaska, Oregon, Washington, Louisiana, and Texas, and for territories like American Samoa and Guam, the existence of important resources and interests highlights the need to develop a management program. Coastal states with few resources or uses of immediate interest, however, may not have a compelling need for altering the present arrangements.

Governor John Waihee of Hawaii has stated his belief that the two portions of the territorial sea should be part of an integrated management process that is guided by a single comprehensive set of coastal policies. A necessary element of state control would be the elimination of the existing regime's arbitrary (three mile)

²⁰⁰ Ocean Issues: Hearings on Reauthorization of the Coastal Zone Management Act, Hard Mineral Resources in the Exclusive Economic Zone, Fisheries Issues, and Extension of the Territorial Sea Before the House Committee on Merchant Marine and Fisheries, 101st Cong., 2nd Session 86, 92 (Honolulu, January 8, 1990) (Statement of John Waihee, Governor, State of Hawaii) [hereinafter Waihee Statement].

jurisdictional boundaries.²⁰¹ Waihee reports several examples of Hawaii's leadership role in integrating ocean development to support the state's position: the existing local partnership between the state and its counties, an agreement signed with the Secretary of Interior initiating the nation's first joint federal-state management program regarding mineral resources in the EEZ, and the cooperation between state/federal governments and the private sector in the development of ocean science and technology at the Natural Energy Laboratory on the Island of Hawaii.²⁰²

On equitable grounds, the people of Hawaii feel that culturally, historically, and economically, the ocean is theirs to value, respect, and nurture. National security and international navigational interests are recognized, but these interests are consistent with Hawaii's legitimate concerns: the proper stewardship of renewable resources, a fair return on the use of the ocean and its resources, the regulation of ocean activities to protect public health and welfare, and planning for future use of ocean resources and the growth of Hawaii's economy.²⁰³ There is no need to bind security and navigation to other interests in the ocean which can be more effectively managed by the state that is most directly affected by them. In any event, "without effective local participation in the decision-making process, no amount of 'national interest' justification is likely to overcome local

²⁰¹ Id., at 92.

²⁰² Id., at 89.

²⁰³ Id., at 88.

opposition."²⁰⁴

Other studies indicate that participation is not an impossible goal. A study of federal consistency under the CZMA²⁰⁵ noted that the requirement of federal-state cooperation in coastal management has resulted in states concurring with 97% of all federal consistency applications.²⁰⁶ The figures presented provide reason to be optimistic about the potential for increased federal-state cooperation. Nonetheless, the authors concluded that the consistency requirement "should not be viewed as a general bromide for dealing with the fragmentation of management authority," but rather as a modest experiment in mandating interagency and intergovernmental coordination.²⁰⁷ The approach should be seen simply as leading to more specific analysis of the conditions and techniques that result in genuine collaboration.

Criticism by the federal government of undue administrative complexity and inconvenience, created by increased state participation, will be outweighed by the environmentally sound decisions that result from increased review. The interactions between coastal states and their adjacent oceans clearly demand a prominent state role in management of the extended territorial sea.

²⁰⁴ Robert Knecht, The Coastal States and the U.S. Exclusive Economic Zone 15 (CSO, Washington, D.C. 1987).

²⁰⁵ Kem Lowry, M. Casey Jarman, & Susan Maehara, Federal-State Cooperation in Coastal Management: An Assessment of the Federal Consistency Provision of the Coastal Zone Management Act (unpublished report) prepared for the Hawaii Sea Grant Program.

²⁰⁶ Id., at 38.

²⁰⁷ Id., at 39.

Governor Waihee of Hawaii suggests the creation of a "federal ocean resources council" consisting of the key ocean agencies, such as the National Oceanic and Atmospheric Association, the Environmental Protection Agency, the Department of Interior, and the Department of Defense.²⁰⁸ The council would be convened by NOAA as needed to assist states in the development of management programs for the extended territorial sea. The operation of this council would improve coordination at the federal level, the lack of which has made it difficult for states to work with the federal government on ocean and coastal matters in the past.

In the Coastal States Organization study mentioned previously, the Deepwater Ports Act²⁰⁹ and the Ocean Thermal Energy Act²¹⁰ are cited as setting the precedent for shared decision-making.²¹¹ The concept of "shore-linked" impacts of ocean development provides the basis for gauging the roles of the state and federal governments in ocean management. In the past, the interests of the states and local communities have usually been projected from the shoreland seaward, and terminated arbitrarily at the boundary of state ocean waters. A more appropriate approach, however, is to start from the location of the activities and project the effects and impacts shoreward to the state coastal zone and shorelands. Long-term commitments for the exclusive use of ocean space, and the resultant

²⁰⁸ Waihee Statement, supra note 200, at 93.

²⁰⁹ 33 U.S.C. Sections 1501-24 (1988).

²¹⁰ 42 U.S.C. Sections 9101-67 (1988).

²¹¹ CSO Study, supra note 185, para. 2, at 20.

long-term commitment of the shoreside support facilities require the concurrent approval of both the federal government and the involved coastal states.²¹²

C. Regional Management

A modified alternative to federal-state cooperation is the formation of new, and the expansion of existing, regional management schemes. A blue-ribbon panel review of the MFCMA resulted in a recommendation that cooperative management through regional councils be retained, but proposed separate fishery conservation and allocation determinations.²¹³ Under the modified scheme, conservation determinations would be made by NOAA and allocation decisions by the regional councils. By counteracting the administration's refusal to share decision-making authority with coastal states, increased participation would significantly reduce tension between the federal government and the states. The policy stalemate in oil and gas development might have been avoided if the coastal states were given greater authority.²¹⁴

Efforts to implement regional cooperation should be carefully formulated to avoid compounding the already fragmented ocean management regime. Information sharing and coordination must be promoted. In attempting to balance national and regional interests, including the costs and benefits of ocean activities,

²¹² Id., at 21.

²¹³ Knecht, Cicin-Sain & Archer, supra note 189, at 126.

²¹⁴ Id., at 125-26.

the management framework should also have the capability of ranking specific uses and resources when necessary.²¹⁵

D. Multiple-Use Approach

The complex nature of the ocean as an interdependent ecological system provides much of the reasoning behind a third alternative, multiple-use management. The multiple use approach requires the establishment of clear legislative guidelines, possibly even priorities, to govern ocean management. For example, Oregon has crafted an integrated regime for nearshore ocean management that includes legislatively-set priorities, favoring living over nonliving marine resources in cases where multiple use conflicts occur.²¹⁶ Possibilities on the national level include creation of a multiple-use federal oceans agency (or federal regional commissions) for ocean management.²¹⁷ This entity would have plenary authority analogous to that of the Corps of Engineers in the Coastal Decision Framework.²¹⁸ It would provide the forum

²¹⁵ Cicin-Sain & Knecht, supra note 186, at 315. See Lew Alexander & Lynne Hanson, Regionalizing Exclusive Economic Zone Management, in Proceedings of Oceans, 1984 (Marine Technology Society, 1984), and William S. Gather, A Public Authority to Manage the Atlantic Outer Continental Shelf, 2 Coastal Zone Management Journal 59-64 (1975) for other versions of the regional approach.

²¹⁶ Knecht, Cicin-Sain & Archer, supra note 189, at 133, citing J. Good & R. Hildreth, Nearshore Ocean Management in Oregon (Oregon Department of Land, Conservation and Management, draft 1986).

²¹⁷ Cicin-Sain & Knecht, supra note 186, at 312, Table 2.

²¹⁸ The structure of the coastal decision framework involves decisionmaking at all three levels of government, and involves multiple agencies within each level. Certain agencies have primary

for integrating the preferences of many special purpose agencies and interests.²¹⁹

Ocean resources and processes are highly fluid, mobile, and intertwine over great distances. It is clear that a mismatch currently exists between the realities of the ocean system and the government's sectoral approach to its management. Instances of split or shared authority persist. For example, the Department of the Interior has jurisdiction over sea turtles while on land, but NOAA has jurisdiction over them in the ocean.²²⁰ Because many of the most important ocean activities traverse or impact all three jurisdictions (local, state and federal governments), complexity is added to the planning and management of these activities. Furthermore, the benefits and costs of ocean resources exploitation frequently fall disproportionately on different jurisdictions, exacerbating inter-jurisdictional frictions.²²¹

The lack of a plenary law for ocean decision-making creates an organizational vacuum in the ocean arena. An important policy objective should be to fill this vacuum; the Corps of Engineers'

power over certain aspects of a decision, but only a secondary role in other aspects of the decision. The Army Corps of Engineers provides the balance of power as the ultimate decision authority. Over the years, the coastal decision process has developed norms to guide decisions based on Constitutional, public trust and environmental principles reflecting the prevalent societal values of the times.

²¹⁹ Marc J. Hershman, The Coastal Decision Making Framework as a Model for Ocean Management, in Proceedings, supra note 17, at 92, 99.

²²⁰ Cicin-Sain & Knecht, supra note 186, at 299.

²²¹ Knecht, Cicin-Sain & Archer, supra note 189, at 134.

public interest review process is the best model we have.²²² The Corps of Engineers has general jurisdiction over coastal waters, and reviews all discharges of dredged or filled materials.²²³ The public interest review process requires consideration of diverse factors, applying a balancing test to assure that the benefits of a proposed action outweigh the foreseeable detriments. The process is open to all public and private organizations and individuals. By law the Corps must integrate the objectives of a wide range of federal and state laws.²²⁴ The Corps acts as a clearinghouse to ensure that conflicts are identified and resolved among the real parties in interest, requiring participants to try to resolve their differences through negotiation and project modification.²²⁵ The mutual education and trading of information often facilitates trade-offs or at least the establishment of guidelines for addressing problems that may arise in the future. A general and flexible system will allow regional experimentation and trial and error that will lead to a system that arises out of real decisions and real circumstances.²²⁶

In addition to the problems of split and shared authority, numerous other faults in the present ocean management system can be

²²² Hershman, supra note 219, at 96.

²²³ G. Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L. Rev. 503, 547 (1977).

²²⁴ Hershmann, supra note 219, at 94-95.

²²⁵ Cicin-Sain & Knecht, supra note 186, at 302-05.

²²⁶ Hershmann, supra note 219, at 96.

recited. Examination of consequences to proposed ocean uses is biased toward protection or development depending upon the particular law in question. Decisionmakers have few opportunities to debate overall priorities or to make trade-off decisions. No one has jurisdiction over conflicts among different sectors (e.g., controversies surrounding the Santa Barbara Channel, the Beaufort Sea, and the Georges Bank). Litigation addresses only actual rather than potential conflict, often excludes crucial viewpoints because of narrowly defined rules of evidence, and involves damaging delays. Decisionmakers are not encouraged to conduct advanced ocean planning. And finally, the difficulty of estimating the impact of long-range activities often leads to the preclusion of some uses and species from the ocean management regime.²²⁷

In addition to the need to address organizational defects, the United States needs to understand better the interactions between marine ecosystems and the impacts of certain ocean activities, and also of the cumulative impacts resulting from multiple ocean uses. At the very least, appropriations should be made to support the pursuit of such knowledge. Meanwhile, to minimize the uncertainty caused by the complexity of ocean processes, operationally-linked monitoring programs could be used for new and existing ocean uses. After performing baseline studies, agreement should be reached among the potentially affected interests on thresholds that trigger pre-agreed changes in the operation of an activity. This approach would eliminate the problems caused by the inflexibility inherent

²²⁷ Cicin-Sain & Knecht, supra note 186, at 302-305.

in earlier governmental management procedures.²²⁸

The multiple-use approach will not be easy to implement and will take time to become fully operational. It has been recommended, therefore, that realistic field testing of regional approaches (discussed supra) might serve as a stepping stone toward the greater goal of multiple-use ocean management.²²⁹ This approach may not reduce complexity in ocean management, but it may reflect all that we can expect in a pluralistic society and under a federalist system of government, where democratic principles prevail.²³⁰

E. Revenue Sharing

Another way to placate coastal state opposition to federal management of the extended territorial sea is to share the revenues obtained from resource exploitation in the area. A proposal by Richard Littleton calls for sharing with all 50 states.²³¹ Reallocation of resources would not change fundamental federal-state rights and duties, and a consequential increase of ocean awareness will necessarily result in better monitoring of oil and gas production. This approach would provide an immediate and more concrete mechanism for organizing the coastal zone than an abstract

²²⁸ CSO Study, supra note 185, para. 2, at 21.

²²⁹ Cicin-Sain & Knecht, supra note 186, at 315.

²³⁰ Hershman, supra note 219, at 99.

²³¹ Richard Littleton, Coastal States, Inland States and A 12-Mile Territorial Sea 17 J. Mar. L. and Comm. 539 (1986). See supra notes 146-153 and accompanying text.

framework for future federal-state cooperation. Establishing a single decisionmaker out to 12 miles could directly resolve some federal-state tensions, while reducing the intensity of other disputes by moving the focus of tension 12 miles from shore.

In general, the states are clearly capable of managing the area. Extended management is practiced by the Great Lakes states, Alaska, Florida, Texas, and Puerto Rico. Active state participation in the administration of the oceans, coupled with a positive program to mobilize coastal states' industrial bases--which facilitates the recovery and processing of offshore resources--could provide the basis for equitable federal-state sharing of revenues.²³² Hawaii's Governor John Waihee has advocated a 50/50 division between the federal government and the adjacent state for oil and gas development as well as hard minerals.²³³ The fundamental role of the coastal state in such an arrangement would be to provide a cost-effective and reasonably flexible regulatory scheme that reduces the multiple permit burden to a minimum.²³⁴ This reduction in administrative complexity alone might be enough to rally the support of industry and allow the states to present a unified proposal for congressional action.

F. Statutory Modification and Other Action

The National Governors Association and Western Governors have

²³² Harlow Report, supra note 185, para. 3, at 91.

²³³ Waihee Statement, supra note 200, at 94.

²³⁴ Harlow Report, supra note 185, para. 3, at 96.

issued resolutions suggesting that Congress mandate that each federal ocean agency analyze the legislation governing its programs and make a determination as to the extent to which this legislation should be interpreted to extend to the 12-nautical-mile limit of the territorial sea.²³⁵ Congress could then either accept and confirm executive branch interpretations or modify the particular pieces of legislation to conform to Congressional intentions. See also Section III of this paper entitled "A Survey of Statutes Referring to the Territorial Sea" for suggested modifications.

Other issues identified²³⁶ as topics requiring attention include the removal of gaps in the regulatory schemes involving hard minerals and ocean incineration; providing for the identification of potential conflict; establishment of NOAA as an independent agency; amendment of the OCSLA to provide greater protection for marine and coastal resources and uses; and the incorporation of conflict resolution, negotiation and joint planning procedures.

Conclusion

The resolution of intergovernmental and interagency conflicts is crucial to the goal of efficient management of ocean resources. Although our understanding of ocean processes is still far from complete, it is clear that our first generation approach to

²³⁵ Waihee Statement, supra note 200, at __ (appendix).

²³⁶ Cicin-Sain & Knecht, supra note 186, generally; and Knecht, Cicin-Sain & Archer, supra note 189, generally.

management has become overloaded. The Territorial Sea Proclamation provides a compelling opportunity to address the need for reform. Equitable considerations require that the federal government share with the states the decision-making authority it has assumed in the extended territorial sea.

The possible approaches to improving our national ocean management effort presented in this paper are as follows:

(A) increase state control to 12 miles--state ownership would be subject only to the federal navigational servitude and for the constitutional purposes of commerce, navigation, national defense, and international affairs;

(B) create a partnership between the federal government and the willing and capable coastal states;

(C) promote regional cooperative management schemes--analogous to the MFCMA regional councils;

(D) pursue a multiple use approach--where competing values are balanced by a federal oceans agency with plenary authority over U.S. waters;

(E) develop a revenue-sharing scheme in which federal dominion would be maintained and the states would be placated with a secure source of funds; and

(F) modify statutes individually, but comprehensively.

The individual policy approaches listed above are not meant to be exhaustive, nor mutually exclusive. They are recommendations to be considered in formulating an appropriate response to the territorial sea extension. Until some comprehensive action of this

sort is taken, the potential for development of this important area will never be achieved.

ABSTRACT

The Role of Congress in Ratifying and Implementing the Territorial Sea Proclamation

Joan M. Bondareff

On December 27, 1988, President Reagan by Presidential Proclamation extended the territorial sea of the United States from 3 to 12 geographical miles, asserting U.S. sovereignty over this new zone. There is significant doubt that the President acting alone can constitutionally acquire new territory of this magnitude for the United States. See Archer and Bondareff, "The Role of Congress in Establishing U.S. Sovereignty over the Expanded Territorial Sea," 1 Terr. Sea Journal 117 (1990).

Congress has not yet acted to ratify or implement the Presidential Proclamation and to resolve questions about the legal character of the new zone. Legislation was introduced in the 100th Congress to affirm the President's decision (H.R. 5069, introduced by former Rep. Mike Lowry), but was not enacted. No similar bill was introduced or enacted by the 101st Congress. If anything, the 101st Congress has taken action to confirm the status quo ante the Proclamation. For example, in reauthorizing the Coastal Zone Management Act of 1972, Congress recently amended the seaward limit of the state coastal zone boundary to make it co-extensive with the outer limit of state title and ownership under the Submerged Lands Act, generally set at 3 miles. (Section 6204 of the Omnibus Budget Reconciliation Act of 1990.) In enacting comprehensive oil spill legislation, Congress specifically limited the seaward extent of the territorial sea for purposes of the Oil Pollution Act of 1990 to 3 miles. (Section 1001(35), P.L. 101-380.)

Mirroring the limitation in the Proclamation, Congress appears to be shying away from extending the territorial sea for domestic purposes, perhaps due to concerns about the effect of this extension on states' resource claims. It remains to be seen what outside influences, perceived interests, or other motivations will prompt Congress to enact legislation to ratify the Proclamation and to amend domestic legislation to conform to the 12-mile international territorial sea. State interest in this question has been surprisingly low and federal agencies, taking their cue from the Proclamation, have not requested additional authority.

Congress has several options to resolve this matter, including:

1. Legislation to ratify the Presidential Proclamation, but take no further action;

2. Legislation to ratify the Presidential Proclamation and to establish a process for reviewing the effect of the Proclamation on domestic laws and making recommendations for needed amendments;

3. Legislation to amend the Submerged Lands Act to extend the states' resource title and management responsibility to 12 miles;

4. Legislation to divide management responsibility between the states and the Federal Government for resources in the new zone;

5. Legislation amending domestic laws on a piecemeal basis to extend the territorial sea from 3 to 12 miles, as needed.

This paper will briefly review the constitutional defects in the Presidential Proclamation; identify some problems that could arise as a result of these defects; and describe various alternative solutions for Congress to remedy the problem and reasons why Congress should act.

THE ROLE OF CONGRESS IN ESTABLISHING U.S. SOVEREIGNTY OVER THE EXPANDED TERRITORIAL SEA

*Jack H. Archer and Joan M. Bondareff **

I. INTRODUCTION AND BACKGROUND

On December 27, 1988, President Reagan extended the territorial sea of the United States from three to twelve geographical miles and asserted U.S. sovereignty over this new zone.¹ The President stated that "[e]xtension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States."² Thus, the major purpose of the Proclamation was to provide a greater defense perimeter for the United States, presumably to keep foreign intelligence-gathering and naval vessels farther off the coast of the United States.³

At the same time, the President asserted that nothing in the Proclamation "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom."⁴ The President's intention was to extend the U.S. territorial sea to twelve miles solely for

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1. Proclamation No. 5928, 54 Fed. Reg. 777 (1989) (hereinafter *Territorial Sea Proclamation*).

2. *Id.*

3. Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. Times, Dec. 29, 1988, at A-17. See also Schachte, *History of the Territorial Sea from A National Security Perspective*, 1 TERR. SEA J. 143 (1989) (this issue).

4. *Territorial Sea Proclamation*, *supra* note 1.

international legal and national security purposes while denying or limiting any effect of the Proclamation on domestic law.⁵

Uncertain about the underlying authority of the President unilaterally to assert U.S. sovereignty over territorial lands and waters, the Department of State sought the advice of the Department of Justice's Office of Legal Counsel before issuance of the Proclamation.⁶ The Department of State posed three questions to be answered by the Department of Justice (Justice):

First, does the President have the authority to declare, by Presidential Proclamation, the proposed extension of the territorial sea?

Second, assuming the President does have the authority, what effect would such a Proclamation have on domestic legislation, such as the Coastal Zone Management Act (CZMA)?⁷

Third, can the President limit the effect the Proclamation will have on domestic legislation?⁸

5. A particular concern of the Administration before issuing the Proclamation was the potential effect of the extension upon the authority of coastal states to manage and protect their coastal zones under the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1989). Under the CZMA, a state with a coastal management program approved by the federal government has broad authority to control the activities of federal agencies in and affecting the land and water uses and natural resources of the coastal zone, 16 U.S.C. § 1456. See generally, Eichenberg and Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism"*, 14 *Ecol. L.Q.* 9 (1987). Because the CZMA does not explicitly establish the seaward extent of the coastal zone at the three-mile limit, but arguably permits an extension of the seaward limit of the coastal zone in tandem with the expansion of the territorial sea, the Administration feared an enlargement of the states' authority over such federal activities. See Memorandum from John K. Van de Kamp, Attorney General, California Department of Justice, to Peter Douglas, Executive Director, California Coastal Commission (March 15, 1989) reprinted in Saurenman, *The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?* 1 *TERR. SEA J.* 39 (1990) (this issue).

6. Memorandum for Abraham D. Sofaer, Legal Adviser, Department of State from the Office of Legal Counsel, U.S. Department of Justice, (Oct. 4, 1988), prepared for Abraham D. Sofaer, Legal Adviser, Department of State, [hereinafter Justice Memorandum] reprinted in Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 *TERR. SEA J.* 1 (1990) (this issue).

7. See CZMA, *supra* note 5.

8. Justice Memorandum, *supra* note 6, at 1.

The Justice Reply Memorandum (Justice Memorandum) found that the President's constitutional authority to conduct the foreign relations of the United States provided the Executive with the necessary authority to assert jurisdiction over an expanded territorial sea, consistent with international law.⁹ With considerably less confidence, Justice also found a sufficient reason for the President's unilateral claim of sovereignty over an expanded territorial sea (the new "zone" from three to twelve miles) in a claim of "discovery and occupation" of such territory.¹⁰ In response to the second question, the Justice Department acknowledged that the intention of Congress in enacting the CZMA would determine whether the coastal zone would automatically expand upon an extension of the territorial sea. Examining the history of the Act, Justice argued that "the better view" was that Congress had no such intention, but admitted that its conclusion was not "free from doubt."¹¹ Justice also advised the Administration to seek enactment of legislation that would declare that "no federal statute is affected by the President's proclamation" -- an apparent admission that the President lacks the authority unilaterally to limit the Proclamation's effect upon domestic law.¹²

This article focuses upon the role of Congress in establishing the sovereignty of the United States over new lands and waters -- a role that Justice found would be restricted to instances when Congress, pursuant to its constitutional authority, admits new states to the Union.¹³ As argued below, we believe that Congress' role and interests in the extension of the territorial sea were either insufficiently acknowledged or not recognized at all by the Reagan Administra-

9. *Id.* at 6-12.

10. *Id.* at 12, 14-18. The Supreme Court has upheld the exercise of jurisdiction by the United States over "discovered" territory pursuant to the Guano Act. See *infra* notes 98-103 and accompanying text:

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation . . . when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession . . . of territory unoccupied by any other government or its citizens....

Jones v. U.S., 137 U.S. 202, 212 (1890).

11. Justice Memorandum, *supra* note 6, at 2, 36. A contrary view is held by the California Department of Justice. See Saurenman, *supra* note 5.

12. Justice Memorandum, *id.* at 37.

13. *Id.* at 22.

tion and in the Justice Memorandum. We examine part of the historical record considered in the Justice Memorandum, and conclude that Congress must play its constitutional role when the sovereignty of the United States is extended to a greatly expanded territorial sea. Finally, we discuss briefly the extension of the territorial sea in the context of the serious coastal and ocean resource management policy issues that have occupied federal and state officials, Congress, the courts, interest groups, and the public for many years. On the basis of this analysis, (1) we conclude that Congress has the authority and the duty to act to resolve any uncertainty about the sovereign status of the new "zone" from three to twelve miles and (2) we recommend that Congress should also seek to resolve at least some of the fundamental policy issues that currently divide the executive and the states with respect to coastal and ocean resource management.¹⁴

A. The U.S. Territorial Sea

Until the Reagan Territorial Sea Proclamation, the United States had always maintained a three mile territorial sea. The U.S. territorial sea was initially established by the Washington Administration in response to pressure from the French and British Governments to declare how far seaward from its shores the United States would extend its "territorial protection."¹⁵ Secretary of State Jefferson sent letters to the French and British "provisionally" fixing the limit at "one sea league or three geographical miles from the sea-shores."¹⁶ This "provisional" three mile U.S. marginal or territorial sea lasted for almost two hundred years.

The Reagan Proclamation represents a change in longstanding U.S. policy which may be attributed both to a changing perception of U.S. national security interests and to changing principles of international law.¹⁷ A twelve mile

14. Many of these issues are analyzed in PROCEEDINGS, NATIONAL CONFERENCE ON THE STATES AND AN EXTENDED TERRITORIAL SEA, DEC. 9-11, 1985, TEXAS A&M UNIVERSITY TAMU-SG-87-114 (March 1987).

15. See *infra* note 49 and accompanying text.

16. U.S. v. California, 332 U.S. 19, 33 (1947) citing letter from Thomas Jefferson to the British Foreign Minister (Nov. 8, 1793); For an interesting account of the circumstances leading to this initial assertion of the U.S. territorial sea, see Justice Memorandum, *supra* note 6, at 6-11.

17. See generally, Schachte *supra* note 3.

territorial sea is now consistent with the modern practice of nations,¹⁸ customary international law,¹⁹ and U.S. ocean policy.²⁰ Accordingly, we do not question the right of the United States as a sovereign nation to extend its territorial sea to twelve miles as a matter of international law. Our inquiry concerns, rather, the capacity of the political branches of the U.S. government to acquire new lands and waters on behalf of the United States as sovereign territory.

The issue of which political agency has the capacity to acquire new territory on behalf of the United States arises because of the nature of the territorial sea in international law. Within its territorial sea, a nation exercises virtually complete sovereignty.²¹ A nation's authority in its territorial sea is equivalent to the authority it exercises within its terrestrial territory, subject only to the right of innocent passage for foreign vessels.²² Thus, the extension by the United States of its territorial sea from three to twelve miles is the same as the acquisition of a new "zone" of marine territory circling the United States, its territories, and possessions.²³

B. The U.S. Constitution

The U.S. Constitution does not expressly address the authority of the United States to acquire new territory; therefore, it should not be surprising that questions have arisen at times in the Nation's history respecting the branch or branches of government which should bear this responsibility.²⁴ In fact, this

18. One hundred and seven nations, including the United States, now claim a twelve-mile territorial sea. *Examination of the President's Proclamation Extending the Territorial Sea of the United States from 3- To 12-Miles: Hearings Before the Subcomm. on Oceanography the Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 136 (1989) (statement of Brian J. Hoyle, Director, Office of Ocean Law and Policy, U.S. Department of State).

19. See 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 511, 512 (1986).

20. See Statement by the President on U.S. Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383-85 (Mar. 14, 1983).

21. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512, comment at 36 (1986).

22. *Id.* See also Justice Memorandum, *supra* note 6, at 2-5.

23. Justice Memorandum, *supra* note 6, at 12.

24. G. SUTHERLAND, CONSTITUTIONAL POWERS AND WORLD AFFAIRS 52 (1919); W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 407 (1929).

issue, it is said, seriously troubled President Jefferson in the case of the Louisiana Purchase.²⁵ The matter was soon resolved, however, when Chief Justice Marshall sustained the power of the United States to acquire new territory on the basis of its treaty and war-making powers.²⁶ Such power may also be considered to inhere in the authority of a sovereign nation.²⁷

Accordingly, it is no longer open to question that the United States may acquire new lands and waters despite the lack of explicit constitutional authority addressing the government's acquisition of new territory.²⁸ The record of U.S. territorial acquisitions, however, does not authoritatively determine whether the executive branch of government may exercise this right independently of the Congress. Further, nothing in this record suggests that the Congress is prohibited from originating legislation to incorporate new territory into the United States and must defer to the President in this matter. This record, and the constitutional or other authority upon which certain territorial expansions have been grounded, is discussed below.

II. ASSERTING SOVEREIGNTY OVER NEW TERRITORY

Despite the lack of explicit constitutional authority, certain powers in the Constitution acting singly or in combination have been found to authorize both the acquisition of and the extension of U.S. sovereignty over new territory. These powers include the following.

1. The power of the Congress to admit new states into the Union;²⁹
2. The power to declare and carry on war;³⁰ and

25. See *Downes v. Bidwell*, 182 U.S. 244, 252-253 (1901) for a discussion of the history of the Louisiana Purchase.

26. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

27. *Mormon Church v. U.S.*, 136 U.S. 1, 42-43 (1890); *Jones v. U.S.*, 137 U.S. 202, 212 (1890); *Downes v. Bidwell*, 182 U.S. 244 (1901); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

28. *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

29. U.S. CONST., art. IV, §3, cl. 1.

30. U.S. CONST., art. I, §8, cl. 11.

3. The power of the President to make treaties with the advise and consent of the Senate.³¹

In addition to these constitutional powers, the inherent sovereign power to acquire territory by "discovery and occupation" has been recognized.³²

The United States has acquired new territory and extended its sovereignty by exercising all of these powers. Pursuant to its authority to admit new states, Congress acquired and extended the sovereignty of the United States over Texas and Hawaii by enacting joint resolutions, presented to and approved by the President.³³ In the case of territory acquired by the United States through war, sovereignty has been established through treaties of cession, negotiated by the President and approved by the Senate.³⁴

The most extensive acquisitions, however, have been accomplished by use of the treaty-making power. By treaty, the United States has acquired the Louisiana Purchase,³⁵ the Gadsden Purchase,³⁶ the Oregon Territory,³⁷ California,³⁸

31. U.S. Const., art. II, §2, cl. 2.

32. W. WILLIAMS, *supra* note 24, at 408.

33. Texas was added to the Union by joint resolution of the Congress in 1845. Joint Res. 8, 5 Stat. 797 (1845). Hawaii was made a territory of the United States by joint resolution in 1898. S.J. Res. 55, 30 Stat. 750 (1898). See *infra* notes 84-97 and accompanying text for a full discussion of the cases of *Texas* and *Hawaii*.

34. Guam, for example, was acquired by the United States through a treaty of cession concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 1754, T.S. No. 343. According to one legal writer, after an extensive review of the cases involving extensions of U.S. territory as a result of conquest, "In those cases the principle was established that, while military occupation may give the conqueror all rights of sovereignty, it cannot give him sovereignty itself, which remains unchanged until formal cession results from treaty or permanent conquest uncontested by arms." Reno, *The Power of the President To Acquire And Govern Territory*, 9 GEO. WASH. L. REV. 251, 254 (1941).

35. Cession of Louisiana Treaty, April 30, 1803, U.S.-France, art. 1, 8 Stat. 200-201, T.S. No. 86.

36. Gadsden Treaty, Dec. 30, 1853, U.S.-Mexico, art. 1, 10 Stat. 1031-1032, T.S. No. 208.

37. Oregon Treaty, June 15, 1846, U.S.-United Kingdom, art. 1, 9 Stat. 869, T.S. No. 120.

38. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mexico, art. 5, 9 Stat. 922, 926-27, T.S. No. 207.

Alaska," the Panama Canal Zone," and the Virgin Islands.⁴¹ As noted above, the U.S. Supreme Court early recognized the treaty-making powers of the Constitution as authorizing the first large territorial acquisition by the United States - the Louisiana Purchase.⁴² By 1907, the Court noted that it was "too late in the history of the United States to question" the Nation's right to acquire new lands by treaty.⁴³

Common to the several constitutional powers briefly discussed above is the necessity of action by both the Executive and the Congress to acquire new territory. In the case of territory acquired by treaty, at least one House of Congress, the Senate, must approve the treaty presented by the President by two-thirds majority of senators.⁴⁴ Lacking approval, the Executive is checked in its desire to acquire new territory.⁴⁵ In the case of territory acquired by means of legislative action by the Congress to admit new states, the President may veto the legislation and defeat the acquisition of new territory, subject of course to an override under the Constitution by a two-thirds majority of both Houses of Congress.⁴⁶

A. Presidential Claims

The extension of the territorial sea, however, was carried out by the President acting independently from Congress. According to the view argued in the Justice Memorandum, Congress in effect has no role of any kind to play in the extension of sovereignty to this large, new "zone" of territory, nine miles wide surrounding

39. Cession of Alaska Treaty, March 30, 1867, U.S.-Russia, art. 1, 15 Stat. 539, T.S. No. 301.

40. Isthmian Canal Treaty, Nov. 18, 1903, U.S.-Panama, art. 2-3, 33 Stat. 2234-5, T.S. No. 431.

41. Cession of Danish West Indies Treaty, Aug. 4, 1916, U.S.-Denmark, art. 1, 39 Stat. 1706, T.S. No. 629.

42. *American Insurance Co. v. Canter*, *supra* note 26.

43. *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

44. U.S. CONST., art. II, §2, cl. 2.

45. For example, the first attempt to annex Texas by treaty was defeated in the Senate. See *infra* note 85 and accompanying text.

46. U.S. CONST., art. I, §7, cl. 2.

the Nation's shores.⁴⁷ To support this claim of executive branch authority to act unilaterally, Justice relies upon the following instances of past Presidential actions: (1) the claim advanced by the Washington Administration and evidenced by the Jefferson letters to a three-mile territorial sea; and (2) the "discovery and occupation" of Midway and Wake Islands. We examine each of these instances below.

1. The Jefferson Claim

Secretary of State Jefferson is generally credited with asserting the Nation's claim to a three mile marginal or territorial sea in which the "territorial protection of the United States shall be exercised."⁴⁸ The claim was first put forth in letters from Jefferson to the British and French Foreign Ministers, containing the following statement:

The President of the United States, thinking that before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts.

... The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated as one sea league. . . . Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores.⁴⁹

We do not question that the three mile U.S. territorial sea dates from the assertion of territorial jurisdiction made in the Jefferson letters.⁵⁰ This assertion

47. Justice Memorandum, *supra* note 6, at 21-22.

48. Letters from Secretary Jefferson to British and French Ministers, dated November 8, 1793, reprinted in 1 J. MOORE, *DIGEST OF INTERNATIONAL LAW*, § 145, at 702 (1906) [hereinafter J. MOORE].

49. *Id.*

50. See *U.S. v. California*, 332 U.S. 19, 33 n.16 (1947).

by the Washington Administration sought to preserve U.S. neutrality as well as to provide "territorial protection," and Congress quickly acted to legislate the claim put forth by Jefferson in 1793 by enacting the Neutrality Act of 1794.⁵¹ This initial claim of jurisdiction has ripened over time into a claim of sovereignty over the territorial sea, acknowledged and acted upon by the executive, legislative, and judicial branches of the United States government.⁵² But it is not clear whether Jefferson and the Washington Administration intended to assert U.S. jurisdiction to one sea league for defensive purposes only or to acquire new territory subject to U.S. sovereignty three miles seaward.⁵³ One contemporaneous U.S. Supreme Court decision, cited in the Justice Memorandum, speaks of the authority of a nation within its own territorial sea as "absolute and exclusive."⁵⁴ But in light of President Jefferson's well-known misgivings⁵⁵ about the constitutional authority of the United States to acquire the Louisiana Territory,⁵⁶

51. 1 Stats. 381, June 5, 1794. The Neutrality Act conferred jurisdiction upon federal courts to decide cases of captures made "within the waters of the United States, or within a marine league of the coasts or shores thereof." See also Fisher, *Understanding the Role of Congress in Foreign Policy*, 11 Geo. Mason U.L. Rev. 153, 158 (1988): "This policy [of extending jurisdiction over the marginal sea] was not a presidential monopoly, it was shared with Congress."

52. *U.S. v. California*, 332 U.S. 19, 34 n.18; *Jones v. U.S.*, 137 U.S. 202, 212 (1890).

53. The Justice Memorandum clearly distinguishes between the exercise by the United States of "jurisdiction" over an area and the claim of "sovereignty" over territory. The President's authority to extend the jurisdiction of the United States from three to twelve miles in accordance with international law is not in serious dispute. Justice Memorandum, *supra* note 6, at 6-12. There are, as noted in the Memorandum, well-established precedents for the exercise of such jurisdictional authority by the President, including the Truman Fisheries Proclamation of 1945 reprinted in 4 M. Whiteman, *Digest of International Law* 954-55 (1965), the Truman Proclamation on the Natural Resources of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 67 (1945), and, in contemporary history, the 1983 Reagan EEZ Proclamation, Proc. No. 5030, 3 C.F.R. § 22 (1984).

54. In *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804), the U.S. Supreme Court acknowledged that Portugal might seize a U.S. vessel "beyond the range of its batteries" in order to uphold a law prohibiting trade with its colonies, on the ground that the "law of nations" recognized a nation's right to take measures for its own security even beyond the limits of its marginal or territorial sea. The statement that the right of a nation within its own territory to protect itself is "absolute and exclusive" was offered to demonstrate that there was no question that Portugal possessed authority to seize foreign vessels violating its laws within the marginal sea.

55. See *supra* notes 25 and 35. See also, e.g., E. Brown, *The Constitutional History of the Louisiana Purchase 1803-1812* 28-9 (1920) (Jefferson believed "that Congress did not have the power of admitting new states into the Union outside the territory owned at the time of the adoption of the Constitution").

and the fact that in late eighteenth-century international legal practice the territorial nature of the marginal sea was unclear,⁵⁶ it is unlikely that Jefferson thought that he had acquired new territory on behalf of the United States merely by informing the French and British ministers of the United States' intention to claim neutrality and to defend its coast out to one sea league.⁵⁷

It cannot be demonstrated with any certainty that Jefferson was asserting sovereignty over the three-mile marginal sea rather than asserting the right of the United States to preserve its neutrality and to take certain defensive actions within its marginal sea extending three miles from shore. Therefore, the Jefferson letters do not constitute a convincing precedent for the claim that the President may unilaterally establish U.S. sovereignty over this new "zone." Over time, and with the change in practice among nations respecting the status of the marginal sea, the sovereignty of a coastal state over its territorial sea has been recognized; but it was not so in 1793.

2. "Discovery and Occupation"

Justice has grounded the President's unilateral extension of the territorial sea from three to twelve miles in the right of nations to acquire territory by "discovery and occupation."⁵⁸ We examine the two instances cited by Justice in its Memorandum and consider the relevancy of these precedents to the new "zone" from three to twelve miles offshore.

a. Midway Islands

According to international legal records, Midway Islands, situated about 1,100 miles west of Honolulu, were formally occupied by the captain and crew of the U.S.S. *Lackawanna* in 1867.⁵⁹ As described in a later account of this dis-

56. See *U.S. v. California*, 332 U.S. 19, 33 (1947); see also *U.S. v. Louisiana*, 363 U.S. 1, 34 (1960) in which Justice Harlan noted that "such a boundary [the territorial sea limit], even if it delimits territorial waters, confers rights more limited than a land boundary."

57. In 1849 and 1862 respectively, Secretaries of State Buchanan and Seward were still speaking of the marginal sea in terms of maritime jurisdiction. See 1 J. Moore, *supra* note 48, § 145, at 705.

58. Justice Memorandum, *supra* note 6, at 16. "The acquisition of Midway and Wake [islands] by the Navy confirms that the President has the constitutional authority to acquire territory by discovery and occupation."

59. 1 J. Moore, *supra* note 48, § 111, at 555.

covery,⁶⁰ the Secretary of the Navy ordered the *Lackawanna* to explore and occupy Midway Islands at the request of American shipping companies who were seeking to establish a coaling station there. But, according to this account, the United States does not appear to have acted on this claim until after the annexation of Hawaii in 1898.⁶¹

In 1900, after the annexation of Hawaii, the State Department asserted the American claim to these islands in a communication to Japan, and in 1902, the President by proclamation, granted his consent to the laying of the Pacific cable by way of Midway Islands. In the same year these islands were listed as a part of the public lands held by the Navy Department for use as coaling stations. During 1903, the Commercial Pacific Cable Co. asked the Navy Department to erect navigation aids on the islands and also to station a force of marines there "to enforce the law and preserve order," adding that there was then no law on the islands. In response, an Executive Order . . . placed the public lands on these islands under the "jurisdiction and control of the Navy Department," and a force of marines was placed thereon. An act of the Hawaiian Territorial Legislature of 1905 . . . placed these islands within the City and County of Honolulu.⁶²

Further, this account relates the earlier exploration (1857) of the Midway and Kure groups of islands by an American citizen in command of a Kingdom of Hawaii vessel. This resulted in territorial claims by the United States in 1936 on the ground that the Kure Islands were said to have come under the sovereignty of Hawaii in 1857 and to have passed to the United States upon the annexation of Hawaii in 1898.⁶³

Reconsidering the situation of the Midway Islands in the light of the action in regard to the Kure Islands . . . and remembering also that no overt act of authority was performed therein by the United States prior to the annexation of the Hawaiian Islands, it would seem that the claim of [the

60. Reno, *The Power of the President To Acquire And Govern Territory*, 9 Geo. Wash. L. Rev. 251, 274 (1941).

61. *Id.* at 275.

62. *Id.* at 275 (citations omitted).

63. *Id.* at 274-76.

United States] to the Midway Islands is traceable through the Republic of Hawaii rather than to the explorations and claims of 1867.⁶⁴

Therefore, the discovery and occupation of Midway Islands in 1867 may not have been the means by which these islands came under U.S. sovereignty. A reasonable case can be made that Midway Islands came to the United States as part of the territory of the Kingdom (later Republic) of Hawaii, to which they "rightfully" belonged,⁶⁵ as a result of the 1857 exploration described above.

b. Wake Island

The second instance of discovery and occupation of territory relied upon by Justice concerns Wake Island. The U.S. claim to Wake Island is recorded in a letter from an Assistant Secretary of State, dated February 27, 1900:

The United States claims jurisdiction . . . over the atoll, known as Wake's Island, . . . possession of which was taken by the U.S.S. *Bennington* on January 17, 1899.⁶⁶

But, according to one writer:

It does not appear . . . whether [the Commander of the *Bennington*] acted on his own initiative or under order, nor, if the latter, what agency of the government was the source of those orders. Nor is it clear whether this act was intended to establish simple jurisdiction or complete sovereignty. No further action seems to have been taken until 1934 when Wake Island became important as a base for the operation of the trans-Pacific aerial line.⁶⁷

The acquisition of Wake Island appears to be the only clear instance when the Executive has asserted a right to acquire and govern territory "without some color of legislative approval."⁶⁸

64. *Id.* at 275.

65. *Id.* at 285.

66. Reprinted in 1 J. Moore, *supra* note 48, at 555.

67. Reno, *supra* note 60, at 277.

68. *Id.* at 285.

B. "Discovery and Occupation" is Inappropriate Authority

The basis claimed by Justice for the President's unilateral extension of the territorial sea appears to be better grounded in the discovery and occupation of remote islands in the Pacific than in the precedent of the Jefferson letters discussed above.⁶⁹ But the relevance of unilateral claims by the President, based upon discovery and occupation, to incorporate the zone of territory between three and twelve miles from U.S. shores merits further examination. First the discovery and occupation of relatively small atolls and islands in the Pacific in the nineteenth century hardly seems relevant to the action taken by the President in proclaiming an expanded territorial sea. This new zone from three to twelve miles was not "discovered" in any sense similar to the discovery of Wake and Midway Islands.⁷⁰ Rather, a coastal state's sovereignty over its territorial sea is the result of the evolutionary change in international law according to which the nations of the world have come to recognize such authority.⁷¹

Further, as discussed more fully below, even before the issuance of the Territorial Sea Proclamation, this zone was and continues to be subject to the jurisdiction of the United States. Nor, according to international law, was this zone subject to the occupation by any power other than the United States as a consequence of its status as part of the U.S. continental shelf.⁷² Thus, the rationale of a claim to an extended territorial sea based upon the principle that the power first discovering and occupying unclaimed territory may assert

69. Justice Memorandum, *supra* note 6, at 16.

70. See *Jones v. U.S.*, 137 U.S. 202, 212 (1890).

71. See 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 (1986).

72. Geneva Convention on the Continental Shelf, April 29, 1958, art. 2, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

See also *North Sea Continental Shelf Case*, I.C.J. Rep. 1, 29 (1969).

jurisdiction and sovereignty over such territory against any other claimant is inappropriate.

This new zone is already subject to the jurisdiction of the United States under both existing treaty and statutory law. According to the provisions of the Geneva Convention on the Continental Shelf,⁷³ to which the United States is a party, the term "continental shelf" refers to the seabed and subsoil of the ocean "outside the area of the territorial sea."⁷⁴ Under the Outer Continental Shelf Lands Act (OCSLA),⁷⁵ the term "outer Continental Shelf" is defined, by reference to the Submerged Lands Act,⁷⁶ to begin beyond the "line three geographical miles" from the coastline of each state.⁷⁷ Further, the OCSLA declares that the resources of the "outer Continental Shelf" "appertain to the United States" and are subject to its "jurisdiction and control."⁷⁸ This declaration of U.S. authority over the outer Continental Shelf (which is less than sovereign) is at odds with the assertion of sovereignty over the new zone from three to twelve miles in the Territorial Sea Proclamation. Thus, the President's unilateral claim of sovereignty over an expanded territorial sea appears to raise a separation of powers issue,⁷⁹ and to require new legislation to reconcile his action with existing law.⁸⁰

73. Geneva Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

74. *Id.*, art. I.

75. 43 U.S.C. §§ 1331-1356 (1986 & Supp. 1989).

76. 43 U.S.C. §§ 1301-1315 (1986 & Supp. 1989).

77. 43 U.S.C. § 1331(a).

78. 43 U.S.C. § 1332.

79. See *infra* note 106 and accompanying text.

80. Uncertain about the effect of the President's Territorial Sea Proclamation upon domestic law, Justice also recommends that the Administration seek legislation. See Justice Memorandum, *supra* note 6, at 36-37.

C. Congressional Assertions of Sovereignty or Jurisdiction

As discussed above, the Congress has an essential role to play in the acquisition of territory through the Senate's power to approve treaties.⁸¹ Congress has also originated legislation to acquire territory on behalf of the United States by exercising its power to admit new states into the Union⁸² and by acting upon the Government's inherent power as a sovereign nation to acquire territory through discovery and occupation.⁸³ In this context, we examine the annexations of Texas and Hawaii by the Congress as well as its claim of jurisdiction over numerous small islands under the Guano Act.

1. The Annexation of Texas

The United States annexed the Republic of Texas by joint resolution of both Houses of Congress approved by President Polk in 1845.⁸⁴ The Congress used this method of annexation because the treaty of annexation submitted earlier by President Tyler failed to gain the necessary two-thirds majority of the Senate for approval. The treaty had been rejected by a coalition of antislavery forces and partisan senators.⁸⁵

Rebuffed by the Senate, President Tyler encouraged the House to find another way to accomplish the annexation.⁸⁶ Secretary of State Calhoun proposed that "what was sought to be effected by the treaty might be secured by joint resolution, which would have the advantage of requiring only a majority of the two Houses, instead of two-thirds of the Senate."⁸⁷ The joint resolution was justified on the constitutional ground that Congress had the power to admit new

81. *See supra* note 31.

82. *See supra* note 33 and accompanying text.

83. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Mormon Church v. U.S.*, 136 U.S. 1 (1890); *American Insurance Co. v. Canter*, 26 U.S. (1 Pet. 511, 542) (1828); *See* 1 J. Moore, *supra* note 48, §1, at 1028.

84. A detailed history of the annexation of Texas is found in 1 Moore, *supra* note 48, § 103, at 446-457.

85. A. McLaughlin, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 496-505 (1935).

86. *Id.* at 499.

87. 1 J. Moore, *supra* note 48, § 103 at 454.

states into the Union.⁸⁸ The resolution itself expressed Congress' "consent" that the territory properly included within and rightfully belonging to the Republic of Texas might be erected into a new State, to be called the State of Texas⁸⁹

2. The Annexation of Hawaii

The Hawaiian Islands were also acquired by the United States by joint resolution of both Houses of Congress. Two previous attempts had been made to gain approval of the annexation of Hawaii by treaty. In February 1893, President Harrison submitted a treaty of annexation of the Hawaiian Islands to the Senate for approval. Less than one month later, the new President Cleveland withdrew the treaty from consideration because of his concerns regarding the distance of the Hawaiian Islands from the continental United States and the overthrow of the constitutional government of Hawaii.⁹⁰ After a series of revolts against Queen Liliuokalani and the promulgation of a new constitution for Hawaii in 1894, a second treaty of annexation was concluded in June 1897 and submitted to the Senate by President McKinley.⁹¹ While this treaty was pending before the Senate, a joint resolution "to accomplish the same purpose by accepting the offered cession [of the Hawaiian Islands] . . . into the Union was adopted by the Congress and approved July 7, 1898."⁹²

Unlike Texas, the Hawaiian Islands were incorporated into the Union as a territory, not a state. The annexation of Hawaii by legislation was "strenuously contested at the time both in Congress and by the press,"⁹³ but, the annexation of Texas was cited as a precedent.⁹⁴ Although there remains some doubt concerning the aptness of the annexation of Texas as a precedent in the case of Hawaii,⁹⁵ the acquisition of Hawaii may be securely supported on the basis of Congress'

88. A. McLaughlin, *supra* note 85, at 500.

89. 1 J. Moore, *supra* note 48, at 454-455.

90. *Id.* at 496-98.

91. *Id.* at 503.

92. *Id.* at 509. See also *supra* note 33.

93. W. Willoughby, *supra* note 24, at 427.

94. *Id.*

95. Q. Wright, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 275 (1922).

exercising the inherent power of a sovereign nation to acquire territory.⁹⁶ Further, the acquisition of the Hawaiian Islands by joint resolution approved by the President has never been seriously challenged.⁹⁷

3. The Acquisition of the Guano Islands

In the Guano Act,⁹⁸ Congress provided for the discovery and occupation of islands containing deposits of guano. The Act provides in part that whenever any citizen of the United States discovers "a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government," and takes peaceable possession, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.⁹⁹ If the President is satisfied that the discoverer meets the conditions in the Act, the islands can be regarded as belonging to the United States.¹⁰⁰

The Supreme Court sustained the constitutionality of the Guano Act in *Jones v. United States*.¹⁰¹ The decision involved the challenge by the defendant in a trial for murder occurring on Navassa Island in the Caribbean Sea. To sustain the indictment, the United States had to prove that Navassa Island belonged to the United States by virtue of the implementation of the Guano Act and that Congress possessed the authority to pass the Act. The Court upheld the Guano Act on the ground that any nation may acquire dominion over new territory by discovery and occupation, "and may exercise such jurisdiction and for such period

96. W. WILLOUGHBY, *supra* note 24, at 429:

The annexation of Hawaii by legislative act was constitutionally justified upon the same ground that the extension of American sovereignty over the Guano Islands was justified; namely, as an exercise of a right springing from the fact that, in the absence of express constitutional prohibition, the United States as a sovereign nation has all the power that any sovereign nation is recognized by international law and practice to have with reference to such political questions as the annexation of territory.

97. *Id.* at 430.

98. 11 Stat. 119 (1856).

99. *Id.*

100. 1 J. MOORE, *supra* note 48, § 115, at 558-59; MOORE contains a listing of the islands that were discovered and occupied by the United States under the Guano Act. *Id.* § 115, at 566-569.

101. 137 U.S. 202 (1890).

as it sees fit over territory so acquired."¹⁰² The Guano Act and the Supreme Court decision upholding its constitutionality have been accepted by later courts and constitutional writers as an accepted means for the Congress to acquire new territory.¹⁰³

III. ASSERTIONS OF SOVEREIGNTY REQUIRE CONGRESSIONAL ACTION

In sum, the more substantial extensions of U.S. territory have been accomplished by treaty.¹⁰⁴ Further, significant annexations in the cases of Texas and Hawaii were achieved by legislative action. Although the constitutional basis for the acquisition of Texas and Hawaii is found in the power of the Congress to admit new states into the Union, these acquisitions are also grounded in the inherent authority of the United States as a sovereign nation to acquire new territory.¹⁰⁵ Such acquisitions, although initiated by the Congress through legislation, nevertheless require the approval of the President to become law and therefore may be regarded as requiring the combined action of the political branches of the U.S. Government (or the override of a Presidential veto as provided by the Constitution) in order to be implemented.¹⁰⁶

Some relatively minor islands in the Pacific (Wake Island and possibly the Midway Islands) were acquired by Executive action, although in the case of the Midway Islands, the acquisition may be based upon the subsequent annexation by the United States of the Hawaiian Islands to which these islands may be regarded to belong. More importantly, the discovery and occupation of these

102. *Id.* at 212.

103. *U.S. v. Curtiss-Wright*, 299 U.S. 304, 318 (1936); See also W. Willoughby, *supra* note 24, at 429.

104. See *supra* notes 35-43 and accompanying text.

105. W. Willoughby, *supra* note 24, at 429.

106. See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850), concluding that new territory can only be acquired through the treaty-making power or legislative authority. See also Q. Wright, *supra* note 95, at 276 (1922): "We conclude that courts in applying international law and the President in the exercise of his diplomatic powers may recognize minor acquisitions of territory by operation of international law, and that more considerable bodies of territory may be acquired by treaty or joint resolution of Congress." But see also *U.S. v. Louisiana*, 363 U.S. 1, 35 (1960), where the Supreme Court, *in dicta*, would recognize the authority of the President to claim territorial rights in the marginal sea as against foreign nations, while assigning to the Congress the power to fix state land and water boundaries as a domestic matter.

small, remote islands is not a compelling precedent for the authority of the President unilaterally to extend the territorial sea to encompass a vast area of the ocean as sovereign U.S. territory, for the reasons discussed above.

Because the President cannot unilaterally alter or amend law enacted by the Congress or the states, the proviso in the Territorial Sea Proclamation that nothing in the Proclamation "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom" is at best only a statement of intent or, at the least, wishful thinking on the part of the Executive. As stated above, Justice recommended that the Administration should seek legislation to achieve such a result and recognized that the question whether the Territorial Sea Proclamation affects domestic law is strictly a matter of Congress' intent in enacting a particular statute that refers to the territorial sea of the United States or employs a related term.¹⁰⁷ In his oft-quoted decision on the extent of the legislative power of the Congress, Justice Sutherland concluded that "[n]o action or lack of action on the part of the President could destroy [the] potentiality" of an existing law. "Congress alone could do that."¹⁰⁸

In view of our conclusion that Congress must act to extend sovereignty to the new zone from three to twelve miles offshore the United States, what may be said of the President's unilateral action in extending the territorial sea? First, lacking action by the Congress, the new zone is not sovereign territory of the United States, although subject to its jurisdiction, and any action taken by the United States as the holder of title to the submerged lands and resources of the new zone may be subject to challenge.¹⁰⁹

Second, the status of the expanded U.S. territorial sea is made more complicated. Under international law, foreign nations may regard the jurisdiction of the United States over its territorial sea as extending twelve miles from

107. Justice Memorandum, *supra* note 6, at 36.

108. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 332 (1936); *see also* *Argentine Republic v. Amerasia Shipping Corp.*, 57 U.S.L.W. 4121, 4125 n.8 (1989), in which the Supreme Court suggests that extension of the U.S. territorial sea to twelve miles may affect how domestic laws are interpreted.

109. For example, in protecting natural resources found in the new zone, such as coral reefs and other submerged formations and associated species, the United States may not assert a claim for damages based upon its ownership of such resources, although it may make such a claim based upon other authority. See the provisions of the Marine Sanctuaries Act, 16 U.S.C.A. § 1431-1445 (West 1985, Supp. 1989), and Bondareff, *The M/V Wellwood Grounding: A Sanctuary Case Study -- The Legal Issues*, 31 OCEANUS 44-45 (1988).

its shores. But under the Constitution and domestic law, the expanded territorial sea must be regarded as divided into two "zones:" (1) the old "territorial sea" extending three miles from shore, subject to state ownership and regulation of its submerged lands and resources, and (2) the new "zone" from three to twelve miles, subject to existing federal and state legal authorities with respect to its resources and to activities occurring there. Uncertainties have already arisen concerning the interpretation of the Presidential Proclamation, and other problems concerning the implementation and enforcement of federal and state laws may be expected to appear.¹¹⁰ In addition, because many federal laws employ the term "territorial sea" either with or without a reference to "three geographical miles" from the U.S. coast line, technical amendments may be necessary to conform such laws to the Territorial Sea Proclamation.¹¹¹

Finally, the Justice Memorandum argues not only that the President may unilaterally extend sovereignty over the new zone from three to twelve miles offshore, but that Congress lacks the authority to do so: "we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."¹¹² This categorical statement denies a substantive role for the legislative branch in such a critical matter of national interest as setting the territorial limits of the United States. It claims a larger, exclusive area of government subject to Executive fiat than has yet been claimed, and, if unopposed, alters our constitutional system of checks and balances in the President's favor.

IV. AN EXPANDED TERRITORIAL SEA AND NATIONAL MARINE POLICY

Our article to this point has concerned the authority of the two political branches of government to acquire new sovereign territory. We have argued that precedents cited by Justice do not support the unilateral action taken by the President and that the role of the Congress in extending the territorial sea has been skirted. Further, the Territorial Sea Proclamation has already become

110. The claim by California that the "coastal zone," as defined in the CZMA, is automatically expanded to twelve miles as a result of the President's expansion of the territorial sea is one example. See Saurenman, *supra* note 5.

111. The CZMA defines the "coastal zone" as extending seaward to the "outer limit of the United States territorial sea," but does not, as many other federal statutes, specify a three-mile limit. 16 U.S.C. 1453(1). The OCSLA also uses the term "coastal zone" as defined in the CZMA, without reference to a three-mile territorial sea. 43 U.S.C. § 1331(e).

112. Justice Memorandum, *supra* note 6, at 6.

entangled in and measurably complicates U.S. coastal and ocean policy debates. As an example, we note that the Justice Memorandum provides a lengthy analysis of the effects of the Proclamation upon U.S. coastal and ocean resource management issues, and that the response by the California Attorney General is directed almost exclusively to these matters.¹¹³

The question naturally arises what should the Congress do? To do nothing would imply that Congress acquiesces not only in the unilateral extension of the territorial sea by the President but in the extension of presidential authority at the expense of the Congress. But if the Congress is persuaded to act in its own institutional and constitutional interests, what action is appropriate?

A range of options has been suggested, from affirming the Territorial Sea Proclamation through legislation and codifying the status quo prior to the Proclamation, to extending state ownership and control to twelve miles.¹¹⁴ Two prominent marine policy specialists have recommended that Congress enact legislation establishing a joint federal-state mechanism to manage the resources and space of the new nine-mile zone cooperatively.¹¹⁵ This proposal and others similar to it recognize that the expansion of the territorial sea occurs in the context of a long history of conflict between federal and state governments concerning the management of coastal and ocean space and resources.¹¹⁶ This

113. See *supra* notes 5 and 6. Serious concerns have also been expressed by Hawaii and other western states about the effects of the Territorial Sea Proclamation. See Sen. Concurrent Resol. No. 113, 15th Leg., Reg. Sess., 1989 Hawaii, requesting that the U.S. Congress consider the impact of the Proclamation on "domestic law and federal/state relations and rights in the three to twelve mile zone and the related question of federal/state relations and rights in the U.S. Exclusive Economic Zone."

114. A bill was introduced in the first session of the 101st Congress by Congressman Norm Shumway (R-Cal.), which purported to preserve the status quo. H.R. 1405, 101st Cong., 1st Sess. (1989). Although scheduled for mark-up by the Subcommittee on Oceanography, consideration of the bill was delayed because of opposition by members and the coastal states. See also Cummisky, *Expansion of the Territorial Sea: A Congressional Response*, 3 ABA LAW OF THE SEA COMMITTEE NEWSLETTER 15-22 (Summer 1989).

115. Knecht and Cicin-Sain, *The Role of Values in National Ocean Policy*, Paper Presented at the Conference on Values and the American Ocean: Philosophical, Historical, Legal and Public Perspectives, The University of California at Santa Barbara, Santa Barbara, Ca., June 26-29, 1989.

116. For example, see Knecht, Cicin-Sain, and Archer, *National Ocean Policy: A Window of Opportunity*, 19 OCEAN DEV'T & INT'L LAW 113-142 (1988).

conflict has been well chronicled and need not be discussed here.¹¹⁷ We hope only to recommend (and revive) a proposal that will assert and protect Congress' role in establishing the sovereignty of an expanded territorial sea, while creating a mechanism that may lead to the resolution of at least some of the intergovernmental conflicts in U.S. coastal and marine resource management. In this respect, our proposal recognizes that the Territorial Sea Proclamation must be addressed in the context of U.S. marine policy-making and that Congress is an essential actor in shaping this policy.

In 1988, the House of Representatives passed H.R. 5069, sponsored by the former Chair of the Subcommittee on Oceanography, Congressman Mike Lowry (D-Wa.).¹¹⁸ H.R. 5069 would have expanded the territorial sea to twelve miles, thereby accomplishing the defense and foreign policy goals of the United States, and would have established a seventeen-member National Oceans Policy Commission charged with advising both the President and the Congress on a comprehensive oceans policy, including implementing the territorial sea expansion. H.R. 5069 would have required a report and recommendations from the Commission within two years, and would have preserved the legal status quo during the interim, pending action by the Congress in response to the Commission's recommendations. We believe that the approach described in H.R. 5069 would be an appropriate response by the Congress to the Territorial Sea Proclamation.

First, in response to the Territorial Sea Proclamation, Congress should act quickly to assert its authority to acquire new sovereign territory on behalf of the United States. Because the legal status quo will be preserved during the period in which the Oceans Policy Commission conducts its study, coastal states will be less likely to object to the legislation.¹¹⁹

Second, Congress is evidently not yet prepared to act on any marine policy proposals that seek to reduce the level of intergovernmental conflict in a

117. For a partial listing of articles examining federal-state conflicts in coastal and ocean resource management, see Eichenberg and Archer, *supra* note 5, at 9 n.2, and 18 n. 56.

118. See *A Bill to Establish a 12-Mile Territorial Sea and a 24-Mile Contiguous Zone, to Establish the National Oceans Policy Commission, and for other purposes: Hearing on H.R. 5069 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess., (1988) [hereinafter *Hearings on H.R. 5069*].

119. H.R. 5069 was supported by the Coastal States Organization and other state representatives. See *id.* at 23 and 78 (statement of Richard F. Delaney, Coastal States Organization).

comprehensive fashion.¹²⁰ A suitably constituted Oceans Policy Commission may be able to produce legislative recommendations to improve federal-state cooperation in managing marine and coastal resources that will command sufficient support from Congress to be enacted into law. It may emerge that a well-coordinated series of amendments to several federal laws (e.g., the CZMA and the OCSLA) would resolve at least some of the current major coastal and marine resource management conflicts, without the need for more substantial changes in existing programs.¹²¹

120. Although many proposals have been considered by Congress during the past, and several proposals have been included in bills passed by either the House of Representatives or the Senate, none has passed both chambers. For example, proposals to restore state authority to review federally-conducted oil and gas lease sales under the federal consistency provisions of the CZMA have been introduced in several bills, including S. 2324 passed by the Senate in 1984; S. REP. NO. 512, 98th Cong., 2d Sess. (1984); H.R. 4589, 98th Cong., 2d Sess. (1984); H.R. 1445 99th Cong., 1st Sess. (1985); S. 1412, 100th Cong., 1st Sess. (1987); H.R. 3202, 100th Cong., 1st Sess. (1987); and S. 1189, 101st Cong., 1st Sess. (1989).

Proposals to share revenues between the coastal states and the federal government from offshore oil and gas development have repeatedly been made, and, on at least one occasion, were almost passed by the Congress. See Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 UCLA J. ENV'T L. POL'Y 1 (1985) and Consolidated Omnibus Budget Reconciliation Act of 1985. P.L. No. 272, 100 Stat. 82 (1986); H. REP. NO. 453, 99th Cong., 1st Sess. 436 (1985).

Amendments to section 19 of the OCSLA, 43 U.S.C. § 1345, that would have significantly limited the discretion of the Secretary of the Interior to conduct outer Continental Shelf lease sales and approve development and production plans were in fact passed by both the Senate and the House of Representatives in 1985, but strenuous lobbying by the oil and gas industry defeated the amendments in conference. Consolidated Omnibus Budget Reconciliation Act of 1985. *Id.*

A significant proposal to establish a new regime for the exploitation of hard minerals in the U.S. exclusive economic zone, involving a high degree of federal-state cooperation and joint action, was introduced first in 1986 by the former Chair of the House Subcommittee on Oceanography, H.R. 5464, 99th Cong., 2d Sess. (1986). The bill was re-introduced in 1987 and in 1988 reported by the House Committee on Merchant Marine and Fisheries, H.R. 1260, "National Seabed Hard Minerals Act of 1988," 101st Cong., 1st Sess. (1987); see H.R. REP. NO. 1103, 100th Cong., 2d Sess., pt. 1 (1988). This bill has been re-introduced in 1989 under the same title by the Chair of the House Committee on Merchant Marine and Fisheries, but has not yet been reported from committee. H.R. 2440, 101st Cong., 1st Sess., 135 CONG. REC. E1812 (1989). Although congressional interest in resolving at least some of the major disputes in coastal and ocean resource management remains relatively high, a consensus has yet to coalesce around any specific proposals.

121. For example, amendments to the OCSLA and the CZMA to reduce the almost total discretion given to the Secretary of the Interior to determine the schedule and scope of the offshore oil and gas development process, irrespective of the views of state and local governments, would go far to resolve the long and bitter dispute that has enveloped this process. The extensive

(continued...)

V. CONCLUSION

Based on the analysis provided above, we conclude that Congress possesses the authority to determine the status of the new "zone" from three to twelve miles and that it should act to resolve any question of its sovereign character. In addition, and in recognition of the marine policy context in which the expansion of the territorial sea has been accomplished, we recommend that the Congress seize the opportunity to seek a resolution of the serious intergovernmental conflicts that have become endemic to coastal and ocean resource management in the United States.

121. (...continued)

history of program funding moratoria imposed upon the Department of the Interior by the Congress prohibiting oil and gas lease sales offshore California, Massachusetts, Florida, and other states is the best evidence of the loss of confidence in the offshore energy development process. See Appropriation Acts for the Department of the Interior; P.L. 394, H.R. 7356, 97th Cong., 2d Sess. (1982) (Central and No. Cal., and New England); P.L. 146, H.R. 3363, 98th Cong., 1st Sess. (1983) (W. Coast Fla., Central and No. Cal., and New England); P.L. 190, H.J. Res. 465, 99th Cong., 1st Sess. (1986) (Central and No. Cal., and New England); P.L. 591, H.J. Res. 738, 99th Cong., 2d Sess. (1986) (Central and No. Cal., and New England); P.L. 121, H.R. 2788, 101st Cong., 1st Sess. (1989) (East. Gulf of Mex., No. Aleutian Basin, No. Central and So. Cal., New England, Mid-Atl. States, and Georges Bank). See also U.S. GEN. ACCOUNTING OFFICE, *EARLY ASSESSMENT OF INTERIOR'S AREA-WIDE PROGRAM FOR LEASING OFFSHORE LANDS*, GAO/RCFD-85-86 (1985); T. Eichenberg and A. Solow, *Rethinking Federal Offshore Energy Policies* 16-17, Paper Presented at the Marine Policy Center Alumni Symposium, Woods Hole Oceanographic Institution (April 5-7, 1987) (available at the Marine Law Institute). The expected reforms which were to be achieved as a result of the 1978 amendments to the OCSLA have not been realized. See H.R. REP. NO. 590, 95th Cong., 1st Sess. 100-106 (1977).

**THE EFFECT OF PRESIDENT REAGAN'S 12-MILE TERRITORIAL SEA
PROCLAMATION ON THE BOUNDARIES AND EXTRA-TERRITORIAL
POWERS OF THE COASTAL STATES**

By John Briscoe

Presented at

**WORKSHOP ON LEGAL AND POLICY ISSUES CREATED BY THE EXTENSION
OF THE U.S. TERRITORIAL SEA FROM 3 TO 12 MILES**

**UNIVERSITY OF HAWAII SEA GRANT COLLEGE PROGRAM
AND THE
WILLIAM S. RICHARDSON SCHOOL OF LAW, UNIVERSITY OF
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Border Line Trans. Co. v. Haas	
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Civil Aeronautics Board v. Island Airlines, Inc.	
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Eastern Air Transport, Inc. v. South Carolina Commission	
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Evansville Traction Co. v. Henderson Bridge Co.	
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Fluor Ocean Services, Inc. v. Rucker Co.	
341 F.Supp. 757 (E.D. La. 1972)	81
Fry v. United States	
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Gravois v. Travelers Indemnity Co.,	
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Gulf Offshore Co. v. Mobil Oil Corp.	
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Henneford v. Silas Mason Co. 300 U.S. 577 (1937)	69
Kentucky Whip & Collar Co. v. Illinois Cent. R. Co. 299 U.S. 334, 346-47 (1936)	62
Louisiana v. Mississippi 202 U.S. 1, 51 (1906)	41
Mahler v. Norwich and New York Transportation Company 35 N.Y. 352 (1866)	15, 37
Mark v. Home Ins. Co. of New York 52 F. 170 (S.D.N.Y. 1892)	15
Maryland v. Louisiana 451 U.S. 725 (1981)	66-67
Massachusetts Boundary Case 475 U.S. 89 (1986)	14, 16, 33, 53
McCulloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819)	66
New Jersey v. Delaware 291 U.S. 361 (1934)	15
New York and Rhode Island Boundary Case 469 U.S. 504 (1984)	15
Norton Co. v. Department of Revenue of Illinois 340 U.S. 534 (1951)	66
People v. Corsino 91 Misc. 2d 46, 397 N.Y.S.2d 342 (N.Y. Crim.Ct. 1977)	65
People v. Stralla 14 Cal.2d 617 (1939)	64

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People v. Weeren	
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Pool v. Kemper Insurance Group	
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Rodrigue v. Aetna Casualty Co.	
395 U.S. 352 (1969)	80
Saunders v. Bluefield W.W. & Imp. Co.	
58 Fed. 133 (W.D. Virginia 1893)	71
Secretary of the Interior v. California	
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Shell Oil Co. v. Iowa Dept. of Revenue	
488 U.S. 186 (1988)	69
Skiriotes v. Florida	
313 U.S. 69, 75 (1941)	64
Southern Ill. & Mo. Bridge Co. v. Stone et al.	
174 Mo. 1, 73 S.W. 453 (1903)	71
Southern Pacific Co. v. Gallagher,	
306 U.S. 167 (1939)	69
St. Louis etc. R.R. Co. v. S.W. Tel. & Tel. Co.	
121 Fed 276 (8th Cir. 1903)	71
State v. Ames	
47 Wash. 328 (1907)	44
State v. Bundrant	
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State v. Painter	
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State v. Sieminski	
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Territory v. Liliuokalani	
14 Haw. 88 (1902)	23
The Brilliant	
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Toomer v. Witsell	
334 U.S. 385 (1948)	63
United States v. Alaska,	
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United States v. California	
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United States v. Louisiana	
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United States v. Louisiana	
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Vermilya-Brown Co. v. Campbell	
335 U.S. 377 (1948)	54
Woodruff v. Parham	
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18 United States Code	
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33 United States Code	
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Act of Admission of California	
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Act of August 4, 1790	
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31, 64, 1 Stat. 157-58	
164-65, 175 (1845)	2
Act of July 7, 1958	
(72 Stat. 339) (Alaska)	8
Act of March 18, 1959	
(73 Stat. 4)	8
Hawaiian Organic Act	
15 Hawaii Rev. Stat. § 2 (1988)	27

TABLE OF AUTHORITIES
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Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States 30 Stat. 750 (July 7, 1898)	27
Magnuson Fishery Conservation and Management Act of 1976 16 U.S.C. § 1801, et seq	32
Outer Continental Shelf Lands Act (as Amended in 1978) 43 U.S.C. §§ 1331-56, 1801-66 (1982 & Supp. IV 1986)	12
Resolution of September 9, 1897 1 R.L.H. 1955 at 15	27
Rivers and Harbors Act of 1899	83
Submerged Lands Act of 1953	passim
Title VI, Budget Reconciliation Act, P.L. 101-508	75
Code of Washington (Revised) § 88.08.060.	44

Executive and Administrative Materials

Legislative History of the Fishery Conservation and Management Act of 1976, Senate Committee on Commerce & Nat'l Ocean Policy Study, 94th Cong., 2d Sess. (Gov't Printing Office 73-982) (1976)	76
Memorandum of Murray J. Belman, Dept. of State Deputy Legal Adviser (undated)	29
Opinion of Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Abraham D. Sofaer, Legal Adviser, Department of State, October 4, 1988.	45
Opinion of John A. Saurenman, Deputy Attorney General, State of California, to Peter Douglas, Executive Director, California Coastal Commission, March 15, 1989 reprinted in 1 Territorial Sea J, (1990).	6

TABLE OF AUTHORITIES
(Cont'd)

Pres. John Tyler to the House of Representatives, Dec. 30, 1842 Sen. Exec. Doc. 77, 52d Cong., 2d sess.	21
President Reagan's March 10, 1983 Statement on United States Ocean Policy I Pub. Papers of President Ronald Reagan 378 (1983)	35
Proclamation No. 2667, 3 C.F.R. 67 (1943-1948)	32
Proclamation No. 3269, 72 Stat. 339 (1958) and 73 Stat. c16, 3 C.F.R. 4 (1959-1963)	29
Proclamation No. 2667 (September 28, 1945) 59 Stat. 884	12
Proclamation No. 3269, January 3, 1959 (73 Stat. C 16)	8
Proclamation No. 3309, August 21, 1959 (73 Stat. C 74)	8
Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983)	14, 32
Proclamation No. 5928, December 27, 1988, Fed. Reg. 777 (1984)	4, 32
Proclamation No. 5928, 54 Fed. Reg. 777 (1989)	32
U.S. Department of Justice Memorandum November 28, 1973.	45
U.S. Department of State Memorandum Yingling to Boas, "Islands, Drying Rocks and Drying Shoals" 68 (Sept. 1957)	25

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Foreign/International Cases

Fisheries Jurisdiction (United Kingdom v. Iceland) 1974 I.C.J. 3, 130 (Gros, J. dissenting)	32
The Alleganean, Stetson v. United States Court of Commissioners of Alabama Claims	15
The King v. Parish 1 Haw. 58 (1849)	22

Non-United States Statutes

1 Statute Laws of 1846 (Kingdom of Hawaii) ch. VI, art. I	23
Hawaiian Neutrality Proclamation of May 29, 1877	25

International Treaties

Treaty dated June 15, 1846 9 Stat. 869.	40
1958 Geneva Convention on the Continental Shelf.	passim
1982 Convention on the Law of the Sea	passim

Miscellaneous

3 Privy Council Record (Kingdom of Hawaii) 791 (Aug. 29, 1850)	24
Ball, "Good Old American Permits,"	78
Bell, The Log of The Chatham (1929-30)	19
S. Boggs, "Delimitation of the Territorial Sea," 24 Am. J. Int'l. L. 541, 552-553 (1930)	31
S. Boggs, U.S. Dept. of State, Memo. of May 31, 1943	43

TABLE OF AUTHORITIES
(Cont'd)

L. Bouchez, The Regime of Bays in International Law 224-226 (1964)	38
Charney, "A Jurisprudential Problem in the Submerged Lands Cases: International Law in a Domestic Dispute," 90 Yale L.J. 1651 (1981)	49
Charney, "The Offshore Jurisdiction of the States of the United States and the Provinces of Canada-A Comparison," delivered June 24, 1982, at the Sixteenth Annual Conference of the Law of the Sea Institute	52
Charney, Judicial Deference in the Submerged Lands Cases, 7 Vand.J.Int.L. 383 (1974)	14
Crocker, Extent of the Marginal Sea	2, 25-26
R. Faiss and A. Cabot, "Gaming on the High Seas," 8 N.Y.L.Sch.J. of Int'l & Comp. L. 105, 110-119 (1986)	80
Fulton, The Sovereignty of the Sea (1911)	2
G. Daws, Shoal of Time; A History of the Hawaiian Islands (1968, 1974 ed.)	20
J.L. Giddings & D.D. Anderson, Beach Ridge Archeology of Cape Krusenstern (1986)	37
G. Gidel, Le Droit Internationale Public de la Mer (1932)	38
Gaudet, "The Application of Louisiana's Strict Liability Law on the Outer Continental Shelf: A Quandary for Federal Courts," 28 Loy.L.Rev. 101-128 (1982)	83
A. Hollick, U.S. Foreign Policy and the Law of the Sea 61 (1981)	32
J. Moore, A Digest of International Law	passim
Note, "State Court Jurisdiction Under the Outer Continental Shelf Lands Act," 28 Loy. L. Rev. 343-359 (1982)	80

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Note, "Jurisdiction Within the Meaning of the Outer Continental Shelf Lands Act," 5 Geo. Mason U.L. Rev. 385-407 (1982)	80
Note, "The Outer Continental Shelf Lands Act: Vesting State Courts With Concurrent Jurisdiction," 6 Maritime Law. 288-296 (1980)	80
N. Portlock, A Voyage Round the World . . . Performed in (1789)	19
Opinion of Attorney General Randolph of May 14, 1793	38
Personal Communication between John Briscoe and Michael W. Reed, U.S. Department of Justice, July 1990	17
Report of the Second Commission (Territorial Sea), League of Nations Doc. C. 230, M. 117. 1930. V. (1930); see also Boggs, Delimitation of the Territorial Sea Institute, p. 13	53
W. Schachte, The History of the Territorial Sea From a National Security Perspective, 1 Terr. Sea J. (1990)	58
"Secretary of the Interior v. California and the Federal Consistency Provision' of the Coastal Zone Management Act, Like it or Not?" J. of Energy L. and Policy 337-359 (1986) . .	75
Shepard, Submarine Geology 143 (1948)	13
Tate and Yingling, Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and other bills, 83d Cong., 1st Sess.	46
U.N. Office for Ocean Affairs and the Law of the Sea The Law of the Sea, Baselines: An examination of the Relevant Provisions of the United States Convention on the Law of the Sea at 28, U.N. Sales No. E.8.V.5	36
G. Vancouver, Voyage of Discovery to the North Pacific Ocean and Round the World (1967 reprint of 1798 ed.)	18-19

THE EFFECT OF PRESIDENT REAGAN'S 12-MILE TERRITORIAL SEA
PROCLAMATION ON THE BOUNDARIES AND EXTRATERRITORIAL
POWERS OF THE COASTAL STATES

By John Briscoe*

In the waning days of his administration President Reagan proclaimed that the breadth of the United States territorial sea henceforth is to be twelve miles. Conventional wisdom has it that the breadth of the American territorial sea had been fixed at three miles since 1793. Various species of jurisdiction, however, have been claimed by the United States since the eighteenth century to distances greater than three miles. These have often, owing to their comprehensiveness, been difficult to distinguish from what we now consider a wholly

*Mr. Briscoe is a partner in the firm of Washburn, Briscoe & McCarthy of San Francisco, and is a Visiting Scholar at the Boalt Hall School of Law at the University of California, Berkeley. He wishes to acknowledge the valuable research assistance of Ms. Barbara Leibhardt of Boalt Hall, and of Anton Haas of Washburn, Briscoe & McCarthy. For the purpose of assessing whether remarks in this paper are appropriately objective, it ought to be noted that Mr. Briscoe since 1981 has been special counsel to the State of Alaska in its offshore boundary disputes with the federal government, most notably in United States v. Alaska, United States Supreme Court No. 84, Original, and has also served as a special assistant attorney general of the State of Hawaii.

Mr. Briscoe would like to thank Professors Van Dyke, Caron and Scheiber for the invitation to prepare this paper, Professor Van Dyke for the suggestion of subjects, and the Sea Grant Program of the University of California for financial assistance in connection with the research for this paper.

discrete concept, "sovereignty."¹ This paper will ignore the very tantalizing subject whether these prior American claims of maritime jurisdiction beyond three miles were tantamount to territorial claims--that is, to sovereignty. It addresses instead three subjects which by comparison are mundane. The first two are the effects of President Reagan's Territorial Sea Proclamation on the seaward boundaries of the coastal States, both where there are no historic-waters claims and where there are. Those are the subjects of Parts I and II. It examines in Part III, the Proclamation's effect on the extraterritorial powers of the coastal States--their constitutionally "reserved" powers and their separate, congressionally conferred powers.

¹In 1793 Secretary of State Jefferson, as is well known, declared a three-mile territorial sea for neutrality purposes. Proclamation of April 22, 1793, see Fulton, The Sovereignty of the Sea (1911), 572-574. But in 1782 the United States had asserted nine miles as a reasonable territorial sea breadth. Then in 1790, Congress extended American authority over smuggling to a distance of twelve nautical miles from the coast, and in February of 1793 Congress established customs jurisdiction to a distance of nine nautical miles. Crocker, Extent of the Marginal Sea (1919), p. 630, Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), p. 50; Act of August 4, 1790, ch. 35, secs. 12-13, 31, 64, 1 Stat. 157-58, 164-65, 175 (1845); 1 Stat. sections 21, 305, 313-314. It is not surprising then that many long thought that the American territorial sea had a breadth in excess of three miles. In 1862 Secretary of State Seward protested Spain's claim of a six-mile territorial sea around Cuba. Spanish Minister Tassara replied to Seward on December 30, 1862, writing that the United States' claim to a "much more extensive territorial sea," one extending "four leagues from the coast, or to the double of that which Spain has fixed upon," was quite well known in the international community.

The Tassara letter is in evidence in United States v. Alaska, United States Supreme Court No. 84 Original, as Exhibit AK85-027.

These three subjects assigned for this paper are fairly discrete. For this reason its equivocal conclusions are given at the end of each of the three parts of the paper, reducing thus a small bit of redundancy. The section of the paper entitled "Conclusion" is instead more akin to the concluding plea of a bill of complaint filed in a court of law: It is a prayer.

I.

DOES THE PROCLAMATION AFFECT THE COASTAL STATES' SEAWARD BOUNDARIES, QUESTIONS OF HISTORIC WATERS ASIDE? (NO.)

This, the most easily plumbed of the questions posed in this paper, is confidently answered in the negative. And that is so notwithstanding the seeming anomaly that results: A band of American territory, in most cases nine miles in width, now lies contiguous but unannexed to each of the 24 coastal States. We will return to that anomaly in later paragraphs. But first we discuss the reasons that, historic-waters questions aside, the Proclamation leaves the coastal States' seaward boundaries where they were.

First the Proclamation denies that it extends the jurisdiction of any coastal State, and by this the President surely meant he intended no enlargement of state boundaries.²

²Proclamation No. 5928, December 27, 1988, 54 Fed.Reg. 777 (1984):

TERRITORIAL SEA OF THE UNITED STATES OF AMERICA

By the President of the United States of America

A Proclamation

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extend to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage . . . and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

What the Proclamation says it does not do, of course, is not always the end of the matter. Take for example the Proclamation's averral that it is not intended to "alter [] existing Federal or State law or any . . . rights . . . or obligations derived therefrom." Notwithstanding this categorical declaration, an animated and rarified debate has arisen whether the geographic reach of the Coastal Zone Management Act was in fact extended by the Proclamation.³

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of December, in the year of our Lord nineteen hundred and eighty eight, and of the Independence of the United States of America the two hundred and thirteenth.

/s/Ronald Reagan

24 Weekly Compilation of Presidential Documents (Jan. 2, 1989) 1661; 28 I.L.M. 284 (1989).

³Compare opinion of Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Abraham D. Sofaer, Legal Adviser, Department of State, October 4, 1988, with opinion of John A. Saurenman, Deputy Attorney General, State of California, to Peter Douglas, Executive Director, California Coastal Commission, March 15, 1989. Both are reprinted in 1 Territorial Sea J, (1990).

More certain than the effect of the Proclamation's own words, though, is the fact that the power to establish the boundaries of the States, including the seaward boundaries of coastal States, does not repose in the President. It reposes in Congress⁴, and Congress has not acted to extend the States' seaward boundaries. The boundaries of a State (save for the original 13)⁵ are typically set upon the State's admission to the Union.⁶ In the Submerged Lands Act of 1953, Congress relinquished to the coastal States, with certain exceptions, the interests of the United States in lands beneath navigable waters within the boundaries of the States. The boundaries of the States were defined to be those that existed at the time of statehood, or as were thereafter approved by Congress. The

⁴In United States v. Louisiana 363 U.S. 1, 35 (1960), the Court held:

The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations.

⁵Eleven of the original thirteen states were coastal states. None had expressly claimed a three-mile boundary at sea until long after formation of the Union. See U.S. v. Louisiana, 363 U.S. 1, at 21 n. 22.

⁶The usual device is the statehood act's approval of the new State's Constitution, which in turn usually contained a description of the boundaries of the new State. See, e.g., Act of Admission of California, 9 Stat. 452 (1850).

boundaries, however, were not to extend seaward from the coast of any State more than three geographical miles (the equivalent of nautical miles) in the Atlantic and Pacific Oceans, or more than three marine leagues (nine nautical miles) in the Gulf of Mexico. (A nine-mile boundary was allowed only for those Gulf States that could prove an historic boundary more than three miles in width.⁷)

Finally, each coastal State was permitted to extend its seaward boundaries to three geographical miles, if it had not already done so, and Congress gave its approval to such an extension, by whatever means made, all without prejudice to claims of a boundary of greater width.⁸

The Submerged Lands Act, then, speaks of the States' seaward boundaries in terms of fixed distances. No provision in the Act ties the States' boundaries to the American territorial sea, much less to future extensions of the territorial sea.⁹ The

⁷43 U.S.C. section 1301. In United States v. Louisiana, supra, the Supreme Court held that under this provision of the Submerged Lands Act, Texas had proven an historic boundary nine nautical miles wide, but that Louisiana, Mississippi, and Alabama had not proven their cases, and therefore had seaward boundaries extending only three nautical miles from shore. 363 U.S. at 83-85. In the companion case United States v. Florida, 363 U.S. 121 (1960) the Court held that Florida, like Texas, had successfully established a nine-mile boundary on its Gulf Coast.

⁸43 U.S.C. § 1312, Submerged Lands Act, § 4.

⁹Two States have been admitted to the Union since passage of the Submerged Lands Act, Alaska and Hawaii, both in 1959. In both cases Congress incorporated the provisions of the earlier Submerged Lands Act in the statehood legislation, and so the result is no different in the cases of these two States admitted

seaward boundaries of the coastal States thus could not have been extended by the Proclamation, even if President Reagan had expressly intended that result.

An observation on the anomaly referred to earlier--the strip of American territory that now lies adjacent to each coastal State, but not a part of it--is in order. Until the Territorial Sea Proclamation, there existed an even odder anomaly. The territorial boundaries of two States, Texas and Florida (on Florida's Gulf coast), extended nine miles to sea--six more than the limits of American territorial waters. A lesser anomaly, it would seem, ought to be tolerable.

II.

DOES THE PROCLAMATION AFFECT UNRESOLVED HISTORIC-WATERS CLAIMS IN THE UNITED STATES?

Most historic-waters claims in the United States have been made by the States in the face of the federal government's denial. To address the question posed in this section of this

after 1953. Proclamation No. 3269, January 3, 1959 (73 Stat. C 16), and Act of July 7, 1958 (72 Stat. 339) (Alaska), and Proclamation No. 3309, August 21, 1959 (73 Stat. C 74), and Act of March 18, 1959 (73 Stat. 4).

It merits an aside to note that the Supreme Court in 1965 held that future changes in international law would not affect a State's baseline, which is the line from which its seaward boundaries are measured. United States v. California, 381 U.S. 139, 166-67. The question whether a change in the breadth of the territorial sea would effect a change in the States' seaward boundary was no doubt then deemed too obvious to address.

paper it is useful first to consider why it is that American States assert such claims against their national government; second, to consider what American waterbodies the federal government has recognized and thus claims as historic waters; and third, to consider what American waterbodies presently remain in question so far as their historic-waters status is concerned. These topics are considered as background in Part A. The peculiar foreign-relations aspect of these domestic disputes is explored in Part B. And in Part C, the question of the Proclamation's effect on the unresolved claims is addressed.

A. Background: Why States Make Historic-Waters Claims; the Established Claims; and the Unresolved Claims.

1. Why the States Make Claims Against the Federal Government.

An aspect of the federalist nature of the American government accounts for the seeming anomaly of its States' asserting historic-waters status for a waterbody against the national government. In 1947 the Supreme Court, in a landmark decision rendered in favor of the federal government and against the State of California, held that the federal government, and not the coastal States, held "paramount rights" over the waters and submerged-lands of the marginal sea, and that the rights of the States ended at low-water mark, except as to bays and other inland waters, including so-called "historic bays." It was left to California and, ultimately, the other coastal states, to prove

historic-bays status for waterbodies that did not otherwise meet the legal tests for inland waters.

California sought to do so, in proceedings before a Special Master appointed by the Supreme Court. But in due course, in 1953, Congress effectively undid the result of the 1947 California case, insofar as that case decided federal ownership of the three-mile belt of marginal or territorial sea.¹⁰ Congress's action in this respect was accomplished in the Submerged Lands Act of 1953, which is discussed in the previous section in the context of the Constitutional power to establish state boundaries. (The power is Congress's, not the President's.) The Act was also an exercise of power under the Property Clause--a disposition of federally owned land and other resources (e.g., oil, kelp, and fish).

In the Act, Congress also "relinquished" and "released" to the coastal states the rights to the submerged lands and resources of the seabed to a distance of three geographical miles (nine miles, in the cases of certain Gulf coast States), from the low-water mark and the limit of "inland waters." Since petroleum development was then feasible in only relatively shallow water, that is, close to shore, and since petroleum was the grail of the submerged-lands dispute, the question of the outer limit of the grant became for the time of no practical consequence. And,

¹⁰Submerged Lands Act of 1953, 43 U.S.C. § 1301-03, 1311-15 (1982 & Supp. IV 1986).

since, where historic waters exist, the outer limit of the grant is measured from the seaward extent of those waters, the historic-waters claims of the States became concomitantly inconsequential.

But when petroleum extraction became feasible in deeper waters, the litigation was resuscitated and, with it, the question of what qualified as historic waters. That feasibility was attained by the early 1960s, and the California case was then revived. The second principal decision in the case was handed down in 1965. It held that the status of inland waters for purposes of the Submerged Lands Act is, generally speaking, to be decided according to the rules of the 1958 Geneva Convention on the Territorial sea and the Contiguous Zone. While that Convention spells out geographic criteria for determining the limits of the inland waters of rivers, bays and ports (as well as of waters enclosed by straight baselines), and while it alludes to the validity of the notion of historic bays, it says nothing of the criteria for historic-bays status. The Court did hold, however (and reiterated four years later in an opinion involving the State of Louisiana) that the customary international-law criteria for historic bays were applicable to the submerged-lands cases. Put another way, when a waterbody failed the geographic tests for an inland water under the 1958 Convention, the State was nonetheless permitted to argue that it qualified as an historic bay under international law, as if the State were the

national government making the claim. The national government, in turn, would be permitted to dispute the historic-bay status of the waterbody before the Court, as if it were an antagonist nation.

In one sense, this was an easy call for the Court, for even if a State claim failed, the resources of the disputed area would not thereby become international. President Truman's Continental Shelf Proclamation of 1945¹¹ had assured that. By claiming all of the resources of the Continental Shelf, the Proclamation resulted in a situation where the resources of any State's historic-water claim--together with those of the territorial waters measured seaward from the historic waters--would be American, and not subject to any foreign claim of dominion or usage, regardless of the outcome of the State's case.¹² That is so because the seaward extent of the Continental Shelf, even as it was then defined (the 200-meter depth contour¹³

¹¹Proclamation No. 2667 (September 28, 1945), 59 Stat. 884. Congress "ratified" the claim, and exercised its Property Clause powers over the American Continental Shelf, in the Outer Continental Shelf Lands Act (as Amended in 1978) 43 U.S.C. §§ 1331-56, 1801-66 (1982 & Supp. IV 1986), as well as in the Submerged Lands Act, 43 U.S.C. § 1314.

¹²United States v. California, 381 U.S. 1, at 175.

¹³The Truman Proclamation did not define the Continental Shelf, but an accompanying press release described it as "submerged lands . . . contiguous to the continent and . . . covered by no more than 100 fathoms (600 feet) of water." 13 Dept. State Bulletin 484 (1945). See also Shepard, Submarine Geology 143 (1948).

or, if it were farther, the limit of exploitability¹⁴) was seaward of three miles (or even nine) from the most extravagant of the States' historic-waters claims. (This situation would be further assured by the American Exclusive Economic Zone Proclamation of 1983. That proclamation produced, in practical effect for this purpose, an American Continental Shelf having a minimum breadth of 200 miles.¹⁵)

Yet these historic-waters disputes never came to resemble their counterparts in international tribunals. Because of perceived foreign-policy implications of the Court's 1965 historic-bays ruling, an inordinate amount of deference became accorded the federal government's position in the disputes. As example, the Court constructed a quantum of proof more rigorous than required even in criminal cases: The States would have to

¹⁴The concept of exploitability, as defining the extent of the Continental Shelf, is not found among the documents associated with the Truman Proclamation, much less in the Proclamation. Taking as its origin the stated justification for the Continental Shelf Doctrine--the need to give the coastal state an exclusive right to exploit the resources of the Continental Shelf--the concept evolved during the work of the International Law Commission, which drafted the 1958 Geneva Convention on the Continental Shelf, U.S. T.I.A.S. No. 5578, 15 U.S.T. 471. It is codified in Article I of that Convention.

¹⁵Proclamation No. 5030 (March 10, 1983), 97 Stat. 1557. In the view of Solicitor of the Department of the Interior, the effect of the EEZ Proclamation was to cause the outer limit of the American Continental Shelf to leap a hundred or so miles seaward, from the 1000-meter isobath (the 1983 limit of exploitability) to the 200-mile limit, or even beyond. 92 I.D. 459, 461 (1985).

prove their case for an historic bay "clear beyond doubt"¹⁶; in an international tribunal no such burden would befall the historic-waters suitor. One commentator, himself a former litigator for the federal government in these cases, has criticized the Supreme Court's so onerously stacking the deck against the States.¹⁷ The foreign-relations aspect of these cases is developed in section C, below.

And so, the federal government found itself in the odd stance of arguing against the historic-waters status of some familiar American waterbodies, such as Mississippi Sound, the Santa Barbara Channel, and Cook Inlet, Alaska. It conceded only three.

2. Established American Historic Waters.

In the ensuing historic-waters cases the States won on rare occasions.¹⁸ And so, it is easy to catalogue the

¹⁶United States v. California, 381 U.S. at 175.

¹⁷Charney, Judicial Deference in the Submerged Lands Cases, 7 Vand.J.Int.L. 383 (1974).

¹⁸The waterbodies lost by the States are too numerous to mention in the text. They include the Santa Barbara Channel and Santa Monica Bay, California, 381 U.S. 139, 16-18 (1965); numerous inlets of the Louisiana coast, rejected by the Special Master in his July 31, 1974 report, to which Louisiana's exceptions were overruled in United States v. Louisiana, 420 U.S. 529 (1975) (Louisiana boundary case); Florida Bay, rejected by the Special Master, which rejection was confirmed by the Supreme Court, United States v. Florida, 363 U.S. 121 (1960); Cook Inlet, Alaska, rejected by the Supreme Court in United States v. Alaska, 422 U.S. 184 (1975); and Nantucket Sound, tried on an aberrational theory of "ancient title," Massachusetts Boundary Case, 475 U.S. 89, 105 n. 20 (1986).

waterbodies claimed by the American government as historic waters. The first two are waterbodies which, at least since the adoption of the 1958 Geneva Convention (which recognizes a 24-mile closing-line rule for bays) enjoy status as juridical bays. These are Chesapeake and Delaware Bays, both of which had long been claimed as inland waters of the United States regardless of their geographic qualifications under then-recognized principles of international law.¹⁹ The United States had also long claimed Long Island Sound on historical grounds, although not until 1984 was its status as a juridical bay under the 1958 Geneva Convention so clear.²⁰

The other two are waterbodies whose status the Government litigated and lost. In the Alabama and Mississippi Boundary Case, 470 U.S. 93 (1984), the Supreme Court agreed with the States and with its Special Master that Mississippi Sound, lying between the mainland and offlying barrier islands, was historic inland waters. This was the first time the Court upheld a State's historic-waters claim against the disclaimer of the federal government.

¹⁹See Mark v. Home Ins. Co. of New York, 52 F. 170 (S.D.N.Y. 1892); The Brilliant, 64 F.Supp. 612 (E.D. Penn., 1945); The Alleganean, Stetson v. United States, Court of Commissioners of Alabama Claims, IV Moore International Arbitrations 4332 (Chesapeake Bay); New Jersey v. Delaware, 291 U.S. 361 (1934), 295 U.S. 694 (1935) decree (Delaware Bay); letter of Attorney General Randolph to Secretary of State Jefferson, May 14, 1793.

²⁰New York and Rhode Island Boundary Case, 469 U.S. 504 (1984); and Mahler v. Norwich and New York Transportation Company, 35 N.Y. 352 (1866).

A year later, the special master in the Massachusetts Boundary Case²¹ recommended in favor of the State's historic-bay claim to Vineyard Sound. The federal government elected not to except the report of the Special Master in this respect, and the Supreme Court subsequently entered a decree that Vineyard Sound, while concededly not meeting the geographic requirements for a juridical bay under the 1958 Convention, was nonetheless an inland water of the Commonwealth of Massachusetts.²²

The United States has subsequently recognized the decision on Mississippi Sound and Vineyard Sound for purposes of its foreign relations. It has, for example, amended its published charts to show them as inland waters.

3. American Historic-Waters Claims as Yet Unresolved.

What American waterbodies are then still in question, so far as their status as historic waters is concerned? A cranial trip around the coastline of the nation²³ discloses that the only known areas remaining in dispute are (a) the waters of

²¹Reported the next year as Massachusetts Boundary Case, 475 U.S. 91 (1986).

²²Massachusetts argued, contrary to the findings of the Special Master, that title to Nantucket Sound belonged to the State according to the doctrine of "ancient title," 475 U.S. at 91. The Court refused to recognize Massachusetts' claim. It left undecided whether "ancient title" would become an additional exception, like historic bays, to Art. 7 of the Convention on the Territorial Sea and Contiguous Zone (1958), 475 U.S. at 105 n. 20.

²³Authors' research and pers. comm. between John Briscoe and Michael W. Reed, U.S. Department of Justice, July 1990.

the inter-island channels of the main islands of Hawaii;

(b) Kotzebue Sound, Alaska; and (c) the Strait of Juan de Fuca.

The basis for the claim in each case is markedly different from the others. In the case of Juan de Fuca Strait, in fact, the dispute is not even between the State of Washington and the federal government; it is between different branches of the federal government. The next several pages are occupied with a brief description of the factual basis for each claim. Greater parsing of the rules for historic waters will be found there and in Section C, but at the outset, it is helpful to keep in mind the three, very straightforward elements of an historic-waters claim: "(1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority." United States v. Alaska, 422 U.S. at 189 (citations omitted).

a. The Waters of Hawaii.

Even before the establishment of the Hawaiian Kingdom in the late 18th century, the chiefs (ali'i) and priests (kahuna) of ancient Hawaii had exercised such control over the inter-island channels that a modern American court might deem it relevant in considering whether the channels had, by the time of Hawaii's statehood, attained the status of historic waters. The control exercised by the ali'i and kahuna over fishing in the channels and over sea travel was maintained principally through

the enforcement of kapu. "Kapu" in Hawaiian means "sacred," but can also be rendered as "taboo"--"prohibition" or "prohibited." Some of the kapu were imposed annually; others were imposed for specific occasions.

Traditional kapu had durations varying from one to eight days. One common kapu described by early white visitors to the Hawaiian islands was the prohibition against canoe travel in the channels on certain days.²⁴ The log of The Chatham contains entries for January 1794 (year of Kamehameha's conquest) describing such prohibitions.²⁵ Similarly, certain Hawaiian officials routinely prohibited aku fishing for half the year, and 'opelu fishing the other half.²⁶

With the arrival of western explorers and traders in the latter part of the 18th century, kapu were extended to control the islanders' trade with the foreigners. Beginning with Cook's, it became the practice of western expeditions to the north coast of North America to winter in the Hawaiian Islands, where the crew could rest, repair the ships and replenish their stores. The expedition sought pork, yams and other vegetables in return for which the Hawaiians received nails, tools, weapons and ammunition, and bars of raw iron. The extension of kapu to trade

²⁴ 2 G. Vancouver, Voyage of Discovery to the North Pacific Ocean and Round the World 218 (1967 reprint of 1798 ed.) (hereinafter "Voyage of Discovery").

²⁵1 Bell, The Log of The Chatham 77 (1929-30).

²⁶3 Vancouver, Voyage of Discovery 18-19.

with westerners is reported in Nathaniel Portlock's Journal for November 1786. Anchoring off the coast of Oahu, Portlock sought fresh water from Hawaiians who had paddled their canoes to his ship. They told him that, notwithstanding their desire for the nails and beads which Portlock offered, water and "every thing the island produced, was tabooed by the king's order."²⁷

Reports by early western visitors to Hawaii provide many other examples of ali'i or kahuna control over the off-lying waters.

In 1785, Kamehameha I, already the chief of Hawaii and Maui, added Oahu to his hegemony by his victory at the battle of Nuuanu. For the next 112 years, until 1897 when they were annexed by the United States, the Hawaiian Islands were a sovereign state.²⁸ The United States recognized the sovereignty of the Hawaiian Kingdom no later than 1842. In December 1842, Secretary of State Daniel Webster wrote a letter to Timothy Ha'alilio, an Hawaiian chief and secretary to Kamehameha III, and to William Richards, the resident missionary at Lahaina, in which he recognized the sovereignty of the Hawaiian government over the Hawaiian Islands:

The United States have regarded the existing authorities in the Sandwich Islands as a government suited to the condition of the people, and resting on their own choice; and the President [Tyler] is of opinion that

²⁷N. Portlock, A Voyage Round the World . . . Performed in 1785, 1786, 1787, 1788 154, 155 (1789).

²⁸ See G. Daws, Shoal of Time; A History of the Hawaiian Islands 35-41 (1968, 1974 ed.)

the interests of all commercial nations require that Government should not be interfered with by foreign powers. Of the vessels which visit the islands, it is known that the great majority belong to the United States. The United States, therefore, are more interested in the fate of the islands and of their Government, than any other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the islands as a conquest or for the purpose of colonization, and that no power ought to speak for any undue control over the existing Government, or any exclusive privileges or preferences with it in matters of commerce.

Entertaining these sentiments, the President does not see any present necessity for the negotiation of a formal treaty, or for the appointment or reception of diplomatic characters. A consul or agent from this Government will continue to reside in the islands.²⁹

President Tyler subsequently wrote to Congress on this subject, ending his letter with an emphatic recognition of the independence of the Hawaiian government and an admonishment to any foreign power that might seek to threaten the Hawaiian Kingdom's independence:

Considering, therefore, that the United States possesses so very large a share of the intercourse with those islands, it is deemed not unfit to make the declaration that their Government seeks nevertheless no peculiar

²⁹D. Webster to Haálilio and Richards (agents of Hawaii) Dec. 19, 1842, reprinted in 1 Kuykandall, The Hawaiian Kingdom 1778-1854 194 (1938, 1968 ed.), 1 J. Moore, A Digest of International Law (1906) 476.

advantages, no exclusive control over the Hawaiian Government, but is content with its independent existence, and anxiously wishes for its security and prosperity. Its forbearance in this respect, under the circumstances of the very large intercourse of their citizens with the islands, would justify the Government, should events hereafter arise, to require it, in making a decided remonstrance against the adoption of an opposite policy by any other power.³⁰

In 1843 Great Britain and France jointly declared their recognition of Hawaii's status as an independent nation:

taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands as an independent state, and never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed.³¹

In 1846, eliciting no protest from the United States, Kamehameha III's second legislative act pronounced the Kingdom of Hawaii sovereign over the inter-island channels, providing, in pertinent part:

SECTION I. The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau; commencing at low water mark on each of the respective coasts of said islands.

³⁰Pres. John Tyler to the House of Representatives, Dec. 30, 1842, Sen. Exec. Doc. 77, 52d Cong., 2d sess., at 35-37.

³¹Reprinted in 1 Moore, Digest of International Law, at 478-79.

The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island to island.

SECTION II. It shall be lawful for his Majesty to defend said closed seas and channels, and if the public good shall require it, prohibit their use to other nations by proclamation.

SECTION III. All captures and seizures made within said channels or within one marine league of the coast, shall be deemed to have been made, and shall be deemed to have entered in His Majesty's waters. The civil and criminal jurisdiction shall be coextensive with the one maritime league, and interisland channels herein defined. And the right of transportation and transshipment from island to island, shall exclusively belong to Hawaiian vessels duly registered and licensed to the coasting trade, as in the two succeeding articles prescribed.³²

Three years later, in The King v. Parish, 1 Haw. 58 (1849), the Hawaiian Supreme Court upheld its criminal jurisdiction over deserting seamen who had stolen a whaleboat, on the ground the offense had been committed within 3 miles of shore. In choosing to base its decision not on the Kingdom's assertions of sovereignty over the channels, but rather on the safer ground of the internationally recognized 3-mile limit, the Parish court supplied a rationale for a federal court, 120 years later, to reject an historic-waters claim to the inter-island

³²1 Statute Laws of 1846, ch. VI, art. I.

channels.³³ But it is well-known that a court decision is not authority for any proposition it did not decide. Thus, the Parish court's reliance on the fact the offense took place within 3 miles is no statement that Hawaii renounced jurisdiction beyond 3 miles.

A second critical assertion of sovereignty during the mid-19th century occurred with the Privy Council resolution of August 29, 1850, re-asserting the Kingdom's sovereignty over the channels:

Resolved, that the rights of the King as sovereign extend from high water mark a marine league to sea, and to all navigable straits and passages among the islands, and no private right can be sustained, except private rights of fishing and of cutting stone from the rocks as provided and reserved by Law.

3 Privy Council Record 791 (Aug. 29, 1850).³⁴ As with Kamehameha III's 1846 proclamation, this act of the Hawaiian Kingdom met with acquiescence from the United States.

³³See, Civil Aeronautics Board v. Island Airlines, Inc., 235 F. Supp. 990, 999-1000 (D. Hawaii 1964).

³⁴In 1902, the Hawaii Supreme Court, in rejecting a federal government land claim, found it necessary to repudiate the Privy Council's authority to assert, in its 1850 Resolution, the Kingdom's sovereignty. Territory v. Liliuokalani, 14 Haw. 88, 102-103 (1902). Years later, the Island Airlines federal court used this case (as it did the Parish case) to support its rejection of an historic-waters claim. 235 F. Supp 990, 999-1000 (D. Hawaii 1964). Yet in 1940 the Hawaii Supreme Court had found no defect in the 1850 Privy Council Resolution, nor, for that matter, in any other Privy Council acts. Bishop v. Mahiko, 35 Haw. 608, 644-645, 660 n.91 (1940).

In 1854 the Kingdom of Hawaii once again asserted its sovereignty over the inter-island channels, this time in the context of a proclamation of neutrality:

Be it known, to all whom it may concern, that we, Kamehameha III, King of the Hawaiian Islands, hereby proclaim our entire neutrality in the war now pending between the great maritime Powers of Europe; that our neutrality is to be respected by all belligerents, to the full extent of our jurisdiction, which by our fundamental laws is to the distance of one marine league surrounding each of our islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau, commencing at low-water mark on each of the respective coasts of said islands, and includes all the channels passing between and dividing said islands from island to island; that all captures and seizures made within our said jurisdiction are unlawful; and that the protection and hospitality of our ports, harbors, and roads shall be equally extended to all the belligerents, so long as they respect our neutrality.³⁵

Over a century later, in its study of the status of islands in international law, the Department of State recognized the 1854 decree as asserting an archipelagic claim.³⁶

In 1859, however, the enactment of Section 1491 as part of the Hawaiian Civil Code of that year operated to repeal the second act of Kamehameha III.³⁷

³⁵Crocker, Extent of the Marginal Sea (1919 ed.) 595-596 (emphasis added).

³⁶U.S. Department of State Memorandum, R. Yingling to F. Boas, "Islands, Drying Rocks and Drying Shoals" 68 (Sept. 1957) (hereinafter "State Dep't Memo Islands").

³⁷Island Airlines, Inc., 235 F.Supp. at 999.

Then, in the Hawaiian Neutrality Proclamation of May 29, 1877, specific reference to the inter-island channels was inexplicably omitted:

Now, therefore, we, Kalakaua, by the grace of God, King of the Hawaiian Islands, do hereby declare and proclaim the neutrality of this Kingdom, its subjects, and of all persons within its territory and jurisdiction, in the war now existing or impending between the great powers of Europe; that the neutrality is to be respected by all belligerents to the full extent of our jurisdiction including not less than one marine league from the low-water mark on the respective coasts of the islands composing this Kingdom, and also all its ports, harbors, bays, gulfs, estuaries, and arms of the sea cut off by lines drawn from one headland to another; and that all captures and seizures, enlistments or other acts in violation of our neutrality within our jurisdiction are unlawful.³⁸

Although in 1965 the Ninth Circuit interpreted this Proclamation as not having embraced the channels (Islands Airlines Inc. v. Civil Aeronautics Board, 352 F.2d 735) at 739, the Department of State in 1957 had found that, geographically, the Proclamation was co-extensive with the 1854 proclamation, and therefore tacitly embraced the channels.³⁹

The treaty by which the United States annexed Hawaii in 1897 provides:

Article I [of the Treaty]. The Republic of Hawaii hereby cedes absolutely . . . to the United States of America all rights of

³⁸Crocker, Extent of the Marginal Sea 596.

³⁹State Dep't Memo, Islands 68.

sovereignty of whatsoever kind in and over the Hawaiian Islands . . .

Article II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public . . . lands, public buildings . . . ports, harbors, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (July 7, 1898). The Senate of Hawaii ratified the Treaty the same year.⁴⁰

The Organic Act establishing the territory of Hawaii defined it as "the islands acquired by the United States."⁴¹

If the waters of the inter-island channels of Hawaii are held to be historic inland waters, the resulting boundaries will resemble archipelagic baselines drawn under Article 47 of the 1982 Convention on the Law of the Sea. Such lines are depicted on Figure 1. Figures 2, 3 and 4 show the old three-mile limit, and the new 12-mile territorial sea, as the federal government has reckoned them for the Hawaiian Islands.

b. Kotzebue Sound, Alaska.

Kotzebue Sound, a deep bight on the west Alaskan coast north of the Seward Peninsula, has been claimed by the United States as internal waters for at least 20 years, more likely for

⁴⁰Resolution of September 9, 1897, 1 R.L.H. 1955 at 15.

⁴¹Hawaiian Organic Act, 15 Hawaii Rev. Stat. § 2 (1988).

32 years, and perhaps longer. But it has been claimed as internal waters not on the ground of historical assertions of dominion, but on the ground it has qualified as a juridical bay under the tests of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. It is a "well-marked indentation" and its water area exceeds the area of the semi-circle whose diameter is the length of the line connecting the "natural entrance points" of the Sound. Accordingly, under Article 7(2) of the 1958 Convention, Kotzebue Sound qualifies as a juridical bay, and there appears to be no dispute about that (although the Department of the Interior, several years ago, asserted that the Sound had lost its juridical-bay status).

The line connecting the Sound's natural entrance points, Cape Espenberg and Cape Krusenstern, however, exceeds 24 miles, thus making the Sound an "over-large bay." And so, a fall-back line, drawn in accordance with the provisions of Article 7(5) of the 1958 Convention, has served since at least 1970 as the claimed limits of inland waters. That land connects Cape Espenberg on the south with the low-water mark on the Baldwin Peninsula, just inside the mouth of the sound, near the town of Kotzebue.

We say "since at least 1970" because in that year the United States, for the first time, published charts showing its official claims of inland waters. (It is still the exception, rather than the rule, that a nation depicts its maritime claims,

particularly of the inland waters of juridical bays, on charts readily available to the public.) The United States Chart published in 1970 for this region of Alaska (Chart 9402, now bearing the number 16005) depicted the closing line for Kotzebue Sound as it is still depicted on the most current edition of the chart.

But the United States' claim of inland-waters status for Kotzebue Sound presumably goes back to at least 1958, when the United States abandoned the old ten-mile rule for bay closing lines and embraced the 24-mile rule contained in the Geneva Convention of that year.⁴²

⁴²Undated Memorandum of Murray J. Belman, Dept. of State Deputy Legal Adviser. Deputy Legal Adviser Belman's memorandum was incorporated in the responses of the United States to Requests for Admissions and Interrogatories, United States v. Alaska, U.S. District Court for the District of Alaska, Civ. No. A-45-67, Aug. 1968. See Response of the United States to Requests for Admissions and Interrogatories, Response to Request for Admission III, United States v. Alaska, U.S. District Court for the District of Alaska, Civ. No. A-45-67, Aug. 1968.

The federal government was not, it is fair to note, a hobgoblin of consistency as regards the date the United States abandoned the old ten-mile rule for bays and embraced the 24-mile rule codified in the 1958 Convention. While Deputy Legal Advisor Belman was unequivocal that this change in policy occurred in 1958, Solicitor General Archibald Cox, in a March 6, 1961 letter to the Director of the United States Coast and Geodetic Survey, expressed the view that the change in American policy would not occur until 30 days after the convention had been ratified by 22 nations--an event that did not occur until 1964. (Mr. Cox, on the other hand, presumably did not speak for the federal government in matters of foreign relations.)

Nor was the government of one mind regarding the impact the adoption of the 24-mile rule would have on the submerged-lands grants to the States. While some disagreed, Mr. George Swarth of the Department of Justice was of the opinion that the

Whatever the case, the United States has claimed Kotzebue sound as inland waters for at least twenty years; the claim has been continuous and well published; and no nation has disputed it.

Recently the Federal Government's Baseline Committee, acting at the request of the Department of the Interior, decided to delete the closing line of Kotzebue sound, with the result that the inland-water status of nearly 1,000,000 acres has been disclaimed. Some of the Sound becomes territorial sea, but a large bulb or pocket of high seas will be found within the Sound. This pocket is connected with the open waters of the Chukchi Sea by only a narrow channel of high seas.

The justification offered for this position is that the low-water mark on the Baldwin Peninsula, which has served as the northeastern terminus of the closing line since the Committee first drew it in 1970, appears to have eroded. The result of this apparent erosion is that the length of the line connecting

States were entitled, under the Submerged Lands Act, to the submerged lands of bays newly closed under the 24-mile rule. Memorandum from David Warner, Chief, General Litigation Section, Department of Justice, to Ramsey Clark, Assistant Attorney General, January 11, 1963. Of course, in the case of Alaska, the effect of the change in United States' policy on the Submerged Lands Act grant to the states was of no consequence, since the change in policy occurred prior to Alaska's admission to statehood on January 3, 1959. Proclamation No. 3269, 72 Stat. 339 (1958) and 73 Stat. c16, 3 C.F.R. 4 (1959-1963), reprinted in 48 U.S.C. ch. 2 at 591 (1987).

the low-water marks on the Baldwin Peninsula and on Cape Espenberg (the southwestern terminus of the closing line) presently exceeds 24 miles. The Department of Interior now concedes that Kotzebue Sound maintains its status as a juridical bay under international law,⁴³ and so this erosion, in its view, would require that a deeper "fallback" line be drawn, in the inner recesses of the Sound, where the distance between two points of land again narrows to 24 miles. Because of the classical jaws-like configuration of the Sound, such a line cannot be drawn until one is well into the interior of the Sound. Figures 5 and 7, adapted from the current edition of National Ocean Service Chart No. 16005, show the closing line as the Baseline Committee has depicted it since 1970 on both chart 16005 and on its predecessor, Chart 9042.⁴⁴ Figures 6 and 8 show a fallback line as it might be constructed within the Sound, given the decision to delete the present closing line and thereby disclaim the area in the Sound. Figure 6 also shows what would presumably be the outer limit of the territorial sea if the closing line were deleted. It has been constructed using the arcs-of-circles method of delimitation "strictly"--that is to

⁴³At the beginning of this controversy, in 1987, the Department's view was that the Sound had lost its status as a juridical bay. That position cannot seriously be maintained. See note 48, infra.

⁴⁴Such closing lines, together with the outer limit of the American territorial sea, were as mentioned not depicted on American charts prior to 1970.

say, without correcting for the anomalous pocket of high seas that results.⁴⁵

There is little by way of foreign-policy imperative offered for the Interior Department's proposal.⁴⁶ So far as is known, no foreign nation has protested the existing closing line; no foreign fleet admiral clamors to exercise high-seas freedoms within the Sound; and no high reason of principle has been advanced why the Sound should be denied historic-waters status. Indeed, given the expansionist policies of the United States in the area of maritime zones the past 45 years,⁴⁷ it would be

⁴⁵This reference is to the now-abandoned American practice of assimilating to the territorial sea such "objectionable pockets" of high seas, see S. Boggs, "Delimitation of the Territorial Sea," 24 Am. J. Int'l. L. 541, 552-553 (1930), has not been used in drawing this line.

⁴⁶That is, unless one speculates about the ongoing U.S.-Soviet negotiations to identify and settle on, for all time, all historic waters. The American negotiators may have left Kotzebue Sound off their list.

⁴⁷We are adverting to such actions as the United States' 1945 claim of "jurisdiction and control" over the resources of the continental shelf, Proclamation No. 2667, 3 C.F.R. 67 (1943-1948); its 1976 claim of a 200-mile "fishery conservation zone," Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801, et seq.; its 1983 claim of a 200-mile Exclusive Economic Zone, Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983); and its 1988 claim of a 12-mile territorial sea, Proclamation No. 5928, 54 Fed. Reg. 777 (1989).

The Continental Shelf Proclamation, which began a spate of expansionist maritime claims by other countries, was America's most notorious break with customary international law in this area. A. Hollick, U.S. Foreign Policy and the Law of the Sea 61 (1981). Our claim of a 200-mile fishery conservation zone occurred at a time when the International Court of Justice had just intimated that 12 miles was the maximum permitted breadth of such a zone. Fisheries Jurisdiction (United Kingdom v. Iceland)

seemingly out of character for this country suddenly to disclaim a very substantial area of inland waters. In any case, the Baseline Committee notified the State of Alaska of its decision last November, offering no statement of reasons save for the pronouncement that "no credible" case for historic-water status had been made out.

The reason for the Interior Department's urging in this case, in the view of Alaska, is to strengthen the Department's hand in later litigation with the State over the ownership of the resources and submerged lands of the Sound. If the Government deletes the long-maintained closing line of the Sound for international purposes, then the Supreme Court will be less likely to hold with Alaska that, for domestic purposes, the former closing line still obtains.

Alaska last July argued its case for the retention of the inland-waters status of Kotzebue Sound before the Baseline Committee (composed, as we note in Section B, below, of representatives of the Departments of State, Justice, Interior, Defense, Transportation, and Commerce). One element of Alaska's case is that the closing line ought to be maintained under ordinary juridical-bay principles, quite apart from

1974 I.C.J. 3, 130 (Gros, J. dissenting). As for the American Exclusive Economic Zone Proclamation, many have argued that the United States may not have an EEZ without becoming party to the 1982 Convention, on the notion that the EEZ is a creature not of customary international law, but solely of the Convention. (Possibly, the same argument can be made as regards the American claim of a 12-mile territorial sea.)

historic-water considerations. The geophysical dynamics of the Kotzebue Sound region are such that the former physical characteristics will re-establish themselves, and the length of the line connecting Cape Espenberg with the Baldwin Peninsula will again shorten to less than 24 miles. Since that is likely to happen, goes this argument, it is senseless to delete the closing line in the interim. Alaska also advanced an historic-waters case, which is summarized in the following paragraphs.

As we have seen, the Supreme Court in several modern cases has considered whether American waterbodies qualified as historic inland waters. See, for example, United States v. California, 381 U.S. 139, 175 (1965); United States v. Louisiana, 394 U.S. 11, 74-78 (1969); United States v. Alaska, 422 U.S. 184, 200-204 (1975); United States v. Florida, 425 U.S. 791, 793 (1976); Alabama and Mississippi Boundary Case, 470 U.S. 93, 101-105 (1985); Massachusetts Boundary Case, 475 U.S. 89, 93-105 (1986). In each case the denial of the federal government that it had ever claimed the waterbody as inland waters, and the lack of unequivocal evidence that it had, provided the central tension.

But that tension is not present in the case of Kotzebue Sound. The United States has overtly and without equivocation claimed the Sound as inland waters since 1958, one year before Alaska became a State. Since 1970, the claim has been depicted

on charts (a practice at that time engaged in almost exclusively by the United States). And so, irrespective of its status as a juridical bay,⁴⁸ Kotzebue Sound qualifies as an historic bay.

⁴⁸The Interior Department originally held the view that the erosion of the low-tide bank off the Baldwin Peninsula, with the result that the line connecting it and Cape Espenberg lengthened to more than 24 miles, caused Kotzebue Sound to lose its status as a juridical bay. "[T]here are no points between Cape Espenberg and the Baldwin Peninsula which can be connected with a line which is 24-nautical miles (or less) in length as required to make Kotzebue Sound a juridical bay." Letter from Wm. D. Bettenberg, Director, Minerals Management Service, to Paul M. Wolf, Assistant Administrator, National Oceanic and Atmospheric Administration, August 13, 1987 (emphasis added).

The official American view appears to be that both conventional and customary principles of law govern the status of Kotzebue Sound. Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. (Pt. 2) 1606, 1609, T.I.A.S. No. 5639, to which the United States is a party, contains provisions for determining whether a waterbody constitutes a juridical bay. It also contains provisions for determining the location of the line enclosing the inland waters of the bay, which line may not exceed 24 miles, and for determining the location of fallback lines when the first-drawn line exceeds 24 miles.

The provisions of Article 7 of the 1958 Convention have been carried forward virtually verbatim into Article 10 of the 1982 United Nations Convention on the Law of the Sea. Compare, id. with U.N. Doc. A/Conf. 62/122, at 5, reprinted in 21 I.L.M. 1261 (1982). While the United States is not a party to the 1982 Convention, and appears not likely to become a party to it, President Reagan's March 10, 1983, Statement on United States Ocean Policy, 1 Pub. Papers of President Ronald Reagan 378 (1983), and subsequent statements of American officials, make clear that the United States considers the boundary provisions of the 1982 Convention to have attained the force of customary international law.

Notwithstanding the American position that the boundary provisions of the 1982 Convention have customary international-law status, the 1958 Convention has continued relevance here. That is so because this dispute is fundamentally a jurisdictional quarrel between the Department of Interior and the State of Alaska under the Submerged Lands Act of 1953, 67 Stat. 29, 43

The elements of an historic-bay claim, again, are straightforward:

The term "historic bay" is not defined in the [1958] Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority.

United States v. Alaska, 422 U.S. at 189 (citations omitted).

Given the United States' 32 years of continuous exercise of authority over Kotzebue Sound, and the acquiescence of foreign

U.S.C. § 1301 et seq. Since 1965, questions whether a waterbody is inland waters for such domestic purposes are to be resolved by reference to the 1958 Convention, regardless of changes in international law. United States v. California, supra, 381 U.S. at 164-165. While theoretically the Government could decide upon one closing line for Kotzebue Sound for international purposes, and the Court could select another for domestic purposes (and while in fact examples of such conflicting baselines exist), that is not at all what the Court sought to achieve in its 1965 ruling. United States v. California, 381 U.S. at 165.

In any event, the fact that the entrance to a waterbody exceeds 24 miles does not determine its status as a juridical bay. If the waterbody meets the semicircle test of Article 7.2 of the 1958 Convention (Article 10.2 of the 1982 Convention), it is a bay. U.N. Office for Ocean Affairs and the Law of the Sea, The Law of the Sea, Baselines: An examination of the Relevant Provisions of the United States Convention on the Law of the Sea at 28, U.N. Sales No. E.8.V.5. If its entrance happens to exceed 24 miles, that means only that a fallback line must be drawn under Article 7.5 of the 1958 Convention, and that line need not enclose waters that themselves would qualify as a bay. Kotzebue Sound still meets the semicircle test.

states in that exercise, it would seem unnecessary to inquire into other historical factors that, in a less clear case, might be probative.⁴⁹ Nevertheless, the evidence might well prove American exercise of authority, and the acquiescence of foreign states, prior to 1958. See, e.g., Figure 9.

Putting aside the question whether the United States exercised dominion before 1958, it cannot be maintained that 32 years is too brief a time for an historic-waters⁵⁰ claim to ripen. There appears to be no body of water over which a State has exercised continuous dominion for twenty years or more, with the unambiguous acquiescence of foreign states, and which subsequently was denied historic-waters status. When a nation's claim of historic waters is objected to, by other nations or by the publicists, it seems in each instance that the claim had just recently been made known--that there was lacking the overt, unequivocal claim as has been made in Kotzebue Sound, and the

⁴⁹We are adverting to historical evidence from the pre-statehood era. See e.g., J.L. Giddings & D.D. Anderson, Beach Ridge Archeology of Cape Krusenstern (1986); F.P. Shepard & H.R. Wanless, Our Changing Coastlines, (1971) 475-476.

⁵⁰There is no difference in principle between "historic bays" and "historic waters". The term "historic waters" came into currency about 1957, when it was thought to be a more apropos term, since many of the waterbodies in which historic claims had been recognized could not properly be characterized as "bays." Juridical Regime of Historic Waters, Including Historic Bays, U.N. Doc. A/CN.4/143 (1962) 6.

unqualified acquiescence of other nations, for a substantial time prior to the announcement of the claim.⁵¹

Alaska's case further argues that it does not matter that the American claim to Kotzebue Sound has for the past 32 years been predicated on its status as a juridical bay. The bases offered by nations for their claims to historic waters have been as varied as the shapes and depths of the waters claimed. The American claims to Delaware Bay and to Long Island Sound are no exception. As examples, compare the Opinion of Attorney General Randolph of May 14, 1793 (invoking "the necessary or natural law of nations" to utter America's first claim to Delaware Bay; emphasis in original), with the more ratiocinated opinion in Mahler v. Norwich and New York Transportation Company, 35 N.Y. 352 (1866) (the first utterance of an American claim to Long Island Sound). What matters only are the continuous exercise of dominion, and the acquiescence of foreign states, elements that seem present in the case of Kotzebue Sound.

⁵¹The Soviet Union's claim to St. Peter the Great Bay, announced in 1957, is an example. There was dubious evidence of Soviet exercise of exclusive authority over the bay, much less of foreign acquiescence, prior to the announcement. Moreover, the Japanese had fished there as recently as eighteen years before the claim was announced. L. Bouchez, The Regime of Bays in International Law 224-226 (1964). Compare the case of the Gulfs of Tunis and Gabes where, approximately 25 years after Tunisia had granted exclusive rights of sponge fishing, Greece and France acknowledged the validity of the claim of Tunisia to the waters. L. Bouchez, supra, at 221-222; 3 G. Gidel, Le Droit Internationale Public de la Mer, 663, 756 (1932). Where the United States has protested historic-waters claims, the claims had only recently been announced. See, e.g., 4 M. Whiteman, Digest of International Law 250-258, 282-286.

No branch of the federal government has yet published a written refutation of the case for historic-waters status for Kotzebue Sound. As in the case of the criminal accused who pleads simply that he didn't do it, the case against historic-water status for the Sound remains merely that it isn't "credible." Naught more sayeth the Government. Yet.

c. The Strait of Juan de Fuca.

The Strait of Juan de Fuca, approximately fifty miles long, is aligned in an east-west direction between the land territories of Canada (Vancouver Island and the mainland of British Columbia) on the north and those of the United States (Washington State) on the south. The international boundary between the two countries runs the center of the Strait throughout its length. The breadth of the Strait varies from 17 miles at its widest part to ten miles at its narrowest, and it connects the waters of the Pacific Ocean at its western end with the waters of Puget Sound at its eastern end. (This portion of Puget Sound, particularly the waters just north of the eastern end of Juan de Fuca Strait, are also known as Washington Sound.) At the eastern end of Juan de Fuca Strait the international boundary turns to the north, passing through Haro Strait into Georgia Strait and thence to the 49th parallel of north latitude.

The Strait of Juan de Fuca provides passage for deep-draft vessels from the Pacific Ocean to ports of both Canada and the United States, but of no other countries. While it is

possible to pass from the Pacific Ocean through the strait, and through Haro and Georgia Straits back to the Pacific Ocean, it serves no navigation purpose to do so, and they are not so used.

Vessels using Juan de Fuca Strait may navigate either side of the international boundary for its entire extent. When entering from the sea a pilot is taken on at the eastern end of the Strait from either Port Angeles, Washington, or Victoria, British Columbia. Much of the water area of the Strait south of the international boundary lies more than three miles from the mainland of Washington State. Too, much of Puget Sound to the east of Juan de Fuca Strait lies more than three miles from the coast of Washington. Thus prior to the Territorial Sea Proclamation, the waters south of the international boundary with Canada would have constituted territorial sea of the United States and high sea, unless they qualified as inland waters under the principle of historic waters.

To our knowledge the United States has never formally announced that it claims these waters as inland waters under historic principles, but there would be ample support for the claim. The evidence for it is summarized in the paragraphs that follow.

By Treaty dated June 15, 1846, the United States and Great Britain sought to resolve their long-standing dispute over "the territory on the northwest coast of America lying westward of the Rocky or Stony Mountains" (the Oregon Territory). The

boundary between the territories of the two countries established by this treaty was described as follows:

Article I. From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of said channel, and of Fuca's Straits, to the Pacific Ocean; Provided, however, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties. (Emphasis added.)

9 Stat. 869.

The Treaty thus describes a boundary between the "territories" of the two countries, a fact that, standing alone, might be of little consequence. For the use of the expression "territories" could be ascribed to a less exact habit of usage than would be employed by international lawyers today. But the provision for free navigation to the parties to the Treaty suggests that both parties were asserting what today we would term inland-water claims. Certainly if either party thought high seas existed in the Strait no such provision would have been called for. According to a Department of Justice Memorandum dated November

28, 1973⁵², "This language has consistently been interpreted by the United States as a claim of sovereignty over the waters of the Strait of Juan de Fuca south and east of the described boundary."

In 1871 the United States and Great Britain agreed to submit the question of the exact location of the 1846 boundary to arbitration; on October 21, 1872, Emperor William I made his award. The United States Supreme Court has cited that arbitration and in doing so referred to the line as a "boundary." Louisiana v. Mississippi, 202 U.S. 1, 51 (1906)

The Ninth Circuit Court of Appeals considered the status of Juan de Fuca and Puget Sound in Border Line Trans. Co. v. Haas, 128 F.2d 192 (1942). That case concerned an attempt by vessels which engaged in trade between Seattle and Vancouver Island to recover clearance fees charged by United States Customs officials who considered the voyage to be "by sea." After citing precedents applying that term to the inland waters of the United States, the Court concluded that voyages through the Strait of Juan de Fuca were "by sea." The inference is that the Court recognized the waters between Seattle and Vancouver as inland or territorial.

On May 22, 1891, Acting Secretary of State Wharton wrote to the Secretary of the Treasury:

⁵²Authored by Michael W. Reed, Attorney Marine Resources Section, Land and Natural Resources Division, obtained through the Freedom of Information Act.

The straits of Juan de Fuca are not a great natural thoroughfare or channel of navigation in an international sense; and in view of their situation is it not apprehended that any other nation can make reasonable objection to the jurisdiction of the Government of the United States and of Great Britain over their entire area. The breadth of the narrowest point is believed to be about ten miles, but is not equal to the width of the Delaware Bay and other bodies of water over which, on account of their situation, the United States have felt authorized to assume jurisdiction. 1 Moore, Digest of International Law, p. 658.

In 1943 the United States entered negotiations with Canada in an attempt to resolve a number of boundary problems, one of which concerned the Strait of Juan de Fuca. The boundary which had been settled by arbitration in 1872, and accepted by protocol on March 10, 1873, 18 Stat. (Pt. 2) 36, extended to the point at which the Strait enters the Pacific Ocean. The 1943 negotiations were an attempt to reach agreement on the seaward extension of that boundary dividing the territorial seas of the two states. Memoranda between the Department of State and the United States section of the International Boundary Commission indicate that everyone concerned recognized the line in Juan de Fuca as a "boundary" separating the territory of the two states. Mr. S.W. Boggs of the U.S. Department of State, in a memorandum dated May 31, 1943, stated that: "The waters of the Straits of Juan de Fuca have the status of inland waters, like the Great Lakes. There are no 3-mile limits within the Strait of Juan de Fuca." (Emphasis in original.)

Various versions of a proposed boundary agreement contained the following provision:

Whereas the waters of the Strait of Juan de Fuca to the east of the line from Bonilla Point to Tatoosh Island Lighthouse are national or inland waters of Canada and the United States, and whereas there is a contiguous belt of territorial waters to the west of the line * * *.

This language, regardless that no treaty was concluded, seems consistent with the position that both countries have taken with regard to these waters since 1846.

The United States for its part has been consistent in exercising jurisdiction over activities taking place on its side of the boundary line. Numerous Canadian fishermen have been arrested for fishing in American waters in the Strait.⁵³ In some instances their positions are indicated as being a given distance inside the boundary, rather than from the land as is normally done with violations in the territorial sea.

Finally, the State of Washington has, by statute, prohibited any unlicensed person from piloting "any vessel into,

⁵³A partial list of arrests, by date, obtained from the United States Department of Justice through the Freedom of Information Act, is the following:

September 15, 1964	-	Kenneth Udy
August 16, 1967	-	Lloyd Dackey
August 12, 1968	-	Guy Allard
August 16, 1968	-	Ronald Hill
August 26, 1968	-	Terry Bennett
June 24, 1971	-	Herbert Kandt
August 24, 1971	-	John McEachern

within, or out of the waters of Juan de Fuca Strait * * *."⁵⁴

The Washington State Supreme Court upheld a predecessor statute following the arrest of an unlicensed person who had piloted a British vessel through those waters without a license. State v. Ames, 47 Wash. 328 (1907). The local pilots association, which apparently has a monopoly in the area, has also billed the officers of another foreign vessel known to have operated in the Straits without employing one of their pilots. As far as can be determined, the foreign officers have not objected to the billing on any jurisdictional grounds.⁵⁵

B. The Submerged Lands Cases in General, and Historic-Waters Disputes in Particular, have a Peculiar Foreign-Relations Cast to Them.

From their inception the submerged-lands cases were given a distinct foreign-relations cast. The wartime context of the filing of United States v. California, in late 1945,⁵⁶ assured that. And the Supreme Court's 1965 decision⁵⁷ holding that the boundary provisions of the Convention on the Territorial Sea and the Contiguous Zone⁵⁸ were to be in effect engrafted onto

⁵⁴Revised Code of Washington 88.08.060.

⁵⁵Department of Justice Memorandum, November 28, 1973.

⁵⁶332 U.S. 19 (1947).

⁵⁷381 U.S. 139 (1965).

⁵⁸15 U.S.T. 1606, T.I.A.S. No. 5639, 56 U.N.T.S. 205 (in force Sept. 10, 1964).

the Submerged Lands Act, reaffirmed the condition.⁵⁹ It is this foreign-relations cast that suggests that the Territorial Sea Proclamation may affect the remaining historic-waters claims of the States. We explore it briefly in this section, before taking up our conclusion that the effect of the Proclamation in this respect will be negligible.

From the States' standpoint, though, these cases are nothing more than a division of property (the American Continental Shelf) between the federal government and the States. During the debates in Congress leading to passage of the Submerged Lands Act, officials of the United States Department of State reassured Congress that whatever division of the Continental Shelf was made, it could be done without affecting U.S. foreign relations.⁶⁰ The cases of Texas⁶¹ and Florida,⁶²

⁵⁹It is noteworthy that if one considers the decisions of the Supreme Court together with the reports of its Special Masters which did not result in full decisions, it may be that there have been more adjudications under international law of maritime boundaries in American domestic cases, than in all international tribunals combined. This is especially true when one considers those reports of the Supreme Court's special masters in those cases that did not result in full opinions of the Court. As examples there are the 1974 Report of the Special Master in United States v. Louisiana, No. 9, Original; the 1974 Report of the Special Master in United States v. Florida, No. 52, Original; and substantial portions of the 1980 Report of the Special Master in United States v. California, No. 5, Original.

⁶⁰See testimony of Jack B. Tate and Raymund T. Yingling, Asst. Legal Adviser State Dept., Hearings before the Senate Committee on Interior and Insular Affairs on S.J. Res. 13 and other bills, 83d Cong., 1st Sess., (1953) 1053 [hereinafter cited as 1953 Senate hearings.] This too is the conclusion reached by Mr. Justice Black in his dissent in United States v. California, 381 U.S. 1329, 205-206.

Tate and Yingling testified at length before the Senate Committee concerning the effect of the Submerged Lands Act upon the conduct of foreign affairs by the federal government. 1953 Senate Hearings at 1051-1086. Mr. Tate prefaced his testimony with this statement:

I should like to make it clear at the outset that the Department [of State] is not charged with responsibility concerning the issue of Federal versus State ownership or control.

1953 Senate at 1051.

Under questioning, Mr. Tate said that pursuant to the 1945 Presidential Proclamation (Proclamation No. 2667, 59 Stat. 884), the United States claimed the right of exploration and control of the seabed and subsoil of the Continental Shelf. The significance of the 1945 Proclamation, as his testimony showed, was to make the division of the Continental Shelf strictly a matter between the federal government and the states. Congress could divide the claimed area, which therefore was within the United States, in any manner it desired, as a domestic matter. 1953 Senate Hearings, at 1055.

Reiterating his theme that the State Department had no interest in federal-state problems, Mr. Tate commented:

As far as concerns the matter of the States versus the Federal Government, and the Federal Government against the States, I do not think that is a matter the State Department could pass on.

1953 Senate Hearings at 1056.

The Supreme Court has agreed with the States, noting that the passage of the Submerged Lands Act transformed what had been perceived as a question of the limits of American territorial waters into a simple domestic controversy over the division of the continental shelf. United States v. Louisiana, 363 U.S. 1, 30-36 (1960). The Court there laid heavy emphasis upon the legislative history of the Act in reaching its conclusion, and especially upon the testimony before the Committee on Interior and Insular Affairs, of Jack B. Tate, deputy legal adviser to the Department of State. Id. at 31.

which received nine-mile grants of submerged lands under the Act, demonstrate with clarity that foreign-policy considerations ought not invade these domestic controversies: Nothing terribly untoward has befallen our foreign policy by virtue of these States having boundaries and resource rights six miles beyond the former American territorial sea.

This foreign-relations cast to the cases has produced an unusual degree of deference to the positions of the executive branch in the litigation. While the States have occasionally prevailed on issues tendered to the Court⁶¹, clearly the largest prizes have been taken by the federal government. One has been the Court's rulings on historic bays; another is its decisions on the question of straight baselines. On straight baselines, the Court held in 1965:

The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the states in the territory over which they are sovereign. [Nevertheless we conclude that the choice under the Convention to use the straight-baseline method for determining inland waters claimed against other nations is one that rests with the Federal

⁶¹United States v. Louisiana, 363 U.S. 1 (1960).

⁶²United States v. Florida, 363 U.S. 121 (1960).

⁶³In the California case, for example, the Supreme Court held with the state that the line of "ordinary low water" referred to in the Submerged Lands Act was to be taken as the line of mean lower-low water, and not the line of mean low water. 381 U.S. at 175-176. No California official has yet been able to determine, however, whether that ruling enlarged California's submerged lands holdings to any measurable extent.

Government, and not with the individual States.⁶⁴

In the same case, California had asserted historic-waters claims to Santa Monica and San Pedro Bays. On this point the Court again accorded virtually total deference to the position of the United States:

The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, where there is questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.⁶⁵

These holdings were reaffirmed in the third Louisiana case in 1969.⁶⁶ A protracted account of the cordiality with which the Court has usually greeted the positions of the United States in this litigation is not feasible here, and in any event has been well articulated elsewhere.⁶⁷ But it is useful to examine how

⁶⁴United States v. California, 381 U.S. at 168.

⁶⁵Id. at 175.

⁶⁶394 U.S. 11 at 72-73, 77 (Louisiana Boundary case).

⁶⁷For one, Jonathan Charney, who for a number of years was the government's chief trial lawyer in these cases, wrote a lengthy article in 1974 assailing the Supreme Court's habit of deference to the position of the executive in this litigation. Charney, "Judicial Deference in the Submerged Lands Cases," supra, note 17, 383. See also Note, "A Jurisprudential Problem in the Submerged Lands Cases: International Law in a Domestic Dispute, 90 Yale L.J. 1651 (1981).

the cordiality has affected the Government's formation both of foreign policy, and of litigation posture.

Since 1970, the position of the executive branch in the formulation of American baseline policy for both foreign relations and the submerged-lands litigation has been developed largely by the so-called "Baseline Committee." The evolution of the role of the Committee is best described in the words of former State Department Legal Adviser John R. Stevenson, in a 1972 memorandum recently declassified:

The Committee on the Delimitation of the United States Coastline was formally established by a memorandum dated August 7, 1970, from the Acting Legal Adviser of the Department of State to the Executive Operations Group of the Law of the Sea Task Force. The Committee was established under the task force and consists of members from the Departments of State, Commerce, Justice, Interior and Transportation.

Guidelines for the Committee's operation were set out in an attachment to the August 7 memorandum . . . The purpose of the Committee was to delimit, provisionally, baselines, the territorial sea and the contiguous zone for the entire coastline of the United States. The memorandum establishing the Committee indicated that the charts would contain sufficient caveats to indicate that they were not a final and definitive U.S. position. It further stated that:

It is not intended that the charts resulting from the Committee's work will be circulated throughout the Government even as a provisional U.S. position, but rather will be available for use when current and pressing problems arise.

The original task was completed in late 1970 and, after approval by the members of the LOS Task Force, and notwithstanding the original intent, a full set of the charts was published in April 1971 and has been circulated throughout the government and made available to private individuals and foreign governments.⁶⁸ [Emphasis added.]

In like manner, another original intent of the work of the Baseline Committee has with time been altered. Originally the Committee was to develop positions on the United States baseline for its territorial sea and contiguous zone claims. In recent years, however, it has concentrated more on developing the federal position and strategy in the submerged-lands litigation.⁶⁹ This may have occurred in part because of the representation of the Department of the Interior on the Committee. That Department is charged with managing the resources of the Outer Continental Shelf. Much more than any other branch of the Government, it directly benefits from the loss of submerged lands by the States.

The Court's deference to the federal government has contributed to the Government's assuming some absurdly conservative positions on baselines matters. The most salient example is the question of the drawing of straight baselines, which the Supreme Court made clear in the 1965 California decision was an election to be made by the federal government,

⁶⁸John R. Stevenson to Ambassador McKernan, memorandum, August 30, 1972, declassified July 9, 1984, p. 2.

⁶⁹Letter of Michael W. Reed to the author, 20 May 1982.

not the States. In 1972, at the conclusion of a 13-page study, the State Department's Legal Adviser concluded that straight baselines should be drawn to enclose the inland waters of the Alexander Archipelago.

In light of the fact that the Alexander Archipelago so clearly qualifies for the use of straight baselines, we believe such a system should be adopted and the lines drawn in a manner which generally encloses the straits and other waters of the archipelago. Specifically, the lines should follow the coastlines of the seaward islands but be drawn across the entrances to all straits, channels, etc., running between the islands.

We do not believe the use of such a system will have a negative impact on our law-of-the-sea negotiating position, nor do we believe a continued refusal to use such system is justifiable in light of the fact that it is so clearly appropriate to this situation⁷⁰ [emphasis added.]

Yet for reasons yet to come to light, the Government has still not drawn straight baselines along the Alexander Archipelago, or along any other part of the American coastline for that matter.⁷¹

Another, related example of such conservative positions is the Government's treatment of enclaves or pockets of high seas

⁷⁰John R. Stevenson to Ambassador McKernan, et al., August 30, 1972, p. 12.

⁷¹Interestingly, Mr. Charney, the former chief of the Marine Resources Section of the Justice Department, has written, "the United States has not yet adopted a system of straight baselines on any of its coasts [but] . . . [i]t most certainly will." (Charney, "The Offshore Jurisdiction of the States of the United States and the Provinces of Canada--A Comparison," delivered June 24, 1982, at the Sixteenth Annual Conference of the Law of the Sea Institute, p. 13.)

that are totally surrounded, or nearly so, by territorial waters. This situation can result when a chain of islands lies more than twice the breadth of the territorial sea from the mainland coast. (It will also result from the Government's decision on Kotzebue Sound, if historic-waters status is not decreed by the Court. See Fig. 7.) As early as 1930, the United States proposed to the Conference for the Codification of International Law, held at The Hague, that such "objectionable pockets of high seas be assimilated to the territorial seas when the islands creating these penetrating pockets lay no more than ten miles from each other."⁷² That remained American policy for at least 20 years.⁷³ Yet the Baseline Committee has refused to follow this practice of assimilating such enclaves and cul-de-sacs of putative high seas to the territorial seas, a refusal which, in large measure, precipitated the current proceedings in the Mississippi Sound case⁷⁴ and in United States v. Alaska.⁷⁵

The Government's position on historic-waters claims equally fits this category. Most recently it opposed the

⁷²Report of the Second Commission (Territorial Sea), League of Nations Doc. C. 230, M. 117. 1930. V. (1930); see also Boggs, Delimitation of the Territorial Sea Institute, p. 13.

⁷³Memorandum of the United States in Response to Request of Special Master of June 29, 1949, United States v. California, No. 11, Original, August 12, 1949, p. 19.

⁷⁴United States v. Louisiana (Alabama and Mississippi Boundary case), 470 U.S. 93 (1985).

⁷⁵United States v. Alaska, No. 84, Original.

compelling historic-waters claims made by the States for Mississippi Sound and Vineyard Sound. On these uncommon occasions, though, it lost.⁷⁶

The United States has not sought to disabuse the Court of the notion that these cases ineluctably entail matters of foreign affairs. The Solicitor General's office made the following remarks during oral argument in a recent submerged-lands case:

[I]f California's theory were accepted by this Court it would result in an extension of the territorial sea of the United States and its contiguous zone off the shores of all the United States' coastal domain.⁷⁷

Likewise, this language has become boilerplate in the complaints filed by the government in these cases:

The coastline to be used for determining the respective rights of the United States and Alaska under the Submerged Lands Act is the same coastline employed to determine the territorial sea of the United States in its conduct of foreign affairs. United States v. California, 381 U.S. 139, 165 (1965). By its conduct and claims, the State of Alaska casts uncertainty on a position of the United States as to the location of its territorial seas and threatens to embarrass the United States in the conduct of foreign affairs and thereby cause great and irreparable injury to the United States . . .⁷⁸

⁷⁶Alabama and Mississippi Boundary Case, *supra*, 490 U.S. and Massachusetts Boundary Case, 475 U.S. 89, 91 (1986).

⁷⁷Transcript of Oral Argument, United States v. California, No. 5 Original, March 17, 1980, pp. 41-42.

⁷⁸Complaint, United States v. Alaska, No. 84 Original, pp. 5-6.

Yet whatever construction of the Submerged Lands Act is urged by a State, and whatever construction is adopted by the Court, the Government remains unrestrained, as a simple matter of separation of powers, in the conduct of its foreign relations. Cf. Vermilya-Brown Co. v. Campbell, 335 U.S. 377 (1948). It may, without consent from either the States or the Court, adopt a thirteen-mile territorial sea, straight or erratic baselines, or undulating halibut zones. If an historic-waters claim is proved by the State, it may decline to make the claim in the international arena.

Thus the domestic submerged-lands cases (of which the historic-waters cases are a part) have been marked by professed anxieties that the decisions will affect our foreign affairs. We now consider whether the foreign-affairs decision of the Territorial Sea Proclamation will affect the remaining domestic historic-waters cases.

C. The Territorial Sea Proclamation Will Have An Inappreciable Effect On Historic-Waters Claims for the Channels of Hawaii and Kotzebue Sound, but may Enhance the Claim for the Strait of Juan de Fuca.

We have concluded in Part I that, questions of historic waters aside, the Proclamation will have no effect on the seaward boundaries of the American coastal States. (That is, unless one considers as an effect of the Proclamation the to-date ineffectual clamor for Congress to extend the States' seaward boundaries to the new limit of the territorial sea.) As for the

States' historic-waters claims, all but three have been adjudicated by the Supreme Court in decisions handed down between 1965 and 1986. As to the three unadjudicated claims, the Proclamation will have a scarcely appreciable effect. That effect will be an impaired ability of the federal government to plead that the States' claims meddle in international affairs.

That plea has, as we have seen, been used to great effect in the submerged-lands cases generally and, at least until recently, especially in those presenting historic-waters claims. With the territorial sea extended to twelve miles, the international effect of declaring an American waterbody to constitute historic inland waters would presumably, it would appear at first glance, be diminished if not altogether abnegated. That may have been the case with some of the Louisiana coastal features rejected as historic waters by the Court in 1975, but as we discuss below, it can't be said of the three unadjudicated waters. What is more, their case is hurt by negotiations presently occurring between the United States and the Soviet Union. In those negotiations the parties are seeking to list all historic-waters claims the two countries recognize as valid, and to proclaim that all other claims are not recognized. The list submitted by the American negotiators does not include the three unadjudicated waters.

Had some of the Louisiana coastal indentations been ruled inland waters on historic grounds, a twelve-mile

territorial sea measured from them would have been little different from the twelve-mile territorial sea that is measured from the "normal baseline"--that is, the low-water mark along the coast--in the region. That is so because of the presence of small mud lumps and other features that serve as base points for delimiting the outer limit of the territorial sea. And so, were these waterbodies unadjudicated at present, one might well conclude that the Proclamation would aid Louisiana's case. For the Government could scarcely argue with a straight countenance that the State's claims could "embarrass" or otherwise injure the United States in its foreign relations.

(To be sure, even if the outer limit of the twelve-mile territorial sea is the same whether Ascension Bay, Louisiana, is historic inland waters or not, the status of that waterbody is different internationally. That is, if one treats Ascension Bay as not constituting historic inland waters, then it is territorial sea, and the right of innocent passage attaches. If on the other hand it is treated as inland waters, say on historic grounds, then no right of innocent passage is present in those waters. But we have it on excellent authority that this distinction is of no practical consequence in our foreign relations. The principal motivation for the United States extending its territorial sea--once it thought transit-passage rights through international straits were secured for its navy--was to keep Soviet eavesdropping vessels and submarines at bay.

If that pun's excused, the fact is that the activities of Soviet eavesdropping vessels off our coasts cannot be considered innocent passage. And so, it was deemed useful to require them to park twelve miles away, instead of three.⁷⁹)

The same point could be made about Santa Monica Bay, California, Cook Inlet, Alaska, and perhaps even Florida Bay. It can of course be made about the Strait of Juan de Fuca. But it cannot be made about Kotzebue Sound or the Hawaiian channel waters.

The geographical situation of Kotzebue Sound is such that, if it is inland waters (whether on historic or other grounds), the territorial sea limit is far outside the Sound. If the Sound is not inland waters, as the Government contends, the territorial sea boundary is in a radically different location--it penetrates deep within the Sound, thus presumably allowing Soviet vessels of whatever purpose to hover within this embayment.

(Ironically, it is only within the past several months that the Government disclaimed the inland-waters status of the Sound, and so it is not as if the United States had long maintained that these waters were high seas. Ironical too is the fact that by disclaiming the inland-water status for the Sound the United States, in this one geographic area, is defeating the principal purpose for the Territorial Sea Proclamation. It is permitting

⁷⁹W. Schachte, The History of the Territorial Sea From a National Security Perspective, 1 Terr. Sea J. (1990), 143, 166-167.

foreign military vessels to navigate far closer to the coast of Kotzebue Sound than they had ever before been permitted.)

Similarly, if the Hawaiian channel waters were to be enclosed as inland waters, vast areas that had previously been high seas would be closed to international navigation. The extension of the territorial sea to twelve miles removes high-seas corridors from some of the channels, but others retain substantial high-seas areas, most notably the broad expanse of water lying between the Islands of Oahu and Maui.

Nevertheless, in both the case of Kotzebue Sound and that of the Hawaiian waters, the Proclamation removes some of the international "aspect." In the case of Kotzebue Sound, if we put aside the fact that it had been treated as inland waters until very recently, and think instead that it has all along been denied historic-waters status, this point is easier to apprehend. Under the old three-mile limit, most of the Sound would have been high seas, whereas with the 12-mile limit a relatively small area of high seas remains. To argue for treating all of the Sound as inland waters thus has a smaller international ramification than it would have under the three-mile regime. So too with the Hawaiian waters. To treat them as inland waters now would enclose far less area of high sea than if the United States still adhered to the three-mile limit.

In the case of Juan de Fuca Strait, the Proclamation should cinch the case for historic-waters status. No area within

the American portion of the Strait lies more than twelve miles from the baseline, and so all of the Strait qualifies at least as territorial waters. For the Soviet submarine skipper, it makes hardly any difference whether the Strait is territorial or inland waters; he can't legally do his business either way. Of course, in the case of Juan de Fuca Strait the biggest factor militating in favor of historic-waters status is not the Proclamation, but the Government's inclination to treat it as historic waters.

Overshadowing all of these considerations, though, are the negotiations alluded to earlier between the Soviets and the Americans, which are aimed in part at producing a comprehensive list of the historic waters recognized by both countries. By implication or by direct statement, all other waterbodies should be denied historic-waters status, in the view of the two countries. The American negotiators have informed their Soviet counterparts that the United States claims Mississippi Sound as historic inland waters (although it took the Supreme Court to inform the Americans of the claim). And they have informed the Soviets of the American claims to Delaware Bay, Chesapeake Bay, and Long Island Sound--long-maintained but, under the regime of juridical bays, now essentially meaningless claims. Unsurprisingly, they have not tendered the names of Kotzebue Sound or the Hawaiian channel waters. (Nor, to our knowledge, have they proffered the Strait of Juan de Fuca for the list. That may not be surprising, however. If the Americans are trying

to keep the list short, and to urge the Soviets to abandon their claim to St. Peter the Great Bay, for example, it would be sound bargaining form to say, "Look, we have a perfectly good claim to the Juan de Fuca Strait, but we're not trying to be greedy and so we don't claim it." It would also be a fairly safe position to take. Since the Strait would be territorial waters in its entirety if it is not accorded historic status, the Soviets would have to keep their navy vessels twelve miles out to sea.)

How do these considerations play out in a practical sense? Surely the litigators for the United States know of these negotiations with the Soviets, and, perhaps as surely, they have had something to say about them. If each supposition is so, and if the prospects for some accord with the Soviets are good, then the litigators, being the cunning and careful sorts they are, would seek to forestall the day when they are required to present the case against the inland-water status of Kotzebue Sound, the Hawaiian channels, and perhaps even Juan de Fuca Strait. For if they could cross the bar of the courtroom, bearing as evidence an historic treaty or protocol with the Soviets that contained the definitive catalogue of historic waters, their chances against the States would be much enhanced. For what Supreme Court justice would be so indifferent to the astounding new friendship with the Soviets as to vote to find an omission or two in the list? As for the Proclamation, its effect would pale, nay evanesce, by comparison.

III

DOES THE PROCLAMATION AFFECT THE COASTAL STATES' EXTRA-TERRITORIAL POWERS IN THE ZONE THAT LIES BETWEEN THEIR SEAWARD BOUNDARIES AND THE NEW OUTER LIMIT OF THE TERRITORIAL SEA?

Whatever may ultimately prove to be the Proclamation's effect on the States' seaward boundaries, there will remain at least for the short term substantial areas, seaward of those boundaries, of American territorial sea. In the cases of Texas and Florida (on Florida's Gulf Coast), these areas are the three-mile-wide zone lying from nine to twelve miles offshore. In the case of all other coastal States, as well as the case of the Atlantic coast of Florida, this zone is a band nine miles in width, lying from three to twelve miles offshore. Some shorthand expression is needed for this cumbersome-to-describe area and, in the absence of any conventionally adopted term we will refer to it, in lower case, as the States' "unannexed zone." What if anything is the effect of the Proclamation on the States' extra-territorial powers, both their police powers and their separate, congressionally granted powers, in this zone? The following discussion approaches this question by addressing first a predicate question: What, prior to the 1988 Proclamation, was the scope of the States' extra-territorial powers in the sea?

A. The Coastal States' Extra-Territorial Powers in the Sea, As The Stood Before the Proclamation.

The Tenth Amendment to the United States Constitution reserves to the States ("or to the people") all "powers not

delegated to the United States by the Constitution, nor prohibited by it to the States"⁸⁰ This reservation (it was the national government that was granted powers) comprises three principal powers, the taxing and eminent-domain powers (which are shared with the national government) and the police power (which is not).⁸¹ (In extra-territorial cases, the police power is most often the one that has been exercised, the taxing power next most often.)

These powers of the States are not, as is well known, unrestrained. The Commerce Clause, the Privileges and Immunities Clause, the Supremacy Clause and the Fourteenth Amendment all circumscribe them.⁸² The principal limitation on a State's

⁸⁰"The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system" Fry v. United States, 421 U.S. 542, 547 n. 7 (1975). Cf. Justice Stone's peremptory dismissal of the Amendment as a limit on congressional power: "The amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941).

⁸¹"It is a truism that Congress does not possess a "police power," although "in the exercise of its control over interstate commerce, the means employed by Congress may have the quality of police regulations." Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., U.S., 299 U.S. 334, 346-47 (1936).

⁸²United States v. California, 332 U.S. 19 (1947). This is a brief history and is summarized in numerous places. See Stockwell, "The Boundaries of the State of Louisiana," 42 La.L.Rev. 1043-1077 (1982); Murphy, "Title to Land Seaward of the Historic Low-Water Line," New England L.Rev. 109-37 (1981); Ball, "Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf," 12 Envtl. L. 623-78 (1982).

exercise of its police power extra-territorially is the Supremacy Clause. The principal limitations on its taxation power are the Due Process and Commerce Clauses. The principal limitation on this exercise of its eminent-domain power extra-territorially may be paucity of effort.

One commentator has noted that "Beyond the ocean areas granted to the coastal states by the Submerged Lands Act, the states do not have jurisdiction based on sovereignty or sovereign rights."⁸³ Whether this cajoling assertion is true or not, states have enjoyed extra-territorial powers as a matter of long-standing constitutional law, and as well by dint of conferral from Congress.

1. Fundamental State Powers (i.e., those not
Conferred by Congress): The Police, Eminent-
Domain, and Taxation Powers

The rules governing a State's extra-territorial exercise of its police power, particularly in adjacent sea areas, are well known and need be set out only in summary fashion. The "federal government has paramount authority over the seas and submerged lands" beyond "the traditional 3-mile limit," it is true, but its authority there is not exclusive.⁸⁴ In matters

⁸³Charney, "Delineation of Ocean Boundaries," supra note at 501.

⁸⁴State v. Bundrant, 546 P.2d 530, 544 (Alaska, 1976), citing Toomer v. Witsell, 334 U.S. 385 (1948); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478-83 (1981).

affecting its interests a state may exercise extra-territorial jurisdiction where there is no conflict with federal or international law.⁸⁵ As an example, "[I]n matters affecting its legitimate interests a state may regulate the conduct of its citizens upon the high seas where no conflict with federal law is presented."⁸⁶ Too, a state may regulate the extra-territorial activities of noncitizens who have sufficient links or "nexi" with the State with respect to the activity, again assuming no conflict with federal law.⁸⁷

Where a criminal act occurs within a state (or, perhaps, within a state's boundaries as defined by that State), the state's criminal laws may apply.⁸⁸ It is said that a State

⁸⁵People v. Weeren, 26 Cal.3d 654 (1980) 667; People v. Stralla, 14 Cal.2d 617, 619 (1939).

⁸⁶Weeren, 26 Cal.3d at 666-67 citing Skiriotes v. Florida, 313 U.S. 69, 75 (1941).

⁸⁷Weeren, id. at 669; Bundrant, 546 P.2d at 555-56. The Bundrant court was willing to broaden the last category to include possibly all U.S. nationals, id. at 555. Since this case preceded passage of the Fishery Conservation and Management Act of 1976, it is not clear how much of Bundrant's holding remains viable. See text infra, at notes 91, 108, 110.

⁸⁸Weeren, 26 Cal.3d at 669; see also United States v. Louisiana, 339 U.S. at 705 (noting that the Court does not decide the "power of a state to extend, define, or establish its external territorial limits or on the consequences of any such extension vis a vis persons other than the United States.").

has jurisdiction over crimes "having a practical effect on the state."⁸⁹

Fisheries regulation provides the classic model for extra-territorial exercise of the police power. "[A] state's interests in preserving nearby fisheries is sufficiently strong to permit such extra-territorial enforcement of its laws enacted for that purpose," when these laws are not in conflict with federal or international law.⁹⁰ A "state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignty, if such an exercise is based on the conservation principles inherent in their migratory characteristics and not based on artificial boundaries or political circumstances, again, so long as there is no conflict with an act of Congress."⁹¹ As a general matter, courts are reluctant to find state legislation conflicting with an act of Congress. In fact the Supreme Court has referred to this

⁸⁹People v. Corsino, 91 Misc. 2d 46, 397 N.Y.S.2d 342 (N.Y. Crim.Ct. 1977) (state court jurisdiction upheld in an incident involving assault committed on an international flight terminating in New York).

⁹⁰Weeren, 26 Cal. 3d at 666, citing Skiriotes, 313 U.S. at 75.

⁹¹Bundrant, 546 P.2d at 554; see note 87 supra on Bundrant's viability following the passage of FCMA. While a state may extend its jurisdiction, it may not extend its territorial, i.e. boundaries without Congressional approval. United States v. Louisiana, 363 U.S. 1 (1960).

reluctance as presumption that "Congress did not intend to displace state law."⁹²

The rules governing a State's extra-territorial exercise of its taxation power are less well known. Chief Justice Marshall's epigram, "the power to tax is the power to destroy," may be no less quotable today than it was in 1819.⁹³ Still, the limits on a State's power to tax extra-territorially are if anything treated more liberally than its power to regulate. "The general rule . . . is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption."⁹⁴

The rules governing a State's power to tax things or activities beyond its boundaries can be gleaned from the cases of taxation of multi-state corporations. In Complete Auto Transit Inc. v. Brady,⁹⁵ the Supreme Court overruled a series of cases

⁹²Maryland v. Louisiana, 451 U.S. 725, 746 (1981). The field of federal preemption of a State's extra-territorial police powers is one worthy of its own overlong treatment, even though the general field of federal preemption has been prolifically written about. See, e.g., Powell, "Current Conflicts Between the Commerce Clause and State Police Power, 1922-1927," 12 Minn.L.Rev. 321 (1928) Note, "Pre-emption as a Preferential Ground: A New Canon of Construction," 12 Stan.L.Rev. 208 (1959). For a discussion of preemption in the environmental field generally, see Note, "State Environmental Protection and the Commerce Clause," 87 Harv.L.Rev.1762, 1769-72 (1974).

⁹³McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

⁹⁴Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534, 537 (1951).

⁹⁵430 U.S. 274 (1977).

which had held that any state tax on the "privilege of doing business" imposed on a multi-state business was unconstitutional. The Court reasons that commerce-clause analysis should concentrate not on the label of a tax, but rather on its real effect on interstate commerce. The Court held that a state tax does not offend the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the State. Following this analysis, the Court in 1981 struck down Louisiana's first-use tax on natural gas piped through the State from the Outer Continental Shelf. The Court held that the tax "unquestionably discriminate[d] against interstate commerce in favor of local interests as the necessary result of [an intricate scheme of] tax credits and [exemptions]."⁹⁶

The same year the Court upheld Montana's severance tax on coal in Commonwealth Edison Company v. Montana.⁹⁷ The Montana tax clearly met the first two prongs of the Complete Auto Transit test, since the coal was located within Montana, and no other State could impose a severance tax on it. The out-of-state utilities challenging the tax argued that it discriminated against interstate commerce because 90% of Montana coal is shipped to other States. The Court rejected this argument

⁹⁶Maryland v. Louisiana, 451 U.S. 725, 756 (1981).

⁹⁷453 U.S. 609 (1981).

because the tax was computed at the same rate (30%) irrespective of the coal's designation. As for the fourth prong of the Complete Auto Transit case, the Court held that the measure of the tax need only be reasonably related to the extent of contact with the taxing State. Since the coal companies had to enter Montana in order to excavate coal from Montana soil, both the subject of the tax and those who pay it had significant contacts with the levying State.⁹⁸

An effort by a State to tax a thing or activity beyond its boundaries, even in the unannexed zone, will be characterized as an attempt to tax an aspect of interstate commerce. And so it is most useful to look to these taxing cases for guidance on the possible effect of the Territorial Sea Proclamation on the power of a State to tax in the zone. Clearly the degree of "connection, "or "contact" or "nexus" between the taxing State and the commerce being taxed is the fundamental measure of whether the tax violates the Commerce (and Due Process, for that matter) Clauses. Thus, to the extent that a State can point to a substantial connection with a particular, taxed aspect of interstate commerce, it can establish its tax as constitutional.

The "minimum contacts" rule is well illustrated by the courts' treatment of sales and use taxes. A state sales tax is most often measured by a percentage of the gross receipts collected from sales made within the taxing State. The fact that

⁹⁸453 U.S. at 626.

a product has travelled or will travel in interstate commerce does not preclude a tax being levied at the time of its sale.⁹⁹ A state use tax is usually measured by a percentage of the gross receipts from sales made outside of the taxing State, but is imposed on the consumption or use of the purchased goods within the taxing State. A use tax is not unconstitutional merely because it is imposed on goods imported from other States.¹⁰⁰

The Outer Continental Shelf Lands Act, discussed later in this Part, forbids any State from asserting extra-territorial taxing jurisdiction over activities on the Outer Continental Shelf. It is probably preferable to quote what it forbids. After extending the civil and criminal laws of each adjacent State to the OCS, the OCSLA adds, "State taxation laws shall not apply to the outer Continental Shelf." 43 U.S.C. sec. 1333(a)(2)(A).

In Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 186 (1988), the Supreme Court held that this provision did not preclude Iowa from including, in computing corporate income tax on Shell, which does business in Iowa, income earned from the sale of oil and gas extracted from the OCS. As the State computed it, Shell's total adjusted gross income was to be

⁹⁹Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869); Eastern Air Transport, Inc. v. South Carolina Commission, 285 U.S., 147 (1932).

¹⁰⁰Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939).

multiplied by a factor that was the ratio of Shell's Iowa gross sales to its total gross sales. Shell sought to have all income derived from the sale of OCS-produced products deducted from its adjusted gross income.

This is, without undue modesty, a preciously superficial treatment of the subject of a State's power to tax extra-territorial things or doings. But not nearly so superficial as the treatment of the next subject.

The rules governing a State's extra-territorial exercise of its eminent-domain power are the least well known. That may be so because States rarely attempt to condemn property outside their boundaries. We have been unable to find a case of Hawaii seeking to acquire by eminent domain lands in Nebraska, for example. True, there is much written about the power of a municipality or political subdivision to condemn land beyond its boundaries. But all of these discussions concern property within the State, and a municipality's or political subdivision's eminent-domain power is simply whatever the State has conferred on it. And so, these discussions are not germane. The rule is, no doubt then, one of absolute limitation according to state

boundaries.¹⁰¹ California cannot condemn property in Nevada, nor vice-versa.

2. State Powers Derived from Acts of Congress

A number of federal statutes confer on the coastal States rights or powers that may be exercised with respect to sea areas beyond the boundaries of the States. The Coastal Zone Management Act is perhaps the best known of these statutes. And it is the subject of the lively debate between Prof. Douglas Kmiec and California Attorney General John Saurenman regarding the effect on the statute of the Territorial Sea Proclamation. Kmiec, then with the Justice Department's Office of Legal Counsel, wrote an opinion for the State Department in October of 1988 concluding that the proposed Proclamation would not have the effect of extending state "consistency" authority under the CZMA from the three-mile limit to the twelve-mile limit. Saurenman then dashed off an eighty-page opinion of his own that it would. (Kmiec's opinion is dated October 4, 1988; Saurenman's is March

¹⁰¹Cf. Crosby v. Hanover, 36 N.H. 404 (1858) (delegation by New Hampshire legislature of authority to condemn land for a bridge, one end of which was in Vermont); Southern Ill. & Mo. Bridge Co. v. Stone et al., 174 Mo. 1, 73 S.W. 453 (1903); Saunders v. Bluefield W.W. & Imp. Co., 58 Fed. 133 (W.D. Virginia 1893); St. Louis etc. R.R. Co. v. S.W. Tel. & Tel. Co., 121 Fed 276 (8th Cir. 1903); Evansville Traction Co. v. Henderson Bridge Co., 134 Fed. 973 (Kentucky 1904).

It has long been known that, absent congressional authorization, the States do not have the power to condemn federally owned land lying within their boundaries. E.G., Utah Power & Light Co. v. United States, 230 Fed. 328 (8th Cir. 1915).

15, 1989. The two are conveniently reprinted together in Volume I, Number 1, of the Territorial Sea Journal (1990).)

Even typeset, the two conflicting legal analyses require 79 pages in the issue of the Territorial Sea Journal. When read separately, each is inexorably persuasive. It is not possible to replicate that debate in this paper, nor to endeavor an analysis of the other potentially affected federal statutes in anywhere near the depth which Kmiec and Saurenman plumbed. It is at best possible to survey only a small sample of the congressional acts that confer some extra-territorial authority on the coastal States, to say which is like the CZMA and which is different, and to do some superficial handicapping. Given the mass of scholarship that has been given the CZMA, it is most convenient to begin with it.

The Coastal Zone Management Act. The CZMA was enacted in 1972 to provide federal grants to the States for two fundamental purposes: (1) preserving and developing the Nation's coastal zone, and (2) encouraging and assisting the States in exercising their coastal zone responsibilities through the development of management programs.¹⁰² Under the CZMA, the Secretary of Commerce may make grants to States for the development and implementation of management programs.¹⁰³

¹⁰²16 U.S.C. sec 1452.

¹⁰³16 U.S.C. § 1454-1464.

The States under the Act are to establish management programs, subject to the approval of the Secretary, within the area of the "coastal zone," which is defined as:

the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.¹⁰⁴

The issue that lay latent when the Act was originally passed in 1972 is plain: Did Congress intend by use of the expression "territorial sea" an ambulatory coastal zone, one that would expand seaward if the territorial sea were extended, or even contract in such a wholly hypothetical situation? Both Kmiec and Saurenman pore over and parse the precedents and the legislative history and, in the fine tradition of sea-law advocates since Grotius and Selden, reach antipodal conclusions. It will not be theirs to live to see whose view comes to hold sway, however, because Congress mooted the whole question when it reauthorized the CZMA last October. Now the coastal zone extends "to the

¹⁰⁴16 U.S.C. sec 1453 (1) (emphasis added).

outer limit of State title and ownership under the Submerged Lands Act."¹⁰⁵ At the same time, however, Congress greatly enhanced the power of the States to find a federal activity (typically on the OCS) not "consistent" with the State's coastal management program (and thereby effectively veto it), by providing that the power extends to any federal activity that "affects" the coastal zone; the CZMA formerly applied only to activities "directly" affecting the coastal zone, and the provision was strictly construed against the States in *Secretary of the Interior v. California* 464 U.S. 312 (1984).¹⁰⁶

The Fishery Conservation and Management Act of 1976. *Skiriotes v. Florida*, 313 U.S. 69 at 75 (1941), held that a State's interest in preserving nearby fisheries is sufficiently strong to permit the extra-territorial enforcement of laws it enacts for their conservation, absent a conflict with an act of Congress. Congress in the 1976 Fishery Conservation and Management Act at once set up a number of such conflicts, and conferred on the coastal States certain specific powers to regulate fisheries seaward of their boundaries.

As originally enacted, the FCMA established a "fisheries conservation zone," which was defined in former 16

¹⁰⁵ This provision is contained in Title VI of the Budget Reconciliation Act, P.L. 101-508.

¹⁰⁶ 464 U.S. 312 (1984). See also Note, "Secretary of the Interior v. California and the Federal 'Consistency Provision' of the Coastal Zone Management Act, Like it or Not?" 7 J. of Energy L. and Policy 337-359 (1986).

U.S.C. sec 1811 (8) as an area "contiguous to the territorial sea of the United States The inner boundary of the fisheries conservation zone is a line coterminous with the seaward boundary of each of the coastal States," and the zone then extended to a distance of 200 miles from the baseline. Following President Reagan's Exclusive Economic Zone Proclamation on March 10, 1983, the FCMA was amended to do away with the now-superfluous notion of a fisheries conservation zone, and to replace it with an EEZ. In new section 1811 (6) the exclusive economic zone is defined to mean the zone meant by President Reagan in his 1983 Proclamation. Its inner boundary is "a line coterminous with the seaward boundary of each of the coastal States."

The legislative history of the FCMA makes plain that this reference was not the result of confusion with the territorial sea outer limit, but was an intentional selection instead, as the inner line of the EEZ, of the seaward boundaries of the lands restored to the States by the Submerged Lands Act. (All of that is discussed in Part I.) The purpose for this choice was that, if the United States changed its claim of territorial waters from three to twelve miles, as many then expected, the boundaries of the fisheries conservation zone (later the EEZ) could not be argued to have shifted. See A Legislative History of the Fishery Conservation and Management Act of 1976, Senate Committee on Commerce & Nat'l Ocean Policy

Study, 94th Cong., 2d Sess. (Gov't Printing Office 73-982) (1976), p. 678, 1051, 1101.

The FCMA requires that the federal government take account of the fishery management programs of the coastal States in constructing the federal fishery management plans under the Act, where the state programs are "consistent with the national standards" and with the Act itself.¹⁰⁷ The Alaska Court of Appeals has held that where both federal and state management programs for a particular fishery are substantially similar, a State's powers to enforce its regulations extra-territorially, as defined in Skiriotes, are not preempted.¹⁰⁸

The FCMA circumscribes state enforcement authority in 16 U.S.C. § 1856(a)(3) by providing that, with important geographic exceptions, a State may not regulate any fishing vessel outside its boundaries unless the vessel is registered under the laws of that State.¹⁰⁹ Courts have interpreted this

¹⁰⁷Sec. 1853 (5). Section 1861(a) authorizes the Secretary of the Interior and the secretary of the department in which the Coast Guard operates to deputize personnel and utilize the equipment and facilities of state agencies to implement to provisions of the Act.

¹⁰⁸State v. Painter, 695 P.3d 241 (Alaska App. 1985).

¹⁰⁹People v. Weeren, 26 Cal.3d at 667-69 (upholding extra-territorial applicability of California fishing regulations to vessels registered in the state.) The court wrote in Weeren, that "section 1856(a), fairly read, is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are regulated by it and operated from ports under its authority."

provision as permitting state regulation of persons who have applied for fishing and vessel licenses¹¹⁰ and who process their catch within the State.¹¹¹

The geographic exceptions to this limit on state extra-territorial authority are found in section 1856 (a)(2). They were intended to remedy the bizarre situation where, because of the presence of islands lying more than six miles off a coast, small pockets or "enclaves" of sea areas existed, areas that, being more than three miles from the mainland or another island, were not within the State's boundaries, but were nonetheless wholly surrounded by State waters. Nantucket Sound and the area of the Alexander Archipelago in southeast Alaska are two such areas, and these are specifically called out in subsections (2)(B) and (C). But the verbal formulation Congress chose to describe the situation in generic terms, in subsection (2)(A) is, in light of the Proclamation, unfortunate. It provides that the jurisdiction and authority of a State shall extend "to any pocket of waters that is adjacent to the State and totally enclosed by

Id., 669. See also Bundrant, 546 P.2d 530; State v. Sieminski, 556 P.2d 929 (Alaska 1976) (upholding extra-territorial application of state crab fishing regulations); F/V American Eagle v. Alaska, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130. See also Ball, "Good Old American Permits," supra note 82, at 633 n.26; MacRae, "The Fishery Conservation and Management Act: The States' Role in Domestic and International Fishery Management," 88 Dick.L.Rev. 306-25 (1984).

¹¹⁰Sieminski, 556 P.2d at 933 (resident license); Bundrant, 546 P.2d 530 (non-resident licenses).

¹¹¹Sieminski, 556 P.2d at 933; Bundrant, 546 P.2d at 540-41.

lines delimiting the territorial sea of the United States. . . ."

We have seen from the Legislative History of the FCMA that Congress seemed sedulous in saying "seaward boundaries of the coastal States" when it meant that, and "territorial sea" when it meant that.¹¹² And so we must take it that Congress meant what it said here, and had fully in mind that the territorial sea boundary might be extended to twelve miles. But the result is that the pockets or enclaves on the northern coast of Alaska, in Stefansson Sound, may no longer fit this definition. For these pockets, while still (in the view of the federal government, though not of the State) lying outside State boundaries and hence "adjacent" to the State, might not any longer be said to be "totally enclosed by lines delimiting the territorial sea of the United States." On the other hand, perhaps the entire unannexed zone is picked up by these words, if they are to be taken literally.

Gambling. 18 U.S.C. sec 1082 (a), on the statute books since 1949, provides that it shall be unlawful for an American citizen to operate or own a gambling ship, or deal cards aboard one for that matter, "if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the

¹¹²On the other hand we may examine the definition of "Continental Shelf" in section 1802 (3). It is there defined to mean "the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States [extending to the 200-mile limit or the limit of exploitability]." Why did Congress not here employ the expression "seaward boundaries of the coastal States"?

jurisdiction of the United States, and is not within the jurisdiction of any State." Does this verbal formulation lend itself to a reading that a Taiwanese gambling vessel lying six miles offshore California is beyond the reach of the statute? It is certainly "not within the jurisdiction of any State." And it is not "within the high seas" either. Then federal jurisdiction can be predicated only on its being "otherwise under or within the jurisdiction of the United States." Is it, simply because it is within the territorial sea? To answer yes would--given this is the criminal context--raise considerable due-process questions. And so maybe not. And if a court concluded not, a State might in a second case be held to have "jurisdiction" within the statute's meaning, if the Skiriotes test were met.¹¹³

The Outer Continental Shelf Lands Act.¹¹⁴ The question here is whether the inner limit of the Outer Continental Shelf has leaped seaward because of the Proclamation. 43 U.S.C. sec. 1331 (a) provides that the expression "outer Continental Shelf" means "all submerged lands lying seaward and outside of the area of lands [confirmed to the States in the Submerged Lands Act]."

¹¹³See R. Faiss and A. Cabot, "Gaming on the High Seas," 8 N.Y.L.Sch.J. of Int'l & Comp. L. 105, 110-119 (1986).

¹¹⁴43 U.S.C. §1333(a)(2). The text of OCSLA can be found at 43 U.S.C. §§1331-56, 1801-66 (1982 & Supp. IV 1986). See also Note, "State Court Jurisdiction Under the Outer Continental Shelf Lands Act," 28 Loy. L. Rev. 343-359 (1982); Note, "Jurisdiction Within the Meaning of the Outer Continental Shelf Lands Act," 5 Geo. Mason U.L. Rev. 385-407 (1982); Note, "The Outer Continental Shelf Lands Act: Vesting State Courts With Concurrent Jurisdiction," 6 Maritime Law. 288-296 (1980).

We have peremptorily concluded, in Part I, that the seaward boundary of the lands confirmed to the States in the Submerged Lands Act is unaffected by the Proclamation. So then must be the inner boundary of the Outer Continental Shelf, if tergiversation be avoided.

In two other, more ethereal respects, State influence over the Outer Continental Shelf has probably again been unaffected by the Proclamation. Those respects are the applicabilities of state law to claims arising on the OCS, and the authority of state courts to hear those claims. Section 1333(a)(2)(A) of the Act provides that "To the extent that they are applicable and not inconsistent with this [federal law] . . . the civil and criminal laws of each adjacent State. . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf. . . ." ¹¹⁵ Actually, two issues of state power are presented: In what cases is state law the rule of decision, and in what court is the claim to be brought?

Federal courts have recognized state law as the rule of decision under OCSLA where the state law is not inconsistent with federal law. In the 1969 Supreme Court decision in Rodrigue v.

¹¹⁵§1333(a)(2)(A). See §1333(a)(3), stating that "The provisions of this section for the adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom."

Aetna Casualty Co. in which plaintiffs were injured on a drilling rig off the Louisiana coast, Louisiana state law (not federal maritime law) was held to apply on artificial federal islands beyond the three mile territorial limit where not inconsistent with federal law.¹¹⁶ (Artificial islands are not deemed part of the land territory of the United States.¹¹⁷)

Federal and state courts have concurrent jurisdiction over certain offshore claims. The Supreme Court ruled in its 1981 decision in Gulf Offshore Corp. v. Mobil Oil Corp. that federal courts do not have exclusive jurisdiction over personal injury and indemnity claims arising under OCSLA as amended, and claimants may bring actions in state or federal courts.¹¹⁸ But state courts do not have concurrent jurisdiction everywhere under OCSLA.¹¹⁹ For state courts to exercise jurisdiction, state law

¹¹⁶395 U.S. 352 (1969).

¹¹⁷United States v. California, 447 U.S. 1, (1980).

¹¹⁸453 U.S. 473, 483-84 (1981).

¹¹⁹The federal courts have also found exclusive federal jurisdiction in some cases: Gravois v. Travelers Indemnity Co., 173 So.2d 550 (La. 1965) (court found no concurrent state court jurisdiction under OCSLA in case alleging negligence in death of high seas sulphur mine worker); Fluor Ocean Services, Inc. v. Rucker Co., 341 F.Supp. 757, 760 (E.D. La. 1972) (court found exclusive federal jurisdiction under OCSLA over contract case involving use of salvage equipment on continental shelf, where controversy was "indirectly connected with operations on the Outer Continental Shelf"); Pool v. Kemper Insurance Group, 386 So.2d 1006 (La. 1980) (finding that where a federal court has exclusive and original jurisdiction under OCSLA, all issues arising out of an OCSLA-based claim would be heard in the same (federal) court.)

must be compatible with existing federal law,¹²⁰ the subject must not have been preempted,¹²¹ and the controversies at issue may need to be directly connected to resource development under OCSLA.¹²²

The Clean Water Act. This statute, enacted to restore and maintain the chemical and ecological integrity of the nation's waters, established two regulatory programs to that end. Each can be taken over by the States.

The section 402 program, regulating the discharge of "pollutants" into "navigable waters," may be assumed by any State pursuant to the terms of 33 U.S.C. 1342 (b). The second program, section 404 of the Public Law version of the Act, regulates the discharge of "dredged or fill material" into "navigable waters." While the section 402 program is committed to the Environmental Protection Agency in the first instance, the section 404 program is entrusted to the Army Corps of Engineers (which for 91 years has administered the program established by section 10 of the Rivers and Harbors Act of 1899) unless, again, a State meets the

¹²⁰Gulf Offshore Co., 453 U.S.480 ff.

¹²¹Pool, 386 So.2d 1006 (3d Cir. 1980).

¹²²Fluor Ocean Services, 341 F.Supp. at 760 (E.D. La. 1972), finding original jurisdiction in the federal courts over controversies indirectly connected to resource development operations on the Outer Continental Shelf, but failing to indicate whether the federal courts have exclusive or concurrent jurisdiction with the states. This point was noted in Pool, 386 So.2d 1006. See also Gaudet, "The Application of Louisiana's Strict Liability Law on the Outer Continental Shelf: A Quandary for Federal Courts," 28 Loy.L.Rev. 101-128 (1982).

criteria for taking over the program. Those criteria are set forth in 33 U.S.C. section 1344 (g). While numerous States have taken over administration of the section 402 or "National Pollutant Discharge Elimination System," only two States have ever availed themselves of the opportunity to take over the section 404 program.

In section 1362 (7) of Title 33, the expression "navigable waters" is defined to mean "the waters of the United States including the territorial sea." Thus we would seem to have the same issue as presented in the case of the Coastal Zone Management Act. But the prospect of pursuing the same divination of legislative intent fades when we read on. Subsection (8) of section 1362 defines the term "territorial seas" to mean the belt of ocean water from the ordinary low-water mark and the line delimiting inland waters "extending seaward a distance of three miles." Issue foreclosed.¹²³

B. The Proclamation May Enhance the
Extra-Territorial Powers of the Coastal States

The Proclamation will have an appreciable, enhancing effect on the extra-territorial powers of the coastal States. Because American sovereignty now attaches to the nine-mile belt beyond the old three-mile limit (which remains, in all but two

¹²³It is worth adding that section 1370 provides that the Clean Water Act is not intended to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."

cases, the seaward boundary of the coastal States), there may well be more occasions when a court finds sufficient state interests to justify a State's exercise of its basic--that is, not congressionally conferred--powers beyond its boundaries. Too, it is not beyond the pale of the possible that one or more of those federal statutes that confer powers on the States may be held to have applicability within the unannexed zone, whereas before they did not.

1. Fundamental Powers

The three fundamental powers of the States--those powers reserved to them in the Tenth Amendment--are the eminent-domain power, the taxing power, and the police power. The question then is whether a State's right to exercise any of these powers extra-territorially, specifically in the area we are calling the unannexed zone, is greater now than it was before the Proclamation. It is helpful to pose the question in concrete ways, referring to each power separately:

Can California exercise its power of eminent domain over property situated nine miles off Ventura, on the southern California coast? Now it is not useful to pose the question with respect to federally owned Outer Continental Shelf land; it is realistic, however, to consider a privately held lease of such land, one held by Unocal, for example. Does the State have any greater rights to condemn this leasehold than it did before the Proclamation?

Does California have an easier case now for levying an ad valorem tax on oil-drilling equipment owned by Unocal and located on this hypothetical leasehold?

Does California now have a greater ability to exercise its police power over activities in the unannexed zone, assuming no conflict with an act of Congress? Since most activities in the unannexed zone (e.g., fishing, navigation, oil exploration) are addressed by federal legislation, the question here must be put in a more far-fetched manner to be rid of the Supremacy Clause issue. So: Does California have a greater ability now to enforce within the unannexed zone a law banning smoking?

From what has been said, the answers to these questions are simple, and vague, or simply vague. In the cases of the police and taxation powers, the connection requirements of the Supreme Court's jurisprudence may be easier to establish for the area of the unannexed zone than before the Proclamation. The zone is now fully part of the territory of the United States; there are no longer certain fundamental international aspects to that area, such as the high-seas freedoms of navigation and overflight; and, finally, if the area is ever annexed, it will be to California and no other State. In close cases, courts may well find that an activity sought to be regulated in the unannexed zone now sufficiently "affects" the interest of the adjacent State, that an activity sought to be taxed in the zone has a sufficient nexus with the State.

But the Proclamation probably has no enhancing effect on a coastal State's ability to condemn property beyond its boundaries. If it is a correct postulate that California cannot condemn private property held in U.S. territories or possessions such as Puerto Rico or Guam, it is probably too the case that it cannot condemn property in the U.S. territory we are calling the unannexed zone, despite the differences that can be enumerated.

2. Powers Derived from Acts of Congress

Finally some terse ruminations, without tergiversation, on how the States' extra-territorial powers under the spattering of statutes examined might have been enhanced by the Proclamation:

The CZMA. The debate whether the "coastal zone" extends to the 12-mile limit was mooted by Congress last October, to be sure. Nevertheless, one might be able to credit the Proclamation with goading Congress to legislate away the confining holding of Secretary v. California and thereby enhance the States' "consistency" authority over activities on the Outer Continental Shelf that affect the States' coastal zones.

The FCMA. Because the unannexed zone will be felt to be a natural prolongation (pardon the expression) of a State's territory, there may be a greater tendency for courts to find a State's fisheries regulations consistent with the federal regulations. There is a remoter possibility that some court will find that the unannexed area is felicitously described in section

1856 (a)(s)(A). That section extends State authority to waters "adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States." At the least, the Proclamation may again act as a goad to cure a "doctrinal" inconsistency between the statute and international law. Section 1802 (6) of the FCMA has the exclusive economic zone beginning at the seaward boundary of the coastal states (the three or nine-mile limit), whereas all good international lawyers know that the EEZ commences at the seaward limit of the territorial sea.¹²⁴

Gambling. Because a void might be created if the statute were construed otherwise, a State may be held to have "jurisdiction" over a gambling vessel operating in the unannexed zone within the meaning of 18 U.S.C. sec 1082 (a).

The OCSLA. The extension of United States territorial status to the unannexed zone has probably not affected state authority conferred by Congress under this statute.

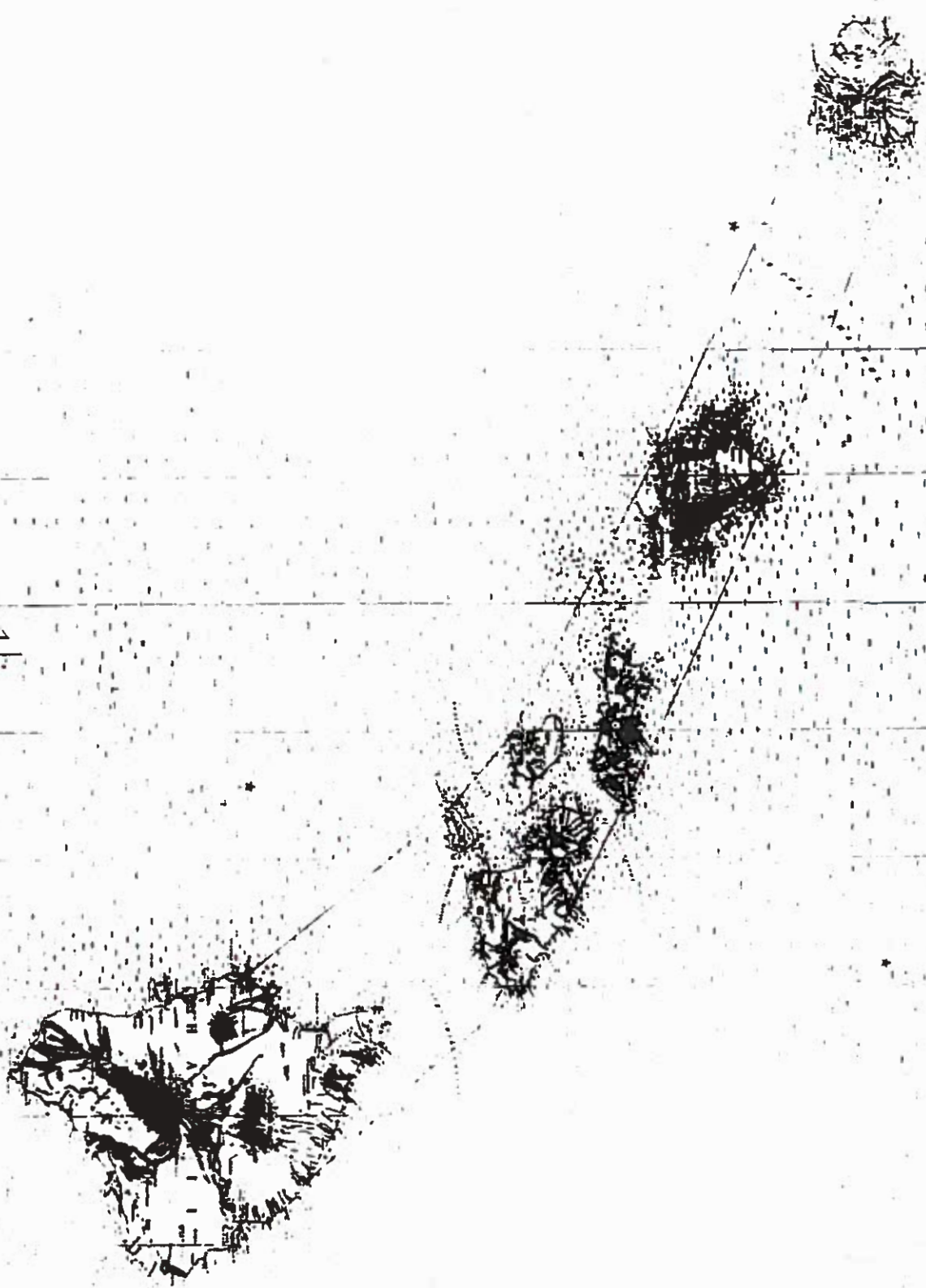
The Clean Water Act. Again but for the subtle pressure created to conform the Act's definition of "territorial sea" to the 12-mile limit now claimed by the United States, the Proclamation will have no effect on the powers of the States conferred by this statute in areas seaward of their boundaries.

¹²⁴See, e.g., 1982 Convention on the Law of the Sea, Article 55.

CONCLUSION

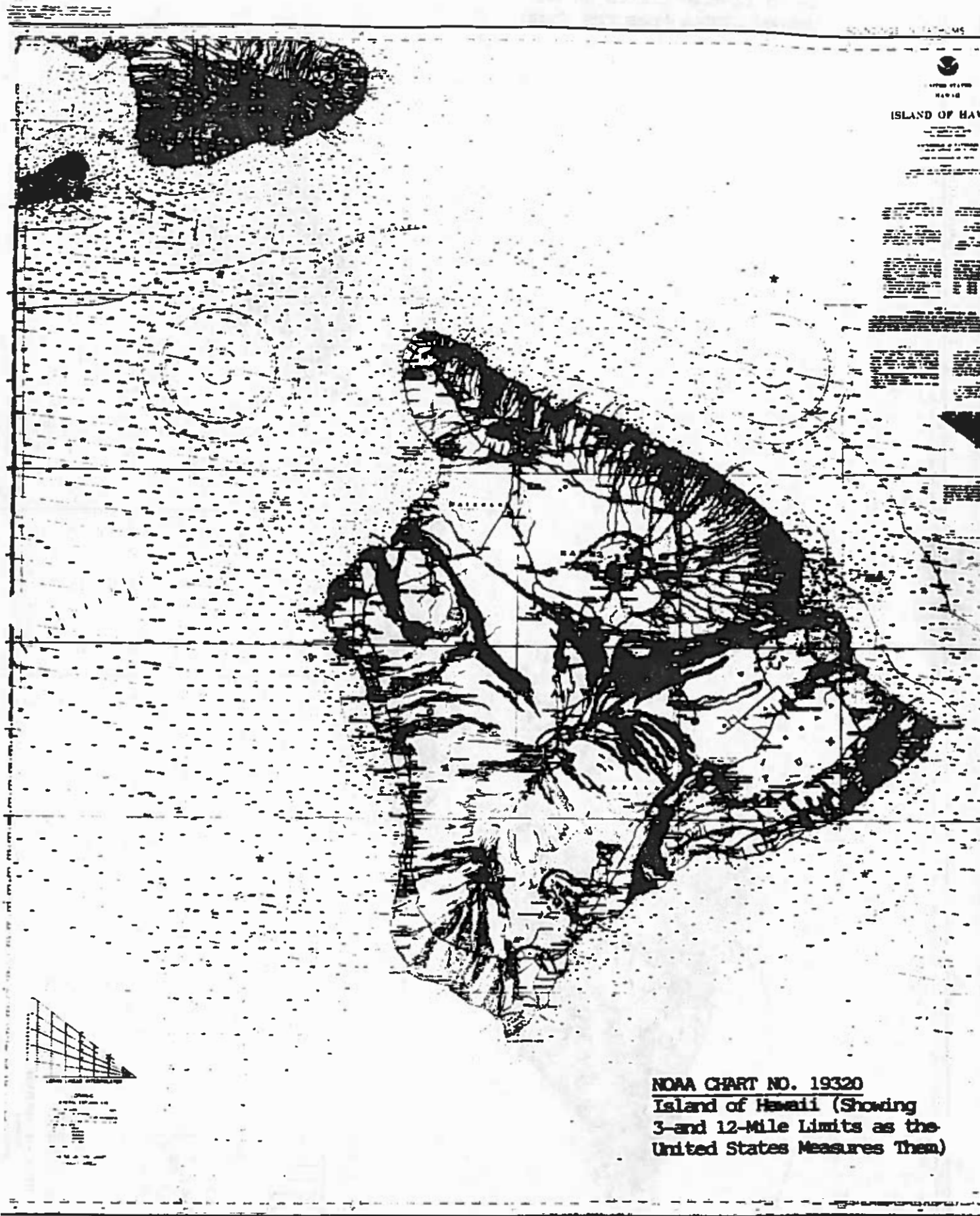
The uncertainties engendered by the Proclamation in the respects touched upon here, and in others as yet undreamed of in our philosophies, ought inexorably to stir the inert cold heart of Congress to act. For without congressional action, only a series of long-deferred Supreme Court decisions can answer the questions raised here. But there is little reason to hope for swift congressional action. After all, it was nearly eight years ago that the President proclaimed an American Exclusive Economic Zone, and we have yet to get from Congress a statute providing "needful rules and regulations respecting" this new American property. It will most likely be some considerable time before Congress exercises its Property Clause powers over the expanded American territorial sea.

NOAA CHART NO. 19004: Hawaiian
Islands: Showing Archipelagic
Baselines that would be per-
missible if Hawaii were a
nation. (At this small scale,
the 3-mile belt surrounding
the baselines would be barely
discernible.)



SOUNDINGS IN FATHOMS

HAWAIIAN ISLANDS



NOAA CHART NO. 19320
 Island of Hawaii (Showing
 3- and 12-Mile Limits as the
 United States Measures Them)

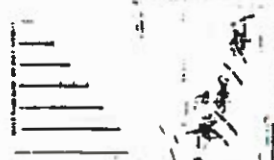
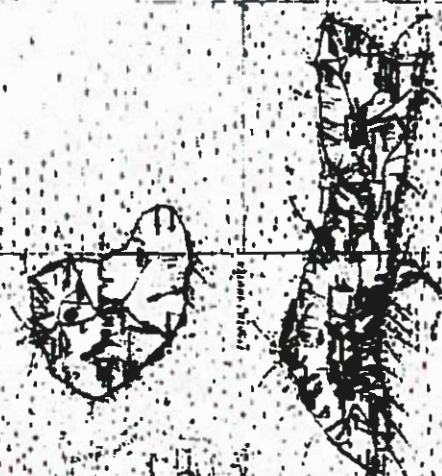
NOAA CHART NO. 19340
Hawaii to Oahu (Showing
3-and 12-Mile Limits as the
United States Measures Them)

NOAA CHART NO. 19340

NOAA CHART NO. 19340

NOAA CHART NO. 19340

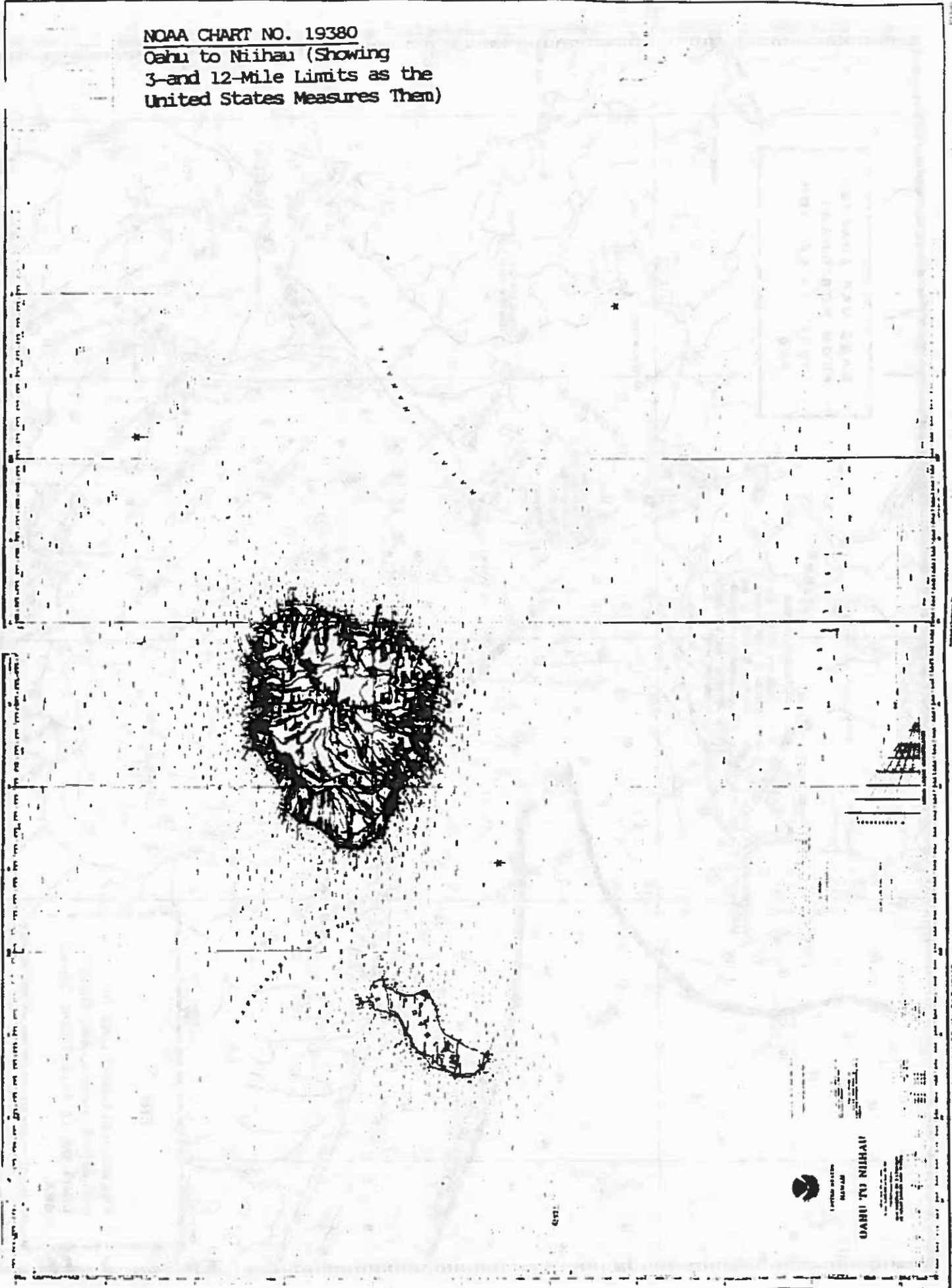
NOAA CHART NO. 19340



HAWAII TO OAHU

NOAA CHART NO. 19340

NOAA CHART NO. 19380
 Oahu to Niihau (Showing
 3- and 12-Mile Limits as the
 United States Measures Them)



BASE MAP ADAPTED
FROM NOS CHART
16006 7th EDITION
1980

TIME! **© 2000** **KOTZEBUE HARBOR** **Idichun**

ZEUSKISTERN

Aids are placed each season to mark entrance channels. Sandbars in the approaches are constantly changing, local knowledge is advised.

FIG. 6

**(CLOSING LINE DELETED,
AND A POSSIBLE FALLBACK
LINE CONSTRUCTED), SHOWING 12
MILE TERRITORIAL SEA PENETRA-
TION INTO KOTZEBUE SOUND**

(CLOSING LINE DELETED,
AND A POSSIBLE FALLBACK
LINE CONSTRUCTED), SHOWING 12
MILE TERRITORIAL SEA PENETRA-
TION INTO KOTZEBUE SOUND

BASE MAP ADAPTED
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Aids are placed each season to mark entrances channel sandbars in the approaches are constantly changing, local knowledge is advised

OUTER CONTINENTAL SHELF

A map of the Baldwin Peninsula, showing its coastline and internal features. The text 'BALDWIN PENINSULA' is written vertically along the right side of the map.

1

2

2

1

6

1

7

1

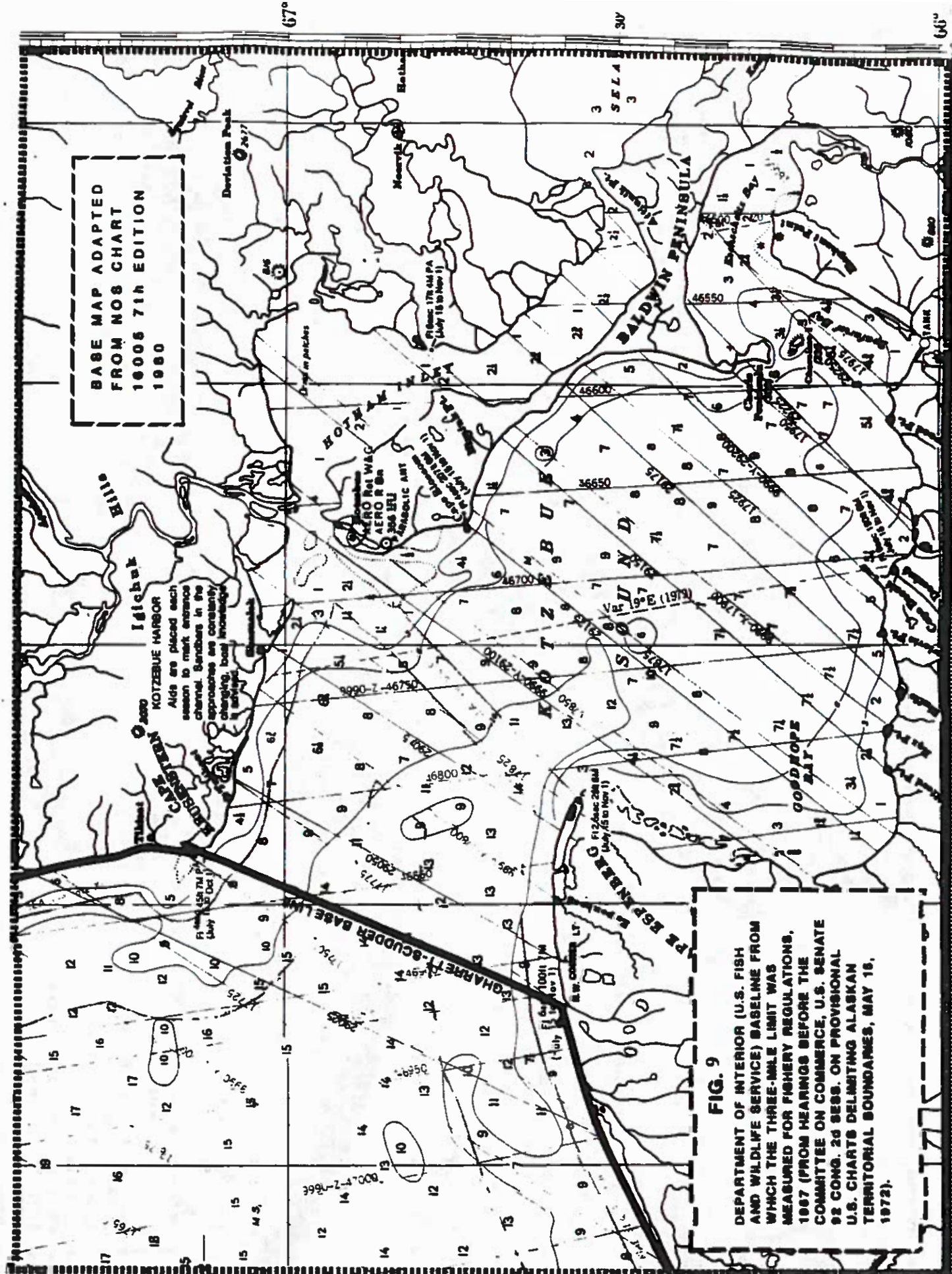
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1

144

FIG. 8

(CLOSING LINE DELETED, AND A POSSIBLE FALLBACK LINE CONSTRUCTED) SHOWING REDUCED ALASKAN OWNERSHIP, AND NEW AREA OF OUTER CONTINENTAL SHELF LANDS OF DEPT. OF INTERIOR



The Continuing Problem of Federal Preemption
in Ocean Resources Management

Alison Rieser¹

I. Introduction

In a recent article in Coastal Management² Tom Koester, an assistant Attorney General for the State of Alaska, argued that the jurisdictional uncertainty created by the Territorial Sea Proclamation³ deserves comprehensive congressional resolution. He bases his recommendation on recognition that fundamental policy issues, not merely questions of statutory interpretation, are involved in the allocation of jurisdiction and responsibility for offshore resources and activities, and that the Congress is a much more appropriate forum for these than are the courts. Without congressional action, the courts are likely to resolve state-federal conflicts on narrow legal grounds, and on a piece-

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2. Koester, State-Federal Jurisdictional Conflicts in the U.S. 12-Mile Territorial Sea: An Opportunity to End the Seaweed Rebellion, 18 Coastal Management 195 (1990).

3. Presidential Proclamation 5928 of December 27, 1988, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (1989).

meal and resource-by-resource basis. This approach, one can almost guarantee, will lead to additional inconsistencies, ambiguities, and further conflicts.⁴

I agree that the appropriate forum for debating and resolving questions of offshore jurisdiction is the Congress. One cannot, however, ignore the fact that sooner or later, any legislatively prescribed state-federal relationship in the extended territorial sea is likely to be tested in the courts. The existing body of federal ocean law, with its diverse array of state-federal accommodations will come into play, and because these laws are unclear and inconsistent in their treatment of state authority, disputants and the courts are bound to use the federal preemption doctrine to sort these conflicts out.

Because the current preemption doctrine lacks a coherent, principled approach to problems of concurrent jurisdiction, judicial resolution of such questions is unpredictable, often appears to be result-oriented, and frequently favors federal authority, even where national interests are not best served by a ruling that subordinates state authority to federal power. In light of this reality, I offer an additional recommendation: In its extended territorial sea legislation the Congress should include a provision giving guidance to the courts on the application of the preemption doctrine in subsequent conflicts over

4. Koester argues that Congress, for reasons of political philosophy as well as efficiency and pragmatism, should expand, through legislation, the role played by states in managing and benefiting from offshore ocean resources.

state and federal offshore jurisdiction.

In this paper, I illustrate the preemption doctrine's negative effect on national interests and state-federal cooperation in the protection and management of marine resources in the context of state oil-spill prevention laws. The Supreme Court's decision in Ray v. Atlantic Richfield was typical of the Court's misguided and misleading use of the multi-standard, indeterminate federal preemption doctrine. The ruling had, in my judgment, a crippling impact on the national efforts to prevent oil spills and contributed to the grounding of the Exxon Valdez tanker and the resulting oil spill. A brief review of the Oil Pollution Act of 1990, whose enactment is considered a victory for state authority over marine resources, indicates concerns that the distracting problems of federal preemption are likely to increase rather than subside.

The preemption doctrine leaves too much room for subjective judicial determinations as to the appropriate state-federal relationship, especially given the ambiguities and inconsistencies of the ocean legislation passed in the 1970s with respect to state-federal power-sharing. This means that even if Congress could agree to extend coastal state jurisdiction to the seaward limit of the national territorial sea, the uncertainties of current legislation and the supremacy clause of the U.S. Constitution could effectively limit state legal and policy initiatives regarding resources of the extended territorial sea.

In the hope that it would contribute to the effort to control the use of federal preemption and to promote stability and predictability in state-federal relations in marine policy, I

conclude this paper with a recommendation for language to be included in federal territorial sea implementing legislation.

II. Preemption Conflicts in Current Ocean Management Efforts

Despite the presence of numerous provisions addressing the state-federal relationship in current federal ocean legislation, courts continue to hear and resolve challenges to state enactments based upon the supremacy clause, and federal agencies and parties objecting to state law initiatives use the threat of preemption to discourage state lawmakers from exercising authority over marine resources.

A brief review of just a few of the recent instances where the preemption doctrine has been invoked indicates that these conflicts are not limited to a narrow spectrum of ocean policy issues, for example, the exploration and development of offshore oil and gas resources. Recent conflicts have involved such diverse issues as fisheries regulation, the management of endangered marine mammals, and ocean waste disposal.

The federal government has resorted to federal preemption to oust state authority to manage fisheries in state waters. This may seem somewhat surprising in light of the direct role state management officials and Governor-appointed individuals play in the development of federal fishery management plans. Because a provision of the Magnuson Act expressly limits federal 'preemption' of state management authority in state waters to instances

where specific circumstances exist,⁵ federal authorities have used federal legislative 'supersession' under the supremacy clause to overturn state regulatory schemes in state waters that were at odds with regional management plans.⁶

Massachusetts is in the process of preparing a recovery plan for the Northern right whale, a highly endangered marine mammal that spends the summer months feeding in Massachusetts coastal waters. Concern about the effect the sizable whale-watching industry may be having on the animals has led the Commonwealth to set state regulations restricting vessel operations near the whales. Because a federal recovery plan has not been developed and implemented and disturbances of mother-calf pairs are being reported, state legislation was introduced to increase the authority of the state to promulgate stronger regulations.

In an unusual step, the NOAA Office of General Counsel informed the speaker of the state legislature that such law would be preempted under federal law. The letter contended that provisions of the Marine Mammal Protection Act (MMPA) preclude state management of marine mammals without an express delegation of

5. MFCMA section 306 (b) prohibits federal preemption of state fisheries regulation inside state waters unless the fishery in question is predominately an EEZ fishery and the state regulation seriously undermines the federal management plan approved under the Act. The state must be afforded an opportunity to present evidence at an administrative hearing that these conditions do not prevail.

6. See, e.g., Florida fish trap ban case discussed in Territorial Sea; see also, 716 F.S. 595 (S.O. Fla. 1989)(preemption of state statute that prohibited shrimp fishing). See generally, Bubier and Rieser, Preemption or Supersession of State Regulation in the Territorial Sea, Territorial Sea ().

authority by the Secretary of Commerce. This conflict is still pending as the tireless public interest group that is prodding the Commonwealth to enact new rules and laws has uncovered strong evidence that the Endangered Species Act authorizes state regulation to protect endangered marine mammals notwithstanding the state program delegation provisions of the MMPA.

The idea of exclusive federal regulation of ocean dumping of dredged spoils and licensing of at-sea hazardous waste incineration has been a sore point for coastal states for several years, especially in light of the promises of federal consistency offered to those who obtained federal approval of their coastal zone management programs. Conflicts over the appropriateness of ocean waste disposal and the acceptability of the risks it poses have pitted state coastal managers against the Army Corps of Engineers and the Environmental Protection Agency. While these conflicts have involved the interplay of two federal statutes, the Coastal Zone Management Act (CZMA) and the Marine Protection, Research and Sanctuaries Act (MPRSA), the preemption doctrine has been used to support a statutory interpretation that seriously limits state authority.

When a hazardous waste disposal firm sought EPA permits for ocean incineration vessels to burn PCB-laden liquid wastes off the Mid-Atlantic coast, coastal states sought to impose operational restrictions to protect their coastal environments and communities. The permit applicant sought a declaration from the courts that the MPRSA preempted state review of federal permits under the CZMA consistency authority. The case was withdrawn

before the issue was finally decided, but the court's preliminary opinion that the MPRSA preempts state review has influenced subsequent EPA positions on the question of state authority.⁷ For example, when EPA's New York regional office proposed to designate dredge spoil disposal sites in the New York Bight region of the Atlantic Ocean in June, 1988, its notice of proposed action stated that EPA site designation decisions are not required to be consistent with state coastal laws pursuant to the CZMA consistency provision because the MPRSA preempts that authority.⁸

Regardless of the merits of these particular claims, they illustrate the conflict that arises when preemption claims are made. It is not difficult to imagine the corrosive effect such actions may be having on federal-state cooperation in marine affairs. At the very least, it wastes time and resources on both sides to pursue and defend against these claims. As the outcome of these conflicts is unpredictable and the costs high, parties

7. The roots of this controversy can likely be traced to the Supreme Court's decision in *Interior v. California* that state consistency review does not apply to federal actions outside of the coastal zone, i.e., beyond state waters.

8. The Region relied on a brief opinion of the D.C. federal district court that the states have no authority under the CZMA to impose unilateral conditions on EPA's site designation process under the MPRSA. According to EPA this interpretation was correct, notwithstanding MPRSA 1987 amendments that may have addressed the application of section 307 to MPRSA actions.

This interpretation, as well as the actions of the Department of Interior, are curious in light of the Reagan Administration's Executive Order of August, 1987 (?) directing all federal agencies and departments to carry out their functions with the least preemptive impact on state authority.

may decide to forgo valid claims and important policy initiatives.

III. The Indeterminacy of Current Preemption Standards

The courts have come to rely increasingly on the doctrine of federal preemption as a basis for invalidating state laws, in place of other constitutional grounds, for example, the commerce clause or the privileges and immunities provision. In the field of marine resource regulation, the Supreme Court's decision in Douglas v. Seacoast Products, Inc. is an example of this trend, where the venerable federal enrollment and licensing law preempted a state fisheries licensing restriction that was based upon state residency.

The courts and commentators have endorsed this trend as it allows courts to use statutory interpretation to resolve disputes and avoids constitutional readings that are not easily reversed if in error. But because these conflicts turn on the interpretation of individual statutes, a coherent understanding of the boundary between state and federal authority has not emerged from the case law. Instead of developing a uniform approach to preemption, the Supreme Court has employed a set of verbal formulations, or "text bites," that give little guidance on the meaning of the supremacy clause or the federalism principles that lay beneath it.⁹ Because the standards for preemption

9. Indeed, one commentator describes the preemption doctrine as "one of the primary judicial vehicles for shaping federalism." Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Col.L.Rev. 623 (1975).

are ambiguous and overlapping, the decisions often appear result-oriented.

The basic criteria for federal preemption have been summarized by the Supreme Court in the following terms:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes of Congress.¹⁰

In addition to the above, there is a third form of preemption wherein Congress includes language in a federal statute making it clear that state law on a particular topic is prohibited. The three forms of federal preemption may be described as (1) express preemption where Congress spells out its intention to preclude state law, (2) implied preemption where congressional intent to preempt is made evident by its enactment of a comprehensive scheme of federal regulation that leaves no room for state law on the same subject (so-called "occupation of the field"), and (3) conflict preemption that occurs because the state law poses an actual conflict with federal law or regulation or stands as an obstacle to accomplishment of feder-

10. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)(citations omitted).

al objectives.¹¹

Frequently, Congress includes state law savings language in a statute that is ambiguous or which only partially addresses the question of concurrent state jurisdiction. In these cases, and even in statutes where the meaning seems plain on its face, courts will infer Congressional intent from the statute, both its language and its 'structure', looking at the entire statute and comparing it against specific provisions of state law to determine whether a fatal conflict exists. Courts also look at administrative regulations enacted pursuant to the federal statute to find if any conflict exists.

The verbal tests for preemption that the courts employ are fraught with terms that convey only subjective meaning: occupation, field, complex scheme of regulation, conflict, so pervasive, so dominant, stands as an obstacle. Under the conflict principle the courts have particularly broad latitude and can use the test to invalidate state laws that complement federal legislation. Courts and judges vary on the extent to which they insist on there being an actual, not just a potential, conflict between a state and federal law, based in part on their judicial philosophies. The occupation of the field standard can be applied strictly or broadly, again reflecting differences in judicial philosophy on the proper allocation of power between state and federal governments. The doctrine that emerges from the case law does not provide a predictable basis

11. Tribe, American Constitutional Law (2d. 1988) at 481, n.14.

for the enactment of new state initiatives nor give guidance on the nature of the federal system and its implications for policy development.

IV. Preemption and the Prevention of Oil Spills

In two major cases concerning oil pollution, the Supreme Court has employed the various formulations for preemption. The results were very different for state authority, and these differences seem to reflect policy considerations that go beyond the differences in statutory language.

A. The Supreme Court's Conflicting Signals

The U.S. Supreme Court addressed the preemption of state law to prevent oil spills in two major cases in the 1970s: Askew v. American Waterways Operators, Inc.¹², considering state oil spill liability and clean-up laws in light of the Federal Water Pollution Control Act of 1970, and Ray v. Atlantic Richfield Co.,¹³ addressing state oil tanker regulation and the federal Ports and Waterways Safety Act of 1972. A comparison of the two decisions indicates that the outcome of the preemption analysis depends upon the structure, comprehensiveness, and specific language of the federal statute. The court's consideration of these factors is likely to be influ-

12. 411 U.S. 325 (1973).

13. 435 U.S. 151 (1978).

enced by its view of the nature of the problem the laws address and the comparative institutional capacities of federal and state authorities. Since these conditions and judicial perceptions of them can change over time, it is difficult to predict how a particular preemption challenge will be resolved.

1. Askew v. American Waterways Operators, Inc.

In Askew, the Supreme Court found reflected in the federal water pollution statute an intent by Congress that a coordinated federal-state effort be employed to combat the threat of coastal oil spills. The Florida Oil Spill Prevention and Pollution Control Act of 1970 imposed strict and unlimited liability for any private or state damages incurred as a result of an oil spill in Florida waters. The Act also authorized the Florida Department of Natural Resources to enact regulations requiring marine terminals and oil tankers to maintain oil spill containment gear and equipment to prevent oil spills. Shortly before the Florida law was enacted, the Congress adopted the Water Quality Improvement Act of 1970. The 1970 federal law included a provision¹⁴ imposing strict but limited liability on marine terminal facilities and vessel operators for federal clean-up costs.¹⁵ It also authorized the President to promulgate regulations requiring terminal facilities and vessels to maintain spill prevention equipment.

14. This provision is now 33 U.S.C. 1321.

15. These limits were \$14 million and \$8 million, respectively.

The Supreme Court rejected the oil shippers' claim that the Florida Act was preempted by the federal provision, noting that the federal law was concerned solely with the recovery of actual, federal clean-up costs, not damages to other parties. Writing for a unanimous Court, Justice Douglas found the federal act to contain an express waiver of preemption of liability claims against vessel and terminal operators.¹⁶

Justice Douglas found that the Act's directive that the President prepare a National Contingency Plan for the containment, dispersal, and removal of oil, contemplates cooperative actions with the states. Other evidence of intended state-federal cooperation is found throughout the statute. In his view the language quoted above was included because:

16.

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed ... to affect any State or local law not in conflict with this section (emphasis added).

the scheme of the Act is one which allows-- though it does not require-- cooperation of the federal regime with a state regime. If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use ... the [Florida] Act and recoup her cost from those who did the damage. ... It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits, so far as vessels are concerned, her costs. ... If the coordinated federal plan in actual operation leaves the State of Florida to do the cleanup work, there might be financial burdens imposed greater than would have been imposed had the Federal Government actually done the cleanup work. But it will be time to resolve any such conflict between federal and state regimes when it arises.¹⁷

In Court's view, Florida's ability to require specific containment gear of vessels and terminal facilities through regulations was not disturbed by the Presidential authority to impose similar requirements, absent a specific conflict between federal and state requirements. The subject of oil spill prevention was not one in which uniform federal standards were required. Any finding of preemption would have to await a reviewing court's finding of a serious conflict between a specific Florida regulation and Coast Guard regulations promulgated under the federal statute.

Justice Douglas also refused to find a per se conflict between applicable federal legislation and Florida's requirement of terminal facility licenses. The federal water pollu-

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tion statute clearly contemplated state licensing, which the Justice referred to as "a traditional state concern," by requiring state certification of consistency with state water quality standards before issuance of federal discharge licenses. Moreover, Congress has recently enacted the Ports and Waterways Safety Act of 1972, Title I of which explicitly provided that the States were not precluded from prescribing for "structures" higher safety equipment requirements or safety standards.¹⁸ While not elaborating on the meaning of this provision, Justice Douglas took it as supporting evidence of congressional intent to allow state regulation of marine terminal facilities to prevent oil spills.

The Court was most likely influenced by the limited scope of the federal regulatory scheme under the federal statute in the face of a serious threat from increasing oil shipments through coastal waters.¹⁹ It was probably reluctant to create a significant legal vacuum by finding state regulation in the same field to be preempted.²⁰

2. Ray v. Atlantic Richfield Co.

The Florida and federal statutes were enacted in 1970 in

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17. 411 U.S. at 332, 336.

18. 33 U.S.C. 1222(b).

response to the growing threat of oil spill damage to the marine and coastal environments. Recent catastrophic oil spills such as the Torrey Canyon disaster and the tremendous growth in oil tanker shipments and the advent of supertankers prompted their enactment. The State of Washington's Tanker Act was passed in 1975, in response to these as well as factors peculiar to the region. Canada had just announced that crude oil shipments to oil refineries along the Puget Sound would be curtailed. The State of Washington expected to replace these shipments with deliveries of North Slope crude oil through tankers loaded at the Trans-Alaska Pipeline terminal in Valdez, Alaska. Concerned about the devastating effect that a tanker accident and spill would have on the productive and fragile waters of Puget Sound, the State adopted a number of direct and indirect controls on the size, design, equipment, and operation of oil tankers.

The Washington law was challenged on the day it took effect by the owners of one of the Puget Sound refineries. They were joined by a major tank vessel owner and shipbuilder. The plaintiffs claimed the entire statute was preempted by the Ports and Waterways Safety Act of 1972 (PWSA), a law which was enacted at least partially in response to the North Slope oil discoveries. A three-judge federal district court agreed and found the law to be completely preempted. On appeal, the Supreme Court affirmed the lower court ruling in part and reversed it in part, upholding certain provisions of the state law.

In Ray, the Supreme Court found within the PWSA a congres-

sional intent to establish uniform national standards for the design and construction, maintenance, and operation of oil tankers to provide vessel safety and to protect the marine environment, thus preempting more stringent state requirements.²¹ It is from this ruling that the principal indices of federal preemption of state tanker controls have been drawn.

The preemptive effect of the 1972 federal law varied with respect to the four major provisions of the Washington law: the requirement of a state-licensed pilot for all federally enrolled and licensed tankers over 50,000 DWT navigating in Puget Sound, the outright ban of supertankers (over 125,000 DWT) from transiting the Sound, the imposition of vessel design, construction, and navigational equipment standards on tankers between 40,000 and 125,000 DWT, and the provision of an alternative tug escort requirement for vessels not meeting these standards. The Court considered each separately, in light of the different provisions of federal law they related to and the congressional intent that each of these provisions reflected.

The Court dispensed easily with the state-licensed pilot provision under the express preemption test, finding in the federal enrollment and licensing laws²² clear evidence of con-

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19. The Torrey Canyon grounding and the Santa Barbara oil well blowout were fresh events. Note commentator who attributes no-preemption holding to protect of vital interests, possibly human health.

gressional intent to preclude state pilotage laws for vessels enrolled in the coastwise trade (i.e., interstate shipping).²³ The federal law left states free to impose pilotage requirements on foreign trade vessels that enter and leave their ports. Washington could therefore require "registered" tankers larger than 50,000 DWT to employ a state-licensed pilot while in Puget Sound.

The State's tanker safety standards presented a much more difficult questions of congressional intent. The relevant federal law, Title II of the 1972 PWSA, made no mention of preemption or of permissible state law. The Court was required to use either the occupation of the field or conflict standards of preemption analysis. The Act required the Coast Guard to promulgate marine environmental protection regulations specifying standards for maneuverability and stopping that would reduce the risk of collisions, groundings, and other accidents that could lead to an oil spill. These regulations were also expected to reduce oil pollution resulting from normal operations, such as ballasting, deballasting, and cargo handling.²⁴ Vessel inspections and certificates of compliance would indicate that a particular vessel complied with applicable design and construction standards and that its crew was qualified to

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20. Tribe, supra note , at 497, citing Askew at 336-37.

handle oil as cargo.²⁵

The Washington Tanker Law required tankers between 40,000 and 125,000 DWT navigating in Puget Sound to have certain "standard safety features."²⁶ These design features were more stringent than those required by international or federal regulations, but they were not required of vessels while in ballast or while escorted by a tug vessel or vessels.²⁷ The Court ruled that the state tanker design and equipment requirements were preempted. In the majority's view, the 'statutory pattern' of Title II revealed a congressional intent to entrust to the Secretary of Transportation the duty to determine which design characteristics render oil tankers sufficiently safe to be allowed to proceed in the navigable waters of the United States. That the Secretary alone was to make the risk assessment judgment was evident to the Court, as it wrote:

Congress intended uniform national standards for [tanker] design and construction ... that would foreclose the imposition of different or more stringent state requirements.... Congress did not anticipate that a vessel found to be

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21. Ray, . See Tribe, supra, at 486-487.

22. 46 U.S.C. 215, .

23. Ray at .

24. 46 U.S.C. 391a(7)(A).

in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.... The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate U.S. waters prevail over [any] contrary state judgment.²⁸

To square its holding under Title II with prior Court decisions allowing state regulation of vessels,²⁹ the Court concluded that State and local governments may enforce local laws against federally licensed or inspected vessels only if they are aimed at objectives that differ from those embodied in the federal law. As Title II was aimed at tanker vessel safety and environmental protection, states may not, at least directly, mandate different or higher tanker design requirements. Can they impose them indirectly by requiring tankers not meeting the standards to be escorted by tugs? This question made it necessary for the Court to examine the congressional intent behind Title I of the PWSA concerning vessel traffic controls and port safety.

The regulation of vessel traffic and port controls has been delegated less exclusively to the federal government than has tanker design and construction. The Court found the lan-

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25. Id., section 391a(9).

guage and structure of Title I to evince a much less preemptive effect on state law. Title I gives the Secretary of Transportation the discretionary authority to adopt vessel traffic systems (VTS) for particular U.S. ports for preventing damage to vessels, structures,³⁰ and shore areas, as well as prevent pollution of navigable waters and marine resources. Under a VTS, the Coast Guard controls vessel traffic during periods of congestion and hazardous conditions by specifying vessel movement times, size and speed limitations, vessel operating conditions, navigational equipment, and minimum safety equipment.

The Supreme Court viewed Washington's tug escort provision not as a design requirement but one "more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures, and, as such, ... a safety measure clearly within the Secretary's [Title I] authority."³¹ Unlike Title II, however, Title I contains explicit language allowing the state to exercise legal authority in the field of vessel traffic and port safety.³² Higher state safety standards for the protection of structures are allowed even if the

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26. These included a particular shaft horsepower to dead weight tonnage ratio (1 to 2.5), twin propeller screws, double bottoms beneath all oil cargo compartments, two operating radars (one being a collision avoidance system), and other navigational position location systems as required by the State board of pilotage commissioners.

27. The tug was required to have a a combined shaft horsepower equivalent to five per cent of the tanker's dead weight tonnage.

Coast Guard has enacted provisions to achieve the same objective in its regulations and applicable VTS.³³ Until the Secretary acts it is not possible to determine if the state standard imposes an impermissible higher safety standard.

Thus, the federal PWSA allows states to regulate in the area of vessel safety and traffic controls as long as they do not conflict with federally-promulgated regulations. States may impose more protective standards with respect to structures even if they go beyond what the Coast Guard has deemed necessary in its regulations. Whether Washington's tug escort requirement, a provision concerning vessel traffic safety, was precluded by the authority of the Secretary of Transportation depended on whether the Coast Guard had either promulgated its own tug escort requirement for the Puget Sound VTS or had decided that such a requirement should not be imposed. Since the record revealed no evidence that either decision had been taken, the Washington tug escort provision was not preempted. The Court, however, left open the possibility that subsequent Coast Guard rulemaking³⁴ setting minimum standards for tug

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28. 435 U.S. at 163-164, 165.

29. E.g., *Kelly v. Washington*, U.S. ().

30. This term is not defined in the Act but its likely meaning is bridges, piers, roadsteads, and other harbor installations.

31. 435 U.S. at 171.

escorts would oust the state provision.³⁵

The members of the Court were divided on whether the tanker design standards were saved by the alternative tug escort provision that allowed tankers to avoid compliance with the design standards. The Court found the Puget Sound tug escort provision to be a requirement "with insignificant international consequences" as it did not coerce tanker owners into adopting the state's design standards. The provision was in effect just a tug escort requirement, a permissible local regulation that was not per se preempted as would be a direct state design standard. The tug escort provision could stand as long as it did not conflict with a federally promulgated tug rule. The 1972 Act authorized the Coast Guard to impose a tug escort rule but did not compel it, and no such requirement had yet been adopted for the Puget Sound vessel traffic system, nor had a policy decision been taken that such a requirement was unnecessary. Justice White's plurality opinion, joined in full only by three justices, Chief Justice Burger and Justices Stewart and Blackmun, implied, however, that if the Coast Guard were to enact such regulation, the state tug provision would be preempted.³⁶ Because the state had the power to require all vessels to use a tug escort, it could also require only those

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32. Section 1222 (b) provides that Title I does not prevent a state from prescribing for structures higher safety equipment requirements or safety standards "than those which may be prescribed pursuant to Title I." 33 U.S.C. section 1222 (b).

vessels not meeting the specified design standards to use tugs. The Court also found that the tug escort provision did not violate the Constitution's commerce clause by imposing heavy costs on interstate shipping.³⁷

In a dissenting opinion, Justice Marshall, joined by Justices Rehnquist and Brennan, agreed that the tug escort provision was permissible. Because all affected tanker owners had opted to use tug escorts and thus had not felt forced to comply with the design requirements, it was unnecessary for the Court to address the question of whether the state design requirements were in conflict with the federal goal of national uniformity and thus not preempted.

The Court was more seriously divided on whether the federal law prevented the State from banning supertankers from Puget Sound. The majority found Washington's prohibition of tankers greater than 125,000 DWT to be preempted by the Coast Guard's authority under PWSA's Title I to establish "vessel size and speed limitations." Both the majority and the dissent agreed that Title I did not on its face preempt all state regulation

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33. The implication can be drawn that state safety standards for vessels are also permissible but they may not impose higher standards than any that are adopted under the federal law. 435 U.S. at 174. This is not entirely clear, however, as the Court's opinion later refers to legislative history that could be interpreted as precluding any state regulation of vessels. 435 U.S. at 174, citing House Report No. 92-563, pt.2 (1971) at 15. But the Court's analysis regarding the supertanker ban, discussed below, indicates the Court's belief that state action respecting vessel safety and equipment is permissible as long as the Coast Guard has not considered and acted upon the particular measure.

of vessel size; preemption depended on whether the Coast Guard had addressed and acted upon the particular regulatory issue of size limitations.

The justices disagreed, however, whether the Coast Guard had in fact considered the question and concluded that no size limitation was necessary. The majority concluded that the Coast Guard's local navigation rule controlling the number and size of vessel in Rosario Strait at any given time constituted federal action with respect to vessel size limit that precluded a higher state standard. The state could not adopt a super-tanker ban as a matter of state judgment that very large tank vessels are unsafe generally. Such a blanket determination would be precluded under Title II as a judgment respecting tanker design. As a judgment reflecting consideration of local conditions and water depths, however, the ban would have been permissible had the Coast Guard not made its own judgment that the local conditions did not warrant such a prohibition. The Court was not concerned that the Rosario Strait rule was an unwritten policy and therefore did not clearly reflect an affirmative Coast Guard judgment that a supertanker ban was unnecessary. The Secretary's failure to adopt a supertanker ban "takes on the character of a ruling that no such regulation is appropriate" because the Title I required him to give full consideration to numerous factors in setting vessel traffic controls. Because his responsibility to consider and balance factors was so broad, it was apparent that the ban was determined to be unnecessary.

The dissent rejected this line of reasoning. It noted the

Court's well-established principle that state and federal statutory schemes should be read to the greatest extent possible as compatible and that federal law should oust state law only to the extent necessary to protect achievement of federal aims. To the dissenters, the Coast Guard's unwritten rule prohibiting more than one tanker larger than 70,000 DWT from transiting Rosario Strait during clear weather reduced to 40,000 DWT during bad weather was insufficient to establish a federal policy that a supertanker prohibition was unwarranted.³⁸ In their view, the tanker design provisions of the Act did not preclude "a state judgment that, as a matter of safety and environmental protection generally, tankers should not exceed 125,000 DWT."³⁹ Justice Marshall wrote:

It is clear, however, that the Tanker Law was not merely a reaction to the problems arising out of tanker operations in general, but instead was a measure tailored to respond to unique local conditions -- in particular, the unusual susceptibility of Puget Sound to damage from large oil spills and the peculiar navigational problems associated with tanker operations in the Sound. Thus, there is no basis for preemption

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34. See 33 CFR Part 164.

35. 435 U.S. at 172.

36. 435 U.S. at 171-172. Justices Stevens and Powell agreed with the majority on the tug escort provision. 435 U.S. (Stevens, J., concurring in part and dissenting in part).

under Title II (emphasis added).⁴⁰

The fact that the Court wrote three separate opinions weakens the force of the Ray decision. Moreover, the holding is not helped by the PWSA's lack of clear congressional intent with respect to state regulatory jurisdiction. The Court's most forceful argument for federal preemption of tanker design and construction standards was based upon the assumed need for uniformity in order to achieve international agreement on tanker safety standards. Because the Court narrowed its focus on the Act and did not consider how the two laws could be read together it overlooked an important caveat to this general notion concerning uniformity. Vessels carrying North Slope crude oil from Valdez to West coast ports are engaged in interstate trade only. They are not competing with foreign tankers for international shipping. Many of these tankers, like the Exxon Valdez, were constructed specifically for the North Slope trade. Rather than frustrate the federal objective for uniform, international standards, assuming that is the driving spirit behind the PWSA, the adoption of compatible state-imposed tanker standards by all States handling North Slope crude oil could have helped demonstrate the need for a higher, minimum international standard of tanker safety design.

The Ray decision was based largely upon a standard that

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the Supreme Court is using with increasing frequency to resolve competing state and federal interests in coastal waters. This test inquires whether the subject matter needs national uniformity or a local approach to its resolution.⁴¹ The Ray case, however, reveals the inadequacies of this test as a basis for deciding between state and federal authority. Washington's statute made risks judgments about the use of Puget Sound by supertankers, based upon its own knowledge of local conditions and the dangers and costs associated with an oil spill in these confined waters. Rather than take a classic "Not in my backyard" stance, the State sought only to prohibit use of the largest tankers. Other tankers were made subject to alternative design and equipment standards or tug escort rules, the choice being up to the tanker and shipping companies. The Court said the design and equipment requirements were preempted in light of the need for uniformity of safety design requirements. Because these requirements are best addressed at the international level, the U.S. needs to have one uniform regulatory stance on the appropriate set of design and equipment requirements.⁴² The Court read this into the statute and went considerably farther than Congress intended, given that the

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37. The problem of costly, divergent state tanker standards was raised in the separate concurring opinion by Justice Stevens, joined by Justice Powell. They criticized the majority's decision not to preempt the tug escort alternative provision. They believed it to be of no consequence that the escort penalty imposed only a modest additional cost on tankers not meeting the invalid design rules. In their view, these additional costs would be magnified by the enactments of similar requirements by other states attempting to

Congress wanted the Coast Guard to push international standards to a higher level of safety. The Coast Guard was reluctant to follow this direction, however, and lack of international accord became an excuse for its failure to make design standards as stringent as environmental protection required.

The Court's uniformity test makes no provision for the possibility that the responsible federal agency may "lack the capacity for disinterested, uniform regulation"⁴³ that achieves the objectives of the law. The national interest may in fact be best served by diverse, local responses, rather than in uniformity. States may provide better for the national interest in uniformity, "where the uniformity propounded by the federal agency is either a narrow interest writ large or a surrender to the lowest common standard of regulation."⁴⁴

B. The Effect of Ray on Alaska's Oil Spill Legislation

Like the State of Washington, the State of Alaska anticipated a greatly increased risk of oil spills in state waters with the construction of the Trans-Alaska Pipeline and the decision to ship the North Slope crude oil by tanker from Valdez instead of using a cross-Canada pipeline. The Alaska State Legislature enacted SB 406 in 1976, a comprehensive act covering all aspects of marine oil transportation and handling.

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impose more stringent standards. Evidence of this multiplier problem could be found in the fact that Alaska had just recently enacted an explicit system of economic incentives to try to get tankers to adopt safety and design standards

Section 1, the Tank Vessel Traffic Regulation Act, required safety and maneuverability features on tankers and tug escorts for certain vessels, and the adoption of a state system of tanker traffic regulations. The Tank Vessel Act included provisions authorizing Alaska's Department of Environmental Conservation (ADEC) to adopt a comprehensive system of traffic regulations for tankers that did not conflict with regulations adopted by the Coast Guard and the Governor to enter into interstate compacts to achieve the purposes of the Act.

Section 2, the Oil Discharge Prevention and Pollution Control Act, prohibited the discharge of oil in state waters and required the payment of annual risk charges by terminal operators and vessel owners into a fund to pay for clean-up, research, and administration. The amount of the annual risk charges depended upon the presence or absence of the vessel safety features specified by ADEC under the Tank Vessel Act. Provisions of the new law also controlled the placement of ballast water in tankers and prohibited its discharge.

The new law took effect on July 1, 1977. On September 16, 1977, Chevron USA, Inc. and others filed suit in the federal district court for Alaska, claiming that key provisions of the law were unconstitutional. The Supreme Court announced its decision in Ray v. Atlantic Richfield Co. while the litigation was in its pretrial phase in March, 1978. In response to the Ray decision, Chevron and Alaska stipulated that certain provisions of the 1976 Tank Vessel Traffic Regulation Act were preempted by the federal Ports and Waterways Safety Act and thus void. This agreement settled a significant part of Chev-

ron's challenge.

The parties stipulated as preempted under the tanker design provisions (Title II) of the PWSA the requirement that all tankers navigating Alaskan waters have on board what Alaska considered to be "standard safety and maneuverability features."⁴⁵ The parties likewise agreed that requirements for tug escorts for tankers over 40,000 DWT that lacked particular maneuverability and stopping features⁴⁶ were preempted in light of the Vessel Traffic System the Coast Guard had promulgated for Prince William Sound under Title I of the PWSA. The parties also agreed on the invalidity of provisions controlling the placement of ballast water in vessel cargo tanks, not because they were preempted by Coast Guard rules under the PWSA but because they imposed an undue burden on interstate commerce in violation of the commerce clause.

A trial was necessary of the validity of the Oil Discharge Prevention and Pollution Control Act, probably because Alaska believed that the Askew decision and the Clean Water Act would support the state law and would therefore not stipulate to

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similar to those required by the Washington Tanker Law.

38. 435 U.S. at 183 n.3. The dissent took particular note that the Coast Guard's Puget Sound Vessel Traffic System, 33 CFR Part 161, Subpart B, contained no tanker size limitation. The Coast Guard comments on the System in

their invalidity.⁴⁷ Under this law the State believed that the key to oil spill prevention was to provide economic incentives for oil terminal facilities and tanker owners to adopt the State-specified safety and maneuverability features through the assessment of annual risk charges and the requirement of risk avoidance certificates and proof of financial responsibility. The certificates would be issued upon payment of an annual risk charge into the Coastal Protection Fund and upon proof of capability to carry out all required state and federal spill prevention and contingency plans. Oil terminal facility and marine carrier certificates would not be issued unless the owners could demonstrate their ability to provide all equipment, personnel and supplies to contain and clean-up any oil spills. Differential risk charges were to be based upon the presence of the risk-reducing equipment and design features.⁴⁸

The first phase of the two-phase trial considered the validity of the annual risk charges and the Coastal Protection Fund. After this phase, the federal district court ruled in June, 1978, that the State's system of risk avoidance charges was preempted by the federal PWSA. The Coastal Protection Fund

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the Federal Register during its promulgation indicated that no consideration of the need for a ban took place.

39. 435 U.S. at 175. The dissenting Justices also found support for the state supertanker ban in a provision referring to local vessel traffic control systems.

40. 435 U.S. at 184-185.

was invalid in light of Article IX, section 7 of the Alaska Constitution prohibiting the dedication of license fees for a special purpose.⁴⁹

The second phase tried the validity of the ballast water discharge provision and onshore treatment requirement, the loading and unloading requirements, the contingency plans and capability criteria, the tanker certification provision, and the financial responsibility standards.⁵⁰ The court ruled in September, 1979 that the ballast water discharge provisions were preempted by the PWSA. Perhaps convinced that the remainder of its comprehensive scheme would not survive the court's preemption scrutiny, the Alaska Legislature repealed all the provisions of the Tank Vessel Regulation Act and the Oil Discharge Prevention and Pollution Control Act before the court could rule on the remaining provisions.⁵¹

Similarly, again perhaps because they were persuaded by the certainty of the lower court's preemption ruling and reliance on Ray, Alaska's lawyers chose not to appeal the decision except for the PWSA's preemption of the ballast water discharge provision. Alaska eventually prevailed on this issue. The

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41. Ball, Madisonian Federalism and Good Old American Permits, Env. L. (1982). Ball points out that this test has been employed under all three constitutional provisions that order state and federal interests in the sea: the commerce clause, the admiralty power, and the supremacy clause. Ball at 639 n.52.

42. 435 U.S. at 166.

U.S. Circuit Court of Appeals for the Ninth Circuit reversed the federal district court, holding that the federal Ports and Waterways Safety Act as amended in 1978,⁵² did not "occupy the field" of tanker discharge regulation in state waters, and that the State's discharge prohibition did not pose an irreconcilable conflict with any regulations adopted by the Coast Guard pursuant to the PWSA nor prevented the achievement of that Act's objectives.⁵³ This interpretation was, in the court's view, supported by the congressional intent evident in the Clean Water Act to achieve maximum state-federal cooperation in protecting the marine environment within three miles of the shoreline.⁵⁴ When the Supreme Court denied Chevron's petition for a writ of certiorari the litigation was over. All that remained, however, of Alaska's comprehensive scheme of oil tanker and terminal surveillance and regulation was the ballast water discharge prohibition.⁵⁵

It is difficult and probably unwise to speculate on what

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43. Ball at .

44. Id. at 642.

45. The safety features included two marine radars systems, collision avoidance radar systems, LORAN-C navigational receivers, and other position location systems as prescribed by regulations by ADEC.

46. These features included lateral thrusters, controllable pitch propellers, and backup propulsion equipment.

the Ninth Circuit would have held had Alaska decided to appeal the lower court's preemption ruling regarding its oil spill risk charge system. The trial judge's opinion makes clear that his principal objection was based on the inadequacy of the risk charge system's statistical basis.⁵⁶ He seemed particularly disturbed by the nature of the actuarial statistics and data on tanker accidents that were used as the basis for establishing the different risk charges by tanker size and construction.

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47. This law authorized ADEC to take all necessary steps in cooperation with federal authorities to prevent oil spills, including the inspection and supervision of oil transfer activities, to arrange for the prompt and effective containment and removal of spilled oil, and to provide procedures to compensate victims.

48. One commentator has noted that the Alaska risk charge system effectively favored fewer trips by larger, weel-equipped tankers as the best way to reduce the risk of oil spills. The risk charges schedule levied higher chargews for smaller tankers with equipment identical with larger tankers.

49. The State of Alaska initially filed an appeal of this ruling but later abandoned it.

50. The constitutionality of the warrantless ADEC searches and inspections of tankers was also at issue.

51. HB 205, Chapter 116, 1980 Alaska Laws, effective July 1, 1980.

52. The Ports and Tanker Safety Act of 1978.

53. Chevron v. Hammond, (9th Cir. 1978). The court's preemption analysis narrowly interpreted the field the federal government occupied through the PWSA and further required that an actual and irreconcilable conflict exist before preemption would be found.

54. Chevron v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. denied, .

His discussion of the system and of the qualifications and methodology of the ADEC contractor who designed it, suggest that it was the program's execution rather than its legal basis that troubled him. That being the case, he should have remanded the risk charge regulations to ADEC to correct the defects rather than invalidate the system entirely.

On the question of whether the risk charge regulations were preempted, the lower court's opinion was not particularly convincing nor detailed. The judge noted the international dimension of the problem of tanker oil spills. He observed that President Carter's proposal for requiring double bottoms on tankers had been rejected, on safety grounds, four months before at IMCO's International Conference on Tanker Safety and Pollution Prevention, where the decision was taken instead to study further the selective placement of segregated ballast tanks. In his view, Alaska's risk charge system was an attempt to influence the design characteristics of tankers, a subject that the Ray v. Atlantic Richfield decision of three months prior had indicated was completely preempted by Title II of the PWSA.

The trial judge rejected the argument that the risk charge system was similar to Washington's alternative design/tug escort requirement, and that as an operating rule reflecting the peculiar conditions of local waters, it was not preempted under Title I until specific federal judgments to the contrary were made. He merely concluded that because the risk charge system was designed to provide incentives for the incorporation

of state-desired safety and maneuverability features it was contrary to the apparent goal of Title II to achieve uniform national and international standards. In light of the divergence in opinion revealed at the IMCO conference respecting the effectiveness of various design characteristics to prevent oil spills, he predicted that a widely varying array of conflicting state standards would result if states were allowed to enact their own tanker standards.

Although there was merit in the analogy between Washington's tug escort option and Alaska's risk charge alternative, the trial judge believed that the potential conflict posed by the risk charge system was sufficient for preemption. He did not consider the actual impact the state regulations were having on tanker design, even though the Supreme Court had considered this question with respect to Washington's design/tug escort alternative in Ray. The trial judge gave no weight to the fact that tanker owners were paying the risk charges instead of incorporating the State's safety and design features.

Further, he made no mention of the argument that the risk charge system was effectively an oil spill contingency fund the contributions to which were assessed on the basis of the different risks posed by certain kinds of tankers. Under this line of inquiry a court that was more favorably disposed to state initiatives could have upheld the risk charge system as a contingency fund provision authorized by the federal Clean Water Act and the decision in Askew v. American Waterways Operators. It is possible that the Ninth Circuit would have so

ruled, given its reading of the Clean Water Act with respect to the ballast water discharge provision. The State's failure to appeal the ruling is unfortunate. A ruling by the Ninth Circuit on all aspects of the Alaska law could have helped clarify the application of the Ray and Askew rulings and promoted the development of this uncertain area of the law.

The shallowness of the trial judge's analysis is probably attributable to the doctrinal confusion that the Supreme Court's preemption jurisprudence represents. His reading of the Supreme Court's decisions overlooked the aspects of the Ray decision that should limit its impact on other state laws. He completely ignored the Askew Court's strong endorsement of state authority in spill contingency measures. On these grounds it would have been more appropriate to appeal the decision to the Ninth Circuit for a more comprehensive reading of the applicable case law. It may have been the risk charge regulations' technical deficiencies revealed by the trial court's close scrutiny that made the State reluctant to pursue an appeal on the preemption issue. On the other hand, the court's willingness to accept a broad reading of the flawed decision in Ray v. Atlantic Richfield is likely to have played a significant part in discouraging the State's appeal. Likewise, the forcefulness of the federal preemption pronouncements on its neighboring state, Washington, probably caused Alaska to abandon its entire spill prevention scheme through repeal.

The states affected by the coastwise oil tanker traffic from the Alyeska pipeline found that international considera-

tions prompted a doctrinally uncertain judiciary to read a Congressional desire for national uniformity in the oil tanker spill prevention domain. This result is ironic at least in part because the terms of the Alyeska pipeline agreement prohibit tankers from shipping North Slope crude oil to foreign ports.

V. The Oil Pollution Act of 1990

The linkage between a desire for international cooperation and the permissible scope of state authority in marine affairs may have been effectively severed with the passage of the 1990 Oil Pollution Act⁵⁷. The post-Exxon Valdez Congress was, for the first time in nearly two decades, able to agree on comprehensive, federal oil spill legislation. The Act significantly raises liability limits for spillers, creates a \$1 billion clean-up and compensation fund, imposes strict new oil tanker design and construction standards, including requirements for double bottoms and hulls, and provides stronger, federally coordinated response and contingency planning. The preemption of state laws was one of the major issues that divided the House and Senate in their deliberations on comprehensive legislation in the years prior to 1989. After the Exxon Valdez spill, however, this issue was subordinated to the desire to get in place the greatest possible coverage for damage claims from oil spills.

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In the 101st Congress, the House and Senate were initially divided on the issue of ratification of the 1984 international protocols,⁵⁸ which set a limit on the liability of oil shippers and consequently required the preemption of state oil spill laws that provided higher limits or unlimited liability. The Senate bill, S. 686, did not endorse the international protocols nor preempt state laws or state court actions to recover damages. The House's original bill, H.R. 1465, in an effort to secure endorsement of the protocols, preempted state liability limits but not state compensation funds. Proponents of state authority were able to amend the House bill during the floor debate to eliminate preemption of certain state law damage claims, to require clean-ups to meet stricter state environmental standards, and to give state courts jurisdiction over suits under the federal Act. The House bill retained, however, implementation of the 1984 protocols, thus limiting the liability of spillers, except in the case of gross negligence.⁵⁹

The House and Senate conferees eventually rejected the House bills endorsement of the 1984 protocols and replaced it with language conveying a "sense of the Congress" supporting an

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55. Alaska eventually enacted a much less ambitious law prohibiting oil discharges, establishing liability standards, and requiring state approval of contingency plans. The State's principal means of reducing the risks of spills and enforcing the requirements were gone.

56. The trial judge considered at length the ADEC methodology employed in setting the risk charges, emphasizing the Department's conscious decision,

international oil pollution liability and compensation regime that is "at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents."⁶⁰

The final bill includes an extensive state law savings clause pertaining to oil pollution liability and compensation.⁶¹

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with the encouragement of the Attorney General, to develop the program as a system of insurance premiums rather than regulatory standards for tankers. Alaska apparently took this approach in an effort to avoid preemption under the federal regulatory statute, the PWSA, and the court's opinion seemed aware of this tactic. The court found particularly persuasive the testimony of Chevron's expert witnesses that the ADEC contractor's report, which formed the basis for the risk charge regulations, was "statistically and actuarially unsound" and based upon inadequate and misapplied data. Memorandum of Decision, June 30, 1978, at 29. (These data concerned the casualty experience of the world-wide tanker fleet on the high seas, and did not take account of the performance of tankers in Alaskan coastal waters.)

In the court's view, the model employed in the report assumed a simplistic and unproven relationship between particular tanker design features and navigation equipment and their reduction of the risk of an oil spill. The judge found the risk reduction estimates to be subjective, incomplete, and unsupported. He condemned the contractor's report as "devoid of merit" but faulted the ADEC decision to use an actuarial method for which the contractor was unqualified and for which he was given inadequate time (six weeks), resources, and staff assistance. Noting the complexity of the task of determining tanker standards to reduce oil spills, the judge pointed out that the double bottom issue alone had consumed years of study and debate before it was ultimately rejected by the International Maritime Consultative Organization (IMCO) in February, 1978, just four months prior to his ruling.

If the judge was influenced, and apparently he was, at least in part, by the results of the IMCO deliberations, he most likely assumed, perhaps naively, that the IMCO decision was a technical rather than a political and economic one. See Silverstein, Superships and Nation-States: The Transnational Policies of the Intergovernmental Maritime Consultative Organization (1978) at 184-186 ("IMCO is an inherently sympathetic forum to maritime interests" which has not functioned effectively as a regulatory body because of its lack of an independent research and technical capability).

57. P.L. 101-380, signed August 18, 1990.

58. The 1984 protocols amended the 1969 Civil Liability Convention and the

Title IV, Subpart A, of the Act addresses regulation to prevent spills, including crew licensing, tanker construction standards, mandatory pilotage areas, and vessel traffic service systems. This subsection makes no mention of concurrent state jurisdiction on these subjects. The only hint one can glean from the Act is a reference in the Conference Committee report which says, without elaboration, that the Act does not overturn the Supreme Court's decision in Ray v. Atlantic Richfield Co.. It is confusing, to say the least, to find in a domestic statute that sets strict unilateral construction and safety standards for all tankers using U.S. waters and rejects international on liability limits because of their preemptive effect on state laws, fidelity to a decision that preempted state law based upon the perceived Congressional goal of fostering inter-

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1971 Compensation Fund Convention, both of which were negotiated under the auspices of the International Maritime Organization.

59. After the anti-preemption amendments were approved on a vote of 279 to 143 on November 8, the House passed H.R. 1465 375 to 5 on November 9, 1989. Grumbles, Major Provisions, Themes of Oil Pollution Act of 1990, BNA Environment Reporter, Current Developments 1264 (November 2, 1990).

60. P.L. 101-380, section 3001.

national cooperation.⁶²

By enacting a comprehensive set of very specific technical standards and timetables for the Coast Guard, the 1990 Act creates even greater doubt about the permissible scope for state law-making to control the risks of oil spills than had existed before its enactment, the triumph of the non-preemption advocates notwithstanding. There is no doubt that states can adopt and enforce state liability laws and administer compensation funds. The vast area of spill prevention regulation, through readiness training, the pre-positioning of sufficient quantities of state-of-the-art containment equipment, and prohibitions against tanker operations under unsafe conditions or in particularly sensitive waters, will remain murky areas for state law-makers as long as the judiciary has the opportunity to determine the scope of state regulation under the preemption doctrine that's exemplified by the Ray decision. the enactment of the 1990 law.

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61. Sec. 1018 Relationship to other law.

(a) Nothing in this Act or the Act of March 3, 1851 [Limitation of Liability Act] shall-

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to-

(A) the discharge of oil or other pollution by oil within such State; or

VI. Conclusions and Recommendations

If left to their own devices, the courts will probably continue to flounder in the doctrinal confusion and inconsistencies of federal preemption analysis, viewing their task as one merely of statutory interpretation with no particular bearing on the definition or preservation of the basic principles of federalism that conflicts over state and federal law-making powers implicate. Those of us who work with the judiciary, either directly through litigation or indirectly through teaching and scholarship, should work toward guiding the courts toward a better articulated and more principled preemption doctrine. This would serve us all through more consistent and predictable results and through the reinvigoration of the federalism system, with important benefits for the management of ocean and coastal resources.

Those of us who work with the Congress should watch closely how the matter of concurrent jurisdiction is resolved in bills that are drafted. Saying nothing or including an ambiguous, partial reference to either the preemption or savings of state law effectively delegates to the courts the determination of what is the appropriate balance of state and federal lawmaking on a particular subject. We should keep in mind the rationale the courts give for deciding cases under the supremacy clause rather than under other, more traditional 'constitutional' grounds. Interpreting a statute for its intent with respect to state authority preserves flexibility and the opportunity for the Congress to correct their mistakes if they get it

wrong. Where courts get it wrong on a particular statute, take them up on their offer and reverse them.⁶³

Those of us who work with state legislation should look skeptically at claims of federal preemption, if we don't already. We should prepare ourselves to make sound and substantive arguments on behalf of a full partnership with the federal government in the management of ocean resources, and be willing and courageous in initiating bold experiments that other policymakers throughout American government can watch and adapt for their purposes.

Perhaps we could try to jump-start this project of clarifying federal preemption in the name of a better federal-state partnership by enacting new federal legislation to the following effect:

No Act of Congress shall be construed or interpreted as indicating an intent on the part of Congress to occupy the field... [of ocean management or any part of that field]... unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a state law so that the two cannot be reconciled or consistently stand together.⁶⁴

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(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

(b) Nothing in this ACT or in section 9509 of the Internal Revenue Code of 1986 ... shall in any way affect, or be

Legislation implementing the extended territorial sea may be a good place to include this provision.⁶⁵ Amendments to the Submerged Lands Act are another. I like the idea of a new "Stratton" commission to prepare a comprehensive review of U.S. marine law and policy; perhaps a legislative recommendation to this effect could be considered by such a body. I look forward to such discussions and to the search for true meaning that some court will inevitably have to undertake to determine the provision's intent, if it is ever enacted.

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construed to affect, the authority of any State-

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

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(c) Nothing in this Act, the Act of March 3, 1851 ..., or section 9509 of the Internal Revenue Code of 1986 .., shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof-

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Section 1019. A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1013.

62. It is interesting to note that the Oil Pollution Act of 1990 defines the seaward limit of the territorial sea as three miles. Sec. 1001(35). The Act does, however, cover all oil discharges in all waters of the U.S. and the exclusive economic zone. Sec. 1002(a), 1001. The effect of this seems to be that state enforcement of the evidence of financial responsibility requirements, which is specifically authorized in section 1019, is limited to waters within three miles of the coastline. The general state savings clause appears to preserve state liability requirements only with respect to oil discharges "within such State." Sec. 1018(a)(A). This language may cast doubt on the validity of existing state laws that do not limit their coverage to inland and state waters. See, e.g., Oil Pollution Prevention, Liability and Compensation Act, MRSA (Act is enforced to a distance of twelve miles from the coastline). Compare FWPCA sec. 311 construed in Askew.

63. Veterans of the "directly affecting" wars under CZMA section 307(c)(1) and Interior v. California should at this point be shouting "that's easy enough for you to say. You try it!"

64. This language is a slightly modified version of a bill (H.R. 3) that was passed by the House of Representatives in 1958, during the 85th Cong., 2d Sess., 104 Cong. Rec. 13993, 14162 (1958). The Senate version, S. 654, failed to pass by one vote. 104 Cong. Rec. 16127, 18928 (1958). I credit the anonymous author of Comment, Preemption Doctrine in the Environmental Context: A Unified Method of Analysis, 127 U.Pa. L. Rev. 197 (1978) with finding this gem of information. Id. at 208 n.62.

65. If the Congress considers new territorial sea legislation that increases

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state geographical jurisdiction, it should include provisions setting procedures and standards for the management of shared resources and principles for the resolution of all the new lateral seaward boundary disputes that will arise between states. It may want to direct the courts to apply substantive standards that are more sensitive to resource management and allocation questions than is the equidistance principle in Article 12 of the Geneva Convention on the Territorial Sea. See, e.g., Georgia v. South Carolina, U.S. (1997). See also Barneyer, in Dallmeyer and DeVorse, eds. (1988): Outer Continental Shelf Lands Act, sec. 8(g).

STATE HISTORIC INTERESTS IN THE MARGINAL SEAS

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I. Introduction

In the last fifty years, the importance of the marginal seas in international affairs and the value of the resources of these seas have precipitated the exercise of federal paramount powers that has converted an area that was traditionally subject primarily to state management to an area dominated by federal legislation and regulation. In spite of the dominant federal concerns in the marginal seas, however, Congress has continued to recognize the traditional and historic interests of the states in the marginal seas both within and outside the three mile limit. This paper reviews the historical basis for assertion of state interests in the marginal seas and assesses the continuing vitality state powers beyond their territorial limits.

II. The Tidelands Controversy

A. Background of the Federal/State Offshore Ownership Controversy

In *Martin v. Waddell*,¹ the United States Supreme Court articulated the basic principles governing the ownership of lands under navigable waters: "When the Revolution took place, the people of each State became themselves sovereign; and in that character

¹16 Pet. 367 (1842).

hold the absolute right to all their navigable waters and the soils under them for their common use, subject only to the rights surrendered by the Constitution to the general Government."² The "equal footing doctrine," first explained in *Pollard v. Hagan*³ and reiterated in *Shively v. Bowlby*,⁴ stood for the principle that "new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."⁵ Until the 1940s, little doubt seemed to exist that the coastal states "owned" the lands under their

²*Id.* at 410.

³44 U.S. (3 How.) 212 (1845). In *Pollard v. Hagan*, the Supreme Court held that on the admission of Alabama into the Union, title to lands under navigable waters passed to the state. Alabama had been created from trust territory ceded by the state of Georgia for the express purpose of creating new states. "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it to the same extent, in all respects, that it was held by the States ceding the territories." *Id.* at 221. "When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain, which Georgia possessed at the date of the cession. . . . *Id.* at 222. "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws and compact to the contrary notwithstanding." "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States." *Id.* at 228, 229.

⁴152 U.S. 1 (1894). In *Shively v. Bowlby*, the Supreme Court confirmed that the admission of Alabama on an equal footing with respect to lands under navigable waters was not based merely on the terms of the cession of the territory to the United States by Georgia, but that such rights in navigable waters was "inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States . . ." *Id.* at 27.

⁵*Id.* at 57.

territorial seas, which were presumed be encompassed within the definitions of navigable waters or tide waters.

Prior to 1940, most coastal states had legislation establishing offshore marine boundaries,⁶ and many state constitutions described state boundaries as extending a marine league or more offshore.⁷ Numerous state court cases had early concluded that the original colonies succeeded to the King's interest in the tidelands and adjacent seas and, therefore, title vested in the original colonies.⁸ Decisions of federal courts, including the United States Supreme Court, impliedly, if not expressly, supported the presumption of state ownership of the seabed of the territorial sea.⁹ Even Secretary of the Interior Harold L. Ickes, charged

⁶See generally, Ireland, *Marginal Seas Around the States*, 2 LA. L. REV. 252, 283-293, 436-476 (1940) [hereinafter Ireland]. Ireland reviews the claims and law of each coastal state in this comprehensive work.

⁷*Id.*

⁸See E. BARTLEY, *THE TIDELANDS OIL CONTROVERSY* 27-42 (1953) [hereinafter BARTLEY], for a review of of early cases adopting the theory that the thirteen original colonies succeeded to the rights of the Crown of England to the adjacent sea.

In reviewing cases and other proceedings involving rights in the adjacent seas, Ireland stated:

In the United States questions have arisen concerning, in the sea below high water mark, probably every class of property right known or claimed over dry land, as well as those peculiar to the nature of this strip as covered with water . . . always the decision by executive, legislative or judicial authority, in court or other tribunal, has been consistent with a theory of original absolute ownership by the sovereign state. (citations omitted)

Ireland, *supra* note 6, at 267-68.

⁹In *Shively v. Bowlby*, 152 U.S. 1 (1894), the United States Supreme Court surveyed some of the earlier Supreme Court cases concerning state ownership of navigable waters and tidelands:

. . . The decision in *Manchester v. Massachusetts*, 139 U.S. 240, affirming 152

with administering United States public lands, stated that the federal government had no

Mass. 230, upheld the jurisdiction of the State, and its authority to regulate fisheries, within a marine league from the coast. . . . This court, speaking by Mr. Justice Curtis, in affirming the right of the State of Maryland to protect the oyster fishery within its boundaries, said: "Whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish." *Smith v. Maryland*, 18 How. 71, 74.

The State of Virginia was held by this court, upon like grounds, to have the right to prohibit persons not citizens of the State from planting oysters in the soil covered by tide waters within the State, Chief Justice Waite saying: "The principle has long been settled in this court, that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States." *McCready v. Virginia*, 94 U.S. 391, 394. . . .

In the very recent case of *Knight v. United States Land Association*, Mr. Justice Lamar, in delivering judgment, said: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States; and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." 142 U.S. 183. . . .

By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones." 23 Wall. 64, 68.

Id. at 19, 24, 30.

authority to lease the seabed for mineral exploration.¹⁰ In the now famous 1933 Proctor Letter, Ickes explained to a lease applicant that "[t]itle to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State."¹¹

In the late 1930s, controversies emerged within California concerning oil recovered from submerged lands by slant drilling from shore¹² and ownership of mineral rights in submerged lands granted by the state to coastal cities for harbor and recreational development.¹³ Apparently instigated by Secretary Ickes¹⁴ and fired by the oil industry¹⁵ and

¹⁰Letter from Harold L. Ickes, Secretary of the Interior, to Olin S. Proctor (Dec. 22, 1933), *reprinted in* BARTLEY, *supra* note 8, at 128-29. In the Proctor Letter Secretary Ickes cited the United States Supreme Court case, *Hardin v. Jordon*, which specifically stated:

With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands under in front of lands so granted enures to the State within which they are situated Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state . . . and cannot be retained or granted out to individuals by the United States. 140 U.S. 371, 381 (1891).

¹¹*Id.*

¹²*See, e.g.,* Metcalfe, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYR. L. REV. 39 (1952). California laws had prohibited offshore drilling. "The California laws, however, were by-passed by the ingenuity of petroleum engineers who conceived what is known as 'slant drilling.'" *Id.* at 40.

¹³*See* Ireland, *supra* note 6, at 253-54. *See also* BARTLEY, *supra* note 8, at 73-78.

¹⁴According to Bartley, Secretary Ickes asked Senator Nye of North Dakota to introduce in 1937 the first bill in Congress challenging state ownership of the territorial sea. BARTLEY, *supra* note 8, at 101.

¹⁵

vocal individuals from California¹⁶ interested in settling the offshore ownership issue, Congress in 1938 began a series of hearings¹⁷ and attempted resolutions¹⁸ addressing federal

¹⁶*Id.*

¹⁷For an overview of the congressional hearings, see BARTLEY, *supra* note 8, at 101-21.

¹⁸In *United States v. Louisiana*, 363 U.S. 1 (1960), the Supreme Court chronicled Congress' attempts to quiet title:

FN4. 1937--1938, 75th Congress:

S. 2164, S.J.Res. 208. Both would have confirmed the rights in the Federal Government. S.J.Res. 208 was passed by the Senate but not by the House.

1939, 76th Congress, 1st Session:

H.J.Res. 176, H.J.Res. 181, S.J.Res. 24, S.J.Res. 83, S.J.Res. 92. All would have confirmed the rights in the Federal Government.

1945--1946, 79th Congress:

H.J.Res. 118 and 17 similar bills, H.J.Res. 225, S.J.Res. 48. All would have quitclaimed rights to the States within their boundaries. H.J.Res. 225 was passed by both Houses but vetoed by President Truman.

1948, 80th Congress, 2d Session:

H.R. 5992 and S. 1988 (quitclaim measures); S. 2222, H.R. 5890, and S. 2165 (to confirm States' rights in lands underlying inland waters and the Federal Government's rights in lands underlying the marginal sea). H.R.

5992 was passed by the House.

1949--1950, 81st Congress:

1st Sess: H.R. 5991, H.R. 5992 ('compromise' bills); S. 155, S. 1545 (quitclaim measures); S. 923, S. 2153, H.R. 354 (to confirm States' rights in lands beneath inland waters and Federal Government's rights in lands beneath marginal seas); S. 1700 (to establish a federal reserve) 2d Sess: H.R. 8137 (quitclaim measure); S.J.Res. 195 (interim management bill).

1951--1952, 82d Congress:

S.J.Res. 20, H.J.Res. 131, H.J.Res. 274 (interim management bills); H.R. 4484, S. 940 (quitclaim measures). H.R. 4484 was passed by the House in the 1st Session; S.J.Res. 20 was passed by the Senate after amending it by substituting therefor S. 940, in the 2d Session. S.J.Res. 20 as amended prevailed in conference, but was vetoed by President Truman.

interests in the tidelands. These efforts culminated in 1946 in House Joint Resolution 225,¹⁹ which quitclaimed any rights of the federal government in lands beneath tidelands and navigable waters to the states. President Truman vetoed the resolution on August 2, 1946, citing the fact that the issue was currently before the Supreme Court²⁰ in *United States v. California*.²¹ President Truman stated in his veto message:

[T]he issue now before the Supreme Court . . . presents a legal question of great importance to the Nation, and one which should be decided by the Court. The Congress is not an appropriate forum to determine the legal issue now before the Court. The jurisdiction of the Supreme Court should not be interfered with while it is arriving at its decision in the pending.²²

As one commentator remarked, the "failure of Congress to override the veto . . . shifted a vexed political question to the Supreme Court."²³

B. *United States v. California*

On October 19, 1945, after aborting an action to enjoin Pacific Western Oil Company from further extracting oil from a submerged field near Santa Barbara,²⁴ the United States Attorney General filed an original jurisdiction suit in the Supreme Court against the state

363 U.S. at 6 n.4.

¹⁹H.R. Doc. No. 765, 79th Cong., 2d Sess. (1946).

²⁰See Tide Lands Title Act Veto, Message to Congress, U.S. CODE CONG. SERVICE 1712-12 (1946) [hereinafter Title Act Veto].

²¹332 U.S. 19 (1947).

²²Title Act Veto, *supra* note 20, at 1713.

²³Note, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 Yale L. J. 356, 356 (1947).

²⁴See BARTLEY, *supra* note 8, at 159-161.

of California.²⁵ The suit sought to have the United States declared "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and . . . extending seaward three nautical miles"²⁶

California's seaward boundary, extending three English miles offshore, was established in its original constitution²⁷ and was ratified by the Enabling Act admitting California to the Union in 1850.²⁸ California argued that because the original colonies had acquired from the Crown of England all lands under navigable waters, including all marginal seas within their boundaries, these lands also vested in California upon admission by virtue of the equal footing doctrine as an element of sovereignty.²⁹

The Court quickly dismissed California's arguments. Rather than joining the debate concerning whether the colonies had acquired the elements of sovereignty necessary to succeed to the Crown's rights in the marginal seas,³⁰ the Court found the evidence insufficient to establish that England claimed ownership rights that could have passed to the

²⁵ *Id.* at 161.

²⁶ *United States v. California*, 332 U.S. 19, 22 (1947).

²⁷ CAL. CONST. art. XII (1849).

²⁸ 9 STAT. 452 (1852).

²⁹ *California*, 332 U.S. at 23. California also asserted several affirmative defenses: title under a doctrine of prescription; by a Congressional policy of acquiescence in California's asserted ownership; by estoppel or laches; and by application of *res judicata*. 332 U.S. at 23-24.

³⁰ *Cf. United States v. Curtis Wright*, 299 U.S. 304 (1936).

colonies.³¹ The Court also limited application of the principles announced in *Pollard*³² to inland waters.³³ The Court concluded that "acquisition, as it were, of the three-mile belt [had] been accomplished by the National Government,"³⁴ rather than the English Crown or the colonies. The assertion of territorial rights in 1872 by Secretary of State Thomas Jefferson was found by the Court to be "the first official American claim for a three-mile zone which has since won general international acceptance."³⁵

The Court's depiction of the federal government's role, not as merely a property owner, but as the entity responsible for the security and defense of the marginal seas, and for the conduct of foreign relations,³⁶ presaged the holding.

The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. The state is not equipped in our constitutional system with the powers or the facilities for exercising the

³¹From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. 332 U.S. at 31.

³²332 U.S. at 29-33.

³³332 U.S. at 36-38.

³⁴332 U.S. at 34.

³⁵332 U.S. at 33 n.16.

³⁶332 U.S. at 34.

responsibilities which would be concomitant with the dominion which it seeks.³⁷

However, these interests did not necessitate ownership by the United States of the territorial sea. Instead, the Court held only "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."³⁸

Justice Frankfurter's dissent pointed out the inconsistencies in the majority's reasoning: "Of course the United States has 'paramount rights' in the sea belt of California -- the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power."³⁹ No court pronouncement was necessary "to confer or declare such sovereignty."⁴⁰ But no interference with these rights was before the Court - only questions of ownership. Frankfurter opined that the fact that oil is vital to national security and to the conduct of foreign affairs is irrelevant to the issue of ownership or dominion.⁴¹

³⁷332 U.S. at 35-36 (citations omitted).

³⁸332 U.S. at 38-39.

³⁹332 U.S. at 44.

⁴⁰332 U.S. at 45.

⁴¹332 U.S. 44-45.

C. Interpretations of *United States v. California*

1. The Texas and Louisiana Cases

On the heels of the *U.S. v. California* holding, the United States brought suit against both Texas⁴² and Louisiana⁴³ on the basis that the broad principles of the case also dictated federal ownership or control of the oil fields of the Gulf of Mexico. The Louisiana case, with little to distinguish its history from California, was found to be controlled by *United States v. California*.⁴⁴ The Court reiterated that "[t]he marginal sea is a national, not a state concern. . . . National interests, national responsibilities, and national concerns are involved. . . . National rights must therefore be paramount in that area."⁴⁵

The Texas case, however, presented a clearly unique circumstance because of its preadmission history. Unlike California or Louisiana, which had "never acquired ownership in the marginal sea,"⁴⁶ Texas, as a sovereign republic prior to annexation, had established a boundary and dominion extending three-marine leagues into the Gulf of Mexico which had never been transferred to the United States.⁴⁷ Texas argued that these differences necessitated a different result.

⁴²*United States v. Texas*, 339 U.S. 707 (1950).

⁴³*United States v. Louisiana*, 339 U.S. 699 (1950).

⁴⁴*Louisiana I*, 339 U.S. at 704.

⁴⁵*Louisiana I*, 339 U.S. at 704.

⁴⁶*Louisiana I*, 339 U.S. at 704.

⁴⁷*Texas*, 339 U.S. at 713.

But the Court had set the stage for the Texas judgment in the *Louisiana* case when it stated that "the issue in this class of litigation does not turn on title or ownership in the conventional sense."⁴⁸ The Court, instead, disposed of the case through a "converse" application of the equal footing doctrine.⁴⁹ Even assuming that Texas as an independent Republic had full dominion to the three-league sea, the Court found that the equal footing clause "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State."⁵⁰ In order for Texas to become "a sister State on 'equal footing' with all the other States . . . entailed a relinquishment of some of her sovereignty."⁵¹

The relinquishment of "any claim that Texas may have had to the marginal sea" was held by the Court to be incidental to the transfer of Texas' external sovereignty to the United States.⁵²

In addressing the sovereignty/property issue that had also been raised in Frankfurter's dissent in *California*, the Court stated that in the "international domain" beyond the low water mark: "Property rights must . . . be so subordinated to political rights as in substance to coalesce and unite in the national sovereign."⁵³

⁴⁸*Louisiana I*, 339 U.S. at 704.

⁴⁹*Texas*, 339 U.S. at 717.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³339 U.S. at 719.

2. Congress

The Senate Judiciary Committee of the Eightieth Congress was given the task of examining the Supreme Court's handiwork in the *California* case.⁵⁴ In hearings, the Committee heard testimony that variously described the case as "'extraordinary and unusual,' 'creating an estate never before heard of,' 'a reversal of what all competent people believed the law to be,' 'creating a new property interest,' 'a threat to our constitutional system of dual sovereignty,' 'a step toward the nationalization of our natural resources,'[and] 'causing pandemonium.'"⁵⁵ The Committee Report concluded that the "decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be."⁵⁶

In addition, the Committee was completely perplexed as to the meaning of the "paramount rights" in the territorial sea that the Court had attributed to the federal government. The Committee was "unable to determine whether or not the Supreme Court held that the United States has actual title in and to the submerged coastal lands adjacent to California"⁵⁷ If neither the United States nor California was the owner of the marginal sea, the Committee "deem[ed] it imperative that Congress take action at the

⁵⁴See SENATE REPORT NO. 1592, 80th Cong., 2d Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 1501-27.

⁵⁵*Id.*, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS at 1508.

⁵⁶*Id.*, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS at 1507.

⁵⁷*Id.*, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS at 1510.

earliest possible date to clarify the endless confusion and multitude of problems resulting from the California decision⁵⁸

In the Eightieth Congress in 1948, five of measures concerning the marginal sea were introduced and one resolution quitclaiming federal territorial sea interests passed the House.⁵⁹ The first session of the Eighty-first Congress in 1949 saw even more legislation introduced, but in the 1950 session, legislators seemed to be awaiting the Supreme Court's disposition of the Texas and Louisiana cases.⁶⁰ The holdings instigated a flurry of activity in the Eighty-second Congress which culminated in quitclaim legislation passed in May 1952.⁶¹ President Truman again vetoed the quitclaim, calling the bill "robbery in broad daylight -- and on a colossal scale."⁶² The Senate did not attempt to override the veto.⁶³

Spurred by the election campaign pledge of President Eisenhower to sign legislation returning offshore lands to the states, legislators introduced almost fifty resolutions in 1953. On May 22, 1953, Congress, passed the Submerged Lands Act (SLA),⁶⁴ quitclaiming to the

⁵⁸*Id.*, reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS at 1508.

⁵⁹*See* note 18 *supra*.

⁶⁰Metcalf, *supra* note 12, at 70.

⁶¹*Id.* at 85-86.

⁶²*Id.* at 86, *quoting* N.Y. TIMES, May 18, 1952, p.1 col.7.

⁶³*Id.* at 88.

⁶⁴43 U.S.C.A. §§ 1301-1315 (West 1986 & Supp. 1989).

coastal states all federal proprietary rights in the territorial sea⁶⁵ and confirming federal government rights in the seabed and subsoil beyond that.⁶⁶

C. The Submerged Lands Act

Through the SLA, Congress accomplished three objectives: it established state title to the territorial sea; it delimited state ocean boundaries; and it reserved federal rights both within and beyond state territorial limits.

The vesting of title to the territorial sea was accomplished through a two step process. First, Congress provided that "title to and ownership of" the territorial sea was "recognized, confirmed, established, and vested in and assigned to the respective States . . ."⁶⁷ Congress then quitclaimed any right, title, and interest the United States might have had in the territorial sea lands.⁶⁸ The constitutional powers of the United States over those

⁶⁵*Id.* § 1311.

⁶⁶Interestingly, the constitutionality of the SLA was upheld in *Alabama v. Texas*, 347 U.S. 272 (1954), as an exercise of Congress' power to dispose of federal property.

⁶⁷43 U.S.C.A. § 1311(a) (West 1986 & Supp. 1989). Presumably, Congress found this plethora of language necessary because of the uncertainly underlying the ownership of territorial sea prior to the SLA. See, e.g., language of the Senate Report No. 1592 stating:

The committee cannot agree that the relinquishment by the Federal Government of something it never believed it had, and the confirmation of rights in the States which they always believed they did have and which they have always exercised, can be properly classified as a "gift," but rather a mere confirmation of titles asserted under what was long believed and accepted to be the law.

SENATE REPORT NO. 1592, *reprinted in* 1953 U.S. Code Cong. & Admin. News at 1520.

⁶⁸*Id.* § 1311(b).

lands and waters, including the navigation servitude, the regulation of commerce and navigation, and control of national defense and international affairs, were specifically reserved to the federal government.⁶⁹ Congress also provided that the SLA would not affect federal rights in the natural resources of the continental shelf beyond state boundaries.⁷⁰

Although one of the purposes of the SLA was to relieve both the state and federal governments of the "interminable litigation" provoked by *California*⁷¹, the boundary provisions of the Act created additional legal problems. Section 1312 of the SLA confirmed title of the original coastal states to three geographic miles and recognized the authority of subsequently admitted states to extend boundaries to that distance. However, the section went on to provide the basis for states to continue to assert claims beyond three miles:

Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.⁷²

Therefore, Congress left it to the courts to determine whether a state could establish a historic claim beyond three miles. Because the SLA did not address the methodology for

⁶⁹See *id.* §§ 1311(d), 1314.

⁷⁰*Id.* § 1302.

⁷¹See H.R. REP. NO. 215, 83rd Cong., 1st Sess. [hereinafter HOUSE REPORT], reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS 1385, 1386.

⁷²43 U.S.C. § 1312 (West 1986 & Supp. 1989).

establishing the boundary lines, the courts also had to address the legal problems of boundary delimitation.⁷³

D. State Ownership Beyond the Territorial Sea

1. Extended Jurisdiction in the Gulf of Mexico⁷⁴

Florida and Texas were clearly intended as the beneficiaries of the language in the SLA preserving certain historic boundaries' claim beyond three miles that were based on the state's "constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."⁷⁵ Florida's three-league claim was based on its Constitution which had been approved by Congress in 1868.⁷⁶ Texas based

⁷³See generally Shalowitz, *Boundary Problems Raised by the Submerged Lands Act*, 54 COLUM. L. REV. 1021 (1954). In *United States v. California*, 381 U.S. 139 (1965), the Supreme Court adopted the definitions of the Convention on the Territorial Sea and Contiguous Zone, done at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, to deal with problems created by irregular coastlines, islands, and the mouths of bays and rivers.

⁷⁴For a more complete discussion of the extended boundaries of Florida and Texas, see generally Christie, *Making Waves: Florida's Experience with Extended Territorial Sea Jurisdiction*, 1 TERR. SEA J. 81 (1990).

⁷⁵See 43 U.S.C. § 1312 (West 1986 & Supp. 1989). The Senate version of the legislation was introduced by Senator Spessard Holland of Florida. S. REP. NO. 133, 83d Cong., 1st Sess., reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS 1474. See *United States v. Louisiana*, 363 U.S. 1, 29 (1960), which states: "[T]he last sentence of the present Act's § 4 was added, for the specific purpose of assuring that boundary claims of Texas and Florida would be preserved." See also *United States v. Florida*, 363 U.S. 121, 128 (1960), in which the Supreme Court stated that "the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida."

⁷⁶See HOUSE REPORT, *supra* note 71, reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS at 1427; 43 U.S.C.A. § 1312 (West 1986 & Supp. 1989); *Florida*, 363 U.S. at 123. Florida contended that it was entitled (under the Submerged Lands Act) to "ownership of three marine leagues of submerged lands because (1) its boundary extended three leagues or more seaward into the Gulf [of Mexico] when it became a State, and (2) Congress approved such

its claim on its seaward boundary prior to annexation in 1845.⁷⁷ In 1960, the Supreme Court upheld Florida's historic boundary claim in the Gulf of Mexico.⁷⁸ In a 1976 consent decree between Florida and the United States, Florida's Atlantic boundary was fixed at three geographic miles and the delimitation between the Gulf of Mexico and the Atlantic Ocean was established.⁷⁹ Texas' three-league historic boundary was also confirmed by the Supreme Court in 1960.⁸⁰

2. *United States v. Maine*⁸¹

In 1969, the United States brought an action against the thirteen states bordering the Atlantic Ocean⁸² to exclude the coastal states from exercising "sovereign rights over the

a three league boundary for Florida after its admission into the Union" *Id.* at 123. The Court agreed with Florida's latter contention, and hence Florida's seaward boundary is three leagues or nine geographical miles.

⁷⁷See HOUSE REPORT, *supra* note 71, reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS at 1427; 43 U.S.C.A. § 1312 (West 1986); *Louisiana*, 363 U.S. at 36-50. Texas argued that because it was an independent nation prior to admission into the Union and because it had a three league marine boundary at the time it was admitted in 1845, it should have a three league boundary under the Submerged Lands Act. The Court held that Texas' maritime boundary when it was admitted into the Union entitled it to claim a three marine league boundary under the Submerged Lands Act.

⁷⁸*United States v. Florida*, 363 U.S. 121 (1960).

⁷⁹*United States v. Florida*, 425 U.S. 791 (1976). Florida's 1868 Constitution arguably also extended the boundary in the Atlantic beyond three miles to the edge of the Gulf Stream. See 363 U.S. at 123 n.4. However, the definition of "boundaries" in the Submerged Lands Act limited extension of claims to no more than three geographic miles into the Atlantic Ocean. 43 U.S.C.A. § 1301 (West 1986 & Supp. 1989).

⁸⁰*United States v. Louisiana*, 363 U.S. 1, at 64 (1950).

⁸¹420 U.S. 515 (1975).

⁸²Connecticut was not included as a defendant because it borders only on inland waters. *United States v. Maine*, 420 U.S. 515, 517 (1975).

seabed and subsoil . . . lying more than three geographic miles seaward" from the coast.⁸³ The states, basing their claims primarily on colonial grants from the English Crown,⁸⁴ sought to have *California*, *Louisiana*, and *Texas* overruled. The Court upheld the historical conclusion in *California* that the colonies had no "legitimate claims to the marginal sea prior to independence"⁸⁵ The Court buttressed its findings by declaring that nothing in the Submerged Lands impaired the validity of earlier cases and by citing the provisions in the Submerged Lands Act which expressly limit boundaries to three miles in the Atlantic Ocean⁸⁶ and state that nothing in the Act "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf"⁸⁷

III. Imperium and Dominium

For many centuries, scholars have theorized about the intellectual basis of the coastal states' interests in the marginal sea.⁸⁸ At the heart of the debate was the question of whether the power to rule, *imperium*, flowed from ownership of the sea, *dominium*, or

⁸³*Maine*, 420 U.S. at 517.

⁸⁴See the appendix for a listing of state historic offshore claims.

⁸⁵*Maine*, 420 U.S. at 523.

⁸⁶420 U.S. at 526.

⁸⁷420 U.S. at 525.

⁸⁸See D. O'CONNELL, I THE INTERNATIONAL LAW OF THE SEA 58-123 (1982) [hereinafter O'CONNELL].

whether it existed independently.⁸⁹ During the seventeenth century these concepts were considered to be coextensive - "*imperium* resulted from *dominium*."⁹⁰ It was considered axiomatic, however, that within the dominion of the sovereign, property rights could be alienated "while the competence to rule persists."⁹¹

The end of extensive proprietary claims in the seas⁹² required that another rationale be devised to support application of the doctrine of *imperium* beyond the shores of a nation. The attempt to resolve inherently conflicting concepts like *mare liberum* and property rights, innocent passage and exclusive fishery rights, led scholars to posit a number of theories.⁹³ In the modern era many of the intellectual conflicts have remained unresolved; the rights of nations in the marginal seas are now generally described as sovereign rights or sovereignty.⁹⁴ This ambiguous terminology affords the coastal nation broad discretion to define its effect within municipal law,⁹⁵ but clearly provides international recognition for

⁸⁹*Id.* at 14-15.

⁹⁰*Id.* at 60-70.

⁹¹*Id.* at 16.

⁹²See generally, T. FULTON, *THE SOVEREIGNTY OF THE SEA* 517-542 (1911).

⁹³O'CONNELL, *supra* note 88 at 58-75. O'Connell summarizes a number of theories for exclusive territorial sea rights including the "property theory" (territorial sea is property acquired by occupation); the "police theory" (nations have "un droit de police et de jurisdiction sur la partie de la mer qui borde ses cotes"); the "competence theory" (states are competent to act to the full extent of national authority); and the "servitude theory" (the rights of a coastal nation consist of a bundle of servitudes).

⁹⁴*Id.* at 71-74.

⁹⁵*Id.* at 82-83.

nations to include the territorial sea within national boundaries.⁹⁶ O'Connell has stated:

There is no doubt that the intention behind the use of the word "sovereignty" in Article I of the Convention on Territorial Sea and Contiguous Zone is to concede to the coastal State plenary power to regulate events in the territorial sea. . . . [I]t allows for the maximum implications that may be drawn from the concept of sovereignty, but does not impose them on the coastal state; it leaves them to municipal law.⁹⁷

Irrespective of whether a coastal nation asserts both *dominium* and *imperium* in its marginal seas as a matter of municipal law, it is clear that *imperium*, the power to rule, is not entirely limited to territorial waters. Commentators since Grotius have admitted the legitimacy of limited exercise of *imperium* beyond a nation's territorial boundaries.⁹⁸ Exercise of jurisdiction of a nation's subjects or pirates on the high seas are historic examples; contiguous zone regulation is a modern example. One commentator postulated that "[s]ince *imperium* was directed to persons, and *dominium* to things . . . it was possible to manifest the former beyond the bounds of the latter."⁹⁹

In Justice Frankfurter's dissent in *United States v. California*,¹⁰⁰ he recognized the two types of interests the United States might exercise in its marginal seas:

To speak of "dominion" carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept *dominium*, was concerned with property and ownership, as against *imperium*, which related to political sovereignty. One may choose to say, for example, that the United States has "national dominion" over navigable streams. But the power to regulate commerce over these streams, and its

⁹⁶*Id.* at 80.

⁹⁷*Id.*

⁹⁸*Id.* at 16-17.

⁹⁹See *id.* at 17, discussing CONRING, *EXERCITATIO DI DOMINIO MARIS* (1654).

¹⁰⁰*California*, 332 U.S. at 43-46.

continued exercise, do not change the *imperium* of the United States into *dominium* over the land below the waters.¹⁰¹

In trying to address this argument and to rationalize the result of tidelands cases, Justice Douglas, author of the majority opinion in *United States v. Texas*,¹⁰² developed not only a "converse" application of the equal footing doctrine, but also of the historical dilemma of the *imperium/dominium* issue. By holding that political rights of the national sovereign require that property rights must "coalesce and unite" in that sovereign,¹⁰³ Justice Douglas changed the issue from whether *imperium* may only flow from *dominium* to whether *dominium* must result from exercise of *imperium*.

Although the Supreme Court cases unequivocally held that the coastal states had no *dominium* in the territorial sea or the subsoil and seabed beyond three miles, the cases did not address the issue of whether the states retained *imperium* in the marginal seas. The early California, Texas, and Louisiana cases seemed to raise doubts about whether the states retained any jurisdiction or authority beyond the low water mark. However, even in *United States v. California*,¹⁰⁴ the Supreme Court "[c]onced[ed] that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries"¹⁰⁵ Within a few months, the Supreme Court also decided *Toomer v.*

¹⁰¹332 U.S. at 44-45.

¹⁰²339 U.S. 707 (1950).

¹⁰³339 U.S. at 719.

¹⁰⁴332 U.S. 19 (1947).

¹⁰⁵332 U.S. at 36.

Witsell,¹⁰⁶ which recognized South Carolina's authority to regulate the shrimp fishery in the territorial sea.

In a 1948 law review article, United States Attorney General Tom Clark¹⁰⁷ discussed the nature of the equal footing doctrine: "the powers and rights so reserved to the original states, and vested in the subsequently admitted states under the 'equal footing' clause, are political and not proprietary in character."¹⁰⁸ As in the case of federal ownership of property of new states carved out of territories, there is no inconsistency between federal proprietorship and certain exercises of state jurisdiction not predicated on ownership.¹⁰⁹ Clark also explained that *United States v. California*¹¹⁰ did not interfere with the control of matters, like fisheries regulation, that is "an element of the jurisdiction to be exercised by a state within its boundaries."¹¹¹

IV. State Jurisdiction in the Marginal Sea

In *United States v. California*, the Supreme Court had to overcome the legacy of over a century of cases indicating state ownership of the territorial sea. In distinguishing

¹⁰⁶334 U.S. 385 (1947).

¹⁰⁷Attorney General Clark, later Supreme Court Justice Clark, brought the California, Texas, and Louisiana cases.

¹⁰⁸Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean*, 27 TEXAS LAW REVIEW 140, 150 (1948).

¹⁰⁹*Id.* at 149, 156.

¹¹⁰332 U.S. 19 (1947).

¹¹¹Clark, *supra* note 108, at 156.

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¹⁰⁹*Id.* at 149, 156.

¹¹⁰332 U.S. 19 (1947).

¹¹¹Clark, *supra* note 108, at 156.

*Manchester v. Massachusetts*¹¹² and *The Abby Dodge*,¹¹³ cases that the Court said lent "more weight to California's arguments than any others,"¹¹⁴ the Court stated that the former "involved *only* the power of Massachusetts to regulate fishing,"¹¹⁵ and the latter "was concerned with the state's power to regulate and conserve within its territorial waters."¹¹⁶ *California*, rather than rolling back state boundaries and terminating state jurisdiction at the low water mark,¹¹⁷ specifically recognized the states' *imperium* in the marginal seas subject to the paramount rights of the federal government. However, because the state's *imperium* could not flow from its property interests in the marginal sea, other principles must form the basis for the "power to rule."

A. The Citizenship Principle

In a 1941 case, *Skiriotes v. Florida*, the Supreme Court had to determine whether the state of Florida could regulate the use of diving equipment by a Florida resident to take sponges two marine leagues off the Florida coast.¹¹⁸ The Court recognized that Florida clearly had an interest in conservation and management of the sponge fishery and that, absent a conflict with federal legislation, regulation of the fishery within territorial waters

¹¹²139 U.S. 240 (1981).

¹¹³223 U.S. 166 (1912).

¹¹⁴*California*, 332 U.S. at 37.

¹¹⁵332 U.S. at 37 (emphasis added).

¹¹⁶332 U.S. at 37.

¹¹⁷See *Toomer v. Witsell*, 334 U.S. 385, 393 (1947), in which the appellants "urge[d] that South Carolina has no jurisdiction over coastal waters beyond the low-water mark."

¹¹⁸*Skiriotes v. Florida*, 313 U.S. 69 (1941).

was clearly within the state's police power.¹¹⁹ However, the Court did not need to determine whether the activity occurred within Florida's boundaries, because a broader basis for jurisdiction existed. The Court explained the citizenship basis for exercise of authority as follows:

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. . . . When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.¹²⁰

The Court also reaffirmed the principle that a vessel is a bit of floating territory of a state and subject to the jurisdiction of the state even beyond territorial boundaries.¹²¹

B. Legitimate State Interest

During the hiatus between the holding in *California* and the passage of the SLA, the Supreme Court had the opportunity to consider the regulation by South Carolina of the shrimp fishery in its marginal sea in *Toomer v. Witsell*.¹²² The Supreme Court had no doubt that South Carolina had "sufficient interests in the shrimp fishery" to regulate both citizens of the state and nonresidents within "the three-mile belt."¹²³ The Court avoided a

¹¹⁹313 U.S. at 74.

¹²⁰313 U.S. at 77, 78-79.

¹²¹313 U.S. at 77-78.

¹²²334 U.S. 385 (1947).

¹²³334 U.S. at 393-94.

determination of whether the state law could apply to shrimping more than three miles from shore. Since no evidence was introduced involving application of the statute beyond three miles, the Court found it "inappropriate . . . to rule in the abstract on the extent of the State's power" ¹²⁴

The Supreme Court had addressed the question of whether state interests in a fishery could be important enough to regulate indirectly the activities of residents and nonresidents beyond state waters in *Bayside Fish Co. v. Gentry*.¹²⁵ To preserve the fish supply within the state, the California statute prohibited use in reduction processes of fish caught in state waters or brought into the state.¹²⁶ Although the regulation of reduction operations in the state indirectly and incidentally affected fisheries and fishermen outside the state and interstate commerce, the "provisions ha[d] a reasonable relation to the object of their enactment."¹²⁷ The difficulty of otherwise preventing evasion of the statute and "covert depletion" of local fisheries provided the legal justification for the statute.¹²⁸

The United States Supreme Court has not addressed the issue of whether legitimate states interests justify direct state regulation of activities of noncitizens beyond the territorial sea. However, in *State v. Bundrant*,¹²⁹ the Alaska Supreme Court considered the legitimacy

¹²⁴334 U.S. at 394.

¹²⁵297 U.S. 422 (1936).

¹²⁶297 U.S. at 424.

¹²⁷297 U.S. at 426-27.

¹²⁸297 U.S. at 426.

¹²⁹546 P.2d 530 (Alas. 1976).

of the state's high seas crab fishery regulations that applied to both citizens and noncitizens of Alaska. After establishing that the state had a legitimate interest in regulation of the offshore crab fishery because of the existence within state waters of fishery and nursery areas and the economic impact of the crab fishing industry on the state,¹³⁰ the court concluded that the jurisdiction beyond state territorial waters was consistent with "conservation principles inherent in [the crabs'] migratory characteristics and not based on artificial boundaries or political circumstances."¹³¹ The Alaska court specifically rejected the opinion of a federal district court that found that extraterritorial regulations may be upheld only when they are necessary to facilitate enforcement of conservation regulations within the state.¹³² In considering whether *Skiriotes* limited the application of the regulation to Alaska citizens, the supreme court suggested a broad reading of the citizenship principle.¹³³ The court found it inconsistent to recognize the importance of conservation of the fishery and the legitimacy of the state interest in regulation of the fishery, and then provide the means

¹³⁰546 P.2d at 540-41. "The appellant and the State of California, as amicus, . . . propose a theory that the state's 'imperium,' or 'political' jurisdiction, can extend to activities beyond the boundaries of its territory, or 'dominium,' when there is sufficient nexus between the activities and legitimate state interests" 546 P.2d at 548.

¹³¹546 P.2d at 554.

¹³²546 P.2d at 553. In issuing an injunction against enforcement of an earlier Alaska statute purporting to control crab fishing in virtually the entire Bering Sea. The federal district court distinguished the Alaska regulation from other "landing law" cases because it directly regulated extraterritorial activities and it was not designed to aid conservation enforcement in state waters. See *Hjelle v. Brooks*, 377 F.Supp. 430 (D.C. Alaska 1974). Alaska regulators repealed the regulations addressed in *Hjelle* and enacted emergency regulations that established closures in certain state waters and adjacent high seas areas designated "biological influence zones." 546 P.2d at 533-34.

¹³³546 P.2d at 554-56.

to "frustrate the legitimate objectives of these laws"¹³⁴ by exempting citizens of other states and allowing the opportunity for Alaskans to elude the regulation by transferring citizenship to another state. Because the regulation did not discriminate or exhibit other constitutional infirmities, the extraterritorial crab fishery regulation could continue to be enforced.¹³⁵

Most of the cases concerning state regulation of extraterritorial activities have involved living resources because of the historical importance of coastal fisheries. However, it cannot be concluded that fishery regulation is somehow "different" and that principles concerning regulation based on state interests in activities or their effects are unique to fisheries regulation. Current state laws address extraterritorial activities in a number of ways.

[Provide some examples: 1) Florida oil spill liability for oil spills beyond TS that have effects in the state; 2)]

V. Limitations on State Jurisdiction in the Marginal Sea

Although it is clear that state regulatory authority in the marginal seas is not predicated purely on proprietary principles, *dominium*, it is also clear that there are limits on the *imperium* of the states. Foremost, of course, are constitutional limitations¹³⁶ and the

¹³⁴546 P.2d 555.

¹³⁵546 P.2d 537-548.

¹³⁶Constitutional limitations include not only those that will be discussed in this section, but also limitations based on equal protection, the privileges and immunities clause, and the commerce clause. These limitations have also been interpreted in the context of fisheries cases: *Toomer v. Witsell*, 334 U.S. 385 (1947) (discriminatory fishing license fees violate the

limitations imposed by the exercise of "paramount rights" of the United States,¹³⁷ including the foreign relations power.

A. Foreign Relations Power

The president is vested with power under the constitution to conduct foreign relations.¹³⁸ From this power, comes the authority of the president "to determine how far this country will claim territorial rights in the marginal sea as against other nations."¹³⁹ In *United States v. Louisiana*,¹⁴⁰ the United States Supreme Court directly addressed the issue of whether extension of state ocean boundaries by the SLA beyond United States territorial claims was circumscribed by the foreign relations power of the executive branch of the federal government. Although the Court did not discuss state authority beyond three miles based on *imperium* rather than *dominium*, the same principles would appear to be applicable. In *Louisiana*, the Supreme Court held that, "irrespective of the limit of

privileges and immunities clause); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (statute directed at prohibiting resident aliens from obtaining fishing licenses violated the concept of equal protection). See generally, Schoenbaum & McDonald, *State Management of Marine Fisheries After the Fishery Conservation and Management Act of 1976 and Douglas v. Seacoast Products, Inc.*, 19 WM. & MARY L. REV. 17, 26-28 (1977).

¹³⁷See *United States v. California* 332 U.S. 19 (1947).

¹³⁸For a discussion of the sources of the executive's authority over foreign relations, see Memorandum from Douglas W. Kmiec, Office of Legal Counsel, U.S. Dep't of Justice, to Abraham D. Sofaer, Legal Adviser, Dep't of State at 7 n.9 (Oct. 4, 1988) [hereinafter *Justice Dep't Memo*].

¹³⁹*United States v. Louisiana*, 363 U.S. 1 (1960). For a detailed discussion of the president's power to extend territorial sea claims, see *Justice Dep't Memo*, *supra* note 138 at 6-22.

¹⁴⁰363 U.S. 1 (1960).

territorial waters" asserted by the executive internationally,¹⁴¹ Congress unquestionably has the "power to fix state land and water boundaries as a domestic matter."¹⁴² The Court found "no irreconcilable conflict"¹⁴³ between the executive's three-mile policy in international relations and the recognition of a state boundary beyond three miles for domestic purposes.¹⁴⁴ That is, the recognition of state authority over the marginal sea in relations between the federal and state government does not necessarily have international ramifications. In the case of recognizing state boundaries beyond three miles for domestic purposes, the Court found no conflict because the because both international law and the federal government recognized coastal nation jurisdiction over the seabed and subsoil of the continental shelf beyond three miles.¹⁴⁵

The Supreme Court considered it self-evident that to the extent executive policy has been established for the exercise of certain authorities in relation to other nations, "such determination is binding on the states" in the international context.¹⁴⁶ The Court explained that "the Executive . . . can limit the enjoyment of certain incidents of a Congressionally conferred boundary"¹⁴⁷ "by virtue of the Executive power to determine this country's

¹⁴¹363 U.S. at 36.

¹⁴²363 U.S. at 35.

¹⁴³363 U.S. at 33.

¹⁴⁴363 U.S. at 33-36.

¹⁴⁵363 U.S. at 35.

¹⁴⁶363 U.S. at 35.

¹⁴⁷363 U.S. at 51.

obligations vis-a-vis foreign nations."¹⁴⁸ Obviously, if state authority based on *dominium* is subjugated to federal interests, state exercise based on *imperium* similarly bows to paramount federal interests.

However, both domestic policy and international law recognize the right of a coastal nation to extend its "authority into the adjacent sea to a limited distance for various purposes."¹⁴⁹ Although international law creates the framework for assertion of national claims in the marginal sea, international law does not proscribe how a nation may deal with the distribution of those powers and authorities internally.¹⁵⁰ The federal claim to a territorial sea in the international context, therefore, creates a limitation on state authority beyond that distance, but only to the extent that the state's exercise of authority necessarily creates a conflict with executive foreign policy or international obligations.¹⁵¹

In 1989, President Reagan proclaimed the extension of the United States territorial sea from three miles to twelve miles for international purposes.¹⁵² The proclamation purported not "to extend or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations"¹⁵³ However, it seems that at least to

¹⁴⁸363 U.S. at 1.

¹⁴⁹363 U.S. at 34. The Supreme Court noted that "[f]or hundreds of years, nations have asserted the right to fish, to control smuggling, and to enforce sanitary measures within varying distances from their seacoasts." *Id.*

¹⁵⁰See 363 U.S. at 31, citing Senate testimony of Jack B. Tate, Deputy Legal Adviser to the Department of State.

¹⁵¹International obligations may arise through customary international law or by treaty.

¹⁵²Presidential Proclamation No. 5928, 54 FED. REG. 777 (1989).

¹⁵³*Id.*

the extent that regulation of legitimate state interests in the marginal sea from three to twelve miles offshore had formerly had some limitations due to conflict with executive foreign policy, the extension of the territorial sea *does* affect domestic jurisdiction and authority. This factor affects not only states with proprietary interests beyond three miles, Florida and Texas, but also states with other important interests that may be reached by exercise of *imperium*.

B. Preemption by Exercise of Federal "Paramount Rights"

In *United States v. California*,¹⁵⁴ the Supreme Court found national interests, particularly foreign policy and security interests, to be so compelling as to preclude state ownership of the territorial sea.¹⁵⁵ In the Submerged Lands Act, Congress continued to reserve specifically to the federal government within three miles these "paramount rights," including the navigation servitude and the power to regulate "for the constitutional purposes of commerce, navigation, national defense, and international affairs"¹⁵⁶ The Supreme Court has noted that these paramount federal interests extend beyond the territorial sea: "The ocean seaward of the marginal belt is perhaps even more directly related to the

¹⁵⁴332 U.S. 19 (1947).

¹⁵⁵In the Submerged Lands Act, Congress rejected the principle that these national interests necessarily required *dominium* of the federal government of three-mile territorial sea. See 43 U.S.C.A. § 1311 (West 1986 & Supp. 1989).

¹⁵⁶43 U.S.C.A. § 1314 (West 1986 & Supp. 1989). Of course, it may maintained that Congress did not need to retain specifically these arguably nondelegable, constitutional powers.

national defense, the conduct of foreign affairs, and world commerce than is the marginal sea."¹⁵⁷

Even in the absence of proprietary interests, cases like *Skiriotes v. Florida*,¹⁵⁸ *United States v. California*,¹⁵⁹ and *Toomer v. Witsell*¹⁶⁰ recognized state authority to regulate within and beyond the territorial sea if it caused no conflict with the exercise of federal paramount rights. However, since the enactment of the Submerged Lands Act in 1953, the United States has exercised these paramount powers in numerous statutes, implicitly or explicitly preempting state authority in those areas and occasionally giving specific recognition to state interests beyond three miles. This section will consider only a few of the more comprehensive federal statutes.¹⁶¹

A. Submerged Lands Act and Outer Continental Shelf Lands Act

[to be added]

B. Magnuson Fishery Conservation and Management Act

[to be added]

¹⁵⁷*United States v. Louisiana*, 339 U.S. 699, 705 (1950) (rejecting Louisiana's claim to a twenty-seven mile territorial sea).

¹⁵⁸313 U.S. 69 (1941).

¹⁵⁹332 U.S. 19 (1947).

¹⁶⁰334 U.S. 410 (1948).

¹⁶¹Other federal statutes affecting this area include:

[list additional statutes and coverage.....].

[C. The Clean Water Act or Ocean Dumping Act]

[to be added]

VI. The "Residuum" of State Interests Beyond Territorial Boundaries

The powers of the states that have not been exclusively delegated to the federal government by the constitution or preempted by federal occupation of the field have often been described by the Supreme Court as the "residuum" of the powers of the states.¹⁶² Because there has been so much federal legislation concerning the resources and regulation of the coastal oceans, it may be assumed that little remains of the residuum of state power in those areas. However, as noted in the previous section, federal statutes contain a number of provisions that specifically recognize and preserve state interests beyond the territorial sea.¹⁶³ For example, the MFCMA specifically retains a type of *Skiriotes* jurisdiction allowing

¹⁶²*E.g.*, in *McCulloch v. Maryland*, 17 U.S. 316, 410 (1819), the Supreme Court noted that "the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power" The equal footing doctrine was described in *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911), as establishing new states equal "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945), the Court stated that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make law governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent regulate it"

¹⁶³Of course, one may debate whether these statutes are preserving existing state powers or creating new authorities.

state regulation of its fishing vessels even beyond the territorial sea,¹⁶⁴ and the OCSLA requires the Secretary of Interior to follow state governors' recommendations on oil leasing and development under certain circumstances.¹⁶⁵ Perhaps the broadest recognition and elevation of a continuing residuum of state interests in the marginal sea is contained in federal legislation that is not even directly involved with federal regulation of offshore resources or activities - the Coastal Zone Management Act of 1972 (CZMA).¹⁶⁶

A. The Coastal Zone Management Act and Federal Consistency

The CZMA was passed in 1972 to encourage states to develop programs to protect, enhance, and restore their coastal areas.¹⁶⁷ The legislation provided federal guidelines and funding for program development and administration,¹⁶⁸ but state participation was voluntary and state approaches to coastal management were not dictated by the legislation.¹⁶⁹ Therefore, not all coastal states developed coastal management programs¹⁷⁰, and among participating states, the programs vary greatly.

¹⁶⁴ 16 U.S.C. § 1856(a)(3) (1988).

¹⁶⁵ See, e.g., 43 U.S.C. §§ 1340(c)(2), 1344(c), and 1345 (1982).

¹⁶⁶ 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1990).

¹⁶⁷ *Id.* § 1452.

¹⁶⁸ *Id.* §§ 1454-55.

¹⁶⁹ *Id.*

¹⁷⁰ Of the 35 states and territories eligible under the CZMA, 29 states currently have federally approved plans or programs.

Although federal funding was a preliminary incentive for state development of a coastal program, the so-called "federal consistency" provision of the CZMA¹⁷¹ is of more long term importance to the states. This provision currently requires¹⁷² that federal activities within and outside the coastal zone¹⁷³ that affect land or water uses or natural resources of the coastal zone must be consistent with the state coastal management program to the maximum extent practicable.¹⁷⁴ Federal permittees and offshore oil and gas developers, whether or not they are citizens of the state, must also conduct activities that affect the coastal zone consistently with state plans.¹⁷⁵ Federal permits may not be issued¹⁷⁶ nor may OCS oil and gas exploration or development plans be approved¹⁷⁷ until the state concurs, or is conclusively presumed to concur, with a finding that the activity complies with the state program.¹⁷⁸ State interests, therefore, that are reflected in federally-approved

¹⁷¹16 U.S.C.A. § 1456 (West 1985 & Supp. 1990).

¹⁷²The original version of the CZMA required that the federal activity "directly affect" the state coastal zone to trigger the consistency requirement. "Direct" effects were not defined. One interpretation of *Secretary of Interior v. California*, 464 U.S. 312 (1984), was that a federal activity must be conducted or supported within the coastal zone to directly affect it. The 1990 reauthorization of the CZMA specifically addressed this issue by referring to federal activities "within or outside the coastal zone."

¹⁷³The coastal zone has varying inland boundaries from state to state, but includes the territorial sea of all the participating states. *Id.* § 1453(1).

¹⁷⁴*Id.* § 1456(c)(1)(A).

¹⁷⁵*Id.* § 1456(c)(3).

¹⁷⁶*Id.* § 1456(c)(2)(A).

¹⁷⁷*Id.* § 1456(c)(2)(B).

¹⁷⁸*Id.*

coastal management programs receive special deference in circumstances that might, in the absence of this CZMA provision, be considered to be preempted by the exercise of federal paramount rights.

The CZMA retains limitations on the exercise of state authority beyond territorial waters in several ways. First, the state must establish that it is asserting a legitimate state interest of local importance by demonstrating that the activity is inconsistent with "enforceable policies"¹⁷⁹ of its coastal management plan.¹⁸⁰ Federal agency compliance with state programs is limited by the federal laws applicable to the agencies' operations.¹⁸¹ The

¹⁷⁹Enforceable policies are "State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." *Id.* § 1453(6a).

¹⁸⁰*Id.* § 1456(c)(1)(A), (3)(A)-(B).

¹⁸¹NOAA regulations define "consistent to the maximum extent practicable" as follows:

§ 930.32 Consistent to the maximum extent practicable.

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities . . . affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. . . . The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

CZMA also provides a mechanism to exempt elements of a federal agency's activity from compliance if "the President determines that the activity is in the paramount interest of the United States."¹⁸² A finding by the state that OCS plans or a federal permittee's activities are inconsistent with the state coastal plan may be overridden by the Secretary of Commerce if the activity is "consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."¹⁸³

For a time it was unclear whether the location of federal activities was also a limiting factor on the consistency requirement. One interpretation of the 1984 Supreme Court case, *Secretary of Interior v. California*,¹⁸⁴ is that only federal activities conducted within the coastal zone can directly affect the zone and require consistency with the state plan. In the 1990 reauthorization of the CZMA, Congress added specific language that clarified that federal activities conducted "within or outside" the zone may affect the zone requiring consistency.¹⁸⁵

B. Consistency as the Limit of States' Legitimate Interests Beyond State Boundaries

It may be suggested that by enactment of the CZMA and the consistency provisions, the federal government has comprehensively defined, through its exercise of paramount rights, the circumstances under which a state can exert its interests beyond its territorial limits. The fact that the participation in coastal program development is voluntary, with no suggestion in the CZMA that a state will be stripped of rights if it does not participate,

¹⁸² 16 U.S.C. § 1456(c)(1)(B).

¹⁸³ *Id.* §§ 1456(c)(3)(A)-(B).

¹⁸⁴ 464 U.S. 312 (1984).

¹⁸⁵ 16 U.S.C. § 1456(c)(1)(A).

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suggests otherwise. In addition, other statutes, such as the OCSLA and the MFCMA continue to recognize state offshore interests, even in the absence of an approved coastal program.

However, in the offshore area, where federal regulation and international interests are so pervasive, there may be little of the residuum of state power left to preserve. To the extent that the exercise of federal paramount rights has preempted state interests in regulation of offshore activities, the CZMA has created new "limits" for legitimate state involvement. The consistency requirement not only preserves state interests in activities beyond its territorial sea, but also elevates recognition of those interests a federal requirement.

Fisheries management again provides the best example of these principles. The MFCMA preserves state fisheries jurisdiction over its registered vessels even beyond territorial boundaries.¹⁸⁶ However, most commentators and courts have indicated that this state authority is limited when regulation of the fishery has been addressed in a federal fisheries management plan.¹⁸⁷ Thus, traditional application of federal preemption principles

¹⁸⁶16 U.S.C. § 1856(a)(3) (1988).

¹⁸⁷See, e.g., Greenberg & Shapiro, *Federalism in the Fishery Conservation Zone: A New Role for the States in an Era of Federal Regulatory Reform*, 55 S. CAL. L. REV. 641 (1982), which provides the following analysis of state authority to regulate its vessels beyond territorial waters:

Thus, the Magnuson Act allows the exercise of state police power over FCZ [now Exclusive Economic Zone] fishing where:

1. The state regulation is not in conflict with any applicable federal fishery regulation, i.e.,
 - a. There are no federal fishery regulations for the subject fishery and there is no affirmative decision by the

apply to assertion of state authority based on the MFCMA. Almost conversely, however, the consistency requirement of the CZMA requires that federal fishery management plans be consistent with state coastal management plans to the maximum extent practicable.¹⁸⁸ This provision elevates to a federal requirement the recognition of legitimate state interests in fisheries that are incorporated in a coastal management program.

VII. Conclusion

Over the two hundred year history of the United States, the Supreme Court has from time to time recognized that the coastal states, just as the nation, have interests in activities and the resources of the marginal sea. Although it was originally presumed that the source of much of the state's authority to manage offshore resources and activities was grounded in ownership of the adjacent territorial sea, *United States v. California*¹⁸⁹ and *United States*

federal government that any regulation in such fishery would be inappropriate; or

b. Compliance with both federal and state regulation is possible; or

c. Enforcement of the state regulation would not interfere with the fulfillment of the objectives of the applicable federal regulations;

See also *Southeastern Fisheries Association v. Dep't of Natural Resources*, 453 So. 2d 1351 (Fla. 1984) (the prohibition on possession of fish traps in state waters unconstitutionally restricts the lawful use of the traps in extra-territorial waters).

¹⁸⁸*See* 50 C.F.R. § 604.5(a) (10-1-89 Edition).

¹⁸⁹332 U.S. 19 (1947).

*v. Maine*¹⁹⁰ clearly established that *dominium* was not the source of state authority. State power to regulate certain offshore activities, *imperium*, survived these Supreme Court cases.

The clearest and broadest recognition of the continuing importance and legitimacy of state authority in the marginal seas even beyond state boundaries is the consistency provision of the CZMA. In the 1984 case, *Secretary of Interior v. California*,¹⁹¹ the Supreme Court's finding that OCS lease sales do not "directly affect" a state's coastal zone requiring consistency with the state program led to speculation that no federal activities outside the coastal zone must be consistent.¹⁹² Just as *United States v. California* called into question state authority seaward the low water mark thirty-seven years earlier,¹⁹³ interpretations of *Secretary of Interior v. California* threatened to limit drastically the continuing recognition of state interests beyond three miles. And as Congress acted 1953 to "restore" the coastal states' *dominium* and *imperium* in the territorial sea,¹⁹⁴ it has acted once again in the 1990 reauthorization of the Coastal Zone Management Act to restore federal recognition of the states' *imperium* that may reach beyond state waters.

¹⁹⁰420 U.S. 515 (1975).

¹⁹¹464 U.S. 312 (1984).

¹⁹²The U.S. Army Corps of Engineers, for example, has stated, based on *Secretary of Interior v. California*, that "[the Corps] believe[s] that the CZMA and case law leave some doubt regarding authority of a state to control Corps dredging and disposal activities not physically located 'within' a state's coastal zone or within a Federal enclave and directly affecting the coastal zone." 53 FED. REG. 14902 (Apr. 26, 1988).

¹⁹³332 U.S. 19 (1947). See text at n. 24-40.

¹⁹⁴See text at n. 67-73.

Abstract

THE EXTENDED TERRITORIAL SEA: AN OPPORTUNITY FOR CREATIVE FEDERALISM

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The December 1988 presidential proclamation extending the U.S. Territorial Sea from 3 to 12 miles offshore quadrupled the ocean area over which the U.S. has virtually complete sovereignty. The original 3 miles of territorial sea is largely governed by the coastal states although certain powers have been reserved to the federal government and other nations can exercise the right of innocent passage.

The issue now arises as to the governance of the new portion of the territorial sea-- the 3-to-12 mile zone. The paper first examines the nature of the adjacent state interests that exist (or could exist) in the extended zone relying, in part, on the results of a recent mail survey of the coastal states conducted jointly by the Coastal States Organization, the Western Governors' Association, and the authors. The national interests existing in this zone are then reviewed and alternative ways to achieve them are analyzed. Not surprisingly, overlapping state and federal interests and concerns are found to co-exist in the 3-to-12 mile region suggesting that a system of shared governance might be the most appropriate arrangement for this zone. Possible governance schemes are examined using several likely management decision scenarios.

Outline

THE EXTENDED TERRITORIAL SEA: AN OPPORTUNITY FOR CREATIVE FEDERALISM

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EXTENDED TERRITORIAL SEA
3. PRELIMINARY RESULTS OF WGA/CSO SURVEY ON EXTENDED
TERRITORIAL SEA
4. DIMENSIONS TO CONSIDER IN FORGING NEW OCEAN
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 - STATE/FEDERAL
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--REALIGNMENT OF STATE/FEDERAL ROLES ON ALL USES
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--SELECTIVE REALIGNMENT OF STATE/FEDERAL ROLES
CONCERNING "NEW USES" IN THE EXTENDED TERRITORIAL
SEA

8. WHAT ADVICE TO GIVE TO CONGRESS IN THE SHORT AND LONG
RUN

SURVEY ON THE EXPANDED TERRITORIAL SEA (3 TO 12 MILE ZONE)

PART 1. — PLEASE RETURN BY JUNE 1, 1990

This part of the survey is aimed at soliciting information from state and territorial officials on the importance of the 3 to 12 mile zone adjacent to their jurisdictions.

1. Please rate the following ocean resources/activities occurring in the 3 to 12 mile zone adjacent to your state or territory as:

1. very important, 2. important, 3. not very important, 4. unimportant, 5. don't know.

☐ Commercial fishing

☐ Sand and gravel

☐ Recreational fishing

☐ Waste disposal

☐ Mariculture

☐ Marine transportation

☐ Marine mammals

☐ Recreation (boating, etc.)

☐ Marine plants

☐ Energy production (OTEC, etc.)

☐ Oil and gas

☐ Marine research

☐ Hard minerals

☐ Environmental monitoring

2. Has your state or territory developed a position regarding the extension of the territorial sea?

☐ 1. yes ☐ 2. no ☐ 3. not yet, but we are planning to ☐ 5. don't know

(IF YES)

2a. What position has your state or territory adopted? (PLEASE EXPLAIN AND ATTACH A COPY, IF AVAILABLE)

3. In your view, what factors were (or will be) most important in determining your state's or territory's position on the extended territorial sea?

(Please rank the top 3, with "1" being the most important)

☐ A. The resources and potential uses of the 3 to 12 mile zone are seen as important to the state.

☐ B. The state feels that it must insure the environmental protection of the 3 to 12 mile zone.

- ☐ C. The costs of a stronger state role in the 3 to 12 mile zone appear to outweigh the benefits that are likely to accrue to the state.
- ☐ D. The state feels that the protection of the 3 to 12 mile zone is imperative if the state is to fulfill its resource management responsibilities in its own 0 to 3 mile zone.
- ☐ E. The existence (or lack thereof) of federal financial assistance for planning and managing the 3 to 12 mile zone.
- ☐ F. The fact that pending legislation reauthorizing the Coastal Zone Management Act is likely to strengthen the consistency provisions, and hence give the states the necessary leverage over the 3 to 12 mile zone.
- ☐ G. Other _____ (PLEASE EXPLAIN)

4. If you feel that a stronger state or territorial role in the 3 to 12 mile zone is needed, which of the options listed below best describes your view as to what that role should be? (PLEASE CHECK YOUR TOP CHOICE ONLY)

- ☐ A. Full state jurisdiction and ownership of the 3 to 12 mile zone
- ☐ B. The sharing of planning and management responsibilities and duties with the federal government in the 3 to 12 mile zone (i.e., a joint management approach)
- ☐ C. Extend the coastal zone to 12 miles for federal consistency purposes under the Coastal Zone Management Act
- ☐ D. Other _____ (PLEASE DESCRIBE)

Thank you very much for your participation in this important survey. Please return the survey in the attached envelope to Phil Shimer, Western Governors' Association, Suite 526, 444 No. Capitol, Washington, D.C. 20001, telephone (202) 624-5402, by June 1, 1990.

Preliminary Results of Territorial Sea Survey (Part One)
[As of Sept 11, 1990]

1. Of 25 potential respondents (27 states/territories minus TX and GA), 17 responded or 68%.

2. Concerning question 2 on the survey (DOES YOUR STATE HAVE A POSITION ON THE EXTENDED TERRITORIAL SEA?), of the 17 respondents,

- 4 replied YES (AK, CA², GU, and HI)
- 8 replied NO, BUT PLANNING TO (CA¹, MA, MD², MI, NC, NY, WA, and C?)
- 7 replied NO (CN, LA, MD¹, ME, NH, OR, and VA)

3. Concerning question 4 on the survey (IF YOU FEEL A STRONGER STATE ROLE IS NEEDED IN EXT. TERR. SEA, WHAT SHOULD THAT ROLE BE?), of the 19 responses,

- 5 said preferred full state jurisdiction (AK, CA², CN, NY, and WA)
- 8 said preferred shared/joint management with the federal government (HI, MA, MD², ME, MI, NC, OR, and C?)
- 3 said rely on extension of federal consistency to 12 miles (CA¹, MD¹, MD¹)
- 1 said "other" (CA¹)

4. Concerning question 3 on the survey (WHAT FACTORS WERE (OR WILL BE) MOST IMPORTANT IN DETERMINING YOUR STATE'S POSITION ON THE EXT TERR SEA?), top three factors (in order) were:

- resources and uses in 3 to 12 zone important to the state (score of 37)
- state must ensure env. protection of 3 to 12 zone (score of 24)
- state must protect env. of the 3 to 12 zone if it is to do its duty to protect env and resources of 0 to 3. (score of 20)

(remaining three factors had a total score of 22)

5. Concerning question 1 (VALUE OF VARIOUS RESOURCES/USES IN 3 to 12), all respondents had at least one resource/use rated as "very important" and 16 out of 19 rated three resources/uses as "very important". Median number of "very important" was 5 (of the 14 listed). Most important resources/uses were commercial fishing, recreational fishing, transportation, recreation, env. monitoring, and research. (Analysis not yet completed)

PERCEIVED IMPORTANCE OF RESOURCES/USES IN THE 3 TO 12 MILE ZONE

(Based on responses by 17 states/territories to WGA/CSO survey)

RESOURCES/USES	VERY IMP.	IMP.	NOT VERY IMPORTANT	UNIMP.	DON'T KNOW
1. COMMERCIAL FISHING	17				
2. RECREATIONAL FISHING	13	3	1		
3. TRANSPORTATION	10	7			
4. RECREATION	10	6	1		
5. MARINE MAMMALS	9	6	2		
6. RESEARCH	8	9			
7. MONITORING	8	8	1		
8. WASTE	6	7	1	3	
9. MARICULTURE	4	4	9		
10. OIL/GAS	4	2	2	8	1
11. MARINE PLANTS	3	4	4	5	1
12. SAND/GRAVEL	1	6	7	2	1
13. MINERALS	1	3	5	5	3
14. ENERGY	1	2	2	10	2

ABSTRACT

The Role of the Public Trust Doctrine in the Expanded Territorial Sea

(1) In the 0-3 mile "zone:"

The public trust doctrine applies to resources and uses found or occurring within the 0-3 mile "zone" to the same extent as the doctrine applies to resources and uses within the intertidal zone or in fresh bodies of water, according to the law of each coastal state. Our presentation will briefly review the public trust law with respect to such "territorial sea" resources and uses and suggest how the public trust doctrine may be used by coastal states to manage these resources and uses more effectively. We will incorporate some of the material in our national public trust study, soon to be published.

(2) In the 3-12 mile "zone:"

If the United States has effectively established its sovereignty over the new "zone" from 3-12 miles, then the character of this new "zone" of federal lands as public lands and the applicability of public trust principles to the "zone" must be considered. Our presentation will examine possible legal bases in support of the argument that the new "zone" from 3-12 miles is held by the federal government subject to a "temporary public trusteeship" until such time as this new territory is incorporated into the coastal states.

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**THE PUBLIC TRUST DOCTRINE:
ITS ROLE IN MANAGING AMERICA'S COASTS**

**Draft as of August 2, 1990
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**THE PUBLIC TRUST DOCTRINE:
ITS ROLE IN MANAGING AMERICA'S COASTS**

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The Development and Importance of The Public Trust Doctrine

A. Some Relevant Recent History

In the late 1960s, the public in this country dramatically changed its attitudes toward our nation's environment and the uses to which our lands should be put. The public developed an increased awareness of the relationship between the environment and human health and welfare, and became intensely concerned about the quality of their physical environment and the appropriate regulation of land use. The result was a proliferation of state and federal environmental and land use legislation, often piecemeal, uncoordinated, and sometimes even conflicting, yet all reflecting this common and deepening concern about the American landscape as a shared heritage and limited resource. Eight decades after Frederick Jackson Turner announced that we no longer enjoyed the luxury of an unlimited frontier¹ and four decades after the United States Supreme Court warned property owners that they could no longer use their land in a manner

1/ The vastness and complexity of our federal and state environmental laws can perhaps be adequately appreciated by scanning such multi-volume works as F.P. Grad, Treatise on Environmental Law (4 vols. 1989) or W.H. Rodgers, Environmental Law (3 vols. 1986). An abbreviated but helpful review is provided by the annual Environmental Law Handbook published by Government Institutes, Inc. of Rockville, MD.

2/ Turner, "The Significance of the Frontier in American History", Report of the American Historical Association (1983).

contrary to the public interest, our citizens and lawmakers finally joined in a societal appreciation of the scarcity and fragility of our natural resources.

The public's new environmental consciousness did not overlook its most unique and valuable asset: its coastal areas, both ocean and freshwater, including the shores, submerged lands, and tidewaters. In the pre-industrial, sparsely populated colonial and pre-civil war eras, these coastal zones seemed infinite and invulnerable to human activities. They were exploited with little appreciation of their loss. By the late 1960s, however, the realities of eight generations of intensive economic development and explosive population growth had shattered the notion that the environment could forgive or absorb all trespassers. As the Council on Environmental Quality observed in 1970, in its first annual report, our coastal areas:

represent attractive waterfront acreage in particular demand by industrial and commercial concerns and home buyers. Relatively inexpensive to dredge, fill and bulkhead for building sites, shallow wetlands attract many industries which are not dependent on waterfront sites but which find an economic advantage in developing these low-priced lands. Too often local governments acquiesce, anticipating the increased tax revenues. Consequently, natural coastal areas are being nibbled away. The long-range economic and ecological costs are borne not just by the particular local

3/ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In this case the Supreme Court upheld the validity of comprehensive zoning regulations in general as a legitimate exercise of the police power, over objections that they they violated constitutional due process guarantees.

community, but by the people of the state and the region, and no less by the rest of the Nation.⁴

The Council also noted the complexity of the demands upon the tidelands:

Competition for the use of the limited coastal zone is intense. Shipping activities are increasing, with larger vessels needing deeper channels. Mining and oil drilling in coastal zones continue to enlarge their influence over these waters. Industrial and residential developments compete to fill wetlands for building sites. Airport and highway construction follows and further directs growth patterns in the coastal zone. Recreation - from enjoyment of the surf and beaches to fishing, hunting, and pleasure boating becomes more congested as available areas diminish. Since over 90 percent of U.S. fishing yields come from coastal waters, the dependence of the commercial fisheries industry on a stable estuarine system is obvious.'

Officials and citizens began to realize that indiscriminate use of the coastal zones had caused a grave and pressing situation, which needed to be addressed in a comprehensive manner:

The key to more effective use of our coastland is the introduction of a management system permitting conscious and informed choices among development alternatives, providing for proper planning and encouraging recognition of the long-term importance of maintaining the quality of this productive region in order to ensure both its enjoyment and the sound utilization of its resources. The benefits and the problems of achieving national management are apparent. The present Federal, State, and local machinery is inadequate. Something must be done.⁶

4/ Council on Environmental Quality, Environmental Quality: The First Annual Report of the Council on Environmental Quality 177 (1970).

5/ Id. at 176.

6/ Our Nation and the Sea, Report of the Commission on Marine Science, Engineering and Resources (the Stratton Commission Report), 49, and generally Ch. 3 (1969).

The need for coordinated planning and development of coastal resources and activities soon found concrete voice in the federal Coastal Zone Management Act of 1972 (CZMA)^{7/} and the numerous state coastal zone management programs instituted pursuant to the federal law's provisions.^{8/} The state's basic authority to regulate its coastal zone derives from the same source as is used to enact zoning laws: each state's general "police power." The police power consists of those prerogatives of sovereignty and legislative power which are necessary for the protection of the health, safety and welfare of state citizens and which the states did not surrender to the federal government when the United States Constitution was adopted.

The police power is a broad and valuable basis for the exercise of state regulatory authority (whether by statute or by agency regulations) that will rarely be invalidated (if challenged in the courts) so long as it is rationally related to a legitimate state goal and does not unduly burden interstate commerce.^{9/} However, the police power is subject to several limitations as the sole source of coherent coastal management programs. First, because of its breadth, the police power is not tailored to the special problems of coastal areas and does

7/ 16 U.S.C. §§1451-1464 (1972).

8/ See Part III.

9/ E.g., Southern Pacific Co. v. State of Arizona 325 U.S. 761 (1945). See Pars II... and G.

not provide organizing principles for addressing those problems, particularly the inevitable conflicts between legitimate but competing coastal uses.¹⁰ Second, the police power has traditionally been linked to the restriction or suppression of harmful or dangerous activities and has not, until relatively recently, been utilized effectively to create and support affirmative, proactive management programs. Finally, and most limiting of all, if a state's regulation based on its police power "goes too far" in restricting uses or activities, it may be invalidated under federal and state constitutional guarantees against the taking of private property, even for public use, without the payment of just compensation.¹¹

Fortunately, an additional and powerful source of authority that can be used in conjunction with the police power for more effective management of coastal areas is found in the public trust doctrine. This ancient property law principle, which arose out of our English common law heritage, exists in every state in the Union, but has only relatively recently begun to be fully appreciated. The traditional principles of the public trust doctrine are: (1) all tidelands and lands under navigable waters were owned by the original thirteen states at the time of the American Revolution, as successors in sovereignty to the English Crown, and each subsequent state was endowed with

^{10/} See Part II.B.

^{11/} See Part II.H.

similar ownership rights at the time of its admission into the Union; (2) the states own these lands subject to a "public trust" for the benefit of all their citizens with respect to certain rights of usage, particularly uses related to maritime commerce, navigation and fishing; and (3) all lawful grants of such lands by a state to private owners have been made subject to that trust and to the state's obligation to protect the public interest from any use that would substantially impair the trust. Moreover, any such conveyed lands must be used by their private owners so as not to interfere unduly with the public's several rights under the public trust doctrine and so as to promote the public interest.¹²

B. THE UNIQUE POTENTIAL OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine provides states with a unique supplemental authority over their coastal lands to be used in conjunction with the traditional police power authority.¹³

First, the historical origin of the public trust doctrine stems

^{12/} See below, Parts I.C., II. B and F.

^{13/} The increased application of the public trust doctrine by state coastal managers is particularly appropriate in light of Congress's 1972 declaration, in the federal Coastal Zone Management Act, that "the key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone...." 16 U.S.C. §1451 i) (emphasis added). In addition to the public trust doctrine and the police power, states can protect and advance the public interest in their coastal areas by utilizing their power to enjoin public nuisances (see below Part II.E.) and their ultimate power to take private land by eminent domain (see below II.H.).

from concern for the particular benefits and uses of coastal areas. Therefore, the doctrine as it has been implemented in the course of its ancient and modern history provides a unique perspective on specific issues of importance in coastal land management. Second, because the public trust doctrine is fundamentally a property- or ownership-based doctrine, a state's authority under the public trust doctrine is not limited to the power to regulate but also includes the power to protect the state's fundamental rights in the property, and the rights of all members of the public to use the property, even where the property has been conveyed into private ownership. Third, because the public trust doctrine is grounded in property ownership principles, it is less vulnerable to a challenge by a private property owner based upon the takings clause of the United States Constitution where a state has exercised its rights and obligations as a trustee over public trust land to restrict (or even prohibit) the activities of private landowners. Fourth, the public trust doctrine has its origins in the common law and in the basic premise that scarce coastal resources are to be used in a manner consistent with the public interest. Consequently, although the core of the public trust doctrine has remained stable over the past two centuries, it shares the inherent common law capacity to grow and adapt in response to the changing social conditions and public needs which has distinguished the development of Anglo-American legal

doctrines.¹⁴ Finally, the public trust doctrine has at its root the notion of a trust, which is analogous, in many senses, to the body of private and charitable trust law which has developed in the United States. This analogous law can provide a valuable source of insight and precedent for determining the rights and responsibilities of the states as trustees over public trust lands for the benefit of their citizens, particularly in jurisdictions where there has been little concrete legislative or judicial application of public trust principles.¹⁵

C. A SUMMARY LOOK AT THE LEGAL EVOLUTION
OF THE PUBLIC TRUST DOCTRINE IN THE UNITED STATES

Despite scholarly arguments over its historical origins, development and scope, there appears to be general agreement that the public trust doctrine existed as an important principle of English common law at the time of the English settlement of

14/ See Parts II.A. and B. for examples of such legal development affecting the public trust doctrine. In this connection, the fact that the public trust doctrine historically included maritime "commerce" as one of the quintessential public rights protected by it may provide the basis for additional common law development, at least as to water dependent and water-related activities, should state courts be inclined to interpret the term "commerce" as expansively as the federal courts have done under the interstate and foreign commerce clause of the United States Constitution, Article I, cl. 3, §8. See, e.g., Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Rarig, 389 U.S. 121 (1967).

15/ See Part II.C.

the New World in the early 17th Century.¹⁶ The central idea of the public trust doctrine has always been that each state holds its coastal waters and the land underneath them for the benefit of the public. Until recently, however, American lawmakers have tended to use the public trust doctrine primarily as a legal restriction rather than an affirmative management tool.

The Massachusetts Bay Colony's Ordinances of 1641 and 1647, the doctrine's American debut, foreshadowed its thrust in American law over the following three centuries. Under those Ordinances, the Colony granted title extending to the low water mark to owners of land adjoining tidally influenced waters, and granted title to the high water mark to owners of land adjoining "great" ponds over ten acres in size. The purpose of the Ordinances was to encourage private wharf building for the stimulation of commerce, which the struggling colonial government could not afford to do. Despite this expansion of private ownership in apparent derogation of the traditional public trust

^{16/} The various current scholarly views and controversies regarding the origin, development, scope and proper application of the doctrine, as well as references to virtually all the significant judicial decisions, books and articles on the subject, can be found in 19 Environmental Law No. 3 (Spring 1989), an important Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow, held under the auspices of Northwestern School of Law of Lewis and Clark College. Coastal managers may find these discussions interesting and even stimulating, but the debate about the historical origins and validity of the public trust doctrine is largely academic, since it has been so clearly acknowledged by all American courts and therefore exists as a binding legal principle. See, e.g. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 477-78 (1988).

rights, the Ordinances expressly reserved for the public the right to use these areas for fishing, fowling and navigation. In addition, the public retained the right to pass over the private land itself between the high and low water marks or next to great ponds in order to exercise its reserved rights.

A century and a half later, with the Northwest Ordinance, the newly formed United States government adopted public trust principles to apply to its great internal waterways. As one of its first acts, the national government made the Mississippi and St. Lawrence rivers "common highways, and for ever free."¹⁷ The Massachusetts Ordinances of 1641 and 1647 and the Northwest Ordinance significantly expanded the scope of the public trust doctrine beyond that recognized in England, to include fresh as well as tidal waters. This extension of the doctrine to fresh waters, adopted by most states as the country grew, was the first reflection of the doctrine's dynamic nature in the United States.

1. The Influence of English Common Law

Although the public trust doctrine initially appeared in the United States in statutory form, it has developed mainly through judicial decisions, mostly dealing with disputes over title or access to public trust lands. After the Revolution, American courts faced the daunting prospect of creating a new

¹⁷ The Northwest Ordinance of 1787, Stat. 50 (1789); See also Barney Keouk, 94 U.S. 324 (1875).

body of case law from scratch. The courts and most state legislatures rejected this option and instead adopted, either by judicial decision or "common law reception" acts or constitutional provision, the familiar English common law that had governed the colonies before the Revolution.¹⁸ Both state and federal courts referred to pre-Revolutionary English common law as the direct ancestor of, and thus the presumptive authority and precedent for, application of the common law in the United States. The public trust doctrine's place in English common law accordingly gave it an automatic foothold in the common law of the new United States.

Under 17th and 18th Century English common law, coastal lands were subject to two different ownership interests. The Crown held title to the coastal waters and lands beneath them by virtue of its sovereignty. This interest was called the "jus privatum," which was a transferable property interest held by the Crown or by private persons claiming through it.¹⁹ The jus privatum was, however, subject to the public trust rights of the English people, who held the "jus publicum" -- the common right to use these public trust lands

18/ See e.g., Livingston v. Jefferson, 1 Brock. 203, Fed. case No. 8, 411 (Cir. Ct. Va. 1811); Fitch v. Brainerd, 2 Day 163 (Sup. Ct. Errors, Ct. 1805); 1 Laws of the Commonwealth of Pennsylvania, c. 726 of the session ending Jan. 21 1777; Massachusetts Constitution of 1780, Ch. VI, Section VI.

19/ Hale, De Jure Maris, in 1 A Collection of Tracts Relative the Law of England 84, 89 (F. Hargrave 1st ed. 1787).

and their resource for certain traditional purposes necessary to individual survival and livelihood, including navigation, commerce and fishing.²⁰

This division of ownership interests between the Crown and the people restricted the use of public trust land. The jus privatum in public trust land, whether held by the Crown or by an owner claiming through the Crown, theoretically yielded to the paramount jus publicum of the English people. Therefore, the holder of the jus privatum could not impede the public's customary use of public trust land for navigation, commerce and fishing. But the common law's recognition of divided ownership interests in trust lands created a tension between private and public rights. Private ownership inevitably led to conveyances of public trust lands for purely private or non-water dependent purposes inconsistent with the common rights of usage. At the same time, public rights continually posed a threat to the individual's investment in what he perceived as his land. Neither the English common law nor its American descendants have established clear-cut mechanisms to resolve this tension. Thus, modern coastal managers and advocates are faced with both difficulties and creative opportunities in their discretionary applications of public trust principles.

^{20/} Id.

2. The Early Development of the Public Trust Doctrine in the United States

The reshaping of the public trust doctrine in the United States, despite the preservation of its basic outlines and core policy, has reflected the political and geographical differences between the United States and England. Recognition of these differences gave American courts the discretion to emphasize those facets of the doctrine they favored and the justification to downplay those they did not. Two political differences between England and the United States are primarily responsible for the doctrine's dynamic and somewhat disjointed development in American law.

First, unlike England, the United States is a federal system with certain powers held by the individual states and others by the national government. The creation and regulation of property rights within their borders is one of the powers held by the individual states. Thus, in the United States, use of coastal lands and waters is primarily a matter of state law, although the state's authority over coastal waters yields to the federal government's supreme authority under the Constitution to regulate navigation and commerce (often called the "federal navigational servitude"). In addition, new states entered the union over a period of more than 160 years, during which time the doctrine has undergone change (along with virtually every other body of law) in response to society's changing needs and demands. Thus, although at the time of its admission into the

Union each new state possessed exactly the same rights and obligations as did the original thirteen, including those relating to public trust lands, the public trust doctrine has developed somewhat differently in each state.²¹

Second, in each of the states the people are the sole source of legitimate authority, and they collectively exercise this authority through their state governments. The sovereignty that vested in the Crown in England now inheres in the people of each state. The common law formulation of public trust ownership interests necessarily undergoes a modification when inserted into this system. The jus privatum and jus publicum still make up the property interests in trust land, but now what is essentially the same entity -- the people of the state and the state government as the representatives of those people -- holds both interests.²² The people of each state have empowered their popularly elected legislatures to enact laws and regulations governing public trust lands as well as all other matters of public interest. But, in our modern era, when there are too many complex problems requiring ongoing expert

21/ See, e.g., Shively v. Bowlby, 152 U.S. 1, 57 (1894).

22/ Since a single person or entity cannot be both sole trustee and sole beneficiary of a trust (Restatement (Second) of Trusts §115(5) (1959)), it might at first glance be thought that trust principles are inapplicable, in the American system, to public trust analysis if the people are in effect both the trustee and the beneficiary. This is, however, a simplistic and inaccurate characterization of our democratic system. See Part II.C. for a more thorough discussion of the analogy to private trust law.

supervision and regulation for a legislature itself to handle, the legislatures of each state have generally delegated regulatory authority over numerous matters of public concern, including the management of coastal resources, to expert administrative agencies, which have become our society's most characteristic forum for governmental activity.²³

One respected state court at an early date described the nature of the state's sovereign authority over public trust lands:

The people . . . may make such disposition of [the beds of navigable waters], and such regulation concerning them, as they may think fit; that this power . . . must be exercised by them in their sovereign capacity; . . . that the legislature . . . may lawfully erect ports, harbours, basins, docks, and wharves; . . . that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvements of the navigator and the ease of passage; that they may clear and improve fishing places The sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.²⁴

The United States Supreme Court has consistently held that this authority is initially the same in every state of the Union, under the "equal footing doctrine," which originated in

23/ See Part II.D., dealing with delegation of public trust responsibilities.

24/ Arnold v. Mundy, 6 N.J.L. 1, 78 (1821). The Supreme Court of the United States in Martin v. Wadell, 14 U.S. 345, 349 (1842), echoed the Mundy view of state sovereignty and gave it the authority of the nation's highest court.

the Northwest Ordinance of 1787.²⁵ The equal footing doctrine dictates that each new state, upon entering the Union, has the same sovereignty and jurisdiction over all territory within its limits as was enjoyed by the thirteen original states, which in turn had inherited all sovereign rights of the English Crown.²⁶ This sovereignty is defined not by the law of the nation that held the territory before its entry to the United States, but by the common law of England as modified in the United States.²⁷

Under the equal footing doctrine, each state has complete power over its public trust lands, subject only to the federal government's supreme power under the United States

25/ "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." Northwest Ordinance, Maxwell's Code, XII. See also Phillips, 484 U.S. at 472.

26/ See e.g. Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1883). The case of Pollard's Lessee v. Hagan, 44 U.S. 212 (1845) established the relationship between the equal footing doctrine and the public trust doctrine. In that case, the Court nullified a federal grant of intertidal Alabama land made prior to Alabama's statehood. The Court found that the equal footing doctrine restricted the United States to the role of caretaker of a future state's interests in the interim between foreign rule and statehood. The United States had no power to grant to a private person the soil under navigable waters and thus deprive the forthcoming state of its sovereign authority over such land. Id. at 230. Any federal grant was thus limited to the area above high water mark. Id. at 219, 229.

27/ Id.

Constitution's commerce, navigation, and treaty powers.²⁸ A state may, however, decide to limit the waters over which this power extends.²⁹ Thus, all states begin with equal sovereign jurisdiction over all their public trust lands, but the individual states may decide to extinguish their rights or to uphold grants of certain public trust lands to private individuals.³⁰

Each state holds its public trust lands "in trust for the enjoyment of certain public rights."³¹ From an early date, courts have acknowledged that a state may regulate the methods by which the public enjoys its rights, to better preserve and promote that enjoyment.³² As examples, states may forbid certain methods of oystering in order to protect the growth of oysters,³³ grant exclusive fisheries,³⁴ and license private wharves and levees in order to encourage navigational uses.³⁵ The breadth of the state's authority to regulate public trust

28/ See generally Part IV, dealing with the Federal role in the public trust doctrine, and, e.g., Shively v. Bowlby, 152 U.S. 1 (1894); Knight v. U.S. Ass'n, 142 U.S. 161 (1891).

29/ Hardin v. Jordan, 140 U.S. 371, 382 (1891).

30/ Id. at 383. See Phillip's, 484 at 483; Part II.F. dealing with conveyances of public trust lands and termination of the trust.

31/ Smith v. Maryland, 59 U.S. 71, 74 (1855).

32/ Id. at 75.

33/ Id.

34/ Hardin, 140 U.S. at 382.

35/ Barney v. Keokuk, 94 U.S. 324, 342 (1877).

lands is directly related to the public interests which the doctrine is intended to protect. Thus, courts have approved some state conveyances of public trust land to private parties for purposes consistent with the public trust, subject to certain standards established by the Supreme Court of the United States and the various state courts prescribing the conditions for such conveyances.³⁶

3. The Definitive Supreme Court Cases

Four United States Supreme Court cases dominate modern understanding of the public trust doctrine. They deserve brief description and should be known by public officials and others interested in coastal management, because state and federal courts frequently refer to them in decisions dealing with public trust rights and because they will be referred to frequently in the remainder of this book.

Two of these cases occurred in the 1890s. In the first, Shively v. Bowlby, the Court undertook a full review of the doctrine's judicial past in order to resolve the "diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands

^{36/} See Part II.F., dealing with conveyances of public trust lands and termination of the trust.

below high water mark of navigable waters."³⁷ The Court started with the then prevalent view that the public trust doctrine naturally arises out of the tidelands' "uselessness" for private occupation, cultivation or improvement.³⁸ These lands' natural and primary uses are the public ones of navigation, commerce and fishing.³⁹ Thus, the doctrine's purpose is to ensure that these lands are put to their highest and best uses in the public interest.⁴⁰

The second key Supreme Court case of the 1890s, perhaps the most celebrated public trust decision in American history, involved a state grant of virtually the entire Chicago

37/ Shively, 152 U.S. at 10-11. The Supreme Court in Shively noted that "there is no universal and uniform law on the subject [of the public trust doctrine][E]ach state applies the doctrine ... according to its own views of justice and policy"; and provided the still timely warning that, despite a fundamental core of public trust principles shared by all coastal states, "Great caution ... is necessary in applying [public trust] precedents in one state to cases in another." 152 U.S. at 26.

38/ Id. at 11.

39/ Id.

40/ After a summary of the tenets of the doctrine developed by earlier decisions of the Supreme Court, the Court in Shively held that the federal government can make grants of public trust land to private parties in a Territory. This power goes beyond the earlier announced authority to "honor foreign grants" recognized in Knight, 142 U.S. 161. The Shively Court held that the federal government can grant such lands for any public purposes appropriate to the objects for which the United States holds the Territory. 152 U.S. 57-58. But because the United States had never done this other than to honor international treaties over new territories, Congress must clearly express its intention to break with past practice when purporting to convey land below high water mark. Id.

waterfront to a private party. In 1869 the Illinois legislature had granted to the Illinois Central Railroad "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan . . ."⁴¹ for a certain distance, in consideration of 7% of the railroad's gross income from its use of these lands. The grant required that the railroad hold the fee forever and prohibited the railroad from obstructing the Chicago harbor or impairing the public right of navigation, but contained no other restrictions on the property's use. A few years later, a differently constituted Illinois legislature revoked the overly-generous grant, and the railroad challenged the validity of the revocation in court and ultimately brought the challenge before the United States Supreme Court.

The Supreme Court upheld the legislature's power to revoke its earlier grant, explaining that a state may, in certain circumstances, grant parcels of submerged lands to private individuals for building wharves and docks, because these grants further the public's interest in navigation and commerce. A state may not, however, convey away the submerged lands of an entire harbor, bay or lake.⁴² The critical issue was not just the quantity of land conveyed, but the loss of a state's ability

41/ Illinois Cent. R. R. v. Illinois, 146 U.S. 37, 406 n.1 (1892).

42/ Id. at 453.

to control an entire waterfront area. The Court stated as a general proposition that a state's conveyance of any piece of public trust property which impairs the public's interest in remaining public trust lands is void.

The unusual facts of Illinois Central, where almost the entire Chicago waterfront on Lake Michigan lay in the control of the railroad, obviously influenced this ruling. The Court's statement that "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it,"⁴³ would literally void any coastal conveyance not serving a public trust purpose. But a cogent argument can certainly be made that such a sweeping prohibition,, appropriate in the extreme case where "the harbor of a great city and its commerce have been allowed to pass into the control of [a] private corporation . . .,"⁴⁴ may not be necessary when dealing with the more common situation where a state conveys much smaller individual parcels primarily to further public interests.

The Supreme Court recognized this distinction less than thirty years later when it held that in certain circumstances a state can terminate its control over public trust land by conveying it to private parties. Appleby v. City of New

43/ Id. at 460.

44/ Id. at 455.

York⁴⁵ involved a conveyance by New York City, with the state's approval, of a relatively small portion of land submerged under the Hudson River. When the City later tried to regulate and preserve navigation over this area, the Court sustained the owner's trespass action against the City. According to Appleby, as long as the state's statutory grant was made for money consideration and in support of a definable public purpose, the state no longer holds the jus privatum or the jus publicum and has no legal right to use the water over the conveyed land.⁴⁶ The ground rules for state conveyances of public trust lands must be found somewhere between Illinois Central and Appleby.⁴⁷

The public trust doctrine lay relatively dormant in the 60 years following Appleby. But new battles over coastal areas emerged with the growing concern over development and the push for conservation of natural resources in the 1960s and 1970s. Following a plethora of state cases, the Supreme Court revisited and significantly extended the reach of the public trust doctrine in 1988. In Phillips Petroleum Co. v. Mississippi,⁴⁸ the Court held that the doctrine extended in every state to all

45/ 271 U.S. 364 (1926).

46/ Id. at 397-99, 402-403.

47/ See Part II. F., for a discussion and summary of these rules.

48/ Phillips Petroleum, 484 U.S. 469.

tidal waters, regardless of their navigability. The Court employed a broad interpretation of state public trust authority to reconcile its decision with evidence that the original states did not claim title to non-navigable tidal waters. According to the Court, every state upon its admission to the Union received ownership of all lands under waters subject to the ebb and flow of the tide, as well as to lands beneath navigable fresh waters. As a result, the states could "define the limits of the lands held in public trust and recognize private rights in such lands as they saw fit."⁴⁹

The Phillips decision may have significant implications for future exercises of state authority over public trust lands. Each state entered the Union with the ownership of all tidal and navigable waters and the lands beneath them and, apparently, could narrow its responsibilities as it "sees fit." In addition, a state could presumably expand its public trust authority over these lands and waters. In rejecting navigability as the sole bench mark of public trust applicability, the Supreme Court pointed to a "[s]tate's public trust interest in these lands . . . such as bathing, swimming, recreation . . . and mineral development."⁵⁰ The Court also noted that lands beneath tidal waters had in some states been validly filled and conveyed "to

^{49/} Id. at 473-74 (citing Shively, 152 U.S. at 26).

^{50/} Id. at 482.

create land for urban expansion."⁵¹ Thus, it is apparent that a state may increase the universe of public trust uses beyond the traditional areas of navigation, commerce and fishing, as well as narrow its involvement by granting private rights in these lands. Every state starts with the same rights under the equal footing doctrine, but the precise interpretation of the doctrine is left to the judicial and public policy decisions of each individual state, so that the outcomes in the several states will necessarily differ.

D. A CHECKLIST FOR APPLICATION OF THE PUBLIC TRUST DOCTRINE

Despite two centuries of legal development, and despite its fundamental core principles, several key characteristics of the public trust doctrine remain in flux. Significant divergences about these issues exist among the coastal states, and these states vary widely in the extent to which their legislatures, judiciaries and administrative agencies have anticipated, refined and applied the public trust doctrine and its underlying principles.⁵² The remaining parts of this study are intended to provide coastal managers⁵³ with insights into critical

⁵¹/ Id. at 476.

⁵²/ See generally the companion Compilation for a full discussion of such differences and divergences.

⁵³/ Although this study is directed primarily to state coastal agencies and managers, the authors stress that its recommendations and conclusions can be utilized effectively by state attorneys general and other state officials and state judges, as well as by environmental advocates, developers, title companies, property owners, and other private citizens.

aspects and applications of the public trust doctrine, so that they will better understand the doctrine in their states, and more important, so that they will be in a better position to coordinate and balance the legitimate interests of development and preservation of the waterfront and coastal resources. After reviewing this study, the authors strongly recommended that a similar study be conducted in each state.

In reviewing this study and, more important, in analyzing the law in each state, the reader should use the following basic checklist of issues:

- What is the geographic reach of the public trust doctrine in the state, and how are the boundaries actually measured?
- What are the appropriate or protected uses of public trust lands in the state, and how is the choice made between legitimate competing uses?
- What state entity - the legislature, a state agency or some other entity or official -- is empowered to act as the trustee over public trust lands?
- How has the public trust doctrine been enforced and is there explicit or implicit authority for enforcement in any of the state statutes, regulations or programs?

- Does the state have the authority to convey public trust lands and terminate the trust and, if so, how is this done?
- Does the state have authority to issue licenses and leases for public trust lands, and if so, what mechanism or procedure should be used to effect those licenses and leases?
- What, if any, precautions are necessary to protect against challenges, under the "locking" clause of the state and United States Constitutions, to the state's exercise of its public trust authority?
- How does or could the public trust doctrine influence state decision making in the most commonly occurring or controversial areas of coastal management?
- What role, if any, does the federal government play under the public trust doctrine?

Because the public trust doctrine is essentially a state law doctrine and therefore differs from state to state, this study cannot definitively answer the questions outlined above.

However, it is structured to provide both the background information needed to conduct this analysis and ideas and possibilities for application of the public trust doctrine in reaching beyond its existing uses. In addition, the reader is

directed to the companion Compilation for a thorough review of the existing law in his as well as other states.^{3 4}

54/ The checklist of questions listed above is keyed to the subsequent portions of this study and is accordingly relatively general. A somewhat more detailed checklist that might be useful is as follows:

1. Is there a statute (such as the state Coastal Zone Management statute) expressly conferring public trust authority on a specific agency? Does that authority include rule making powers? Do statutes confer public trust authority and obligations on more than one agency in the state, so that they are effectively co-trustees?
2. If there is no explicit public trust statute, is there an existing statute or statutory program that can be or has been construed to confer public trust authority on a specific agency (or several agencies) even if the words "public trust" are not actually used? If so, under existing judicial precedent, can public trust authority impliedly possessed by an agency under such a statute or program be implemented via the promulgation of regulations incorporating public trust principles? Does the state Administrative Procedure Act apply to such an agency?
3. What are the geographic boundaries and extent of public trust authority? Do they include, in addition to coastal areas, adjacent dry sands and uplands? Navigable waterways? Wetlands?
4. What private uses and activities are permitted in public trust areas? Must they be, to some significant degree, water dependent before being allowed by the agency, or is any essentially public purpose sufficient? Are there any guidelines for choosing between or balancing competing legitimate public trust uses? Does the agency have authority to create such guidelines by regulation? How does the agency determine when a private project creates sufficient public benefit to be a proper purpose?
5. What is the extent of the agency's licensing/leasing

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authority with respect to areas covered by the public trust? For how long a term can licenses or leases for public trust uses be granted? What reasonable conditions can be attached to such leases and licenses to protect the public interest? How much can be reasonably charged for such leases and licenses? Assuming no express statutory direction, can the revenues therefrom be used for any authorized agency purpose or only for purposes relating to the public trust?

6. What is the extent of the agency's power to enforce the public trust, for example, to prevent or limit private owners of land subject to the public trust from using their property in ways that violate or subvert the interests protected by the public trust? Have statutes or judicial decisions authorized another agency or official, or private citizens, to enforce the public trust?
7. To what extent have statutes or judicial decisions empowered or obligated the public trust agency to act affirmatively with respect to public trust lands so that the agency must take positive steps to enhance their value or increase their access, as opposed to merely reacting to prevent damage to them?
8. Has it been determined, by statute or judicial decision, whether areas covered by the public trust can be divested or conveyed to private parties; and, if so, how and by whom can such transactions be lawfully effected? If a condition of such transfer is continued use for a public purpose, how is such a condition to be monitored and enforced?
9. Is it clear, from statutes or judicial decisions, what the relationships and lines of respective authority are between the public trust agency and, on the one hand, other state agencies with some aspect of jurisdiction or power over areas covered by the public trust and, on the other hand, federal agencies with powers over tidelands such as the Army Corps of Engineers and the EPA? What mechanisms for

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coordination have been or should be developed? What options are available to a public trust agency when another state or a federal agency proposes or takes action inconsistent with public trust principles?

10. Are agency officials clear in their understanding of the differences between, the relative advantages and disadvantages of, and the strategies for combining their powers under the police power, the public trust doctrine, the Coastal Zone Management Statute, traditional public nuisance principles, and eminent domain powers?
11. Assuming that the agency has public trust authority, should the public trust doctrine be asserted in (or attempted to be extended to) novel or controversial situations if there is a risk that the particular factual circumstances are not favorable and could lead to an adverse judicial decision restricting the applicability of the public trust doctrine; or should the agency rather wait for the emergence of more favorable facts on which to act that will likely produce a positive judicial ruling supporting or advancing the public trust, despite the countervailing risk that agency inaction in the former situation will be argued to have created justifiable reliance and de facto precedent against the agency's later action?