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# Venue for Offshore Environmental Crimes: The Seaward Limits of the Federal Judicial Districts

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## I. INTRODUCTION

Consider the following scenario: USA Oil, an American company incorporated in Delaware with its principal place of business in California, has been conducting ongoing oil drilling operations in the Gulf of Mexico. The company operates three oil platforms off the Texas coast. One is located two miles offshore, another six miles offshore, and the third ten miles offshore.

Federal authorities receive notice that on several occasions since the company began operating these rigs, it deliberately allowed large quantities of oil to leak into the Gulf from each of them. The government seeks to indict USA Oil on three counts of violating the Clean Water Act,[1] as amended by the Oil Pollution Act of 1990.[2] The U.S. Attorney's office in the Southern District of Texas coordinates the investigation as all relevant documents, witnesses, and evidence are located in that district. All of USA Oil's executive officers reside near the company's principal place of business in San Diego, in the Southern District of California. The rig foreman in charge of USA Oil's Gulf of Mexico operations at the time the violations occurred has since left the company and now lives and works for another company near Prudhoe Bay, in the District of Alaska.

Where should the government file the indictments? The United States Constitution requires that the trial be held in the district in which the crime was committed,[3] and the government must

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1. The Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(2) (1994 ed.) ("Clean Water Act") provides:

> Any person who—
> (A) knowingly violates . . . section 1321(b)(3) . . . of this title . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

2. The Oil Pollution Act of 1990, § 4301(c), Pub. L. No. 101-380, 104 Stat. 534, 537, amended the criminal enforcement provisions of the Clean Water Act, 33 U.S.C. § 1319(c), to include violations of § 1321(b)(3). Section 1321(b)(3) provides:

> The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States . . . or . . . the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.] . . . in such quantities as may be harmful . . . is prohibited.

3. U.S. Const., Amend. VI.

prove that venue is proper by a preponderance of the evidence.[4] Failure to prove venue in a criminal trial precludes a conviction,[5] and if a verdict of acquittal results from that failure, such failure leads to a double jeopardy bar to reindictment in the appropriate district.[6] Therefore, the government must make an airtight determination at the outset of the prosecution as to where proper venue lies.

There are three separate venue provisions for the trial of federal crimes. 18 U.S.C. § 3237 stipulates that venue for offenses begun in one district and completed in another, or for offenses committed in more than one district, lies in any of the districts in which the crime occurred. However, it is the other two provisions which are relevant to the problem of venue for crimes committed offshore but within the territorial sea of the United States. Federal Rule of Criminal Procedure 18 ("Rule 18") sets venue for crimes committed within a single judicial district, while 18 U.S.C. § 3238 ("Section 3238") applies to crimes committed outside of any judicial district. In the face of the current ambiguity as to the limits between state and domestic federal sovereignty in the marginal seas,[7] there is presently no point at which a definitive geographic line can be drawn dictating where Rule 18 ends and Section 3238 begins. Though in the past there have been few federal criminal prosecutions of environmental crimes committed in the territorial sea, several U.S. Attorney's Offices have become more active in this area, and the Environmental Crimes Section of the United States Department of Justice recently formed a Vessel and International Pollution Unit specifically to address these crimes. Thus, the frequency of prosecutions of this type will probably increase in the near future, placing an even greater premium on the need for a clear resolution of this issue.

This Note explores the question of venue for crimes committed offshore but within the twelve-mile seaward limit of federal territorial jurisdiction[8] for the purpose of determining where the seaward limit

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4. *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974).

5. *United States v. Gross*, 276 F.2d 816, 818-19 (2d Cir. 1960).

6. See Part II.A and accompanying text for a discussion of the government's burden to prove venue in a criminal case and the application of double jeopardy.

7. "Marginal seas" as used in this Note refers to the narrow band of ocean that surrounds the nation. It does not, however, connote any particular defined breadth of sovereign torritory as does the term "territorial seas." That term is defined in the Third Unitod Nations Convention on the Law of the Sea as a twelve-nautical mile belt of sea around a coastal nation over which that nation is sovereign with respect to all other nations. Third United Nations Convention on the Law of the Sea, Art. 3 (1982) ("UNCLOS III").

8. It is well settled that the twelve-mile territorial sea proclaimed by President Reagan in 1988 represents the seaward limit of national sovereignty. See generally Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) ("Reagan Proclamation"); UNCLOS III, Art. 3.

of the federal judicial district lies and thus where Rule 18 ends and Section 3328 begins. Part II discusses Rule 18 and Section 3238 and illustrates the importance of fixing the location of state boundaries in order to make the proper choice between the two provisions. Because there is no definite answer to the seaward extent of state territory, the possibilities must be extracted from the historical development of legal doctrines regarding offshore boundaries. Therefore, Part III examines the history of the territorial sea and the development of offshore federalism. Part IV discusses the various possible limits of state territory and analyzes the implications of each in the context of the USA Oil hypothetical. Part V proposes a new paradigm for offshore criminal venue that unravels the web of uncertainty currently plaguing the issue.

## II. FEDERAL VENUE RULES

### *A. The Importance of Venue*

More than merely formal legal procedure, proper venue in criminal cases is a constitutional right of the defendant. Article III of the United States Constitution provides that "[t]he Trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[9] Further, the Sixth Amendment guarantees that defendants will receive a speedy trial "by an impartial jury of the State and district wherein the crime shall have been committed."[10] The constitutional foundations of criminal venue place a burden on the government to prove venue in every prosecution; such proof is an essential part of the government's case without which there can be no conviction.[11] When the government obtains an indictment in an improper venue, it has two choices:[12] it can file a new indictment on the same

9. U.S. Const., Art. III, § 2, cl. 3.

10. Id. Amend VI.

11. *Gross*, 276 F.2d at 818-19.

12. Because of the constitutional underpinnings of criminal venue, the Federal Rules of Criminal Procedure do not allow the government to move for change of venue in a criminal trial. Only the defendant may make such a motion, under Rule 21(b), and even then only if it appears that the offense was committed in more than one district and "if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." *United States v. Cores*, 356 U.S. 405, 410 (1957).

charges in a different district where venue is proper, provided that the statute of limitations has not expired, or it can try to obtain a waiver of venue by the defendant.[13] If the government proceeds with its case without proper venue, the defendant may make a timely objection at the close of the government's case which, if sustained, will result in dismissal.[14] Alternatively, the judge may dismiss the case sua sponte for lack of venue.[15] If the case proceeds and the government simply fails to prove venue at trial, a verdict of acquittal will result. The Double Jeopardy Clause of the Fifth Amendment[16] will then prevent the government from obtaining a new indictment and retrying the defendant in the proper district.[17]

### *B. Federal Venue Provisions: Rule 18 versus Section 3238*

Rule 18 of the Federal Rules of Criminal Procedure[18] provides that venue for crimes committed within a single judicial district lies in the district in which the crime was committed. This is the most commonly implicated of the federal venue provisions and the easiest for the government to prove. The government must simply show that it is prosecuting the crime in the same district in which the defendant committed it.

Section 3238 governs venue for crimes begun or committed on the high seas or otherwise outside of any judicial district. It stipulates:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any of two or more joint offend-

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13. Because of the constitutional foundations of criminal venue, the standard for waiver is high—it occurs only when the defendant fails to make any objection to venue during the trial and in a very narrow set of additional circumstances. *Gross*, 276 F.2d at 819. See also *Powell*, 498 F.2d at 891 (stating that venue is waived when an objection is not made until after the jury returns a guilty verdict); *United States v. McMaster*, 343 F.2d 176, 181 (6th Cir. 1965) (identifying the same standard for waiver of venue).

14. Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 25.3 at 1073 (West, 2d ed. 1992).

15. Id.

16. The Fifth Amendment commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V.

17. See generally LaFave and Israel, *Criminal Procedure* at 1073 (cited in note 14) (discussing which dismissals are acquittals for purposes of double jeopardy).

18. Rule 18 codifies the directives of the Sixth Amendment. See note 10 and accompanying text.

ers, or if no such residence is known the indictment or information may be filed in the District of Columbia.[19]

There is substantial authority establishing that the two major alternatives of Section 3238 are to be read in the disjunctive.[20] Thus, the "last known residence" alternative applies if the indictment is

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19. 18 U.S.C. § 3238 (1994 ed.). The meaning of the term "high seas" as used in Section 3238 is unclear. Under international law, "high seas" clearly denotes the area beyond the 200-mile exclusive economic zone ("EEZ") of a coastal nation. UNCLOS III, Art. 86. The history of the term in U.S. case law is less clear. Early cases variously refer to the high seas as the open ocean which washes the seacoast or is not within the *fauces terrae* of any state, *United States v. Grush*, 26 Fed. Cases 48, 51 (D. Mass. 1829), or as the open waters of the sea or ocean, as distinguished from the ports, havens, and waters within the narrow headlands on the coast, *United States v. Rodgers*, 150 U.S. 249, 254-55 (1893). More recently, federal courts have defined the high seas as those waters lying seaward of the nation's territorial sea, and have identified the territorial sea as the band of water that extends three miles from the coast. See, for example, *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990); *United States v. Romero-Galue*, 757 F.2d 1147, 1149 n.1 (11th Cir. 1985); *United States v. Williams*, 617 F.2d 1063, 1073 n.6 (5th Cir. 1980); *United States v. Rubies*, 612 F.2d 397, 402 n.2 (9th Cir. 1979); *United States v. Warren*, 578 F.2d 1058, 1064-65 n.4 (5th Cir. 1978).

The definition of high seas given in these cases clearly is more expansive than the international law definition. This discrepancy is necessary to preserve the integrity of the countless domestic statutes which reference or rely upon the boundary between the territorial sea and the high seas, including the Rule 18/Section 3238 statutory scheme. If the domestic definition of high seas were to mirror the international definition, it would create a nearly 200-mile gap between the limits of the territorial sea and the EEZ which would be part of neither the territorial sea nor the high seas, and within which the affected statutes technically would not apply. To avoid this situation, it is reasonable to define the high seas as beginning, for domestic purposes, at the limit of the territorial sea.

While providing a workable domestic definition for "high seas," the cases further refer to the three-mile limit as the limit of the territorial sea. This would settle the question of venue for crimes committed beyond three miles except for the fact that the U.S. territorial sea no longer lies at three miles offshore. Since the Reagan Proclamation of 1988, see Part III.E, the U.S. has claimed a twelve-mile territorial sea in accordance with UNCLOS III. The cases which reference a three-mile territorial sea either pre-date this extension or draw their definitions directly from an earlier case which pre-dates the extension. Furthermore, the discussion of the meaning of the term high seas in these cases was dicta because the crimes alleged took place beyond twelve miles. Therefore the question of whether the high seas begin at three or twelve miles offshore was not at issue. Any court addressing the question today must consider the effect of the Reagan Proclamation's declaration of a twelve-mile territorial sea.

20. See, for example, *United States v. Layton*, 855 F.2d 1388, 1410-11 (9th Cir. 1988); *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989); *United States v. Fraser*, 709 F.2d 1556, 1558 (6th Cir. 1983).

Section 3238 offers two distinct alternatives for establishing venue. *Fraser*, 709 F.2d at 1556. The first alternative allows venue to be established for any offender, and any joint offenders, in the district where one or more of the offenders was arrested or "first brought." The first brought provision applies only where the offenders have been returned to the United States already in custody. *United States v. Catino*, 735 F.2d 718, 724 (2d Cir. 1984); *United States v. Provoo*, 215 F.2d 531, 537 (2d Cir. 1954) (holding that a defendant who was not under restraint when he returned to the U.S. was not "brought" into the district where his ship came into port); *Hilger*, 867 F.2d at 568 (citing *Catino* with approval for the proposition that "brought" means "first brought into a jurisdiction while in custody"). The second alternative allows for the filing of an indictment or information in the district of one of the offenders' last known addresses, or in the District of Columbia if no such address is known.

filed before one of the offenders is arrested or first brought into any district.[21] When proceeding under this alternative, the indictment can *only* be filed in the district of one of the defendants' last known residences.[22]

The pivotal factor determining whether venue will be established according to Rule 18 or Section 3238 is whether the crime occurred within a judicial district or outside of all judicial districts. For purposes of the USA Oil hypothetical, the relevant question is whether each of the three individual oil platforms operated by USA Oil is located within a single judicial district, in this case the Southern District of Texas. If so, the government can proceed with the prosecution in that district and will not have difficulty establishing the venue.

However, if any or all of the offshore platforms lie outside of all judicial districts, the government must rely on Section 3238 to establish venue for the charges relating to that particular facility. Because none of the defendants are either present in Texas to be arrested there or outside the country so that they can be "first brought" into the Eastern District of Texas, venue will only be proper in the district of one of the defendants' last known addresses (or if no address is known, in the District of Columbia). Thus, since the defendants do not reside in Texas, the government cannot prosecute them in that district, despite the fact that it is the district nearest to the site of the offenses and the one most affected by them, the district in which the U.S. Attorney's office that investigated and prepared the case is located, and probably the location of most of the witnesses and evidence. The government must prosecute in the District of Delaware, the Southern District of California, the District of Alaska, or some other district where one of the corporate officer defendants can be located.

In order to determine whether the platforms are located in any federal district, it is necessary to refer to the federal definition of the districts.[23] The U.S. Code defines each district by reference to state counties. For example,

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21. *Fraser*, 709 F.2d at 1558.

22. Id. In *Hilger*, the Ninth Circuit held that where the defendant was not arrested or first brought into any district, and the defendant's residence was known to be in a state other than California, indictment of the defendant in the Northern District of California was improper. 867 F.2d at 568.

23. 28 U.S.C. § 81 et seq. (1994 ed.).

> Florida is divided into three judicial districts to be known as the Northern, Middle, and Southern Districts of Florida.
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> ....
>
> (c) The Southern District comprises the counties of Broward, Dade, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, and Saint Lucie.[24]

Hence, the district boundaries coincide with the boundaries of the counties they contain. The county boundaries, in turn, are coterminous with those of their parent state.[25] Therefore, the seaward limit of the federal judicial districts, the point at which Rule 18 ends and Section 3238 begins, depends upon the seaward limit of the state's territory.

The obvious starting point for determining the seaward limits of state territory is the coastal state's own definition of its boundaries. Often, a state's boundary definitions appear in the state constitution. For example, Florida's constitution defines the seaward extent of its boundaries as follows:

> [S]traight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southwestwardly along the coast to the edge of the Gulf Stream; thence southeastwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido river; thence to the place of beginning.[26]

The California Constitution describes California's boundaries as "... to the Pacific Ocean, and extending therein three English miles...."[27] Other states, such as Texas, rely on historical claims or state statutes for the delineation of their seaward boundaries.[28] While Congress generally approves a state's boundaries on its admission to

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24. 28 U.S.C. § 89 (1994 ed.).

25. See, for example, Fla. Stat. Ann. § 7.13 (West, 1988):

> The boundary lines of Dade County are as follows: Beginning at the southwest corner of township fifty-one south, range thirty-five east; ... thence east on the north boundary of said section thirty-one and other sections to the waters of the Atlantic Ocean; thence easterly to the eastorn boundary of the State of Florida; thence southward along the coast, including the waters of the Atlantic Ocean and the gulf stream within the jurisdiction of the State of Florida....

26. Fla. Const., Art. I (1868). A league, or marine league, is the equivalent of three nautical miles. Philip Babcock Gove, ed., *Webster's Third New International Dictionary, Unabridged* 1382 (Merriam-Webster, 1993).

27. Cal. Const., Art. XII, § 1 (1849).

28. See Marjorie M. Whiteman, 4 *Digest of International Law* § 3 at 764-68 (U.S. Dept. of State, 1965), for an overview of the historical and statutory seaward boundary claims of several of the coastal states.

the Union,[29] it has never proclaimed a universal seaward limit for state territory.

Congress's failure to establish a definite seaward limit for state boundaries complicates the determination as to which venue provision to apply because the federal districts cannot extend beyond the seaward limits of the states. The states themselves have made several boundary claims in the area from their coastlines out to the twelve-mile limit of national sovereignty.[30] However, these claims are based on several different types of control: title, jurisdiction, and sovereignty.[31] Only the last, sovereignty, satisfies the original intent of Congress in drawing the federal districts: to make the districts coterminous with the plenary power of the states as defined by their borders. But the physical boundaries of sovereignty are not always coterminous with the boundaries of title and jurisdiction. Therefore, any attempt to derive a uniform limit of state—and therefore federal district—boundaries from these historical claims quickly becomes bogged down in inconsistent and even illusory concepts.

This Note argues that the notion of state sovereignty upon which the definition of the federal judicial districts ultimately relies is just such an illusory concept. State sovereignty is nothing more than a rhetorical construct with no certain meaning. It is therefore inappropriate for use in determining the seaward boundaries of the federal judicial district. This Note argues that the factor which should determine the seaward limits of the federal judicial districts is the limit of national sovereignty.

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29. The usual device is a statehood act approving the new state's constitution, and by implication, the boundary description contained in that constitution. John Briscoe, *The Effect of President Reagan's 12-Mile Territorial Sea Proclamation on the Boundaries and Extraterritorial Powers of the Coastal States*, 2 Terr. Sea J. 225, 228 & n.7 (1992). See, for example, Act for the Admission of California into the Union, ch. 50, 9 Stat. 452 (1850). Of the original eleven coastal states, none expressly claimed a three-mile boundary until after the formation of the Union. Briscoe, 2 Terr. Sea J. at 228 n.6. See *United States v. Louisiana*, 363 U.S. 1, 21 n.22 (1960).

30. See note 8 for an explanation of the twelve-mile territorial sea as the limit of national sovereignty.

31. The distinction between jurisdiction and sovereignty is overlooked in most discussions of offshore federalism, but is crucial to this discussion. Jurisdiction refers to the authority possessed by the government to regulate specific types of conduct in a particular area. See *Black's Law Dictionary* 853 (West, 6th ed. 1990). Sovereignty, on the other hand, is a far weightier concept, denoting the "supreme, absolute, and uncontrollable power by which any independent state is governed; . . . [the] paramount control of the constitution and . . . the self sufficient source of political power." Id. at 1396. A nation is sovereign over its territorial sea in the same way that it is sovereign over land. By contrast, a nation has jurisdiction in its contiguous zone (the belt of the marginal seas from 12 to 24 miles from the nation's coast) over customs, immigration, fiscal, and sanitary issues, though the nation lacks sovereignty in this area. Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Seas*, 1 Terr. Sea J. 1, 3-4 (1990). See UNCLOS III, Art. 33.

The first step in this process is an examination of the development of offshore federalism and the history of the territorial sea, the ultimate limit of national sovereignty. What historical acts and actions influenced the development of the territorial sea, and what effects did these have on the location of state boundaries vis-à-vis national sovereignty? The next step requires a determination of where the limit of state territory in the marginal seas is currently located, and what other possibilities exist that may be equally valid and perhaps more appropriate. Then, having considered all of the possible limits, we can apply each of these claims to the hypothetical case to evaluate their strengths and weaknesses as possible boundaries for the federal districts. Although this Note argues that we should abandon any reliance on the historical development of offshore federalism in ascertaining the limits of the federal judicial districts, the current state of the law requires such reliance. As a practical matter, attorneys faced with questions of venue for alleged crimes committed within twelve miles of shore must make arguments based on the law as it currently stands. This requires tracing the choice of the appropriate venue statute from the federal district definitions, to the appropriate state's county boundaries, to the boundaries of the state itself. It is only through consideration of the history and development of the territorial sea and offshore federalism that state boundaries can be determined.

With this purpose in mind, the following section examines that history and development in order to sort out the conflicting claims of state title, jurisdiction, and sovereignty within twelve miles of the coast. It is essential to understand the legal and historical foundations of the competing state and federal claims in order to assess their validity. In addition, a broad understanding of this developmental process is valuable for what it reveals about the nature of the claims themselves. There is no more compelling argument for the revision and clarification of federal district boundaries called for in this Note than the complete lack of relationship between the developmental process and the issue of venue for offshore crimes.

## III. THE HISTORY OF THE TERRITORIAL SEA AND THE DEVELOPMENT OF OFFSHORE FEDERALISM

According to international law, "[t]he sovereignty of a coastal [nation] extends beyond its land territory and internal waters . . . over

an adjacent belt of sea, described as the territorial sea."[32] This sovereignty extends from the seabed and underlying subsoil to the surface and the airspace above it.[33] The Third United Nations Convention on the Law of the Sea ("UNCLOS III") sets a limit of twelve nautical miles[34] as the maximum breadth any nation may claim for its territorial sea. From virtually the inception of the Union until 1988, the United States adhered to a claim of three miles for its territorial sea. Until the Tidelands Controversy of the 1930s, it was generally presumed that the states were sovereign to this three-mile limit; however, the Tidelands Controversy abrogated that notion, and despite the ultimate failure of the federal government's attempt to claim exclusive sovereignty over that area, the question of the extent, or even the existence, of state sovereignty in the marginal seas became clouded with uncertainty.[35] With the passage of the Submerged Lands Act in 1953, Congress transferred title to the submerged lands within three miles of the coast to the states, but the question of the seaward extent of state sovereignty persisted, now largely unnoticed in the face of the newfound certainty as to title and jurisdiction. Provisions of the Submerged Lands Act allowing Gulf Coast states to retain nine-mile boundaries with proof of an historical claim of that extent[36] further complicated this question by allowing some states to assert boundaries beyond the limits of national sovereignty. Finally, in 1988 President Reagan issued a proclamation declaring a twelve-mile territorial sea, but including a disclaimer of questionable effect stating that the extension applied for international purposes only.[37]

This patchwork of federal and state claims and grants created a glaring lack of certainty regarding the present limits of state territory in the marginal seas. Because accurate venue determinations

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32. UNCLOS III, Art. 2(1).

33. Id. at Art. 2(2).

34. The territorial sea is measured in nautical miles as opposed to statute miles. A statute mile, the measure generally used on land, derives from the Latin for 1000 paces and equals 5,280 feet. By contrast, a nautical mile equals one degree of latitude on the Earth's surface, the equivalent of 6,076 feet, or 1.15 statute miles. Robert Jay Wilder, *The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism*, 32 Va. J. Intl. L. 681,, 681 n.1 (1992). This difference is crucial for the physical delimitation of coastal state boundaries but is not essential for purposes of this discussion, and the generic term "miles" will be used throughout this Note.

35. The Tidelands Controversy is discussed in Part III.C.

36. 43 U.S.C. §§ 1301(b), 1302 (1988 ed.).

37. Reagan Proclamation, 54 Fed. Reg. 777 (cited in note 8). The disclaimer stated: "Nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . ."

depend upon the seaward boundaries of the districts, which in turn depend upon the seaward limits of the coastal states, establishment of a clear and consistent limit to state territory in the marginal seas is crucial.

### *A. The Origins of National Sovereignty in the Marginal Seas*

The twenty-three coastal states existing today consist of three historical categories. Eleven of the original thirteen colonies were coastal states. These states were independent, sovereign jurisdictions before coming together to form the Union.[38] Two other coastal states, Texas and Hawaii, also existed as sovereign republics before joining the Union.[39] The remaining ten coastal states were created out of territory held by the U.S. prior to their admission to the Union.[40]

Upon forming the Union, the original thirteen states did not give up all aspects of sovereignty. They retained all the rights and powers which they did not expressly or by implication surrender to the federal government, and the federal government had no powers other than those granted by the states in the Constitution.[41] This holds true in the marginal seas as well as on land. However, the Supreme Court has since made it clear that the original coastal states were never sovereign beyond their shores.[42] Thus, the powers the federal government originally gained in the marginal seas were of a far more limited scope than those it gained on land.

All states that subsequently joined the Union enjoy the same elements of sovereignty as the original thirteen by virtue of the "equal footing" doctrine set forth in *Pollard's Lessee v. Hagan*.[43] In *Pollard's Lessee*, the Supreme Court held that Alabama gained admission to the Union, "on an equal footing" with the original states, inheriting the full degree of sovereignty, jurisdiction, and eminent domain enjoyed by its parent state, Georgia. Therefore, the Court held that Alabama was sovereign over the navigable waters and the lands beneath them,

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38. Gordon Ireland, *Marginal Seas Around the States*, 2 La. L. Rev. 252, 270-71 (1940).

39. Id.

40. Id. at 271.

41. Id. at 272. These powers included the power to collect duties, provide for the national defense, regulato foreign and interstate commerce, punish felonies on the high seas and offenses against the law of nations, and maintain military installations. Id. See U.S. Const., Art. I, § 8.

42. *United States v. California*, 332 U.S. 19, 31-32 (1947). In *California*, the Court concluded that the nation did not become sovereign over the three-mile belt until 1793 wben the United States first asserted such a claim against foreign nations. Id. at 33. See notes 88-103 and accompanying text for a discussion of *California*, and Part III.B for a discussion of the United States' initial claim over the three-mile belt.

43. 44 U.S. (3 Howard) 212, 223 (1845).

subject to the rights possessed by the United States that had been surrendered by the original states under the U.S. Constitution.[44] In *Shiveley v. Bowlby*,[45] the Court further explained that the equal footing doctrine guarantees that "new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark within their respective jurisdictions."[46] Thus, riparian owners' title and rights in the lands beneath the high water mark of navigable waters are covered by the laws of the state, subject to the powers granted to the federal government by the Constitution.[47] The Court considered this to be "inherent in her character as a sovereign, independent State, or indispensable to her equality with her sister States."[48]

It is clear that at the inception of the Union, neither the states nor the nation were sovereign in the marginal seas. More importantly, this did not change even as the federal government obtained exclusively federal territory through its westward expansion and annexed that territory as new states. It is important to keep this in mind when weighing the validity of the various possible limits of state sovereignty in the marginal seas. The current state of the law suggests that the sovereignty of the federal government now not only encompasses but surpasses that of the several states in the marginal seas. If that is the case, it is not due to any inherent and exclusive federal rights in the marginal seas resulting from the territorial means by which the nation grew. Instead, this situation can be traced to the Tidelands Controversy of the middle part of this century. The history of that controversy reveals much about the seaward extent of state sovereignty past and present. It further provides an appropriate

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44. Id. at 228-29. In *California*, the Court limited the direct application of *Pollard's Lessee* to internal waters. 332 U.S. at 36-38. "Internal waters" are those that lie landward of the baseline used to measure the territorial sea. UNCLOS III, Art. 8(1). The term includes rivers, harbors, small bays, and other bodies of water which may be enclosed by a straight baseline in accordance with the provisions of UNCLOS III. Id. Art. 7. A nation is sovereign over its internal waters in exactly the same way that it is sovereign over the land within its borders. See UNCLOS III, Art. 2(1). In contrast to the territorial sea, over which a nation is also sovereign, there is no right of innocent passage by ships of foreign nations through any nation's internal wators. See id. Art. 17. Because the original states were never sovereign in the marginal seas, there was no need to grant such status to newer states. But as explained in note 129, the Court employed a converse application of the equal footing doctrine in *United States v. Texas*, 339 U.S. 707 (1950), making it a vital concept in the development of offshore federalism.

45. 152 U.S. 1 (1894).

46. Id. at 26.

47. Id. at 40.

48. Id. at 34. See Donna R. Christie, *State Historic Interests in the Marginal Seas*, 2 Terr. Sea J. 151, 152 & n.46 (1992), for a more complete discussion of the equal footing doctrine.

starting point for a discussion of the validity and appropriateness of the various possible limits of state sovereignty and the practical effect of each of those limits on current venue determinations for crimes committed within the marginal seas.

### *B. The United States and the Cannon Shot Rule*

The one hundred fifty-year-old notion of state sovereignty over a three-mile belt of the marginal seas that predominated in this country until the Tidelands Controversy of the late 1930s and early 1940s is traceable to a letter that then-Secretary of State Thomas Jefferson sent to the governments of France and Great Britain on November 8, 1793.[49] In the letter, Jefferson asserted that there was a zone of neutrality surrounding the United States into which neither of the warring nations should intrude.[50] Jefferson defined the breadth of this zone as the range of a cannon ball, generally one sea league.[51] The basis of the claim announced in Jefferson's letter was the cannon shot rule.[52] This rule originated in 1610 and gained widespread acceptance in 1702 with the writings of Cornelius van Bynkershoek.[53] Essentially, the rule holds that a nation exercises sovereignty over its marginal seas for as far seaward as its cannons can shoot.[54]

The cannon shot rule predominated from 1702 to 1793, during which time the effective cannon range remained relatively constant at three miles, and remained viable until 1911.[55] Thus, Jefferson, under pressure from President Washington to make an initial claim, relied upon the cannon shot principle.[56] However, neither Jefferson nor

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49. David L. Larson, *National Security Aspects of the United States Extension of the Territorial Sea to Twelve Nautical Miles*, 2 Terr. Sea J. 189, 193 (1992).

50. In 1793, France, Great Britain, and Spain, all of which held territory in North America, were engaged in maritime conflicts off the Atlantic coast of the United States in an extension of hostilities occurring between the nations in Europe. Kmiec, 1 Terr. Sea J. at 9 (cited in note 31).

51. A sea league is identical te a marine league, and is the equivalent of three nautical miles. Gove, ed., *Webster's Third New International Dictionary, Abridged* at 2047 (cited in note 26).

52. Larson, 2 Terr. Sea J. at 193 (cited in noto 49) (citing Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 6 (G. A. Jennings, 1927).

53. Wherefore on the whole it seems a better rule that the control of the land [over the sea] extends as far as cannon will carry . . . that the control from the land ends where the power of men's weapons ends . . . ; for it is this, as we have said, that guarantees possession.

Id. at 191 (quoting Cornelius van Bynkershoek, *De Dominio Maris Dissertatio* 44, 364 (1923)).

54. Sayre A. Swarztrouber, *The Three-Mile Limit of Territorial Seas* 24 (Naval Inst., 1972).

55. Id. at 25.

56. Kmiec, 1 Terr. Sea J. at 9 (citod in note 31).

Washington wished to be hurried into a final decision as to United States control over the marginal seas.[57] Therefore, the claim made in Jefferson's letter was merely provisional. It explicitly reserved the right of the Executive to claim a greater distance in the future.[58] The issue subsided, however, for nearly one hundred fifty years. No further territorial sea expansion of the sort contemplated by Washington and Jefferson was made for nearly two centuries, until President Reagan proclaimed a twelve-mile U.S. territorial sea in 1988.[59]

### *C. The Tidelands Controversy*

The series of events that broke the silence and ultimatly provoked the present uncertainty as to the seaward location of state boundaries has come to be known as the Tidelands Controversy. Until the Tidelands Controversy, the general presumption was that states were sovereign offshore for three miles.[60] This presumption rested on a belief that the original states possessed sovereignty over the three-mile belt upon joining the Union[61] and was buttressed by Thomas Jefferson's assertion of territorial rights over that area in 1793.[62] The Tidelands Controversy abrogated this notion, obscuring the extent and even the existence of state sovereignty.

The Tidelands Controversy had its roots in the early 1930s with speculators who wanted the federal government to issue them permits for drilling in the submerged lands beneath the marginal seas.[63] Since 1842, when the Supreme Court decided *Martin et al. v. Waddell*,[64] it had been settled law that the coastal states "owned" the submerged lands within their internal waters and bays and alone had the power to grant such permits.[65] The speculators wanted the federal government to assert federal ownership over the submerged

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57. Id.
58. Id. at 10.
59. For a comprehensive history of the cannon shot rule and the development of the territerial sea from Roman Law to the present, see Wilder, 32 Va. J. Intl. L. 681 (cited in noto 34); Swarztrauber, *The Three-Mile Limit of Territorial Seas* (cited in note 54); Larson, 2 Terr. Sea J. at 191-98 (cited in note 49).
60. Wilder, 32 Va. J. Intl. L. at 710-11 (cited in note 34).
61. This belief was explicitly refuted by the Supreme Court in *California*, 332 U.S. at 36-38. See notes 88-93 and accompanying text.
62. Wilder, 32 Va. J. Intl. L. at 711 (cited in note 34).
63. Id.
64. 41 U.S. (16 Peters) 367 (1842).
65. Christie, 2 Terr. Sea J. at 151-52 (cited in noto 48).

lands[66] so that it could issue to the speculators the permits currently controlled by the states.[67] Oil companies drilling and planning to drill in the Gulf of Mexico and off the coast of California would then be forced to buy the permits from the speculators at exorbitant rates.

Federal officials routinely rejected the requests of these "claimjumpers," but in 1934 one of the speculators, a personal friend of President Roosevelt's Secretary of the Interior Harold Ickes, persuaded the Secretary to reconsider the issue.[68] Roosevelt officials sought to adopt strong federal policies in order to combat the Great Depression, and Secretary Ickes was especially bold about broadening the powers of the Department of the Interior.[69] The President himself strongly favored a significant expansion of U.S. territorial jurisdiction, at one point even exploring the feasibility of establishing naval oil reserves, beginning at the shoreline and extending out to halfway across the ocean.[70] On June 9, 1937, Secretary Ickes ordered the Department of the Interior to cease the routine rejection of the speculators' permit requests and place them in abeyance.[71] This

66. In *Martin*, the Court settled a dispute over the ownership of suhmerged land off the coast of New Jersey by articulating the basic principles which were to govern ownership of submerged lands for the next hundred years: "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general Government." 41 U.S. at 410. *Martin* dealt only with internal wators, but the Court used the term "navigable waters" in its holding, which includes the territorial sea. For this reason, the case was commonly interpreted as applying to the submerged lands of the continental shelf as well. Interview with Michael W. Reed, Unitod States Department of Justice, Environment and Natural Resources Division, General Litigation Section (Feb. 20, 1996) ("Reed Interview"). The equal footing doctrine announced in *Pollard's Lessee* and reitorated in *Shively* established that these principles apphed not only to the thirteen original states but to all states subsequently admitted to the Union. See notes 43-48 and accompanying text.

67. Wilder, 32 Va. J. Intl. L. at 711-12 (cited in note 34).

68. Id. at 711-15.

69. Id. Wilder suggests that another factor in Ickes's willingness to reconsider this long-settled issue may have been a concern that once he began looking into the matter, principles of laches and estoppel would require the government te assert whatever claims of dormant rights it may have had in order to preserve them. Id. at 714.

70. Id. at 718. Another factor contributing to the President's eagerness to extend U.S. territorial jurisdiction was the growing conflict with the Japanese over Alaskan salmon fisheries, particularly in Bristol Bay, Alaska. The U.S. was concerned about depletion of the salmon steck through overfishing, but Japan refused to negotiate any agreement that would limit Japanese fishing activity in the waters off Alaska. Id. at 721-23.

71. Id. at 714. Secretary Ickes's reversal in position was particularly significant in light of his response to one lease applicant in 1933. In the now-famous Proctor Letter, Ickes wrote that "[t]itle to the soil under the ocean within the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State." Letter from Harold L. Ickes, Secretary of the Interior, to Olin S. Procter (Dec. 22, 1933) ("Proctor Letter"), cited in Christie, 2 Terr. Sea J. at 153 (cited in note 48). In the letter, Secretary Ickes cited *Hardin v. Jordan*, 140 U.S. 371, 381 (1891), in which the Supreme Court stated:

action immediately clouded the rights of states and lessees in the submerged lands and dampened economic development of the Continental Shelf.[72] After a failed attempt to obtain a legislative appropriation of submerged lands within three miles of the coast,[73] Secretary Ickes altered his strategy and attempted to obtain title to the submerged lands for the federal government in court.[74]

Secretary Ickes wanted a test case brought against the state of California, but Attorney General Francis Biddle convinced President Roosevelt that with the advent of World War II it was not an appropriate time to inflame the nation's oil-producing states.[75] Biddle also expressed grave doubts, shared by Secretary of State Cordell Hull, about the constitutional authority of the President to extend U.S. jurisdiction beyond territorial waters and about the advisability of doing so with respect to international law and foreign relations.[76]

To strengthen his position, Secretary Ickes allied with the Navy and the Department of Defense, citing national defense and the Navy's ostensible need for a Naval Petroleum Reserve off the coast of California.[77] Despite the questionable need for such a reserve and the Navy's exceptionally poor record of managing its inland reserves,[78] the interest of the Navy strengthened the government's case.[79] With the replacement of Secretary of State Hull on the interdepartmental negotiating team,[80] the Departments of Interior and State reached a compromise and sent a memo to President Roosevelt recommending that he issue two separate proclamations: one asserting jurisdiction over the resources of the continental shelf and another asserting jurisdiction over coastal fisheries.[81] While the memo recommended

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> With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated.... Such title to the share and lands under water is regarded as incidental to the sovereignty of the state ... and cannot be retained or granted out to individuals by the United States.

Proctor Letter (quoted in Christie, 2 Terr. Sea J. at 153 n.11 (cited in note 48)).

72. Wilder, 32 Va. J. Intl. L. at 714 (cited in noto 34).

73. Id. at 715-17.

74. Id.

75. Id. at 729.

76. Id. at 718-19. President Roosevelt's enthusiasm for expanding U.S. jurisdiction offshore led him to merge in his own mind the domestic issue of federal versus state sovereignty with the international issue of extending national jurisdiction. Id. at 718.

77. Id. at 717.

78. Id.

79. Id.

80. Secretary Hull was replaced by Assistant Secretary Breckenridge Long. Id. at 730.

81. Id.

that the President stop short of asserting a single extended regime,[82] the compromise between Interior and State predictably failed to consider the states' interests in these new zones.[83]

President Roosevelt approved the memo two weeks before his death, leaving it to President Truman to issue what would become known as the Truman Proclamations.[84] The proclamations did not purport to resolve the questions of domestic federalism and sovereignty within three miles of the coast,[85] but they effectively precluded states from making their own extended jurisdictional claims in the marginal sea.[86] Thus, after the proclamations, the area beyond three miles was considered to be exclusively federal. This casually conceived notion would shape the development of offshore federalism over the ensuing decades, and continues to do so today.[87]

After issuing the proclamations in 1945, President Truman, with considerable prompting from Secretary Ickes, ordered Attorney General Tom Clark to file an original action in the Supreme Court against the State of California.[88] Secretary Ickes sought to have the U.S. declared the owner in fee simple, with the accompanying rights and powers, of the submerged lands within three miles of the low water line of the coast of California.[89] Both sides contended that they possessed title to these lands. California argued that because the original colonies acquired all lands beneath navigable waters within the marginal sea from England, California also had vested ownership of these lands under the equal footing doctrine.[90] However, the Court found insufficient evidence to establish that England ever claimed title that could have passed to the colonies.[91] It also limited the application of *Pollard's Lessee* to internal waters.[92] The Court concluded that acquisition of the three-mile belt was first accomplished by the

82. Id. at 730-31.
83. Id. at 730.
84. Id. at 730-31.
85. Id. at 731. Attorney General Biddle's opposition to the filing of a test case and his admonitions about inflaming the oil-producing states convinced President Roosevelt to drop the domestic issue of federal versus state sovereignty. In response, Secretary Ickes turned his attention from gaining department of justice support and sought an accord with the State Department alone. Id. at 729.
86. Id. at 731.
87. Id.
88. Id. at 732. See *California*, 332 U.S. at 22-23.
89. Christie, 2 Terr. Sea J. at 156 (citod in noto 48).
90. Id.
91. Id. at 156-57.
92. Id. at 157. See *California*, 332 U.S. at 36-38.

federal government through Thomas Jefferson's 1793 letter to the governments of France and Great Britain.[93]

The Court viewed the federal government as more than a mere property owner. It observed that the federal government, as the entity responsible for the conduct of foreign relations, has a duty to protect and defend the marginal seas.[94] This observation foreshadowed the Court's holding that the ocean, including the three-mile belt, is vitally important to international peacekeeping and world commerce,[95] the paramount responsibilities of the federal government.[96] The Court stated that our constitutional system does not equip the states with the powers necessary to uphold "the responsibilities which would be concomitant with the dominion which it seeks."[97]

Importantly, the Court did not think that these interests necessitated federal ownership of the territorial sea. Rather, the Court held only "that California is *not* the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[98]

Justice Frankfurter's dissent pointed out some rather serious flaws in the Court's reasoning. "Of course the United States has 'paramount rights' in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power."[99] He pointed out that no interference with these rights was before the Court, only questions of ownership. Oil's importance to national security is irrelevant to the issue of ownership or dominion.[100]

Echoing Justice Frankfurter's criticism, Congress reacted strongly to the Court's opinion. The Senate Judiciary Committee heard testimony describing the case as "'creating an estate never before heard of,' 'a reversal of what all competent people believed the law to be,' . . . 'a threat to our constitutional system of dual sover-

93. Christie, 2 Terr. Sea J. at 157 (cited in note 48). See Part III.B.
94. Christie, 2 Terr. Sea J. at 157 (cited in note 48).
95. Id. See *California*, 332 U.S. at 35.
96. *California*, 332 U.S. at 35.
97. Id. at 35-36.
98. Id. at 38-39 (emphasis added). See Christie, 2 Terr. Sea J. at 157-58 (cited in note 48).
99. *California*, 332 U.S. at 44 (Frankfurter, J., dissenting). See Christie, 2 Terr. Sea J. at 158 (cited in note 48).
100. *California*, 332 U.S. at 44-45 (Frankfurter, J., dissenting).

eignty,' . . . [and] 'causing pandemonium.' "[101] The Committee Report concluded that the decision set out the law differently from what members of the legal community thought it to be, and also differently from what the Supreme Court had apparently believed it to be.[102]

The Court's holding, however controversial, that the federal government had paramount rights in submerged lands, but not title to them, did not give the federal government the necessary statutory authority to lease submerged lands within the three-mile limit. Yet the decision created grave doubts as to the security of existing leases from the State of California and the appropriate source of new leases.[103]

Congress responded by considering a number of bills to quitclaim the submerged lands within three miles to the states.[104] The federal government, meanwhile, won two more original actions against Louisiana and Texas, clarifying rights but not title in the submerged lands in favor of the federal government.[105] However, the Executive still had to submit to Congress for the statutory authority to issue permits, and Congress still refused to provide it.[106] President Truman responded in kind by vetoing the only quitclaim bill to come before him.[107]

### *D. The Submerged Lands Act and the Submerged Lands Cases*

The stalemate between the executive and legislative branches lasted until 1952, when President Eisenhower took office. Several new quitclaim bills were introduced immediately in Congress[108] and in 1953 Eisenhower signed the Submerged Lands Act ("SLA"),[109] quitclaiming all federal proprietary rights in the submerged lands within three miles of shore, or up to nine miles in the Gulf of Mexico, to the

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101. Confirming and Establishing the Titles of the States to Lands and Resources in and Beneath Navigable Waters Within State Boundaries and to Provide for the Use and Control of Said Lands and Resources, Senate Rep. No. 1592, 80th Cong., 2d Sess. 7 (June 10, 1948).

102. Christie, 2 Terr. Sea J. at 160 (cited in note 48).

103. Wilder, 32 Va. J. Intl. L. at 733 n.329 (cited in note 34).

104. Id. at 734.

105. *United States v. Louisiana*, 339 U.S. 699 (1950); *Texas*, 339 U.S. at 707 (1950).

106. Wilder, 32 Va. J. Intl. L. at 734 (cited in note 34).

107. Id. at 736.

108. Out of concern that President Eisenhower would only be willing to sign a three-mile quitclaim bill similar to the one President Truman vetoed, most of the bills took a conservative approach and failed to consider any progressive approaches involving shared federal-state administration of a broader area offshore. Id. at 737. This proved to be an opportunity unnecessarily foregone, for Eisenhower was strongly in favor of "returning" the submerged lands to the states. Id.

109. 43 U.S.C. § 1301 et seq. (1988 ed.).

coastal states.[110] Shortly thereafter, he also signed its companion, the Outer Continental Shelf Lands Act,[111] confirming rights in the seabed and subsoil beyond three miles to the federal government.[112]

With the SLA, Congress accomplished several goals. It established and confirmed the states' title to and ownership of submerged lands and resources within three miles, or up to nine miles in the Gulf of Mexico, as well as the power to manage, administer, lease, develop, and use those lands and resources.[113] It further relinquished to the states "all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources."[114] In so doing, Congress explicitly resolved all uncertainty regarding offshore leases that had resulted from the Tidelands Controversy and the *California* decision.[115]

The final major effect of the SLA was to establish definite state boundaries. The Act approved and confirmed the three-mile limit as the seaward boundary of the coastal states, allowing a greater boundary of up to nine miles only in the Gulf of Mexico, and only if the state could prove a legitimate prior claim of greater than three miles.[116] The provision for the extension of state boundaries in the Gulf of Mexico was for the benefit of Florida and Texas, both of which had historical claims to a three-league boundary in the Gulf.[117] Florida's claim was based on its constitution, which Congress approved in 1868,[118] and which defined Florida's boundaries as extending "to a

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110. Wilder, 32 Va. J. Intl. L. at 738 (cited in note 34).
111. 42 U.S.C. § 1331 et seq. (1988 ed. & Supp. V).
112. Christie, 2 Terr. Sea J. at 161 (cited in note 48).
113. 43 U.S.C. § 1311(a) (1988 ed.).
114. Id. § 1311(b).
115. See id. § 1311(c).
116. Section 4 stated:

> The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line.... Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

Id. § 1312. Section 1 defined the term "boundaries" te include:

> ... the seaward boundaries of a State or its boundaries in the Gulf of Mexico ... 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, or more than three marine leagues into the Gulf of Mexico....

Id. § 1301(b).
117. Christie, 2 Terr. Sea J. at 163-64 (cited in note 48).
118. Id. at 164.

point three leagues from the mainland" in the Gulf of Mexico.[119] Texas's claim relied on the three league boundary it claimed as an independent nation prior to its annexation in 1845.[120] The federal government soon challenged both of these claims, as well as similar claims made by Louisiana, Mississippi, and Alabama. In *United States v. Louisiana* (*Louisiana II*),[121] the Supreme Court upheld Texas's claim and denied the claims of Louisiana, Mississippi, and Alabama.[122] The Court also upheld Florida's claim in a separate opinion issued concurrently with the first, *United States v. Florida*.[123]

In the last of the submerged lands cases bearing upon this issue, *United States v. Maine*,[124] the federal government brought an original action against the thirteen Atlantic coastal states, which were claiming exclusive rights in the resources of the submerged lands beyond three miles of their coastlines and beyond their three-mile SLA boundaries.[125] The states' claims rested on what they argued was a succession to the rights of the British crown, either through their charters or at independence.[126] The federal government, asserting its own exclusive rights in the natural resources of the submerged lands seaward of the three-mile state boundaries established in the SLA,[127] argued that the issue of historical succession had been resolved by the *California*, *Texas*, and *Louisiana* decisions.[128]

The Supreme Court accepted the conclusions of the special master and reaffirmed its holdings in *California*, *Texas*, and *Louisiana*.[129] The Court viewed those cases as resting on a dual basis

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119. Fla. Const., Art. I.

120. Christie, 2 Terr. Sea J. at 164 n.77 (cited in note 48).

121. 363 U.S. 1 (1960).

122. Id. at 83-84.

123. 363 U.S. 121, 129 (1960).

124. 420 U.S. 515 (1975).

125. Id. at 516-17. The action originally included the State of Florida, but the action against Florida was later severed when it became apparent that Florida's claims, which were based solely on its constitution, which defined the state's boundaries as extending "to the edge of the Gulf Stream," Fla. Const., Art. I, had nothing in common with the claims of the other Atlantic states. *Maine*, 420 U.S. at 517 n.3. Florida's claims were tried separately. Id. See Michael W. Reed, G. Thomas Koester, and John Briscoe, eds., *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949-1987* at 591 (Landmark Publishing, 1991) ("*Special Masters' Reports*").

126. *Special Masters' Reports* at 591 (cited in note 125).

127. Milner S. Ball, *The Law of the Sea: Federal-State Relations and the Extension of the Territorial Sea, Prolegomena to an Experimental Politics* (U. of Ga., 1978).

128. *Special Masters' Reports* at 591 (cited in note 125).

129. The Court appointed a Special Master te hear and evaluate the evidence and submit recommendations to the Court. Id. The Special Master noted that the Court previously considered the question of whether the colonies entered the Union with sovereign rights in the submerged lands beyond their coasts, and determined that they had not. Id. By virtue of the equal

of history and pure legal principle.[130] It held that as a matter of law, the Constitution granted the federal government jurisdiction over foreign commerce, foreign affairs, and national defense.[131] As a matter of law, paramount rights for the federal government in the marginal seas are an attribute of those external sovereign powers.[132]

*Maine*, while confirming the Court's previous holdings that none of the coastal states have been sovereign beyond their shorelines at least since the formation of the Union, did not reduce the rights these states received from the federal government under the SLA. Despite their lack of sovereignty and the paramount rights of the federal government, the coastal states were entitled to anything the federal government deemed appropriate to give them.[133] With the SLA, the federal government granted them exclusive title to and rights in the land from their coastlines to three miles offshore, and those rights and title remained valid even after *Maine*.[134]

### *E. The Reagan Proclamation*

The next major development in offshore federalism occurred in 1988. Following the Third United Nations Convention on the Law of the Sea, which adjourned in 1982, coastal nations around the world expanded their territorial sea claims to the newly approved distance of twelve miles.[135] Although the Convention had not been ratified by the requisite sixty nations, and although the United States itself was

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footing doctrine, the Court had held that California, Texas, and Louisiana also entered the Union without sovereign rights over this area. Id. The Special Master concluded that the Court's holdings in these cases applied with equal force to the Atlantic States. Id.

The decision in *Texas* differed from the *California* and *Louisiana* decisions in one very important respect. Texas had been an independent sovereign republic prior to its annexation and had therefore held sovereign rights over the submerged lands out te its three-league boundary in the Gulf. *Texas*, 339 U.S. at 711. Texas argued that that territery had never been transferred to the United States and that it therefore retained its sovereignty over the area. Id. The Court rejected Texas's argnments, applying instead a "converse" application of the equal footing doctrine. The Court stated that equal footing "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State." Id. at 717. Becoming a sister state of the Union on equal footing with the rest of the states "entailed a relinquishment of some of [Texas's] sovereignty," id. at 718, and resulted in a holding similar to that of the other two cases. See Christie, 2 Terr. Sea J. at 159 (cited in note 48) (discussing the Court's use of the equal footing doctrine in *Texas*).

130. *Maine*, 420 U.S. at 522.

131. Id.

132. Id. at 522-23. See Report of Albert B. Maris, Special Master (Aug. 27, 1974) (reprinted in *Special Masters' Reports* (cited in note 125)). See also Ball, *The Law of the Sea* at 28 (cited in note 127).

133. Interview with Jonathan I. Charney, Professor of Law, Vanderbilt University (Nov. 16, 1995) ("Charney Interview").

134. Id.

135. See UNCLOS III, Art. 3.

not signatory, the proliferation of expanded claims was rapidly turning the new twelve-mile limit into customary international law.[136] The federal government wished to keep up with this trend, but the Reagan Administration was concerned that doing so would prompt individual U.S. coastal states to expand their own sovereignty claims to twelve miles. The Administration feared that this would result in those states becoming embroiled in international affairs, the exclusive constitutional province of the federal government, and in a renewal of the disputes regarding ownership of the oil and gas resources between three and twelve miles.[137]

In response to these developments, President Reagan issued a proclamation extending the United States' territorial sea to twelve miles, but for international purposes only.[138] The proclamation included a disclaimer explicitly stating that it had no effect whatsoever on the state of domestic law and offshore federalism.[139]

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136. Charney Interview (cited in note 133).

137. Wilder, 32 Va. J. Intl. L. at 688 (cited in note 34).

138. Reagan Proclamation, 54 Fed. Reg. 777 (cited in note 8).

139. "Nothing in this Proclamation: (a) extends or alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . ." Id.

The extension of the territorial sea by proclamation rather than by treaty with the advice and consent of the Senate raised questions about the power of the Executive, acting alone, to assert a territorial claim. This issue was addressed by the Justice Department's Office of Legal Counsel ("OLC") prior to the issuance of the Proclamation. The OLC concluded that:

> . . . the President can extend the territorial sea from three to twelve miles by proclamation . . . by virtue of his constitutional role as the representative of the United States in foreign relations. The President's foreign relations authority under the Constitution clearly permits his unilateral assertion on behalf of the United States of jurisdiction over the territorial sea. Whether the President may individually assert sovereignty over the territorial sea is open to some question, although on the basis of several long-settled, historical examples of Presidents unilaterally claiming territory in this fashion, we believe that he may.

Kmiec, 1 Terr. Sea J. at 2 (cited in note 31). This article is a reprint of the original OLC opinion. See id. at 6-7 nn.16, 18 for a summary of authorities to the effect that the President has broad authority over the nation's conduct in foreign affairs.

Foremost among the examples of unilateral executive assertions of sovereignty cited in the OLC memo was the original claim to a three-mile territorial sea made by President Washington and Secretary of State Jefferson in 1793. "[I]n making the original claim to the territorial sea [Washington and Jefferson] relied on the President's constitutional power as the representative of the United States in foreign affairs to proclaim sovereignty, and not simply jurisdiction, over unclaimed territory." Id. at 14. Other examples cited by the OLC included the acquisition of the Midway Islands in 1869 and Wake Island in 1899. Both of these were acquired by discovery and occupation. Id. at 15. The OLC concluded that "the considerations which explain why the President's constitutional position as the representative of the United States in foreign affairs allows him to acquire territory by discovery and occupation counsel that the same constitutional status allows him to proclaim sovereignty over an extended territorial sea." Id. at 16. The OLC also observed that practical considerations lend credence to this presidential authority, noting that "[a]s our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation." Id.

This disclaimer has been the subject of considerable controversy. Critics have called into question its effectiveness in limiting the application of domestic law to the area between three and twelve miles, and thus in precluding the extension of state boundaries beyond three miles. Some commentators insist that the disclaimer is necessarily invalid. The proclamation asserts full sovereignty and jurisdiction for the United States out to twelve miles from shore, then indicates by the disclaimer that a full assertion of sovereignty is not intended. In effect, it attempts to create a type of federal property which is subject neither to domestic law nor to international law. This appears wholly inconsistent, critics argue, with the usual notions of the territorial sea and sovereignty.[140] If the marginal sea out to twelve miles from shore now constitutes the territorial sea of the United States, the argument continues, then this country exercises full plenary power over it and, presumably, it must be subject to existing domestic law, notwithstanding the proviso inserted in the proclamation.[141]

International law supports the contention that a nation's domestic laws apply in its territorial sea. In defining the territorial sea, UNCLOS III stipulates that the sovereignty of a coastal nation extends beyond its land and internal waters to the territorial sea.[142] By this definition it appears that by claiming a territorial sea "in accordance with international law,"[143] the proclamation asserted national sovereignty over that area. If domestic law does not apply in the new territorial sea, then the President would seem to have created a new type of federal property, but with questionable authority to do so.[144]

Other observers disagree with the conclusion that domestic law must apply within the newly expanded territorial sea. They argue that when making the extended claim, President Reagan was trying to avoid a battle with Congress by not purporting to extend the reach of its laws without its consent.[145] When making the original

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140. John A. Saurenman, *The Effects of a Twelve-Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?*, 1 Terr. Sea J. 39, 66 (1990) (citations omitted).

141. Id. at 67-68.

142. UNCLOS III, Art. 2(1).

143. Reagan Proclamation, 54 Fed. Reg. 777 (cited in note 8).

144. Saurenman, 1 Terr. Sea J. at 66 (cited in note 140). But see note 139 for support of the contention that the President does have the power to claim federal territory unilaterally.

Other commentators point out that, at least to the extent that the states' ability to protect their legitimate interests in the marginal sea between three and twelve miles offshore had formerly been limited by conflict with executive foreign policy, the extension of the territorial sea has some effect on domestic jurisdiction and authority. Christie, 2 Terr. Sea J. at 176-77 (cited in note 48).

145. Reed Interview (cited in note 66).

claim to a three-mile belt, Thomas Jefferson did not endeavor to dictate to Congress what statutes applied in that new area, and President Reagan wished to show the same deference to the legislature. It is Congress's province alone to decide what domestic legislation should be extended to the new federal territory, although it has never done so. Where existing statutes define the precise geographic limits of their application, the Executive must adhere to that definition in enforcing the statutes.[146] But many more laws merely state that they apply within the territorial sea of the U.S. without defining its limits,[147] leaving questions as to whether Congress intended for the statutes' scope to expand in conjunction with the territorial sea, or whether they were presumptively limited to three miles. In these cases, the Executive interprets the statutes delicately, enforcing them only out to three miles, not twelve.[148]

Whatever domestic effect the proclamation may have had, it seems clear that it did not extend state sovereignty to twelve miles, for the President does not possess the power to establish the seaward boundaries of the individual states. That power rests with Congress, and Congress has not extended the states' seaward boundaries.[149] Nevertheless, the unintended consequence of the proclamation's disclaimer was to produce a very unsettled legal regime in the marginal seas between three and twelve miles.[150]

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146. The Clean Water Act, for example, defines the "territorial sea" in which it applies as extending three miles from shore. 33 U.S.C. § 1362(8) (1994 ed.). However, the provisions relating to oil and hazardous substance liability apply out to twelve miles because they prohibit discharges of oil or hazardous substances in the navigable waters of the United States, specifically including the contiguous zone. Id. § 1321(b)(3). The contiguous zone is defined in § 1321(a)(9) as the zone established by Article 24 of the Convention on the Territorial Sea and the Contiguous Zone (part of the First United Nations Convention on the Law of the Sea (UNCLOS I), the latest UNCLOS in effect at the time the Clean Water Act was passed). That article defines the contiguous zone as extending from the then three-mile limit of the torritorial sea out to twelve miles. UNCLOS III redefined the contiguous zone as extending from the limit of the new twelve-mile territorial sea out to twenty-four miles from shore. UNCLOS III, Art. 33.

147. For example, the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1994 ed.), makes it unlawful to take endangered species "within the United States or the territorial sea of the United States." Id. § 1538(a)(1)(B).

148. Reed Interview (cited in note 66).

149. Briscoe, 2 Terr. Sea J. at 228 (cited in note 29). See also *California*, 332 U.S. at 27 (explaining that Art. IV, § 3, cl. 2 of the Constitution "vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .' We have said that the constitutional power of Congress in this respect is without limitation. Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power" (internal citation omitted)).

150. Richard J. McLaughlin, *The Impact of the Extension of the U.S. Territorial Sea on Foreign Flag Vessels*, 2 Terr. Sea J. 91, 92 (1992).

## IV. THE SEAWARD EXTENT OF STATE SOVEREIGNTY

Because the federal judicial districts are defined by reference to the state counties they contain, the seaward limit of those districts cannot be ascertained without first determining the general limit of state sovereignty in the marginal seas. As the history of offshore federalism indicates, the location of that limit is an unsettled and highly elusive issue. Nevertheless, four distinct possibilities stand out from this history: a zero-mile offshore limit; a universal three-mile offshore limit; a three-mile limit except for Texas and Florida's Gulf Coast, each having nine miles; and a twelve-mile limit. Valid arguments can be made for and against each of these possibilities. This Part examines those arguments and concludes that, under the current state of the law, the universal three-mile limit is the most tenable. However, in deference to the uncertainty which plagues this issue, this Part applies all four possibilities to the hypothetical set out at the beginning of this Note, in order to illustrate the venue consequences of each if it were adopted.

### *A. A Zero-Mile Limit*

#### 1. The Case For and Against a Zero-Mile Limit

*California*, *Texas*, *Louisiana*, and *Maine* provide strong support for the argument that state sovereignty does not extend even to the three-mile marginal sea. The holdings in those cases establish that the coastal states were not sovereign in the three-mile belt seaward of their coastlines prior to the formation of the Union. It follows that they are not sovereign in that belt today. However, this position has not been seriously argned, and it generally receives little credence.

The legislative history of the SLA clearly indicates that the Act's purpose was to restore to the coastal states the sovereignty they *thought* they had before the Tidelands Controversy. Unfortunately, the language of the SLA does not specify that it grants sovereignty in the three-mile territorial sea to the states. It speaks only in terms of title to the seabed and the resources thereunder, "recogniz[ing], confirm[ing], establish[ing], and vest[ing] in and assign[ing]" that title and those rights to the states or to the persons entitled to them under

existing leases with the states at the time of the Act.[151] Further, this language suggests that Congress could not have made any "persons" sovereign over the three-mile belt. Nevertheless, the general assumption is to the contrary. This is in large part a reaction to the language Congress used for its grant.[152] The grant's language is so comprehensive, so much more than what would be required for an ordinary grant of title or jurisdiction, that it is commonly equated to a grant of sovereignty despite the lack of the explicit use of that term.

In addition, when addressing conflicts between states or between states and the federal government, the Supreme Court generally analogizes to principles of international law.[153] The international law cases slip back and forth between the terms sovereignty and title when addressing territorial disputes.[154] Thus, it is generally assumed that the language of the SLA, with its reference to title, was sufficient to extend state sovereignty to three miles, particularly in light of the clear congressional intent to do so.[155] The statute's potentially troubling reference to "persons" can be explained by interpreting the provision to mean that in granting sovereignty over the three-mile belt to the states, Congress intended for any leases and grants made by states prior to the Act to remain valid despite the intercession of *California*.[156]

The one hundred fifty-year-old assumption of state sovereignty over the three-mile marginal sea that predominated before the *California* decision further buttresses the present presumption of such sovereignty. Although a strict reading of the SLA alone does not

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151. 43 U.S.C. § 1311(a) (1988 ed.).

152. The statute grants to the states "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 . . . the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law." Id.

153. See, for example, *Georgia v. South Carolina*, 497 U.S. 376 (1990) (adopting the special master's recommendation for the location of the seaward boundary between Georgia and South Carolina and noting that the special master felt constrained by international law); *Georgia v. Tennessee Copper Company*, 206 U.S. 230 (1977) (allowing Georgia to maintain a public nuisance action against a corporation by virtue of Georgia's sovereignty, despite the lack of an injury sufficient for a private party to sustain such an action).

154. Charney Interview (cited in note 133).

155. Title II [of the SLA] merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters.

Confiring and Establishing the Titles of the States to Land Beneath Navigable Waters Within State Boundaries and to the Natural Resources Within Such Lands and Waters, H.R. Rep. No. 695, 82d Cong., 1st Sess. 5 (July 12, 1951) (footnote omittied).

156. See notes 88-103 and accompanying text.

support this assumption, such an approach discounts the substantial value of history and simply is not in accord with modern scholarly thought on the issue.

### 2. A Zero-Mile Boundary and the Hypothetical

In the USA Oil hypothetical, USA Oil operates three oil platforms—at two, six, and ten miles off the coast of Texas, respectively—and allegedly causes unpermitted releases from each. Federal prosecutors must determine the proper venue in which to file the charges arising from each platform. If any platform is located within the state's boundaries, and therefore within a federal judicial district, Rule 18 applies and venue for the charges relating to each platform will lie in the district in which that platform is located. For charges relating to any platform located beyond the state's boundaries, Section 3238 stipulates that venue lies in the district in which the offenders were arrested or first brought, or, since these defendants were not arrested or first brought into a district, the district of their last known address. If state sovereignty ended at the low water line, resolution of the question of venue in the hypothetical situation would be fairly simple. State boundaries, and therefore county and judicial district boundaries as well, would coincide with the low water line. Because each of the rigs is located offshore, each of the alleged discharges would have occurred outside of any state or judicial district, and Section 3238 would control the entire case.

Because none of the offenders was arrested or first brought into the Southern District of Texas, the government could not prove venue in that district. Rather, it would have to proceed under the second alternative of Section 3238, which fixes venue in the district of the last known address of one or more of the joint offenders. Venue would therefore lie in the Southern District of California, assuming that the company itself or any of its executive officers were named as defendants. Venue would also lie in the District of Delaware if the company itself were named as a defendant, and in the District of Alaska if the former rig foreman was named as a defendant.[157]

Trial of this case in California, Delaware, or Alaska as opposed to Texas would impose a significant burden on the federal govern-

157. Under the joint offenders provision of § 3238, venue for all of the defendants would be proper in any of the districts in which it was proper for any one of the defendants. 18 U.S.C. § 3238. For example, venue for trial of the former rig foreman would also lie in the Southern District of California provided that USA Oil itself or any of the corporate executive officers was also a defendant. Of course, questions of personal jurisdiction still would have to be addressed.

ment. The cost of transporting all relevant documents, witnesses, and evidence across the country would be substantial, perhaps even unfeasible. It would be a great burden on the Assistant U.S. Attorney for the Southern District of Texas and the other government personnel who participated in the investigation and prepared the indictments to transfer their operations for the duration of the trial. Besides the obvious logistical difficulties and the lack of familiarity with the particular judges, the distance would impair the prosecutor's ability to attend to his or her other cases. Of course the case could be reassigned to the U.S. Attorney's Office based in the district of venue, but that would result in a prosecution handled by attorneys other than those most familiar with the facts, history, and circumstances of the alleged violations. Removing the prosecution from the "natural" district (the Southern District of Texas) to satisfy the arbitrary requirements of Section 3238[158] thus imposes significant costs on the criminal enforcement process. A zero-mile limit to coastal state sovereignty would result in far more frequent impositions of these costs which society ultimately bears.

### *B. A Universal Three-Mile Limit*

#### 1. The Case For and Against a Universal Three-Mile Limit

The strongest argument for a universal three-mile seaward limit to state sovereignty is momentum. Following its adoption by the United States as a stopgap measure in 1793, the three-mile limit gradually gained international acceptance.[159] The passage of time obscured this limit's arbitrariness, tentativeness, and supposed temporariness.[160] The assumption of a universal three-mile limit persisted for one hundred fifty years until the Tidelands Controversy. Even after *California* decision, Congress so staunchly believed in the three-mile state limit that it battled the executive for six years to restore it through the SLA.[161]

Commentators commonly interpret the SLA as having definitively established the boundaries of state sovereignty as three

158. In *Layton*, the Ninth Circuit observed that the original purpose of § 3238 was to create an "arbitrary rule of venue" for offenses not committed in any judicial district and therefore not addressed by the constitutional criminal venue provisions of Article III and the Sixth Amendment. 855 F.2d at 1411.

159. See Part III.B.

160. Wilder, 32 Va. J. Intl. L. at 681-82 (cited in note 34).

161. See notes 101-12 and accompanying text.

miles from the Atlantic and Pacific coasts and a maximum of nine miles off the Gulf coasts of Florida and Texas.[162] But basic principles of property law suggest that while the SLA was effective in granting Florida and Texas an interest in the resources of the Gulf between three and nine miles, it could not have granted them sovereignty within that six-mile belt. The conveyance in the SLA was by quitclaim.[163] By virtue of the Truman Proclamation,[164] the United States had jurisdiction and control over the resources of the continental shelf. But the Truman Proclamation did not in any way assert national sovereignty over the continental shelf. National sovereignty only extended to three miles at the time the SLA was passed. This was the limit originally asserted by Thomas Jefferson in 1793 and the maximum claim permitted under international law prior to UNCLOS III in 1983. Thus, all that could have been transferred by the SLA quitclaim in 1953 was jurisdiction and control of the resources beyond three miles—not sovereignty. Though national sovereignty was extended to twelve miles by the Reagan Proclamation in 1988, such an expansion does not retroactively amend a quitclaim made thirty-five years prior.[165] Since the Reagan proclamation,

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162. See notes 116-23 and accompanying text for a discussion of the boundaries established by the SLA.

163. The congressional quitclaim grant states:

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

43 U.S.C. § 1311(b) (emphasis added). In contrast to a general warranty deed, a quitclaim deed transfers only those intorests which the grantor has in the property at the time of the conveyance. The grantor transfers whatever rights, title, and interest the grantor may have in the property, "if any," to the grantee. The use of a quitclaim deed can be regarded as notice to the grantee that there may be outstanding equities against or impediments to the grantor's title and can thus deprive a grantoe of bona fide purchaser status. Richard R. Powell and Patrick J. Rohan, 6A *Powell on Real Property* ¶ 897[1][b] (Matthew Bender, 1995). Thus, while Florida and Texas received the complete interest of the United States in the submerged lands and resources of the nine-mile marginal sea, the quitclaim device employed by the SLA was insufficient to confer sovereignty upon them because the United States was not sovereign in that area.

164. Proclamation No. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

165. There is a doctrine known as estoppel by deed, or the doctrine of after-acquired property, which holds that if a grantor conveys land in which he has no rights with warranty of title, and afterwards acquires good title, that title instantly passes to the vendee, and the grantor is estopped from denying that he had no right in the property at the time of tbe sale. Powell and Rohan, 6A *Powell on Real Property* at ¶ 901[2] (cited in note 163). The doctrine prevents a grantor from making a conveyance in which he or she assures the grantee that title is being transferred, and later asserting paramount title te gain unjust enrichment. Id. Estoppel by deed does not depend on proof of fraudulent intent on the part of the grantor. Id. This may be used in support of the contention that the federal government's 1988 assertion of sovereignty over a twelve-mile torritorial sea resulted in an instantaneous conferral of sovereignty out to nine miles to Florida and Texas. However, estoppel by deed requires that the original conveyance

Congress has not acted to grant sovereignty over the three- to nine-mile area to Florida and Texas, so they cannot claim sovereignty beyond three miles.[166] Therefore, historically as well as legally, a universal three-mile limit to U.S. coastal state sovereignty is the most sound and defensible position.

2. A Universal Three-Mile Boundary and the Hypothetical

If the limit of state sovereignty lies at three miles for all coastal states, management of the hypothetical case against USA Oil becomes problematic. The platform lying two miles offshore would be located within the State of Texas and therefore within the Southern District of Texas. There would be no problem in bringing a prosecution of the alleged violations related to that platform in that district. However, if the government wished to proceed with a prosecution of the alleged violations committed on the six- and ten-mile platforms, Section 3238 would still require that it do so in either the Southern District of California, the District of Delaware, or the District of Alaska. Unfortunately, the Federal Rules of Criminal Procedure do not authorize supplemental, or "pendent," venue in criminal prosecutions, and in the absence of a pendent venue rule, the USA Oil prosecution would have to be split.[167]

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included a warranty of title. Id. Quitclaim deeds by definition contain no warranties of title, and as such are categorically excepted from the doctrine of estoppel by deed. Id.

166. It would be invalid to argue that Florida and Texas are sovereign to nine miles in the Gulf of Mexico by virtue of the very historical claims which prompted Congress to grant them ownership of the submerged lands out to that distance in the SLA. The converse application of the equal footing doctrine applied by the Court in *Texas*, 339 U.S. at 715-20, dictates that the two states forfeited all such unique and independent claims of sovereignty upon their admission to the Union and precludes such an argument.

167. F.R.Cr.P. 8(a) provides for joinder of offenses in an indictment where the offenses are of the same or similar character, are based on the same act or transaction, or are connected or constitute parts of a common scheme or plan. However, it does not authorize supplemental, or "pendent," venue for the multiple offenses. In order for charges to be joined, there must be an independent basis of venue under Rule 18, Section 3237, or Section 3238 for each charge in the district in which the case is prosecuted. This is a result of the article III and sixth amendment requirements that all crimes be tried in the state and district in which they were committed.

In situations such as the one presented by the USA Oil hypothetical, a rule authorizing pendent venue would make sense while still respecting the constitutional policies underlying the article III and sixth amendment guarantees. The principle underlying these constitutional guarantees was fairness to the defendant. *Johnston v. United States*, 351 U.S. 215, 224 (1956) (Douglas, J., dissenting). The goal was to protect a defendant from being subjected to the hardships of standing trial away from home, where, at that time, most crimes were committed and where the Framers believed people normally would receive the fairest trial. Id. The Supreme Court has expressed a continuing concern that, where possible, choices of venue between appropriate districts be made with consideration for the policies of fairness expressed by the Framers. See, for example, *United States v. Johnson*, 323 U.S. 273, 276 (1944) (indicating that whenever possible, even when not required, laws should be interpreted so as to lay venue in the vicinage of the crime in accordance with the underlying spirit of the Constitution); *Cores*, 356 U.S. at 407

Prosecution of the charges for which venue would lie only in California, Delaware, or Alaska would engender the same costs and burdens discussed in relation to a zero-mile limit. In light of these costs and the opportunity to prosecute the charges stemming from the two-mile platform in the Southern District of Texas, the government may elect not to prosecute the alleged violations arising from the six- and ten-mile platforms at all. This decision would impose certain costs of its own, including allowing known crimes to go unpunished. It would, however, avoid the more tangible costs associated with undertaking two prosecutions, one of which would occur in a remote district.

### *C. A Combined Three- and Nine-Mile Limit*

#### 1. The Case For and Against a Combined Three- and Nine-Mile Limit

The argument in favor of a nine-mile limit to sovereignty for the states of Florida and Texas derives from the Supreme Court cases that originally approved those states' nine-mile boundaries under the SLA. In *Louisiana II*, the Executive Branch argued against the extension of any of the Gulf states' boundaries to nine miles on the grounds that the extension of a state boundary beyond the national boundary would be an international embarrassment with the potential to em-

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(stating that when the language of an act permits, it should be construed so as to respect the considerations of fairness and hardship arising out of prosecution of the accused in a remote place).

A rule allowing pendent venue in criminal cases would not offend these notions of fairness; it would arguably further the policy. If an indictment is filed in a district in which venue is proper for one or more of the included charges, the defendant must face trial on those charges in that district. It hardly offends the basic notion of fairness to have the defendant stand trial in that district on additional charges arising out of the same nucleus of operative facts. While it may impose a slight additional burden, it would be no greater inconvenience than defending a separate prosecution in a different district on related charges.

Pendent venue could be authorized easily by amending Rule 18. The following is one suggestion for revision of the rule:

> (b) In all cases where venue is proper under this rule for prosecution of a particular offense in a district, venue shall also be proper in that district for prosecution of all other offenses that are based on the same act or transaction, or for two or more acts or transactions that are related or constitute parts of a common scheme or plan.

This provision would enable the government te prosecute an entire criminal case in a single district and avoid the inefficiencies associated with multiple prosecutions in multiple districts. The fact that no rule authorizing pendent venue has been promulgated is undoubtedly due to the infrequency with which situations such as the hypothetical discussed in this Note have arisen. But given the increased emphasis the Department of Justice is placing on offshore environmental crimes, a limited criminal joinder rule would be a wise and valuable addition to the Federal Rules.

broil the states in international affairs.[168] The Court responded that while the President has authority over the extent of the nation's territorial claims versus the international community, the power to admit new states and establish state boundaries rests with Congress. Congressional establishment of state boundaries beyond federal boundaries may have international consequences, but it also has consequences for relations between the federal government and the states. It was with respect to these domestic consequences that Congress approved the potential nine-mile boundaries of Florida and Texas in the SLA.[169]

Though it may appear that the SLA granted Florida and Texas nine miles of sovereignty in the Gulf of Mexico, the *Louisiana II* Court avoided that issue. It did not decide whether congressional approval of these state boundaries beyond federal boundaries constituted an overriding determination that those states, and therefore the nation, claimed a nine-mile boundary as against foreign nations. Thus, the decision cannot be cited for the proposition that the nation was sovereign out to nine miles in the Gulf and could have conferred such sovereignty to those states. The *Louisiana II* Court simply held that, with respect to conflicting claims by the federal government, Florida and Texas had rights in and title to the lands beneath navigable waters out to nine miles and the resources within those lands and waters.

As explained in the previous Part, the SLA is commonly understood as establishing the definitive seaward boundaries of the U.S. coastal states. The language used in the Act does not explicitly qualify its provision which stipulates that "[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or . . . beyond three geographical miles [to three marine leagues] if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union."[170] This broad language supports the argument that while three miles is the limit of state sovereignty in the Atlantic and Pacific Oceans, Florida and Texas are sovereign to nine miles in the Gulf of Mexico. The legislative history of the SLA lends further support to this position. It clearly indicates that the purpose of the Act was to restore to the coastal states what they thought they had

168. Kmiec, 1 Terr. Sea J. at 7 (cited in note 31).
169. Id. at 8.
170. 43 U.S.C. § 1312.

before *California* and its progeny.[171] Texas and Florida considered themselves sovereign to nine miles in the Gulf of Mexico and were able to prove the source of those claims, if not their validity, in the *Louisiana II* and *Florida* cases. Therefore, the SLA can reasonably be interpreted as granting Florida and Texas nine miles of sovereignty in the Gulf of Mexico.

Unfortunately, as explained earlier, the SLA's use of a quitclaim to convey title to the submerged lands and resources of the marginal sea, combined with a converse application of the equal footing doctrine, effectively undermines this argument. The United States was not sovereign beyond three miles upon passage of the SLA, and Congress has not taken remedial action since the nation asserted its sovereignty out to twelve miles. Thus, the SLA could not have conferred upon these two states the sovereignty which the Supreme Court repeatedly determined the states surrendered to the national government, if they ever possessed it at all, upon the original ratification of the Constitution.[172]

2. A Nine-Mile Boundary for Texas and the Hypothetical

If Texas's sovereignty extends nine miles into the Gulf of Mexico, the result in the USA Oil hypothetical is very similar to the situation engendered by a three-mile boundary. The two-mile and the six-mile platforms would lie within the State of Texas. The alleged violations arising out of both of those platforms could therefore be prosecuted in the Southern District of Texas. Venue for prosecution of the charges related to the ten-mile platform would still lie only in the Districts of Delaware, Alaska, and the Southern District of California. Though the resulting costs of prosecution in a remote district would be the same as those under a universal three-mile boundary, the government may be more inclined not to prosecute these charges because of its ability to prosecute the greater part of the entire case in the Southern District of Texas. This decision would depend upon a balancing of factors, such as the social costs of not prosecuting some of the charges, the amount and sufficiency of the evidence pertaining to the alleged violations at each of the platforms, and the perceived strength of the case relating to each platform. Ultimately, the U.S. Attorney's Office has discretion to make the decision.

171. See H.R. Rep. No. 695 at 4-5 (cited in note 155).

172. See *Special Masters' Reports* at 591 (cited in note 125) (concluding that federal rights superseded states' claims to seabed interests seaward of the SLA grant).

However, in general terms, a nine-mile boundary for the state of Texas would reduce both the economic and social costs of law enforcement associated with a three-mile boundary.

### *D. A Twelve-Mile Limit*

#### 1. The Case For and Against a Twelve-Mile Limit

Little historical or legal precedent exists to support the proposition that the seaward boundaries of state sovereignty lie at twelve miles. One argument in favor of this position is that the Reagan Proclamation extended state boundaries to twelve miles when it extended the nation's territorial sea to twelve miles, but this argument is fundamentally flawed. The power to establish state boundaries reposes in Congress, not the president, and Congress itself has not acted to extend state boundaries since the Reagan Proclamation.[173] The terms of the SLA do not extend state sovereignty to twelve miles in the wake of the Reagan Proclamation. The SLA refers to state boundaries in terms of a fixed distance and does not tie their definition to the territorial sea, much less to future extensions of the territorial sea. The Proclamation thus could not have extended state boundaries via the SLA even if President Reagan expressly intended that result.[174]

In addition, the Outer Continental Shelf Lands Act ("OCSLA"),[175] passed as a companion to the SLA, provides clear evidence of Congress's intent that state boundaries are not to extend beyond three (or nine) miles. OCSLA reserved all rights in and title to the submerged lands of the continental shelf beyond three miles (beyond nine miles off the west coast of Florida and Texas) and the resources therein for the federal government. Section 1333 of OCSLA specifies that federal law applies to this area of the continental shelf, and that, when not inconsistent with existing federal law, the laws of each adjacent state also apply in the area adjacent to each particular state. But the statute makes it clear that this provision for the application of state law to the federally owned portion of the continental shelf is never to be interpreted as a basis for any state to claim any interest in or jurisdiction over the area of the continental shelf beyond

173. Briscoe, 2 Terr. Sea J. at 228 (cited in note 29). See note 149 and accompanying text.
174. Briscoe, 2 Terr. Sea J. at 229 (cited in note 29).
175. 43 U.S.C. § 1331 et seq.

three miles.[176] Had Congress intended the states to be sovereign over some portion of the outer continental shelf while merely retaining mineral rights for the federal government in the three- to twelve-mile zone, it clearly would not have taken such care to preclude any claim of any type of interest by the states in that zone.

In spite of the arguments that the limit of state sovereignty does not currently extend to twelve miles, there are good reasons why, in the wake of the Reagan Proclamation, state sovereignty should be extended to twelve miles. First, the twelve-mile territorial sea, coupled with a three-mile limit of state sovereignty, results in a band of generic federal territory nine miles wide with an area of 180,000 square miles, about the size of Texas.[177] Every other federal territory that is not part of any state has its own territorial government except for Midway, Johnston, and Wake Islands, which are administered by the Defense Department, and the uninhabited guano islands of Navasso, Swan, Howland, Baker, and Jarvis, which are easily distinguishable from the territorial sea by virtue of their extreme isolation.[178] The territorial sea, on the other hand, has no established government and could not be comprehensively managed by any one agency, unless it was annexed to the coastal states.[179]

From an historical perspective, it should be remembered that the three-mile zone was an impromptu and provisional creation of Thomas Jefferson in response to a situation requiring immediate action. Jefferson did not intend it as a final, definitive limit for state sovereignty. In fact, he and President Washington felt strongly that state sovereignty should eventually extend beyond three miles. But due chiefly to its adoption by the British, the three-mile limit gradually developed into the international default rule.[180]

The extension of national sovereignty to twelve miles presents an opportunity to explore a new approach. The forty-year-old scheme

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176. Id. § 1333(a)(3).

177. David M. Forman, M. Casey Jarman, and Jon M. Van Dyke, *Filling in a Jurisdictional Void: The New U.S. Territorial Sea*, 2 Terr. Sea J. 1, 51 (1992).

178. Id.

179. Briscoe, 2 Terr. Sea J. at 293 (cited in note 29). Proposals abound in the wake of the Reagan Proclamation for the creation of joint federal-state management regimes to administer the newly expanded territorial sea. See, for example, Richard K. Littleton, *Equity, Efficiency, and a 12-Mile Coastal State Boundary*, 2 Terr. Sea J. 331, 336 (1992); Kenneth A. Swenson, *A Stitch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. Cal. L. Rev. 851, 879-91 (1987). However, these proposals only address the management of the resources in the three-te-twelve mile zone and do not consider the issue of state boundaries per se, or the limits of the federal judicial districts.

180. Wilder, 32 Va. J. Intl. L. at 745 (cited in note 34). See Part III.B for a discussion of the genesis of the three-mile coastal stato boundary.

developed during the Tidelands Controversy has not kept pace with society's technological ability to exploit the sea.[181] With the extension of national sovereignty to twelve miles, the only rationale justifying a three-mile limit to state sovereignty has been extinguished.[182]

Recently, there have been calls for an extension of state sovereignty to twelve miles. In 1991 the Western Legislative Conference of the Council of State Governments passed a resolution calling on Congress to extend both the seaward boundaries and the resource jurisdiction of the states to twelve miles.[183] This would increase the area of the states without any loss of uniformity in coastal policy.[184]

Such an extension need not cause tremendous upheaval. Most observers calling for such an extension in the wake of the Reagan Proclamation recommend a universal twelve-mile limit with a shared state-federal cooperative management regime, or some similar form of partnership.[185] The primary obstacle to such a change would be the issue of ownership of the rights to and revenues from the resources of the continental shelf between three (or nine) and twelve miles.[186] The federal government would almost certainly be unwilling to relinquish these revenues.[187] Further, the inland states would have no incentive to grant these revenues to the coastal states, thereby forfeiting their own share.[188]

Various options exist for overcoming this obstacle. One recent proposal calls for the designation of the three- to twelve-mile zone as a "Zone of Shared Revenues," from which all states would share in the revenues on a per capita basis.[189] Another option would be to grant the coastal states sovereignty over the territory and designate the continental shelf as public lands, treating it the same as the public

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181. Wilder, 32 Va. J. Intl. L. at 739 (cited in note 34).

182. There is, as one commentator puts it, "no good reason to continue binding statos to a three-mile [limit of sovereignty]. . . . It is through the force of inertia alone that the states' three-mile limit persists." Id. at 689.

183. See id. at 740.

184. Vital control of navigation and commerce is unified under national authority due to federal constitutional supremacy in the country's navigable wators. Littleton, 2 Terr. Sea J. at 336 (cited in note 179).

185. See, for example, Wilder, 32 Va. J. Intl. L. at 739-45 (cited in note 34); Swenson, 60 S. Cal. L. Rev. at 879-91 (cited in note 179); Territorial Sea Extention, Hearings Before the Subcommittee on Oceanography and Great Lakes of the House Committoe on Merchant Marine and Fisheries, 101st Cong., 1st Sess. 37 (March 21, 1989) (statement of Professor Robert Knecht, University of Delaware).

186. Wilder, 32 Va. J. Intl. L. at 744 (cited in note 34).

187. Littleton, 2 Terr. Sea J. at 355 (cited in note 179).

188. Wilder, 32 Va. J. Intl. L. at 744 (cited in note 34).

189. See Littleton, 2 Terr. Sea J. at 332 (citod in note 179) for a comprehensive discussion of this proposal.

lands that make up such a substantial part of the western states. This would settle the question of venue by establishing a definite limit to the states, counties, and therefore the judicial districts, without requiring wholesale revision of the current management regime.

If the coastal states were to accept a plan that does not entitle them to revenues from their new territory, however, they would have to justify to their citizens why they have accepted increased public obligations in the zone without demanding corresponding benefits.[190] Furthermore, tension already exists between the executive branch, which favors development and exploitation of the continental shelf, and the states, which generally do not. A situation forcing the states to sit idly by while the federal government granted leases for the development of their continental shelf would only exacerbate this tension.[191]

Regardless of the management regime selected, a twelve-mile limit to state sovereignty would have one distinct advantage over the zero-mile, universal three-mile, and mixed three- and nine-mile limits. By eliminating the stateless zone of federal sovereignty, a twelve-mile limit would create a single boundary for state title, jurisdiction, and sovereignty. This would eliminate the confusion and uncertainty which plagues the question of venue for crimes committed beyond three or nine miles. Furthermore, depending on the management regime selected, a twelve-mile limit offers the opportunity to streamline management of the coastal zone by broadening the authority of the states, the entities responsible for coastal zone management under the Coastal Zone Management Act.[192]

### 2. A Twelve-Mile Boundary and the Hypothetical

The USA Oil hypothetical clearly illustrates the superiority for venue purposes of the twelve-mile limit to coastal state sovereignty. With a twelve-mile limit, all three of the platforms would be located within the Southern District of Texas. Rule 18 would not only allow, but dictate, that the government prosecute all of the charges against USA Oil in the Southern District of Texas because it is the district in which the alleged crimes were committed.

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190. Id. at 331-32.

191. Wilder, 32 Va. J. Intl. L. at 744 (cited in note 34).

192. 16 U.S.C. § 1451 et seq. (1994 ed.). The Coastal Zone Management Act provides federal grants te states for the creation of State Coastal Zone Management Plans and guarantees that federal activities within the coastal zone will be, to the maximum extent practicable, consistent with the enforceable provisions of the attached state's plan. Id.

This result is a natural one, and leads to the lowest social costs because it does not force the government to choose between allowing provable crimes to go unprosecuted and incurring needless expenses in prosecuting the case in a remote district unconnected with the crime itself. Further, it places greater reliance on the constitutional venue directives embedded in Rule 18 and less emphasis on the arbitrary provisions of Section 3238.

## V. A NEW APPROACH TO ANALYZING THE PROBLEM

As the preceding discussion of the history of offshore federalism and the seaward extent of state sovereignty indicate, the current state of the law regarding venue for offshore environmental crimes is extremely uncertain. While this is due in large part to the arbitrariness of the various claims and boundaries and the political considerations which pervade this area of the law, it is fundamentally the result of the language and concepts that have been, and in current practice must be, used to analyze the problem.

The analysis required by the langnage of the venue statutes involves the drawing of distinctions between preexisting concepts such as title, jurisdiction, and sovereignty. These concepts evolved in the context of a completely different problem, that of control of the lands and resources of the continental shelf and the marginal seas. In that narrow context they remain valid. The concepts of title and jurisdiction are essential, for example, when considering the question of ownership of the lands and resources of the continental shelf. But trouble arises when one attempts to use those concepts, and the limits ascribed to them in the SLA and OCSLA, to define limits for the more abstract concept of state sovereignty in order to determine the extent of the federal judicial districts.

Sovereignty is an elusive concept—an artificial, rhetorical construction used to convey notions of supreme authority or plenary independence of rule. It is ill-suited for resolving technical legal questions such as whether a particular crime was committed within a judicial district. When a federal crime is committed in U.S. waters, it should not matter whether the adjacent coastal state is sovereign over those waters, or whether the state is entitled to the mineral rights in that area. The only concern should be for the constitutional require-

ment that the crime be tried in the same vicinity in which it was committed.[193]

Unfortunately, the current legal framework, which requires a choice between Rule 18 and Section 3238, depends instead upon a technical determination of whether the crime was committed within or outside of a judicial district. This in turn requires a determination of state boundaries. But what state boundaries? Not title, and not resource jurisdiction—for nothing in the venue statutes makes reference to these specialized concepts. The boundaries at issue, then, must be some transcendent, all-purpose limit of state authority. This inevitably leads to the ethereal concept of sovereignty. In a confounding trap of circular logic, this guides the venue analysis back to the concepts of title and jurisdiction to define the limits of sovereignty—the very concepts determined to be inappropriate for this purpose.

A better approach to the problem, one which avoids this confusion, involves taking a step back from the letter of the law and looking instead to the purpose of the law. The problem of offshore venue can be addressed in this manner by answering two questions: (1) what was Congress seeking to accomplish by the Rule 18/Section 3238 venue scheme; and (2) when the limits of that scheme are in question, what are the limits of congressional power to impose such a scheme?

Along with Section 3237, Rule 18 and Section 3238 comprise a comprehensive scheme for assigning venue for every criminal case. Rule 18 sets venue for crimes committed within a single district, Section 3237 lays venue for crimes committed in multiple districts, and Section 3238 provides venue for crimes committed outside of any district.[194] By establishing this scheme, Congress responded to the constitutional requirement that all crimes be tried in the vicinity in which they were committed. In the case of Rule 18 and Section 3237 this was a simple matter, but there was no similar, natural solution for assigning venue for crimes committed outside of any district. The solution Congress adopted was the arbitrary rule embodied in Section 3238. This solution created a new problem of where to draw the boundary line for the federal judicial districts, the boundary between Rule 18 and Section 3238. As the preceding Parts of this Note demonstrate, this question has never been addressed, largely because it has never been asked.

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193. See Part II for an explanation of the constitutional policy underlying the requirement that all crimes be tried in the district in which they are committed.

194. See notes 18-22 and accompanying text for a full explanation of these provisions.

The most rational means of determining where the boundaries of the federal judicial districts lie is to ask where the limits of congressional power to act in this area lie. The boundary between Rule 18 and Section 3238 should be set as far seaward as congressional power permits. A fundamental assumption of this approach is that it is preferable to establish venue under Rule 18, a direct codification of the Sixth Amendment, than to rely on the arbitrary gap-filling provisions of Section 3238.

Congress has the power to establish judicial districts anywhere within the United States. This power derives from the Constitution, which allows Congress to establish "such inferior courts" as it deems necessary.[195] On this authority, Congress has passed judiciary acts establishing the judicial districts and the district court system. The Constitution contains no explicit limits on the power of Congress to establish judicial districts. This power is implicitly limited, however, to the area within the nation's territorial boundaries.

As a matter of international law, the boundaries of the nation, in contrast to those of the individual states, have been clearly established by treaty. The twelve-mile territorial sea claimed by the United States in the Reagan Proclamation and universally adopted as the international standard in UNCLOS III currently represents the undisputed boundary of the nation.[196] Therefore, it represents the maximum possible seaward limit of the federal judicial districts. Setting the federal district boundaries at this limit would effectively restrict the application of Section 3238 to those crimes actually committed on the high seas or overseas, rather than to crimes committed a mere 3.1 miles offshore—beyond the ostensible limits of the states but clearly within the exclusive territory of the nation.[197]

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195. U.S. Const., Art. III, § 1.

196. UNCLOS III, Art. 3.

197. The extension or clarification of the district boundaries could be accomplished in a variety of ways. One of the simplest would be to amend Rule 18 as follows:

> For purposes of this Rule, and all other rules and statutes relating to the place of prosecution and trial, the judicial districts shall extend beyond the land territory of the several states te the limit of the territorial sea claimed by the United States at the time of the commission of the offense.

Alternatively, similar language could be inserted as a separate statute in the U.S. Code immediately prior to or following the district definitions located at 28 U.S.C. §§ 81-131:

> Notwithstanding the actual boundaries of the counties comprising the various judicial districts, every judicial district appurtenant to the coast line of the United States shall extend beyond the coast line to the limit of the territerial sea of the United States.

Each of these approaches would eliminate the present uncertainty as to the seaward extent of the judicial districts. As an additional benefit, by defining the district boundaries by reference te the territorial sea, they would eliminate the need to redefine the district boundaries in the event of any future extensions of the territorial sea.

This approach would not result in any legitimate unfairness to defendants. Taking the hypothetical case of USA Oil, it would be difficult for the defendants to argue that while it is proper to prosecute the charges related to the two-mile platform in the Southern District of Texas, it would be unfair to prosecute the charges arising out of the six- and ten-mile platforms in the same district. Even if the defendants had not operated a platform two miles offshore, such that they were not otherwise required to stand trial in the Southern District of Texas, they would not have a compelling argument. It would hardly offend constitutional notions of fairness to require them to stand trial in the Southern District of Texas. The alleged crimes took place within twelve miles of that state's coast, within the boundaries of the United States, and venue would have been proper in the Southern District of Texas had the crimes been committed within three miles of the coast.

The approach advocated in this Part would be accompanied by all of the benefits of a twelve-mile limit to state sovereignty, with none of the political difficulties that an actual expansion of state boundaries to that distance would entail. It respects the intent of Congress to create a seamless criminal venue scheme while employing a functional analysis of that scheme, rather than a literal reading to identify the proper limits within which its component statutes should operate.

## VI. CONCLUSION

The constitutional requirement of criminal venue is a vital aspect of every prosecution. The statutory scheme created for criminal venue seeks to respect the constitutional concern for trial of a crime in the vicinity of its commission. But there is an emerging class of criminal prosecutions, environmental crimes committed within the U.S. territorial sea, that exposes a fundamental weakness in the traditional venue scheme. When applied to domestic offshore environmental crimes, the statutory scheme depends on a definition of state boundaries that bears little relation to the underlying goals and purpose of the scheme itself. While the statutes do not specifically reference this definition, it is the only one currently available to address the issue. This definition, the limit of U.S. coastal state sovereignty in the marginal seas, is itself an abstract notion. The Supreme Court has repeatedly held that it lacks any valid historical foundation. In

the wake of those decisions, this orphaned concept has thrown federal venue analysis into great uncertainty.

Based on the history and development of offshore federalism, there are at least four possible limits to state sovereignty. Currently, the most reasonable conclusion is that the limit of state sovereignty in the marginal seas lies at three miles from shore around the entire nation. But since President Reagan proclaimed a twelve-mile limit for national sovereignty, frequent calls have sounded for an expansion of state sovereignty to twelve miles, and such an extension has much to recommend it. However, a twelve-mile limit to state sovereignty faces significant political obstacles before it can be realized, particularly the distribution of revenues from the exploitation of the resources between three and twelve miles. That is not the case with an extension of the judicial districts alone to twelve miles.

No legitimate reason exists to tie the limits of the federal judicial districts to the boundaries of state sovereignty. Such a connection is currently necessary only because the judicial districts were originally defined as coterminous with those boundaries. A fresh, objective look at the purpose of the criminal venue scheme reveals a better approach. By defining the limits of the federal judicial districts as the limits of the federal territorial sea, a much-needed symmetry can be achieved between the geographical limits of the federal government's power to define illegal conduct and its power to enforce those definitions.

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