RECENT DEVELOPMENTS

LAW OF THE SEA—SUBMERGED LANDS—A STATE MUST EXERCISE SUBSTANTIAL, CONTINUOUS, AND RECOGNIZED AUTHORITY TO ESTABLISH A BODY OF WATER AS A HISTORIC BAY.

In April 1967 the State of Alaska offered to sell, at competitive bidding, an oil and gas lease to a tract of approximately 2,500 acres of submerged lands located in lower Cook Inlet[1] on Alaska's southwestern coast. One month later the United States brought suit in the United States District Court for the District of Alaska,[2] asserting that its rights to the resources therein precluded Alaska's action and seeking (1) a temporary restraining order to enjoin Alaska from issuing mineral leases[3] and (2) a ruling to quiet title to the lands. The plaintiff advanced three arguments in support of its contention,[4] alleging primarily that the area claimed was not "inland water" and, therefore, had not been "granted"[5] to the state by the Submerged Lands Act of 1953 (SLA).[6] The district court determined that lower

[1] The tract in question is more than three geographical miles, or approximately 3.45 land miles, from the shore of the inlet.

[2] United States v. Alaska, 352 F. Supp. 815. Under article III, section 2, clause 2 of the United States Constitution, the case would have qualified for the original jurisdiction of the United States Supreme Court. United States v. West Virginia, 295 U.S. 463, 470 (1935). No reason was given as to why the United States chose not to bring an original action in that Court. United States v. Alaska, 422 U.S. 184, 186 n.2 (1975).

[3] The motion was denied on the ground that no risk of irreparable harm existed. *See generally* 7 VAND. J. TRANSNAT'L L. 225 (1973) [hereinafter cited as VANDERBILT].

[4] The arguments were reported in VANDERBILT, *supra* note 3, at 225, as follows:

> (1) the seaward limit of the area in which defendant has exclusive rights to the natural resources of the subsoil and seabed of Cook Inlet is limited to three geographical miles seaward from the baseline from which the territorial sea is measured; (2) the United States has exclusive rights to the natural resources of the subsoil and seabed of lower Cook Inlet since the submerged land in dispute is neither inland waters nor a historic bay; and (3) the executive branch of the government has denied that lower Cook Inlet is a historic bay and the determination involved is a political decision not cognizable by the court.

[5] The grant is more in the form of a recognition and confirmation of state ownership coupled with a "quitclaim" of "all right, title, and interest of the United States, *if any it has*, in and to all said lands, improvements, and natural resources . . . ." 43 U.S.C. § 1311(b)(1) (1970) (emphasis added).

[6] 43 U.S.C. §§ 1301-15 (1970). Section 6 (m) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. ch. 2, note, provides that the SLA "shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." Section 1311(a) of the SLA reads:

> It is determined to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provi-

Cook Inlet was a "historic bay"[7] and was to be considered "inland water" within the meaning of the SLA.[8] Consequently, the court ruled, "the subsurface resources of lower Cook Inlet are vested exclusively in the State of Alaska,"[9] under the provisions of the SLA.[10] The United States Court of Appeals for the Ninth Circuit affirmed in a per curiam opinion,[11] holding that "the law applied by the district court was correct and its findings were not clearly erroneous . . . ."[12] The plaintiff appealed to the United States Supreme Court and was granted certiorari "because of the importance of the litigation and because the case presented a substantial question concerning the proof necessary to establish a body of water as a historic bay."[13] *Held*, reversed and remanded. A state must exercise substantial, continuous, and recognized authority to establish that a body of water is a historic bay. *United States v. Alaska*, 422 U.S. 184 (1975).

The controversy between the Federal Government and the states over apportionment of the seabed resources of our coastal waters has created a vexing problem for the judiciary as well as for private industry. As recent technological developments have enabled more and varied interests to follow the oil companies in their move away from the dry land and into the sea, private sectors are increasingly in search of a sovereign to secure their interests in the submerged lands.[14] Historically, the coastal states had been thought to be the proper sovereigns.[15] This belief had been based on several United States Supreme Court decisions, notably the 1845 case of

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sions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . .

The Act defines a state's boundaries by declaring that:

> The term "boundaries" includes the seaward boundaries of a State . . . as they existed at the time such State became a member of the Union . . . but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean . . . .

43 U.S.C. § 1301(b) (1970). The crucial definition, for the purposes of this case, lies in section 130(c) of the SLA, which reads: "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of *inland waters* . . . ." (emphasis added).

[7] The court relied on the definition of "inland water" arrived at in the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective for United States Sept. 10, 1964) [hereinafter cited as Convention].

[8] The definitions of the Convention were adopted by the Supreme Court for purposes of the SLA in United States v. California, 381 U.S. 139, 161-67 (1965).

[9] 352 F. Supp. at 821.

[10] 43 U.S.C. §§ 1301, 1311 (1970).

[11] United States v. Alaska, 497 F.2d 1155 (1974).

[12] *Id.* at 1158.

[13] 422 U.S. at 187.

[14] Note, *The Seaward Extension of States: A Boundary for New Jersey under the Submerged Lands Act*, 40 TEMP. L. Q. 66, 73 (1966) [hereinafter cited as *Seaward*].

[15] *See, e.g.*, Note, *Tidelands—Definition of "Inland Waters" As Used in Submerged Lands Act*, 40 TUL. L. REV. 444 (1966) [hereinafter cited as *Tidelands*].

Pollard's Lessee v. Hagan.[16] The rule in *Pollard's* case was that the shores of navigable waters and the soils under them were not granted to the United States by the Constitution but were reserved to the states respectively.[17] In *Smith v. Maryland*[18] the Court further clarified that "[w]hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies . . . ."[19] Finally, dicta in *Manchester v. Massachusetts*[20] had intimated that the state had the power of an independent nation over the sea adjacent to its coast.[21] However, Congress had never acknowledged that state boundaries extended to the 3-mile limit.[22] As the value of mineral rights in submerged lands became apparent, the Federal Government began contesting the state's asserted ownership and proposing legislation to expand federal control.[23]

Upon failure to secure congressional relief, the United States sought a judicial declaration that the *Pollard* rule was not applicable to the marginal sea.[24] In *United States v. California*[25] the United States Supreme Court ruled that "the Federal government rather than the state has paramount rights in and power over that [3-mile marginal] belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[26] The decision was met with hostility.[27]

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[16] 44 U.S. (3 How.) 212 (1845).

[17] *Id.*

[18] 59 U.S. (18 How.) 71 (1855).

[19] *Id.* at 74.

[20] 139 U.S. 240 (1891).

[21] *Id.* at 264. The Court stated:

> The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State . . . . Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea . . . .

Id.

[22] *Seaward, supra* note 14, at 74.

[23] *Tidelands, supra* note 15, at 445 *citing* Ireland, *Marginal Seas Around the States*, 2 LA. L. REV. 252 (1940). *See also* United States v. California, 381 U.S. 139, 180 (dissenting opinion).

[24] United States v. California, 332 U.S. 19 (1947), had issued numerous mineral leases in coastal waters, and the United States reacted by bringing suit for an injunction and declaration of rights. *Id.*

[25] *Id.*

[26] *Id.* at 38-39.

[27] One writer suggested the following:

> Objection to the United States' claim was made because it was argued this was a Federal intrusion on states' rights. 99 Cong. Rec. 2487-2538 (1953). Probably more important, however, was the loss of revenue anticipated by the coastal states since the value of the oil under the submerged lands was estimated at between $20 billion and $250 billion. *Id.* at 2509, 2521 (1953).

2 N.Y.U.J. INT'L L. & POL. 374 n.4 (1969) [hereinafter cited as N.Y.U.J.].

In response to the *California* decision, Congress passed the SLA[28] with the clear intention of reinstating the state title abrogated by the Court's ruling.[29] The SLA, in effect, quitclaimed to the states all federal rights in the marginal sea up to 3 miles from the "coastline,"[30] defining "coastline" partially as "the line marking the seaward limit of inland waters."[31] An early draft of the SLA had described "inland waters" as including "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies which join the open sea."[32] The act as passed, however, contained no definition of the term. This omission left open to speculation the exact location of the 3-mile border which the states could claim.

The coastline of California was the first to undergo scrutiny. The *California* Court had appointed a special master to define more clearly the apportionment of ownership under its 1947 ruling[33] and his report had been filed in 1952.[34] In 1964 the case was reopened for evaluation of the report in light of the SLA and for final determination of rights.[35] Discussion centered on two problem areas of the SLA: (1) the limitation of state claims to 3 miles and (2) the definition of "inland waters." The Court noted that the 3-mile limitation was inconsistent with the philosophy behind the SLA, which had been to restore to the states all the waters within their historic boundaries,[36] but concluded that "to the extent the limitation would come into play, the philosophy was modified."[37] Next the Court declared that in removing the definition of "inland waters" from the SLA, Congress had plainly shown "its intent to leave the meaning of the term

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[28] 43 U.S.C. §§ 1301-15 (1970).

[29] *See generally* 1953 U.S. CODE CONG. & AD. NEWS 1385. After making an unfavorable assessment of the *California* decision, the Committee on the Judiciary (H.R. REP. No. 1778, 80th Cong., 2d Sess. (1953)) wrote that: "We are certain that until the Congress enacts a law consonant with what the States and the Supreme Court believed for more than a century was the law, confusion and uncertainty will continue to exist, titles will remain clouded, and years of vexation and complicated legislation will result." 1953 U.S. CODE CONG. & AD. NEWS at 1423.

[30] *Tidelands, supra* note 15, at 446.

[31] 43 U.S.C. § 1301(c) (1970); *see* note 6 *supra*.

[32] S. REP. No. 133, 83d Cong., 1st Sess. 18 (1953).

[33] The order calling for the appointment of a special master appears in United States v. California, 334 U.S. 855 (1948). William H. Davis, Esquire, of New York City was appointed to this position by order of February 12, 1949. United States v. California, 337 U.S. 952 (1949).

[34] The report was filed with the Court on November 10, 1952. United States v. California, 344 U.S. 872 (1952).

[35] United States v. California, 381 U.S. 139 (1965). The United States asserted that certain bays were not included in the congressional grant because of their geographical position. California maintained that the bays constituted "historic bays," were within the state's historic boundaries, and thus came within the meaning of the SLA. *Id.* at 149.

For an explanation of the procedural development of the case see *id.* at 142-50 and Meiners, *Submerged Lands—Submerged Lands Act of 1953—Definition of "Inland Waters,"* 6 NATURAL RESOURCES J. 186, 186-88 (1966).

[36] 381 U.S. at 153-54.

[37] 381 U.S. at 154.

to be elaborated by the courts, *independently of the Submerged Lands Act*."[38] Though the first *California* decision was its only reference for dealing with the term in this context,[39] the Court found that it "clearly indicated that 'inland waters' was to have an international content."[40] The Court revealed that since the time of the first ruling, a settled international definition had been announced in the Convention on the Territorial Sea and the Contiguous Zone (hereinafter referred to as the Convention).[41] It then adopted the provisions of the Convention for the purposes of the SLA, establishing "a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations."[42]

Turning to the Convention's provisions, the majority noted[43] that article 7, paragraph 4 sets a 24-mile maximum width for the mouth of a body of water if the body is to classify as a bay and thereby be deemed inland water.[44] However, article 7, paragraph 6, excepts "historic bays" from this and other requirements.[45] Since the Convention does not define "historic bays," the Court looked to other international sources and ruled that

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[38] *Id.* at 151 (emphasis added).

[39] The Court admitted that it had never precisely defined "inland waters" in the context of bodies of water adjoining the open sea, *id.* at 161-62, stating:

> It immediately appears that the bulk of cases cited by Congressmen during debates on the Submerged Lands Act for the proposition that inland waters have been defined time and time again by the courts deal with interior waters such as lakes and rivers, and provide no assistance in classifying bodies of water which join the open sea. In this latter context no prior case in this Court has ever precisely defined the term.

Id.

[40] *Id.* at 162.

[41] Note 7 *supra*. The Court declared that the position of the United States in the controversy at hand was expressed in the Convention. 381 U.S. at 163-64.

[42] 381 U.S. at 165. This is an unusual declaration for the judiciary to make. Apparently the Court chose to ignore the possibility that the choice by the United States of an international boundary might well be considered an entirely different matter than apportionment of title between the Federal and state governments within that boundary. In fact, the very same year that the SLA was passed, Congress extended the rights of the United States in the ocean bed well beyond the 3-mile limit in the Outer Continental Shelf Land Act, 43 U.S.C. §§ 1331-43 (1970). *See Tidelands, supra* note 15, at 450-51.

Both the United States and California objected to the use of the Convention's definitions. The United States contended that only such meaning as the Court would have given to the SLA as of its enactment date (*i.e.*, prior to the Convention) could be used. 381 U.S. at 164. Certainly this is the only definition that might conceivably have been anticipated by the legislators and have come within the legislative intent.

[43] 381 U.S. at 169.

[44] Article 7, paragraph 4 of the Convention, *supra* note 7, reads:

> If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

[45] Article 7, paragraph 6 of the Convention, *supra* note 7, reads: "The foregoing provisions shall not apply to so-called 'historic bays' . . . ." The exception is also made "in any case where the straight baseline system provided for in section 4 is applied." *Id.*

"[e]ssentially these are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[46] The Court agreed with the special master that California had not traditionally exercised the required dominion over any of the claimed waters.[47]

Justice Black wrote a vigorous dissent in which he investigated the legislative history of the SLA in the two problem areas discussed by the majority and reached different conclusions as to congressional intent.[48] He relied on the same passages of committee reports which the majority found controlling, but reported evidence of a much more consistent philosophy behind the legislation, geared to restoring to the states the *full* extent of their historic boundaries.[49] He found that the definition of inland waters was deleted merely in response to warnings that a purely legislative definition might create embarrassment for the State Department in its foreign relations and that an overly descriptive definition might be read as restrictive, resulting in litigation.[50] The 3-mile maximum placed on the belt to be

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[46] 381 U.S. at 172, *citing Juridical Régime of Historic Waters, Including Historic Bays*, 2 Y.B. INT'L L. COMM'N 1, 13 U.N. Doc. A/CN.4/143 (1962) [hereinafter cited as *Régime*]. The Court summarily decided that, of the bays under consideration which did not qualify under section 4, none were saved by the exception in section 6, relying solely on the special master's conclusions. California contended that "two studies of the criteria for determining historic waters have been made since the Special Master filed his report which show that he applied the wrong standards, thus vitiating his conclusion." 381 U.S. at 173. The Court dismissed this argument, finding no substantial indication of this in his report.

[47] 381 U.S. at 173.

[48] *Id.* at 178-213. Justice Black found it ironic that an act passed expressly to escape the Court's opinion should be construed so as to leave the Court free to determine claims without any reference to the SLA's stated purpose. He disagreed with the Court's adoption of a "formula of its own devising based on one used by the State Department in its handling of foreign affairs." *Id.* at 210. He further criticized the Court for relying solely on the 13-year-old report of the special master, which could not have anticipated either the SLA or the Court's interpretation of its standards. Justice Black believed strongly that a special master should be appointed to consider the facts in light of the new ruling and that California should be given a chance to prove its historic boundaries. He emphasized that:

> Both state and federal court decisions have held as a matter of fact and law that some of the very bays in question here, which the Government argues are not inland waters in the international sense, were within the boundaries of the State and subject to its jurisdiction.

Id. at 212. In one case, People v. Stralla, 14 Cal.2d 617, 96 P.2d 941 (1939), he pointed out, a United States Attorney General appeared amicus curiae in support of state jurisdiction. 381 U.S. at 212.

[49] *Id.* at 185-88.

[50] Justice Black pointed out that the deletion of the definition clause was an action taken in response to the Attorney General's warning that an attempt to describe bays or otherwise define "coast line" in a few words would almost surely result in litigation. *Id.* at 190 & n.28. Justice Black quoted Senator Daniel of Texas as saying: "[T]he striking of these words was not done in any manner to prejudice the rights of the States . . . . I just want to state that for the record . . . ." *Id.* at 191. Black noted that Senator Gordon, whose remarks were relied upon heavily by the majority in its contrary holding, concurred with the Senator Daniel. *Id.* Black then concluded that the elimination of the legislative definition did not alter the

claimed by the states was intended, he reported, to leave "totally undi turbed the validity of their historic claims to the boundaries from which those belts would be measured."[51]

Further, he stated that "[i]f there is anything clear in the legislative history, it is that Congress was not satisfied with the way in which this Court had decided the *California* case and did not approve of the considerations of external sovereignty used there in determining a domestic dispute over title."[52] For the most part, however, his observations went unheeded.

The *California* Court had left unresolved the contention of the United States that no state could maintain a claim to historic waters unless the claim was endorsed by the United States. It ruled only that, *in the case before it*, "with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters,"[53] the disclaimer by the United States that any of the disputed areas were historic waters was decisive. The question arose again when in 1969 another case which had been decided before the SLA's passage, *United States v. Louisiana*,[54] was reopened for consideration in light of the new law. The Court wrestled with the practical effects of applying the *California* ruling in the Gulf of Mexico[55] but upheld its adoption of the Convention's standards.[56] The majority deferred to the judgment of a special master for the job of ruling on historic claims[57] but did disagree with the assertion by the United States that "it can prevent judicial recognition of a ripened claim to historic title merely by lodging a disclaimer with the court."[58] The Court ruled that the disclaimer was not conclusive and added that "it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events."[59]

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original intent of the bill in the slightest degree. Rather, the elimination left it to the states to prove their "historic boundaries," according to "the position in which both they and the Federal Government thought they were for more than a century and a half." *Id.* at 197.

[51] *Id.* at 201. The majority had said that the addition of the 3-mile limitation was fundamental and that it modified the philosophy of the entire SLA when it was called into play. Justice Black pointed out that Senator Holland, author of the original bill *and* of the addition, considered it to be "just a minor change of verbiage," and that, in essence, the provision was merely meant to prevent expansion of state claims *beyond the nation's* asserted jurisdiction. *Id.*

[52] 381 U.S. at 210.

[53] *Id.* at 175.

[54] 394 U.S. 11 (1969).

[55] *Id.* at 17-35.

[56] *Id.* at 34-35.

[57] *Id.* at 74-78.

[58] *Id.* at 76.

[59] *Id.* at 77. Justice Black again wrote a dissent, objecting to the use of an international standard in a domestic title dispute: "There appears to be one thing certain about the problem, however, and that is that the dispute between Louisiana and the United States is

The *Louisiana* case did elaborate on the prerequisites of a historic claim, describing the factors to be considered as: "(1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; [and] (3) the attitude of foreign States."[60] Under general principles of international law, the Court reported, "the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them."[61] Of the three zones, the inland waters are the ones which are "subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels [from these waters] altogether."[62] Reasonable regulation of navigation, however, is permissible even in the territorial sea and "is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters."[63] The question left open after *Louisiana* was exactly what degree of authority must be exercised over a body of water to establish it as historic inland water.

In the principle case, *United States v. Alaska*,[64] the Supreme Court looks to the guidelines developed in the *California* and *Louisiana* opinions to determine "whether the body of water known as Cook Inlet is a historic bay."[65] Alaska seeks to establish that this area, although it does not meet any precise geographical test for inland water, has achieved that status by virtue of the manner in which it has been treated traditionally by the

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no part of international affairs subject to international law, but is exclusively a domestic controversy between the State and Nation." *Id.* at 81.

[60] *Id.* at 23-24 n.27, *citing Régime*, *supra* note 46, at 13.

[61] *Id.* at 22, *citing* L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 4-5 (1945); 1 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 203-11 (1962); M. STROHL, THE INTERNATIONAL LAW OF BAYS 3-4 (1963).

[62] 394 U.S. at 22.

[63] *Id.* at 24.

[64] 422 U.S. 184 (1975).

[65] *Id.* at 185. Since the tract in question lies more than 3 geographical miles from the shore, it lies outside the grant made to the states under the SLA, unless it can fall within the Convention's definition of "inland water." Since it also lies seaward more than 3 miles from a line across the inlet at Kalgin Island, where the headlands are about 24 miles apart, the tract cannot be considered land underneath a bay. *See* Convention, *supra* note 7, art. 7, para. 4. The United States contends that Alaska owns only up to this 24-mile mouth under article 7, paragraph 4 of the Convention, as adopted for the purposes of the SLA. Alaska, however, claims this tract under the "historic bay" exception of article 7, paragraph 6 of the Convention. Both parties concede that upper Cook Inlet, above Kalgin Island, belongs to Alaska under the SLA. The Court outlines the consequences of its determination as follows:

> If the inlet is a historic bay, the State of Alaska possesses sovereignty over the land beneath the waters of the lower, or seaward, portion of the inlet. If the inlet is not a historic bay, the United States as against the State, has paramount rights to the subsurface lands in question.

422 U.S. at 186. One wonders what basis there is for the vesting of title in the United States merely because the state claim fails. It seems that a determination that the United States has made sufficient claim within the international community would be necessary before declaring its ownership.

coastal sovereign. The Court investigates the inlet's treatment by the three authorities which have claimed its shore—Russia, the United States (during Alaska's territorial period), and Alaska.[66]

The district court had found that "Russia exercised sovereignty over the disputed area of Cook Inlet."[67] Justice Blackmun, writing for the majority, finds that none of the facts relied upon by the lower court demonstrate the essential exercise of authority in that period prior to the United States' acquisition in 1867.[68] As the district court pointed out, however, this alone would not defeat Alaska's claim. Under general principles of international law, no precise length of time is necessary to create a usage upon which historic title can be based.[69]

Blackmun next discusses Alaska's territorial period, reviewing five United States statutes which Alaska offers as evidence of control exercised by the Federal Government prior to the grant of Statehood.[70] He points out,

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[66] The Supreme Court finds this division in the district court's approach. 422 U.S. at 189-90. While such a division is not apparent in the reported opinion, it was brought out in the petition of certiorari. *See id.* at 190 n.9, *citing* Petition for Certiorari 21a-55a.

[67] 422 U.S. at 190. The Court takes this statement from the Petition for Certiorari 25a. The reported opinion of the district court did not discuss the exercise of sovereignty prior to 1906. *See* United States v. Alaska, 352 F. Supp. 815 (1972).

[68] 422 U.S. at 190. Justice Blackmun discusses three facts: (1) that there were Russian settlements on the shores of Cook Inlet by the early 1800's; (2) that a Russian fur trader fired on an English vessel which attempted to enter the inlet in 1786; and (3) that in 1821 Tsar Alexander I issued an imperial ukase which purported to exclude all foreign vessels from the waters within 100 miles of the coast of Alaska. The Court discounts these facts on the grounds respectively that the settlements indicated merely a claim to land with no suggestion of authority asserted over the inlet, that the fur trader's firing was an act of a private citizen with no apparent governmental authorization, and that the ukase was unequivocally withdrawn in the face of vigorous protests from the United States and England. Regarding the fur trader's firing, the Court points out that the firing of a cannon is consistent with the present position of the United States that the inland waters of Alaska are to be measured by the 3-mile mark under the old Cannon Shot Rule. The Cannon Shot Rule is to the effect that a coastal state possesses sovereignty over the waters within range of a cannon shot from its shore, based on the traditional range of 18th century cannon. *Id.* at 191 and n.11. With regard to Tsar Alexander's edict, the Court does not discuss whether the ukase or the protest expressly referred to Cook Inlet. The assertion of a 100-mile claim alone, without any specifics as to bays and inlets, would have certainly invoked protest in 1821, when the Cannon Shot Rule was widely accepted.

[69] United States v. Alaska, 352 F. Supp. 815, 820 (1972), *citing Règime, supra* note 46, at 104. The requisite usage and title could have ripened since the United States' acquisition of the territory in 1867.

> By the Treaty of Cession in 1867 Russia ceded to the United States "all the territory and dominion now possessed [by Russia] on the continent of America and in the adjacent islands." 15 Stat. 539. The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession.

422 U.S. at 192 n.13.

[70] 422 U.S. at 192-96. These statutes, first discussed by the trial court, are as follows:

a. Act of July 27, 1868, 15 Stat. 240, codified as Rev. Stat. § 1956 (1878), prohibiting the killing of sea otter and other fur-bearing animals "within the limits of the said territory [of Alaska], or in the waters thereof."

first, that none of these promulgations were expressly linked to Cook Inlet in a definitive way (except by administrative regulations), and second, that they merely prove the fact of fish and wildlife management, and jurisdiction to that end.[71] The question is whether or not enforcement of fishing regulations is legally sufficient to demonstrate the type of authority necessary to establish historic title.[72] Justice Blackmun points out that "the exercise of authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed."[73] He reviews the three internationally recognized zones of the sea discussed in *Louisiana* and concludes that for classification as inland waters, "the exercise of sovereignty *must have been*, historically, an assertion of power to exclude all foreign vessels and navigation."[74] Justice Blackmun rules that enforcement of fishing regulations, a characteristic of the marginal sea under the international scheme, is patently insufficient.[75]

The Court finally looks to the evidence that Alaska has exercised sovereignty over Cook Inlet during her period of statehood. The two factors which Justice Blackmun considers here are the district court's findings that (1) Alaska has enforced fishing regulations in basically the same fashion that the United States had during the territorial period,[76] and (2) Alaska had arrested two Japanese fishing vessels more than 3 miles from shore in the Shelikof Straits in 1962.[77] He dismisses the Alaskan fishing regulations as he did those of the United States.[78] The seizure of a foreign

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b. The Alien Fishing Act of 1906, 48 U.S.C. § 243 (1970), prohibiting commercial fishing by non-citizens "in any of the waters of Alaska under the jurisdiction of the United States."

c. Executive Order No. 3752, November 3, 1922, creating the Southwestern Alaska Fisheries Reservation. Regulations promulgated pursuant to the order by Secretary of Commerce Hoover referred to and embraced "all the shores and waters of Cook Inlet."

d. The White Act of 1924, ch. 272, 43 Stat. 464 (codified in scattered sections of 48 U.S.C.), for protection of Alaskan fisheries, by such regulations as the Secretary of Commerce might issue. The regulations consistently defined the Act to include all the waters of Cook Inlet.

e. The Gharrett-Studder Line of 1957, a chart reflecting the boundaries of the United States' fishing regulations for the purposes of an agreement with Canada regarding fishing for salmon with nets. The maps were passed on to the State Department by the Bureau of Fisheries with express disclaimers that the line was not related to the territorial waters of the United States in a legal sense.

422 U.S. at 192-96.

[71] 422 U.S. at 196.

[72] *Id.*

[73] *Id.* at 197.

[74] *Id.*

[75] *Id.* The Court in *Louisiana* had similarly ruled that navigation regulations which allowed the innocent passage of foreign vessels were inadequate to establish historic title. 394 U.S. at 24.

[76] 422 U.S. at 200-01.

[77] *Id.* at 201.

[78] *Id.*

vessel, however, is given a more careful examination.

The incident occurred when a private commercial fishing fleet in Japan publicly announced its intention to send a fleet into the waters of Cook Inlet and the Shelikof Straits.[79] Alaskan officials informed the Federal Government which, as the Court says, "significantly took no action."[80] Two boats did enter Cook Inlet briefly[81] and then moved into the Shelikof Strait where they were boarded by Alaskan officials and the crews arrested. The Japanese fishing company entered into an agreement with the State of Alaska whereby the ships and crews were returned in exchange for a promise to refrain from fishing in the straits or inlet pending adjudication.[82] Japan formally protested to the United States Government, which declined to take a position.[83] The proceedings were dismissed with no determination of jurisdiction.[84]

The Court concedes that to the extent that the incident indicates an intent on the part of Alaska to exclude all foreign vessels, it must be viewed as an exercise of authority over the waters as inland waters.[85] Justice Blackmun, however, discounts its significance. First, he asserts that the incident was an exercise of sovereignty only over the Shelikof Straits.[86] Secondly, he is "not satisfied that the exercise of authority was sufficiently unambiguous to serve as the basis of historic title to inland waters."[87] He cites *Louisiana* and *California* for the proposition that the claim, even though between a state and the Federal Government, is to be measured primarily as an international, rather than a purely domestic claim.[88] He decides that from the Japanese Government's point of view, the import of the incident is far from clear:

> Alaska clearly claimed the waters in question as inland waters but the United States neither supported nor disclaimed the State's position. Given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters.[89]

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[79] *Id.*

[80] *Id.* The district court had pointed out that on a prior occasion an official of the State Department indicated to the Governor of Alaska the Federal Government's unwillingness to act but encouraged action by the State of Alaska. 352 F. Supp. at 820.

[81] The Supreme Court reports that the boats were in lower Cook Inlet one day and left the next, 422 U.S. at 201, whereas the district court had reported that the intrusion lasted only a few hours, 352 F. Supp. at 820. This discrepancy is not explained by the Court.

[82] 422 U.S. at 202.

[83] *Id.* The Federal Government declined to take a formal position on the issue pending adjudication and took no position after dismissal of the proceedings. *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 203.

[88] *Id.*

[89] *Id.*

Finally, Blackmun points out that Japan immediately protested and never acceded to the position taken by Alaska. Therefore, he concludes, no foreign acquiescence has occurred and no historic title has ripened.[90]

If one thing is clear from the legislative history of the Submerged Lands Act, it is that "Congress determined that state management, administration, development, leasing and use of natural resources on or above navigable waters was in the national interest."[91] There is no indication in the history of the SLA that the courts were to give it what amounts to a strict construction in favor of the Federal Government. It is at least apparent that Congress did not intend that the judiciary should promulgate definitions and interpretations *independently* of the act[92] and its philosophy.

The purpose of the SLA was to put an end to the dispute over ownership of submerged lands which had brought oil production in offshore lands to a standstill.[93] Congress had partial knowledge of the monetary value of the resources which it chose to grant to the states but also knew that, constitutionally, the Federal Government is to raise revenue by taxation and not by ownership of profit-producing land.[94] The states have traditionally been the land-owning units.[95]

Opponents of the SLA have attacked it on the grounds that the Federal Government alone must supervise any undertaking which may have a bearing on foreign affairs.[96] The grant has been upheld, however, against claims that it involved an unconstitutional relinquishment of sovereignty.[97] The SLA's conveyance was not absolute, but was qualified by the control the Federal Government continued to exercise for regulation of navigation and other purposes of international importance.[98] Nor was the grant inclusive of all lands claimed by the United States or one which illegally extended state boundaries. In Presidential Proclamation No. 2667,[99] the

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[90] *Id.* Justice Blackmun points out that the Court has taken no position in the debate over whether mere absence of opposition is sufficient evidence of foreign acquiescence. *Id.* at 189, *citing* United States v. Louisiana 394 U.S. 11, 23-24 n.27. The district court had found that most commentators require only "general toleration by the community of nations" and that testimony "clearly indicated the general absence of foreign fishing vessels [in the inlet] over the years." 352 F. Supp. at 821. Justice Blackmun, however, "feel[s] that something more than mere failure to object must be shown." 422 U.S. at 200.

[91] Smith & Marshall, *Mariculture: A New Ocean Use* 4 GA. J. INT'L & COMP. L. 307, 321 (1974), *citing* 43 U.S.C. § 1311(a) (1970).

[92] *See* note 38 *supra* and accompanying text; *see, e.g.*, N.Y.U.J., *supra* note 27, at 383.

[93] N.Y.U.J., *supra* note 27, at 383.

[94] Note, *The Federal - State Offshore Oil Dispute*, 11 WM. & MARY L. REV. 755, 763 (1970) [hereinafter cited as *Oil Dispute*].

[95] *Id.* at 765.

[96] *Id.* at 761.

[97] Alabama v. Texas, 347 U.S. 272 (1954). The argument against constitutionality was that "the United States can no more relinquish its sovereignty to the submerged lands than it can yield the sovereignty it possesses over the Federal Union as a whole." *Oil Dispute, supra* note 91 at 760.

[98] *Tidelands, supra* note 15, at 451.

[99] S. REP. No. 411, 83d Cong., 1st Sess. 55 (1945); *see* 5 GA. J. INT'L & COMP. L. 580, 583

United States laid claim to all resources in the continental shelf. The Outer Continental Shelf Lands Act[100] reiterated and acknowledged this claim. There is precedent, too, for state boundaries more than 3 miles out, even though such extensions would normally be contrary to national claims,[101] because Texas and Florida[102] were admitted to the Union with congressionally approved boundaries of 3 leagues.

The problem, then, lies not with the SLA itself but with the Court's interpretations. The use of the Convention's standards for administration of the SLA has been, at best, unsatisfactory. The majority in *California* had justified its adoption partially in terms of establishing the most workable standard possible,[103] but the *Louisiana* case quickly showed how cumbersome its provisions can be in some situations.[104] The present case has demonstrated another significant inadequacy: while the Convention does provide guidelines for resolution of many questions which may come before the Court, there is no "settled international rule" for determining historic bays.[105]

Furthermore, as Justice Black pointed out in his earlier dissents,[106] it seems inappropriate to apply an international standard to settle a purely domestic problem. The controversy concerns how much of the area claimed by the United States will be administered by the states and how much by the Federal Government and has no real bearing on one of the most pressing international concerns, the obstruction of waters above the seabed.[107] Use of an international yardstick leaves the Court in the embarrassing position of having to rule, as it did in *Alaska*, that, though the United States has not exercised sovereignty over a particular body of water, it has exclusive rights to the resources of the seabed below.[108] The disclaimer by the United States of any dominion over Cook Inlet took on an interesting role: while the Court would not rule that it was conclusive as to title,[109] the disclaimer went a long way toward deteriorating Alaska's claim and yet did not prevent final adjudication that "the United States, as against the

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n.20 (1975).

[100] 43 U.S.C. § 1331 (1970).

[101] N.Y.U.J., *supra* note 27, at 384.

[102] United States v. Louisiana, 364 U.S. 502 (1960).

[103] 381 U.S. at 165.

[104] *See* 394 U.S. at 83-84 (Black, J., dissenting).

[105] *See generally* L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW (1964).

[106] *See, e.g.*, United States v. Louisiana 394 U.S. 11, 81 (1964).

[107] *Id.*

[108] The Court had framed its basis for resolution as follows:

> If the inlet is a historic bay, the State of Alaska possesses sovereignty over the land beneath waters of the lower, or seaward, portion of the inlet. If the inlet is not a historic bay, the United States, as against the State, has paramount rights to the subsurface lands in question.

422 U.S. at 186.

[109] *Id.* at 203-204 n.17.

State, has paramount rights to the subsurface lands in question."[110]

Justice Black, dissenting in *United States v. Louisiana*, suggested that "since we cannot look to legalistic tests of title, we must look to the claims, understandings, expectations and uses of the States throughout their history."[111] An equitable basis for decision, rather than reference to an international standard, has been considered by commentators.[112] One possible solution would be to give ownership of the seabed to one level of government and then split the revenue between the two levels.[113] Since none of the noncoastal states have formally objected to the bonus of revenue for coastal states under the existing system,[114] such a division should be agreeable to most and would eventually result in a portion of the proceeds being passed to inland states through the federal government. This arrangement is already being used under the Mineral Leasing Act, with 37.5 percent of revenue earned going to the states.[115]

The decision in the present case stands as a reaffirmation of the Court's apparent conviction that the Convention's standards are to govern the administration of the SLA. Much of the task of actually delineating boundaries will undoubtedly be left to administrative agencies, or in the event of dispute, to court-appointed special masters. The Court, however, has left itself in a position such that it may "find it necessary at times to indulge in the delicate task of assessing whether some issues, not covered by the Convention, necessitate executive exclusivity, and if not, the reasonableness and fairness of the executive's decision."[116]

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[110] *Id.* at 186; *see* note 104 *supra*.

[111] United States v. Louisiana, 363 U.S. 1, 90 (1960).

[112] *See Oil Dispute*, *supra* note 91.

[113] *Id.* at 769.

[114] *Id.* at 765.

[115] 30 U.S.C. § 191 (1970).

[116] Ereli, *The Submerged Lands Act and the Geneva Convention on the Territorial Sea and the Contiguous Zone*, 41 TUL. L. REV. 555, 578 (1967).