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JUDICIAL DEFERENCE IN THE SUBMERGED LANDS CASES

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When the Constitution established three branches of government, it did not create three hermetically sealed areas of responsibility. The executive, legislative and judicial branches are required to govern through a certain degree of accommodation. One area in which the need for accommodation between the judicial branch and the other two branches was recognized at an early stage is cases containing questions bearing on foreign relations.[1] Under the Constitution it appears that the conduct of the foreign relations is vested in the Executive with a secondary role for the Congress, but that the courts have no role to play in this area. Litigation brought to the courts, however, has been found to demand decisions affecting foreign relations. To avoid breaching the constitutionally required separation of powers in these instances, the Supreme Court has determined that the judiciary should move away from its role as a neutral decision maker. In these instances the courts are either to decide the cases consistent with the wishes of the executive branch or to refuse to decide, thus effectively sanctioning the status quo.[2]

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1. *See, e.g.,* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

2. Many legal scholars have analyzed the deference doctrine. *E.g.*, R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 9-11, 34-35, 58-59, 86-107, 118-21, 136-37, 142-45, 152-53, 160-61, 168-69, 175-77 (1964); INTERNATIONAL LAW IN NATIONAL COURTS (3d Cornell Conf. on Int'l Law 1960); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative for Abdication to Usurper,* 48 CORNELL L.Q. 461 (1963); Dickinson, *The Law of Nations as National Law: Political Questions,* 104 U. PA. L. REV. 451 (1956); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption,* 67 COLUM. L. REV. 1024, 1046-56 (1967); Jessup, *Has the Supreme Court Abdicated One of Its Functions?,* 40 AM. J. INT'L L. 168 (1946); Lillich, *The Proper Role of Domestic Courts and International Legal Order,* 11 VA. J. INT'L L. 9 (1970); Moore, *Federalism and Foreign Relations,* 1965 DUKE L.J. 248; Note, *The Relationship between Executive and Judiciary: The State Department as the*

One series of cases in which the Supreme Court has indicated its willingness to be bound by executive suggestion is the federal-state submerged lands litigation. That litigation involves a thirty-year dispute between the federal government and the coastal states of the Union over the seaward boundary of those states' rights to the resources of the ocean off their respective shores.[3] Early in the litigation the Supreme Court equated this dispute with the question of the extent of the United States sovereignty in the ocean, a question that has foreign relations ramifications.[4] As a consequence, it has deferred to the Executive on certain substantive issues. Since the Supreme Court has never made a systematic study of the basis for bringing judicial restraint into play in this litigation, there is a great deal of confusion concerning its application.

This confusion was recently illustrated in a federal district court decision involving one aspect of the submerged lands dispute. In *United States v. Alaska*,[5] the court decided contrary to an executive suggestion on the extent of United States sovereignty off the Alaska coast. The State of Alaska urged that Cook Inlet is a historic inland water bay giving the state, rather than the federal government, the exclusive right to exploit the resources of the Inlet. The United States argued that the area is not historic inland waters but high seas in which vessels of foreign nations could travel unmolested. It argued that the district court was bound by that executive position because of the Supreme Court's holding in previous submerged lands decisions that the Executive's position is to be accepted unless it is proved to be "clear beyond doubt" that the historic evidence is to the contrary. Although it gave lip service to that requirement, the district court found that the Executive's position had "low reliability" and proceeded to find contrary to the Executive's suggestion.

Supreme Court of International Law, 53 MINN. L. REV. 389 (1968); 14 HARV. INT'L L.J. 131 (1973); 8 HARV. INT'L L.J. 388 (1967); 53 MINN. L. REV. 389 (1968); 48 NOTRE DAME L. REV. 750 (1973); 6 VAND. J. TRANSNAT'L L. 272 (1972). These writings primarily analyze the many Supreme Court and lower court decisions in the field stretching back as far as 1803 through the most recent and confusing opinion in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

3. For the major submerged lands decisions see note 91 *infra*.
4. United States v. California, 332 U.S. 19 (1947).
5. 352 F. Supp. 815 (D. Alas. 1972).

It is apparent from the district court's treatment of the deference question that it doubted the appropriateness of judicial restraint in submerged lands cases and that it did not understand the injunction of the Supreme Court. This error is primarily the product of the Supreme Court's failure to identify the factors that require judicial restraint for foreign relations reasons and to test the submerged lands cases against those factors. If the Supreme Court would conduct this examination, this writer submits that it would probably find judicial restraint inappropriate in the submerged lands cases.

Part one of this article undertakes that review by delineating the primary subject matter areas in which judicial restraint has been exercised for foreign relations purposes. These areas are: recognition, sovereign immunity, act of state, treaty interpretation and terriorial questions. Each area involves a different combination of factors that lead to judicial restraint. By isolating those factors we are able to create a rough yardstick with which other cases, including the submerged lands cases, might be measured.[6]

I. JUDICIAL RESTRAINT AND DEFERENCE

United States courts frequently apply general principles of international law. As early as 1815 Chief Justice Marshall stated that in the absence of an act of Congress "the Court is bound by the law of nations which is a part of the law of the land."[7] One difficulty that arises from the application of international law in domestic courts is the possible intrusion on the conduct of foreign affairs, an area traditionally held to be the domain of the Executive.[8] The judiciary thus has frequently refused to adjudicate a

6. The factors derived from this examination are enumerated in Pt. I(C) *infra.*

7. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). Although several theories support the incorporation of international law into United States law, the most frequently advanced argument is that international law was part of English common law and as such became part of the common law of the colonies. *See* Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States,* 26 AM. J. INT'L L. 280, 282 (1932). One inherent difficulty with this position, however, is that the individual states cannot alter international law; therefore, if international law is to be considered part of common law, it must be presumed to be part of federal common law. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). For a discussion of the effect of international law in British courts see J. BRIERLY, THE LAW OF NATIONS 86-93 (6th ed. 1963).

8. The most expansive view of the scope of the Executive's authority in foreign

question that has a significant impact in the area of foreign affairs on the grounds that deciding the question would violate the separation of powers doctrine, *i.e.* that a "political question" is involved. On the other hand, the courts often make an independent assessment of international law and apply that law even when doing so appears to intrude on the conduct of foreign affairs. For example, in *The Paquete Habana*,[9] the Supreme Court considered whether coastal fishing vessels were exempt from capture as prizes of war. The Court examined recognized international practice in this area and found that the custom of civilized nations had ripened into a rule of international law that exempted the fishing vessels, their cargoes and their crews from capture.

Since the issue revolved around the legality of the capture of a Spanish fishing vessel by the United States, the recognition of the fishing boat immunity required the invalidation of the federal action vis-à-vis another country's ship in time of war. The dissent clearly raised this possible conflict with the allocation to the Executive of both the foreign relations power and the power as Commander in Chief. Despite this plea the Court found itself with sufficient power to overrule the Executive's action. Discussing the independent examination of international practice, the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .[10]

The Paquete Habana, therefore, squarely presents the issue: under what circumstances should the judiciary adjudicate a question that may have an impact on the conduct of foreign affairs and under what circumstances should the judiciary abstain. Between these two possibilities of adjudication and abstention is the judicial practice of merely deferring to the Executive's position and reaching a decision by adopting that position. The purpose of the

affairs is found in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

9. 175 U.S. 677 (1900).

10. 175 U.S. at 700.

inquiry in this section is to identify the factors that militate in favor of each of these three possible courses of action.[11]

A. *Political Questions*

1. *Recognition.*—One of the earliest expressions of the approach of the judiciary to the question of recognition[12] is found in *United States v. Palmer.*[13] Chief Justice Marshall observed, in dictum,[14] that questions concerning the rights of foreign colonies that are asserting their independence are political rather than legal.

> They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to

11. Necessary in this organization is the presumption that the failure of the courts to adjudicate a dispute independently is the exception rather than the rule. This preliminary conclusion can only be made on the basis of the volume of cases and subject areas touching on the international arena in which no mention of the separation of powers question is found, beginning with the *Paquete Habana* case and continuing to this day. For a comprehensive collection of domestic cases touching on the international arena see the multivolume collection, AMERICAN INTERNATIONAL LAW CASES 1783-1968 (F. Deak ed. 1971). In contrast, areas of international affairs in which the deference question has arisen are discussed below.

12. Recognition extends not only to states and governments, but may also apply to a status of hostilities. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 48 (1972); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 94, comment *e* (1965). Therefore, judicial deference might also be applicable in these areas. There is authority to support the view that the status of neutrality of the United States is a proper area for deference. *See* 11 AM. J. INT'L L. 883 (1917).

On the question of the legality of a particular war, the District Court for the District of Kansas held that it would defer to the political branches concerning the legality of the Viet Nam war. Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968).

13. 16 U.S. (3 Wheat.) 610 (1818).

14. The issue in *Palmer* was whether defendants had committed the offence of piracy, which under the Act of 1790, ch. 36, § 8, 1 Stat. 113-14, was proclaimed to be a crime against United States citizens. Defendants had committed a robbery on board a ship that belonged to subjects of a foreign state but which was on the high seas at the time of the crime. Moreover, the victims were not United States citizens. The Court concluded that the crime of robbery, committed under these circumstances, did not constitute piracy as defined in the Act. This conclusion properly disposed of the case; Chief Justice Marshall's observations concerning political recognition are obiter dictum.

> whom are intrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.[15]

The policy of complete deference to the Executive on questions of recognition was given its most expansive interpretation in *United States v. Pink*.[16] The Supreme Court stated that the Executive has the sole authority to recognize foreign governments, a power derived from his constitutionally defined function of receiving and appointing ambassadors under article II. This explicit constitutional commitment to the Executive is the primary factor militating in favor of deference in recognition questions. Thus, if the courts have to determine whether a country exists for the purposes of domestic litigation they look no further than statements of the Executive.[17]

Not only does the judiciary defer to the Executive's act of recognizing a foreign government, the courts have also deferred in the face of nonrecognition. Thus in *The Maret*,[18] the court sought to determine the ownership of the *S.S. Maret*, which had been nationalized when Soviet troops occupied Estonia in 1940. Title was purportedly transferred to the Estonian State Steamship Line, organized by the People's Commissar of the Maritime Fleet. The court determined it could not recognize the Estonian State Steamship Line as the owner of the ship since the United States had not recognized the Soviet Republic of Estonia: "A policy of nonrecognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition."[19] Therefore, it appears that the courts will also defer to the executive's policy of nonrecognition.[20]

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15. 16 U.S. (3 Wheat.) at 633-34.

16. 315 U.S. 203 (1942).

17. The *Pink* decision deals primarily with the validity of executive agreements. In *Pink*, the Court upheld the agreement in question on the basis of the Executive's power of recognition. *See generally* Note, *United States v. Pink—A Reappraisal*, 48 COLUM. L. REV. 890 (1948).

18. 145 F.2d 431 (3d Cir. 1944).

19. 145 F.2d at 442 (footnotes omitted). The court noted that the Executive had made its position plain by "freezing" property located in the United States that belonged to citizens of the Baltic Republics, including the former Republic of Estonia. 145 F.2d at 442 n.43.

20. *Accord*, Latvian State Cargo & Passenger S.S. Line v. Clark, 188 F.2d 1000 (D.C. Cir. 1951). *But cf.* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

The articulated basis for deference to the Executive on questions of recognition is the inference reached from the power of the President to appoint and receive ambassadors under article II, section 2. This deference exists with such vigor for two reasons. First, this power is discretionary, with only political standards to guide it. There is no consensus in international law that requires recognition,[21] and phrases such as the one from which the President's power to recognize is derived have been construed as discretionary beginning with *Marbury v. Madison.*[22] Secondly, the question of

21. There are at least two schools of thought. One is that there is an international law standard based on criterion for establishing statehood and a government. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 62-63 (1947). The other is that the decision is purely political. *See* C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 239 (rev. ed. P. Corbett transl. 1968). The United States adheres to the latter. 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 174-92 (1940). However, even the former leaves room for dispute since the international law standard is not clear. *See, e.g.,* Convention on Rights and Duties of States, art. 3, Dec. 26, 1933, 49 Stat. 3097 (1935-36).

22. Although Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), does not directly concern the question of international relations, the long opinion of Chief Justice Marshall contains the seeds for one aspect of the judicial deference doctrine. The Court outlined the power of the courts to inquire into actions of the Executive. It excluded from its power of inquiry those areas in which either the Congress or the Constitution had granted complete discretion to the Executive. "[T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

. . .

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.

. . . .

[T]here exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. . . . But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." 5 U.S. (1 Cranch) at 164.

From this part of the *Marbury* opinion we can identify certain factors that must be considered before the court will examine positions of the Executive. First of all, one must analyze the nature of the act. Does it involve the rights of individuals or does it involve broader questions of policy? Second, is the power of the

the recognition of another nation or government goes to the very heart of the relations of the United States with foreign nations.[23] Were the courts to limit the discretion of the President on recognition they could thwart most international actions by the President, from the conduct of negotiations to the entry into force of treaties. Accordingly, the Court has given the President total dominance of this question.

2. *Sovereign Immunity.*—Deference in sovereign immunity cases in United States courts is based on the same considerations on which judicial deference in the area of recognition rests. Reliance on the Executive is not as complete, however, because of the absence of an explicit constitutional allocation of power to the Executive. In addition, some international standards exist, requiring that a sovereign be immune from judicial process in a foreign court.[24] In a leading sovereign immunity case, *The Schooner Exchange v. McFadden*,[25] the Supreme Court considered a libel against a French warship. Chief Justice Marshall dismissed the libel on grounds of international comity. Although the Executive had filed a suggestion of immunity, the Chief Justice refused to rule on the question of the effect to be given the suggestion. He found ample grounds for dismissing the libel in the principle of international equality of nations and the custom of exempting visiting warships from the host state's jurisdiction.[26]

Beginning with *Ex Parte Peru*,[27] the courts have characterized sovereign immunity as a political question based on the extensive powers of the Executive in foreign affairs. It is suggested, however, that the underlying factor that leads to the conclusion that sover-

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Executive in the area one of discretion or one of obligation?

23. In the case of M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933), the question of the mere existence of an unrecognized government was raised. The court found consistent with a statement from the Secretary of State that the Soviet Russian Government existed de facto despite United States policy that it had only recognized the Provisional Government of Russia. As a result, Sovit Russian Government law was held to bar the instant expropriation claim.

24. *See* W. BISHOP, INTERNATIONAL LAW 658 (3d ed. 1971).

25. 11 U.S. (7 Cranch) 116 (1812).

26. The law of nations also supported a grant of immunity in Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926). In that case, the Court granted immunity in the face of a State Department suggestion that immunity need not be granted.

27. 318 U.S. 578 (1943).

eign immunity is a political question is still the proximity of the sovereign power of a foreign state. The courts will abstain from taking the property of a sovereign state because to do so could interfere with the conduct of the affairs of the foreign nation. The delicate foreign relations question disappears when there is no question of the sovereign power or property of another state. When the foreign nation is present, the cases demonstrate that complete deference is given to the position of the Executive on the question whether to subject that government to court process. When the Executive has not expressed an opinion on the grant of immunity, the courts will nevertheless look to prior State Department pronouncements to determine whether or not the foreign nation is deemed to be present. This policy is obviously based on the court's assumption that under the constitutional scheme the Executive rather than the courts should deal with the conduct of foreign governments. This position is reinforced by the requirement of sovereign immunity under international law. Since the extent of this requirement is indefinite, its implementation is discretionary and thus up to the arm of the country charged with conducting relations with foreign countries. The Court has stated that the judiciary may not exercise its jurisdiction so as to embarrass the Executive in the conduct of foreign affairs. Therefore, the "courts are required to accept and follow the executive's determination . . . ."[28]

Judicial deference to the Executive on sovereign immunity was extended in *Republic of Mexico v. Hoffman*,[29] in which the State Department had taken no position on the immunity question. Noting that in the absence of a request for immunity from the political branch of the government the judiciary is free to make the determination, the Court, nevertheless, ruled that in order not to act in a manner that could embarrass the Executive in the conduct of foreign affairs, the courts should decide in accordance with the pro-

28. 318 U.S. at 588. "The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no farther in the cause." 318 U.S. at 589.

29. 324 U.S. 30 (1945).

nouncements of the State Department in prior cases.[30]

In 1952, the State Department released the "Tate letter,"[31] which announced that the Department would follow the more current restrictive theory of sovereign immunity.[32] Under the rule of *Republic of Mexico*, the courts are also bound to follow the restrictive theory, since it constitutes a pronouncement by the Department.[33] The only truly independent action exercised by the courts in the area of sovereign immunity takes place in conjunction with an attempt to determine what the position of the State Department would be in light of the Tate letter when its position is not articulated.[34]

The policy of complete deference is so strong that a State Department declaration urging immunity will prevail over a prior waiver of immunity by the foreign sovereign.[35] Moreover, even though the State Department professes to adhere to the restrictive theory of sovereign immunity, the Department is not bound by that theory. If the State Department suggests immunity in a particular case, showing complete disregard for previous policy state-

30. "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." 324 U.S. at 35 (footnote omitted).

31. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to the Acting Attorney General, Philip B. Perlman, *published as Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T STATE BULL. 984 (1952).

32. Essentially, the restrictive theory prescribes that acts of a public nature (*jure imperii*) are granted immunity, while acts of a private or commercial nature (*jure gestionis*) are treated as those of a foreign commercial enterprise, The Supreme Court accepted the principles enunciated in the Tate letter in National City Bank v. Republic of China, 348 U.S. 356 (1954).

33. It is essential to recall, however, that *Republic of Mexico* applies only when the Department has not communicated its position in a particular case to the courts.

34. The Court of Appeals for the Second Circuit met this issue squarely in Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). The court postulated the following categories for which immunity would be granted in the absence of an expression of opinion from the executive: (1) internal administrative acts, such as the expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; and (5) public loans. 336 F.2d at 360.

35. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

ments and judicial implementations, the courts feel constrained to give that suggestion conclusive effect.[36] The controlling factor in sovereign immunity cases, therefore, is the presence before the court of a foreign sovereign's property or of a question involving the sovereign power of a foreign state. Since the Supreme Court has held in various cases that the conduct of United States affairs vis-à-vis foreign nations is committed to the Executive, deciding such a question could infringe on the Executive's powers in violation of the separation of powers doctrine.

3. *Act of State.*—The act of state doctrine as originally enunciated by the Supreme Court in *Underhill v. Hernandez*,[37] dictates that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[38] Thus, this doctrine is founded on considerations similar to sovereign immunity. Although the doctrine is generally believed to be based on domestic law,[39] there is some authority for concluding that the act of state doctrine is a rule of conflict of laws[40] or a rule of general international law.[41] Regardless of its basis, the practical effect of the application of the act of state doctrine is that the judiciary will refuse to test the validity of the act of the foreign state. In essence, the act of state doctrine requires the court to decide the case before it based on the conclusive presumption that the act of the foreign sovereign is valid, regardless of any apparent invalidity. The application of that doctrine is an abdication of the courts' role of adjudication of the same magnitude as that practiced in deferring to the Executive

36. Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). *See also* Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961), *aff'g* 197 F. Supp. 710 (E.D. Va.). For a discussion of the most recent statutory proposal on sovereign immunity see Note, *The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States*, 6 VAND. J. TRANSNAT'L L. 549 (1973).

37. 168 U.S. 250 (1897).

38. 168 U.S. at 252.

39. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1964).

40. Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178-82 (1967).

41. In *Oetjen v. Central Leather Co.*, the Court stated: "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency." 246 U.S. 297, 303-04 (1917).

on matters regarding recognition or sovereign immunity.

The primary issues raised by the act of state doctrine in United States courts are first, which of the three branches of the Government determines when to invoke the doctrine, and secondly, if it is the judiciary's determination, what considerations are relevant. The discussion of the relevant cases below indicates a tentative conclusion that the decision is up to the courts with some weight given to the views of the other branches.

The reasons for this greater independence of the judiciary is apparent from a number of factors:

(1) The absence of a textual allocation by the Constitution of the decision to the other branches;
(2) The possible recognition of the act of state doctrine under international law; and
(3) The minimal likelihood that a decision on these matters would control the actions of either the Executive or the foreign nations whose actions are involved.

The first attempt by the Executive to intervene in the application of the act of state doctrine occurred in the *Bernstein* litigation. Bernstein had owned stock in a German corporation, but had been coerced to transfer the stock to a Nazi agent. During the war various ships belonging to the corporation had been sunk and Bernstein subsequently brought suit to recover the insurance proceeds. In *Bernstein v. Van Heyghen Freres Societe Anonyme*,[42] Judge Learned Hand applied the act of state doctrine and refused to question the validity of the Nazi confiscation. In a subsequent related case,[43] however, the court determined that it was no longer constrained by the doctrine since the State Department had filed letters condemning the Nazi confiscation and relieving United States courts from any restraint on the exercise of jurisdiction. The court's holding that it was free to disregard the act of state doctrine as a result of this expression of executive policy gave rise to the "Bernstein exception." *Bernstein*, however, did not actually require the application of the act of state doctrine. At the time of the litigation, Nazi Germany, the government whose acts were being questioned, no longer existed. Thus, the entire rationale for the act

42. 163 F.2d 246 (2d Cir. 1947).
43. Bernstein v. N.V. Nederlandsche Amerikaansche-Stoomvaaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

of state doctrine—the proximity of the sovereign power of a foreign state—was not present. Subsequent act of state cases have emphasized that this sensitivity of national nerves is a central consideration in the act of state doctrine.[44]

Banco Nacional de Cuba v. Sabbatino[45] involved the validity of Cuban decrees nationalizing sugar plantations in Cuba. The lower courts had held that although the act of state doctrine would normally apply, the judiciary could adjudicate the case since Cuba had violated international law. The Supreme Court held that the act of state doctrine applied and that the courts, therefore, were precluded from examining the validity of the acts of the Cuban Government. The Court noted that the act of state doctrine is compelled neither by international law nor by the Constitution,[46] but that the doctrine does have "constitutional underpinnings" arising from the separation of powers. In discussing the reasons for invoking the doctrine in that case, the Court pointed out those underpinnings and that the international law relied on to invalidate the Cuban actions was unclear.[47] The law being unclear, the Court determined that the resolution of the conflict was more appropriately one for the Executive to resolve in its conduct of relations with Cuba:

> If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather

44. "The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

45. 376 U.S. 398 (1964).

46. The Court noted that the text of the Constitution does not require the act of state doctrine. The judiciary is not irrevocably barred by the Constitution from reviewing the validity of foreign acts of state.

47. 376 U.S. at 427-28.

> than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[48]

Moreover, the Court found that it would not be able to make an objective determination. Any holding other than that the taking was in violation of international law would embarrass the Executive, since such a holding would be contrary to the Executive's position. Thus, the Court could not operate as an independent judiciary without possibly affecting executive actions in foreign affairs. The Court did not rule on the validity of the *Bernstein* exception since an amicus curiae brief filed by the State Department urged the application of the act of state doctrine and, therefore, removed all doubt concerning executive policy.[49]

In *First National City Bank v. Banco Nacional de Cuba*,[50] the district court ruled that *Sabbatino* had been overturned by the Sabbatino Amendment,[51] which eliminated the judiciary's discre-

48. 376 U.S. at 427-28.

49. The Court of Appeals had relied in part on two letters from the State Department filed by the attorneys for defendant. The Supreme Court ruled that these letters were merely intended to reflect the Department's desire not to make any statement concerning the pending litigation. 376 U.S. at 420. Thus, the question of the validity of the *Bernstein* exception was not before the Court.

50. 406 U.S. 759 (1972).

51. 22 U.S.C. § 2370(e)(2) (1970): "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standard set out in the subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation of other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

tion in applying the act of state doctrine. That statute requires the courts to adjudicate claims arising out of a taking in violation of international law unless the Executive asks the court to apply the act of state doctrine. In *Banco*, plaintiff had brought suit to recover the excess realized on the sale of collateral that secured a loan. First National City Bank counterclaimed that this excess could be retained as partial compensation for properties expropriated by Cuba. After extensive litigation the Court of Appeals ruled that the Sabbatino Amendment did not apply, and held that since the *Bernstein* exception should be limited to its own facts, the act of state doctrine applied.[52]

In the Supreme Court the case was a divisive one. Although the decision was to reverse,[53] requiring the lower courts to inquire into the legality of the expropriations and not to apply the act of state doctrine, there was no consensus among the five Justices who voted for reversal. There were three opinions for reversal and one for affirmance.[54]

Although the immediate question concerned the application of the act of state doctrine, the more basic issue was the extent to which the Executive's foreign relations power can diminish the

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The impact of the Amendment has been avoided by some courts by holding that the loss sustained was not a "taking." French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704 (1968). In *Menendez v. Faber Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972), the court held that the Sabbatino Amendment did not apply since the property in question that had been confiscated by the Cuban Government had belonged to Cuban nationals and, therefore, international law had not been violated.

52. For a discussion of the history of the litigation see 6 VAND. J. TRANSNAT'L L. 272 (1972).

53. It should be noted that there is not an opinion of the Court.

54. For reversal Mr. Justice Rehnquist was joined by the Chief Justice and Mr. Justice White. They found that the *Bernstein* exception applied. Accordingly, since the Executive did not want the act of state doctrine applied, the Court should not do so. 406 U.S. at 760-70. Mr. Justice Douglas voted for reversal on the ground that plaintiff was the Government of Cuba and, therefore, had made a limited waiver of the doctrine. 406 U.S. at 770-72. Mr. Justice Powell voted for reversal on the ground that the balance of factors articulated in *Sabbatino* for invocation of the act of state doctrine required that the doctrine not be applied either in the instant case or in *Sabbatino*. 406 U.S. at 773-76. For affirmance Mr. Justice Brennan was joined by Justices Sewart, Marshall and Blackmun. They argued that the balance of factors articulated in *Sabbatino* for invocation of the act of state doctrine required its application in the instant case. 406 U.S. at 776-96.

independent adjudicatory power of the courts. The dicta of six of the Justices, including four dissenters, indicated that the Executive's power to limit the judicial function is quite narrow.

The three Justices in favor of a broad executive prerogative were Justices Rehnquist and White and Chief Justice Burger. They appeared to extend absolute judicial deference to the Executive in any case in which a court decision "might frustrate the conduct of foreign relations by the political branches of the government."[55] Their solution is complete deference to an executive communication that "expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy . . . ."[56] It would appear that the same reasoning would apply to any question touching foreign relations.

The six remaining Justices indicated a greater degree of independence from executive requests for judicial action. Mr. Justice Brennan stated in his dissenting opinion: "As six members of this Court recognize today, the reasoning of [the *Sabbatino*] case is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative."[57]

All six of these Justices adopt the considerations discussed in the *Sabbatino* case and elaborate further on them. Mr. Justice Powell in his separate concurring opinion stressed the necessity that the foreign relations ingredient be very direct and concurrent: "Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that the federal courts have an obligation to hear cases such as this."[58]

The other five Justices rely on Mr. Justice Brennan's dissent. Justice Brennan, taking issue with Justice Rehnquist, stated that the basis of the act of state doctrine is found in the political question doctrine. The possible impairment of the Executive's conduct of foreign affairs was found to be only one, and not necessarily the most important, factor in deciding whether a political question is

55. 406 U.S. at 767-68.
56. 406 U.S. at 768.
57. 406 U.S. at 790.
58. 406 U.S. at 775-76.

involved.[59] Furthermore, the dissent concluded that adoption of the *Bernstein* exception would politicize the judiciary. The dissent submitted that by asking the judiciary to adjudicate a question of international law when there is no consensus in the international community concerning the controlling legal principles, the Executive transformed the judiciary from its natural role as a neutral interpreter into the role of an advocate in the international community—thus supplanting the Executive. The result of this transformation, the dissent concluded, is to cause the judiciary to become a political arm, thereby bringing the rule of law into disrespect both domestically and internationally.

It appears that in light of the views of the six Justices who stressed the judicial prerogative to determine the extent of a court's power to adjudicate an issue before it, the constitutionality of the Sabbatino Amendment is in question. If it is viewed as an attempt by the Congress to allocate to the Executive the role of determining when an expropriation is or is not a political question, it can be viewed as an unconstitutional invasion of the court's role as arbiter of the separation of powers.[60] Similarly, it could be viewed as an unconstitutional bill of attainder permitting the State Department to invoke the act of state doctrine on specific arbitrarily chosen occasions. On the other hand, if it is viewed as a statement of substantive law eliminating the act of state doctrine except when foreign affairs interests predominate, it may be upheld.

If any conclusion can be reached concerning judicial deference as affected by the act of state cases, it is that its scope will be determined on a case-by-case analysis based on a number of factors. Some of the factors articulated in the context of the act of state doctrine and probably applicable to other areas are: (1) the risk that an independent court decision will upset specific current

59. "To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a 'political question.' " 406 U.S. at 788 (Brennan, J., concurring).

60. The determination of the existence of a political question has been held to be the exclusive function of the judiciary. Baker v. Carr, 369 U.S. 186, 210-11 (1962).

activities of the Executive vis-à-vis one or more foreign countries; and (2) the clarity of the international law to be administered.[61]

B. *Judicial Discretion*

Although they touch on foreign affairs, questions of treaty interpretation and national territorial limits are treated differently in domestic courts than issues of recognition, sovereign immunity and act of state. Treaties present unique problems for the courts: treaties are, at the same time, part of the supreme law of the land under the Constitution, and compacts among sovereign entities. Under the former characterization, treaties are subject to the traditional interpretation by the courts. Under the latter characterization, however, they become imbued with the political considerations relating to the Executive's actual conduct of foreign affairs, *i.e.* the considerations present in a political question.

It also should be noted that balancing the competing interests of private parties is also a traditional function of the courts. International territorial disputes often present the courts with the same dilemma as treaty interpretation, *i.e.* how to fulfill its traditional function of deciding private rights and interpreting the law while adhering to the separation of powers doctrine. Resolving this dilemma is also a function of the courts, for, as the Supreme Court ruled in *Baker v. Carr*,[62] determining the existence of a political question is the exclusive function of the judiciary.

Questions of treaty interpretation and international territorial disputes thus present considerations similar to those discussed above, but the traditional functions of the courts dictate that judicial abstention is not a possibility. The only available alternatives are deference to the Executive's position or an independent judgment by the courts. Identifying the factors that militate in favor of adopting one of these alternatives is helpful in determining which alternative the judiciary should select in the submerged lands cases.

1. *Treaty Interpretation.*—When faced with a problem concerning the construction of a treaty, the courts often give "great weight" to the Executive's interpretation. In general, the Executive's interpretation has been viewed as an aid in the court's interpretation of the treaty language and not as a determinative fact

61. 376 U.S. at 428.
62. 369 U.S. 186 (1962).

which must be followed. The position submitted by the Executive may be supplemented by the traditional information used to interpret statutory language depending on the existence of various factors that either militate in favor of judicial independence or militate in favor of judicial deference. A significant factor that can be identified as favoring independent action by the judiciary is the presence of a question involving individual liberties. On the other hand, the judiciary will be disposed to defer to the Executive if the question presented is the subject of international negotiation or controversy in which the political branches of the government have expressed an opinion to other nations.

In *The Amiable Isabella*,[63] the Court considered the construction of a treaty that may have circumscribed the appropriateness of a passport form. The Court viewed its function as that of determining the "intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind."[64] Thus, as in the interpretation of a contract, when the meaning of a treaty is uncertain, the courts look to the negotiations and diplomatic correspondence of the contracting parties and to the practical construction given the subject matter by the parties in an effort to ascertain the apparent intentions of the parties.[65] Since the position taken by the Executive is evidence of the meaning intended by one of the parties, the courts give these positions great weight.[66] In this context, however, the consideration given executive actions is not deference as used previously, but merely an indication of the intent of one of the parties. The assignment of "great weight" to the executive positions, however, does constitute deference.

Similarly, in *Sullivan v. Kidd*,[67] the issue was whether the Treaty of March 2, 1899,[68] between the United States and Great

63. 19 U.S. (6 Wheat.) 1 (1821).

64. 19 U.S. (6 Wheat.) at 71.

65. Nielsen v. Johnson, 279 U.S. 47, 52 (1929).

66. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1965).

67. 254 U.S. 433 (1921).

68. Convention with the United Kingdom of Great Britain and Ireland Relating to the Tenure and Disposition of Real and Personal Property, Mar. 2, 1899, 31 Stat. 1939, T.S. No. 146.

Britain permitted an inheritance of land located in Kansas by a Canadian citizen despite a Kansas statute prohibiting alien inheritance. At the time of the suit, the United States and Great Britain held differing views on the interpretation of the treaty. In its diplomatic correspondence, the United States maintained that citizens of Canada were not within the scope of the treaty and submitted a brief in support of this position to the Court. The Court, maintaining its independence, stated the general rule that treaties are to be interpreted according to the principles governing the interpretation of contracts. To effectuate the purposes of the parties the Court examined the negotiative history. However, the Court went further than the previous cases and seemed to hold that the Executive's position as expressed in an amicus brief should be given great weight and that the Treaty did not supersede Kansas law.

In *Sullivan*, the Court was readily able to ascertain the Executive's position since the Government had filed a brief. In other cases, such as *Factor v. Laubenheimer*,[69] recourse to diplomatic correspondence is required. The presence of the United States as a party, of course, disposes of the problem of ascertaining the Executive's position. A clear expression of that position, however, does not insure that the judiciary will defer to it. The predominant factor militating against deference is the limitation of private individual rights by the Executive's position.[70] For example, in *Perkins v. Elg*,[71] the Secretary of State relied on a naturalization convention with Sweden to support his finding that respondent was an alien and should be denied a passport on that ground. The Court made an independent examination of prior practice under the convention and concluded that the Secretary's finding contradicted the previous rulings.[72]

69. 290 U.S. 276 (1933).

70. *See* Note, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 MINN. L. REV. 389, 409 (1968).

71. 307 U.S. 325 (1939).

72. Another dimension to this question is the role of the Supreme Court as the arbiter between the federal and state governments. In Zschernig v. Miller, 389 U.S. 429 (1968), the Court struck down an Oregon statute that conditioned the ability of aliens to inherit Oregon property on the presence of a reciprocal right for United States citizens and the ability of the heirs to take the property without confiscation. Defendants, citizens of East Germany, claimed the provisions of a 1923 treaty with Germany entitled them to inherit the property. Although the State Department had communicated to the Court that the statute was not an

The treaty cases, therefore, identify a number of new perspectives and factors that must be considered to determine the limits of deference:

(1) deference will be less when the role the judiciary plays is the traditional role of interpreting the written law along with preparatory materials;
(2) deference will be greater when the interpretation of the treaty might change a contractual relationship between the United States and another nation;
(3) deference will be less when individual rights are at stake;
(4) deference does not have to be complete; rather the court can give the Executive's position a certain amount of weight; and
(5) extrajudicial statements of the Executive in conducting the foreign relations are more persuasive.

2. *Territorial Questions.*—The cases most directly on point in a consideration of the submerged lands controversy are those dealing with disputes over the extent of national territory. United States courts have been faced not only with cases that have involved questions concerning the extent of United States territory but with at least one case concerning the territory of another nation. As will be shown below, the courts have sought to apply the deference doctrine in these cases. Since the submerged lands dispute is primarily territorial and since it has a relationship to the extent of the United States territory in the ocean, the factors that have been taken into account in the territorial cases are most relevant to an analysis of the role of deference in the submerged lands cases.

Of all the areas of deference discussed, this area is the least refined. In fact, the most recent cases indicate a reluctance by the Supreme Court to come to grips with the question in this context.

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impediment to the conduct of foreign relations and that it was not prohibited by the Treaty, the Court held that the statute "has more than 'some incidental or indirect effect in foreign countries,' and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle." 389 U.S. at 434-35. The Court's holding is not directed at the interpretation of the Treaty; primarily the Court held that the state had intruded on a domain reserved to the federal government. Therefore, while *Zschernig* is not actually a treaty interpretation case, it demonstrates an added factor to be considered when characterizing a problem as one requiring abstention or not.

It appears, however, that the courts will give some degree of deference to executive positions in territorial matters. In connection with questions of the territorial extent of a foreign nation the chief reason for this deference is probably the reluctance of the courts to adjudicate the sovereign claims of another nation. An adjudication of such a matter would be most comparable to the sovereign immunity and act of state questions, in which the decisions would question the integrity of the foreign government itself. Such activity directly concerns the political relationship of this country with the foreign country and, thus, is a matter of foreign relations allocated to the Executive.

In cases involving United States territory, the primary rationale for deference appears to be that an expansion or contraction of United States territory would cause the converse to occur to the territorial boundaries of contiguous nations. As to the oceans, their international character represents the rights of all nations and the extent of those rights are affected by changes in United States territorial claims in the sea in the same way that our contiguous neighbors are affected by territorial changes. Accordingly, the extent of United States territory involves the relations of the United States vis-à-vis foreign nations and is a foreign relations question. A review of the cases in the field demonstrates the effect of this reasoning and the considerations that militate against its strict application.

The question of the extent of the territorial sovereignty of a foreign nation first arose in a domestic lawsuit in *Williams v. Suffolk Ins. Co.*[73] Plaintiff conducted fishing in an area off the Falkland Islands, which the Buenos Aires Government claimed as its territory and in which United States fishing was prohibited. Plaintiff refused to recognize this claim and his ships were seized. In this suit against the insurance company, the insurance company sought to avoid payment on the grounds that plaintiff had violated Buenos Aires law and, thus, violated the insurance agreement. The question of sovereignty over the Falklands was the subject of an international dispute in which the United States claimed that the Buenos Aires Government had no sovereignty and therefore no jurisdiction to control the fisheries near the Falkland Islands. In determining whether plaintiff had violated a valid law of a foreign

73. 38 U.S. (13 Pet.) 415 (1839).

country, the Supreme Court decided to defer conclusively to the position of the United States on the question whether Buenos Aires had sovereignty over those islands. The Court stated:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judiciary department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional function he has decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the union. If this were not the rule, cases might often arise, in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character . . . . And we think, in the present case, as the executive in his message, and in his correspondence with the government of Buenos Aires, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands; the fact must be taken as acted on by this court as thus asserted and maintained.[74]

The Court then found the actions of the insured not illegal and awarded the insurance proceeds to plaintiff.

This decision is probably the high water point for deference to the Executive on a territorial question. A review of the situation indicates that there were a number of factors militating in favor of deference in addition to the factors discussed above. These are:

(1) there were current negotiations between the United States and a foreign government;
(2) deference was based on extrajudicial communications from the United States Executive to a foreign government;
(3) the United States was not a party;
(4) the question involved the territory of a foreign nation;
(5) there were no readily identifiable standards available to

74. 38 U.S. (13 Pet.) at 420.

the court to judge the validity of the claim of sovereignty by the foreign nation; and

(6) even if standards were available, the proof of the facts would be difficult because of the location of the area in dispute.

Some factors present would militate in favor of judicial independence but they were apparently not of sufficient importance to change the result:

(1) individual property rights were being litigated;

(2) no foreign nation stood to be affected by any possible order of the Court either by way of loss of property rights or by way of injunction directed at any of its actions.

Turning to litigation involving the extent of United States territory, one must begin with the dispute surrounding the cession of West Florida[75] to the United States. This dispute involved a mixed question of United States territory, territory of a foreign country and treaty interpretation. The cases involving the West Florida cession began with the 1829 Supreme Court decision in *Foster v. Neilson*.[76] The parties claimed title to land located in West Florida derived from different chains of title. Plaintiff's chain evolved from a Spanish grant dated 1804 and 1805. Defendant denied the validity of plaintiff's chain arguing that the United States rather than Spain was the sovereign of the area in 1804 and 1805. Thus, the question was the date of cession of West Florida to the United States.

In diplomatic correspondence over many years prior to 1819, the United States and France contended that Spain, in an ambiguous treaty of 1800, transferred this area to France and that a quit claim from France to the United States in 1803 granted the United States territorial rights in the area. Spain maintained that West Florida was not granted to France in 1800 and that the first time it relinquished its rights in West Florida was in the treaty of 1819 in which Spain explicitly ceded West Florida to the United States. Whether plaintiff's claim based on title from Spain dated 1804 and 1805 was valid depended on whether the Spanish or the United States con-

75. West Florida is the land located east of the Mississippi River and west of the Perdido River.

76. 27 U.S. (2 Pet.) 253 (1829).

struction of the treaty was adopted. Thus, in *Foster*, considerations concerning treaty interpretation and the territorial limits of the United States and Spain converged. The Court appeared to defer to the United States position without making an independent examination of the treaties. The Court stated:

> If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally ascertained its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and its discussion, the courts of every country must respect the pronounced will of the legislature. . . . Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each.[77]

As in the previous case it is important to itemize the factors militating in favor of deference:

(1) the Executive's position had been taken extrajudicially in diplomatic correspondence with foreign governments;
(2) territory previously controlled by a foreign nation was involved;
(3) international negotiations on the specific question had taken place and had resulted in a compromise solution;
(4) the Congress had passed laws applicable to the area in question based on the assumption that it was United States territory prior to 1804;[78] and
(5) the United States was not a party to the action.

Factors militating against deference were:

77. 27 U.S. (2 Pet.) at 309. Subsequent cases on the question of West Florida, although overruling other aspects of the *Foster* case, continued to reaffirm the deference aspects of the case. Davis v. Police Jury of Concordia, 50 U.S. (9 How.) 280 (1850); Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838); United States v. Perchman, 32 U.S. (7 Pet.) 51 (1833).

78. Congress enacted various statutes, the first in 1812, incorporating portions of the disputed territory into the State of Louisiana and the territories of Mississippi and Alabama. In addition, Alabama was granted statehood in 1819. 27 U.S. (2 Pet.) at 308.

(1) the international issue had been conclusively resolved prior to the litigation;
(2) judicial standards for the interpretation of written documents, as well as the facts, were easily available;
(3) individual property rights were in dispute;
(4) since the area was now clearly within the United States, the decision either way would not affect the extent of United States territory vis-à-vis foreign nations; and
(5) no foreign nation was a party to the litigation and none would be affected by its outcome in terms of either their property or freedom of action.

Although these factors against deference did not carry the day, they did result in the Court's making some separate inquiry into the issue at hand. That inquiry might indicate a desire not to give the executive position conclusive force but merely great weight, in contrast to the broad language quoted above.

Jones v. United States[79] has been heralded as the landmark decision in the field of deference of the courts to executive decisions concerning territorial jurisdiction. The Court stated:

> Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.[80]

The Court proceeded to defer to the Executive's position, as expressed in letters, statements and pronouncements, that the United States did claim jurisdiction over the island of Nevassa and to hold that the district court, therefore, had properly exercised jurisdiction in petitioner's murder conviction.

The Court's language in *Jones* has been cited for the proposition that it is not in the province of the judiciary to question an executive assertion of territorial jurisdiction by the United States if that assertion is made through the exercise of his constitutional functions.[81] The Court did rely heavily on executive correspondence

79. 137 U.S. 202 (1890).
80. 137 U.S. at 212.
81. *E.g.*, United States v. California, 332 U.S. 19, 34 (1947); Pearcy v. Stranahon, 205 U.S. 257, 265 (1907).

with the Government of Haiti and decided the issue in accordance with the Executive's expressed position. An added factor that is often overlooked, however, is that the President was acting pursuant to his authority under the Guano Islands Act of 1856.[82] That statute specifically gave the President authority to claim jurisdiction over any islands that he found to be uninhabited, unclaimed and to contain guano deposits. Thus, the authority of the Executive and the legislature converged. The Court was merely required to determine that the requirements of the Guano Islands Act were satisfied and that the Executive asserted jurisdiction over the island in the manner provided in the statute. Although the Court utilized language that indicates that unilateral action of the Executive in asserting jurisdiction over territory is binding on the courts, as a result of the legislative delegation the Court was not faced with a situation in which it was asked to defer to a unilateral claim of the Executive.[83] Therefore, *Jones* does not stand for the proposition that when the judiciary is dealing with the limits of the territory and sovereignty of the United States it is bound absolutely to defer to statements of the Executive.

The Supreme Court came closer to holding that the Executive's position is controlling in *In re Cooper*.[84] That case involved a statute which permitted the United States to exercise its jurisdiction over fisheries in the territory of Alaska and in the Bering Sea. As in the Submerged Lands Act,[85] Congress intentionally failed to define the extent of United States jurisdiction in the Bering Sea off the coast of Alaska. The District Attorney for the District of Alaska had seized a British vessel more than three miles off the coast in the Bering Sea for violation of the Act. Forfeiture proceedings commenced against the vessel were objected to on jurisdictional grounds. The issue ultimately became whether the District of Alaska as used in the Act extended more than three miles from the coast into the Bering Sea. The Court initially implied that the Executive's positition would be controlling, but then qualified these statements. Since international negotiations on the question

82. Act of August 18, 1856, ch. 164, 11 Stat. 119.

83. This interplay and conflict of the President and the Congress was most aptly described in Mr. Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

84. 143 U.S. 472 (1892).

85. *See* note 102 *infra* and accompanying text.

were pending, the Court felt that to decide whether the government's position was valid and to review the action of the political branches of the government would be contrary to settled law. The Court explicitly stated, however, that in certain circumstances it would be obliged to render a judgment.

> We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline jurisdiction which is given than to usurp that which is not given."[86]

The Court totally avoided deciding the issue, however, by holding that the objections to jurisdiction had been waived at an earlier stage. Nevertheless, the direct interests of foreign countries in the outcome of the litigation militate more in favor of deference than the situation in *Jones*.

The Court indicated a tendency toward a more independent judgment on the question than found in any of the previous cases. It appears that, in the case of the Executive's acting under a vague statute, the court will determine the territorial extent of that statute despite the presence of some international factors. As in the past we see some of the same factors supporting a decision for deference:

(1) the presence of a national of another country; and
(2) the existence of current international negotiations on the question.

On the other hand the factors against deference were:

(1) the court was called on to interpret a domestic statute;
(2) individual property rights were at issue; and
(3) the United States was a party.

Subsequent to the erosion of the deference doctrine in the *Cooper* case, the Supreme Court has avoided clarifying the role of deference in territorial cases, except in the submerged lands cases. An example of this avoidance is found in *Vermilya-Brown Co. v.*

86. 143 U.S. at 503.

Connell.[87] That case involved the question whether a United States military base in Bermuda was a United States possession within the meaning of the Fair Labor Standards Act of 1938.[88] The Department of State took the position that the arrangements under which the United States leased the bases from Great Britain did not, and were not intended to, transfer sovereignty over the leased areas from Great Britain to the United States. The Court did not want to disagree with this position, but was desirous of extending the coverage of the Act. The solution was the tenuous theory that "possession" as used in the Act did not require territorial sovereignty. Thus, the Court found that the base was a possession without dealing with the deference question, much as in *In re Cooper.* Not only did the Court avoid the deference question, but it also avoided all issues concerning international law.

In conclusion, although judicial deference is the stated rule in cases involving the extent of United States territory and jurisdiction, an examination of the cases demonstrates that the rule is not as rigid as it appears. The judiciary will feel constrained to defer or avoid decision when the direct interests of foreign sovereigns are involved in the litigation, especially if these rights are the subject of a current dispute or negotiations. The Court, however, does not seem to be as disposed toward deference if doing so would restrict the rights of individual parties to the litigation. An additional consideration is that it is well established that an administrative interpretation of a statute by the agency charged with its enforcement is entitled to great deference.[89] Expanding this concept and applying it to the State Department's interpretation of a treaty or an international situation gives added impetus for judicial deference in cases that have significant foreign affairs overtones.[90]

87. 335 U.S. 377 (1948).

88. 29 U.S.C. §§ 201-19 (1946), *as amended,* 29 U.S.C. §§ 201-19 (1970).

89. *E.g.,* Ehlert v. United States, 402 U.S. 99, 105 (1971); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v. City of Chicago, 400 U.S. 8, 10 (1970); Udall v. Tallman, 380 U.S. 1, 16 (1965).

90. *Alaska v. Arctic Maid* involved the jurisdiction of Alaska to tax fishing activities off its coast in the Bristol Bay area. In 1961, the United States Supreme Court held that the tax was valid under the Commerce Clause as applied to fish caught within Alaskan territorial waters. The Court expressed no opinion on the question of the extent of Alaskan territorial waters in Bristol Bay and remanded the case for a determination of the question. Alaska v. Arctic Maid, 366 U.S. 199 (1961). On remand, the Alaska Superior Court determined that Bristol Bay is a

C. *Conclusion*

Throughout the discussion of cases in which deference has been applied, various factors responsible for the application of the deference doctrine in derogation of the Court's responsibility to make an independent judgment on a case before it have been pointed out. It is clear, however, that the Supreme Court has never articulated a closed set of factors to make this determination but rather has relied on vague perceptions of the separation of powers interests that should be preserved. This practice has resulted in a fluid situation with marked aberrations. One area in which the deference question has not been properly addressed is the submerged lands litigation. Before discussing the course of development of that litigation, it would be helpful to set out those factors which appear to have primarily influenced the Court in the areas of deference discussed above. From the review of the cases above it is apparent that the courts rely strongly on certain factors. Others, which recur regularly but have not been particularly emphasized by the courts, also appear to have influenced the decisions.

The former factors are:

(1) whether an explicit constitutional allocation to the Executive exists;
(2) whether the judgment in the case may actually affect the property or territorial rights claimed by a foreign nation;
(3) whether the judgment in the case may actually order a foreign nation to do or not to do something;
(4) whether the judgment in the case may actually require

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historic bay without receiving any communication from the federal government. After learning of the decision, the Office of Legal Adviser authorized the Justice Department to submit an amicus curiae brief indicating that the Bay is not historic waters. The brief was submitted to the Alaska Supreme Court where the case was to be heard on appeal, but the parties settled before a judgment was reached. Arctic Maid Fisheries, Inc. v. State, No. 316 (Alas. Sup. Ct., *settled* April 1963). For a discussion of this case see 2 INT'L LEGAL MATERIALS 524-29 (1963). In the 1970 trials of four Cuban fishermen who allegedly violated the United States twelve-mile exclusive fishery zone, however, the district court deferred to the Executive's position on the location of that zone. *See, e.g.*, United States v. Elisen Soto-Fuentes, No. 71-100-CR-WM (D. Fla., May 26, 1971). No question of deference arose in Island Airlines, Inc. v. C.A.B., 352 F.2d 735 (9th Cir. 1965), which involved the question whether the waters between the Hawaiian Islands were historic territorial sea.

the federal government to do or not to do something vis-à-vis another nation; and
(5) whether the Executive's position is authorized by statute.

The latter factors are:

(1) whether there are relatively strong legal standards present for deciding the issue;
(2) whether the United States is a party;
(3) whether the Executive's position is found in diplomatic correspondence or formulated for the purpose of the litigation;
(4) whether the rights involved in the litigation are individual or public.

With these factors in mind, one can review the submerged lands cases to determine how the courts have applied the deference doctrine in those cases.

II. The Submerged Lands Cases

A. *The Deference Doctrine in the Submerged Lands Cases*

There have been twelve significant court decisions in the submerged lands dispute.[91] A review of these cases will show that the Supreme Court perceived at the outset that foreign relations matters were involved and, accordingly, exercised restraint in asserting its independence of the Executive. This restraint was based primarily on the Court's perception that the decisions might determine the extent of United States territory and rights vis-à-vis other nations. Accordingly, it accepted United States positions in the litigations as fact. Later, this restraint began to be tempered by the Court's recognition of the domestic aspects of these cases; the most recent decisions minimize deference.

1. *The First* California *Decision* (1947).—The first submerged

91. United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11 (1969); United States v. Louisiana (Texas Boundary Case), 394 U.S. 1 (1969); United States v. Lousiana (Texas), 389 U.S. 155 (1967); United States v. California, 381 U.S. 139 (1965); United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960); Alabama v. Texas, 347 U.S. 272 (1954); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); United States v. California, 332 U.S. 19 (1947); United States v. Alaska, 352 F. Supp. 815 (D. Alas. 1972); United States v. Alaska, 236 F. Supp. 388 (D. Alas. 1964).

lands case to be decided was *United States v. California*.[92] This original action in the Supreme Court involved the question whether California or the United States has the right to exploit and to regulate the seabed resources located seaward of the coastline and landward of the limit of the territorial sea adjacent to California.[93] In reaching the decision that these rights are possessed by the United States, the Court relied heavily on the foreign relations aspects of the litigation. It found that the rights to these resources must reside in that arm of the sovereign that has control over foreign relations:

> The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.[94]

In accepting the Government's argument, the Court said:

> The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars raged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriate for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge, detracts from it, is a question for consideration among nations as

92. 332 U.S. 19 (1947).

93. The United States territorial sea limit is a line that is: (1) at all times three nautical miles seaward of: (a) the mean low-water line of islands and the mainland; (b) the limits of inland waters defined by the closing line of rivers, juridical bays, and historic inland water bays; (c) a system of straight baselines; (d) the mean low-water lines of harbor works and jetties; (e) the mean low-water line of low tide elevations which are within three nautical miles of (a), (b), (c) or (d); or (2) the closing line of historic territorial sea waters. Although theoretically part of the baseline, the United States maintains that there are no systems of straight baselines or historic bays that affect the delimitation of the territorial sea of the United States.

94. 332 U.S. at 29.

> such, and not their separate governmental units. What this nation does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations . . . . The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.
>
> The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve the peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so if wars come, they must be fought by the nation . . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. . . . [This] leads to the conclusion that national interests responsibilities, and therefore national rights are paramount in the waters lying to the seaward [of the inland waters] in the three-mile belt.[95]

There could be no stronger presentation of the foreign relations interests that support the Court's deference to the Executive's positions in the submerged lands controversy than was made in that opinion.

The Court had occasion to defer to the Executive's position on the existence and breadth of the territorial sea. In the course of its opinion the Court determined that there was no territorial sea in international law prior to the establishment of the United States and that the United States territorial sea was first asserted by Secretary of State Jefferson in 1793.[96] The Court went on to defer to that claim:

> That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones v. United States*, 137 U.S. 202, 212-214; *In re Cooper*, 143 U.S. 472, 502-503.[97]

95. 332 U.S. at 35-36.
96. 332 U.S. at 33 n.16.
97. 332 U.S. at 33-34.

Thus, the Court's conclusion that the definition of the extent of the territorial sea is related to the conduct of foreign affairs was the primary basis for the holding that the United States had the exclusive rights to the resources in dispute in the first *California* case.[98]

2. *The First* Louisiana *Case* (1950).—Since valuable oil deposits also lay off the Louisiana coast, it was necessary to ascertain whether the first *California* decision applied there. With little ceremony the Court found that *California* controlled and expressly incorporated the reasoning of that case into this decision, which limited Louisiana's rights to inland waters and areas landward of the shoreline.[99]

3. *The First* Texas *Case* (1950).—On the same date that the first *Louisiana* decision was handed down, the *California* holding was applied to the coast of Texas.[100] An integral part of the previous cases was the finding that none of the states in question had rights to the marginal sea area prior to its creation by the federal government. The Texas situation was different. Texas argued that prior to joining the Union it was an independent nation with a nine-mile marginal sea. Despite this argument the Court found that since Texas joined the Union on "equal footing" with the other states, the factors articulated in the first *California* decision went so far as to work a divestiture on Texas.

4. Alabama v. Texas (1954).—No sooner had the first *California* decision been handed down than there were calls in Congress to "restore" the tidelands to the states.[101] This outcry ultimately led to passage of the Submerged Lands Act of 1953,[102]

98. As a result of this decision the United States had possession of the resources in the three-mile belt of territorial sea. This area was defined in the Court's decree as an area "underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside the inland waters, extending three nautical miles . . . ." 332 U.S. at 805 (1947). Ultimately, it was found necessary to appoint a special master to determine the location of the baseline for the measurement of the territorial sea in order to locate this boundary between the state and federal rights. United States v. California, 342 U.S. 891 (1951).

99. United States v. Louisiana, 339 U.S. 699 (1950). The decree is found at 340 U.S. 899 (1950).

100. United States v. Texas, 339 U.S. 707 (1950). The decree is found at 340 U.S. 900 (1950).

101. United States v. Louisiana, 363 U.S. 1, 28 n.44 (1960).

102. 43 U.S.C. §§ 1301 *et seq.* (1970). The Submerged Lands Act grants to

which sought to give the coastal states the rights previously held by the United States in the resources found within three miles of the "coast line." There is an additional grant of up to nine miles in the case of historic boundaries in the Gulf of Mexico. Two states, Alabama and Rhode Island, sought to challenge the Submerged Lands Act on the ground that the rights in the marginal sea are attributes of the national sovereign power over foreign relations and cannot be delegated to individual states. In a per curiam opinion denying leave to file an original action,[103] the Supreme Court held that the interests are property of the United States that can be disposed of without review pursuant to article IV, section 3 of the Constitution, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." No reference was made to the foreign relations aspects of the case. The author of the first *California* decision, Justice Black, and that of the first *Louisiana* and *Texas* decisions, Justice Douglas, dissented from the decision, fearing that the grants may have included aspects of the foreign relations power of

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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 water . . . ." 43 U.S.C. § 1311(a)(1) (1970). "Boundaries" for the purposes of the Act include the seaward boundaries of a state "as they existed at the time such State became a member of the Union, or approved by the Congress," but subject to the limitation that the term "boundaries" will not be construed to extend from the coast line more than three geographic miles into the Atlantic Ocean or more than three marine leagues into the Gulf of Mexico. 43 U.S.C. § 1301(b) (1970). Section 2(a) of the Act defines the term "lands beneath navigable waters" as "(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined . . . ." 43 U.S.C. § 1301(a)(1)-(3) (1970).

103. Alabama v. Texas, 347 U.S. 272 (1954).

the federal government.[104] This decision thus marks a sharp turn away from the strong foreign relations analysis of the submerged lands controversy.[105]

5. *The Second* Louisiana *Decision* (1960).—In 1960, the Gulf states pressed for a decision to determine which to them possess the necessary historic boundaries to entitle them to the resources of the Gulf up to nine miles from shore under the Submerged Lands Act. The suit was an original action in the Supreme Court styled *United States of America v. States of Louisiana, Texas, Mississippi, Alabama and Florida, No. 10 Original.*[106] Only Texas and Florida proved the necessary historical facts. For the purposes of this paper, the significant factor was the role that the foreign relations position of the United States *did not* play in this decision.

To receive rights beyond three miles the states had to locate their state boundaries outside the three-mile limit as defined in the Submerged Lands Act. The Submerged Lands Act defined the state boundaries in question "as they existed at the time [a] State became a member of the Union, or as heretofore approved by the Congress . . . ."[107] The United States argued that the language of the statute necessarily prevents any state from obtaining any rights beyond the three-mile limit. It argued that the terms of the statute set the time for ascertaining the state boundary at a time after statehood.[108] On the basis of the previous cases the United States argued that no state had a boundary beyond the coastline because of the foreign relations aspects of the territorial sea. In fact, the United States argued that not only had it never claimed boundaries beyond the three-mile limit but that a holding by the Court that any state had a boundary beyond three miles would be embarrassing to the present conduct of United States foreign rela-

104. 347 U.S. at 277 (Black, J., dissenting), 281 (Douglas, J., dissenting).

105. This change can best illustrated by the most recent decision by the Supreme Court in the third *Louisiana* decision of 1969. We still find Justices Black and Douglas dissenting but their argument is very different: "There appears to be one thing certain about the problem, however, and that is that the dispute between Louisiana and the United States is no part of international affairs subject to international law, but is exclusively a domestic controversy between the State and Nation." United States v. Louisiana, 394 U.S. 11, 81 (1969).

106. 363 U.S. 1 (1960) (as to Louisiana, Texas, Mississippi and Alabama); 363 U.S. 121 (1960) (as to Florida only).

107. 43 U.S.C. § 1301(b) (1970).

108. 363 U.S. at 11-13.

tions.[109] The Court accepted the United States view on the time that the boundary was to be determined but determined that a state could have had boundaries beyond the coastline.

The Court's reasoning allowed it to reach this conclusion without overruling its holdings in the first *California, Louisiana* and *Texas* decisions. The Court introduced a new element into the picture —Congress. It found that despite the foreign relations interests of the Executive, Congress had set the boundaries of Florida and Texas in the Gulf of Mexico out to a distance of approximately nine miles.[110] The Court then implied that these states have no right to enjoy the benefits of that boundary because of the Executive's foreign relations interests, which vest all rights in the area in the federal government.[111]

Although this finding might be better viewed as a statement of the limitations that the Executive can place on the states' use of the area granted to them, it also provides the new conceptual basis for the first *California, Louisiana* and *Texas* cases. Since the find-

109. 363 U.S. at 30. That argument was particularly appropriate as a result of the imminent Law of the Sea Conference of 1960, which had as one of its agenda items the matter of the breadth of the territorial sea. During the 1958 Conference the United States had initially staunchly defended the three-mile limit, but had later proposed as a compromise that six miles be accepted as the limit of territorial waters with an additional six-mile contiguous zone for exclusive fishing rights. That proposal failed to win the necessary two-thirds vote in 1958, and when proposed again in 1960 fell one vote short of the two-thirds requirement. For a discussion of the 1960 Conference see Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas,* 54 AM. J. INT'L L. 751 (1960); Gormley, *Unilateral Extension of Territorial Waters,* 43 U. DET. L.J. 695 (1966); Jessup, *The Law of the Sea Around Us,* 55 AM. J. INT'L L. 104 (1961). The failure of the compromise proposal at the 1960 Conference is one of the principal causes for the present race to claim various areas in the ocean. *Cf.* W. BISHOP, INTERNATIONAL LAW 595 (3d ed. 1971).

110. 363 U.S. at 64; 363 U.S. at 121.

111. "It is contended that since Texas was admitted to the Union with its maritime boundary not yet settled, United States foreign policy on the extent of territorial waters, to which Texas was admittedly subject from the moment of admission, automatically upon admission operated to fix its seaward boundary at three miles. This contention must be rejected. As we have noted, the boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new States and to define the extent of their territory, not by virtue of Executive power to determine this country's obligations vis-à-vis foreign nations . . . . It may indeed be that the Executive, in the exercise of its power, can limit the enjoyment of certain incidents of a Congressionally conferred boundary, but it does not fix that boundary." 363 U.S. at 51.

ing of the Court was that at least Florida and Texas had boundaries outside the coastline from statehood, they necessarily possessed these during the period of the first submerged lands cases. Executive interests in the foreign relations aspects of the litigation articulated in those opinions, however, required that those boundary rights not be exercised. Only through the combined action of Congress and the President culminating in the Submerged Lands Act was that presumption of foreign affairs interests set aside, subject to reassertion by the Executive. Nevertheless, the clear fact is that the Executive's foreign affairs power in this area was severely limited by the Submerged Lands Act through its interpretation by the Supreme Court.

Although on its face the recognition of state boundaries beyond the three-mile territorial sea appeared to be internationally embarrassing to the United States, the practical effect was not. The Submerged Lands Act purported to convey to the coastal states all resource rights in the areas granted to the states. Since the Act did not purport to claim for the United States vis-à-vis the rest of the world any more rights than already held by the United States, the Court viewed the Act as merely a domestic division of United States resources.[112] This conclusion is particularly valid in the case of the resources that were the subject of the litigation. These resources were identified by the United States in its complaint seeking to quiet its "exclusive possession of, and full dominion and power over, the lands, minerals, and other things underlying the waters of the Gulf of Mexico more than *three geographic miles* seaward from the coast of each State and extending to the edge of the Continental Shelf."[113] These rights include the exclusive right

112. 363 U.S. at 31.

113. 363 U.S. at 5. The Court pointed to the testimony of Jack B. Tate, Deputy Legal Adviser to the State Department, before Congress to show the purely domestic character of the issue: "He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve." 363 U.S. at 31. President Truman, in a proclamation entitled *Natural Resources of the Subsoil and Sea Bed of the Continental Shelf,* first asserted that "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Presidential Proclamation No. 2667, 59 Stat. 884 (1945). Under article 2, paragraph 1 of the

of the coastal state to explore and exploit the natural resources of the adjacent continental shelf.

After limiting this division of resources to a domestic question, the Court admits of only one role for the foreign relations power of the President as contrasted with congressional power on this question:

> The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States.[114]

Thus, Congress can divide the resources of the continental shelf any way it wants, and since the interests of no foreign nations are recognized in those resources, there is no foreign relations interest present.[115]

6. *The Second* California *Decision* (1965).—If the Congress had picked an arbitrary line to divide the areas of the continental shelf that are under state and federal control the submerged lands cases might never have returned to foreign relations questions. Unfortunately, the baseline, from which the three- and nine-mile grants under the Submerged Lands Act are measured, had to be identified in order to definitively locate the state-federal boundary. That baseline was identified in the Act as the "coast line" and was defined as "the line of ordinary low water along that portion of the

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Convention on the Continental Shelf, it is recognized that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." Convention on the Continental Shelf, *opened for signature* April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

114. 363 U.S. at 35.

115. After the 1960 *Louisiana* decision the pressure was off the parties to determine the exact limits of the Submerged Lands Act grant off Texas because oil exploitation was not near the nine-mile line. There was more pressure in the case of Louisiana. As an interim measure a decree was entered setting up various zones of responsibility between the United States and Louisiana pending a final location of the three-mile Submerged Lands Act grant. United States v. Louisiana, 364 U.S. 502 (1960). During the period following the decision the United States Coast and Geodetic Survey prepared large scale maps under joint supervision of the parties for use in locating that boundary.

coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[116]

A 1965 opinion in the second *California* case became the vehicle for a Supreme Court interpretation of this term.[117] After a review of the legislative history of the Submerged Lands Act, the Court found that it had great discretion in determining what that term meant:

> Congress, in passing the Act, left the responsibility for defining inland waters to this Court. We think that it did not tie our hands at the same time. Had Congress wished us simply to rubber-stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself. It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available.[118]

The Court first turned to the definition of "inland waters." A review of its 1947 *California* opinion clearly indicated that this definition was to have an international content since the outer limits of inland waters would determine the country's international coastline, but the Court in that earlier case did not specify further.[119]

Apparently, the Court felt that the conclusion reached by the Special Master appointed in the first *California* case did not provide the best definition for its purposes.[120] It was not until the late

116. 43 U.S.C. § 1301(c) (1970).

117. United States v. California, 381 U.S. 139 (1965).

118. 381 U.S. at 164-65.

119. 381 U.S. at 162.

120. The Special Master found that there was no internationally accepted definition for inland waters and decided in those circumstances that the position taken by the United States in the conduct of foreign affairs should be controlling. He concluded that the relevant date on which to determine our foreign policy to be October 27, 1947, the date of the *California* decree. He therefore rejected the assertion that letters from the State Department, written in 1951 and 1952, declaring the then present policy of the United States, were conclusive on the question before him. At the same time, that decision required the Special Master to consider a great deal of foreign policy materials dating back to 1793 in an attempt to discern a consistent thread of United States policy on the definition of inland waters. He ultimately decided that as of 1947 the United States had taken the position that a bay was an inland water only if the distance between the headlands of the bay was less than ten miles and a closing line drawn across the mouth of the bay enclosed a sufficient water area to satisfy the Boggs formula,

1950's and early 1960's that a better definition was presented. In 1958, the Geneva Conference on the Law of the Sea approved the Convention on the Territorial Sea and the Contiguous Zone.[121] The United States ratified the Convention in 1961 and it came into force in 1964.[122] The Convention's definition of inland waters was in part a codification of the previous international definition and in part progressive development of international law. Articles three through thirteen provide rules for delineating the baseline from which the territorial sea is measured. Once the baseline of a coastal nation is determined, all waters located landward of that baseline form part of the inland waters of the nation. In addition, the Convention provides that certain bays[123] that belong exclusively to a coastal nation are considered part of the inland waters of that nation. The Court adopted this definition for use in "giving content to the words which Congress employed" in 1953.[124]

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which is a reduced area formula similar to the semi-circle test described in note 123 *supra*. (The Boggs formula is described in Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L L. 551 (1930)). The Report of the Special Master is printed in full in I A. SHALOWITZ, SHORE AND SEA BOUNDARIES 329-53 (1962).

121. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (Sept. 10, 1964) [hereinafter cited as Convention].

122. 381 U.S. at 164.

123. Article 7, paragraph 2 of the Convention defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Convention, art. 7, ¶ 2. In addition, if the distance between the headlands of the bay does not exceed 24 miles, the bay shall be considered inland waters. Convention, art. 7, ¶ 4. If the distance of this closing line is greater than 24 miles, a straight base line of 24 miles may be drawn within the bay in a manner designed to enclose the maximum area, which shall then be considered a bay. Under paragraph 6, article 7 does not apply to historic bays, which are discussed at note 178 *infra* and accompanying text.

124. 381 U.S. at 165. "The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome." 381 U.S. at 165.

This decision then appeared to bring the submerged lands cases full circle back to giving international content to the boundary between the states and the federal government by making the Submerged Lands Act grant directly dependent on the territorial sea boundary the United States claims vis-à-vis other nations. The Court slightly lessened the international overtones, however, by holding that the definition now chosen would be frozen and would not change if the Convention were changed.[125] In responding to California's argument that the decision might inhibit the United States in the conduct of foreign relations, the Court replied that " '[f]reezing' the meaning of 'inland waters' in terms of the Convention definition largely avoids this, and also serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States."[126]

Later, the Court turned to the second part of the definition of the "coast line" utilized by the Submerged Lands Act, which relates to the "line of ordinary low-water."[127] It again found the Convention on the Territorial Sea and the Contiguous Zone convenient in giving content to that phrase and adopted the low-water line used in article 3: "the low water line along the coast as marked on large-scale charts officially recognized by the coastal State."[128] Since the Coast and Geodetic Survey depicted the "lower low water line" on its charts of the California coast, that line was adopted for use under the Submerged Lands Act in California.[129]

From the Court's general conclusions it would have been difficult to determine its perception of the role of the Executive's foreign affairs power in the location of the Submerged Lands Act "coast line" as then defined by the Court. Two facts, however, were clear.

First, as of the date of the decision the coast line for use in the Submerged Lands Act was coincident with the baseline that the United States used in claiming its territorial sea vis-à-vis other countries. Thus, a judicial location of the coast line might determine the extent of United States territorial sea claimed as of May 17, 1965.

125. 381 U.S. at 166-67.
126. 381 U.S. 167.
127. 381 U.S. at 176.
128. Convention, art. 3.
129. 381 U.S. at 176.

Secondly, to locate the coast line the Court would have to interpret the terms of a treaty to which the United States and many foreign nations were parties.

Accordingly, two areas in which the Court has traditionally applied the deference doctrine became relevant—the extent of the territory of the United States and the interpretation of international agreements. The remainder of this second *California* decision and much of the third *Louisiana* decision provide answers to the question of what role the Court perceived deference had in these cases. Apparently, deference has played a role in only two aspects of these issues—straight baselines and historic bays.

In part IV of the second *California* opinion, entitled "Subsidiary Issues," the Court dealt with six issues: (1) straight baselines; (2) 24-mile closing rule; (3) historic inland waters; (4) harbors and roadsteads; (5) the line of ordinary low water; and (6) artificial accretions. Since the fifth has already been discussed, the first four and the sixth will be discussed below in terms of the deference doctrine.

(a) *Straight Baselines.*—In 1947, there was no concept of a system of straight baselines for use in delimiting the territorial sea. It was first recognized as a valid technique in the International Court of Justice *Fisheries Case*[130] and was later codified in article four of the Convention on the Territorial Sea and the Contiguous Zone.[131] That doctrine permits the coastal state under certain geographical circumstances to substitute for the low-water line and the outer limit of inland water of bays and rivers a series of straight lines drawn arbitrarily by the coastal nation between points on the low-water line of that nation's coasts.

California argued that it has the proper geographical configuration for drawing a system of straight baselines on its coast and should be allowed to do so. The Court summarily rejected this claim and placed the sole responsibility for adopting such a system on the federal government.[132]

The first question reached in making that determination was to ascertain whether the Convention requires the drawing of straight baselines or merely makes it optional. The United States argued that it was merely permissive and the Court agreed. Interestingly,

130. Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116.
131. Convention, art. 4.
132. 381 U.S. 167-68.

no mention of deference to the Executive's position on the matter is found.

The second question was whether California or the federal government would make a decision to adopt a system of straight baselines. California argued that its coast has the necessary configuration to allow the use of this system and that the Constitution gives the states the power to draw their boundaries so long as they are within the limits recognized by international law. This proposition was rejected. However, the Court's reasons were solely related to the foreign relations impact of such a boundary decision:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. We conclude that the choice under the Convention to use the straight-baseline method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.[133]

Thus, the Court perceived the foreign relations interests to be sufficiently strong to require that the extension of the United States claims in the oceans by use of a system of straight baselines be made only by the federal government.

(b) *Twenty-four Mile Closing Rule.*—Although the Submerged Lands Act was passed when international law recognized only a 10-mile closing line for bays, the Convention on the Territorial Sea and the Contiguous Zone definition of inland waters extended the closing line for bays to 24 miles.[134] There was little question whether the distance between headlands of particular bays in issue met the 24-mile requirement. A greater problem arose in determining what configuration constitutes a bay. This question arose in the context of the Santa Barbara Channel where the most valuable oil resources lie. California argued that the Channel is a "fictitious

133. 381 U.S. at 168.

134. *See* note 123 *supra.*

bay" formed by the mainland and the islands south of the Channel.[135]

The dispute centered around the question whether the fictitious bay theory is a bona fide theory for delimiting the baseline. California argued that it is and that it is automatically the baseline as in the case of the low-water line. The Court could have decided the question on the basis of an interpretation of the Convention or on the basis of general international law. The Court, however, viewed this situation as similar to the straight baseline question and deferred to the United States. It first stated: "The United States asserts that 'international law recognizes no principle of "fictitious bays." ' We find it unnecessary to decide that question."[136] Later in the opinion the Court concludes this question:

> The United States has not in the past claimed the Santa Barbara Channel as inland water and opposes any such claim now. The channel has not been regarded as a bay either historically or geographically. In these circumstances, as with the drawing of straight base lines, we hold that if the United States does not choose to employ the concept of a "fictitious bay" in order to extend our international boundaries around the islands framing Santa Barbara Channel, it cannot be forced to do so by California.[137]

Thus, the holding was that the United States position on the territorial extent of the United States vis-à-vis other countries was binding on the Court.

(c) *Historic Inland Waters.*—The Court will defer when considering historic inland waters. In this section the Court dealt with waters that did not qualify as 24-mile bays but with waters that California claimed on the internationally recognized ground that the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[138] Santa Monica and San Pedro Bays remained to be discussed in this section. During the course of the Special Master's hearings in the first *California* case California had introduced state statutes and one court case for each bay which purported to show that California has historically treated these bays as inland waters. The Special Master found that the statutes were ambiguous and that the cases

135. 381 U.S. at 170.
136. 381 U.S. at 170 n.38.
137. 381 U.S. at 172.
138. 381 U.S. at 172.

and statutes were insufficient evidence to establish the historical claim. The Master found it unnecessary to determine whether he was required to defer to the Executive's position on the matter because he decided in favor of the federal government without deferring.[139]

The Supreme Court approved the Master's decision on the matter after indicating that California's evidence was even less probative than the Master had indicated.[140] As to the statutes the Court found that legislative claims without actual proof of implementation are insufficient to support a historic bay claim. The case involving San Pedro Bay was found to have been dismissed and, thus, was actually evidence that jurisdiction had not been exercised. The Santa Monica Bay case was successfully prosecuted but was found to be insufficient to support independently the historic bay claim.

Accordingly, the Supreme Court had no reason to determine whether deference was required. In an effort to clarify the matter, however, it indicated that deference was required in these cases:

> The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.[141]

The degree of deference required by the Court in this passage is not at all clear. It is apparent that the deference is at least as great as the "great weight" rule found in other areas. Apparently, it is even stronger than that. The phrase "clear beyond doubt," however, is seldom employed.[142]

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139. The entire Master's report is reprinted in I A. SHALOWITZ, SHORE AND SEA BOUNDARIES 329-53 (1962).

140. 381 U.S. at 173.

141 381 U.S. at 175.

142. The only case I am aware of in which the phrase was used is Leary v. United States, 395 U.S. 6 (1969). Justice Black, in a concurring opinion, considered the Government's argument that possession of marijuana gave rise to the inference that the possessor knew that the marijuana had been imported or brought into the country illegally. In rejecting the inference as "forced and baseless," Justice Black stated that "[i]t is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it

(d) *Harbors and Roadsteads.*—This question revolved solely around the completeness of the adoption of the Convention on the Territorial Sea and the Contiguous Zone. Although the Submerged Lands Act does not speak of harbors and roadsteads as part of the coast line for the measurement of the grant of resources, the Court followed its policy of making the "coast line" identical to the baseline used in the Convention and incorporated it in the Submerged Lands Act.[143]

(e) *Artificial Accretions.*—Similarly, since the Court held that international law permits the coastal state to change the territorial sea baseline through artificial changes in the low-water line, such changes were allowed in the case of the Submerged Lands Act grant. The only additional development in this section is that the low-water line apparently would not be frozen at the date of the decision but would change as the low-water line is modified.[144]

Thus, the result of this second *California* decision is that so long as the United States does not change its position internationally on the baseline for the measurement of the territorial sea, that baseline will be identical to the coast line as used by the Submerged Lands Act. Since the Court assumes that it must defer to the Executive on the determinations of the location of the limits of the territory of the United States, it would have to defer to the Executive on questions relating to the location of the coastline under the Submerged Lands Act.

7. *The Third* Louisiana *Decision* (1969).—It took the State of Louisiana and the United States almost four years to join issue on the questions remaining between them based on the second *California* decision. As in the first *Louisiana* decision, Louisiana argued that the previous *California* decision did not apply to it. The Court rejected this contention and moved on to apply its second *California* decision to the Louisiana coast.[145] The remainder

had been imported." 395 U.S. at 55 (Black, J., concurring). Equating "clear beyond doubt" with "forced and baseless" indicates that the Government's disclaimer will probably be accepted unless it is baseless.

143. 381 U.S. at 175. Article 8 of the Convention states that for the purpose of delimiting the territorial sea, "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." Convention, art. 8.

144. 381 U.S. at 177.

145. United States v. Louisiana, 394 U.S. 11, 34 (1969). It would appear that

stare decisis would limit the claims of all the coastal states to the coastline and the area granted to them by the Submerged Lands Act of 1953. However, the decisions are not res judicata with respect to the coastal states from Maine to Georgia, Washington, Oregon, and Hawaii. This limitation is res judicata for the Gulf States (Florida, Mississippi, Alabama, Louisiana and Texas) because of the submerged lands decisions under discussion. Collateral estoppel would appear to similarly limit the claims of the State of Alaska as a result of the decisions in United States v. Alaska, 236 F. Supp. 388 (1964), and United States v. Alaska, 352 F. Supp. 815 (1972). Although Hawaii has not participated in any of the submerged lands cases to date, there has been one case involving its rights to the adjacent seas that would be stare decisis in a more particular way than the *California* case. That case was Island Airlines, Inc. v. CAB, 352 F.2d 735 (9th Cir. 1965).

The East coast states from Maine to Georgia have challenged the *California* decision in United States v. Maine, 398 U.S. 947 (1970). Initially, the State of Florida was included in this case and in the case of United States v. Louisiana, (Louisiana Boundary Case), 394 U.S. 11 (1969). Due to its unique situation of having coasts on both the Gulf of Mexico and the Atlantic Ocean and having the previous decisions in the *Louisiana* case res judicata as to it, Florida was severed from the *Maine* case. A new case, United States v. Florida, No. 52 Original, was then created. 403 U.S. 949, 950 (1971).

The issues in the *Florida* case revolve around the location of the limits of Florida's rights in the adjacent seas as established by its original constitution, the Congress' act of readmission, recent state boundary descriptions and the Submerged Lands Act of 1953. The Supreme Court failed to act on the United States motion for summary judgment in the consolidated case, and subsequently the *Florida* case was submitted to the same special master who is sitting on the *Maine* case, Albert B. Maris, to hear evidence and submit a report. 403 U.S. at 950. On January 18, 1974, the Special Master issued his final report on the *Florida* case. Report of the Special Master, United States v. Florida, No. 52 Original. In the report the Special Master limited Florida's rights to the seas to three geographical miles from the coastline in the Atlantic Ocean and three marine leagues in the Gulf. *Id.* at 18. Except in the case of a closing line for Florida Bay, his conclusions result in a boundary line that is coincident with that urged by the United States in the litigation. *Id.* at 18-21. It even appears that in the one case of divergence he misconstrued the United States position to be the one he adopted. *Id.* at 39.

There were four areas in the *Florida* case where deference might have arisen: (1) the location of the Florida boundary on readmission to the Union; (2) the existence of historic bays; (3) the existence of straight baselines; and (4) the location of the normal baseline. The Special Master only considered deference in the case of historic bay claims and straight baseline claims although all four issues concerned the location of United States claims in the seas.

In the case of the historic bay claim to an area eastward of a line between the Dry Tortugas and Cape Romano, the Special Master applied the clear beyond doubt test and found Florida's evidence lacking. *Id.* at 36-47. Finally, the Special Master determined that the federal government has the option to adopt straight baselines to define and locate Florida's coastline, and found no such baselines established by the United States. *Id.* at 49.

of the opinion can be analyzed under three conceptual headings: (1) straight baselines; (2) historic bays; and (3) minor interpretations of the Convention on the Territorial Sea and the Contiguous Zone. Within this organization three different levels of deference, ranging from almost complete deference to no deference at all are present. What is not present is the complete deference found in parts of the first and second *California* decisions.

(a) *Straight Baselines.*—In its discussion of the theory of straight baselines the Court reaffirmed its strong deference to the Executive on the matter:

> Since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisana coast, that disclaimer would, under the *California* decision, be conclusive of the matter.
>
> While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.[146]

In a footnote to that statement, however, the Court indicated that this deference was not as complete as one might think. Louisiana argued that the "Chapman Line," the line that had been used to depict the coast line of Louisiana for purposes of the submerged lands litigation and that was used as a basis for the early interim agreement, constituted a system of straight baselines for the coast of Louisiana. In allowing Louisiana to argue the straight baseline claim before a new Special Master the Court said:

> If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. Cf. *United States v. California*, 381 U.S. 139, 168: "[A] contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." We do not intend to preclude Louisiana from arguing before the Special

146. 394 U.S. at 72-73.

> Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.[147]

Thus, the way was opened for a showing that would override the position the United States took in this litigation. However, it was not clear whether the only federal positions that were due deference were those actually made in the course of the Executive's conduct of international relations or whether new positions expressed in court merely for the benefit of the United States in the submerged lands cases also were to be followed.

The Court did have the opportunity to apply its ruling on the straight baselines question in an earlier portion of the opinion that dealt with a navigational line drawn by the Commandant of the Coast Guard.[148] Louisiana had argued and continues to argue that the Commandant's line is the territorial boundary of Louisiana. The Court construed the argument as being founded on both a straight baseline claim and an historic bay claim[149] and ultimately decided that it is not a straight baseline; the interesting aspect, however, is the method by which the Court made the determination. The Court did not merely defer to the position of the United States in the litigation; rather, it devoted a great deal of analysis to the administration of the line and to the extrajudicial statements of the relevant federal officers to determine how the line was treated. From that history the Court determined that the line had not been treated by the United States as a territorial limit.[150] Thus, it was not a system of straight baselines.

147. 394 U.S. at 74 n.97.

148. In drawing this line the Commandant of the Coast Guard was acting pursuant to his authority "to designate and define by suitable bearings or ranges with light houses, light vessels, buoys or coast objects, the lines dividing the high seas from rivers, harbors and inland waters." Act of February 19, 1895, 28 Stat. 672. This authority was originally granted to the Secretary of the Treasury, but was successively transferred to various agencies and finally to the Commandant of the Coast Guard in 1967. 49 C.F.R. § 1.4(a)(2).

149. No reference is made to straight baselines in the discussion, but it is apparent that the concept was at the heart of the court's discussion. Since Louisiana's claim was obviously based, in part, on such a claim, the treatment of the question without the application of the almost complete deference approach theoretically applicable to straight baselines indicates a further erosion of deference in such instances.

150. 394 U.S. at 22.

Therefore, this most recent consideration of the straight baseline question indicates that the deference doctrine is applicable but that the Court will make its own independent judgment to determine whether the disclaimer conforms with the actual position of the United States in its foreign relations. In the hearings before the Special Master appointed after the decision under discussion, Louisiana continues to make straight baseline claims, based primarily on the Commandant's line and the Chapman line.[151] Regardless of the apparent disposition of the question in this opinion, it is clear that the Supreme Court will have to face these questions again.

(b) *Historic Bays.*—Louisiana, following the example of California, fell back on a historic bay claim to support its claim over many areas on its coast. The Supreme Court clearly indicated that the "clear beyond doubt" formulation was still viable and applicable to the coast of Louisiana.[152] However, the Court did add a number of qualifications to the ruling.

First, as in its ruling on straight baselines, the Court warned the Government about trying to rewrite history. The Court construed the United States argument to be "that it can prevent judicial recognition of a ripened claim to historic title merely by lodging a disclaimer with the court."[153] The Court cut this argument short by pointing out that the clear beyond doubt rule is not as complete as that provided for in the case of straight baselines.[154]

Secondly, the Court also freed itself from an executive determination concerning which facts were relevant to the creation of a historic bay claim. One of the major issues was the relevance of state exercises of authority over disputed waters to support proof of a historic bay. The United States argued that it must affirmatively adopt the state action as its own before the state action can be considered by the Court. The Court disagreed and held that the state action would stand as actions of the nation to be considered in determining whether the claims and exercises of jurisdiction combined with foreign activities are sufficient to establish a historic inland water bay.

151. The author represented the United States before the Special Master on matters referred to the Master by the instant opinion. The order of reference is found at 403 U.S. 950 (1971).

152. 394 U.S. at 77.

153. 394 U.S. at 76.

154. 394 U.S. at 77.

> [It] would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case.[155]

Thirdly, unlike the straight baseline question, the international law standards for the establishment of a historic bay are not found in any convention. The Convention on the Territorial Sea and the Contiguous Zone merely refers to customary international law.[156] In recognition of the imprecise nature of the doctrine, the Court in the *California* case had referred the matter to the Special Master.[157] In this third *Louisiana* decision, the Court had occasion to consider the question further. In that discussion, there is no mention of deference to the Executive on the question of what the international standards are or how they are applied by the United States. The implication is that the Court will function independently on such a question of customary international law in the submerged lands cases.

Thus, in discussing the question whether the line drawn by the Commandant of the Coast Guard established historic waters landward of the line, the Court looked to two recent United Nations studies[158] to identify the standards required for proving historic waters. It then reviewed the facts relating to the administration of the line to determine whether it met those standards.

The standard the Court established was that which is required to establish historic inland waters. This standard requires at a minimum that there be proof that the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations."[159] This maintenance of dominion must include the prohibition of innocent passage in order to elevate the claim

155. 394 U.S. at 77-78.

156. Convention, art. 7, ¶ 6.

157. 394 U.S. at 75; 381 U.S. at 143 n.3.

158. *See* note 219 *infra*.

159. 394 U.S. at 23. The Court quoted from United States v. California, 381 U.S. 139, 172 (1965).

from one over a historic territorial sea to that of historic inland waters.[160] It will be remembered that it is the limit of inland waters that is relevant to the location of the Submerged Lands Act grant.

In its review of the Commandant's line the Court found that the only exercise of authority was that of reasonable regulation of navigation, which it found "not alone a sufficient exercise of dominion to constitute a claim to historic inland waters."[161] Furthermore, it found numerous extrajudicial disclaimers by federal officials indicating that the line had no other significance than for use in navigation.[162] Thus, the court concluded: "But even if a nation could base a claim to historic inland waters on its continuous regulation of navigation, it is clear that no historic title can accrue when the coastal nation disclaims any territorial reach by such an exercise of jurisdiction."[163] Finally, it referred to the clear beyond doubt rule articulated in the *California* decision and found this claim wanting.[164]

If any conclusion concerning the historic bay question can be reached from this case, it is that the Court has become suspicious of the United States in the litigation and will closely scrutinize any disclaimer to determine whether it is consistent with the way the United States has treated the waters historically. The degree of deference continues to appear to be academic, since the Supreme Court has never found a bay to be historic inland waters in the face of a disclaimer.

(c) *Minor interpretations of the Convention on the Territorial Sea and the Contiguous Zone.*—In part II of this third *Louisiana* decision the Court turned to the task of interpreting the Convention on the Territorial Sea and the Contiguous Zone for application to the Louisiana coast. In addition to the matters discussed above, the six remaining issues were: (1) dredged channels; (2) the territorial sea of low-tide elevations; (3) the semi-circle test; (4) islands at the mouth of a bay; (5) islands as headlands of bays; and (6) fringes of islands. All these questions could be resolved by a legal analysis of the Convention and its preparatory papers.[165] Although

160. 394 U.S. at 24 & n.28.
161. 394 U.S. at 24.
162. 394 U.S. at 29.
163. 394 U.S. at 26-27.
164. 394 U.S. at 28-29.
165. Those papers are found in the *Yearbook of the International Law Com-*

the resolution of these questions would have the same impact of determining this nation's territorial claims vis-à-vis other nations as straight baselines, the Court interpreted the Convention without any mention of deference to the Executive. In fact, for the first time in this series of cases the Court admittedly ruled against the United States on a question that might affect the location of the territorial sea.

(1) *dredge channels.*—Louisiana argued that submerged dredged channels should be used as part of the baseline on the ground that they are harbor works, which under article 8 of the Convention are part of the coast.[166] The United States argued that they could not be used and prevailed in this dispute.[167]

(2) *the territorial sea of low-tide elevations.*—The United States argued that low-tide elevations within three miles of a bay closing line and more than three miles from a mean low-water line of the mainland or an island could not be used to extend the territorial sea.[168] The Court found the limits of bays to be assimilated into the mainland and determined contrary to the United States position that such an elevation would extend the territorial sea.[169]

(3) *the semi-circle test.*—The issue here revolved around the treatment of small bays found along the shore of a larger bay. The Court decided contrary to the United States position and permitted an expansive use of these bays to increase the water area of the larger bay for determining whether a closing line

mission for the years 1950 through 1958. [1950-58] Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/Ser.A (1950-58). The records of the 1958 Geneva Conference on the Law of the Sea are found in the Official Records, U.N. Doc. A/CONF. 13/37-43.

166. *See* note 143 *supra.*

167. 394 U.S. at 38.

168. Article 11 of the Convention provides: "1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own." Convention, art. 11.

169. 394 U.S. at 47.

could be drawn at its mouth.[170] In addition, a number of subsidiary issues relating to the closing of such subsidiary bays and the use of beach erosion jetties were decided against the United States in footnote 64.[171]

(4) *islands at the mouth of a bay.*—This issue involved the question of the location of the closing line of a bay where islands are located in the mouth of the bay. Louisiana had argued that the closing line from which the three-mile grant is to be measured should be lines connecting the seaward extension of the islands. The United States argued that the lines should connect the geographical natural entrance points of the bay in each of the passes between the islands in question. The Court held in favor of the United States and referred the question of particular delimitation to the Special Master.[172]

(5) *islands as headlands of bays.*—This issue involved the use of islands rather than the mainland as the headland of a bay for drawing the closing line marking the limit of inland waters. The Court determined that such islands may be used if they are virtually part of the mainland. The factors for determining this question were presented but the decision here is inconclusive.[173]

(6) *fringes of islands.*—Louisiana argued that fringes of islands would enclose inland waters. The Court found that such fringes did not fit the Convention's definition of bays and determined that they could form inland waters only if the coastal nation adopted a system of straight baselines.[174] Since the straight baseline question is still unresolved, the United States won a partial victory here.

The net result of the third *Louisiana* decision seems to be an erosion of the deference doctrine as applied to the submerged lands cases. There is no doubt, however, that it is still present. Subsequent to issuing this opinion, the Court referred the unresolved *Louisiana* matters to a Special Master, Memphis attorney Walter

170. The semi-circle test is discussed at note 123 *supra.*
171. 394 U.S. at 48 n.64.
172. 394 U.S. at 60.
173. 394 U.S. at 60-66.
174. 394 U.S. at 71.

P. Armstrong, Jr.[175] He has held extensive evidentiary hearings and received post-trial briefs of the parties. Whatever his decision, it is expected that the parties will take exception to it in the Supreme Court.

8. *The Cook Inlet Case* (1972).—Only two submerged lands cases have not been brought as original actions in the Supreme Court. Both of these were brought in the federal District Court for the District of Alaska by the United States against the State of Alaska. The first case to be decided involved the status of Yakutat Bay on the coast of Alaska. It resulted in a 1964 decision by the district court holding that the limit of inland waters was a ten-mile closing line inside the bay.[176] This decision was reversed on the authority of the second *California* decision, which established a twenty-four mile closing line, which closed the entire bay.[177]

The other case was filed a year before the Yakutat Bay case but, because of its complexity, took ten years to reach a district court decision.[178] The case focused on the question whether Cook Inlet was a historic inland water bay with the result that all the seabed resources of Cook Inlet and an area three miles seaward of its closing line were subject to Alaska's jurisdiction. Although the court's decision is being appealed, this case is worth discussing for two reasons. First, it is the only submerged lands decision dealing with substantive matters subsequent to the third *Louisiana* decision. Secondly, the court found Cook Inlet to be a historic inland water bay in spite of a disclaimer by the United States.

As in the third *Louisiana* decision, the court's handling of the relationship of the court to the Executive's foreign relations power will be discussed first and then its treatment of the specific issue at hand, Cook Inlet. The court acknowledged the obligation placed on it by the Supreme Court that, in the face of a disclaimer by the United States, it must find the evidence to establish a historic bay clear beyond doubt to decide contrary to the disclaimer.[179] It is clear, however, that the court neither followed this injunction nor understood it. As demonstrated above, the sole basis for the lever-

175. United States v. Louisiana, 395 U.S. 901 (1969).

176. United States v. Alaska, 236 F. Supp. 388 (D. Alas. 1964).

177. United States v. Alaska, 353 F.2d 210 (9th Cir. 1965).

178. United States v. Alaska, 352 F. Supp. 815 (D. Alas. 1972). The author conducted the pretrial discovery and trial stages of this case for the United States.

179. 352 F. Supp. at 818.

age given the United States is that the determinations in the submerged lands cases, in effect, might determine the extent of United States territory vis-à-vis other nations. Thus, a decision adverse to the United States could have an impact on the conduct of foreign relations by the Executive. The court ignores this fact by making the circular argument that its finding that Cook Inlet is historic inland waters means that the United States has always claimed it as such; thus, the decision is not contrary to the United States foreign relations position.

> The United States has advanced the argument that a decision by this Court upholding historic title substantially would interfere with the conduct of foreign relations by the Executive branch of government. Under the facts and circumstances of this case, the Court sees no merit in that contention. . . . As the evidence clearly establishes, the United States has long considered all of Cook Inlet to be historic inland waters.[180]

What the court is saying is that it is to act as the determiner of the United States foreign relations position. If the United States postion as found by the court is contrary to the United States stated position in the litigation, there is no embarrassment to the United States internationally. This would be because the court's decision would be consistent with the United States actual foreign relations position. Carrying the court's reasoning to its logical end, deference would not be approprate in any of the subject areas previously discussed in this paper. For example, if a question before the court was one of sovereign immunity, no deference would be required because the court would have access to the facts establishing ownership and use of the property in question and could make its own determination of whether sovereign immunity is applicable. However, the present practice is to defer to executive statements of sovereign immunity without requiring proof of ownership or use. The reason apparently is that the interests of foreign relations require that the court follow present government positions regardless of what the actual facts are or might be. Similarly, this need to follow executive positions in the historic bay area is based on a need to allow the Executive to alter the United States position as necessary. Because of the unique position of the Executive in the submerged lands cases, its prerogatives have been lim-

180. 352 F. Supp. at 821.

ited to the extent that no radical change in position and history can be effected for the purpose of the litigation. This unique position results from the fact that the United States appears to protect not only the foreign relations role in which it represents the entire United States but also a material interest in the property in dispute. Nevertheless, when there is the possibility of some dispute over the historic bay status of an area the court has given the Executive the power to tip the balance in deference to the foreign relations power. Accordingly, the court may not sit as a neutral arbiter of the legal conclusions to be reached from the historic facts.

Although the Supreme Court has interpreted the clear beyond doubt test to mean that a court may find against the United States on a historic bay question only if the United States dislaimer is baseless,[181] the district court did not apply the test in that way. Rather the district court appeared to apply the test to the facts in dispute and not to the ultimate legal conclusions on the status of the Inlet. The trial court's handling of the facts in this case demonstrates that this view is the proper one. The court began the discussion of the facts by discounting the United States disclaimers:

> Considering the circumstances under which they were prepared, the Court assigns a low reliability factor to the disclaimers. The first disclaimer was a letter from the Legal Advisor to the Secretary of State.[182] The Court finds the evidence to show the disclaimer to have been hastily prepared and based on questionable research. The second disclaimer was prepared two years after the commencement of this action, and was vulnerable to self-serving interests.[183]

This discussion indicates that the court did not view the disclaimers as an exercise of the independent power of the Executive over foreign relations. The court's error is especially glaring if one compares the disclaimers in the Cook Inlet case with those in the second *California* case. In the *California* case, there were no letters from the State Department; the so-called disclaimers were the

181. *See* Note 142 *supra* and accompanying text.

182. Since there was no such letter in evidence the Court probably intended to refer to a letter to the Solicitor of the Department of the Interior dated May 3, 1962, from the Legal Adviser, "for the Acting Secretary of State." Letter from Abram Chayes, Legal Adviser, Dep't of State to Frank J. Barry, Solicitor of the Dep't of the Interior, May 3, 1962 (Plaintiff's Exhibit No. 58).

183. 352 F. Supp. at 819.

briefs of the United States Department of Justice advocating the federal government's position that the bays in question were not historic. In the Cook Inlet case, on the other hand, there was one letter, which preceded the filing of the lawsuit,[184] from the Acting Legal Adviser to the Solicitor of the Department of the Interior, another from the Legal Adviser to the Department of Justice[185] and a third from the Secretary of State to the Attorney General.[186] It was noted that in the handling of the Commandant's line in the third *Louisiana* case the Court found extrajudicial disclaimers in the form of statements of Coast Guard personnel.[187] Similar statements were even present in the case of Cook Inlet, for in 1952 the question arose of United States jurisdiction over Canadian vessels fishing in lower Cook Inlet more than three miles from shore. The evidence in the case indicates that the United States Fish and Wildlife Service decided that the Canadian vessels were fishing in waters outside of United States jurisdiction and that they were to be left alone. This decision was followed by a series of letters and memoranda discussing the question whether Cook Inlet was territory of the United States in which it was concluded that it was not.[188] Accordingly, the court took the narrowest conceivable view of the role of disclaimers.

In determining what facts are necessary to prove historic inland waters under international law, the court followed the Supreme Court's lead and adopted the conclusion made by a United Nations study.[189] The facts required to be shown according to international law are:

> (1) the exercise of authority over the area by the state claiming the historic right;

184. *See* note 182 *supra.*

185. Letter from Leonard C. Meeker, Legal Adviser, Dep't of State to Shiro Kashiwa, Ass't Att'y General, Dep't of Justice, Land and Mineral Resources Div., July 3, 1969 (Plaintiff's Exhibit No. 69).

186. Letter from William P. Rogers, Sec'y of State to John N. Mitchell, Att'y General, Dep't of Justice, April 14, 1970 (Plaintiff's Exhibit No. 93).

187. 394 U.S. at 29. *See also* note 162 *supra* and accompanying text.

188. Memorandum from Albert M. Day, Director, Fish and Wildlife Service, to Regional Director, Fish and Wildlife Service, Juneau, Alaska, April 28, 1953, *reprinted in* Trial Brief for Plaintiff, Exhibit No. 77.

189. *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. INT'L L. COMM'N 1, 13, U.N. Doc. A/CN.4/143 (1962) (cited with approval in United States v. Louisiana, 394 U.S. 11, 23 n.27 (1969)) [hereinafter cited as *Juridical Regime*].

(2) the continuity of this exercise of authority; and
(3) the attitude of foreign states.

The district court accepted the Supreme Court's clarification of the last requirement as demanding a showing of foreign acquiescence to the historic title.[190] Actually, the facts found in this case do not support a conclusion that it is a historic inland water bay under international law, much less under the clear beyond doubt test.

Although there were some minor facts in dispute, the facts found as indicated by the memorandum opinion and uncontroverted at trial were the following:

(1) United States authorities had sought to enforce fisheries regulations against American citizens in lower Cook Inlet more than three miles from shore and dicta in one 1892 federal district court opinion, *The Kodiac*,[190.1] involving one such enforcement action stated that Cook Inlet is Alaskan waters;
(2) the Alien Fishing Act of 1906[191] forbad aliens from fishing in the "waters of Alaska";
(3) United States fishery agents charged with enforcing the 1906 Act did not recall ever seeing a foreign fishing vessel in Cook Inlet and if they had they would have taken affirmative action;
(4) the executive order of 1922 establishing the Southwestern Alaska Fisheries Reservation included all the territorial waters included in Cook Inlet for fishery regulation;
(5) regulations adopted pursuant to the executive order described all the waters of Cook Inlet as part of a fishery regulation district;[192] lower Cook Inlet was patrolled pursuant to those regulations;
(6) the White Act of 1924[193] established authority for fishery regulation of the territorial waters of Alaska;
(7) regulations established under the White Act described all the waters of lower Cook Inlet as part of a fishery regulation district;

190. 352 F. Supp. 815, 821 (1972) (citing to United States v. California, 381 U.S. 139, 172 (1965)).
190.1. United States v. The Kodiac, 53 F. 126 (D.C.D. Alas. 1892).
191. Alien Fishing Act, ch. 3299, 34 Stat. 263 (1906).
192. *See* DEP'T OF COMMERCE CIR. No. 251, at 8 (9th ed. Jan. 9, 1923).
193. White Act, ch. 272, 43 Stat. 464 (1924).

(8) lower Cook Inlet was regularly patrolled pursuant to those regulations;
(9) there were twenty occasions on which Canadian fishing vessels fished for halibut in lower Cook Inlet during the period of 1946 to 1972 without interference by United States authorities;
(10) in 1952 one Canadian halibut vessel was found by United States fishery agents to be fishing in lower Cook Inlet and the regional officer determined that the vessel was on the high seas and had a right to continue fishing. No enforcement action was taken against that vessel;
(11) one Japanese vessel, the *Banshu Maru,* entered Cook Inlet in 1962 in search of herring. The *Banshu Maru* was seized in Shelikof Strait, outside of Cook Inlet, by Alaskan authorities for violating Alaska's territorial sea in Shelikof Strait. The captain of the ship signed a statement agreeing not to fish again in Shelikof Strait or Cook Inlet and was released. The Japanese Government delivered a diplomatic protest of the action to the United States claiming a right to use the high seas in Cook Inlet. Ultimately, the prosecution was dropped;
(12) subsequent to statehood, Alaska continued to patrol lower Cook Inlet.

A marshalling of the undisputed facts along the lines of the three factors necessary to prove a historic bay shows that the court could not have applied the clear beyond doubt test to the totality of the facts but rather only to the facts in dispute.

(a) *Exercise of Authority over the Area by the State Claiming the Historic Right.*—The court found the claims of the exercise of authority in the language of the laws, regulations and orders listed above. Neither those laws nor the orders specifically refer to Cook Inlet but rather to "the waters of Alaska." The regulations do include the area in fishery zones and might arguably be used to support a claim of jurisdiction. They fail, however, to support any claim to inland water jurisdiction as is required. As the Supreme Court pointed out when discussing the Commandant's line claimed by Louisiana, the authority claimed must be of inland water status.[194] Since fishery regulation is permitted both in the

194. United States v. Louisiana, 394 U.S. 11, 23-26 (1969).

inland waters and the territorial sea the claim of fishery jurisdiction could at most support a territorial water claim.[195] Furthermore, if the court sought to use fishery patrols to support a historic inland water claim and exercise of jurisdiction, it would fail for the same reasons. Similarly, fishery enforcement activities against United States subjects would not establish territorial rights against foreign nations since both domestic and international law recognize the power of the sovereign to subject its citizens to its laws even in areas outside the nation's territorial jurisdiction.[195.1] Furthermore, court dicta, as in *The Kodiac*, is not an exercise of authority.

(b) *Continuity of This Exercise of Authority.*—As the court indicated, there is no doubt that from 1906 to the present the United States and its successor, the State of Alaska, have claimed the right to exclude aliens from fishing in the territorial waters of Alaska pursuant to a series of statutes and one proclamation. The court also found that from 1906 fishery agents intended to seize foreign vessels found fishing anywhere in Cook Inlet. Furthermore, fishery regulations from 1923 to the present purported to include all of Cook Inlet in domestic fishery regulations.

Even if it is assumed that this evidence standing alone would support a proof of continuity of authority, the fact is that the continuity was broken a number of times. Each time one of the twenty Canadian fishing vessels fished in lower Cook Inlet this continuity was broken. The entry of the *Banshu Maru* would also serve this purpose. The United Nations study addresses the question concerning how many unprosecuted incursions would destroy the continuity. It indicates that the answer is unclear but that one minor incident would not.[196] Twenty such incidents, however, should be enough, and if it is not clearly so, the question would surely be at least arguable. If it is arguable, the proof of historic inland water bay status that is clear beyond doubt is absent.

Furthermore, the United Nations study indicates that the continuity requires a period of time.[197] The court never addressed this question to determine whether the duration of the exercise of authority was sufficient. Some authorities indicate that the time

195. 2 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 378 (1964).

195.1. Skiriotes v. Florida, 313 U.S. 69 (1941).

196. *Juridical Regime, supra* note 189, at 17-18.

197. *Id.* at 15; *see* Post-Trial Brief for Plaintiff at 46-47.

must be through time immemorial; thus, the claim and exercise must have existed as long as there have been records of the area.[198] Surely this was not found.

(c) *The Attitude of Foreign States.*—As indicated above, the court used the requirement that there be a showing of acquiescence by foreign nations. Its conclusion was that the evidence of only twenty Canadian ships and one Japanese ship conducting fishing activities in Cook Inlet was not sufficient to offset its conclusion that foreign nations acquiesed in the claim. This reasoning apparently placed the burden of proof on the United States to show objections of nations rather than on the State of Alaska to prove actual acquiescence by other nations. Even this burden was sustained by the United States through proof that the Government of Japan had claimed a right to use the high seas in Cook Inlet for fishery purposes through its delivery of a diplomatic protest to the United States in spite of Alaskan actions against the *Banshu Maru.*[199] It is almost as difficult to find Canadian acquiescence. Twenty of its ships fished in Cook Inlet over a 30-year period. It must be found that the Canadian Government knew of these activities since the proof of them came from a joint Canadian-United States Government Commission established to oversee halibut fishing of both countries.[200] Furthermore, the word acquiescence would appear to require that foreign nations were put on notice of the claim so that they had an opportunity to react to the claim. No finding of such notice was indicated, much less a reaction.

In light of these conclusions it appears that Cook Inlet is not a historic inland water bay either under the standard of proof required by general international law or under the requirement of proof clear beyond doubt as set out by the Supreme Court in the submerged lands cases. Accordingly, little reliance should be placed on this case in developing the law for the submerged lands cases and it can be expected that the United States will ultimately prevail in this Cook Inlet case. The case does stand, however, to

198. *See* Johnson, *Acquisitive Prescription in International Law,* 27 BRIT. Y.B. INT'L L. 332, 339 (1950).

199. The text of the protest, which was dated May 3, 1962, was in evidence as United States Exhibit No. 57.

200. This was proved through the deposition of an official of the Pacific Halibut Commission and the introduction of records of the Canadian Halibut vessels in question. Appellate Brief for the United States at 34-37.

emphasize the conclusion reached in the discussion of the third *Louisiana* case that the influence of the Executive over decisions in these submerged lands cases has significantly diminished since the first and second *California* cases.[201]

B. *An Evaluation of the Deference Doctrine in the Submerged Lands Cases*

As the previous section demonstrated, the deference doctrine is used in varying degrees in the submerged lands cases. There was little discussion in those cases of the reasons for its use at all. Aside from citations to the *Jones* and *Cooper* cases,[202] reliance was placed primarily on an overzealous listing of the impact of changes in the control over the territorial sea vis-à-vis other countries.[203] Since the Submerged Lands Act, in essence, determined that these factors were not as significant as indicated in the first *California* opinion even Justice Black abandoned the position he advocated in that decision and indicated in a dissent to the third *Louisiana* decision that the dispute involves "no part of international affairs subject to international law, but is exclusively a domestic controversy between the State and [the Union]."[204]

Although the deference cases in other fields each have their indi-

201. The Special Master's report in the *Florida* case is more consistent with the view urged in this article. Report of the Special Master, United States v. Florida, No. 52 Original, at 36-47; *see* note 145 *supra*. His statement of the international law requirements for an historic bay was: "From these opinions of the Court and the authorities upon which they rely, I conclude that the criteria for establishing the existence of an historic bay or historic inland waters are three. First, there must be an open, notorious and effective exercise of sovereign authority over the area not merely with respect to local citizens but as against foreign nationals as well; second, this authority must have been exercised for a considerable period of time; and, third, foreign states must have acquiesced in the exercise of this authority as against their nationals." *Id.* at 41. In contrast to the court in the *Alaska* case, the Special Master felt free to rely on disclaimers of the United States made in the course of the litigation and on a set of maps depicting the United States territorial sea that were recently prepared by the United States. *Id.* at 42. The portions of the set of maps applicable to Cook Inlet also were offered as disclaimers in the *Alaska* case, Post-Trial Brief for Appellant at 31 (United States Exhibit No. 119).

202. *E.g.*, United States v. California, 332 U.S. 19, 34 (1947).

203. *E.g.*, 332 U.S. at 34-37.

204. United States v. Louisiana, 394 U.S. 11, 81 (1969).

vidual characteristics, there are certain common factors to be considered.[205]

1. *Strong Indicators.* (a) *The Constitution.*—It is clear that there is no constitutional allocation to the Executive to decide issues relating to the extent of the submerged lands held by the states. Nor is there a constitutional allocation of authority to the Executive to determine the extent of the territory of the United States. If any allocation exists, it is to the Congress through its law-making power or the states pursuant to article IV, section 3: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."[206]

(b) *Property or Territorial Rights of Foreign Nations.*—Since the property or territory of no individual nation is the subject of the litigation, it is difficult to conceive of a judgment that would affect such rights. The community of nations, however, and thus each nation, claims rights in the high seas. To the extent that an order in the submerged lands cases would diminish or expand United States claims in the oceans, other nations' rights would be conversely diminished. It is not necessary for any particular nation to claim high seas rights to any particular area in dispute to support an argument for deference; the existence of such a claim, however, would make the argument stronger.

Nevertheless, the question whether the submerged lands decisions actually determine the extent of United States claims in the oceans is an open question. This matter must be addressed in order to dispose of this factor as well as a number of others. The argument that these cases determine the extent of United States claims in the ocean proceeds from the Court's delimitation of the "coast line" for the purposes of the Submerged Lands Act since that line also determines the "baseline" as defined in the Convention on the Territorial Sea and the Contiguous Zone. By defining this line the Court consequently determines the location of the United States

205. *See* Pt. I (C) *supra.*

206. U.S. CONST. art. IV, § 3. The sentence preceding this quotation, which forbids the Congress from creating a new state out of the territory of an existing state without the consent of the legislature of the affected state, indicates that the power may not even lie in the Congress.

territorial sea since the United States uses the Convention's baseline.

The specific orders of the Court in these cases, however, are limited to defining the rights granted by the Congress to the states.[207] A reading of the Submerged Lands Act demonstrates that it is a quitclaim of any rights the United States has in the resources of the seabed and waters of the area in question. All questions of international relations that do not involve resource-related rights are specifically reserved to the federal government. Furthermore, most of the resources in question are clearly within United States jurisdiction since the United States as a nation has the exclusive right to the resources of the continental shelf. Even using the narrowest limit of the continental shelf, the 200-meter depth criterion, the limit averages 50 miles from shore.[208] The resources of the waters within twelve miles of shore are also largely held by the United States pursuant to its exclusive fishery zone and claim to territorial sea.[209] Except in the case of extravagant claims of long straight baselines and large historic bays, it is inconceivable that the normal three-and nine-mile grants of the Submerged Lands Act would affect areas seaward of the continental shelf that could be the subject of international interests. An additional fact assures that the Court orders will not prejudice international rights; all the Court decisions are phrased strictly in terms of a quitclaim of rights rather than absolute rights of the state vis-à-vis the rest of the world. Accordingly, these judgments do not explicitly determine the rights of the community of nations.

Although it is clear that the location of the territorial sea of the United States is not determined in the submerged lands litigation, it is another question whether that determination is binding on the United States either in other litigation related directly to the loca-

207. The most recent decree is a partial decree in United States v. Louisiana (Louisiana Boundary Case), 404 U.S. 388 (1971). Others are United States v. Louisiana (Texas Boundary Case), 394 U.S. 836 (1969), United States v. California, 382 U.S. 448 (1966), United States v. Louisiana, 382 U.S. 288 (1965), United States v. Louisiana, 364 U.S. 502 (1960), United States v. Texas, 340 U.S. 900 (1950), United States v. Louisiana, 340 U.S. 899 (1950) and United States v. California, 332 U.S. 804 (1947). *See* note 113 *supra*.

208. SPECIAL SEN. SUBCOMM. ON THE OUTER CONTINENTAL SHELF, 91ST CONG. 2D SESS., REPORT ON THE OUTER CONTINENTAL SHELF TO THE COMM. ON INTERIOR AND INSULAR AFFAIRS 13 (Comm. Print 1970).

209. 16 U.S.C. §§ 1091-94 (1970).

tion of the territorial sea or in the foreign relations activities of the United States. The first question obviously involves the affirmative use of collateral estoppel. In light of the demise of mutuality of estoppel through *Bernhard v. Bank of America National Trust & Savings Association*[210] and its progenitors[211] a serious argument can be made that, since the location of the baseline was fully litigated in a series of the most important cases, the decisions would be found to be collateral estoppel against the United States in any subsequent litigation.

As to the second question whether the submerged lands decisions would bind the United States in its international affairs, the question is more practical than legal. First, it would be extremely difficult for the United States to take a position that is contrary to a Supreme Court decision when negotiating with a foreign country. To say the least, a contrary position taken by the United States in such negotiations would be weakened by the Supreme Court opinion. There is no doubt that foreign countries do monitor the cases that relate to foreign relations.[212] Secondly, the executive departments have an obligation to follow the law. Thus, an interpretation of a treaty made by the courts would appear to be strong evidence of what the law is, at least domestically. If so, it would be difficult to justify a different interpretation by the State Department in its conduct of foreign relations.

Accordingly, a moderately strong argument can be made that the submerged lands decisions ultimately do affect the property and territorial rights claimed by foreign nations in the high seas.

(c) *The Judgment Will Run to a Foreign Country.*—Since no foreign country is a party to this litigation there is no possibility of a judgment ordering a foreign nation to do or not do something. As a matter of precedent, however, the submerged lands decisions could determine the propriety of United States prosecutions of aliens for violation of United States territorial jurisdiction.[213]

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210. 19 Cal.2d 807, 122 P.2d 892 (1942).

211. *E.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

212. *See* Minquiers & Erehos Case, [1953] I.C.J. 47. In that case Great Britain's legal position was put in question by the submission of a British Court opinion in opposition to the British position in that case.

213. This would include: (1) the prohibition against alien fishing in the United States territorial sea (16 U.S.C. §§ 1081-86 (1970)), (2) the same prohibition applying to the exclusive fishery zone (16 U.S.C. §§ 1091-94 (1970)), (3) oil pollu-

(d) *Judgment Will Require the United States to Act Vis-à-vis Foreign Nations.*—No order in these cases will actually order the United States to act vis-à-vis another nation or the community of nations.[214] The same indirect effects which relate to rights of foreign nations and which are described above are present here. The United States territorial claims may be determined in fact if not in law. In addition, the effect of United States protests relating to territorial claims of foreign nations will be similarly affected, especially in light of United States protests relating to foreign claims of historic bays and straight baselines.[215] A domestic court decision stating the law to be contrary to the United States position internationally would diminish the strength of these protests.

(e) *Statutory Authorization for the Executive's Position.*—No congressional authorization for executive determinations of the United States territorial extent or the states' rights under the Submerged Lands Act is present, even in the case of straight baselines. The Convention on the Territorial Sea and the Contiguous Zone makes the establishment of a system of straight baselines optional

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tion (33 U.S.C. § 1161 (1970)) and (4) customs (19 U.S.C. § 1701 (1970)), among others.

214. *See* note 207 *supra.*

215. For the United States protest concerning the Soviet Union's claim to Peter the Great Bay as a historic bay see 37 DEP'T STATE BULL. 588 (1957); 38 DEP'T STATE BULL. 461 (1958). The United States has also disputed Canada's historic bay claim to Hudson Bay. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 236-37 (1965). The majority of United States protests concern the breadth of the territorial sea and fisheries zones. Indicative of the United States protests are the following: Brazil (200-mile territorial sea); Canada (12-mile territorial sea and 100-mile pollution control zone); Ghana (30-mile territorial sea); Haiti (12-mile territorial sea, 15-mile fisheries zone, and straight baselines); Mauritania (30-mile territorial sea); Nigeria (30-mile territorial sea); Senegal (12-mile territorial sea and 110-mile fisheries zone); and Sierra Leone (200-mile territorial sea). The United States has also filed protests with Indonesia and the Philippines contesting the drawing of baselines around archipelagos. Letter from the Office of the Assistant Legal Adviser for Ocean Affairs to the author, Dec. 6, 1973. The United States contends that under article 4 of the Territorial Sea Convention straight baselines may be drawn only to join islands in a coastline archipelago, not those in a mid-ocean archipelago. Additional protests include: Mexico (12-mile territorial sea and straight baselines in Gulf of Mexico); Morocco (12-mile territorial sea and 70-mile fisheries zone); Argentina (200-mile territorial sea); Uruguay (200-mile territorial sea); and Ecuador (200-mile territorial sea). Letter from Director, Office of the Geographer, Dep't of State to the author, Jan. 9, 1974.

with the coastal state.[216] The Supreme Court has held it would defer to an executive denial in that situation but did not decide that it is the Executive that has the power to establish a system of straight baselines. Rather, it stated that the decision is left to the "federal government." This appears to be a reference to the Congress as well as the Executive for the Court usually used the term "United States" when generally referring to the positions of the Executive put forward in the litigation:

> In *United States v. California,* 381 U.S. 139, 168 we held that "the choice under the Convention to use the straight baseline method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." Since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisiana coast, that disclaimer would, under the California decision, be conclusive of the matter.[217]

Although this language is not completely clear, it is implied that the power to implement a system of straight baselines does not rest with the Executive alone.

In conclusion, it is apparent that arguments can be made that these indicators favor deference. These arguments, however, require expansive inferences, and are not as clear as in other areas in which the deference doctrine has been applied. The more reasonable view would hold that the strong indicators support the conclusion that deference is not appropriate.

2. *Other Indicators.* (a) *Availability of Legal Standards.*— Submerged lands questions that hinge on an interpretation or implementation of the Convention on the Territorial Sea and the Contiguous Zone present sources for legal analysis that are as good as or better than those found for domestic statutes. In addition to the text of the Convention, there are extensive preparatory materials and legal opinions.[218] Since the Convention covers every question but historic bays, a discussion of historic bays is required.

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216. "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points *may* be employed in drawing the baseline from which the breadth of the territorial sea is measured." Convention, art. 4, ¶ 1 (emphasis added).

217. United States v. Louisiana, 394 U.S. 11, 72 (1969) (footnotes omitted).

218. *See* note 165 *supra.*

Unlike most areas of international law, the historic bay question has been the subject of two extensive United Nations studies.[219] These studies have included summaries of the facts of many historic bay situations as well as collections of legal opinions on the matter and discussions of the law. Furthermore, many writers have made their own contribution to the subject.[220] Accordingly, materials are readily available for a court to reach its own conclusion on the law governing historic bays. On the other hand, there are significant differences among the writers and nations that have expressed their opinion on the elements required to establish a historic inland water bay. The United States Supreme Court has determined that three elements must be proved: (1) exercise of authority over the area claimed by the state claiming the historic right; (2) continuity of the exercise of authority; and (3) the acquiescence of foreign states.[221] These elements, however, leave many questions unresolved, as seen above in the discussion of the Cook Inlet case.[222]

Although the dispute relating to the law of historic bays has not reached the crisis stage of the expropriation question discussed in

219. *Juridical Regime, supra* note 189; Memorandum by the Secretariat of the United Nations, *Historic Bays*, U.N. Doc. A/CONF. 13.1 (1964).

220. *E.g.*, L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 4-5 (1964); P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962); I A. SHALOWITZ, SHORE AND SEA BOUNDARIES 22-24 (1962); M. STROHL, THE INTERNATIONAL LAW OF BAYS 3-4 (1963).

221. *See* note 190 *supra* and accompanying text.

222. Some open questions are: (1) *exercise:* (a) Does this require more than legislation or rule making?; (b) What authority must be claimed?; (c) How does a nation exercise authority if no nation tests its authority?; (d) What must be done if a nation's claim is violated?; and (e) Is exercise of jurisdiction over nationals sufficient?; (2) *continuity:* (a) How many failures to exercise authority and with what frequency destroy the continuity?; (b) How long must the claim be in effect before it has ripened?; (c) What must be done to maintain the continuity if the claim is never tested?; (d) Do diplomatic protests break the continuity?; and if so is there a minimum number?; and (e) Is the continuity broken if an alien is subjected to authority without the consent of his government?; (3) *foreign states:* (a) Do they have to affirmatively consent?; (b) Do they have to have notice and not complain?; (c) Do they have to have constructive notice and not complain?; (d) Is lack of knowledge or constructive notice combined with no foreign reaction sufficient?; (e) Does the action of an alien vessel represent the position of the alien government? Most of these problems are pointed out in the two United Nations studies, *supra* note 219.

the context of the act of state doctrine,[223] there are some extremely diverse positions found in the community of nations. As a result, a court would be justified in finding that the law of historic bays is sufficiently unclear to require deference, but the court would not be required by necessity to do so. On the other hand, the absence of the option for the court to refuse to decide the substantive questions, an option it has in the act of state and sovereign immunity cases, might support the conclusion that deference is the least offensive alternative.

(b) *United States a Party.*—Not only is the United States a party but it is a very interested party. The extent of the territory involved, the value of the resources in the area and the critical need for these resources especially as sources of energy indicate the extent of the United States interest in these cases.[224]

(c) *Source of the Executive's Position.*—This question has to be answered on a case-by-case basis. Some of the positions relied on by the courts in these cases have been extrajudicial statements of the executive departments and have preceded the litigation. At this stage, however, the likelihood of the existence of extrajudicial statements has greatly decreased. Since these cases began in the late 1940's the federal government has been aware that all related positions concerning any state's coasts may eventually be the subject of litigation. Thus, all positions subsequent to the filing of the *California* case cannot be viewed as wholly extrajudicial. Many of the positions relied on as disclaimers of historic bays and straight baselines have been prepared in response to specific requests for opinions on specific matters in litigation. On the other hand, there have been a large number of diplomatic contacts on law of the sea matters and the United States position in those matters has been dominated by interests other than the submerged lands litigation. Nevertheless, these positions cannot be viewed as untainted by the litigation.[225]

(d) *Rights Involved.*—Since the dispute is between the states

223. *See* note 37 *supra* and accompanying text.

224. The impounded funds released to the United States as a result of the most recent partial decree in the Louisiana submerged lands controversy, 404 U.S. 388 (1971), was over one billion dollars.

225. The Supreme Court has even allowed for the litigation interest to affect the foreign relations positions. In refusing to discount disclaimers of systems of straight baselines based on their self serving nature, the Court said: "It would be

and the federal government, the interests are public, and no question of individual liberties or individual rights is involved.

III. CONCLUSION

It is apparent from a review of the submerged lands issues in light of the identified factors that deference should play no role in these cases. The argument for deference, however, is strongest in the case of historic bays. Since the factors were theoretically derived from Supreme Court case law, it would appear that either the factors do not represent the Court's thinking or that the Court has failed to apply them in the submerged lands cases.

Assuming that the factors are the proper ones to consider, it would appear that the Court should review its position on the submerged lands litigation and bring it into conformity with them. It may be that the trend away from deference which was noted above is part of that reconsideration. In addition, it would be appropriate for all future deference cases to be considered in light of articulated factors such as those isolated in this article.

In future considerations of the submerged lands issues, it is important that a strong case for deference be shown before the doctrine is invoked. Any aspect of deference, from the absolute unquestioning adherence to an executive position to consideration of it as having great weight, is in derogation of the courts' responsibility to decide cases according to the law. Of course, if the separation of powers allocates the decision to another branch, failure of the courts to decide the issue is theoretically not an abrogation of responsibility. Any case or controversy before a United States court, however, is presumptively subject to the court's adjudicatory power and responsibility to decide judicially. It is preferable in general that controversies be resolved according to the law. In contrast, deference can be viewed as allowing a decision to be judicially made regardless of the substantive law. This view is

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inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law." United States v. Louisiana, 394 U.S. 11, 73 (1969).

In fact it is difficult to make the distinction between domestic and international interests the Court purports to make. Despite all the high motives, the foreign relations of any country is merely a tool for satisfying domestic interests. That would include anything from war and peace to the oil trade.

neither novel nor unrecognized in the deference field. Perhaps the most authoritative statement on the matter was made by Justice Powell in his concurrance in *First National City Bank v. Banco Nacional de Cuba.*[226] In arguing for a review of the legality of the Cuban expropriation, he discounted the argument that the international law was unclear:

> I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.
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> Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes that can be resolved only by an exercise of power. Admittedly, international legal disputes are not as separable from politics as are domestic legal disputes, but I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an "act of state." Until international tribunals command a wider constituency, the courts of various countries afford the best means for development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving "an act of state" is relegated to political rather than judicial process.
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> Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this.[227]

226. 406 U.S. 759, 773 (1972) (Powell, J., concurring).

227. 406 U.S. at 774-76 (footnote omitted); *see* P. JESSUP, THE USE OF INTERNATIONAL LAW 63-101 (1959); Falk, *The Role of Domestic Courts in the International Legal Order*, 39 IND. L. REV. 429, 441 (1964).