



10-1974

United States v. Maine

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Admiralty Commons](#)

Recommended Citation

U.S. v. Maine. Supreme Court Case Files Collection. Box 20. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

yes

File and order
parties to file
exceptions and
briefs
King

I agree.
Fortunately
this
issue
is
legal
rather
than
factual.
pc

Summer List 17, Sheet 3

No. 35 Orig.

UNITED STATES

v.

MAINE, NEW HAMPSHIRE,
MASSACHUSETTS, ET AL.

Report of Special Master
(Honorable Albert B. Maris)

1. This is the Atlantic coast boundary case. In 1969, the Court granted the United States leave to file a complaint against the Atlantic coastal states to resolve respective claims to the natural resources of the seabed and subsoil of that portion of the continental shelf underlying the Atlantic Ocean. 395 U.S. 955. The Report of the Special Master, following the holdings of this Court in United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950), concludes that with the exception of the seabed and

subsoil deeded the states by the Submerged Lands Act of 1953, the United States is entitled as against the defendant states to that portion of the continental shelf lying more than three geographical miles seaward from the coastline.

BACKGROUND: In United States v. California, supra, the Court held that the federal government had "paramount rights" in the three-mile territorial sea along the California coast, "an incident to which is full dominion over the resources of the soil under that water area, including oil." 332 U.S. at 39. The Court rejected California's argument that since the 13 original states had acquired from the English Crown ownership of all lands under the sea within at least three miles of their respective coasts, California was entitled to stand on an equal footing with respect to the three-mile marginal sea off its coast. The Court found that the equal footing doctrine did not support California's claim because the 13 original states had not themselves acquired as colonies and did not separately own the three-mile belt or the seabed of the adjacent territorial sea. 332 U.S. at 31-34. In United States v. Louisiana, supra, and United States v. Texas, supra, the Court followed and applied the rule of the California case, stating in Louisiana:

If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. 339 U.S. 705-706.

Subsequent to the Court's decisions in these cases, Congress passed the Submerged Lands Act of 1953. The Act relinquished to the coastal states all rights of the United States to lands within three geographical miles of their coastline. Subsequently, the United States attempted to clarify ownership of submerged land resources in the Gulf of Mexico by instituting suit against the five Gulf Coast states.

See United States v. Louisiana, 363 U.S. 1 (1960). (The Florida and Louisiana Gulf boundaries are still in litigation. No. 52 Orig, see Summer List 18, and No. 9 Orig, see Summer List 15, Sheet 4.) In 1969, the United States filed the present action, asserting that the defendant states claim some right, title or interest adverse to the United States in the continental shelf more than three geographical miles seaward from their respective coastlines, that Maine has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 3,300,000 acres of seabed in the area in controversy and that the defendant states are interfering with and obstructing the exploration, leasing and development of those mineral resources by the United States and will continue to do so, unless the rights of the United States are declared and established by this Court.* The complaint seeks a declaratory decree and a direction for an accounting for money derived by the defendant states from the area owned by the United States.

All of the defendant states filed answers, asserting by way of affirmative defense that as successors in title to certain grantees of the Crown of England (and, in the case of New York, also of the Crown of Holland) they are entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent

*President Truman's Proclamation of September 28, 1945, 59 Stat. 884, first claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf contiguous to the coasts of the United States. It opened a new chapter in the international law applicable to this area. For it, and the Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. Pt. 1, p. 471, which followed it, assured to each coastal nation the exclusive right to explore and exploit the resources of the seabed and subsoil of the adjacent continental shelf beyond the territorial sea regardless of whether or not the nation had actually occupied or exploited the seabed and subsoil, the resources of which it claimed.

In the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 468, Congress declared "the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and to that end provided for the issuance of mineral leases in that area by the Secretary of the Interior to private operators.

to their respective coastlines to the exclusion of any other political entity whatsoever, including the United States, subject only to the limits of national seaward jurisdiction established by the United States, that their power to exercise such dominion and control is not prohibited by the Constitution and has never been delegated to the United States, and that any attempt by the United States to assert such power with respect to the defendant states violates the Tenth Amendment and is void. Additional defenses are asserted by Rhode Island, North Carolina and Georgia.

In 1970, the United States filed a motion for judgment on the ground that there is in the litigation no genuine issue as to any material fact. The states opposed, submitting that the preferable course would be to refer the case to a master. The Court did not rule on the motion for judgment, but in June 1970, appointed Judge Maris Special Master and referred the case to him. 398 U.S. 947.

Conferences and hearings before the Special Master were held through January, 1973, the transcript of which totals 2,800 pages. Because Florida's case presented questions novel to the other states, including the resolution of Florida's Gulf Coast boundaries, the Special Master recommended and this Court granted a severance. (Exceptions and briefs have been filed to Judge Maris' report in the Florida proceeding. United States v. Florida, Orig 52, Summer List 18, Sheet 2.)

REPORT OF THE SPECIAL MASTER: The Special Master defines the basic question involved in this litigation as:

[W]hether the right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf underlying the Atlantic Ocean which is more than three geographical miles seaward from the coastline of the United States belongs to the United States or to the defendant States or any of them.

The Special Master first considers the outstanding motion of the United States for judgment, assuming that the referral of the case to him was not intended to be a

denial of the motion, but rather as an indication of the Court's desire for a full development of and report on the facts in the light of which to consider the issues involved. Reviewing this Court's holdings in the California, Louisiana, and Texas cases, the Special Master rejects the states' argument that these decisions have been repudiated by Congress and by subsequent decisions of the Court and concludes that the rule announced in those cases and later "approved and declared to be applicable to all coastal states by the second Louisiana case 363 U.S. 1, 7, remains in full vigor and applies to all the defendant States in this proceeding, foreclosing the issues of fact raised by them and requiring as a matter of law the entry of judgment for the United States on its motion."

In a lengthy discussion which reflects on the validity of this Court's previous holdings, the Special Master traces the development of international law on the claim of coastal states to sovereignty of adjacent seas and, rejecting the historical and constitutional arguments raised by the defendant states, sets forth his conclusions in part D of the Report. Among the 32 conclusions reached by the Special Master are: (12) the charters of the original colonies did not grant maritime sovereignty or dominion over a territorial sea, a concept then unknown, or property rights in the seabed or its resources; (15) Colonial law and practice prior to 1776 do not support the claim that property rights to the seabed of the marginal sea seaward for 100 miles or any lesser distance had been granted to the colonies or that such rights were exercised by them except in a few cases where portions of the seabed within the three-mile limit were actually occupied; (17) from and after the date of independence, the United States constituted a union of internally independent states with a national government to which were delegated certain powers including the powers associated with external sovereignty such as the conduct of foreign relations, of

defense and of foreign commerce; (19) if the states had any rights to sovereignty of the marginal sea and ownership of the seabed off their coasts which they had received in any manner, which the Special Master does not find that they did have, those rights would have been lost to the national government upon their ratification of the Constitution; (21) the preponderance of the evidence confirms the historical findings made in the California case; (22) prior to the Proclamation of President Truman in 1945, rights to the resources of the seabed beyond territorial waters could be obtained only on the basis of prescription or actual occupation and neither the United States nor the defendant States had made any such claim; (23) the Proclamation for the first time claimed for the United States jurisdiction and control over the natural resources of the continental shelf beyond the three-mile limit of the territorial sea and (24) this claim was validly made by and on behalf of the United States under its powers of external sovereignty and did not enure to the individual benefit of any of the coastal states.

The Special Master also found that it does not appear that any exploration or exploitation has been carried on by the licensee of Maine or that any payments have been made by it to that state, and that an accounting is not required. The Special Master has appended a recommended decree.

DISCUSSION: I would note that although several of the defendant states appeared as amici in the California case, they have not yet had their day in Court on the issues presented here.

The Report of the Special Master should be ordered filed and the parties ordered to file exceptions and briefs.

9/16/74

Ginty

PJN

Supreme Court, U. S.
FILED
JAN 23 1975
MICHAEL RODAK, JR., CLERK

No. 35, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PLAINTIFF,

v.

STATE OF MAINE, ET AL., DEFENDANTS.

MOTION TO ALLOCATE FOUR HOURS
FOR ARGUMENT

I cannot imagine
that that much
time will be
productive. I would
arbitrarily
extend time
to
2 hr.

The twelve defendant States respectfully move the Court to allocate four hours for argument, with two hours to be allocated to the plaintiff and two hours to the defendants.

This action places at issue for the first time the momentous question of ownership, as between the States and the Federal Government, of the resources of the outer continental shelf in the Atlantic Ocean. It is one of the most important cases to come before this Court in many years, in terms of the magnitude both of the practical interests at stake and of the legal principles involved.

This case will determine ownership of the resources of the entire outer continental shelf from Maine to Georgia, inclusive, from the three-mile limit out to 100 miles or more into the sea, comprising a submarine area of more than 125,000 square miles, an area larger than the British Isles. The value of the economic resources at stake has been estimated in the trillions of dollars.

The present case presents extraordinarily complex issues of fact and law. It requires decision of several

constitutional issues of great moment. It also requires a close examination of the development of legal theory, and the evolution of state practice, regarding continental-shelf resources in England and this country, and internationally, over more than four centuries. ^{On June 8, 1970,} ~~For these reasons~~ the Court referred the case to a Special Master, before whom extensive evidentiary hearings were held and an exhaustive record compiled.

The proceedings before the Special Master evoked sharp conflicts on a most unusual range and variety of factual, legal and constitutional issues. The Master's Report, comprising 88 printed pages, made extensive findings and conclusions. The States have excepted from these findings and conclusions, and are convinced that the Master's approach was basically and massively in error and cannot be sustained.

Since this case is within the Court's original jurisdiction, the Court is, of course, the trier of fact as well as law. In this extraordinary case, even more than in the usual original-jurisdiction case, "this Court has the duty of making an independent examination of the evidence." Georgia v. Pennsylvania R.R., 324 U.S. 439, 470 (1945) (Stone, C.J. dissenting).

While nine of the defendant States are represented by Common Counsel, they desire (if scheduling problems can be overcome) to present argument by the Attorney General of one of themselves as well as by Common Counsel. ^{*/} One or

*/ The Common Counsel States are Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia. North Carolina, South Carolina and Georgia are separately represented, but have joined in this Motion.

more of the three States not represented by Common Counsel, some of which have special defenses, may wish to argue separately.

The time allowed in No. 35, Original, should not be limited because of the pendency of two other "tidelands" cases. No. 9, Original, United States v. Louisiana, differs fundamentally from the present case since it involves comparatively technical questions relating to the precise location of boundary lines in the Gulf. No. 52, Original, United States v. Florida, is related to the present case insofar as any decision in favor of the defendant States in the present case would also redound to the benefit of Florida; but, while No. 52, Original, cannot be conclusively resolved before decision in the present case, the broad common issues of state ownership of the Atlantic Coast seabed beyond three miles are presented for argument solely in the present case.

This Court has generally accommodated the scheduling of time for oral argument to allow such extra time as might be necessary for a full presentation where issues of great complexity and moment are involved. Only recently, the Court allowed three hours for oral argument in the Regional Rail Reorganization Act Cases, No. 74-165, et al., decided on December 16, 1974, 43 U.S.L. Wk. 4031. The present litigation is in no way less important and, in its historical factual evidence, vastly more complicated and difficult to present.

The defendant States submit that ample time for argument is required if the Court is to explore the issues sufficiently to do justice in this case. The States believe that four hours are necessary for that purpose. They so

advised the Court by letter to the Clerk dated October 2, 1974. They now renew that advice and that request by Motion.

Respectfully submitted,

Andrew P. Miller
Andrew P. Miller
Attorney General of Virginia
Gerald L. Baliles
Deputy Attorney General
Supreme Court Library Building
Richmond, Virginia 23219

Richard W. Wier, Jr.
Attorney General of Delaware
Charles Brandt
Assistant Attorney General
Wilmington Tower
12th & Market Street
Wilmington, Delaware 19801

Joseph Brennan
Attorney General of Maine
Donald G. Alexander
Assistant Attorney General
State House
Augusta, Maine 04330

Francis B. Burch
Attorney General of Maryland
Henry R. Lord
Deputy Attorney General
One South Calvert Street
Baltimore, Maryland 21202

Franci X. Bellotti
Attorney General of Massachusetts
Robert M. Bonin
First Assistant Attorney General
State House
Boston, Massachusetts 02133

Warren B. Rudman
Attorney General of New Hampshire
David H. Souther
Deputy Attorney General
State House Annex
Concord, New Hampshire 03301

William F. Hyland
Attorney General of New Jersey
Elias Abelson
Assistant Attorney General
198 West State Street
Trenton, New Jersey 08608

Louis J. Lefkowitz
Attorney General of New York
Joseph T. Hopkins
Assistant Attorney General
State Capitol
Albany, New York 12224

Julius C. Michaelson
Attorney General of Rhode Island
Providence County Court House
Providence, Rhode Island 02903

Rufus Edmisten
Attorney General of North Carolina
Jean A. Benoy
Deputy Attorney General
Department of Justice Building
Box 629
Raleigh, North Carolina 27602

Daniel R. McLeod
Attorney General of South Carolina
Edward B. Latimer
Assistant Attorney General
Hampton Office Building
Columbia, South Carolina 29201

Arthur K. Bolton
Attorney General of Georgia
Alfred L. Evans, Jr.
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Brice M. Clagett
Michael Boudin
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for the States of Delaware,
Maine, Maryland, Massachusetts, New
Hampshire, New Jersey, New York,
Rhode Island and Virginia

January 22, 1975

<i>Court</i>	<i>Voted on</i>, 19...
<i>Argued</i>, 19...	<i>Assigned</i>, 19...
<i>Submitted</i>, 19...	<i>Announced</i>, 19...

United States

vs.

Maine

Motion

Request
Parker to
file exceptions
& briefs.

[illegible]

Every atty. gen
of orig 13 states
in this case

Yes

Set for argument
this

January 24, 1975 Conference
List 3, Sheet 2

No. 35 Orig.

Exceptions to Report of
Special Master and Replies
Thereeto

UNITED STATES

v.

MAINE, NEW HAMPSHIRE,
MASSACHUSETTS, ET AL.

This is the Atlantic coast boundary case in which the Special Master, following the holdings of United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950), concludes that with the exception of the seabed and subsoil deeded the states by the Submerged Lands Act of 1953, the United States is entitled as against the defendant states to that portion of the continental shelf lying more than three geographical miles seaward

Set for
Argument
DB

of the coastline. The Report was ordered filed and exceptions and replies thereto called for on October 15.

Exceptions have been taken by the defendant States and extensive briefs have been filed. The United States filed its reply brief Tuesday, January 21. I have not been able to prepare a memorandum summarizing the litigation. I will circulate a memorandum next week.

There would seem little question, however, but that the case should be set for oral argument. Setting the case for argument at this Conference would provide the parties sufficient time to prepare for argument in February. The Clerk tentatively plans to set the case for argument the second argument week in February, together with United States v. Louisiana, No. 9 Orig., and United States v. Florida, No. 52 Orig.

There is a reply brief by the SG.

Ginty

Report filed

1/23/75

DK

No. 35 Orig

vs.

MOTION

Set for
Argument
(4 hours)

Over my
objection

[illegible]

SUPPLEMENTAL MEMORANDUM

January 24, 1975 Conference*
List 3, Sheet 2

No. 35 Orig.

Exception to Report of
Special Master and
Reply Thereto

UNITED STATES

v.

MAINE, NEW HAMPSHIRE
MASSACHUSETTS, ET AL.

1. This case involves the claim of 12 of the 13 Atlantic coast states (Florida is proceeding separately in No. 52 Orig.) to the natural resources of the continental shelf adjacent to their respective coastlines. Citing United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950), and United

*/I was unable to prepare a memorandum summarizing the litigation in this case in time for the January 24 Conference. The present memorandum is submitted for whatever assistance it might provide in preparing for argument.

States v. Texas, 339 U.S. 707 (1950), the Special Master has concluded that with the exception of the seabed deeded the States by the Submerged Lands Act of 1953 43 U.S.C. 1301 et seq, the United States is entitled as against the defendant States to that portion of the continental shelf lying more than three geographical miles seaward of the coastline.

The defendant States have filed exceptions to virtually all the Special Master's principle proposed findings of fact and conclusions of law. North Carolina, South Carolina and Georgia have filed a separate brief and except specifically to 29 of the Master's 32 delineated conclusions, 22 as being contrary to the evidence; 4 as being irrelevant; and 3 on the ground that they are contrary to the law and the evidence. The remaining States, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, are represented by common counsel and except to the report of the Master in a more general manner. They identify 15 issues on which they take exception. The United States has filed no exceptions, but has submitted a brief in response to the defendant States' briefs in support of their exceptions.

Four hours have been granted the parties for oral argument, and the case presently is scheduled to be called Monday afternoon, February 24.

BACKGROUND: In United States v. California, the Court held that the federal government had "paramount rights" in the three-mile belt of territorial sea adjacent to the California coast, "an incident to which is full dominion over the resources of the soil under that water area, including oil." 332 U.S. at 38-39. The Court rejected California's argument that since the 13 original states had acquired from the English Crown title to the land under the sea within at least three miles of their coasts, California was entitled to stand on an "equal footing" with respect to the three-mile marginal sea off its coast. The Court found that the equal footing doctrine did not support California's claim because "[it could not be found] 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 at 31. In United States v. Louisiana and United States v. Texas, the Court followed and applied the rule of California, stating in Louisiana:

As we pointed out in United States v. California, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of [the marginal sea] are. . . functions of national external sovereignty The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

* * * *

If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate states, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. 339 U.S. 704, 705-06.

Subsequent to the Court's decisions in these cases, Congress passed the Submerged Lands Act of 1953. The Act relinquished to the coastal states all rights of the United States to lands within three geographical miles of their coastline. Subsequently, the United States sought to clarify ownership of submerged land resources in the Gulf of Mexico by instituting suit against the five Gulf Coast states. See United States v. Louisiana, 363 U.S. 1 (1960). (The Florida, No. 52 Orig., and Louisiana, No. 9 Orig., cases which also are to be argued this month represent the end of the Gulf Coast litigation.) In 1969, the United States filed the present action, asserting that the defendant States claim some right, title or interest adverse to the United

States in the continental shelf more than three geographical miles seaward from their respective coastlines, that Maine has purported to grant exclusive oil and gas exploration and exploration rights in approximately 3,300,000 acres of seabed in the area in controversy and that the defendant States are interfering with and obstructing the exploration, leasing and development of those mineral resources by the United States and will continue to do so, unless the rights of the United States are declared and established by the Court.* The complaint seeks a declaratory decree and a direction for an accounting for money derived by the defendant States from the area owned by the United States.

All of the defendant States filed answers, asserting by way of affirmative defense that as successors in title to certain grantees of the Crown of England, they are entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to their respective coastlines to the exclusion of any other political entity, subject only to the limits of national seaward jurisdiction established by the United States, that their power to exercise such dominion and control is not prohibited by the Constitution and has never been delegated to the United States,

*/President Truman's Proclamation of September 28, 1945 claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf contiguous to the coasts of the United States. Exec. Proc. 2667, Sept. 28, 1945, 10 FR 12303. See also Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. Pt. 1, p. 471, which assured to each coastal nation the exclusive right to explore and exploit the resources of the adjacent continental shelf beyond the territorial sea regardless of whether or not the nation had actually occupied or exploited the seabed and subsoil.

In the Outer Continental Shelf Lands Act of August 7, 1953, 43 U.S.C. 1331, et seq. Congress declared "the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and to that end provided for the issuance of mineral leases by the Secretary of the Interior.

and that any attempt by the United States to assert such power with respect to the defendant States violates the 10th Amendment and is void. Additional defenses were asserted by Rhode Island, North Carolina and Georgia, but these appear to have been abandoned on review here.

In 1970, the United States moved for judgment on the pleadings, contending that there is no issue as to any material fact involved in the litigation. The States opposed submitting that the preferable course would be to refer the case to a master. Without specifically ruling on the motion of the United States, the Court appointed Judge Alber Maris Special Master and referred the case to him. 398 U.S. 947.

Because Florida raised defenses novel to the other States* and because of Florida's pending Gulf coast litigation, the Master recommended and this Court granted Florida a severance. 403 U.S. 949, 950. Florida's case is before the Court in No. 52 Orig. and will be argued in tandem with this case.

Conferences and hearings before the Special Master were held through January 1973, the transcript of which totals 2,800 pages. The Report of the Special Master was ordered filed and exception and reply briefs called for an October 15, 1974. The brief of North Carolina et al totals 83 pages, plus 149 pages of appendices. Delaware et al, the "Common Counsel States," have filed a 140-page brief, a 485-page "supplemental brief," and three volumes of appendices totaling more than 1,000 pages. The SG has filed a 59-page reply brief. Amicus briefs have been filed by the Special Committee on Tidelands of the National Association of Attorneys General and by the Associated Gas Distributors.

REPORT OF SPECIAL MASTER, EXCEPTIONS AND CONTENTIONS:

A. The Special Master first considers the outstanding motion of the United States for judgment. He assumes that the referral of the case to him was not intended to be

*/Florida claims that upon its readmission into the Union, Congress approved the marine boundaries of the State as described in its Constitution of 1868, which boundaries, it argues, run more than three miles seaward of its coast in certain parts of the Atlantic.

a denial of the motion, but an indication of the Court's desire for a full development of and report on the facts in which to consider the issues. The Master then reviews this Court's holdings in California, Louisiana and Texas. He rejects the States' argument that these decisions have been repudiated by Congress in the Submerged Lands Act and by subsequent decisions of the Court. He cites the following language of the Court in Louisiana II:

Since [the Submerged Lands Act] concededly did not impair the validity of the California, Louisiana, and Texas cases, which are admittedly applicable to all coastal states, this case draws in question only. . . .
363 U.S. at 7.

and concludes that the rule announced in California, Louisiana and Texas and later "approved and declared to be applicable to all coastal states in the second Louisiana case 363 U.S. 1, 7, remains in full vigor and applies to all the defendant States in this proceeding, foreclosing the issues of fact raised by them and requiring as a matter of law the entry of judgment for the United States on its motion."

The defendant States* contend that the issues raised here are in no way foreclosed by California. First, they argue principles relative to the doctrine of res judicata: that the Court has never previously adjudicated the rights of the States to the Atlantic seabed, that none of the defendant States was a party to the California litigation, and that it is well settled that a stranger to litigation is not concluded by its resolution of either factual or legal issues. Second, the states argue that the Master misreads California in imputing to it a constitutional doctrine making federal ownership a necessary adjunct to federal foreign-affairs and defense powers. They note the Court's reference to "equal footing" principles in defeating Texas' claims in the

*/The exceptions and arguments of North Carolina et al and the Common Counsel States do not appear to be significantly different and are not treated separately unless otherwise noted. This is the approach taken by the SG who appears to focus on the brief of the Common Counsel States.

Texas case and cite the Court's opinion upholding the Submerged Lands Act, Alabama v. Texas, 347 U.S. 272 (1954), and the subsequent confirmation of the claims of Florida and Texas to three leagues in the Gulf under the historical standard established by the Act. Louisiana II, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960). The States reason that either California did not rest on any ground of necessary federal ownership or that that ground has been reconsidered and rejected sub silentio. They then go on to argue that such a doctrine is in any event unsound in view of the federal government's preemptive power which would override any state action that would create international problems, interfere with foreign policy etc. [See Justice Reed's dissent in California regarding the federal government's plenary ^{powers}, 332 U.S. at 42-43.] and that any such "inseparability" concept was repudiated by Congress in the Submerged Lands Act in granting the States the three-mile territorial sea and by this Court in Louisiana II and Florida. Thirdly, the States maintain that California--because of the nature of the equal-footing claims advanced--focused on whether there existed a uniform three-mile belt in the 18th century and did not find as a historical fact that the Atlantic States did not own the resources of the seabed along their coasts. Also, the States contend that the ruling in California derived from a lack of evidence, that it is not a definitive historical finding, and that the States have here produced massive evidence ~~in~~ in support of their historic claims. Lastly, the defendant States argue that their historic claims are supported by a presumption of validity in that under the Constitution, the States are residual owners of property and that the common understanding for a century and a half was that the States owned the submerged lands adjacent to their coasts. See Manchester v. Massachusetts, 139 U.S. 240 (1891); Pollard's Lessee v. Hogan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

The United States notes that the Master considered the States' arguments barred not by the doctrine of res judicata but by that of stare decisis. The SG questions

whether the States' assertion that the historical record was inadequately presented in the California, even if true, would warrant a departure from the doctrine of stare decisis in view of the substantial reliance that Congress, the states, and the federal government have placed upon that decision. He then argues that the States misread the Master's report in imputing to him a reading of the California decision as resting upon a presumed inseparability of foreign-affairs and defense powers with ownership of seabed resources. The United States points out that the significance of federal foreign-affairs and defense powers in California was two-fold: (1) the United States originally had acquired dominion and control over the territorial sea through the exercise of those powers, and (2) the degree to which the territorial sea is affected by those powers made it inappropriate for the Court, as the explicator of constitutional doctrine, to extend the Pollard rule of state reparian ownership of inland waters "out into the soil beneath the ocean. . . ." 332 U.S. at 36. Moreover, the SG urges, the basis of the California decision was reconfirmed rather than repudiated by the Submerged Lands Act by which "the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." Louisiana II, 363 U.S. at 6-7. The SG also notes that Congress expressly asserted federal ownership of the natural resources of the seabed of the Atlantic Ocean seaward of the territorial sea in the Outer Continental Shelf Lands Act and in doing so necessarily relied upon the California decision. The SG contends that the finding in California that the Atlantic coast states, and their predecessor colonies, had no ownership interest in the seabed adjacent to their shores was integral to the Court's conclusion that California was not entitled to its claims under the equal footing doctrine. And, he notes, that the Court extended this principle of federal ownership beyond the three-mile belt in Louisiana. Lastly, the United States maintains that the historical holdings of California were based not upon a lack of evidence as suggested by the States, but rather upon a "multitude of references" and

a "wealth of material," 332 U.S. at 31, and further notes the observation by the Special Master here that "many of the historical documents, although admittedly not all, which have been introduced as exhibits. . . were before [the Court] in the California case." The SG argues that the additional evidence submitted by the States is largely cumulative and contributes little to the body of historical knowledge that was before the Court in California. He also notes that Massachusetts, New York and New Jersey participated in California as amici curiae.

B. Although holding the States' claims foreclosed by California, the Special Master nevertheless reviewed and weighed the evidence and arguments concerning the historic basis of the California decision. In a lengthy discussion which reflects on the validity of this Court's previous holdings, the Master traces the development of international law on the claim of the coastal states to sovereignty of adjacent seas and, rejecting the historical and constitutional arguments raised by the States, sets forth his conclusions in part D of the Report. In particular, the Master found (1) that at the time of the American Revolution, British law did not recognize a sovereign right to ownership of the seabed of the outer continental shelf; (2) that the English charters establishing the American colonies did not grant ownership of the seabed; (3) that colonial activities do not support the defendant States' contention that the colonies either had been granted or claimed or exercised dominion and control of the seabed beyond the three-mile marginal sea; (4) that even if the colonies had, contrary to the evidence, been granted or had exercised such dominion and control, their rights would have passed to the United States as attributes of external sovereignty at independence or upon ratification of the Constitution; and (5) that the defendant States did not acquire any interest in the seabed of the outer continental shelf subsequent to ratification of the Constitution.

On these historical points the parties argue extensively from an abundance of sometimes conflicting evidence. Underlying the States' exceptions to the Master's

findings is their contention that he applied an erroneous methodology. The States argue that the Master depended too much on secondary sources, paid extraordinary deference to one such source-Fulton's The Sovereignty of the Sea-and that he tested the evidence and exhibits, including primary sources of reference, by whether they coincided with Fulton's views. See Report at 25-26. The States argue that the opposite approach is the correct one, i.e., that secondary sources must be tested by the primary evidence. Furthermore, the States assert, Fulton, although a significant source, is at variance with the evidence and with the weight of scholarship on two points central to the States' case: (1) the claim that English law prior to 1603 failed to recognize maritime sovereignty and dominion and (2) the claim that the admitted 17th century legal recognition thereof vanished after 1688. They seek to discredit Fulton by noting that his treatise was written at the height of popularity of the freedom-of-the-seas doctrine, a doctrine of which, the States claim, Fulton was a zealous advocate.

The SG replies that the Master's use of Fulton's text was entirely proper: (1) that contrary to the States' contention, the Master studied the primary source materials and did not rely exclusively upon secondary materials; (2) that Fulton drew upon most, if not all, of the relevant primary evidence introduced by the States and the Master was entitled to compare his own preliminary understanding of that evidence with the views expressed by Fulton and others; and (3) that as the Master noted, Fulton's work is generally regarded as perhaps the single most authoritative study of pre-nineteenth century English maritime claims, that even the States' chief witness, Professor Jessup, praised the Fulton text, and that the States' themselves have relied upon Fulton throughout the litigation.

Addressing the specific historical findings of the Master: I. The States argue that the evidence massively supports their claim that English law and practice prior to the 17th century recognized the sovereignty and ownership by the Crown

of the English Seas and the resources thereof. The States argue that the sovereignty claimed by the Crown was complete territorial sovereignty. They cite, inter alia, a 14th century statute referring to "the sea or elsewhere within the realm"; the "flag salute" requiring foreign ships sailing in the claimed English waters to strike their sails to English ships; the Crown's assertion of and exercise of the right to grant exclusive fisheries in these seas, including title to sedentary fisheries; the Crown's asserted rights to flotsam, jetsam and lagan; and establish English law, contrary to Roman law, which held that a new island rising in the claimed seas belongs to the Crown on the theory that the Crown had owned the land while still covered with water.

The United States replies that the States' contentions are based upon a confusion between maritime sovereignty and seabed ownership. As found by the Master, the SG contends that the Crown's claimed "sovereignty" over the adjacent seas was a limited one, that England exercised only a protective jurisdiction for the purpose of protecting commerce. As evidence that the seas were never considered within the realm under British law, the SG cites a 1389 statute which provided that the admiral shall "not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." He argues that this statute, together with other sources, has long been understood as circumscribing the English realm, in a property-law sense, by inland waters and the low-water line. The SG refutes the States' evidence of ownership. He contends that the "flag salute" was merely an attribute of protective jurisdiction and that the Crown's prerogative rights to royal fish, flotsam etc. are merely examples of the Crown's overriding rights in owner-less property found by its subjects. He contends that there is no evidence of Crown grants of exclusive fisheries after 1215 and that the jurisdiction exercised over fishing after that date related primarily to inland waters.

II. All parties agree that during the Stuart era (1603-1688), the Crown asserted general sovereignty over the English seas, including a claim to the ownership of the seabed. The parties disagree, however, as to the grounds on which that sovereignty rested. The States argue that the Crown's claims were based upon a theory of inherent sovereign ownership in the coastal state extending seaward to 100 miles. They rely on the writings of commentators of that period and the testimony of their principle witness, Professor Jessup. They also cite a 1909 decision of the Permanent Court of Arbitration which appears to recognize that maritime territory "is an essential appurtenance of land territory." The SG argues, however, that the States' theory has no historical foundation and is refuted by the very extravagance of the Stuart claims to the Bay of Biscay and the North Sea, which denied to France, Spain and the North Sea nations any corresponding sovereign maritime rights. Noting that the Stuart era proved to be the high tide of British maritime pretensions, the SG relies on the finding of the Master that the Stuart claims were based upon effective occupation of the seas through British naval power. He maintains that even during this period the adjacent seas were never considered to be within the realm of England. He cites a 1876 English case, Regina v. Keyn, in which Lord Chief Justice Cockburn demonstrated that the courts of admiralty had never had territorial jurisdiction to try a foreigner for a crime committed on a foreign ship on the seas over which England claimed "sovereignty."

The parties also disagree as to whether or not the Stuart pretensions were abandoned during the 18th century. As found by the Master, the United States argues that they were. Depreciating the evidence offered by the States to the contrary, the SG argues that the "flag salute" had become largely ceremonial and that the evidence concerning the regulation of foreign fishing appears to pertain only to inland waters or shallow coastal seas. With respect to the latter, the SG notes that Professor Jessup has shown that England claimed no exclusive fisheries beyond three miles from

shore at the end of the 18th century. And, in any event, the SG would rely on his earlier argument that a claim to exclusive fisheries would have been based upon appropriation of those fisheries through occupation and use, not upon a theory of territorial ownership. The SG notes that Blackstone did recognize the Stuart theory of seabed ownership as a possible basis for a Crown claim of ownership of emerged lands, but contends that he was uncertain of the soundness of that theory.

III. Noting the above Stuart claims, the defendant States argue that given this legal and political climate in which the colonial charters were issued, it would have been "incredible" if the colonies they created had not been granted sea and seabed rights. They argue that in view of the Stuart claims it stands to reason that similar claims would have been made on this side of the Atlantic. They rely on the testimony of the expert witnesses, treaties and maps purportedly demonstrating English claims to the marginal seas of the North American colonies. They also note two of the colonial charters, the second Virginia charter of 1609 and the New England charter of 1620, as conveying "all the Islands lying within one hundred Miles along the Coast . . . Together with all the Soils, Grounds. . . Mines. . . as other Minerals. . . within the said Territories. . . whatsoever, and thereto and thereabouts by Sea and Land, being, or in any sort belonging or appertaining. . . ." and, with respect to the New England colony's boundaries, "by all the Breadth aforesaid throughout the Main Land, from Sea to Sea, with all the Seas, Rivers, Islands, Creeks, Inlets, Ports. . . shall be the Limits and Bounds. . . of the second Colony. . ." and the granting language of "Mines, and Minerals. . . both within the same Trail of Land upon the Main, and also within the said Islands and Seas adjoining." Contrary to the conclusion of the Master, the States find the above language explicit enough to convey sovereignty and dominion in the colonial seas. They argue that in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), and Shirley v. Bowbly, 152 U.S. 14, 16 (1844), the Court expressly relied on the "royalties" language of the charters as including a

conveyance of the soil under all navigable waters, without making any distinction between inland waters and the marginal sea. The States go on to cite, inter alia, "free fishing" clauses found in some of the charters and maps made in the colonial period showing boundaries extending out into the sea.

The United States contends that Britain paid little or no attention to, and expressed little or no interest in claiming sovereignty over, the American seas. The SG argues that a proper reading of the charters shows no explicit grant of the seas or seabed but rather that while they granted lands and islands outright, they granted only certain rights short of ownership in the seas. By contrast, the SG notes that the Canadian colonial charters purported to make outright grants of the sea. He further contends that since the charters on which the States rely specifically enumerated many prerogatives, such as fishings and precious stones, but did not specifically enumerate ownership of the seas or seabed as a prerogative, such ownership did not pass to the colonies. In any event, the SG returns to his interpretation that the Stuart claim to sovereign ownership of the seas could be achieved, if at all, only through occupation and use, and argues that there is no evidence of such occupation and use in the area of the seas now at issue. He reasons that while limited evidence of American colonial fishing is insufficient to establish such a claim, it, in any event, demonstrates only an occupation of shallow coastal waters. Finally, the United States contends that the colonial charters did not in practice grant proprietary interests; rather, they granted opportunities to establish settlements and appropriate lands, together with sufficient authority to make laws for the peace, order, and good government of those settlements. Accordingly, the SG contends, any rights to the adjacent seas and seabed that passed under the grants and charters did so as incidents of government. And all colonial governmental powers had reverted to the Crown before independence.

IV. The defendant States also except to the Master's finding that if the colonies had a claim to the seabed, that claim would have passed to the United States at inde-

pendence or upon ratification of the Constitution. The States argue that at independence each State became a complete sovereign, recognized as such by both our law and by international law. They contend that under the constitutional law of the revolutionary period the United States was not regarded as a separate entity distinguished from the States, but rather as the States themselves, acting in confederation or concert for the winning of the war. They cite instances where the States were individually recognized in treaties, and individually carried on substantial foreign-affairs and defense activities. They also argue that Article IV, Section 3, Clause 2 of the Constitution itself refutes any claim that it transferred sub silentio any territory or property from the States to the federal government. Finally, they contend that throughout our history down to the Court's decision in California it was well understood that under the Constitution the States retained their rights in the marginal seas and seabed. They here rely principally on Pollard's Lessee and its progeny. They note the Court's admission in California that in reasserting the basic doctrine of Pollard, the Court had used language strong enough to indicate a belief that the states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not. 332 U.S. at 36. See Manchester v. Massachusetts, 139 U.S. 240 (1891).

The United States argues that it was created upon independence as a single nation and was recognized as such under international law and, accordingly, any seabed ownership rights previously held either by the Crown or by the colonies would have passed to the United States as an incident of external sovereignty. The SG argues that while the United States has never denied that the States exercised internal sovereignty upon independence, they were never external sovereigns. He argues that the history of the Continental Congress shows that a national government possessing the attributes of sovereignty came into being prior to the states. The SG cites an early decision of this Court, Penhallow v. Doane, 3 U.S. (3 Da..) 53 (1795), as finding that "the

states, individually, were not known nor recognized as sovereign, by foreign nations. . . ." He also relies on United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), where the Court found that "[a]s a result of the separation from Great Britain. . . the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." And, in any event, the SG maintains that such sovereignty would have passed to the United States upon ratification of the Constitution in that the Constitution confirmed that the United States possessed all attributes of external sovereignty. He contends that Art. IV, Sect. 3, Cl. 2 was not intended to affect the distribution of incidents of external sovereignty, such as an inherent sovereign ownership of the adjacent seas and seabed.

V. The States argue that the adoption by the United States of a three-mile territorial sea did not work a contraction of any existing States' rights and that even if exclusive rights to the outer continental shelf are deemed to have arisen in 1945 for the first time, the States would be entitled to those rights. They argue that they are entitled to have their rights measured by international law as it exists today. And that, in any event, an overwhelming preponderance of authority confirms that the three-mile limit related fundamentally to surface navigation and related rights; and its basic rationale could not affect the historic claims of the States to develop the mineral resources of the seabed. Repeating their historic arguments, the States further maintain that even if rights in the shelf arose in 1945 for the first time, they are unquestionably the residual owners of property within their land territories to which the continental-shelf rights are an "inherent" appurtenance.

Arguing that it is clear that the federal government can, in the conduct of the nation's foreign affairs, adjust national territorial boundaries and in doing so cede territory of a state, the SG contends that adoption by the United States of a three-mile territorial sea not only renounced the States preexisting claims, if any, to the

seas and seabed beyond; it also foreclosed any such claims from subsequently arising. The SG further argues that the States' contention that the rights created by the Truman Proclamation of 1945 vested in them as residual owners of the adjacent lands is inconsistent with this Court's constitutional determination in California that, in the absence of proof of valid historic title in the States, ownership of the seabed of the adjacent seas inheres in the United States as the external sovereign.

VI. Finally, the States claim that at the very least, they are entitled to prove historic boundaries out to three leagues on the Same basis as the Gulf States are under the Submerged Lands Act. They contend that this difference in treatment violates the equal footing doctrine. The SG notes that this claim was expressly rejected in Alabama v. Texas, 347 U.S. 272 (1954).

C. North Carolina specifically excepts to the Master's determination that the States of Rhode Island and North Carolina were not wholly independent nations and did not have external sovereignty during the period between the operative date of the federal government under the Constitution and the subsequent dates when they ratified the Constitution. North Carolina argues that such a finding is contrary to the evidence and notes, inter alia, that early acts of Congress placed North Carolina and Rhode Island on the same footing as foreign countries. The SG relies on the findings of the Special Master that there is no evidence that either of the two States had withdrawn from the union formed by the Articles of Confederation, that Congress recognized them as a part of the United States and, in fact, in its legislation distinguished them from foreign states.

D. Georgia specifically excepts to the Master's conclusion that the State did not acquire the resources of the seabed under its boundary settlement of 1802 with the United States. Georgia argues that such a finding is contrary to the evidence, noting that the Cession Agreement quitclaimed to Georgia "any lands lying within

the United States" lying east of the States' western boundary. The SG again relies on the finding of the Master that even if the agreement were construed to grant title to the seabed off Georgia's coast, in 1802 the United States did not claim any jurisdiction over or title to the seabed of the continental shelf beyond the three-mile belt of territorial sea.

E. The Special Master found that it does not appear that any exploration or exploitation has been carried on by the licensee of Maine or that any payments have been made by it to that State, and that an accounting is not required. No exceptions are taken to this finding.

F. Amicus Special Committee on Tidelands notes the States' economic and environmental interests in exploitation of the shelf. They attempt to demonstrate that unless they are to obtain the licensing fees, taxes etc. from such exploitation, they will get the short end of the stick, paying out in services more than they will take in in the taxation of spin-off development. Amicus Associated Gas Distributors take no position in the litigation. They note the urgent need for fuel and, in essence, urge everyone to get on with deciding the case. In particular, they note the likelihood of extended litigation between the States as to the extent of State boundaries if the States win and urges the Court to retain jurisdiction until all boundary disputes are resolved.

DISCUSSION: The defendant States' attempts to distinguish-or limit-California appear futile. And, the Court's historical findings there specifically and clearly refute those now advanced by the Atlantic States, e.g.:

"From all the wealth of material supplied. . .we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it. . . ." 332 at 31.

"Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set

apart a three-mile ocean belt for colonial or state ownership." 332 U.S. at 32.

"There is no substantial support in history for the idea that [the settlers] wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth." 332 at 32-33.

"Not only has acquisition. . . of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty." 332 U.S. at 34.

The Court's focus on the three-mile belt would not appear of any relevance and, in any event, Louisiana clearly extended these findings beyond that limit. If the historical analysis in California is weak, it is weak with respect to the States' claims to external sovereignty at independence. A recent article by Professor Morris of Columbia deals extensively with that claim and is strong support for the federal government. Morris, The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty Over Seabeds, 74 Colum. L. Rev. 1056 (Oct. 1974). Gouverneur Morris contends that the historical evidence indicates that a national government was in operation before the formation of the states. He refutes the agency theory advanced by the States by noting that delegates to the First Continental Congress were selected in disregard of colonial assemblies and by other extralegal means. It should also be noted, perhaps, that Fulton is cited extensively throughout the California opinion and that the Court in California specifically limits application of the rationale of Pollard, Manchester and other early cases.

Although it is not clear what part the foreign-affairs and defense powers rationale played in the California Court's analysis, the Court seems to have in any event rejected the preemptive powers argument now advanced by the defendant States. The States' historical arguments appear largely repetitive and although they make much of it, the nature of their additional evidence is not clear. In any event, there

would appear to be no "clear error" in the California holding and the SG's suggestion that there be no departure from the doctrine of stare decisis seems persuasive.

Finally, there is the federal government's pending motion for judgment on the pleadings. The Court's intent in the matter is not clear.

There is a reply brief.

2/5/75

Ginty

PJN

Orig, 35

USA

v.

MAINE, et al.

The defendant States ~~in~~ (one of which is Virginia) request that the Court allocate four hours for argument of this case. They assert that it is extremely complex, both legally and historically, and claim that that much time is required for proper presentation of the issues. They further point out that the Court gave the Railroad Act three hours and assert that this case is equally important and more complicated. The ultimate issue here ~~appears~~ is described to be ownership of the resources of the outer continental shelf from Maine to Georgia.

There is no way to make anything more than a guess about the amount of time required. My general skepticism toward the fruitfulness of oral argument prompts me to recommend two hours rather than four. The parties assert that there are some issues that are distinct among them as well as come issues that they share in common. I would think that an hour on each side should allow the presentation of all of the issues,

BOBTAIL MEMORANDUM

TO: Mr. Justice Powell

FROM: Ron Carr

DATE: February 24, 1975

No. 35, Original - United States v. Maine, et al.

I recommend that you vote to enter judgment for the United States in accordance with the Special Master's recommended decree, although on the basis of reasoning somewhat at variance with that of the Special Master.

I think it might be helpful briefly to outline the legal contours of the problem, if only to clarify the following discussion. In United States v. California, 332 U.S. 19, the Court held that, as between the state and national governments, the latter holds title to submerged lands seaward of the low water mark on the coastline. California had argued that its state constitution, adopted contemporaneously to its admission, defined the state's boundary as three English miles seaward of the low water mark. Moreover, the eleven original riparian states, when they formed the union, assertedly had proprietary

* I.e., all thirteen original states, except for Connecticut and Pennsylvania, plus Maine. Neither Connecticut nor Pennsylvania has an Atlantic coastline (Connecticut fronts Long Island Sound; Pennsylvania the upper Delaware River).

rights out to the three-mile limit bounding the territorial seas. Since California, like all states, was admitted on an equal footing to the thirteen original states, its proprietary rights must be the same. The Court rejected these arguments. It found that, when the union was formed, the boundaries of the original riparian states extended only to the low water mark and that extension of the national boundaries to the three-mile mark occurred, under international law, only thereafter. Hence, regardless of how state boundaries might be defined, the United States, rather than the states, held title to the submerged lands under the peripheral territorial seas. The territorial seas were acquired by the United States and not only the seas but the lands beneath them pertained to the external sovereignty of the nation.

In U.S. v. Louisiana, 339 U.S. 669 (Louisiana I) and U.S. v. Texas, 339 U.S. 707, the Court held that, given its holding in California, it followed a fortiori that title to submerged lands beyond the three mile limit was in the United States. Finally, in U.S. v. Louisiana, 363 U.S. 1, the Court dealt with the construction of the Submerged Lands Act. That Act, passed in response to the decisions described above, confirmed in all riparian states boundaries out to three geographical miles from the low water mark and, in Gulf of Mexico states, boundaries out to three leagues, if those states could prove that such boundaries had received congressional

La II
dealt
with
Submerged
Lands Act

recognition when they were admitted to the union. In addition, Congress ceded to the riparian states all of the United States' interest in the submerged lands within the states' boundaries.

With this background in mind, I think it clear that the defendant states can succeed here only if California was wrong. In other words, they could succeed only if each of the following propositions is correct. (1) That from the inception of English colonization of this continent until independence, England had, under international law, title to the submerged lands underlying the seas adjacent to the continent, from the low water mark out to a point beyond the three mile limit of the subsequently recognized territorial seas. (2) That England's title to the submerged lands was granted to the riparian colonies in their colonial charters. (3) That, upon independence, title to the submerged lands remained in the new riparian states rather than passing to the United States collectively. (4) That, upon ratification of the Constitution, title remained in the riparian states rather than passing to the United States collectively. (5) That such title was unaffected by the subsequent recognition of the United States of territorial seas limited to three miles from the low water mark.

I think that the critical questions here are the first two, for the following reasons. If, in point of international law, the riparian states held title to the submerged

lands out to some distance on the continental shelf, I do not see how such title could be said to have passed to the United States collectively. It is true that under both the Articles of Confederation and the Constitution, such submerged lands would, in a sense, be affected with the external sovereignty of the nation. There is, I would think, no question that the United States could regulate their use, make treaties as to them, and so forth. But I don't see how these acknowledged foreign affairs, defense, and admiralty powers of the United States require that the nation, rather than states, must have proprietary title to the lands. As Mr. Justice Frankfurter said in his dissent in California, there is a distinction between imperium and dominium; while the United States necessarily has the former, it does not follow that it has the latter.

I agree

Yes

The critical question, then, is whether and to what extent the original riparian states held title to the submerged lands in 1776, when they declared independence from England.

The question cannot be alone what England claimed as its property, but what was recognized as such in international law, i.e., the practice and acquiescence of the family of nations. Moreover, whatever England might have claimed in the seventeenth century ^{and} whatever property rights the colonies might have had were subject to defeasance by the British Government. Thus if,

What was
recognized
by international
law in
1776?

as of 1776, the British Government no longer claimed title to the submerged lands, no such title could have remained in or passed to the colonies upon independence.

As of 1776

Under this analysis, much of the Common Counsel states' historical material is irrelevant. From the relevant materials, it seems to me clear that the Special Master's critical conclusion is correct: that, as of 1776, international law recognized in England (and hence its North American colonies) proprietary rights only in those submerged lands adjacent to the shores actually occupied or employed by the colonies or their citizens; at most, the colonies had proprietary rights to submerged lands under the territorial seas, i.e., those within "cannon shot" or three miles from shore.

Continental Shelf is part of U.S. only since Truman Declaration

If this conclusion is correct, then it is clear that under international law any dominion over the submerged lands of the continental shelf, beyond three miles from the low water mark, did not arise until after independence. Indeed, from all indications, it did not arise until the Truman Proclamation following the Second World War, the principles of which were accepted by other nations in the Convention on the Continental Shelf (See Government's Brief at 56). Thus, the continental shelf submerged lands were incorporated into the United States only subsequent to independence, by means of exercise of the national foreign affairs and military powers.

As such, the submerged lands - like all "after-acquired" territories - are subject exclusively to the control of the United States and are within the national domain.

It seems to me unnecessary to go beyond this analysis to sustain the Special Master's recommended judgment. The states' "equal footing" argument - that they, like the Gulf states, should be allowed to establish historic boundaries out to three leagues, - seems to me without merit for the reasons given in the United States' brief, at 57-59.

Clogett (for Stales) { Excellent argument
Three Qs } If I write, I should read it.

1. Does Calif control this case?

The Master granted motion
for judgment on pleadings, relying
on Calif. [U.S. v Calif 332 U.S. 19 (1947)]
But Calif is distinguishable,

No one had ever heard of
3 mile limit at time of Revolution.

~~The~~ Developments since date
of Calif under-cut its force as
a precedent.

Record in this case is
superior to that in Calif case —
in depth, sophistication, & thoroughness.

Gov't's own expert witnesses
ended up agreeing with Stales.
(See last 20 pages of Vol I of
Appendix* — for concessions made
by our expert).

Urges us to reconsideration
of Calif — & if necessary overrule
it. The Calif doctrine is an aberration

* P 528

Cloquet (Cont.)

U.S. argument based on power over foreign affairs & nat. defense is a "mirage" — an argument of no substance. ~~the~~ SG has given no reason why exercise of these national powers would ~~interfere~~, be impaired or limited by recognizing states' rights to their sea shelf.

Since 1953, states admittedly have owned out to 3 mile limit — w/o causing any interference with these national powers.

States claim only seabed — not the water.

Continental shelf is no different from continental land in terms of effect of state ownership.

Events since Calif undermine its authority:

(1) The legis. of 1953 indicated Congressional view that Calif was wrong.

(2) Calif case cannot co-exist with La. cases.

Clagett (Cont)

3. Ala v Texas is also inconsistent with Calif. In Texas, the Submerged Lands Act was sustained. J. Black, dissenting, doubted that Congress could relinquish sovereignty over seabed - if it owned them.

Calif has thus been over-ruled sub silentio

x x x x

Apart from status of Calif, the historic ownership of states is clear. See Report by Senate Committee on Outer Shelf Oil & Gas. (Senator Magnuson) -

With my briefs.

Fed Govt will have full taxing power.

x x x

The U.S. has always owned, (i.e. sovereignty) Continental Shelf.

The Truman Proclamation to this effect left open, however, whether the Fed Govt rather than the States.

Claquet (cont.)

But sovereignty of this country is a dual one - shared bet. states & Fed Govt. The reserve powers of states controls as to powers & rights not expressly ~~de~~ delegated to fed. govt. (Claquet says this divided sovereignty theory suffices alone to sustain states position).

Historic Title:

Complex issue - involves law of two countries

States claims rest on Colonial Charters (see language thereof). The language is unequivocal.

See 2nd Va Charter of 1609
(See Claquet's Br. p 68)

All parties in this litigation agree as to Eng. law in 17th Century. Eng. claimed sea bed off its coasts. This was law when Charters of states were granted. This was doctrine of "Crown Ownership of Sea Bed".

Clagett (Cont)

From beginning of Colonization in 12th century, there was intense interest in control of sea, in fishing rts.

It is "incredible," against background of Eng law in 17th Cent., that the grants to the states did not encompass maritime rights.

In Colonial period if gold had been discovered 10 miles off coast, no one can doubt that

All cases hold states were individually sovereign(?) up to time of Const. See Gibbons v Ogden

The exclusive right to exploit off shore minerals belonged to states at time of Const. They have never lost it.

Bork (SG - p1) * See recent article in
74 Columbia Law Rev (1974).

Eng. law is correctly found by
S/M. But that law is irrelevant
to the case.

~~Four~~ Four independent grounds each
support U.S.:

1. Calif, La & Texas cases
are controlling
2. S/M was right in finding
that states never acquired these
rights.
3. If any such rights existed
in Colonies, they passed to U.S.
at time of Const.
4. Whatever prior status, the
U.S. since has asserted its
jurisdiction.

~~Calif~~ Calif case expressly decided
orig. 13 colonies never acquired
ownership of 3 mile limit sea
bed. Black op. is explicit &
controlling.

* If ~~we~~ I will, I should review Briefs
filed with Special Master.

Bork (56-112)

Fact that Calif involved only 3 miles.
In La, a 27 mile belt was involved.
Same principle applied in U.S. v Texas.

Calif was not an aberration. There
was dictum to ^{the} contrary in prior cases,
but no holding.

Submerged Lands Act of '53 ^{*} did not
repudiate ~~the~~ these cases; it is
consistent with them. Congress merely
ceded 3 miles to states.

Frankfurter dissent in Calif would
have left decision as to ownership of
land to Congress - as he thought
neither U.S. nor Calif had sovereignty
over seabed. Now that Act of 53
has been passed, the condition
occurred as necessary by Frankfurter
has been met.

The Gov't's motion for judgment
rests on state decision.

* In 2nd La case, the Court said
Calif. decision remained unimpaired.

~~26~~ Bork (56-p3).

But even if ~~we~~ we are not bound by previous decisions, Bork ~~contends~~ contends that States' argument as to historical basis of title is ~~a~~ not supported by facts, by history or by cases in Eng & Australia.

The States' argument is confusing because it confuses authorities dealing with admiralty law (rights to use of surface water) with authorities dealing only with ownership of sea bed.

It also was possible to obtain prescriptive rights to an oyster bed or other limited sea bed area actually occupied.

Title was vested in U.S., ^{at the latest,} upon ratification of Treaty in 1789.

U.S. can certainly cede or grant to a foreign country any part of ~~this~~ our territory over which it exercises jurisdiction.

Closett (Reply) (Read $\frac{1}{2}$ - Superb argument)

The Chief Justice Affirm Master

Douglas, J.

S/M "entirely correct"
Accept his ~~report~~

& direct him to
prepare a decision
implementing his
findings.

Chief could do this
w/o opinion.

Chief referred to
article by Stevens (sp?)
in ABA Journal.

If we grant summary
judgment, only Q is whether
~~we~~ we retain jurisdiction.

Out

Brennan, J. Affirm Master

Grant Summary
Judg. motion
citing Calif, La
& Texas.

Could do this by
short P.C.

Law is settled.

Prompt decision is
vital.

Stewart, J. Affirm Master

Calif. wrongly decided.

Claggett is right.

But Calif decided Q
of property law, as
to which state
decision is especially
applicable.

Would grant
motion for Summary
Judgment. Would
not get into - or
agree with - much of
what Major said after
he disposed of motion.

White, J. Affirm Master

Agrees we are
bound by prior cases,
but thinks we
should have an op.
that answers Cloggett
— esp. as to why
Calif should not be
overruled.

U.S. advances
4 grounds ~~in~~ support
of Calif. May not
agree with all of them,
but some have merit.

Should at least write
enough to show that Calif.
is not distinguishable.

Powell, J. Affirm Master

Marshall, J.

Out

Blackmun, J. Affirm

We will be accused of
caving out unless we
write an opinion.

There are other grounds
— in addition to stare
decisis — for deciding
in favor of Gov't

More Article in Columbia
Law Review very helpful.

Rehnquist, J. Affirm Master...

Can't get away with short
opinion even if confined
to granting Summary
Judgment.

Lawmaking for the Seas

by John R. Stevenson

File on
35 Orea
U.S. v Maine

The United Nations Conference on the Law of the Sea is engaged in a monumental task—nothing short of drafting a constitution for the oceans that will gain the support of the world's nations. The first substantive session of the conference has been concluded, and the second will open next month in Geneva. Several new approaches to international lawmaking are being used.

THE THIRD United Nations Conference on the Law of the Sea held its first substantive session last summer in Caracas from June 20 to August 29, and a second substantive session is scheduled to meet for eight weeks in Geneva commencing on March 17 of this year.

The fundamental task of this conference, which many consider the most important international lawmaking conference since the establishment of the United Nations in 1945, is to agree on a legal regime governing the activities of men and nations on more than two thirds of the surface of the world. The results of the first substantive session of the conference and the prospects for agreement have been reported in hearings before congressional committees¹ and in other journals.² Rather than essentially repeating those reports, this article focuses on the law of the sea negotiations as an example of the international lawmaking process and on those aspects of the process that appear to be most constructive in facilitating agreement on a constitution for the oceans.

Why do we need international lawmaking for the seas? Consideration of this basic question resolves itself into two subquestions: Why do we need any legal regime for the oceans, and why is it necessary to have a system of international as opposed to national law for this vast area of the world?

The answer to the first is merely a variant of the basic political theory and jurisprudential inquiry as to why we need law at all: As long as nations and their nationals use this vast area and exploit its resources, there must be certain agreed principles of conduct to resolve competing uses and conflicts. Otherwise there will be chaos.

But why is international rather than national law making necessary?

This is a more complex issue. One possibility would have been to extend the national state system established in the seventeenth century to embrace the seas as well as the land territory of the world. This, in fact, was attempted, with brief periods of varying success, by those countries that sought to establish maritime empires with the same sovereignty over the seas as they had on land. Because of the desires, however, of other states to navigate freely and to carry on naval and commercial activities throughout the oceans without seeking the consent of a territorial sovereign, the extension of coastal state territorial sovereignty was limited by and large to a fairly narrow belt of territorial sea that ranged until very recent history between three and twelve miles. In the area beyond the international regime freedom of the seas was firmly established. This regime excluded national sovereignty over the ocean and permitted everyone the free use of the seas and their resources, providing they showed reasonable regard for the interests of others in their exercise of this freedom.

This simple, comprehensive rule of international law served the international community well for more than three centuries. It reflected the general interest in free common utilization of the ocean, at least on the part of those countries with the national power to enforce this rule and the apparent inexhaustibility of the principal ocean resource—fish. Moreover, while this basic constitutional provision was a rule of customary international law only finally codified in the 1958 High Seas Convention, the constitutional allocation of powers provided for a large measure of national jurisdiction through the establishment of the principle of flag state control over vessels navigating the high seas.

Commencing at the end of World War II, however, this established constitutional scheme for the ocean—freedom of the high seas beyond a narrow territorial sea with flag state control over vessels on the high seas—has been widely challenged on the ground that it no longer serves the needs of the international community.

1. Hearings before Senate Foreign Relations Committee on September 4, 1974, Subcommittee on Minerals, Materials and Fuels of Senate Interior and Insular Committee on September 17, 1974, House of Representatives Merchant Marine and Fisheries Committee on September 25, 1974, and House of Representatives Foreign Affairs Committee on November 19, 1974.

2. Stevenson and Oxman, *The Third United Nations Law of the Sea Conference: The 1974 Caracas Session*, 69 AM. J. INT'L. L. (1975).

The explanation for this challenge has many aspects. In the first place, a technological explosion has increased and intensified the uses of the ocean. The traditional uses—navigation and fishing—are now carried on in entirely new types of ships and equipment—500,000-ton supertankers, nuclear-powered and armed submarines, and factory fishing vessels equipped with electronic tracking gear. There are also vast increases in the numbers and tonnage of vessels and economic effort devoted to these traditional uses to the point that the world today faces a very serious problem of congestion and navigational safety in important shipping routes, overfishing and depletion of fish stocks, and pollution of the ocean.

We also have many entirely new uses of the ocean: exploitation of the world's most important new sources of petroleum in the continental margins of the world, as well as the nickel, copper, and other hard minerals soon to be produced from manganese nodules from the deep ocean seabed; intensified scientific research adding to our knowledge not only of the oceans but also of our climate and the planet as a whole; and increasingly diversified recreational uses of the ocean and its beaches.

The failure of the traditional freedom-of-the-seas principle to deal adequately with coastal states' concerns for the utilization of the oceans and their resources beyond a narrow territorial sea has led to a renewal of the seventeenth-century attempt to extend the national state system to the oceans—this time through coastal state claims of territorial sovereignty extending beyond twelve and up to two hundred miles.

At the same time the maritime countries, which for so long upheld the freedom-of-the-seas principle through force, if necessary, have become increasingly inhibited by limitations in the U.N. Charter and other treaties on the use of force, as well as the high political cost in terms of alliance policies and other foreign policy objectives, in restricting coastal state claims through the application of force.

Finally, the sharp increase in the number of national states from some fifty at the time of the founding of the United Nations to roughly a hundred and fifty today has increased the demand for a fundamental remodeling of the law of the sea to take into greater account the interests of the developing and newly independent countries, a demand that the increasing role of international organizations, based on the principle of the sovereign equality of all states, has made increasingly difficult for the major maritime and developed states to ignore.

The net result, in the absence of international agreement, has been a spiral of competing and escalating claims to the use of the same ocean space and resources,

and this has resulted in increasing conflict and disorder. The Law of the Sea Conference may be viewed in this context as the international community's best and perhaps last opportunity to arrest this new extension of the national state system and reach an agreed international solution that will avoid conflict over unilateral claims and an ultimate partition of the ocean.

Granted the necessity of achieving promptly a new constitution for the ocean, how can this best be achieved? In the present stage of development of the international community the only three alternatives would appear to be: the traditional customary lawmaking process involving changes accomplished principally through the unilateral assertion of claims that other states accept or acquiesce in over time; the international, multilateral lawmaking treaty process in which the Law of the Sea Conference is engaged; and finally the establishment of a new international organization with the authority to enact and enforce binding legislation for the ocean.

The difficulty with the customary lawmaking process as applied to today's ocean is not only the inevitable conflict that is produced by differing perceptions of legal rights and national interests but also the inability to make satisfactory functional accommodations between competing claims for the use of the same ocean space. It is my view, shared by many other participants in the law of the seas negotiations, that, in the absence of a generally accepted international agreement, the most likely result will be the extension of the national state system to the high seas through the establishment of territorial seas of two hundred miles or more, with no provision for freedom of navigation or overflight beyond twelve miles or for unimpeded transit of straits. This would be accompanied by continuing conflict with respect to national claims to the use of the ocean in the area beyond, including the exploitation of the deep seabed's resources.

While this outcome would give coastal states the control they seek over coastal resources, pollution, and scientific research, it would seriously prejudice all states' navigational interests in unimpeded transit of straits and in using the one third of the ocean that would be overlapped by two-hundred-mile territorial seas, as well as their interests in distant water resource exploitation, scientific research, and effective international pollution standards for the ocean. It is simply not possible through unilateral customary lawmaking to achieve a functional accommodation of interests through a twelve-mile territorial sea accompanied by an economic zone extending to two hundred miles in which the interests of coastal states in controlling resources, participating in scientific research, and preventing pollution, and the interests of all states in free navigation and overflight, promotion of scientific research, and other high seas uses are reconciled through a balance of obligations, enforceable through compulsory dispute settlement.

Unilateral international lawmaking favors the blunt

EDITOR'S NOTE: The views expressed are those of the author and do not necessarily represent the views of the Department of State or the United States government. This article has been adapted by the author from his remarks at the Princeton University Conference on "A New World Order," November, 1974.

instrument—the extension of the territorial sea—rather than a delicate adjustment in accordance with functional needs.

At the other extreme, the international community clearly does not seem any more prepared in the ocean than in other areas to deal with the problem by the fundamental reordering of the national state system that would be entailed in the establishment of an international organization with the general power to enact and enforce the necessary substantive rules. In some limited areas, however, the establishment of an international organization with carefully prescribed rule-making authority and a balanced decision-making process, taking into account not only the numbers of sovereign states involved but other important factors as well, appears to be a necessary supplement to a comprehensive international treaty.

If a comprehensive multilateral treaty appears to be the best, if not the only, viable solution to lawmaking for the oceans, what lessons do the law of the sea negotiations hold for the achievement of a treaty?

One of the first issues to be resolved was the nature of the treaty. Shortly after the United Nations General Assembly in 1967 turned to the consideration of the problems of a legal regime for the deep seabed by establishing a special committee, the Soviet Union began exploring the possibility of resolving the principal question on which the 1958 and 1960 Law of the Sea Conferences failed to reach agreement—the breadth of the territorial sea. It was encouraged in its belief that agreement might be possible by the willingness of the United States (in a change from its position at the earlier conference) to agree to a twelve-mile territorial sea, provided free transit through, over, and under straits used for international navigation was guaranteed. Both countries recognized that general agreement on a twelve-mile territorial sea would require some recognition of preferential fishing rights of coastal states beyond twelve miles.

It was the initial position of the United States and other maritime countries that the law of the sea was so complex that its many problems could better be dealt with in what were called “manageable packages” and that the negotiations with respect to the deep seabed should proceed independently of the negotiations dealing with the more traditional subjects of the territorial sea, straits, and fisheries. This proposal was strongly opposed by the developing countries, however, and they were successful in broadening the General Assembly’s 1970 resolution, which called for a Law of the Sea Conference, to provide for a comprehensive treaty dealing not only with these subjects but also with pollution, scientific research, and the high seas and continental shelf regimes. The 1973 General Assembly resolution fixing the schedule for the conference went even further and determined that the mandate of the conference would be “to adopt a convention dealing with all matters relating to the law of the sea

John R. Stevenson has served as special representative of the president to the United Nations Law of the Sea Conference and chairman of the United States delegation, with rank of ambassador. A graduate of Princeton (A.B. 1942) and Columbia (LL.B. 1949, D.Jur.Sc. 1952), he practices law in New York City.



... bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.”

While this comprehensive approach has increased the difficulty of the negotiations by increasing the number of items with which the conference must deal, it is my view that, on balance, it has been a favorable development facilitating the achievement of general agreement.

Countries Now Must Consider the “Package”

In the first place, countries participating in the negotiations must now consider the entire “package” of law-of-the-sea treaty provisions rather than only their own particular interests in one or more items. They must, in effect, accept or reject the treaty as a whole rather than picking and choosing in accordance with their special interests.

Second, many of the ostensibly different subjects involve the use of the same ocean space. For example, among the most difficult remaining negotiating issues with respect to the nature of the economic zone are the accommodation of navigational, economic, scientific, environmental, and national security interests within that zone.

Finally, the very outlines of the general agreement on which a consensus appears to be evolving also depend on a comprehensive approach. While on the one hand the United States and other maritime powers are unwilling to accept a twelve-mile territorial sea without concurrent agreement on unimpeded transit of international straits, most coastal states are unwilling to agree to limit coastal state territorial sovereignty to twelve miles unless they have broad control over resources in an economic zone beyond twelve miles. Nor, on the other hand, do the developing countries appear willing to agree on the protection of the navigational interests of maritime countries in the area beyond

twelve miles and in international straits without concurrent agreement on a deep seabed regime in which their interests in participation in the "common heritage of mankind" are recognized.

A second common assumption in the negotiations has been the desirability—indeed, in the view of many, the practical necessity—of achieving very general agreement and not just a majority or even a two-thirds majority for the treaty. This was reflected in the gentlemen's agreement to make every effort to reach an accord on substantive matters by way of consensus. This was the basis for the adoption of the 1973 General Assembly resolution scheduling the conference. The gentlemen's agreement expressly recognizes "the desirability of adopting a convention on the law of the sea which would secure the widest possible acceptance."

This understanding reflects not only the basic legal problems that would be implicit in a new constitution for the ocean to which a number of important states do not become parties but also the underlying restraint on voting majorities in treaty-making conferences, namely, that to be binding on an individual state the treaty must be accepted by that state. If important maritime and coastal states do not feel that their interests have been accommodated adequately in the comprehensive treaty, they may refuse to go along and make meaningless the voting majorities by which the treaty texts are adopted at the conference.

Apart from these general principles, what have been the specific lawmaking processes followed in the law of the sea negotiations? Prior to the first and second Law of the Sea Conferences, a single treaty text was prepared by the International Law Commission after obtaining the comments of nations on the commission's draft texts. This single text was then discussed, amended, and voted on at the conferences. The third conference has followed essentially the reverse procedure. The various national interests and objectives have been discussed in general terms both in the preparatory committee and conference, with states submitting their competing texts on most treaty articles to be considered by the conference and its committees and to be reduced ultimately to a single, approved text.

The difference may be accounted for in part by the fact that the 1958 conference was a conference devoted in many respects to codifying existing law, whereas the role of the present conference is not only to modernize codified law in the light of changing circumstances and fill in the gaps, such as the breadth of the territorial sea, but also to provide progressive development of entirely new law in areas such as the deep seabeds and the protection of the environment. The process followed has been somewhat prolonged, particularly as a result of unnecessary delay in turning to substantive discussions because of organizational and procedural disagreements and a carryover from the General Assembly of many tactical techniques more appropriate to the passage of General Assembly resolutions than inter-

national lawmaking. But the general approach has been appropriate to a lawmaking effort of this nature, an effort nothing short of adopting a constitution for the ocean.

Seabeds Committee Identified National Interests

In view of the vital and diversified national interests involved, this was not a task that should have been entrusted to legal technicians in the first instance. Before a precise treaty text could be generally agreed on, it was clearly necessary for the nations of the world, including the many newly independent ones, to understand the nature of the task and where their respective national interests lay and to agree on at least the broad political framework of a generally acceptable agreement. This has been achieved in the preparatory work of the United Nations Seabeds Committee and in the general debate and committee discussions last summer at Caracas. Most countries have indicated a clear appreciation of their national interests, and there appears to be broad general support in favor of a comprehensive treaty based on a twelve-mile territorial sea, a coastal state economic zone of two hundred miles, and an international regime and authority for the exploitation of the mineral resources of the deep seabed beyond the economic jurisdiction of coastal states.

The broad ranging discussions to date also have identified the critical areas of negotiation for achieving a final agreement: unimpeded transit of international straits overlapped by a twelve-mile territorial sea; international limitations on coastal state resource jurisdiction in the economic zone (such as full utilization and conservation obligations with respect to fisheries and some modest payments with respect to oil production to be used for international community purposes); the extent of a coastal state's nonresource rights in the economic zone, particularly as to pollution and scientific research; equitable treatment of landlocked states; and the extent of the Seabed Authority's discretion with respect to access and regulation of the exploitation of the hard minerals found in the manganese nodules of the deep seabed and the role of the authority in that exploitation.

The success of the Law of the Sea Conference will depend on its ability to resolve these difficult remaining issues and translate the emerging consensus into generally acceptable detailed treaty provisions. This in turn will depend in large measure on the willingness of governments to make a number of hard decisions on the critical issues remaining and to give their representatives the necessary instructions to permit effective negotiation. The international lawmaking procedures followed, however, may also contribute to the ultimate success or failure of the conference. Certain procedural aspects of the negotiations merit more detailed consideration—(1) decision making, (2) the role of committees and working groups, and (3) the establishment of rule-making machinery and compulsory dispute

settlement to deal with some of the items on the conference's agenda.

Decision Making. In connection with the adoption of its rules of procedure on June 20, 1974, by consensus, the conference endorsed the following declaration by its president confirming the gentlemen's agreement on the basis of which the General Assembly adopted the resolution scheduling the conference:

Bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance,

The conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

The rules of procedure contain certain provisions that may be viewed as an attempt to reconcile the interest in achieving a treaty generally acceptable among all groups of states with the necessity for expeditious action.

The voting rules that have been used in most United Nations lawmaking conferences have provided for decisions on matters of substance in committee by a majority vote of states present and voting and in the full conference by a two-thirds majority of states present and voting. Since abstentions are not counted, this frequently has permitted the adoption of important rules of law by a small number of the participating states. The Law of the Sea Conference rules provide that the two-thirds majority in plenary must include at least a majority of the states participating in that session of the conference. They also provide expressly for the adoption by the same qualified majority of the text of the convention as a whole in addition to the adoption of individual articles.

Rule 37 of the conference rules sets out a novel procedure in international lawmaking somewhat akin to the "preliminary question" practice of parliamentary bodies in determining whether a vote should be taken. Before a matter of substance is put to a vote, the committee or the plenary, as the case may be, must decide that all efforts at reaching agreement have been exhausted. Provision is also made for periods of delay prior to making that determination, during which the chairman or the president are "to make every effort . . . to facilitate the achievement of general agreement, having regard to the over-all progress made on all matters of substance which are closely related."

The gentlemen's agreement and these rules should facilitate the achievement of a generally acceptable treaty and at the same time prevent holders of extreme positions from unduly delaying agreement through procedural maneuvers.

Agreement by consensus, while not requiring the affirmative express approval of a text by every participating delegation, does give any delegation that is pre-

pared to stand up and be counted the right to block agreement. A provision to proceed exclusively by consensus would not be feasible for a subject as complex as the law of the sea, in which so many important and disparate national interests are involved. The effect of the gentlemen's agreement, plus the procedural rules facilitating a consensus but providing for resort to voting if necessary, should dissuade states that might use their right to block agreement by consensus from doing so and should enable both the committees and the plenary to proceed further by consensus than might have been thought possible.

The provisions for a preliminary vote on whether efforts to reach general agreement have been exhausted should be helpful to those responsible leaders who, while having the necessary voting majorities to push through a particular proposal without amendment, recognize that to do so would jeopardize the general acceptance of the treaty and who would prefer to delay the vote on a matter of substance until further efforts at reaching agreement have been made. There has been some skepticism expressed that if the votes are there to carry a particular substantive position, they will be used automatically to determine that all efforts at reaching agreement have been exhausted. But this skepticism does not seem warranted.

One of the most difficult problems of lawmaking in an international community of equal sovereign states with enormous differences in area, population, resources, and development is the disproportionately large voting power of smaller countries, including many of the newly independent members of the international community. The principal protection against any abuse of the one-nation, one-vote principle in treaty making is, of course, the impossibility of binding a dissenting minority that refuses to ratify the treaty. The Law of the Sea Conference has made an important contribution to reconciling the one-nation, one-vote principle with the realities of power and responsibility through procedural innovations that strengthen the position of responsible leadership in working for a generally acceptable treaty.

Committees and Working Groups. One of the ways the one-nation, one-vote principle has been prevented from obstructing effective lawmaking has been to maintain this principle in the plenary organ and committees of the whole, while providing more equitable representation in smaller committees and other subsidiary organs or in a preparatory committee. The reliance in the prior conferences on the International Law Commission was an instance of this technique, and it has been the practice of a number of conferences to establish special committees or working groups consisting of less than the entire membership of the conference.

The record of the Law of the Sea Conference in this area has been somewhat mixed. The three main committees are committees of the whole, and in the organization session of the conference there was considerable espousal of the proposition that in the distri-

bution of positions on committees of limited membership the principle of "one nation, one seat" (taking all of the committees as a group) should be the logical corollary of "one nation, one vote." This principle was watered down in formal conference action, however, to the proposition that no state should be entitled as of right to membership on more than one limited membership committee. In practice, the United States and the Soviet Union were elected to both the general committee and the drafting committee.

The conference has been reluctant to provide for the establishment of subsidiary organs, such as working or drafting groups, composed of less than the entire membership. When smaller groups have been appointed, it usually has been with the proviso that they be open-ended in the sense that any state not appointed may participate in their deliberations as an observer. The result has been that some of the drafting and negotiating that could be done most effectively by smaller bodies of the conference with a representative cross-section of various geographic and other interest groups have been conducted by the regional geographic groups in the conference from the U.N. General Assembly.

While these groups have been useful in the absence of other means of consideration of issues by smaller groups, their organization along essentially regional political lines can be divisive and invites rigidity, particularly when the group has worked out delicate compromises that leave little flexibility for negotiation.

Some of the most effective negotiating and drafting have been accomplished by unofficial groups with like substantive interests, such as a coastal state group or a group of states interested in compulsory dispute settlement. The latter group, meeting under the cochairmanship of the El Salvador and Australian chiefs of delegation with Prof. Louis Sohn of Harvard as rapporteur, prepared a set of alternative treaty texts on the important issues in this area. It was introduced in the plenary in the final week of the conference with the co-sponsorship of states from four different regional areas. There also has been a group of individual international lawyers, principally heads of delegations, meeting under the chairmanship of the chairman of the Norwegian delegation, which has been doing valuable work in seeking to reduce the number of alternative texts and to arrive at a single, widely acceptable text.

As a practical matter, the insistence that all states be represented on official committees and working groups has prevented the conduct of intersessional work by official groups and has relegated intersessional work principally to meetings of regional and unofficial groups.

Rule Making and Compulsory Dispute Settlement. In making law for the ocean, participants in the Law of the Sea Conference are in some respects engaged in two rather distinct efforts. On the one hand they are drafting a constitution—that is, determining the respective jurisdiction of states and the Seabed Authority and the allocation of the power to determine and enforce

rules of conduct for the activities of states and their nationals in the oceans. In addition, particularly when there is an overlap of jurisdiction or an accommodation of competing uses problem—as, for example, with respect to vessels in the economic zone—it may be desirable for the law of the sea treaty itself to spell out the substantive rules to be applied. There are many areas, however—as, for example, the rules with respect to the protection of the environment—where detailed rule making may best be left to the future.

One very important element in effective lawmaking for the ocean may well be for the conference itself not to strive to establish rules of conduct in all areas, but rather to concentrate on the few essential areas and on rule-making machinery that equitably reflects population, geographic position, resources, development, and other relevant factors, as well as numbers of sovereign states. In a certain sense, in international lawmaking it is not the one-nation, one-vote principle that best expresses the existing sovereign equality of states but rather the right of each state to refuse to be bound in the absence of its consent. An agreement to accept future rule making by some qualified majority is to that extent a yielding of an individual state's sovereignty, and this will only be acceptable if equitable procedures for reflecting states' different interests are found.

Second, in view of the necessary generality of many of the provisions in the treaty and the necessity for the accommodation of different uses of the same ocean space, particularly in the economic zone, it is important that a lawmaking treaty for the ocean include effective provisions for the compulsory settlement of disputes.

Compulsory dispute settlement machinery is the most equitable and reasonable basis for dealing with the many difficult boundary delimitation questions involving many quite dissimilar factual situations.

Conference Tests International Law

Lawmaking for the ocean is important not only for the peaceful resolution of the critical issues of national and international interest but also for the development of the international legal process. If the international community cannot deal effectively with the problems of lawmaking in this area, in which a large measure of mutual accommodation appears feasible and in which there is a very broad common interest in minimum rules of order on which all can rely, thus giving the negotiation a dimension going beyond the mere maximization of particular national interests, the prospects for dealing with other more intensely political disputes is bleak indeed. If, on the other hand, in this area in which international law has played an important role for so long, the law can be successfully adapted to the changes brought about by the new technology and the evolving structure of the international state system, the gains should extend far beyond the ocean to the benefit of international lawmaking and international institutions generally. ▲

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1975

Re: 35 Orig. - U. S. v. Maine

MEMORANDUM TO THE CONFERENCE:

In this case there seems to be four Justices who think an opinion (either per curiam or signed) should be written.

Beyond doubt time is of the essence on this matter and I believe we should announce the disposition as soon as possible and let the opinion follow, unless the "brief" opinion suggested by someone can come down within two weeks, i.e., March 17.

Byron was perhaps the most vehement on the matter of an opinion preceding the Decree and I assign the case to him. He will work out the possible remand to the Special Master to consider the alternative basis for his recommendation on the juridical bay at the southerly tip of the mainland.

Regards,

WBJ

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
☒ Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 3-12-75

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 35, Orig.

United States, Plaintiff,	}	On Bill of Complaint.
v.		
State of Maine et al.		

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, § 2, and 28 U. S. C. § 1251 (b), the United States in April 1969 sought leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida.¹ We granted leave to file, 395 U. S. 955, on June 16, 1969. The complaint asserted a separate cause of action against each of the States and each alleged that:

“The United States is now entitled, to the exclusion of the defendant State, to exercise sovereignty rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low watermark and from the outer limits of inland waters on the coast, extending seaward to the outer edge of the Continental Shelf, for the purpose of exploring the area and exploiting the natural resources.”

¹ The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland waters rather than open sea.

Revised
LTP
3/12

Join

It was further alleged that each of the States claimed some right or title to the relevant area and was interfering with the rights of the United States. It was therefore prayed that a decree be entered declaring the rights of the United States and that such further relief be awarded as may prove proper.²

The defendants answered, each generally denying proprietary rights of the United States in the seabed in the area beyond the three-mile marginal sea. Each of them, except Florida,³ claimed for itself, as successor in title to certain grantees of the Crown of England (and in the case of New York, to the Crown of Holland), the exclusive right of dominion and control over the seabed underlying the Atlantic Ocean seaward from its coastline to the limits of the jurisdiction of the United States, asserting as well that any attempt by the United States to interfere with these rights would in itself violate the Constitution of the United States.⁴

² The United States also demanded an accounting for all sum that the States may have derived from the area in question. This demand was ultimately denied for failure of proof.

³ The State of Florida claimed that by virtue of the Act of June 25, 1968, 15 Stat. 73, Congress had approved the maritime boundaries for that State which at certain places included more than three miles of the Atlantic Ocean and had thereby granted to the State all of the seabed within those boundaries. Florida also claimed in its answer that the Florida Straits were not in the Atlantic Ocean as claimed by the United States but in the Gulf of Mexico. Subsequently, the controversy between the United States and Florida was severed and consolidated with the proceeding in No. 9 Original which was then concerned with the seabed rights of the State of Florida in the Gulf of Mexico, 403 U. S. 949, 950 (1971). (The consolidated proceedings were given a new number—Original 52. We have acted on the Special Master's Report in that case. See *ante*, p. —.)

⁴ The States of Rhode Island, North Carolina, and Georgia each submitted an additional special defense applicable only to itself. We agree with the Special Master's rejection of these special defenses, and they will not be mentioned further.

Without acting on the motion for judgment which was filed by the United States and which asserted that there was no material issue of fact to be resolved, we entered an order appointing the Honorable Albert B. Maris as Special Master and referred the case to him with authority to request further pleadings, to summon witnesses and to take such evidence and submit such reports as he might deem appropriate. 398 U. S. 941 (1970). Before the Special Master, the United States contended that based on *United States v. California*, 332 U. S. 19 (1947); *United States v. Louisiana*, 339 U. S. 699 (1950); *United States v. Texas*, 339 U. S. 707 (1950), it was entitled to judgment in accordance with its motion. The defendant States asserted that their cases were distinguishable from the prior cases and that in any event, *California*, *Louisiana*, and *Texas* were erroneously decided and should be overruled. They offered, and the Special Master received, voluminous documentary evidence to support their claims that, contrary to the Court's prior decisions, they acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States. At the conclusion of the proceeding before him, the Special Master submitted a Report which the United States supports in all respects but to which the States have submitted extensive and detailed exceptions. The controversy is now before us on the Report, the exceptions to it and the briefs and oral arguments of the parties.

In his Report, the Special Master concluded that the *California*, *Louisiana* and *Texas* cases, which he deemed binding on him, governed this case and required that judgment be entered for the United States. Assuming, however, that those cases were open to re-examination, the Special Master went on independently to examine the legal and factual contentions of the States and con-

cluded that they were without merit and that the Court's prior cases should be reaffirmed.

We fully agree with the Special Master that *California*, *Louisiana*, and *Texas* rule the issues before us. We also decline to overrule those cases as the defendant States request us to do.

United States v. California, *supra*, involved an original action brought in this Court by the United States seeking a decree declaring its paramount rights, to the exclusion of California, to the seabed underlying the Pacific Ocean and extending three miles from the coastline and from the seaward limits of the State's inland waters. California answered, claiming ownership of the disputed seabed. The basis of its claim, as the Court described it, was that the three-mile belt lay within the historic boundaries of the State; "that the original States acquired from the Crown of England title to all lands within their boundaries under ~~sovereign~~ waters, including a three-mile belt in adjacent seas; and that since California was admitted as a State on an 'equal footing' with the original States, California at that time became vested with title to all such lands." 332 U. S., at 23. The Court rejected California's claim. The original Colonies had not "separately acquired ownership of 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. As the Court viewed our history, dominion over the marginal sea was first accomplished by the National Government rather than by the Colonies or by the States. Moreover, the Court went on to hold that the "protection and control of [the marginal sea] has been and is a function of national external sovereignty," 332 U. S., at 34, and that in our constitutional system paramount rights over the ocean waters and their seabed were vested in the Federal Government.

navigable

The United States later brought actions to confirm its title to the seabed adjacent to the coastline of other States. *United States v. Louisiana, supra*, was one of them. There Louisiana claimed title to the seabed under waters extending 27 miles into the Gulf of Mexico, the basis of the claim being that before and since the time of her admission to the Union, Louisiana had exercised dominion over the ocean area in question and that her legislature had formally included the 27-mile belt within the boundaries of the State. The Court gave judgment for the United States, holding that *United States v. California* was controlling and emphasizing that paramount rights in the marginal sea and seabed were incidents of national sovereignty:

"As we pointed out in *United States v. California*, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U. S. pp. 31-34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." 339 U. S., at 704.

Louisiana had "no stronger claim to ownership of the marginal sea than the original 13 Colonies or California had," *id.*, at 705; and its claim, like theirs, gave way to the overriding rule that "the three-mile belt is in the domain of the Nation rather than of the separate States," *id.*, 339 U. S., at 705. 33

at 7. *A fortiori*, the waters and seabed beyond that limit were governed by the same rule.

In a companion case, *United States v. Texas, supra*, the Court again reaffirmed the holding and rationale of *United States v. California* and again rejected the claims of the State based on her historic boundaries and congressional recognition of those boundaries at the time of the State's admission to the Union:

"If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the *California* decision, which we have applied to Louisiana's case. The same result must be reached here if 'equal footing' with the various States is to be achieved. Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States v. California, supra*, pp. 31-32) nor California nor Louisiana enjoys such an advantage." 339 U. S., at 719.

The Special Master was correct in concluding that these cases, unless they are to be overruled, completely dispose of the States' claims of ownership in this case. These decisions considered and expressly rejected the assertion that the original States were entitled to the seabed under the three mile marginal sea. They also held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition

in the first instance are the business of the Federal Government rather than the States.

The States seriously contend that the prior cases, as well as the Special Master, were in error in denying that the original colonies had substantial rights in the seabed prior to independence, and afterwards, by grant from or succession to the sovereignty of the Crown. Given the dual basis of the *California* decision, however, and of those that followed it, the States' claims of ownership prior to the adoption of the Constitution are not dispositive. Whatever interest the States might have had immediately prior to statehood, the Special Master was correct in reading the Court's cases to hold that as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal Government jurisdiction over foreign commerce, foreign affairs and national defense" and that "it necessarily follows as a matter of constitutional law, that as attributes to these external sovereign facts, the federal government has paramount rights in the marginal sea." Report, at 23.

United States v. Texas unmistakably declares this constitutional proposition. There, Texas claimed that prior to joining the Union, she was an independent sovereign with boundaries extending a substantial distance in the Gulf of Mexico—boundaries which Congress had ~~recognized~~ ^{allegedly} recognized when Texas was admitted to the Union. In deciding against the State, the Court did not reject the prestatehood rights of Texas as it had the rights of the 13 original States in the *California* case. On the contrary, the Court was quite willing to "assume that as a republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it and of all the riches which it held. In other words, we assume that it had *dominium* and *imperium* in and over this belt which the United States now claims." 339 U. S.,

at 717. Such prior ownership nevertheless did not survive becoming a member of the Union; ~~even though the historic boundaries of Texas had been recognized by Congress.~~

“When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an ‘equal footing’ with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman of the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.” 339 U. S., at 717–718.

The Court stood squarely on the *California* and *Louisiana* cases for this conclusion; and in our view, the Special Master correctly read these authorities, unless they were to be overruled in all respects, as foreclosing the present efforts of the States to demonstrate error in the Court’s understanding of history in the *California* case.

Assuming the possibility, however, that the Court might re-examine the constitutional premise of *California* and similar cases, the Special Master proceeded, with admirable diligence and lucidity, to address the historical evidence presented by the States and aimed primarily at establishing that the Colonies had legitimate claims to the marginal sea prior to independence and statehood and that the new States never surrendered these rights to the Federal Government. The Special Master’s ultimate conclusion was that the Court’s view of our history expressed in the *California* case was essentially correct and

that if prior cases were open to re-examination, they should be reaffirmed in all respects.

We need not retrace the Special Master's analysis of historical evidence, for we are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the *California* case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953. In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; but this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority. As the Special Master said, the Court in its prior cases "did not indicate that the federal government by Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian States rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs." Report, at 16. The question before the Court in the *California* case was "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." 332 U. S., at 29. The decision there was that the National Government had the power at issue, the Court declining to speculate that "Congress,

control

which has constitutional ~~power~~ over government property, will execute its power in such a way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission." 332 U. S., at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea.⁵ But in further exercise of paramount national authority, the Act expressly declared 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 lying seaward and outside of [the marginal sea] all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." 43 U. S. C. § 1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. Moreover, in the course of litigation dealing with the reach and impact of the Act, the Court has said as plainly as may be that "the Act concededly did not impair the validity of the *California*, *Louisiana* and *Texas* cases, which are admittedly applicable to all coastal States" *United States v. Louisiana*, 363 U. S. 7; see also *id.*, at 83 n. 140. We agree with the Special Master when he said that "It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the Continental Shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf States)

⁵ The Submerged Lands Act was held constitutional in *Alabama v. Texas*, 347 U. S. 272 (1954).

only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report, at 19.

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Continental Lands Act of 1953. 43 U. S. C. § 1331 *et seq.* Section 3 of the Act

"declared [it] to be the policy of the United States that the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this subchapter."

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States v. California* or to the relevant decisions and they are not precluded by *res adjudicata* from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California*, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principle purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See H. R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and Outer Con-

tinental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt.⁶ In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas have been extracted daily from the Outer Continental Shelf.⁷ Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.⁸ We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity⁹ by calling into question, at this date, the constitutional premise of prior decisions. We add only that the Atlantic States, by virtue of the *California*, *Louisiana*, and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law,

⁶ S. Rep. No. 931140, 93d Cong., 2d Sess., 4 (1974).

⁷ *Id.*, at 4.

⁸ 86 Stat. 1281. For a summary of legislation affecting the Outer Continental Shelf, see Outer Continental Shelf Oil and Gas Development and the Coastal Zone, A Report for the Committee on Commerce, United States Senate, 93d Cong., 2d Sess., 55-58 (1974).

⁹ We have long held that the doctrine of *stare decisis* carries particular force where the effect of re-examination of a prior rule would be to overturn long-accepted commercial practice. See, *e. g.*, *M'Gruder v. Bank of Washington*, 9 Wheat. (U. S.) 598, 602 (1824); *Rock Spring Distilling Co. v. W. A. Gaines & Co.*, 246 U. S. 312, 320 (1918).

both constitutional and statutory, which is squarely at odds with claims of theirs to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment should be entered for the United States.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

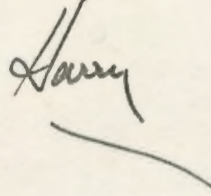
March 12, 1975

Re: No. 35 Orig. - United States v. Maine, et al.

Dear Byron:

Please join me. I appreciate your taking this on and giving it such expeditious treatment.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a long horizontal flourish extending to the right.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 12, 1975

Re: No. 35, Orig., United States v. Maine

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

PS
✓

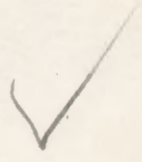
Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 12, 1975



RE: No. 35 Original United States v. Maine, et al.

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

March 12, 1975

No. 35 Orig. United States v. Maine

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 13, 1975

Re: No. 35, Orig. - United States v. Maine

Dear Byron:

Please join me.

Sincerely,

Wm

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 13, 1975

Re: No. 35, Orig. -- United States v. State of Maine

Dear Byron:

Please join me.

Sincerely,

J.M.

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1975

Re: No. 35 Original - United States v. Maine

Dear Byron:

I join in your proposed opinion dated
March 12.

Regards,

WLB

Mr. Justice White

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
join BLW 3/13/75		join BLW 3-12-75	join BLW 3-12-75	1st draft 3-12-75 2nd draft 3/13/75	join BLW 3/12/75	join BLW 3-12-75	join BLW 2/12/75	join BLW 3/13/75
					35 Orig.	U.S. v. Maine		