HJR 29

SENATE COMMITTEE REPORT

DATE: 3/23/90 FURTHER:

DATE TURNED INTO OFFICE: 4-18-90

Resources Committee considered CSHJR 29 (Resources)

Relating to state jurisdiction over the territorial sea out to 12 nautical miles and the air, water, submerged land, and resources found there and to the transfer of title to submerged land of the territorial sea out to 12 nautical miles to the State of Alaska and the other coastal states.

and recommended:

[ ] replace with _____ CS _____ [ ] same title
[ ] or adopt _____ CS _____ [ ] new title
[ ] technical title change (HB only)

[ ] attached amendment(s)
[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S): Dept/Date:

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

[ ] appropriation-no fiscal note

APPROVES PREVIOUS: Dept/Date:

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) _____

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

Rick Halford

OTHER RECOMMENDATIONS:

Jackson Do Pass

Chair: Signature and Recommendation

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29 (Resources)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to state jurisdiction over territorial sea...
Sponsor: Davidson
Requestor: _____

Agency Affected: Fish and Game
SRU: _____
_____
Components: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) No FY 90 Impact. The Department of Fish and Game supports the extension of the territorial sea from three to twelve miles proposed by HJR 29. Fisheries data do not relfect the resources specifically harvested between three and twelve miles at this time. The data do incidate, however, that there may be significant potential economic benefits to the state from fisheries activities occuring in an extended territorial sea.

Prepared by: Deborah Greenberg
Phone: 465-4100
Division: Commissioner's Office
Date: 2/28/90

Approved by Commissioner: _____
Date: _____
Agency: Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
HOUSE OF REPRESENTATIVES
Box V, Juneau, Alaska 99811
(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON • DISTRICT 27 • Box 746, Kodiak, Alaska 99615 • (907) 486-8250

TO: Senator Bettye Fahrenkamp, Chair
Senate Resources Committee

FROM: Representative Cliff Davidson

DATE: April 2, 1990

SUBJECT: HJR 29, "Relating to state jurisdiction over the territorial sea out to 12 nautical miles and the air, water, submerged land, and resources found there and to the transfer of title to submerged land of the territorial sea out to 12 nautical miles to the state of Alaska and the other coastal states"

House Joint Resolution 29 was recently referred to the Senate Resources Committee. I would appreciate an expeditious hearing on this legislation.

In December of 1988, President Reagan signed Presidential Proclamation 5928 unilaterally extending the U.S. territorial sea out to 12 nautical miles. This proclamation has intensified the legal question as to whether the individual states or the federal government actually have jurisdiction between three and 12 miles from shore. HJR 29 asks Congress to resolve the question in favor of the states.

HJR 29 was co-sponsored by 42 House members and passed the House unanimously. Its passage will support and assist the Coastal States Organization staff in their lobbying efforts in Washington, D.C.

Attached is some background information on HJR 29. If you have additional questions please do not hesitate to contact me. My staff assigned to this bill is Jay Nelson (465-3715).

Thank you for your assistance.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29 (Resources)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: Relating to state jurisdiction over territorial sea...
Sponsor: Davidson
Requestor:

Agency Affected: Fish and Game
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) No FY 90 Impact. The Department of Fish and Game supports the extension of the territorial sea from three to twelve miles proposed by HJR 29. Fisheries data do not relfect the resources specifically harvested between three and twelve miles at this time. The data do incidate, however, that there may be significant potential economic benefits to the state from fisheries activities occuring in an extended territorial sea.

Prepared by: Deborah Greenberg
Phone: 465-4100
Division: Commissioner's Office
Date: 2/28/90

Approved by Commissioner:
Date:
Agency: Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HJR 29
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: State Jurisdiction Over Territorial Sea
Sponsor: Davidson, et al.
Requestor: House Resources

Agency Affected: Commerce & Econ. Dev.
BRU: Business Development
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Jamie Parsons, Director
Division: Business Development
Phone: 465-2017
Date: 2-7-90

Approved by Commissioner: Larry Merculieff
Agency: Department of Commerce & Economic Development
Date: 2/27/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

3775D-1/22790b

Prepared by:

Steven E. Kettel
Income and Excise Audit Division
February 28, 1990

Analysis

The Department has consulted with both in house counsel and the Attorney Generals's office concerning state taxation beyond the traditional 3 - mile limit. It is their advice that President Reagan's actions to extend the federal territorial waters out to 12 nautical miles did not likewise extend the state's taxing jurisdiction.

Assuming that Congress were to extend state's taxing powers to the 12 - mile limitation alluded to in CS HJR 29, the state would be entitled to collect several taxes from activities conducted there. These would include fisheries business tax (AS 43.75), corporate income tax (AS 43.20) oil severance taxes (AS 43.55) and motor fuel tax (AS 43.40). We do not presently have data which would allow us to estimate the revenues collectible in the additional 9 mile area. Our experience is that the cost to enforce tax compliance for offshore activities is very high.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : HJR 29
PUBLISH DATE :

FISCAL NOTE

REQUEST:

Revision Date: 27-Feb-90
Agency Affected: Natural Resources
Title: Asserting sovereign jurisdiction over the territorial sea out to 12 nautical miles
BRU: Management & Administration
Sponsor: Davidson
Components: Commissioner's Office
Requestor: House Resources

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Larry Ostrovsky
Phone : 465-2400
Division: Commissioner's Office
Date : 27-Feb-90

Approved by Commissioner: Lennie Gorsuch
Date: 27-Feb-90
Agency: Department of Natural Resources

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS HJR 29

PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date:
Title: Territorial Sea to 12 Nautical Miles
Sponsor: Davidson, et al.
Requestor: Resources and Finance

Agency Affected: Revenue
BRU: Income & Excise Audit
Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
OPERATING						
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	-	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	-	-	-
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

FULL-TIME	-	-	-	-	-	-
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: February 28, 1990

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: February 28, 1990

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

News

from the Coastal States Organization

FOR IMMEDIATE RELEASE
January 5, 1988

FOR FURTHER INFORMATION CONTACT:
Gary Magnuson
(202) 628-9636

PRESS STATEMENT OF THE COASTAL STATES ORGANIZATION ON THE PRESIDENTIAL PROCLAMATION EXTENDING THE U.S. TERRITORIAL SEA

For over 200 years the United States territorial boundary extended three miles out to sea. On December 28, 1988, President Reagan extended that boundary from three miles to twelve, to "advance the national security . . . interests of the United States." This move brings the United States in line with 100 other coastal nations that claim a 12 mile territorial sea.

"The Coastal States Organization (CSO) supports the President's action as a logical step to serve the Nation's security needs better," stated CSO Chair, Chris Shafer in response to the proclamation. "However, the Proclamation raises significant legal and policy questions regarding its domestic effect, its effect on the citizens of the coastal states," he said.

"Of equal importance to what the Proclamation says is what it does not say. Many areas of significant interest to coastal states -- fisheries, offshore oil and gas production, air and water pollution, coastal management, even state boundaries -- are simply omitted from the proclamation," stated Shafer.

ry as the President may to have this Proclamation affect only the international theater, it is clear to the coastal states that it will be the genesis of a new era in Federal-State relations on the management of the nation's offshore resources. The President should expect, as Truman did when he issued his 1947 Outer Continental Shelf Proclamation, that Congress and the coastal states will act to legally chart these seas.

The Proclamation recognizes the U.S. territorial sea as "a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction." This maritime zone is then extended to "12 nautical miles" from the previous three. At the same time, the Proclamation adds that this extension of U.S. territory another 9 miles out to sea does not "extend or otherwise alter existing Federal or State law or any jurisdiction, rights, legal interest, or obligations derived therefrom." In other words, the Proclamation's intent is to preserve the domestic legal status quo, while changing only the internationally recognized U.S. border.

There is now a 9 mile-wide belt of U.S. territory, from 3 to 12 miles offshore (over 100,000 square miles of U.S. territory), that is a legally uncharted sea with respect to the application of domestic law. All of the existing ocean resource laws are designed to fit a 3-mile territorial sea. This design no longer fits.

For example, foreign fishing has been banned within the U.S. territorial sea for many years. However, federal law allows foreign fishing (with a permit) within the U.S. Exclusive Economic Zone which extends, by definition, from 3 to 200 miles. Is foreign fishing now allowed within the U.S. territorial sea from 3 to 12 miles out? If not, under what authority are the foreign fishermen banned? If so, isn't this an amazing reversal of federal law and policy? The coastal states will pursue answers to this and other questions the proclamation leaves begging.

######

March 23, 1990 SENATE JOURNAL p. 2999

HJR 29

CS FOR HOUSE JOINT RESOLUTION NO. 29 (Resources) by the Resources Committee,

> Relating to state jurisdiction over the territorial sea out to 12 nautical miles and the air, water, submerged land, and resources found there and to the transfer of title to submerged land of the territorial sea out to 12 nautical miles to the State of Alaska and the other coastal states.

was read the first time and referred to the Resources Committee.

April 19, 1990 SENATE JOURNAL p. 3455

HJR 29

The Resources Committee considered CS FOR HOUSE JOINT RESOLUTION NO. 29 (Resources) (Relating to state jurisdiction over the territorial sea out to 12 nautical miles and the air, water, submerged land, and resources found there and to the transfer of title to submerged land of the territorial sea out to 12 nautical miles to the State of Alaska and the other coastal states) and a majority of the committee recommended do pass. The report was signed by Senator Fahrenkamp, Chair, and concurred in by Senators Halford, Zharoff, Eliason, Sturgulewski and Frank.

Previous House zero fiscal notes.

CS FOR HOUSE JOINT RESOLUTION NO. 29 (Resources) was referred to the Rules Committee.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29(RES) No.
PUBLISH DATE: HOUSE 3/2/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: Relating to state jurisdiction over territorial sea...
Sponsor: Davidson
Requestor:

Agency Affected: Fish and Game
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary) No FY 90 Impact. The Department of Fish and Game supports the extension of the territorial sea from three to twelve miles proposed by HJR 29. Fisheries data do not relfect the resources specifically harvested between three and twelve miles at this time. The data do incidate, however, that there may be significant potential economic benefits to the state from fisheries activities occuring in an extended territorial sea.

Prepared by: Deborah Greenberg
Phone: 465-4100
Division: Commissioner's Office
Date: 2/28/90

Approved by Commissioner:
Date:
Agency: Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29(RES) No.
PUBLISH DATE: HOUSE 3/2/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: State Jurisdiction Over Territorial Sea
Sponsor: Davidson, et al.
Requestor: House Resources

Agency Affected: Commerce & Econ. Dev.
BRU: Business Development
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Jamie Parsons, Director
Division: Business Development
Phone: 465-2017
Date: 2-7-90

Approved by Commissioner: Larry Merculieff
Agency: Department of Commerce & Economic Development
Date: 2/27/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

3775D-1/22790b

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29(RES) No. 3

PUBLISH DATE: HOUSE 3/5/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: Territorial Sea to 12 Nautical Miles
Sponsor: Davidson, et al.
Requestor: Resources and Finance

Agency Affected: Revenue
BRU: Income & Excise Audit
Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
OPERATING						
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	-	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	-	-	-
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

FULL-TIME	-	-	-	-	-	-
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: February 28, 1990

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: February 28, 1990

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Prepared by:

Steven E. Kettel
Income and Excise Audit Division
February 28, 1990

Analysis

The Department has consulted with both in house counsel and the Attorney Generals's office concerning state taxation beyond the traditional 3 - mile limit. It is their advice that President Reagan's actions to extend the federal territorial waters out to 12 nautical miles did not likewise extend the state's taxing jurisdiction.

Assuming that Congress were to extend state's taxing powers to the 12 - mile limitation alluded to in CS HJR 29, the state would be entitled to collect several taxes from activities conducted there. These would include fisheries business tax (AS 43.75), corporate income tax (AS 43.20) oil severance taxes (AS 43.55) and motor fuel tax (AS 43.40). We do not presently have data which would allow us to estimate the revenues collectible in the additional 9 mile area. Our experience is that the cost to enforce tax compliance for offshore activities is very high.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHJR 29(RES) No. 4
PUBLISH DATE: HOUSE 3/5/90

FISCAL NOTE

REQUEST:

Revision Date: 27-Feb-90
Agency Affected: Natural Resources
Title: Asserting sovereign jurisdiction over the territorial sea out to 12 nautical miles
BRU: Management & Administration
Sponsor: Davidson
Components: Commissioner's Office
Requestor: House Resources

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Larry Ostrovsky
Phone: 465-2400
Division: Commissioner's Office
Date: 27-Feb-90

Approved by Commissioner: for Lennie Gorsuch
Date: 27-Feb-90
Agency: Department of Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

RECEIVED APR 1989

April 4, 1989

The Honorable Cliff Davidson
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Dear Cliff,

Thank you for your letter about House Joint Resolutions (HJR) 29 and 30, which assert State jurisdiction over the extended 12-mile territorial sea. I have asked members of my staff, my resource agency commissioners, and the Department of Law to carefully review HJR 29 and 30, as well as to prepare testimony for a Congressional hearing on the topic. By now you should have received suggestions for restructuring the resolutions from the Attorney General's Office.

I believe a strong argument can be made to extend State jurisdiction and ownership out to 12 miles, based upon Alaska's excellent record of ocean management from the coast out to three miles. HJR 29 and 30 can be strengthened if they are based upon similar arguments. Enclosed is a copy of the State's Congressional testimony on this topic, which explains my position in more detail. Please contact Bob Grogan of the Division of Governmental Coordination at 465-3562 if you have questions.

Thanks again for your letter.

Sincerely,

Steve Cowper
Governor

Enclosure

cc: Bob Grogan
John Katz
Denby Lloyd

Testimony of Suzanne Iudicello
Before the
House Subcommittee on Oceanography and Great Lakes
March 21, 1989

Mr. Chairman and Members of the Subcommittee:

My name is Suzanne Iudicello. I am the Associate Director for Fisheries and the Environment in Alaska Governor Steve Cowper's Washington, D.C. office. Thank you for the opportunity to present the views of the State of Alaska on the Presidential Proclamation extending the United States territorial sea.

As a State with 6,640 miles of coastline--more than half of the entire United States coast--Alaska has a strong interest in the expansion of the territorial sea. Moreover, as a state whose ocean resources are critical to its economy, Alaska is concerned with the stewardship of those marine resources. The wholesale value of Alaska's commercial fishing industry exceeded $? billion last year, and exports of fishery products were our largest source of income. But fishery resources are only the most obvious concern. The role the states will play in the nine miles of the expanded territorial sea will govern issues from environmental protection to community planning to resource development. Alaskans believe that role should be an active one, and we look forward to working with you to develop it.

Today, we would like to focus on four general areas, similar to the concerns expressed on behalf of the other coastal states by Mr. Shafer of the Coastal States Organization (CSO). Alaska is a member of CSO and we support their views. We do, however, appreciate the opportunity to elaborate on the Alaskan perspective on these issues.

Summary

First, the State of Alaska strongly supports Congressional action to resolve the many confusing legal and policy questions the Proclamation has raised. Second, it is our view that the vastness of this new area, the value of its abundant resources, and the scope and number of federal statutes delineating authority and jurisdiction over those resources merit more attention than one hearing by this committee. Third, H.R. 1405, which would freeze federal-state relationships in coastal waters despite expansion of the territorial sea, does not resolve federal-state relationships in a manner that is either realistic or satisfactory to coastal states. For that reason, the State of Alaska cannot support it. Finally, and most important, the State of Alaska believes that state jurisdiction and ownership over coastal waters should be extended to encompass the new 12 mile territorial sea. Such an extension will promote wise ocean stewardship.

Congress Should Clarify the Meaning of the Territorial Sea Expansion

Presidential Proclamation 5928, which extended the U.S. territorial sea from three to 12 miles, was signed to "advance national security and other significant interests of the United States." Although the Proclamation states that "nothing in this Proclamation extends or otherwise alters existing federal or state law or any jurisdiction, rights, legal interests or obligations derived therefrom," the matter is not so simply resolved.

While no one questions the President's authority to extend U.S. jurisdiction for foreign relations purposes, the Proclamation has raised the constitutional question of whether he may unilaterally acquire territory by an extension of sovereignty. Was the President's December 27 action an annexation of territory, and must Congress act in order for the United States to acquire the new area encompassed by the nine-mile expansion of the territorial sea? Legal scholars on both sides can, and likely will, debate these questions. Even the U.S. Department of Justice conceded, in its October 1988 Memorandum accompanying the Proclamation, that the domestic effect of the Proclamation on the relationship between the states and the federal government is not free from doubt.

As a matter of sound public policy, Alaska believes Congress should act to resolve questions of jurisdiction, sovereignty, and ownership over this new area. We encourage the members of this Committee to exert their leadership now, rather than wait for the expensive and time-consuming process of the litigation that undoubtedly will result without clear direction.

Jurisdictional Issues Raised by the Proclamation Merit Thorough Congressional Review

Not only is it important for Congress to act to answer basic questions about the national territorial effect of the proclamation, but action also is required to resolve the issues of jurisdiction over the conservation, management, and development of the myriad ocean resources in the three to 12 mile zone.

The term 'territorial sea' is used more than seventy times in the United States Code, in laws governing activity ranging from waterfowl hunting to smuggling. In the area of environmental protection alone, there are at least a half dozen statutes that define the territorial sea as three

miles. Further, the Proclamation creates anomalies between those laws whose seaward jurisdictional limit is defined simply as the "territorial sea" and those in which it is expressly defined as three miles. For example, the Magnuson Fishery Conservation and Management Act (MFCMA) gives the federal government management authority over fishery resources out to 200 miles, and gives the states authority in their coastal waters. The so-called "inner boundary" of that federal management zone is defined in the Act as a line "coterminous with the seaward boundary of each of the coastal states." Thus, if a case can be made that the Proclamation affects a state's seaward boundaries, state fishery jurisdiction could be expanded.

The courts will be asked to clarify some of these interpretational problems if Congress does not act. Because the Proclamation leaves unanswered questions about effects on domestic law, and because the potential issues are so diverse, we recommend that Congress hold more than one hearing to fully consider these conflicts.

The Alaska Attorney General and the state's resource management agencies presently are analyzing in more detail the legal, economic, and policy issues that arise in the territorial sea area off Alaska. We hope such information will be useful in your deliberations and look forward to providing it to you in future hearings.

<u>The State of Alaska Supports Legislation To Extend State Jurisdiction and Ownership Over Coastal Waters</u>

One piece of legislation that proposes to resolve questions raised by the Proclamation is H.R. 1405. This bill would maintain the 'status-quo' (prior to the signing of the Proclamation) with respect to state-federal jurisdiction and law. It is the State of Alaska's view that not only would H.R. 1405 contravene the congressional intent underlying certain laws delineating authority in the territorial sea, but this bill also would foreclose an important opportunity for Congress to consider, as a matter of national policy, how resources in the three to 12 mile zone can best be managed.

For example, the Coastal Zone Management Act (CZMA) simply defines the coastal zone as "seaward to the outer limit of the United States Territorial Sea." Looking more closely at the legislative intent when the CZMA was adopted, Congress considered using both the definition 'territorial sea' and a more specific definition based upon the Submerged Lands Act. Legislative history suggests that a future expansion of the

territorial sea was considered and that the flexible term 'territorial sea' was specifically chosen for that very reason. It thus appears that freezing all domestic law boundaries, as H.R. 1405 advocates, would be counter to the intent of the CZMA.

As this subcommittee and others in Congress consider implementation of the Proclamation, the State of Alaska strongly believes it is appropriate to extend state jurisdiction, which currently extends from the coastline to three miles, to include the entire 12 mile territorial sea.

Further, the same arguments that can be made for extending this jurisdiction apply to granting state ownership as well. While we understand that a case can be made, based upon historical and constitutional precedent, that new U.S. territory must be held in trust and ultimately granted to the states, we would rather focus on congressional precedent, and the public policy reasons why Congress should grant Alaska and the other states jurisdiction and ownership over this zone.

Alaska has consistently demonstrated great competence in managing ocean resources, not only from the coastline out to three miles, but in the 200 mile exclusive economic zone (EEZ) as well. We are not unique in our ability to successfully manage large territorial seas and ocean areas. As you know, the Great Lake States routinely manage large coastal seas (11-80 miles), and some Gulf states currently have jurisdiction over nine or 12-mile state coastal waters. Alaska has a proven record showing experience and skill at balancing protection, conservation and utilization of the living and non-living resources in the zero to three mile ocean zone and beyond. We have devoted a larger percent of available revenues to resource management that has the federal government. We are better able, in terms of fiscal resources and administrative abilities, to manage these relatively nearshore fisheries, minerals, oil and gas, and other resources that are so close to our state borders.

For example, Alaska now manages a multi-billion dollar a year seafood industry which includes the world's largest salmon fisheries and several world class salmon runs. We already exclusively manage some fisheries in federal waters such as the shelf commercial rockfish fishery, king and tanner crab, and the troll salmon fishery. The State of Alaska spends $20 million dollars annually to manage its regional fisheries--ten times the federal government's expenditure to manage fisheries in the vast area of federal waters off Alaska's coasts. Further, the State has taken

the lead in joint efforts with the U.S. State Department on reducing foreign interception of salmon and other living marine resources, and has years of experience in negotiating the harvest of anadromous species with other states and with foreign nations.

Alaska has had a successful offshore mining program since statehood. The State's program has provided minerals such as gold and platinum to industry while providing for environmental protection. State regulations and the coastal zone management program ensure that offshore mining leases go through strict review by all state resource agencies. In contrast to the federal government, which has never issued a single offshore mining lease off the coast of Alaska, there are currently nine active offshore leases which have been issued by the State and more than 200 offshore prospecting permits, giving Alaska the benefit of experience in this area.

Looking at oil and gas resources, the State also has a successful track record of evaluating oil and gas potential, completing timely permitting, and balancing complex interests such as subsistence whaling and oil development. The federal government currently takes an average of five years to plan an oil and gas lease sale in the three to 12 mile zone, while Alaska typically completes a similar rigorous evaluation and analysis in two to three years. The state also maintains a consistent and predictable leasing schedule, providing oil companies a better opportunity to plan and execute exploration budgets. In addition, the State's stipulations and mitigating measures for oil and gas exploration and development offer better environmental protection for marine life, the multi-million dollar fishing industry, and the subsistence lifestyle of many coastal residents. Again, we believe Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government.

In another initiative regarding ocean resources, the State of Alaska already is working with other Pacific states to assess the resource potential of the EEZ in the Northeast Pacific Ocean. This includes an effort to identify priorities for research and management, and to analyze capabilities for ocean governance.

In addition to demonstrated competence in protecting and managing ocean resources off our coasts, we believe there is a sound policy basis for extending not only coastal state jurisdiction, but also our ownership over the expanded territorial sea. Congress concluded properly in 1953 that

the states were the proper owners of the submerged lands within their boundaries and over which they had jurisdiction. There are good reasons for this, and they are as valid as they were 35 years ago. First, the coastal states are most significantly impacted by activities in the territorial sea. Second, and most important, it makes good sense to unify jurisdiction and ownership in one sovereign so that the states and the federal government are not working at cross purposes.

In conclusion, we request that Congress act to resolve the many questions this Proclamation has raised: to reaffirm the policy made by this body in 1953, to extend the states' jurisdiction over the expanded territorial sea, and to grant them ownership of the lands beneath it. Thank you for your consideration. We look forward to working with this Committee to implement the Territorial Sea Proclamation.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 8, 1939

MEMORANDUM

TO: Representative Cliff Davidson

ATTN: Lourene Miovski

FROM: Karen Oakley KO
Legislative Analyst

RE: **Extension of State Jurisdiction in the New 12-Mile Territorial Sea: Impact on Alaska**
Research Request 89.172

You requested this agency to report on the likely impact on the State of Alaska if the U.S. Congress extends state jurisdiction in territorial waters to 12 miles offshore; currently states have jurisdiction within three miles of shore. You were particularly interested in the impact on fisheries management and on development of offshore mineral and oil and gas resources. You asked whether the benefits of extended state jurisdiction would be likely to outweigh the costs.

As you are aware, the State of Alaska supports the extension of state jurisdiction and has so testified before Congress.[1] The executive branch is in the process of preparing a detailed analysis of the impacts of extending the state's jurisdiction. You may contact Barb Sheinberg, with the Division of Governmental Coordination, for updates on the progress of this effort.

This memorandum provides background information on the recent extension of the U.S. territorial sea to 12 miles and provides an overview of impacts on the development and management of offshore natural resources--specifically fisheries, minerals and oil and gas--of extending state jurisdiction to 12 miles.

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[1]A copy of the testimony of Suzanne Iudicello, with the Governor's Washington D.C. office, before the House Subcommittee on Oceanography and Great Lakes on March 21, 1989, is provided as Attachment A.

In summary:

- President Reagan extended the territorial sea of the United States from three miles to 12 miles by proclamation in late 1988; the purpose of the extension was to hinder the activities of Soviet spy ships.

- Congress granted coastal states jurisdiction within three miles of shore in 1953 under the Submerged Lands Act. Coastal states are expected to now lobby Congress to extend state jurisdiction to the new 12-mile boundary of the United States' territorial sea.

- Coastal states are eager to assume jurisdiction within 12 miles to increase their control over activities in coastal waters and to increase their revenues from such activities.

- Extension of state jurisdiction to 12 miles will probably increase the management responsibilities of the state with regard to certain offshore fisheries, primarily the groundfish fishery. The state will also receive additional revenues from the Fisheries Business Tax.

- Offshore mining now occurs only in state waters offshore of Nome. Unless the state changes the way it taxes production of offshore minerals, the extension of state jurisdiction offshore will not generate significant additional revenue for the state.

- Currently, there are some federal oil and gas leases within 12 miles of shore in the Beaufort and Chukchi seas, but none have been developed. Under current federal revenue sharing provisions, the state receives 27 percent of the bonuses, rentals and royalties from these leases.

- Extension of state jurisdiction to 12 miles will increase, possibly by a significant amount, state revenues from oil and gas. The state would receive 100 percent of bonuses, rentals and royalties. In addition, the state would receive severance and property taxes.

- Based on this preliminary analysis, the benefits of extending state jurisdiction appear likely to outweigh the costs. More detailed study is required, however.

BACKGROUND

On December 27, 1988, then-President Ronald Reagan extended by proclamation the territorial waters of the United States from its present breadth of three miles to twelve miles.[2] Although the reasons given for the extension in the proclamation were somewhat vague ("extension of the territorial sea to the limits permitted by international law will advance the national security and other significant interests of the United States"), the primary reason was apparently to hinder the activities of Soviet spy ships. In extending the territorial sea, the United States joined the 104 nations that have extended their territorial seas to 12 miles; only 12 nations now maintain a three-mile limit.

The territorial sea is the belt of water immediately adjacent to the coast of a nation. A nation is sovereign within its territorial sea and exercises the same sovereignty there as over its land. In contrast, nations are not sovereign over the high seas, which are the remainder of the ocean beyond the territorial sea. Nations may assert, however, limited forms of jurisdiction in portions of the high seas.[3]

In 1953, the Submerged Lands Act (SLA) granted coastal states the rights to offshore submerged lands within their "boundaries."[4] The SLA was passed to override the effects of a 1947 case, California v. United States, in which the Supreme Court ruled that the United States had jurisdiction over submerged lands off the California coast.[5] Prior to this decision, the coastal states were assumed to have jurisdiction out to the three-mile territorial limit. The

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[2]Proclamation 5928 of December 27, 1988, published in the Federal Register, January 9, 1989, Vol. 54, No. 5., page 777. A copy of the proclamation is provided as Attachment B.

[3]For example, a nation may exercise authority necessary to apply its customs, fiscal, immigration and sanitary regulations in the territorial sea within immediately contiguous waters (the "contiguous zone"). On the continental shelf, a nation is restricted to the exploration and exploitation of natural resources. Within the Exclusive Economic Zone (EEZ), which extends 200 miles offshore, a nation is restricted to activities for economic exploration and exploitation, scientific research and environmental protection.

[4]For the states bordering the Atlantic and Pacific, their boundaries could not extend past three miles; states bordering the Gulf of Mexico were given the opportunity to prove that their historic boundaries extended up to nine miles from shore. Two states, Texas and Florida, were able to justify their ownership of submerged Gulf of Mexico lands out to nine miles.

[5]A copy of the Supreme Court decision in the California case is provided as Attachment C. As you requested, we have ordered copies of the briefs filed in this case through Interlibrary loan and will notify you when these materials are available.

California decision established the principle that coastal states had no rights to submerged lands beyond the low-tide line or to coastal waters unless such rights were given to them by Congress.

The potential for extension of the territorial sea boundary to 12 miles--either by Congressional action or Presidential Proclamation--has been recognized for several years, and the effects of extending the territorial sea--and of extending state jurisdiction in an expanded territorial sea--have been considered by various federal agencies, coastal states, and other interested parties. Several of the reports published on this topic in recent years are described below.

- In 1985, the Texas A & M University Sea Grant Program sponsored a Conference on an Expanded Territorial Sea. A copy of the proceedings of this conference has been requested and will be forwarded upon arrival.

- Two California officials discussed whether the State of California should support extension of state jurisdiction in an expanded territorial sea in a 1984 paper published in the Coastal Zone Management Journal. They noted that "no fixed boundary can possibly separate federal from state interests in ocean management," and they argued against the extension of state jurisdiction. Based on their experiences in dealing with the federal government on ocean issues in California, they felt it would be more prudent for the state to argue for increased state clout in the federal decision making process and for increased revenue sharing than to argue for extended state jurisdiction. This article provides a good "checklist" of questions to be examined when considering extending state jurisdiction to 12 miles; a copy of the article is provided as Attachment D.

- In a 1986 article in the Journal of Maritime Law and Commerce, Attorney R.K. Littleton proposed that coastal states seek the support of inland states in their efforts to expand their boundaries from three miles to 12 miles. He argued that the federal government would be opposed to extending state jurisdiction; therefore, the only way to achieve extended jurisdiction would be to enlist the support of inland states by promising to share revenues (primarily from oil and gas) from the territory acquired by the coastal states with the inland states. A copy of this article is provided as Attachment E.

- The California Attorney General issued an opinion on March 15, 1989, concerning the effect of the President's Proclamation on the obligations of the California Coastal Commission. He concluded that the proclamation did not extend the boundary of the State of California nor did it extend the permit jurisdiction of the coastal commission. However, the Attorney General found that the

proclamation did extend the boundary of the coastal zone for the purposes of the Coastal Zone Management Act (CZMA); this extension of the coastal zone would mean that more activities will affect the coastal zone and thereby require consistency with the provisions of the CZMA. A copy of this opinion is provided as Attachment F.

Two resolutions relating to extension of state jurisdiction in the territorial sea, HJR 29 and HJR 30, are currently before the Alaska Legislature. HJR 29 asserts the sovereign jurisdiction of the State of Alaska over the territorial sea out to 12 miles; HJR 30 (respectfully) demands that the U.S. Congress 1) immediately authorize the transfer of title to all submerged lands below the territorial sea from three miles out to 12 miles, and 2) recognize the sovereign jurisdiction of the State of Alaska in the new territorial sea.[6] Both resolutions were co-sponsored by all members of the house. The measures are expected to be considered by the House Resources committee during the latter part of the 1989 session.

IMPACT ON ALASKA

Fisheries

Currently, the State of Alaska manages fisheries which occur entirely within three miles of shore. Fisheries which occur between three miles and 200 miles offshore are managed by the North Pacific Fisheries Management Council (NPFMC) under the Magnuson Act. The State of Alaska, as a member of the NPFMC, participates in the management of these offshore fisheries. No fisheries that are currently managed by the NPFMC would occur totally in state waters if state jurisdiction were extended to 12 miles. Thus, the existing management program for fisheries offshore of Alaska would probably not be greatly changed. However, the responsibility for various aspects of the management program (e.g., enforcement and data collection) could shift. The Department of Fish and Game is currently considering the specific effects of an extension of state jurisdiction, and you may wish to contact Deborah Greenberg, with the commissioner's office, at 465-4100, for further information.

The primary fisheries that would be affected by an extension of state jurisdiction to 12 miles are the groundfish fisheries of the Bering Sea-Aleutians and the Gulf of Alaska. Tables 1 and 2 and Figures 1 and 2, found in Attachment G, present information on the volume and value of the 1987 Alaska

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[6]It is commonly understood, based on the 1947 California case, that coastal states will receive jurisdiction in the expanded territorial sea only if Congress grants them jurisdiction by amending the Submerged Lands Act or by passing new legislation specifically addressing the issue. In this regard, assertion of State of Alaska sovereignty in the new portions of the territorial sea via HJR 29 appears to be an unnecessary and possibly counterproductive step.

groundfish harvest by the distance offshore of the harvest. Approximately 30 percent of the groundfish (representing 33 percent of the value) taken offshore of Alaska in 1987 were harvested between three and 12 miles.

The Magnuson Act prohibits processing and other support activities by foreign processors within state waters except for certain operations approved by the governor of the affected state. Applications by foreign processors to process fish in State of Alaska waters are reviewed under 5 AAC 39.198 by the Department of Commerce and Economic Development and approved by the Governor. A copy of the regulations governing issuance of these "internal waters permits" is provided in Attachment H.

The requirement for approval of processing by foreign ships within the three to nine mile zone will have its biggest effect on joint venture operations.[7] Although joint ventures in Alaska offshore fisheries increased greatly in recent years, their numbers are now declining. The extension of state jurisdiction may, therefore, not greatly increase the number of applications for internal waters permits. Paul Peyton, Commercial Fisheries Development analyst with the Department of Commerce and Economic Development, is considering the effect on internal waters permits, and you may wish to contact him at 465-2162 for further information.

The extension of state jurisdiction will allow the state to collect additional revenues via its Fisheries Business Tax.[8] Pursuant to AS 43.75, persons engaged in fisheries businesses within the State of Alaska are liable for a fisheries business tax applied to the value of fish processed. The tax rate varies from 1.5 to 5.0 percent depending on the species, the status of the fishery (developing versus established) and whether the fish are processed on shore or by a floating processor. Current revenues from the fish tax are on the order of $20 million, of which from $7 million to $8 million is shared with local government jurisdictions in which the fish are processed.

Extension of the state waters to 12 miles means that fish harvested within 12 miles would be subject to the tax. The Department of Revenue is currently analyzing the potential revenue from the extension of state waters. Based on the value of groundfish harvested from waters between three and 12 miles offshore in 1987, approximately $3 million in additional Fisheries Business Tax revenues would have been collected.

The federal government is likely to oppose extension of state jurisdiction for fisheries management. The National Marine Fisheries Service (NMFS) has twice evaluated the effects on fisheries of extending the territorial sea to 12 miles with and without concomitant extension of state jurisdiction, first in 1984 and most recently in November of 1988. A copy of the most recent

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[7]Joint ventures involve domestic fishermen and foreign processors.

[8]See House Research Memorandum 89.303, State of Alaska Revenues from Natural Resources, for a more complete description of taxes on fishing.

analysis is provided as Attachment I. In this analysis, the NMFS concluded that simply extending the territorial waters of the United States to 12 miles would have no significant effect on federal fishery management responsibilities. However, the NMFS opposed the extension of state jurisdiction. The report stated:

> In general, if state jurisdiction were extended to 12 nm [nautical miles], several purposes of the Magnuson Act would be negated, or at a minimum, made much more difficult to achieve. Reexamination of the role and purpose of Federal fishery management would become necessary, in turn requiring redefinition of Council functions and the spectrum of State/Federal relationships (such as shared enforcement and data collection responsibilities) developed since passage of the Magnuson Act. New legislation would be required to address and balance the questions arising from reduced Federal authority, increased State responsibility, and a return to divided fishery management authority, which by defining a federal role, the Magnuson Act was in part designed to overcome. It would be ill-advised to extend state fishery jurisdiction without assurance that the resources would be adequately protected and managed.

Offshore Mining

Near shore marine mineral exploration was given a boost in 1983 when the 200-mile Exclusive Economic Zone (EEZ) was declared. The unconsolidated placers of the continental shelf can now be developed under the protection of U.S. law and can therefore be considered viable resources. Alaska, with 74 percent of the U.S. continental shelf, is expected to contain much of the mineral wealth of the U.S. EEZ. Although largely unexplored, there are numerous prospects, mining sites and known occurrences of marine placer minerals, including gold and platinum, along Alaska's coast. Three geologists with the Alaska Division of Geological and Geophysical Surveys recently completed a paper entitled "Marine Placer Development and Opportunities in Alaska." This paper, which describes the known occurrences of marine minerals off Alaska and discusses the past, present and future development of marine placers off Alaska, is provided as Attachment J.

Currently, the only offshore mining operation in Alaska is just offshore of Nome. The State of Alaska has leased approximately 21,000 acres to Westgold Minerals, which is using the world's largest bucket line offshore dredge. Gold placers are believed to occur over a wide area off Nome, and at the request of industry, the federal government recently commenced a mineral leasing program in that area under the auspices of the Outer Continental Shelf Lands Act (OCSLA). Although the state is participating in the review of the proposed lease sale, the state is also arguing that the OCSLA is inadequate for offshore mineral leasing and that legislation establishing a leasing

system specifically for marine minerals should be passed. With other coastal states, Alaska is seeking provisions for sharing federal offshore mineral revenues and significant state consultation in the leasing process.

If state jurisdiction were extended to 12 miles offshore, more of the placers of the continental shelf, including the valuable gold placers off Nome, would be leasable by the state. Under the current federal mineral leasing system, the state would receive no revenue from leasing of submerged lands by the federal government, thus extension of state jurisdiction would increase the revenue potential of the state. However, under current state law, the state receives only minimal payments from mining, including offshore mining.[9] Offshore prospecting permits yield $3 per acre in annual fees, and leases produce $1 per acre in annual rentals; expenses can be credited against annual rentals. In addition, there is no provision for royalty payments. Under these conditions, the state receives only a minuscule percent of the value of offshore mining. For example, in FY 88, offshore prospecting permits and leases generated a net total of $11,509 for the state; at the same time, the Westgold Minerals dredging operation at Nome is estimated to have extracted 36,000 ounces of gold worth over $16 million. Unless the state changes the way it taxes the production of offshore minerals, the extension of state jurisdiction offshore will not generate significant additional revenue for the state.

The extension of state jurisdiction will allow the state to control more of the mining that can be expected to occur offshore. In contrast to the federal government--which is just getting into the business of offshore mineral leasing--the state has an established program. The acquisition of additional submerged lands would allow the state to expand its role in offshore mineral development.

The mining industry may view expanded state jurisdiction favorably if the expansion reduces the number of prospects that are interjurisdictional. Mining companies proposing to develop prospects that include both federal and state submerged lands, e.g., Westgold Minerals at Nome, must go through two separate leasing processes. Because developable prospects are usually close to shore, the expansion of state territory may allow more prospects to be developed solely under the auspices of the state program. Industry may react to a less complicated regulatory regime with increased exploration and development.

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[9]See House Research Memorandum 89.303, State of Alaska Revenues from Natural Resources, for further information on state revenues from mining.

Oil and Gas

Under the OCSLA, the federal government has pursued an aggressive oil and gas leasing program in Alaska.[10] Currently, there are some federal oil and gas leases within 12 miles of shore in the Chukchi and Beaufort seas, however, none of these leases has been developed. Attachment K shows the location of these leases. If state jurisdiction were extended, the state would presumably take over management of these existing leases. The state would also be able to expand its own oil and gas leasing of submerged lands.

Extension of the state's offshore jurisdiction could significantly increase the revenue potential of the state, but the potential revenue gains cannot be quantified. Under the current revenue sharing provisions of the OCSLA, Alaska receives 27 percent of federal offshore oil and gas lease bonuses, rentals and royalties. If state jurisdiction were extended, the state would receive 100 percent of bonuses, rentals and royalties from leases in the new territory; in addition, the state would receive severance taxes and property taxes.[11]

Although the revenue potential of expanding the state's offshore jurisdiction is significant, the opportunity for increased state control over offshore leasing is also compelling. As have other states, Alaska has had several major disputes with the federal government over the federal oil and gas leasing program. These disputes include the leasing of Bristol Bay and the measures to be imposed on Beaufort Sea lessees for the protection of bowhead whales. Expanded state jurisdiction would give the state control over the leasing of a much larger area. The state could dictate the areas to be offered, the pace of leasing, and the conditions under which exploration and development can occur.

Costs Versus Benefits

Based on this preliminary analysis, the revenues to be gained from extending Alaska's jurisdiction to 12 miles offshore appear to have the potential to be greater than the costs of managing resources in the additional territory. The state has management programs in place for fisheries and for offshore oil and gas and mining, and these programs could presumably manage the additional territory without major changes in structure, function or cost. The potential revenues from oil and gas and fishing in the new territory could be significant. Offshore mining, which is just beginning to develop, could

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[10]The Department of Interior has proposed eight oil and gas lease sales off Alaska during the period 1989 - 1992. This level of leasing activity is not new.

[11]See House Research Memorandum 89.303 for more complete description of State of Alaska taxes on oil and gas.

generate revenues for the state with changes to the tax structure. Apart from the financial aspects of extending state jurisdiction, the state would benefit from increased control.

The executive branch agencies that would be involved in managing resources in the new territory are currently preparing a more detailed analysis of the costs and benefits of extending the state's jurisdiction. Please be aware that our conclusion that benefits are likely to outweigh costs is based on preliminary information.

I hope you find this information useful. If you need additional information, please let us know.

Attachments

FIGURE 1

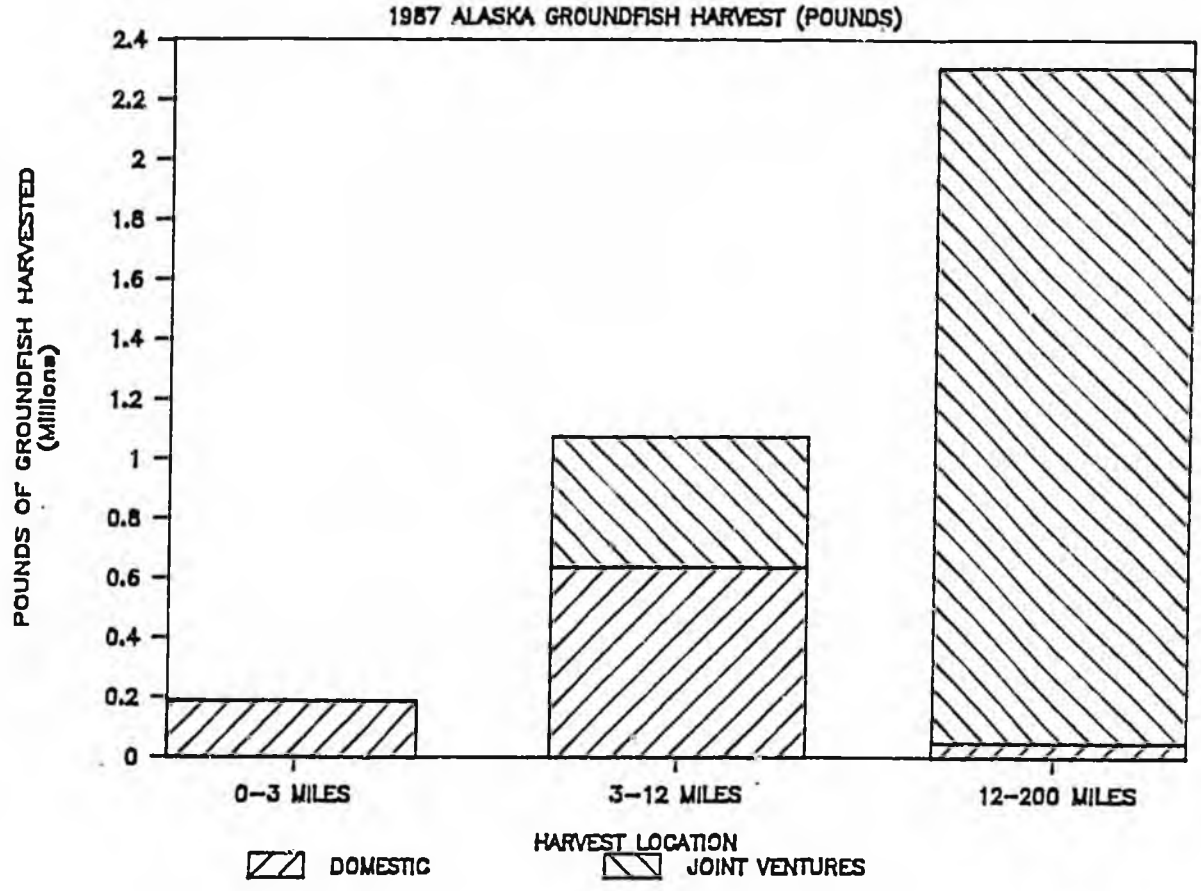

FIGURE 2

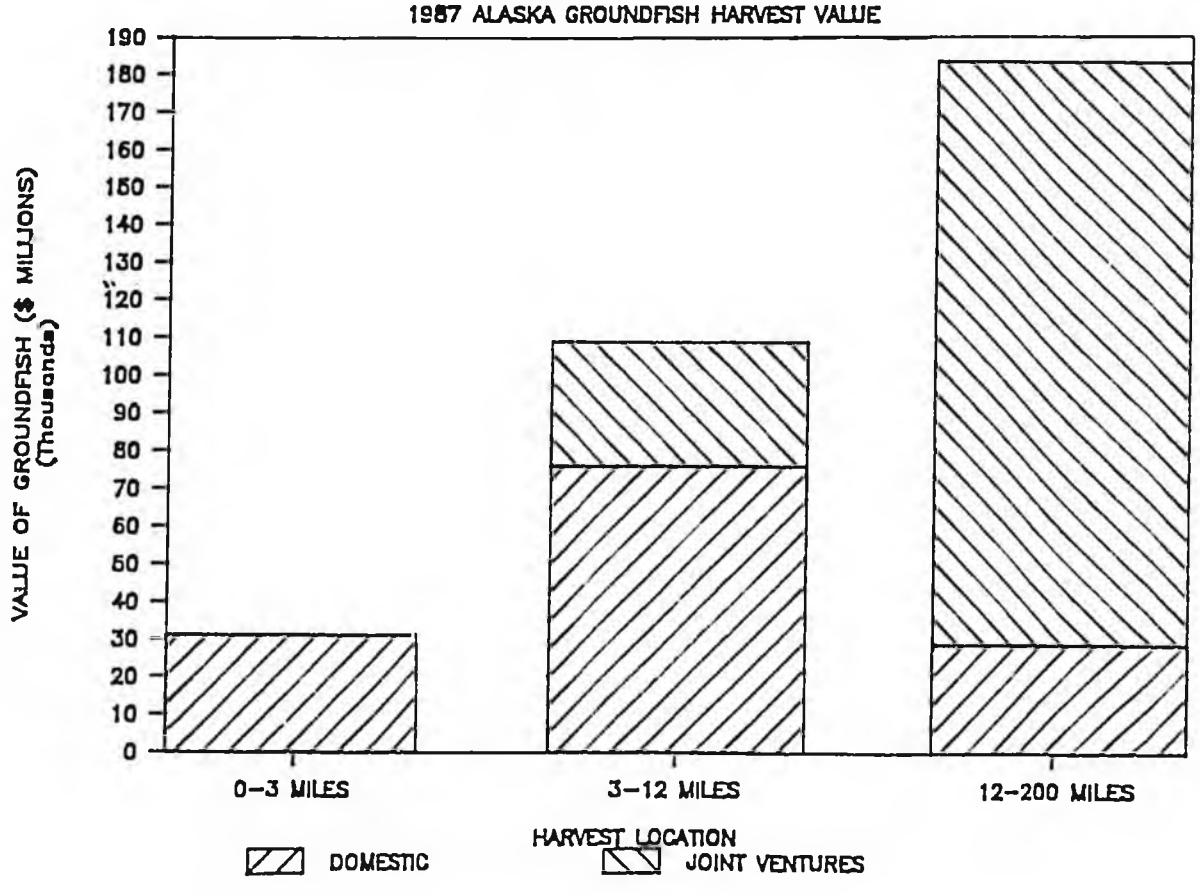

TABLE 1
POUNDS OF GROUNDFISH HARVESTED OFF ALASKA IN 1987 BY DISTANCE FROM SHORE
(IN THOUSANDS OF POUNDS)

	HARVEST LOCATION (DISTANCE FROM SHORE)			
FISHERY	0-3 MILES	3-12 MILES	12-200 MILES	TOTAL
Bering Sea/Aleutians				
Domestic	140,618	500,799	0	641,417
Joint Venture	0	370,505	2,258,757	2,629,262
Subtotal	140,618	871,304	2,258,757	3,270,679
Gulf of Alaska				
Domestic	49,612	138,073	50,417	238,102
Joint Venture	0	69,704	0	69,704
Subtotal	49,612	207,777	50,417	307,806
TOTAL				
Domestic	190,230	638,872	50,417	879,519
Joint Venture	0	440,209	2,258,757	2,698,966
TOTAL	190,230	1,079,081	2,309,174	3,578,485
PERCENT OF TOTAL POUNDS				
Domestic	5.3	17.9	1.4	24.6
Joint Venture	0.0	12.3	63.1	75.4
TOTAL	5.3	30.2	64.5	100.0

Source: National Marine Fisheries Service

Prepared by the House Research Agency, April 1989 (89.172A1)

TABLE 2
VALUE OF GROUNDFISH HARVESTED OFF ALASKA IN 1987 BY DISTANCE FROM SHORE
(IN THOUSANDS OF DOLLARS)

	HARVEST LOCATION (DISTANCE FROM SHORE)			
FISHERY	0-3 MILES	3-12 MILES	12-200 MILES	TOTAL
Bering Sea/Aleutians				
Domestic	$20,073	$58,110	$0	$78,183
Joint Venture	0	28,462	155,041	183,503
Subtotal	20,073	86,572	155,041	261,686
Gulf of Alaska				
Domestic	11,155	18,056	28,956	58,167
Joint Venture	0	4,490	0	4,490
Subtotal	11,155	22,546	28,956	62,657
TOTAL VALUE				
Domestic	31,228	76,166	28,956	136,350
Joint Venture	0	32,952	155,041	187,993
TOTAL	$31,228	$109,118	$183,997	$324,343
PERCENT OF TOTAL VALUE				
Domestic	9.6	23.5	8.9	42.0
Joint Venture	0.0	10.2	47.8	58.0
TOTAL	9.6	33.6	56.7	100.0

Source: National Marine Fisheries Service

Prepared by the House Research Agency, April 1989 (89.172B1).

CONFLICTS OF JURISDICTION IN THE AMERICAN 12-MILE TERRITORIAL SEA: A CASE FOR THE STATES (or how to make it work instead of worse)

by

G. Thomas Koester *

I. Introduction.

President Reagan's Proclamation expanding the United States' territorial sea from three to twelve nautical miles 1/ explicitly addressed only the United States' foreign relations and disclaimed any effect domestically. Strong arguments can be made, however, that it had a substantial domestic effect because of specific jurisdictional formulations in various federal statutes. Some of the most significant questions presented involve the allocation of off shore resource jurisdiction between the states and the federal government. The Proclamation accordingly has generated substantial domestic interest in the twenty-three coastal states which, along with their twenty-seven inland sisters, collectively make up the United States. 2/

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* Assistant Attorney General, State of Alaska. The views expressed herein are those of the author and not necessarily those of the State of Alaska, although the state should find none of this loyal employee's opinions objectionable.

1/ Presidential Proclamation 5928 of December 27, 1988, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (1989).

2/ In contrast to the domestic interest provoked, there has been very little international reaction to the Proclamation. This is not surprising for at least two reasons. First, most of the international community has already adopted a twelve-mile limit. In effect, the United States at long last has simply joined the rest of the family of nations. More significant, however, is the

(continued...)

These questions undoubtedly could be resolved through litigation in the courts. A much better solution, however, would be for the United States Congress to address the matter comprehensively from a public policy perspective after thorough consideration of the views of the states, the federal government, the directly affected private sector, and the public generally.

When looked at from the standpoint of public policy, the jurisdictional questions raised by the extension of the territorial sea from three to twelve miles should be resolved in favor of the states. This is true whether the policy being considered is as fundamental as the principles of federalism on which this nation was founded or as pragmatic and practical as determining the most efficient and effective way to manage off shore activities.

The three theses of this paper, then, are: (1) the extension of the territorial sea from three to twelve miles raises serious and substantial questions regarding the allocation of

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2/ (...continued)
fact that the rest of the world undoubtedly is now accustomed to the United States expanding its jurisdictional claims to the ocean and its resources. The United States in 1945 was the first country to claim for itself the entire continental shelf off its shores. Proclamation 2667, 59 Stat. 884. Later, the United States extended its fisheries jurisdiction to 200 miles in the 1976 Fishery Conservation and Management Act, 16 U.S.C. §§ 1891 et seq. Even those claims paled when the United States in 1983 claimed total resource jurisdiction against the rest of the world in Proclamation 5030, 48 Fed. Reg. 10605 (1983), even though the only international legal authority for such a claim is Part V of the 1982 United Nations Convention on the Law of the Sea which the United States has refused to sign. Taken in context, the only surprising feature of the United States' territorial sea extension may be its uncharacteristic modesty. It is no wonder that it provoked a negligible reaction from the international community.

jurisdiction between the states and the federal government; (2) those questions should be resolved by Congress and not in the courts; and (3) those questions should be resolved in favor of the states.

II. Questions regarding the allocation of jurisdiction between the states and the federal government stem from a questionable decision by the United States Supreme Court in 1947 and subsequent Congressional action to reverse it.

A. Overview.

For much of our nation's history, there was no dispute between the states and the federal government over the allocation of off shore resource jurisdiction. The early cases involved the states and private parties, and generally concerned either the ownership of submerged lands or the enforcement of state fisheries regulations. The federal government did not claim either ownership or jurisdiction, and the cases were consistently resolved in favor of the states.

Language in those early cases strongly suggested that the states both owned the lands underlying the territorial sea and had virtually plenary resource jurisdiction over activities in the territorial sea except for one area -- navigation -- explicitly allocated to the federal government under the United States Constitution. The decisions themselves, however, applied only to tidelands (the lands between low tide and high tide), lands underlying inland navigable waters (bays, rivers, lakes, etc.), and the associated waters. No case explicitly addressed state ownership or jurisdiction between the coast line and the seaward

limit of the territorial sea.

The first major conflicts between the states and the federal government over off shore jurisdiction coincided with the development of the technology necessary to exploit the subsurface resources of the seabed. These disputes were proprietary in nature: were the states or the federal government entitled to the revenues from the submerged lands underlying the territorial sea?

Although it had been assumed by virtually everyone that the rules applicable to tidelands and lands underlying inland waters also would apply to off shore submerged lands, a combination of unusual factors resulted in a determination by the United States Supreme Court in 1947 that the United States, and not the states, had plenary jurisdiction seaward of the nation's coast line.

That decision was viewed by both the states and the United States Congress as an unwarranted judicial reversal of virtually settled law and policy. It subsequently was reversed by Congress and, as a general rule, the states now have federal statutory ownership of and jurisdiction over the submerged lands out to three miles off shore and the living and nonliving resources in the superjacent water column.

Had that been the end of it, questions regarding the allocation of jurisdiction between the states and the federal government would have been relatively easy to resolve: the states would have jurisdiction out to three miles; jurisdiction further off shore would belong to the federal government.

But things did not stop there. The environmental

movement of the 1970s brought with it a host of federal procedural and substantive laws designed to protect the environment. With respect to activites off shore, most of these laws call for some degree of state involvement in implementation, decision-making, and enforcement. These federal laws present the most obvious questions regarding the allocation of jurisdiction between the states and the federal government.

B. The early cases established a rule of state jurisdiction over the territorial sea.

The ownership of the lands underlying navigable water bodies has long been a matter of dispute in the United States. Use of the nation's many lakes and rivers as highways of trade and commerce was central to its early economic development; the living and nonliving resources of the beds and banks provided both sustenance and economic opportunity for early settlers; and, even in the country's youth, the beaches and shores were valued for recreation.

Early on, the United States Supreme Court adopted the English common law rule that the beds and banks of tidal and navigable waters are not privately owned but held by the sovereign in trust for the benefit of the public. 3/ The governmental sovereign in that early case was one of the thirteen original states, and the Court logically concluded that it owned the lands as the sovereign successor to the English crown following the revolution. In the Court's view, the ownership of such lands was simply one of

3/ Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

the incidents of sovereignty which each of the individual thirteen original states assumed upon achieving independence from England.

Three years later, the Court extended the rule of state ownership to those states subsequently admitted to the Union. 4/ The Court reasoned that new states must join the Union on an "equal footing" with the original states in terms of sovereignty. One incident of sovereignty under this equal footing doctrine is the ownership of submerged lands underlying navigable waters. Significantly, the Court noted that the state's territorial limits "extended all her sovereign power into the sea," 5/ clearly implying that the rule of state ownership extended off shore to the lands underlying the territorial sea.

The Court subsequently upheld state regulation of off shore fishing activity, 6/ relying in large part on the equal footing doctrine ownership cases. Indeed, the Court first acknowledged that, under international law, the limits of a nation's right to control off shore fishing "have never been placed at less than a marine league from the coast on the open sea." 7/ It went on to state that "[t]he extent of the territorial jurisdiction of Massachusetts [and, by extension, all other states]

4/ Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

5/ Id. at 230.

6/ Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); McCready v. Virginia, 94 U.S. 391 (1877).

7/ Manchester v. Massachusetts, 139 U.S. 240, ____, 35 L.Ed. 159, 164 (1891).

over the sea adjacent to its coast is that of an independent nation" 8/ -- i.e., out to at least three miles off shore.

These and other cases applied the equal footing doctrine rule of state jurisdiction to bays, 9/ tidal rivers, 10/ harbors, 11/ nontidal rivers, 12/ lakes, 13/ and tidelands. 14/ None of these cases specifically addressed jurisdiction over the territorial sea, but it was generally assumed by both state and federal officials in all three branches of government -- executive, legislative and judicial -- that state jurisdiction was the rule. That, however, proved not to be the case.

8/ Id. at ____, 35 L.Ed. at 166.

9/ E.g., Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Manchester v. Massachusetts, 139 U.S. 240 (1891).

10/ E.g., Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1844); McCready v. Virginia, 94 U.S. 391 (1877).

11/ E.g., Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57 (1873).

12/ E.g., Barney v. Keokuk, 94 U.S. 324 (1876).

13/ E.g., United States v. Holt State Bank, 270 U.S. 49 (1926).

14/ E.g., Borax, Ltd. v. Los Angeles, 296 U.S. 101 (1935).

C. The equal footing doctrine was not extended off shore. 15/

The first case addressing the ownership of offshore submerged lands was filed in 1945. The United States sued the State of California, seeking title to the submerged lands seaward of that state. 16/

From the states' perspective, the timing of the litigation could not have been worse. The United States was just emerging from World War II, a conflict which had instilled an intense spirit of nationalism throughout the country.

This war-driven nationalistic spirit even affected as august an institution as the United States Supreme Court. The effect of the war on the Supreme Court perhaps was best reflected in Korematsu v. United States, 17/ in which the Court upheld the forcible internment of United States citizens of Japanese ancestry. Korematsu may have marked a singular low point in the history of the Court. One commentator has stated that "the decision represents the nefarious impact that war and racism can have on

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15/ Much of this section and the remainder of part II is drawn from Briscoe, Federal-State Offshore Boundary Disputes: The State Perspective, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in The Developing Order of the Oceans 380 (R. Krueger and S. Riesenfeld, eds.) 380 (1985).

16/ United States v. California, No. 12 Original, United States Supreme Court, October Term, 1945. For a history of the events leading up to the filing of the complaint, see E. Bartley, The Tidelands Oil Controversy (1953).

17/ 323 U.S. 215 (1944).

institutional integrity and cultural health." 18/ It certainly revealed a willingness by the Court to accept what today is viewed as an outrageous position taken by the national government in direct conflict with fundamental principles embodied in the United States Constitution.

In that light, consider the chronology of events leading up to the filing of the complaint against California. On August 14, 1945, the Allies defeated Japan. Japan's formal surrender was accepted on September 2, 1945. On September 28, 1945, President Truman signed Executive Proclamation 2667, 19/ which announced to the world that "the government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."

This unilateral assertion by the United States of jurisdiction over the entire continental shelf as against the rest of the world was followed by the filing of the United States' complaint against California on October 19, 1945. In the complaint, the United States claimed that it "was and now is the owner in fee simple of, or possessed of paramount rights in and

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18/ L. Tribe, American Constitutional Law 1452 (2d ed.) (1988). The United States Congress recently passed legislation making reparations for the detention of both Americans of Japanese descent and Aleut Indians. [need cite]

19/ 59 Stat. 884.

powers over, the lands, minerals, and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside the inland waters of the State . . . ." 20/

In light of the times, it perhaps was not surprising that the Supreme Court embraced the United States' alternative submission and held that the national government, and not California, was possessed of "paramount rights" in the off shore submerged lands at issue. 21/ The influence of World War II is revealed in the Court's reasoning:

> The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. 22/

The Court acknowledged that, prior to the dispute, it had been generally understood that the states owned the off shore submerged lands, at least within the three-mile limit of the

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20/ Complaint, United States v. California, No. 12 Original, United States Supreme Court, October Term, 1945, paragraph 2.

21/ United States v. California, 332 U.S. 19 (1947).

22/ Id. at 35.

territorial sea constituting the seaward boundary of the United States. 23/ Following California, however, the states could no longer argue that the constitutional equal footing doctrine encompassed all submerged lands within their boundaries; instead, it reached only to the seaward limit of inland waters. The Court subsequently rejected claims by Louisiana, 24/ Texas 25/ and, ultimately, the Atlantic seaboard states that, in large part, comprised the thirteen original states which initially formed the Union. 26/

D. Congress reversed the 1947 California decision when it passed the Submerged Lands Act in 1953.

The 1947 California decision prompted a firestorm of protest from the states, and the United States Congress acted quickly to reverse it by passing legislation quitclaiming the federal government's interest to the states. Such legislation was passed by three successive Congresses, only to suffer vetoes by

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23/ Id at 36-37, citing Manchester v. Massachusetts, 139 U.S. 240 (1891), Louisiana v. Mississippi, 202 U.S. 1, 52 (1906), and The Abby Dodge, 223 U.S. 166 (1912).

24/ United States v. Louisiana, 339 U.S. 699, 704-05 (1950).

25/ United States v. Texas, 339 U.S. 707, 718-20 (1950). Ironically, the Court employed the equal footing doctrine to defeat Texas' claim that, as an independent nation prior to its admission to the Union, it possessed full sovereignty over the territorial sea as well as ownership of it. The Court held that only by relinquishing its sovereignty and ownership to the national government upon admission could Texas have joined the Union on an equal footing with the other states. 339 U.S. at 718.

26/ United States v. Maine, 420 U.S. 515 (1975).

President Truman. 27/

With the change in administration following the 1952 national election, however, legislation quitclaiming the federal government's interest in certain off shore submerged lands became law. The Submerged Lands Act of 1953 28/ restored to the coastal states the rights to their off shore submerged lands which Congress believed the 1947 California decision had divested. 29/ Congress declared that it was in the public interest that title to and ownership of the lands beneath navigable waters within state boundaries, along with the natural resources within such lands and waters, be vested in the states, to include the right and power to manage and administer them. 30/ The Act then quitclaimed the submerged lands to the coastal states. 31/

The term "boundaries" was defined to include a state's seaward boundaries "as they existed at the time such State became a member of the Union, or as heretofore approved by Congress." 32/ For states bordering the Atlantic and Pacific Oceans, boundaries were limited to three geographic miles off

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27/ The first of these quitclaim measures actually was enacted and vetoed in 1946, prior to the Court's 1947 California decision.

28/ 43 U.S.C. §§ 1301 et seq.

29/ See the Court's discussion of Congress' belief in United States v. Louisiana, 363 U.S. 1, 19-20 (1960).

30/ 43 U.S.C. § 1311(a).

31/ 43 U.S.C. § 1311(b)(1).

32/ 43 U.S.C. § 1301(b).

shore; states bordering the Gulf of Mexico, however, were afforded an opportunity to prove that their historic boundaries extended up to three marine leagues (nine geographic miles) off shore. 33/

The same Congress shortly thereafter passed the Outer Continental Shelf Lands Act, 34/ legislatively ratifying President Truman's 1945 claim to that area on behalf of the national government. The outer continental shelf is defined as "all submerged lands lying seaward and outside of the area of land [quitclaimed to the states in the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 35/

The basic framework for the allocation of state and federal ownership and jurisdiction offshore was thus established: the states have ownership and control within their boundaries, generally three miles off shore, while the United States has authority over areas "seaward and outside of" those allocated to the states.

The first critical point for current purposes is that, by virtue of the 1947 California decision, this allocation of ownership and jurisdiction is pursuant to federal statute and not any fundamental right of the states. In effect, Congress has

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33/ Id. Only Texas and Florida (with respect to its Gulf coast) were successful in claiming a seaward boundary nine miles off shore. United States v. Louisiana, 363 U.S. 1, 36-65 (1960) (Texas); United States v. Florida, 363 U.S. 121 (1960).

34/ 43 U.S.C. §§ 1331 et seq.

35/ 43 U.S.C. § 1331(a).

virtually plenary power to allocate jurisdiction between the states and the federal government through the enactment of federal laws.

The second critical point is that in the Submerged Lands Act, the first such Congressional allocation, state jurisdiction was explicitly defined as extending three miles off shore; it was not defined in terms of the territorial sea. In subsequent jurisdictional allocations, however, Congress made explicit reference to the territorial sea, giving rise to the current questions.

E. Since 1953, Congress has employed a variety of statutory formulations to allocate jurisdiction between the states and the federal government.

While the initial controversy over state and federal off shore jurisdiction was proprietary, more recent questions have involved police power regulation of development activities. The environmental movement which began in the late 1960s spawned a host of federal laws affecting development of off shore resources. Whether substantive or purely procedural, virtually all of those laws acknowledge the strong state interest in playing a significant role in the decision-making process.

For example, the 1978 amendments to the Outer Continental Shelf Lands Act included the following statements of Congressional policy: 36/

> It is hereby declared to be the policy of the United States that --
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> . . .

36/ 43 U.S.C.A. § 1332 (1986 and 1989 Supp.).

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments --

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

. . .

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

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

. . .

Similarly, Congress found in the Coastal Zone Management Act that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and

processes for dealing with land and water use decisions of more than local significance." 37/

The big question these general statements leave unanswered, of course, is the precise location of the line between state and federal jurisdiction.

Prior to the expansion of the territorial sea, the coastal states' seaward boundaries generally were coextensive with the seaward limit of the territorial sea -- i.e., three miles off shore. 38/ It accordingly made little or no practical difference whether Congress defined the line between state and federal jurisdiction in terms of state boundaries, three miles, or the territorial sea. For all intents and purposes, they were one and the same.

Now that the limit of the territorial sea no longer is coextensive with the coastal states' three mile boundaries, however, the precise statutory formulation employed by Congress takes on much greater significance. Where Congress has expressly defined state jurisdiction in terms of the territorial sea, a strong argument can be made that the extension of the territorial sea also extended state jurisdiction to twelve miles.

For example, Congress defined the "coastal zone" in the Coastal Zone Management Act as extending "seaward to the outer

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37/ 16 U.S.C.A. § 1451(i) (1985).

38/ The two exceptions are off the Texas coast and Florida's Gulf of Mexico coast, where the boundaries are nine miles off shore. See n. 33 supra and accompanying text.

limit of the United States territorial sea." 39/ Under that Act, activities in the coastal zone must be consistent with the state's coastal management program; activities outside the coastal zone are subject to much less state control. Under the express terms of the Act, then, it would seem that the expansion of the territorial sea from three to twelve miles significantly expanded coastal states' jurisdiction under the Coastal Zone Management Act.

President Reagan clearly intended that the expansion of the territorial sea from three to twelve miles have no effect on domestic legal issues like the allocation of jurisdiction between the states and the federal government. The Proclamation expressly states that nothing in it "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." 40/ Some may think that this disclaimer puts an end to the matter, and that the proclamation simply could not have had any effect on domestic law.

The question, however, is not that simple. With respect to the Coastal Zone Management Act's definition of "coastal zone" in terms of the territorial sea, 41/ for example, the disclaimer in the Proclamation can be read two ways. First, it can be read as not modifying the express terms of the statute. In that case,

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39/ 16 U.S.C.A. § 1453(1) (1985).

40/ Proclamation 5928, supra n. 1.

41/ 43 U.S.C.A. § 1453(1) (1985).

state authority therefore still extends to the seaward limit of the territorial sea -- which now simply happens to be twelve miles off shore and not three.

On the other hand, the disclaimer can be read as attempting to keep the limit of state authority as it was before the Proclamation was issued -- i.e., at three miles off shore. This, however, would require that it be read as amending the Act's definition of coastal zone, substituting a three mile limitation for the definition's reference to the territorial sea. Under the separation of powers doctrine, of course, the President has no constitutional power to amend Acts Congress; only Congress can do so. 42/

Prior to the issuance of the Proclamation, the United States Department of Justice recognized that there was a serious question in this regard. Although stating that "the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act (CZMA)," it concluded that "the effect of the Proclamation on the CZMA is not entirely free from doubt and that the effect of the expansion on other federal statutes raises complex questions." 43/ The Justice

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42/ Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,587 (1952) (the President cannot make laws; "[t]he Constitution limits his functions in the lawmaking process to recommending laws he thinks wise and the vetoing of laws he thinks bad").

43/ Memorandum for Abraham D. Sofar, Legal Adviser, Department of State, from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice (October 4, 1988) at 2.

Department accordingly recommended that legislation be sought "to conclusively preclude" any determination that the Proclamation had an effect on the Coastal Zone Management Act or any other federal statute. 44/

In a somewhat more thorough analysis, the California Department of Justice reached a contrary conclusion: "regardless of the analysis used, the effect of the President's proclamation is to extend the seaward boundary of the federal coastal zone from three miles to twelve miles from the shoreline." 45/ The California analysis makes four points in support of its conclusion. The first point is that Congress was well aware that the seaward limit of the territorial sea could be altered, yet nonetheless chose that statutory formulation for delimiting the line between state and federal jurisdiction. Second, Congress was capable of limiting the seaward extent of the territorial sea for statutory purposes when it desired to do so, and in fact did so in the Federal Water Pollution Control Act Amendments of 1972, 46/ enacted the same year as the Coastal Zone Management Act. Third, the legislative history of the Coastal Zone Management Act indicates that Congress intended any extension of the territorial sea to extend the coastal zone as well. Finally, the

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44/ Id. at 36.

45/ March 15, 1989 letter to Peter Douglas, Executive Director, California Coastal Commission, from John A. Saurenman, Deputy Attorney General, California Department of Justice, at 3.

46/ P.L. 92-500; see 33 U.S.C.A. § 1362(8) (1986).

structure and purpose of the Coastal Zone Management Act suggest that the seaward boundary of the coastal zone was not limited to three miles.

The point here is not to try to resolve the competing viewpoints expressed by attorneys for California and the United States. Instead, the simple reality is that there are serious and substantial legal questions regarding the effect of the extension of the territorial sea on the allocation of jurisdiction over ocean resources between the states and the federal government. 47/ Until these questions are answered, this jurisdictional uncertainty will

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47/ There also are numerous other questions regarding the effect of the extension on domestic law. A Congressional Subcommittee was told that a computer search found "territorial sea" or "territorial waters" in a total of 151 separate sections of the United States Code and 218 sections of the Code of Federal Regulations. When combined with related terms such as "high seas," "navigable waters," "domestic voyages," and "waters under U.S. jurisdiction," the numbers are 392 and 614, respectively. Testimony of William N. Myhre, Hearing on the Presidential Proclamation Extending the United States Territorial Sea before the Subcommittee on Oceanography, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, 101st Cong., 1st Sess., March 21, 1989, cited in M. Cummisky, Expansion of the Territorial Sea: A Congressional Response, 3 ABA Law of the Sea Committee Newsletter 15, 18 n. 7 (Summer, 1989). The federal tax code alone uses the phrase "in the United States" more than 2,000 times. D. Slade, The New Twelve Mile Territorial Sea and Role of the Coastal States, 3 ABA Law of the Sea Committee Newsletter 23, 24 (Summer 1989). The Federal Aviation Administration has extended its domestic jurisdiction under the Federal Aviation Act of 1958, P.L. 85-726, 49 U.S.C. §§ 1301 et seq., from three to twelve miles off shore. See Applicability of Federal Aviation Regulations in the Airspace Overlying the Waters Between 3 and 12 Nautical Miles from the United States Coast, 54 Fed. Reg. 264 (January 4, 1989) (to be codified at 14 CFR Parts 71 and 91). While not necessarily implicating the allocation of jurisdiction between the states and the federal government, additional legal questions regarding the effect of the extension of the territorial sea on domestic law clearly exist.

complicate matters for everyone concerned with activities between three and twelve miles off shore.

III. Congress, and not the courts, should resolve these questions.

While legal questions regarding the effect of the extension of the territorial sea on the allocation of jurisdiction under federal statutes undoubtedly could be resolved through litigation in the courts, comprehensive Congressional resolution of these issues from the perspective of fundamental policy would be far better. Litigation in the courts is certainly available as an alternative, but it has several disadvantages.

To begin with, it is a lengthy and not very efficient process, 48/ leading to a substantial period of time during which activities between three and twelve miles would be conducted in an atmosphere of legal uncertainty.

In addition, the constitutional requirement that there be an actual case and controversy before the courts have jurisdiction 49/ requires both that there be an actual dispute as opposed to a hypothetical one, and that it be limited to the narrow specific question presented. The first consequence of this

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48/ For example, the very narrow question whether a federal oil and gas lease sale on the outer continental shelf constitutes an action "directly affecting the coastal zone" under 16 U.S.C. § 1456(c)(1) such that it must be consistent with a state coastal management plan required almost three years to resolve. Secretary of Interior v. California, 464 U.S. 312, 319-20 (1984).

49/ United States Constitution, art. III, sec. 2; see generally The Constitution of the United States, Sen. Doc. No. 92-82, 92nd Cong., 2nd Sess. 630-669 (1972).

requirement is that questions cannot be resolved judicially until there is a genuine conflict -- i.e., long after an answer is needed from the standpoint of advance planning. Another consequence is that questions cannot be resolved comprehensively because the courts are limited to the consideration of only the precise statutory question presented. In other words, the litigation alternative would require separate and discreet adjudication of the many statutes involved, precluding any kind of comprehensive consideration from the standpoint of overall policy.

Litigation, moreover, necessarily would focus on jurisdictional schemes enacted while the territorial sea was virtually coextensive with state boundaries. Although Congress may have contemplated that the coastal zone for purposes of the Coastal Zone Management Act would be extended by an extension of the territorial sea, 50/ it is certainly possible (if not probable) that Congress in some cases employed the territorial sea formulation in federal statutes without considering the possibility that it might be extended. While courts may be competent to construe those statutes in light of the new reality of an extended territorial sea, 51/ they clearly would be performing the legislative function of making law, and not the judicial function of interpreting it, in the absence of any indication that Congress

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50/ See March 15, 1989 letter to Peter Douglas, supra n. 45.

51/ 2A J. Singer, Sutherland Statutory Construction (Sands 4th Ed.) § 49.02 (1984).

intended one result or another.

Finally, court decisions do not allow full participation by all interested parties, and are subject to change without the opportunities for public involvement which the Congressional legislative process affords. Only the actual parties to a controversy may participate fully in litigation. And while the principle of stare decisis -- literally, "to stand by decided matters" 52/ -- causes courts to think carefully before overruling earlier decisions, they nonetheless will do so in appropriate cases. 53/

Congressional action to address these questions, on the other hand, would allow them to be resolved on the basis of fundamental policy -- i.e., under our federal system, in which areas should the states have jurisdiction and in which areas should

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52/ Webster's Third New International Dictionary 2226 (1976).

53/ For a discussion of four factors which the Supreme Court considers in deciding whether to overrule a prior decision, see Monell v. New York City Dept. of Social Services, 436 U.S. 658, 695-701 (1978). The likelihood that an earlier case will be overruled may be increased when the earlier case was by a closely divided court, there has been a change in the membership of the court, or there have been relevant extrajudicial events. A case involving the allocation of off shore jurisdiction between the states and the federal government fitting all three of these circumstances is Secretary of the Interior v. California, 464 U.S. 312 (1984). In that case, the Court held in a five to four decision that federal outer continental shelf oil and gas lease sales did not "directly affect" the coastal zone such that they had to be consistent with state coastal management plans. Two members of the majority -- Chief Justice Warren E. Burger and Justice Lewis F. Powell -- have since resigned and been replaced by Justices Antonin Scalia and Anthony M. Kennedy, respectively. A relevant extrajudicial event, of course, is the recent extension of the territorial sea from three to twelve miles.

the federal government have control? Congressional resolution also would facilitate a comprehensive, coordinated approach to these matters, allowing for orderly implementation and bringing necessary predictability to the process.

The questions, moreover, are the direct result of Congress' use of various statutory formulations for defining the boundaries of state and federal jurisdiction. It is only logical that Congress be the one to resolve the questions raised by its own actions.

Finally, the Congressional legislative process provides all interested parties with a full and complete opportunity to present their views, and cannot be reversed without going through the same legislative process.

When the two alternatives -- litigation versus resolution by Congress -- are compared, there simply can be no question that Congressional resolution is preferable.

IV. From the standpoint of public policy, questions of state and federal jurisdiction raised by the extension of the territorial sea should be resolved in favor of the states.

There are several policy reasons why Congress should resolve the questions regarding the allocation of jurisdiction between the states and the federal government in the newly expanded twelve-mile territorial sea in favor of the states.

The most fundamental of these is the basic notion of federalism underlying the United States Constitution. President Reagan's Working Group on the Status of Federalism of the Domestic Policy Council noted that the framers of the Constitution rejected

the notion of a single, all-powerful national government, and opted for one in which the states would retain a significant measure of sovereignty. 54/ Although a proponent of a strong national government, Alexander Hamilton stated that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by [the Constitution], exclusively delegated to the United States." 55/ Indeed, his view seemed to be that the states would possess somewhat greater authority than the federal government: "there is greater probability of encroachments by the [states] upon the federal head than by the federal head upon the [states]." 56/ The Tenth Amendment to the United States Constitution formalized those concepts, making clear that the powers of the national government are limited to those expressly delegated to it under the Constitution, while all other powers are retained by the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Two of the powers expressly delegated to the federal government are the powers to conduct foreign affairs 57/ and to regulate foreign and interstate commerce. 58/ Neither of those,

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54/ The Status of Federalism in America (1986) 7-12.

55/ The Federalist Papers, No. 32 (C. Rossiter ed. 1961) 198 (emphasis in original).

56/ Id., No. 31, at 197.

57/ United States Constitution, art. II, sec. 2, cl. 2.

58/ Id., art. I, sec. 8, cl. 3.

however, conflicts with state resource jurisdiction over the territorial sea. Once the federal government has claimed national jurisdiction over the territorial sea as against foreign nations, it has completed the exercise of its foreign relations power; the subsequent allocation of that jurisdiction between the states and the federal government is purely a domestic question. 59/ And the early off shore jurisdiction cases establish that the primary federal jurisdictional interest with respect to the regulation of foreign and interstate commerce relates to control over navigation, not resources. 60/

Under the Constitution, all remaining governmental authority is vested in the states. The only exceptions, where exclusive federal governmental power is authorized, are for the seat of national government (Washington, D.C.) and lands purchased, with the consent of the legislatures of the states in which they are located, for military and "and other needful Buildings." 61/

The basic principles of federalism accordingly auger strongly for state jurisdiction over the newly expanded territorial sea.

State jurisdiction would also acknowledge the far more direct interest the coastal states have in activities directly off their shores. Congress has recognized this substantial state

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59/ United States v. California, 332 U.S. 19, 43-46 (1947) (Frankfurter, J., dissenting).

60/ See part II.B supra.

61/ United States Constitution, art. I, sec. 8, cl. 17.

interest in a wide variety of statutes, many of which present serious allocation of jurisdiction questions. 62/

Of particular concern to the private sector interested in off shore resources, state jurisdiction would result in more efficient and more effective management. One state spokesperson described the situation for a Congressional subcommittee in these words: 63/

> [The states] are better able, in terms of fiscal resources and administrative abilities, to manage these relatively nearshore fisheries, minerals, oil and gas, and other resources that are so close to our state borders.
>
> For example, Alaska now manages a multi-billion dollar a year seafood industry which includes the world's largest salmon fisheries and several world class salmon runs. We already exclusively manage some fisheries in federal waters such as the shelf commercial rockfish fishery, king and tanner crab, and the troll salmon fishery. The State of Alaska spends $20 million dollars annually to manage its regional fisheries -- ten times the federal government's expenditure to manage fisheries in the vast area of federal waters off Alaska's coasts. Further, the State has taken the lead in joint efforts with the U.S. State Department on reducing foreign interception of salmon and other living marine resources, and has years of experience in negotiating the harvest of anadromous species with other states and with foreign nations.
>
> Alaska has had a successful offshore mining

62/ See n. 36 and 37 supra and accompanying text.

63/ Testimony of Suzanne Iudicello, Associate Director for Fisheries and the Environment, Alaska Governor's Office, Hearing on the Presidential Proclamation Extending the United States Territorial Sea before the Subcommittee on Oceanography and Great Lakes, House Merchant Marine and Fisheries Committee, 101st Cong., 1st Sess., March 21, 1989.

program since statehood. The State's program has provided minerals such as gold and platinum to industry while providing for environmental protection. State regulations and the coastal zone management program ensure that offshore mining leases go through strict review by all state resource agencies. In contrast to the federal government, which has never issued a single offshore mining lease off the coast of Alaska, there are currently nine active offshore leases which have been issued by the State and more than 200 offshore prospecting permits, giving Alaska the benefit of experience in this area.

Looking at oil and gas resources, the State also has a successful track record of evaluating oil and gas potential, completing timely permitting, and balancing complex interests such as subsistence whaling and oil development. The federal government currently takes an average of five years to plan an oil and gas lease sale in the three to 12 mile zone, while Alaska typically completes a similar rigorous evaluation and analysis in two to three years. The state also maintains a consistent and predictable leasing schedule, providing oil companies a better opportunity to plan and execute exploration budgets. In addition, the State's stipulations and mitigating measures for oil and gas exploration and development offer better environmental protection for marine life, the multi-million dollar fishing industry, and the subsistence lifestyle of many coastal residents. Again, we believe Alaska can more efficiently and competently manage this resource in the three to 12 mile zone than can the federal government.

In another initiative regarding ocean resources, the State of Alaska already is working with other Pacific states to assess the resource potential of the EEZ in the Northeast Pacific Ocean. This includes an effort to identify priorities for research and management, and to analyze capabilities for ocean governance.

Less than a week after that testimony was given, the EXXON Valdez ran aground on Bligh Reef in Prince William Sound. The subsequent efforts to assess the natural resource damages

caused by the spill provide a clear example why the states, and not the federal government, should have primary resource jurisdiction over the newly expanded territorial sea.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 64/ provides for the appointment of state and federal trustees to assess natural resource damages "for natural resources under their trusteeship." 65/ Alaska Governor Steve Cowper appointed the Alaska Commissioner of Fish Game as the state trustee; President Bush appointed the Secretaries of Agriculture, Commerce, and Interior.

Problems arose almost immediately because of the distance between the site of the spill in Alaska and the federal trustees' location in Washington, D.C. In an effort to minimize those problems, the federal trustees appointed representatives in Alaska to work with the state trustee. Unfortunately, and all too typically, the federal trustees' Alaska representatives were given authority to negotiate, but were not given the power to make decisions. As a result, all damage assessment plans developed were subject to further review by federal officials in Washington who (1) had not participated in the discussions leading up to their development, and (2) had absolutely no knowledge of local conditions and requirements. The first set of plans were in fact

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64/ 42 U.S.C. §§ 9601 et seq.

65/ 42 U.S.C.A. § 9607(f)(2) (1983).

rejected outright by federal officials in Washington, D.C., unnecessarily complicating the damage assessment effort.

Another reality favoring state jurisdiction is the difference in the amount of time it takes the states and the federal government to act. The difference in the time needed to prepare and conduct an offshore oil and gas lease sale has already been noted. 66/ The EXXON Valdez spill provides another example. Within three weeks of the spill, the Alaska Legislature had appropriated $20 million for expenditures necessitated by the spill; 67/ expenditure of an additional $39.2 million was subsequently authorized. 68/ To date, the federal government has appropriated no money for spill related expenditures.

Finally, states find it much easier to develop policies with respect to ocean resources, and adhere to those policies once developed. The federal government, on the other hand, is a model of inconsistency. As one example, Congress in the Outer Continental Shelf Lands Act adopted a policy that the outer continental shelf "should be made available for expeditious and orderly development." 69/ Despite this national policy, however, Congress has repeatedly thwarted outer continental shelf development through moratoriums imposed in appropriations

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66/ See n. 63 supra and associated text.

67/ Secs. 1 and 2, ch. 13, Session Laws of Alaska 1989.

68/ Secs. 55 and 56, ch. 87, Session Laws of Alaska 1989.

69/ 43 U.S.C.A. § 1332(3) (1986).

bills. 70/

In light of the foregoing, public policy considerations clearly favor state jurisdiction over the newly expanded territorial sea.

V. Conclusion: The questions regarding state and federal natural resource jurisdiction off shore present an opportunity to make the system work.

As shown above, there are serious and substantial questions regarding the effect of the extension of the territorial sea on the allocation of off shore resource jurisdiction between the states and the federal government. Those questions should be resolved by Congress and not in the courts. From the standpoint of public policy, they should be resolved in favor of the states.

In all likelihood, the federal government will oppose such a resolution. The federal government has frequently accused the states of making extreme, outrageous, and unwarranted claims to off shore jurisdiction, 71/ and there is no reason to believe that its position has changed.

At the same time, it is the United States that first claimed the outer continental shelf off its shores as against the

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70/ See, e.g., secs. 110-113, P.L. 100-446, 102 Stat. 1801 (1988).

71/ For example, the United States made the following allegation in a complaint against Alaska: "By its conduct and claims, the State of Alaska casts uncertainty on the position of the United States as to the location of its territorial seas and threatens to embarrass the United States in the conduct of foreign affairs and thereby cause great irreparable injury to the United States." Complaint, United States v. Alaska, United States Supreme Court No. 84, Original, October Term, 1978.

rest of the world in 1945 72/ and more recently claimed a 200-mile exclusive economic zone authorized under an international convention which it has refused to sign. 73/ By comparison, state claims are the epitome of reasonableness.

The basic point, however, is that these questions must be resolved. The Congressional process for resolution of such questions allows thorough consideration of all points of view, and generally produces a viable result.

Through active advocacy by the states and the concerned private sector, state jurisdiction over the newly expanded territorial sea can become a reality. If it does, it will be because those interested in the question of state and federal off shore jurisdiction viewed it as an opportunity, not an obstacle, and took that opportunity to make the system work.

72/ See n.2 supra.

73/ Id.

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

Jack H. Archer and Joan M. Bondareff *

I. Introduction and Background

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

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

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

2. *Id.*

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

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

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

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

> First, does the President have the authority to declare, by Presidential Proclamation, the proposed extension of the territorial sea?
>
> Second, assuming the President does have the authority, what effect would such a Proclamation have on domestic legislation, such as the Coastal Zone Management Act (CZMA)?[7]
>
> Third, can the President limit the effect the Proclamation will have on domestic legislation?[8]

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

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

7. *See* CZMA, *supra* note 5.

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

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

9. *Id.* at 6-12.

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

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

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

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

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

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

A. The U.S. Territorial Sea

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

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

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

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

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

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

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

B. The U.S. Constitution

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

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

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

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

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

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

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

24. G. SCHERLAND, CONSTITUTIONAL POWERS AND WORLD AFFAIRS 52 (1919); W. WILLOUGHBY, THE

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

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

II. ASSERTING SOVEREIGNTY OVER NEW TERRITORY

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

1. The power of the Congress to admit new states into the Union;[29]

2. The power to declare and carry on war;[30] and

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

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

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

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

29. U.S. Const., art. IV, §3, cl. 1.

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

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

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

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

31. U.S. Const., art. II, §2, cl. 2.

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

33. Texas was added to the Union by joint resolution of the Congress in 1845. Joint Res. 8, Stat. 797 (1845). Hawaii was made a territory of the United States by joint resolution in 189 S.J. Res. 55, 30 Stat. 750 (1898). See *infra* notes 84-97 and accompanying text for a full discussi of the cases of *Texas* and *Hawaii*.

34. Guam, for example, was acquired by the United States through a treaty of cessi concluding the war with Spain. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, art. II, 30 Stat. 175 T.S. No. 343. According to one legal writer, after an extensive review of the cases involvi extensions of U.S. territory as a result of conquest, "In those cases the principle was establish that, while military occupation may give the conqueror all rights of sovereignty, it cannot give hi sovereignty itself, which remains unchanged until formal cession results from treaty or permanen conquest uncontroverted by arms." Reno, *The Power of the President To Acquire An Govern Territory*, 9 GEO. WASH. L. REV. 251, 254 (1941).

35. Cession of Louisiana Treaty, April 30, 1803, U.S.-France, art. 1, 8 Stat. 200-201, T.S. N 86.

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

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

38. Treaty of Guadalupe Higaldo, Feb. 2, 1848, U.S.-Mexico, art. 5, 9 Stat. 922, 926-27, T.S. N

Alaska,[39] the Panama Canal Zone,[40] and the Virgin Islands.[41] As noted above, the U.S. Supreme Court early recognized the treaty-making powers of the Constitution as authorizing the first large territorial acquisition by the United States - the Louisiana Purchase.[42] By 1907, the Court noted that it was "too late in the history of the United States to question" the Nation's right to acquire new lands by treaty.[43]

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

A. Presidential Claims

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

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

40. Isthmian Canal Treaty, Nov. 18, 1903, U.S.-Panama, art. 2-3, 33 Stat. 2234-5, T.S. No. 4

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

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

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

44. U.S. CONST., art II, §2, cl. 2.

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

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

1. The Jefferson Claim

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

> The President of the United States, thinking that before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts.
>
> The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated as one sea league. . . . Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given as restrained for the present to the distance of one sea league or three geographical miles from the seashores.[49]

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

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

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

49. *Id.*

50. *See* [illegible] 332 U.S. 19, 33 n. 6 (1947).

by the Washington Administration sought to preserve U.S. neutrality as well as to provide "territorial protection," and Congress quickly acted to legislate the claim put forth by Jefferson in 1793 by enacting the Neutrality Act of 1794.[51] This initial claim of jurisdiction has ripened over time into a claim of sovereignty over the territorial sea, acknowledged and acted upon by the executive, legislative, and judicial branches of the United States government.[52] But it is not clear whether Jefferson and the Washington Administration intended to assert U.S. jurisdiction to one sea league for defensive purposes only or to acquire new territory subject to U.S. sovereignty three miles seaward.[53] One contemporaneous U.S. Supreme Court decision, cited in the Justice Memorandum, speaks of the authority of a nation within its own territorial sea as "absolute and exclusive."[54] But in light of President Jefferson's well-known misgivings about the constitutional authority of the United States to acquire the Louisiana Territory,[55]

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

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

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

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

55. *See supra* notes 25 and 35. *See also, e.g.*, E. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812 28-9 (1920) (Jefferson believed "that Congress did not have the power of admitting new states into the Union outside the territory owned at the time of the adoption of

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

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

2. "Discovery and Occupation"

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

a. Midway Islands

According to international legal records, Midway Islands, situated about 1,100 miles west of Honolulu, were formally occupied by the captain and crew of the U.S.S. *Lackawanna* in 1867.[59] As described in a later account of this dis-

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

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

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

covery,[60] the Secretary of the Navy ordered the *Lackawanna* to explore and occupy Midway Islands at the request of American shipping companies who were seeking to establish a coaling station there. But, according to this account, the United States does not appear to have acted on this claim until after the annexation of Hawaii in 1898:[61]

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

Further, this account relates the earlier exploration (1857) of the Midway and Kure groups of islands by an American citizen in command of a Kingdom of Hawaii vessel. This resulted in territorial claims by the United States in 1936 on the ground that the Kure Islands were said to have come under the sovereignty of Hawaii in 1857 and to have passed to the United States upon the annexation of Hawaii in 1898:[63]

> Reconsidering the situation of the Midway Islands in the light of the action in regard to the Kure Islands . . . and remembering also that no overt act of authority was performed therein by the United States prior to the annexation of the Hawaiian Islands, it would seem that the claim of [the United States] to the Midway Islands is traceable through the Republic of Hawaii rather than to the explorations and claims of 1867.[64]

60. Reno, *The Power of the President To Acquire And Govern Territory*, 9 GEO. WASH. L. REV. 251, 274 (1941).

61. *Id.* at 275.

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

Therefore, the discovery and occupation of Midway Islands in 1867 may have been the means by which these islands came under U.S. sovereignty. A reasonable case can be made that Midway Islands came to the United States as part of the territory of the Kingdom (later Republic) of Hawaii, to which it "rightfully" belonged,[65] as a result of the 1857 exploration described above.

b. Wake Island

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

> The United States claims jurisdiction . . . over the atoll, known as Wake's Island, . . . possession of which was taken by the U.S.S. *Bennington* on January 17, 1899.[66]

But, according to one writer:

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

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

64. *Id.* at 275.

65. *Id.* at 285.

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

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

B. "Discovery and Occupation" is Inappropriate Authority

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

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

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

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

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

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

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

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

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

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

74. *Id.*, art. 1.

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

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

77. 43 U.S.C. § 1331(a).

78. 43 U.S.C. § 1332.

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

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

C. Congressional Assertions of Sovereignty or Jurisdiction

As discussed above, the Congress has an essential role to play in the acquisition of territory through the Senate's power to approve treaties.[81] Congress has also originated legislation to acquire territory on behalf of the United States by exercising its power to admit new states into the Union[82] and by acting upon the Government's inherent power as a sovereign nation to acquire territory through discovery and occupation.[83] In this context, we examine the annexations of Texas and Hawaii by the Congress as well as its claim of jurisdiction over numerous small islands under the Guano Act.

1. The Annexation of Texas

The United States annexed the Republic of Texas by joint resolution of both Houses of Congress approved by President Polk in 1845.[84] The Congress used this method of annexation because the treaty of annexation submitted earlier by President Tyler failed to gain the necessary two-thirds majority of the Senate for approval. The treaty had been rejected by a coalition of antislavery forces and partisan senators.[85]

Rebuffed by the Senate, President Tyler encouraged the House to find another way to accomplish the annexation.[86] Secretary of State Calhoun proposed that "what was sought to be effected by the treaty might be secured by joint resolution, which would have the advantage of requiring only a majority of the two Houses, instead of two-thirds of the Senate."[87] The joint resolution was justified on the constitutional ground that Congress had the power to admit new states into the Union.[88] The resolution itself expressed Congress' "'consent' that the territory properly included within and rightfully belonging to the Republic of Texas might be erected into a new State, to be called the State of Texas . . . ."[89]

81. *See supra* note 31.

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

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

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

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

86. *Id.* at 499.

2. The Annexation of Hawaii

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

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

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

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

90. *Id.* at 496-98.

91. *Id.* at 503.

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

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

94. *Id.*

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

3. The Acquisition of the Guano Islands

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

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

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

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

97. *Id.* at 430.

98. 11 Stat. 119 (1856).

99. *Id.*

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

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

III. ASSERTIONS OF SOVEREIGNTY REQUIRE CONGRESSIONAL ACTION

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

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

102. *Id.* at 212.

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. AN EXPANDED TERRITORIAL SEA AND NATIONAL MARINE POLICY

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

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

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

led in and measurably complicates U.S. coastal and ocean policy debates. xample, we note that the Justice Memorandum provides a lengthy analysis effects of the Proclamation upon U.S. coastal and ocean resource ement issues, and that the response by the California Attorney General is d almost exclusively to these matters.[113]

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

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

See supra notes 5 and 6. Serious concerns have also been expressed by Hawaii and other states about the effects of the Territorial Sea Proclamation. *See* Sen. Concurrent Resol. 15th Leg., Reg. Sess., 1989 Hawaii, requesting that the U.S. Congress consider the impact oclamation on "domestic law and federal/state relations and rights in the three to twelve le and the related question of federal/state relations and rights in the U.S. Exclusive ic Zone."

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

Knecht and Cicin-Sain, *The Role of Values in National Ocean Policy*, Paper Presen- e Conference on Values and the American Ocean: Philosophical, Historical, Legal and erspectives, The University of California at Santa Barbara, Santa Barbara, Ca., June 26-

For example, see Knecht, Cicin-Sain, and Archer, *National Ocean Policy* 1 *Window*

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

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

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

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

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

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

119. H.R. 5069 was supported by the Coast of States Organization and other coastal interests

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

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

Proposals to share revenues between the coastal states and the federal government from offshore oil and gas development have repeatedly been made, and, on at least one occasion, were almost passed by the Congress. *See* Fitzgerald, *Outer Continental Shelf Revenue Sharing: A Proposal to End the Seaweed Rebellion*, 5 UCLA J. ENVT'L L. POL'Y 1 (1985) and Consolidated Omnibus Budget Reconciliation Act of 1985. P.L. No. 272, 100 Stat. 82 (1986); H. REP. No. 453, 99th Cong., 1st Sess. 436 (1985).

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

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

121. For example, amendments to the OCSLA and the CZMA to reduce the almost total discretion given to the Secretary of the Interior to determine the schedule and scope of the [illegible] development [illegible] irrespective of the views of state and local governments,

V. CONCLUSION

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

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