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# The Division of the Maritime Zones of the United States Between Its Federal Government and Its States

John Briscoe
Briscoe Ivester & Bazel LLP



Institute for Legal Research
381 Boalt Hall
University of California
Berkeley, CA 94720-7200

# THE DIVISION OF THE MARITIME ZONES OF THE UNITED STATES BETWEEN ITS FEDERAL GOVERNMENT AND ITS STATES

John Briscoe[1]
Briscoe Ivester & Bazel LLP
San Francisco
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The Unites States claims the same maritime zones off its seacoasts, measured in the usual ways, as most other coastal states of the world. It does not claim archipelagic waters and baselines however, because it does not qualify for them. Moreover, in the past 30 years it has declined, for reasons to be discussed, to employ straight baselines, even where the coastal geography cries out for their use. This brief paper first describes America's maritime zones. It then relates some of the history of how the States came to have little pieces of those zones. In the last section it identifies the offshore jurisdiction the American coastal States now enjoy.

## I. The Present List of U.S. Offshore Zones, and Their Breadths

In the past 30 years, the federal government has added two new maritime zones (which overlap) to its dominion, and it has broadened the geographic scope of older zones.

### A. The Territorial Sea.

The territorial sea is the most familiar maritime zone. The territorial sea is the zone over which the coastal state exercises sovereignty as fully as over its land territory, subject to the rights of foreign vessels to innocent passage and archipelagic sea-lanes passage.[2] On December 27, 1988, President Reagan by Proclamation extended the American territorial sea from three to

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[1] Mr. Briscoe has represented the States of California, Hawaii, Georgia and Alaska in maritime boundary disputes, principally with the national government, and principally in the United States Supreme Court. He has also represented the Territory of Guam, and advised foreign governments, including the Republic of Korea, in maritime boundary matters. He is senior partner with Briscoe Ivester & Bazel in San Francisco, and is a member of the board of The Law of the Sea Institute. He prepared the original version of this paper at the request of the late Professor Stefan Riesenfeld of the University of California, Berkeley, in 1990. John P. Briscoe contributed significant research and analysis to this paper.

[2] See Article 1 of the 1958 Convention on the Territorial Sea and Contiguous Zone, and Article 2 of the 1982 Convention on the Law of the Sea (New York: United Nations, 1983), Sales No. E83.V.5.

twelve miles.[3] Most of the other coastal nations of the world also claim twelve miles as the breadth of their territorial seas.

America probably had a twelve-mile territorial sea, or at least a nine-mile territorial sea, for some time in its history, though it was not actually called that then. Let us digress to consider a bit of that history.

In 1782 the United States asserted that nine miles was a reasonable breadth for its territorial sea.[4] In 1790, Congress extended American authority over smuggling to a distance of twelve nautical miles from the coast,[5] and in February of 1793 Congress established customs jurisdiction to a distance of nine nautical miles.[6]

It is well known that, on April 22 of 1793, Secretary of State Jefferson formally declared a three-mile American territorial sea for neutrality purposes.[7] But a mere several months later, on November 8, Jefferson wrote both the Spanish and French ministers to the United States that America was entitled to "as broad a margin . . . as any nation," and reserved "the ultimate extent of the [territorial sea] for future deliberations."[8] Jefferson later explained that the United States had been forced to accept three miles, and in 1805 suggested that the Gulf Stream would make a good outer limit of the American territorial sea.[9]

During the mid-nineteenth century, America made protestations that a three-mile territorial sea was the maximum permissible. Foreign governments, though, would have none of it. In one example, the United States in 1862 protested Spain's claim to a six-mile territorial sea

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[3] Proclamation No. 5928; 54 Fed. Reg. 777 (1989).
[4] Crocker, *Extent of the Marginal Sea* (1919), p. 630; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 50; 7 North Atlantic Coast Fisheries Arbitration, p. 46.
[5] Act of August 4, 1790, ch. 35, §§ 12-13, 31, 64, 1 Stat. 157-58, 164-65, 175 (1845)
[6] 1 Stat. § 21, 305, 313-14.
[7] Proclamation of Neutrality, April 22, 1793. See Fulton, *The Sovereignty of the Sea* (1911), 572-574.
[8] Letter from Secretary of State Jefferson to George Hammond, British Minister to the United States, November 8, 1793, reprinted in Swartztrauber, The Three-Mile Limit of Territorial Sea (1972), p. 57.
[9] Conversation between President Jefferson, John Quincy Adams, and Mr. Gaillard, as related in Memoirs of J. Q. Adams, Vol. 1, p. 375-376.

off Cuba. In reply to a letter from Secretary of State William H. Seward (which advocated the three-mile limit), Spanish Minister Gabriel G. Tassara wrote Seward on December 30, 1862 that the United States' claim to a "much more extensive" territorial sea, one having a breadth of twelve miles, was well known in the international community.[10]

Undeterred, the United States continued to assert that it claimed but a three-mile territorial sea. It continued to assert that in subsequent correspondence with Minister Tassara. It asserted that during World War II, when it declared defense zones of several hundred miles[11] It asserted that in 1945 when it broke with the rest of the world and proclaimed jurisdiction over the Continental Shelf.[12] It asserted that in 1958 and 1960 when it sought international agreement on a six-mile territorial sea.[13] It maintained that when, in 1970, it proposed that all the coastal nations of the world adopt a twelve-mile territorial sea.[14] It asserted that in 1976 when it declared a 200-mile fishery conservation zone[15] (this at a time when the International Court of Justice had just recently suggested that twelve miles was the maximum permitted breadth for such a zone[16]). And it asserted that when, in 1983, having refused to sign the 1982 Convention on the Law of the Sea, it unilaterally proclaimed a 200-mile Exclusive Economic Zone, which, of

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[10] This letter is in evidence in *United States v. Alaska*, United States Supreme Court, No. 84 Original, as Alaska's Exhibit 85-027.

[11] *See, e.g.*, Department of State Bulletin, 1, No. 15 (October 7, 1939), 5 Foreign Relations of the United States, pp. 36-37.

[12] Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884.

[13] This occurred at the First and Second United Nations Conferences on the Law of the Sea held in Geneva those years. See generally, 1 Shalowitz, *Shore and Sea Boundaries* (1962) pp. 269-270.

[14] 1970 Public Papers of the Presidents—Richard Nixon; Statement about United States Oceans Policy, p. 454, May 23, 1970.

[15] Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.

[16] *United Kingdom v. Iceland* (Fisheries Jurisdiction) (1974) I.C.J. 3, 130. C F. Magnuson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries, 52 Wash. L. Rev. 427, 438-441 and Esp. 441 fn. 46 (1977).

course, was then provided for only by the Convention.[17] Its consistency has been that of a hobgoblin.

The venerable territorial sea ("marginal sea" in older terminology) is the most long-lived of the maritime zones in use today but, with the coming of claims to continental shelves and exclusive economic zones, its importance to coastal nations is far less than what it was.

B. The Contiguous Zone.

The contiguous zone, which lies adjacent to a state's territorial sea, is a maritime zone in which the coastal state may exercise powers necessary to:

> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations with its territory or territorial sea;
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> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.[18]

The 1958 Convention on the Territorial Sea and the Contiguous Zone, in Article 24.2, permitted a maximum breadth of twelve miles for the contiguous zone; Article 33.2 of the 1982 Convention allows 24 nautical miles. At the time of the President's Territorial Sea Proclamation of December 27, 1988, the United States claimed a 12-mile contiguous zone. The Proclamation, however, did not extend the breadth of the United States' contiguous zone. And so, for a time, the United States had no contiguous zone. On September 2, 1999, however, President Clinton extended the United States' contiguous zone from the outer limit of the territorial sea, at 12 miles from the baseline, to a distance of 24 miles from the baseline.[19]

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[17] Proclamation 5030, Exclusive Economic Zone of the United States of America, 1 Public Papers of the President—Ronald Reagan, p. 380, March 10, 1983.
[18] Article 33.1 of the 1982 Convention on the Law of the Sea; see also Article 24.1 of the 1958 Convention on the territorial Sea and the Contiguous Zone.
[19] Proc. No. 7219, Sept. 2, 1999, 64 F.R. 48701, 49844

C. The Fishery Conservation Zone.

The Fishery Conservation and Management Act of 1976 ("FCMA") established the Fishery Conservation Zone, which began at the seaward boundary of each coastal state[20] and extended to 200 miles from the baseline from which the territorial sea was measured.[21]

In 1986 the FCMA was amended to eliminate all references to the Fishery Conservation Zone. In its place, the United States claimed "sovereign rights and exclusive fishery management authority over all fish, and all Continental shelf fishery resources, within the *exclusive economic zone*."[22] (Emphasis added.) The ramifications of this change are discussed later in this paper.

D. The Continental Shelf.

The 1958 Convention on the Continental Shelf defined the Continental Shelf by what was called the "exploitability" criterion. That is to say, the Continental Shelf under that Convention extends waterward to a depth of 200 meters and, beyond that, to whatever depths permit the exploration of the resources of the seabed and the subsoil of the Shelf. This criterion has been supplanted in Article 76 of the 1982 Convention. The new formulation provides: "The Continental Shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline

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[20] By "seaward boundary" Congress probably meant the seaward boundaries of the lands restored to the states by the Submerged Lands Act, which is discussed below, rather than the seaward limit of the territorial sea. A Legislative History of the Fishery Conservation and Management Act of 1976, Senate Committee on Commerce & National Ocean Policy Study, 94th Cong., 2d Sess. (Gov't Printing Office 73-982) (1976), p. 678. The Submerged Lands Act boundaries, most pronouncedly in the cases of Texas and Florida, on Florida's gulf coast, may extend seaward of the territorial sea boundary.

[21] 16 U.S.C. § 1811 (pre-1986). Selecting as the inner boundary of the Zone the seaward boundary of the coastal State, rather than the seaward boundary of the territorial sea, was done intentionally. If the United States, as many then expected, changed its claim of territorial waters from three to twelve miles, the boundaries of the fishery conservation zone would not have to be shifted. See A Legislative History, etc., *supra*, at 1051, 1101. 16 U.S.C. § 1811.

[22] 16 U.S.C. § 1811(a).

from which the breadth of the Territorial Sea is measured where the outer edge of the continental margin does not extend up to that distance."

The geological definition of the continental margin contained in the 1982 Convention is exceedingly complicated, but suffice it to say that, in certain geological circumstances, the 1982 Convention permits states to claim continental shelves to distances as great as 350 nautical miles from the baseline from which the territorial sea is measured. Two claims, by Chile and by Ecuador, each made in September of 1985, provide examples. On September 12, Chile proclaimed jurisdiction over the Continental Shelves of the Easter and Sala y Gomez Islands extending to a distance of 350 nautical miles from the territorial-sea baseline. On September 19, Ecuador issues a similar proclamation asserting its jurisdiction over the continental shelf extending between mainland of Ecuador and the Galapagos islands. The United States contested these claims on the grounds that the geologic facts did not satisfy the criteria of Article 76.4 of the 1982 convention.[23]

On October 27, 1995, South Africa published a sheet containing charts showing its claim to straight baselines, internal waters, territorial waters, the contiguous zone, and the continental margin beyond 200 nautical miles. If the claim to the continental shelf more than 200 nautical miles from Marion and Prince Edward Islands is submitted to the Commission on the Limits of the Continental Shelf, close attention will need to be paid to the submarine ridge on which the islands stand. If the islands stand on either the Atlantic-Indian Oceanic Ridge or the Southwestern Indian Oceanic Ridge their claim will probably have to be modified. "Although there has been much debate over the rather confusing language of Article 76 dealing with ridges there is widespread agreement that the oceanic ridges are those connected with sea-floor

[23] See Kilaparti Ramakrisha, Robert E. Bowen, and Jack H. Archer, "Outer Limits of the Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U.S. Response, " 11 Marine Policy 56-68 (Jan. 1987).

spreading related to the process of plate tectonics.... If Marion and Prince Edward are located on an oceanic ridge then South Africa's claim would be restricted to a maximum of 350 nm."[24]

Whether the United States (which as of this writing has still not signed the 1982 Convention) is permitted to claim a continental shelf in accordance with Article 76 is a nice question.[25] By 1980, it was generally thought that the seaward limit of the American Continental Shelf stood at the 1000-fathom isobath (20 to 50 miles offshore in the case of California)—the then-existing limit of exploitability. The President's Proclamation of March 10, 1983 declaring a 200-mile Exclusive Economic Zone (EEZ) produced an unusual claim by the Department of Interior relating to the Outer Continental Shelf Lands Act of 1853. The Solicitor of the Department of Interior on May 30, 1985 issued an opinion on the question of the seaward extent of the Department's jurisdiction under the Outer Continental Shelf Lands Act in light of President Reagan's 1983 EEZ Proclamation. It is published in 92 Interior Decisions 459 (1985). The Solicitor's opinion – particularly since an EEZ was claimed without our having ratified the Convention – is worth a little examination.

The Solicitor's Opinion was that on the date of the EEZ Proclamation, March 10, 1983, by no act of Congress but by virtue solely of the Proclamation (which made no mention of the Outer Continental Shelf Lands Act), the outer limit of the Department's jurisdiction over the "outer *continental shelf*" leapt seaward from its location on March 9, at approximately the 1000-fathom contour, to a new limit precisely 200 miles from the territorial sea baseline. (The landward limit of the jurisdiction of the Department of Commerce under the Deep Seabed Hard

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[24] Prescott, Victor, and Schofield, Clive. The Maritime Political Boundaries of the World, 2nd Ed. Martinus Nijhoff, Leiden. 2005.

[25] The United States ratified the four 1958 Geneva Conventions, which had been sent to the Senate for ratification in 1959 by President Eisenhower, in 1961. The Continental Shelf Convention, like the Territorial Sea Convention, went into force in 1964. Hollick, U.S. Foreign Policy and the Law of the Sea (1981) 1959 and 442. U.S. T.I.A.S. 5578; 15 U.S.T. 471. The United States, of course, has not ratified, the 1982 Convention. That Convention went into force _____.

Minerals Resources Act, would, if the Solicitor is correct, have made a corresponding leap seaward. *See* 30 U.S.C. § 1403(4).) The new limit is not related to any geologic concept of continental shelf, nor to the legal concept of "continental shelf" that had been employed in American law from 1945 until, at least, March 9, 1983.

While the Solicitor's published opinion fills 52 printed pages, its essence is found in two sentences on its third page. The Solicitor first noted that in section 2(a) of the OCSLA, Congress defined the expression "outer Continental Shelf" to mean

> . . . all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

43 U.S.C. section 1331(a).

The Opinion then notes that the question presented was "when may the subsoil and seabed of its submerged lands be said to 'appertain' to the U.S. and to be 'subject to its jurisdiction and control.'" 92 I.D. at 461. The critical two sentences are then stated:

> On its face, the area described by this statutory definition is an expanding one: if a given area of subsoil and seabed becomes subject to the U.S. jurisdiction and control and appertains to the U.S., then that area falls within the definition. The plain meaning of section 2(a) must be followed, unless some unstated limitations must be inferred.

92 I.D. at 461 (footnote omitted).

Without citation of authority, the Solicitor concluded that the plain-meaning rule holds sway, and not any of the several other, usually more preferred rules of statutory construction, such as those suggesting a construction in accordance with contemporaneous (that is, 1953) circumstances. *See* generally *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-11, 23-24 (1976).

Even so, the "meaning" attributed by the Solicitor to the OCSLA's definition of "outer Continental Shelf" is not so plain at all. The Solicitor took pains to show that, ever since 1953, the area of the American Continental Shelf had been thought to be expanding. 92 I.D. at 465-68. That is true enough. But the Shelf expanded not because its definition continually changed, but because that definition, fixed in its terms, spoke of the limits of exploitability—and those limits changed. The Truman Proclamation of September 28, 1945 made emphatic reference to the exploitability concept,[26] and the concept, as is well known, was subsequently codified in Article 1 of the 1958 Convention on the Continental Shelf. Substantial areas of the seabed and subsoil that were unexploitable in 1953 were, by 1980, exploitable. In 1953, 100 fathoms of depths was considered the limits of exploitability; by 1980 it was 1000 fathoms. Still, by March of 1983 the limit of exploitability had not reached the several-thousand-fathom depths found 200 miles from, say, the Pacific Coast.

D. Exclusive Economic Zone.

The 1982 Convention on the Law of the Sea provides in Articles 55 and 57 that every coastal state enjoys an Exclusive Economic Zone ("EEZ") adjacent to its coast, extending as far as 200 nautical miles from the territorial sea baselines. The President's Proclamation of March 10, 1983 proclaimed a 200-mile EEZ for the United States,[27] notwithstanding, again, that we had not (and still have not) ratified the 1982 Convention. (The Government's rationale, given in the Statement on United States Oceans Policy accompanying the Proclamation, was that the EEZ had become established in customary international law, and so accession to the Convention was not necessary[28].

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[26] Proclamation No. 267, 59 Stat. 884.
[27] Proclamation 5030, 1 Public Papers of the President—Ronald Reagan 380 (March 10, 1983); 48 Fed. Reg 10, 605 (1983)
[28] I Public Papers of the President, Ronald Reagan, March 10, 1983, pp. 378-79.

## II. How the States Got What Little They Got.

Disputes as to the division of offshore *jurisdiction* between the federal and state governments have historically arisen mostly in the context of *title* to offshore submerged lands. It had long been settled that the States acquired title to the submerged lands of all inland waters within their territories upon admission to the Union. *See,* e.g., *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212, 228, 229 (1845).[29] But in 1945, the United States challenged that assumption. The question in that first "tidelands" case, brought by the federal government against California, was whether the states owned submerged lands off their coasts seaward of the ordinary low-water mark (the ordinary low-water mark was the seawardmost limit of state ownership then conceded by the federal government.) 1945, of course, was the same year as President Truman's Proclamation on the Continental Shelf. The United States Supreme Court swiftly decided that the federal government, and not California, enjoyed "paramount rights"—something apparently not the equivalent of title—to the submerged lands seaward of the coastline of California. *United States v. California*, 332 U.S. 19, 39 (1947). In short order this principle was applied to the States of Louisiana and Texas. *United States v. Louisiana*, 339 U.S. 699, 704-705 (1950); *United States v. Texas*, 339 U.S. 707, 718-720 (1950).

Following the decisions in the *California*, *Texas* and *Louisiana* cases, the federal-state dispute focused on the location of the boundary between the state-owned tidelands and beds of inland waters (*e.g.,* bays), and the federally owned offshore submerged lands. In the *California* case, a Special Master was appointed to locate the legal coastline of California and, in the process, determine the status, as inland waters or not, of several water bodies such as Monterey

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[29]The equal-footing doctrine holds that subsequently admitted states attain to all the incidents of sovereignty enjoyed by the original 13 states, one of which is ownership and dominion over tidelands within state borders. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183 (1891); *but see Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198 (1984).

Bay and the Santa Barbara Channel. Extensive hearings were conducted in 1952 before the Special Master on these questions.[30]

From the perspective of the coastal States, the following can be said of these early jurisdictional disputes:

1. The whole matter of offshore jurisdiction, and hence of boundaries separating federal and state submerged lands, arose at the least propitious time in American history.

2. From the outset, these disputes have been perceived by the Supreme Court as ineluctably entailing foreign relations; from this perception an undue deference has been accorded the views of the federal government, the custodian of our foreign relations.

3. This deference has encouraged the United States to take absurdly conservative positions as to the location of its baselines from which its offshore zones are limited. This has been done nominally in the name of foreign relations, but in truth for the purpose of enlarging that government's Outer Continental Shelf holdings. Its consistent refusal to employ straight baselines where the geography begs for them is one such example.

4. While it niggardly delimits its baselines, the United States continues to make expansionist claims to ocean resources, redolent of the Truman Proclamation in 1945. In 1976, the United States unilaterally claimed a 200-mile fishery zone; in 1983 President Reagan

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[30] An order of the Supreme Court, 342 U.S. 891 (1951), directed the Special Master to conduct hearings and make recommendations to the Court on the following questions:

> Questions 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water areas to be determined?
>
> Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?
>
> Question 3. By what criteria is the ordinary low watermark on the coast of California to be ascertained?

declared a 200-mile exclusive economic zone, enlarging by a factor of four the submarine areas claimed as sovereign U.S. property. And in 1988 he declared a 12-mile territorial sea. Yet, by virtue of language in prior Supreme Court opinions, the states may receive no benefits from these acts of American foreign policy in the law of the sea.

5. The Department of the Interior has been the States' *bete noire* in this episode. As one articulate writer has commented:

> [T]he principal engine for expansion of United States government continental shelf claims during the 1930s and early 1940s was the Interior Department, and in particular its Secretary, Harold Ickes. Secretary Ickes worked persistently to gain control of offshore lands for the federal government and to extend the boundary of the continental shelf for the nation. He was willing to pursue any available means including legislation, litigation, and executive proclamation.[31]

When the Court in 1969 sent its clearest signal that it would maintain obeisance to the positions of the Government in these cases, the Government formed in 1970 an inter-agency committee, commonly called the "Baselines Committee." The function of this Committee was to determine the United States' baseline, and delimit the outer boundaries of the territorial sea, contiguous zone, and now, the exclusive economic zone. Most of the Committee's membership—representatives of the Departments of State, Defense and Commerce, for example—is unobjectionable enough. But the participation of the Department of the Interior on the Committee has long chafed the States. Interior would seem to have no cause to enter the business of formulating foreign policy, save as that policy serves an ulterior purpose—determining the boundary between state submerged lands and the outer continental shelf, which the Department manages.

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[31] Hollick, U.S. Foreign Policy and the Law of the Sea, 103-104 (1981).

Events immediately preceding the 1947 decision in *United States v. California* (the leading case in this area of federal-state relations) clearly foreshadowed that decision:

- December 18, 1944. The United States Supreme Court decides *Korematsu v. United States*, 323 U.S. 215, 222, upholding, for all intents and purposes, the establishment of detention centers for American citizens of Japanese ancestry.

  > *Korematsu v. U.S.* . . . represents the nefarious impact that war . . . can have on institutional integrity and health.[32]

- August 14, 1945. The Allies are victorious over Japan. The formal surrender takes place aboard the U.S. Missouri on September 2, 1945.

- September 28, 1945. President Truman signs Executive Proclamation 2667, declaring 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." 59 Stat. 884. Soon afterwards, in an effusion of jingoistic hyperbole, Professors Clark and Renner of Columbia University write that the proclamation constitutes "one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny." Clark and Renner, "We Should Annex 50,000,000 Square Miles of Ocean," Saturday Evening Post 16 (May 4, 1946).

With these events as prologue, it should have come as no surprise that the Supreme Court held in 1947 that the United States, and not California, was possessed of paramount rights in the submerged lands within the three-mile belt.[33] The Court's rationale discloses the profound influence of those events:

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[32] Lawrence Tribe, *American Constitutional Law* 1452 (2d ed. 1988). *See also* The Japanese-American Cases – A Disaster, 54 Yale L. Journal 489 (1945).

[33] On October 19, 1945 the federal government filed its suit against California to establish its title to the submerged lands. Paragraph 2 of the complaint against California alleges:

> At all times herein mentioned, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low watermark on the coast of California and outside of the inland

> 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.

*United States v. California* 332 U.S. 19, 35 (1947).

A glance at some more of the history provides a deeper understanding of the 1947 decision.

At most other times in American history, the title of the States to the offshore submerged lands would have been secure. Even the Supreme Court conceded, in its 1947 decision in the *California* case, that prior to the dispute it had generally been understood that the States owned the natural resources of the submerged lands within the three-mile belt. The Court cited for this understanding *Manchester v. Massachusetts*, 139 U.S. 240, *Louisiana v. Mississippi*, 202 U.S. 1, 52, and *The Abby Dodge*, 223 U.S. 166. 332 U.S. at 36-37.

The recognition of the States' title in administrative actions of the federal government had been as consistent as California could have hoped. F.W. Clements, for 35 years a law officer in the Department of the Interior, testified before Congress in 1939 that all requests for entry or claim in the submerged lands during his experience in the department "were uniformly turned down, since they were deemed the property of the states."[34] Indeed, even the acquisitive Secretary Ickes denied an application for a federal mineral prospecting permit in the submerged lands off the coast of California in 1933 with the following words:

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> waters of the state, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the state of California.

[34] Hearings on S.J. Res. 208 (1939), 200.

> [N]o rights can be granted to you either under the Leasing Act of February 25, 1920 (41 Stat. 437), or under any other public-land law to the bed of the Pacific Ocean either within or without the three-mile limit. Title to the soil under the ocean within the three-mile limit is in the state of California, and the land may not be appropriated except by authority of the State. A permit would be necessary to be obtained from the War Department as a prerequisite to the maintenance of structures in the navigable waters of the United States, but such a permit would not confer any rights in the ocean bed.[35]

As one observer has written, "What clearer declaration of policy could be made by one in high authority, especially one charged with administration of the public lands of the United States and presumably knowing the law and settled policies in regard to what were, and what were not, considered lands of the United States?"[36]

Notwithstanding these unequivocal recognitions of the states' title by the Supreme Court and by the Department of the Interior, the events within the government during the decade or so preceding the filing of the complaint against California should have hinted at a forthcoming change in the government's position. The leading players in these events were, again, Harold Ickes, and as well President Roosevelt himself. One writer has observed:

> President Franklin D. Roosevelt's willingness to extend coastal jurisdiction for a variety of purposes was particularly striking. In the decade prior to the Truman proclamations, his proclivities resulted in a number of claims characteristic of a regional or middle power strong enough to defy the prevailing legal system, yet too weak to impose a new legal regime.[37]

As examples, the United States enacted anti-smuggling legislation in 1935 which permitted the president to declare a customs-control area extending 100 miles north and south from where a

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[35] Letter of Harold L. Ickes, Secretary of the Interior, to Olin S. Proctor, dated December 22, 1933, reprinted in Hearings on S.J. Res. 83 and 92 (1939), 23-24; Hearings on H.J. Res. 176 and 181 (1939), 172-173; and Hearings on H.J. Res. 118 et al. (1945), 18.
[36] E. Bartley, The Tidelands Oil Controversy, 129.
[37] Hollick, *supra*, p. 19.

suspected ship was hoving, and creating an additional band of 50 miles' width seaward of the 12-mile customs zone.[38]

In 1939, the United States successfully proposed to an inter-American meeting of ministers of foreign affairs that neutrality zones be created around the hemisphere to be patrolled individually or collectively by the American republics. The resulting Declaration of Panama adopted the U.S. proposal for a defense zone which extended 300 miles and more from shore. President Roosevelt personally drew the connecting straight lines of the zone, which in some areas extended the defense area considerably beyond 300 miles.[39]

On July 1, 1939, Roosevelt wrote the Attorney General and the Secretaries of State, Navy and Interior:

> I am still convinced that: (a) federal as opposed to state jurisdiction exists below low-watermark . . . and that (b) federal jurisdiction can well be exercised as far out into the ocean as it is mechanically possible to drill wells.
>
> I recognize that new principles of international law might have to be asserted but such principles would not in effect be wholly new, because they would be based on the consideration that inventive genius has moved jurisdiction out to sea to the limit of inventive genius.[40]

Meanwhile, Secretary Ickes was, not inexplicably, coming round to his President's point of view. Precisely why is unclear but, whatever Ickes' motives, by 1943 the forces that would lead two years later to both the Continental Shelf Proclamation and the filing of the *California* case were in one motion. In that year, General Land Office officials wrote Ickes that the wartime situation offered an ideal opportunity to strike "from our own thinking and international law the shackles of the three-mile limit for territorial waters. . . . In the interest of national and domestic

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[38] Anti-Smuggling Act, 49 Stat. 517; 19 U.S.C. 1701-1711, August 3, 1935.
[39] 15 U.S. Department of State, Foreign Relations of the United States 1939, 36-37, 765, as cited in Hollick, *supra*, pp. 19-20.
[40] Unpublished memorandum from National archives Record Group 48, as quoted in Hollick, *supra*, p. 30.

security" the United States should adopt a "line of 100 or 150 miles from our shore" thereby taking the United States "beyond the continental shelf and reserving this valuable asset for the United States . . ."[41] Secretary Ickes took these notions to the president, who immediately embraced them. On June 9 Roosevelt wrote Secretary of State Cordell Hull:

> I think Harold Ickes has the right slant on this. For many years, I have felt that the old three-mile limit or a 20-mile limit should be superseded by a rule of common sense. For instance, the Gulf of Mexico is bounded on the south by Mexico and on the north by the United States. In parts of the gulf, shallow water extends very many miles off shore. It seems to me that the Mexican government should be entitled to drill for oil in the southern half of the gulf and we in the northern half of the gulf. That would be far more sensible than allowing some European nations, for example, to come in there and drill.[42]

The Truman proclamations were issued on September 28, 1945. Precisely three weeks later, the federal government sued California in the Supreme Court's original jurisdiction.

(California chose, in pleading to the government's complaint, to avoid the pitfalls of omission. Its answer was in three volumes of 822 printed pages, and weighed 3 pounds, 9 ounces.[43] The answer must have adduced every known incident that could be construed as an acknowledgment of the state's title to the submerged lands. The United States promptly moved the Court for an order striking the answer on the ground of "excessive prolixity." Following negotiations, California filed a more succinct answer on May 21, 1946,[44] and the case was argued on March 13 and 14, 1947.)

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[41] Unpublished memorandum from C.E. Jackson et al. to Secretary Ickes dated May 28, 1943, quoted in Hollick, *supra*, p. 33.

[42] Foreign Relations of the United States, 1945, II, 1482, quoted in Hollick, pp. 34-35.

[43] Statement of Secretary Ickes in Hearings on S.J. Res. 48 and H.J. Res. 225 (1946), 9. A copy of this answer is on file in the library of the Office of the Attorney General, San Francisco.

[44] In the United States' motion to strike, dated March 1946, the government cites the Punishment of Richard Mylward for Drawing, Devising, and Engrossing a Replication of the Length of Six Score Sheets of Paper. In that case according to the government,

Before the case was decided, Congress enacted the first of three bills that would have quitclaimed any federal interest in the submerged lands to the State.[45] It was promptly vetoed by President Truman.[46]

The decision in the *California* case, about which, in hindsight, no one should have been surprised, was handed down June 23, 1947. In it, the Supreme Court declined to embrace the government's primary submission that it owned the submerged lands in issue, and chose instead to achieve the same result—insofar as proprietary rights in the oil were concerned—by adopting the paramount-rights argument. An incident of these "paramount rights," wrote Justice Black for the majority, is "full dominion over the resources of the soil under that water area, including oil." The most perspicacious analysis of the Court's decision is found in the dissenting opinion of Justice Frankfurter, who wrote:

> [The court does not find] that the United States has proprietary interests in the area. To be sure, it denies such proprietary rights in California. But even if we assume an absence of ownership or possessory interest on the part of California, that does not establish a proprietary interest in the United States.
>
> Of course the United States has "paramount rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights.

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> [T]he filing of a replication amounting to six score sheets of paper which "might have been well contrived in 16 sheets of paper", so outraged the court that, in addition to imposing a fine upon the pleader, it ordered that the warden of the fleet take the pleader into custody and "bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed replication * * * and put the same Richard's head through the same hole * * * and then, the same so hanging, shall lead the same Richard, bareheaded and barefaced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall * * *."

The Supreme Court's records do not disclose whether the same fate was meted the Attorney General of California.

[45] H.J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946).

[46] 92 Cong. Rec. 10660 (1946). The veto was sustained. 92 Cong. Rec. 10745 (1946).

> Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?
>
> * * * To declare that the Government has "national dominion" is merely a way of saying that *vis-à-vis* all other nations the Government is the sovereign. If that is what the court's decree means, it needs no pronouncement by this court to confer or declare such sovereignty. If it means more than that, it implies that the Government has some proprietary interest. That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States.
>
> * * * On a fair analysis of all the evidence bearing on ownership, then, this area is, I believe, to be deemed unclaimed land . . . . It is noteworthy that the court does not treat the president's proclamation in regard to the disputed area as an assertion of ownership. See Exec. Proc. 2667 (September 28, 1945) 10 F.R. 12303. If California is found to have no title, and this area is regarded as unclaimed land, I have no doubt that the president and the congress between them could make it part of the national domain . . .[47]

(The Court's 1947 *California* opinion foreshadowed the decision it would make nearly 30 years later in *United States v. Maine*.[48] 420 U.S. 515 (1975). There it held that there was sparse historical support for the proposition that the 13 original colonies acquired separate ownership of the three-mile belt or the soil under it. That was so, wrote the Court, notwithstanding that the colonies' revolution gave them elements of the sovereignty of the English crown.[49])

The federal government sued two Gulf Coast States in short order, and succeeded against each in 1950. The Court found that Louisiana's claim to the lands underlying the marginal sea and beyond were no more compelling than California's claims.[50] The Court also rejected Texas's claim, notwithstanding Texas's existence as an independent republic prior to admission

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[47] 332 U.S. at 43-45.
[48] 420 U.S. at 43-45.
[49] 332 U.S. at 31-33.
[50] *United States v. Louisiana*, 339 U.S. 699, 704-705 (1950).

to statehood.[51] Ironically, the same principle upon which California and Louisiana had grounded their arguments, the equal-footing doctrine, defeated Texas's argument. Texas argued that as a republic, it had possessed full sovereignty over the territorial sea as well as ownership of it. The court held, however, that Texas had relinquished sovereignty and ownership to the national government upon admission to the Union. That then placed Texas on an "equal footing", wrote the Court with the other States.[52]

Following its 1947 decision in the *California* case, the Court appointed William H. Davis of New York as Special Master to delineate the limits of inland waters along certain disputed segments of the California coast. The Special Master's report was filed with the Court in 1952,[53] but before the Court took it up, Congress passed the Submerged Lands Act.[54] That Act "restored" to the seaboard states the rights to their offshore submerged lands, rights Congress evidently thought the *California* decision of 1947 had divested.[55] The Act quitclaimed to California and the other coastal states whatever interest the federal government may have had in the lands and natural resources therein lying within three geographic miles seaward of the "coast line";[56] in the instances of Texas and of Florida, on Florida's Gulf Coast, the grant of the Act, as decided in later cases, operates to nine geographic miles. Special Master Davis's report reposed in the files of the Court until 1965, when at last it was acted on.[57]

The Submerged Lands Act defined "coast line" as "the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the

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[51] *United States v. Texas*, 339 U.S. 707, 718-720 (1950).
[52] 339 U.S. at 718.
[53] *United States v. California*, 344 U.S. 872 (1952).
[54] 43 U.S.C. §§1301-43 (1976).
[55] *See United States v. Louisiana*, 363 U.S. 1, 28 (1960).
[56] 43 U.S.C. at §1311(b)(1) (1976).
[57] United States v. California, 381 U.S. 139 (1965)

seaward limit of inland waters."[58] That latter term has been the principal point of contention in the fifty-four years of litigation, virtually all of which has occurred in the Supreme Court's original jurisdiction,[59] following passage of the Act.

At the same time as its passage of the Submerged Lands Act, Congress enacted the Outer Continental Shelf Lands Act, which declared that the subsoil and seabed of the outer continental shelf -- that is, beyond the submerged lands confirmed in the States -- appertain to the United States and are subject to its jurisdiction, control, and power of disposition. The Department of Interior, of course, administers the OCSLA.[60]

## III. What the States Now Have—That Is To Say, How The Federal Government Has Designed To Divide Its Offshore Zones With The States.

Because of the 1947 *California* decision, what jurisdiction the States now enjoy in offshore zones exists mostly by dint of the largess of Congress. That is to say, even though a State's boundaries extend three or even, in two cases, nine nautical miles from the coast, the States basically possess there only what authority Congress confers on them.

Still, the decision of the Supreme Court in *Skiriotes v. Florida*[61], has not expressly been overruled:

> If the United States may control the conduct of its citizens upon the high seas, we see no reason why the state of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with the acts of Congress.

The court held in *Skiriotes* that Florida had a legitimate interest in regulating its citizens' fishing activities in waters even beyond its borders. *Skiriotes* is a maritime application, or

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[58] *Id.* At §1301(c).
[59] The single exception is *United States v. Alaska*, 442 U.S. 184, 186 n.2 (1975).
[60] 43 U.S.C. at §1332(a).
[61] 313 U.S. 69 (1941)

extension, of the preemption doctrine, which doctrine has its constitutional origin in the Supremacy Clause of the U.S. Constitution. Ordinarily, then, one would think that the States would be free to regulate *within* their boundaries, except when a statute of Congress acted to "occupy the field." *See DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 127 (1973). The Paramount Rights Doctrine, however, as the past 40 years have shown, has served to turn the preemption rule on its head: Now, it seems, the States may not act unless Congress specifically permits them.

There are a host of federal statutes that spell out these divisions of authority, between nation and state, in the offshore zones of the United States, but five are most pertinent.

A. The Submerged Lands Act And The Outer Continental Shelf Lands Act of 1953.

This pair of statutes acted to divide the Continental Shelf of the United States as between the nation and state. The first was to "restore" to the coastal states the rights to the subsoil and seabed within the territorial sea that were confirmed in the federal government in the 1947 *California* decision, and the second to establish federal authority over the balance of the Shelf. As observed in the second section of this paper, the part of the Continental Shelf that was apportioned to the coastal States in this pair of statutes was not expressed in terms of the area lying within the territorial sea (or as it was sometimes called then, the "marginal sea"). Instead, the grant extended to a distance of three nautical miles from the "coastline" of the coastal states, with, as it turned out, two exceptions, in the cases of Texas and Florida. (Texas's grant is nine miles, as is Florida's, on its Gulf Coast only.) The geographic limits of the grants are expressed in sections 2(a) and 2(b) of the Submerged Lands Act, which contain no provision for an

extension of state jurisdiction under the act should the United States proclaim a broader territorial sea.[62]

B. The Clean Water Act, 33 U.S.C. §§ 1251, et seq.

Under this statute, a State may regulate water quality within the territorial sea if it has developed and gotten "certified" by the United States a water-quality program under section 402 of the act. Otherwise the Environmental Protection Agency administers the program.[63]

C. The Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801, et seq., as amended.

This statute, which formerly established the Fishery Conservation Zone, now applies to the United States Exclusive Economic Zone ("EEZ") proclaimed by Presidential Proclamation 5030 (March 3, 1983). The EEZ is defined in Proclamation 5030 (and in Article 57 of the Law of the Sea Convention) as a zone extending "to a distance of 200 miles from the baseline from which the breadth of the territorial sea is measured."

Under the FCMA, the inner boundary of the zone is "a line coterminous with the seaward boundary of each of the coastal states."[64] The expression "seaward boundary of the coastal state" most probably intended to refer to the seaward limit of the lands granted under the Submerged Lands Act, and so the United States' EEZ for FCMA purposes off the coast of California is 197 miles wide. But for international purposes the EEZ is only 188 miles wide, since it lies adjacent to the territorial sea, which is 12 miles in breadth. Convention, Article 55. Off the coasts of Texas and Florida, the EEZ for FCMA purposes is 191 miles wide, while for international purposes it is 188 miles wide. Thus, while the 1986 amendment to the FCMA did

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[62] Cf. *United States v. California*, 381 U.S. 139, 166-167 (1965).
[63] Federal Water Pollution Control Act, § 402 (a)
[64] 16 U.S.C. § 1802(6).

not substantively change any of the state jurisdiction previously enjoyed under the Act, it did create inconsistencies in the geographic reach of the EEZ.

Nevertheless, the FCMA does provide two examples of Congress not intending to occupy the field. First, it left in the States the authority to regulate fisheries within the area granted by the Submerged Lands Act. Second, under the *Skiriotes* holding, the States have the right to regulate fishing, beyond their Submerged Lands Act grants and into the FCZ, in the case of fisheries for which the fishery management councils have not completed "management plans." 16 U.S.C. §§ 1852(h), 1855(g); and 1856(3); *People v. Weeren*, 26 Cal.3d 654, 662-663 (1980).

D. The Coastal Zone Management Act of 1972.

Under this statute, federally undertaken activities as well as federally regulated activities in the "coastal zone" are required to be consistent with the coastal State's "coastal management program".[65] Until 1990, the coastal zone was defined in 16 U.S.C. section 1453(1) as extending "seaward to the outer limit of the United States territorial sea." When the statute was written, of course, the territorial sea of the United States extended merely to three nautical miles from the coastline; since December 1988; it extends to 12 nautical miles. Were the States' "consistency" powers correspondingly extended? Needless to say, there has been no agreement whatsoever on this score.[66]

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[65] 16 U.S.C. 1451 *et seq.*

[66] President Reagan's Proclamation of December 27, 1988 expressly stated its intention that the expansion of the territorial sea from 3 to 12 miles was to have no effect on domestic legal issues such as the allocation of jurisdiction between the States and the federal government. It stated that nothing in it "extends or otherwise alters existing federal or state law, or any jurisdiction, rights, legal interests, or obligations derived therefrom." 54 Fed. Reg. 777, (1989). Prior to the issuance of the Proclamation, the United States Department of Justice rendered a legal opinion stating that "the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act," but concluded that "the effect of the proclamation on the CZMA is not entirely free from doubt, and that the effect of the expansion other federal statutes raises complex questions." Memorandum to Abraham D. Sofaer, Legal Advisor, Department of State, from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, dated October 4, 1988, p. 2, *reprinted in* 1 Terr. Sea J. 1 (1990).

Such disagreement is now, however, purely academic. In 1990, section 1453(1) was amended to define the zone as extending "seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 *et seq.*), the Act of March 2, 1917, (48 U.S.C. 749), the covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 (48 U.S.C. 1681 note), or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705), as applicable." In short, the State's consistency powers were not extended; they remain at either the three-mile mark or, in the case of Texas and Florida, at the nine-mile mark.

Expressing these areas of state jurisdiction by reference to the U.S. offshore zones identified in the first section of this paper, we have the following:

1. Territorial Sea: Within the 12-mile territorial sea the States have jurisdiction over Continental Shelf resources to the limits of their Submerged Lands Act grant (generally 3 miles). Too, they would seem to enjoy their general police powers (except where preempted), but since most state boundaries, by their constitutions, end at the old territorial sea limit of three miles, presumably their police powers still end there, and do not extend to the new 12-mile limit of the territorial ea. Thus, adjacent to California, for example, there is a 9-mile-wide belt that is fully the territory of the United States—every bit as much as Monterey County[67]--but that lies within no state.

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The California Attorney General has 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 3 miles to 12 miles from the shoreline.

Letter to Peter Douglas, Executive Director, California Coastal Commission, from John A. Saurenman, Deputy Attorney General, dated March 15, 1989, *reprinted in* 1 Terr. Sea J. 39 (1990).

[67] With the sole exception of the right of foreign vessels to make "innocent passage." See 1958 Geneva Convention on the Territorial Sea on the Contiguous Zone, Article 14, and 1982 Convention on the Law of the Sea, Articles 17-26.

States that have a water-quality program certified under section 402 of the Clean Water Act may regulate water quality within the territorial sea, and may insist upon "consistency" with its state coastal management program, under the coastal Zone Management Act within the territorial sea.

2. The Contiguous Zone: The contiguous zone extends from 12 to 24 miles to sea. The States have no jurisdiction in it, save perhaps *Skiriotes* jurisdiction.

3. The Exclusive Economic Zone under the FCMA: This zone, strictly speaking, is one that begins not at the coastline, but rather at the seaward limit of the State's Submerged Lands Act grant. Within the area of that grant then, the State has plenary authority over fisheries. Within the EEZ under the FCMA it has authority only over fisheries as to which no fishery management plan has been developed.

4. Continental Shelf: The States have the limited continental shelf rights granted to them by the Submerged lands Act of 1953 -- again, generally speaking, to a distance of 3 nautical miles from the coastline. The federal government's rights in the continental shelf—at least in the view of the Solicitor of the Department of the Interior—now extend to a minimum distance of 200 nautical miles from the baselines from which the territorial sea is measured.

5. The Exclusive Economic Zone under International Law: Since the Exclusive Economic Zone, for purposes other than the FCMA, is an area "*beyond* and adjacent to the territorial sea," the American EEZ is now 188 miles in breadth, and not the 197 miles it was when it was first proclaimed on March 10, 1983. The states (excepting Florida and Texas) would appear to have virtually no rights in the EEZ, save for very limited *Skiriotes* rights to regulate its citizens with respect to fisheries for which no fishery management plan has been developed, and perhaps some tenuous consistency authority. Several bills have been introduced

in the Congress for the purpose of sharing EEZ authority with the States, but none of the bills has progressed appreciably toward enactment.

## CONCLUSION

While our national government since 1945 has quite consistently pushed its maritime claims seaward, it has at the same time drawn its legal coastline or "baseline"—the line from which most offshore zones are measured—in the most conservative ways possible. As an example, in the 1960's the federal government abandoned a long-maintained position of measuring its territorial sea from "straight baselines" connecting the outermost of coastal islands—even though it was a perfectly legal practice, and done in the most conservative manner possible.[68] What explains this apparent anomaly? When the baseline is moved landward, the Submerged Lands Act jurisdiction of the States correspondingly moves landward.

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[68] *United States v. Louisiana* (Alabama and Mississippi Boundary Case) 470 U.S. 93, 107 (1985).