Constitutionalism and the Territorial Sea: An Historical Study

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CONSTITUTIONALISM AND THE TERRITORIAL SEA: AN HISTORICAL STUDY

Harry N. Scheiber and Chris Carr*

I. INTRODUCTION

President Ronald Reagan’s proclamation in December 1988 of a twelve-mile territorial sea for the United States represented a dramatic departure from the basic policy of the nation for nearly two centuries -- a departure, that is, from the three-mile rule that had represented the United States’ claim to offshore waters since the administration of George Washington. Reagan’s almost offhand pronouncement -- including its singularly opaque, if not to say obtuse, disclaimer denying that the nine-mile extension of the nation’s territorial boundaries affected any state or federal law, rights, interests, jurisdiction or obligation! -- was in another sense, however, squarely within the great American tradition of territorial sea law and policy. This tradition was one of great temporal voids between rare moments when the

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2. For an argument to the contrary, contending that the three-mile rule had been only one segment of a more complex policy of offshore waters, with numerous (and incongruous) components, see John Briscoe, The Division of American Offshore Zones, TERR. SEA J. (forthcoming).

constitutional authorities of the United States (whether Congress, the Executive, or the judiciary) addressed the legal status of the territorial sea in relation to the other jurisdictional claims and boundary lines off the American marine coastline. In 1793 the Attorney General and in 1794 the Secretary of State moved almost by indirection into the original announcement (albeit an ambiguous announcement in important particulars) of a three-mile territorial sea. For the next 150 years the issue lay virtually dormant, as Congress neither sought to validate nor concerned itself with the implications of offshore jurisdiction.

Similarly, the U.S. Supreme Court in decisions handed down in 1842 and 1845 dealt with offshore lands in relation to the equal footing doctrine and the state claims to jurisdiction in the three-mile zone. Thereafter followed a nearly century-long gap before the Court again considered the central issues of offshore jurisdiction in relation to territorial waters. Then, in the opening scene of a great constitutional drama played out just after the Second World War, the Truman Administration issued its famous proclamations of 1945 declaring the seabed resources of the continental shelf (including the three-mile territorial sea) to be the property of the United States. A suit filed three weeks later subsequently produced the great decision in United States v. California upholding the national government’s claim over that of the state regarding offshore oil in the three-mile zone. Congress immediately followed by enacting the Submerged Lands Act, which with later legislation reversed the effect of the Supreme Court’s ruling. The gyrations of law and policy in this frenzied period of administrative edict, statute-writing, and

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5. On the Truman Proclamations, see infra text accompanying notes 8-10.


adjudication that resulted in the Submerged Lands Act and the later, varied efforts in Congress at quitclaim, shared authority, deference to state planning goals, administrative checks and balances, revenue sharing, and outright recapture of national proprietorship add up to a fitting closing scene (still in progress) for a history that has sorely lacked in rationality and consistency at key points and has been positively madcap at others.

In this brief study we offer a different historical perspective on the Reagan twelve-mile proclamation, a view that concentrates not upon federal-state relationships in territorial sea development but rather upon separation-of-powers issues at the center itself. The conflicting claims of the executive and the legislative branch in fact have comprised a fairly continuous history of tensions in this area of law for more than half a century, dating from the late 1930s. Our purpose here is to examine the changing positions of Congress and the President with respect to offshore jurisdiction; and we take within our purview the major debates over all forms of control over coastal waters, within and beyond the territorial sea, as those questions have been debated in an elaborate interrelationship with the narrower questions of law and policy regarding the geographical limits and jurisdictional implications of the territorial sea. We give some attention to the organized economic and other domestic interests, especially the commercial fisheries and the Department of Defense, that have played a formative role in the politics of most of the episodes in lawmaking that we review. We also seek to show that the international legal context, especially Cold War-related pressures and the progress of the U.N. Law of the Sea negotiations and agreements, have had a profound impact upon the changing posture of the Executive, Congress, and relevant interest groups in debates over offshore jurisdiction since the pre-World War II years.

II. THE TRUMAN PROCLAMATIONS OF 1945

As is well known, the modern era of "ocean enclosure" was inaugurated with the issuance of the Truman Proclamations of September 1945 -- a move by the U.S. Government fated to shape much of the subsequent history of both national debate and global development in relation to ocean law. As was well recognized at the

time the Proclamations were formulated and promulgated, and as has been fully acknowledged in commentary ever since, the Truman initiative represented a startling departure from the traditional adherence by the United States to freedom of fishing and virtually all other activity by all nations on the high seas beyond the three-mile territorial sea. Specifically, one of the proclamations declared the national government's proprietary right in all seabed resources on the continental shelf -- thus establishing the controversial claim to offshore oil resources; and the other declared that the United States was prepared to establish "conservation zones" for the conservation and management of fishery resources in the high seas beyond three miles.

In the scholarly literature on the Truman Proclamations, they are nearly always portrayed as having been produced by a unilateral executive branch move. It has been insufficiently recognized that these documents -- though unquestionably inspired principally by President Franklin D. Roosevelt's determination, beginning as early as 1937-38 when Japanese fishing vessels "invaded" American salmon waters in the Bering Sea, to see American jurisdiction over fishing waters extended beyond three miles; and by the Interior Department's equally keen determination to get control over the offshore oil in the three-mile zone -- actually were the

8. (...continued)


10. Where U.S. nationals alone were fishing such resources, the United States was prepared to establish such zones unilaterally; where American fishing vessels were sharing waters with other nations, the United States would seek to create such zones by bilateral and multilateral agreements. Fisheries Proclamation, 10 Fed. Reg. 12,304 (Sept. 28, 1945); Continental Shelf Proclamation, id., 12,303 (Sept. 28, 1945).

11. The Office of Strategic Services prepared a document in 1945 entitled AMERICAN CONTROL OVER THE NATURAL RESOURCES OF THE CONTINENTAL SHELF, which reviewed the history of the policies and stated flatly (at 4) that "Mr. Ickes and Mr. Roosevelt had desired to make the entire Continental Shelf and the waters above it a part of the United States." (Department of State Records, U.S. National Archives; copy in authors' files.) See also, inter alia, HOLLICK, supra note 9, at 35-61, on the roles of Roosevelt and Ickes, and of the State and Interior officials charged with developing the policies.
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product of a policy process in which Congress played a significant role. In the 1937-39 period, for example, when the Bristol Bay salmon interests created an uproar over the apparent entry of Japanese fleets into "their" waters, a series of measures was introduced in Congress that variously sought to extend the proprietary rights of the United States to anadromous fish that spawned in American rivers, no matter how far out to sea those fish migrated; to extend fisheries jurisdiction out to the limits of the continental shelf and beyond, up to 150 miles; and to enlarge the territorial sea by shifting its outer boundary beyond three miles. These proposals put Congress into the arena as new policies were being worked out over the period from 1938 (when Japan withdrew its salmon fleets, under pressure from the United States) and throughout the ensuing war years, when high-ranking State, Interior, and White House officials worked to develop a new policy on offshore waters. At every point, Administration officials were sensitive to congressional opinion and kept a close watch upon the progress of the various legislative measures that proposed to reform the substance or geographic limits of U.S. offshore jurisdiction.12

As State and Interior drew close to agreement on the content of the proposed proclamations in late 1944 and early 1945, following consultation with selected foreign governments, President Roosevelt stated that it was advisable to undertake "formal or informal communication with the Congress or with some of its leaders," in light of the "past interest of Congress in this question."13

In fact, members of the Congress -- especially the majority and minority leaders of the committees on foreign relations and foreign affairs -- took a keen interest in the progress of the policy formulation. Others, especially members from the Pacific Northwest salmon fishing area, kept up pressure on the State Department to develop

12. Memorandum, S. 930, Alaskan Fisheries Bill, (March 8, 1944) (manuscript in Department of State Records, National Archives) (copy in authors' files). The State Department officer in charge of fishery matters, Leo Sturgeon, asserted that the statements of those testifying at congressional hearings of 1944 on extended offshore jurisdiction "bring out rather clearly the relation between pending legislative action and the work being done in the Department on the problem of regulation and control of coastal fisheries." Id. See also discussion of the McNary bill, introduced in Jan. 1943 by a Senator from Oregon, to extend jurisdiction in salmon waters, in LARRY LEONARD, THE INTERNATIONAL REGULATION OF FISHERIES 135 (1944).

13. Roosevelt to Sec'y Ickes and Acting Sec'y Grew, Jan. 22, 1945, FOREIGN RELATIONS OF THE UNITED STATES, 1945 at 1500-1501. This did not mean, however, that accomplishment of the purposes of the proposed draft proclamations was contemplated by means, instead, of legislation. See Memorandum of Conversation, E.H. Doorman to the Assistant Secretary of State (May 12, 1945), id., at 1506.
a tough stand extending U.S. jurisdiction beyond three miles. One Representative, after learning from Secretary Ickes in January 1945 that issuance of the proclama-
tions might be imminent, explicitly raised the question with the State Department "as to whether the President had authority to take the proposed action or whether it was not a prerogative of the Congress."\textsuperscript{14} It was his position, the State Department reported:

\begin{quote}
[that] legislation by Congress as regards territorial waters would be a step in the right direction. . . . He repeated his view that Congress alone could make the claim on behalf of the people of the United States as regards the territorial waters or the Continental Shelf.\textsuperscript{15}
\end{quote}

In the event, it was President Truman and not Roosevelt, the actual originator, whose name would be affixed forever to the proclamations. After Roosevelt's death, Truman was informed of the ongoing policy discussions about the proclamations and was asked by Ickes to take early action on them. Again, presidential sensitivity to congressional prerogatives prevailed: Truman required consultation with the foreign policy leadership in Congress, and a series of meetings was indeed held.\textsuperscript{16} At least with respect to the fisheries proclamation, these congressional consultations led to some very significant changes in the extent of the document's unilateral claim warranting the exclusion of new entrants from fisheries areas beyond three miles of the U.S. shoreline.\textsuperscript{17} With regard to the continental shelf proclamation, though the specific language apparently was not altered as a result of the talks with Congress and hearings held in executive session, there were informal understandings as to

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\item Green Hackworth, Memorandum of Conversation, Subsoil Rights on the Continental Shelf (Jan. 27, 1945), reporting conversation with Rep. Sam Hobbs, State Department Records, National Archives (copy in authors' files).
\item Id.
\item Sec'y Byrnes to Sec'y Ickes (July 5, 1945), FOREIGN RELATIONS OF THE UNITED STATES 2:1519 (1945). Senators consulted included Tom Connally of Texas, chair of the Senate Foreign Relations Committee, and Senator Joseph O'Mahoney of Wyoming, chair of a special Senate committee then investigating oil resources issues.
\item Scheiber, supra note 8.
\end{enumerate}
\end{footnotesize}
some key legal issues that must have affected the subsequent implementation efforts.\textsuperscript{18}

In light of this evidence regarding the beginnings of the modern era of U.S. claims to extended jurisdiction, culminating with the Truman Proclamations of 1945, it is important to recall that the congressional-executive relationship was never far from the center of attention and that it formed an essential element in the context of decision.


The issue of extended jurisdiction largely passed off the political stage, except for the offshore oil questions, for a period of more than fifteen years after the Truman Proclamations were issued. This was in part because of the successful "fisheries defense perimeter" erected in the Northeastern region of the Pacific Ocean to protect the American salmon and several other important fisheries from potential Japanese competition, by the terms of the tripartite International North Pacific Fisheries Convention of 1952.\textsuperscript{19} The policy of abstention by new entrants from fishing grounds that were already being exploited at Maximum Sustainable Yield

\textsuperscript{18} Most specifically, there was agreement that a press release would be issued together with the proclamations that would state that the continental shelf policy "does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint." Release of Sept. 28, 1945, \textit{reprinted in} 13 DEP'T ST. BULL. 484. This left unresolved the matter of state claims to seabed oil resources within the traditional three-mile zone; in effect the congressional leaders and the Administration either had agreed to disagree, the issues to be resolved later by mutual consent, or else the Administration had failed to reveal that it had already decided to make a full claim to ownership of resources from the coast to three miles as well as beyond. That the latter may be true -- that is, that there well may have been some purposeful obfuscation by the Administration -- is suggested by documents in the Truman Library archival materials on the period. "Summary," phone transcript, Abe Fortas to Tommy Corcoran (Sept. 29, 1945), (copy in President's Secretary's File, Harry S. Truman Presidential Library, Independence, Mo.) We are indebted for evidence on this point to Prof. Laura Kalman, University of California at Santa Barbara.

\textsuperscript{19} Under terms of this convention, the signatories (Canada, Japan, and the United States) agreed to the management of the salmon and other designated fisheries under principles of Maximum Sustainable Yield. The practical effect was to enforce the principle of "abstention" against Japanese entry for a period of years into the salmon fishery controlled by the U.S. and Canadian fleets. \textit{See, inter alia}, Harry N. Scheiber, \textit{Origins of the Abstention Doctrine in International Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958}, 16 ECOLOGY L.Q. 23-99 (1989). The "fisheries defense perimeter" term is our own.
levels, was elevated by American diplomats during the international ocean-law discussions of the ensuing decade to the status of a principle on which international fishery jurisdiction might rest; and although this effort by the United States proved unsuccessful, in the earliest of the UN Law of the Sea discussions, beginning in 1955-58 with the Rome and Geneva meetings, it did effectively hold off threats to U.S. offshore fishing grounds that would materialize prominently in the 1960s and early 1970s.20

By the early 1960s, however, international developments in regard to the Law of the Sea had begun to emerge to an extraordinary degree as the driving force in the domestic U.S. decision-making process for ocean law and policy. Congress acted twice in dramatic ways affecting extended jurisdiction, in each instance with important effects on the status of waters within the territorial sea. First, by the Fishing Act of 1964, Congress reserved for American vessels exclusive fisheries rights within the territorial sea.21 Sentiment in favor of this legislation had built up in response to the rising presence of massive Soviet trawler fleets operating off the New England coast. Concerns about the impact on American fishing harvests of "Communist poaching in our waters," as one member of Congress put it, were compounded by Cold War anxieties, especially given that the Cuban missile crisis was still much in the public mind.22 Because the legislation did not affect waters beyond three miles, there was little reason for the Executive to oppose the measure; and no objections were raised.

Potentially more controversial issues were raised by a group of proposed statutes intended to extend the exclusive fisheries zone beyond three miles. Introduced in 1965, these measures variously provided for extension of exclusive fishing jurisdiction out to twelve miles, to the limits of the continental shelf, or to the extent permitted by the drawing of straight baselines to various distances from the coast. Immediately the U.S. Navy leadership protested that any extension must not compromise freedom of navigation and thereby establish a precedent that could


adversely affect the movement of U.S. warships in foreign waters, with consequent jeopardy to American security -- a position to which the Navy would adhere consistently during the next decade. The Administration opposed drawing straight baselines -- then a controversial matter in the Law of the Sea deliberations ongoing in this period -- on grounds it undermined the U.S. position in those deliberations. The Interior Department, presumably reflecting its responsibility for marine fisheries management and Outer Continental Shelf management, reasserted the executive prerogative and declared that Congress had no authority to direct the President as to when or how to draw baselines.

To the surprise of many observers, however, the Executive decided not to oppose the bill that merely extended exclusive fisheries jurisdiction to twelve miles. This change, declared the State Department -- previously opposed to any claims of this sort beyond the three-mile limit of the territorial sea -- would serve the constructive purpose of confirming the twelve-mile fishery zone as the norm in international practice; as such, it would militate against the pretensions of those nations which, as had been occurring in Latin America and elsewhere since 1946, sought to extend their jurisdiction or even sovereignty as far out as 200 miles. "Times change," a State Department legal officer stated, in giving testimony to Congress; and with some sixty countries already claiming a twelve-mile fisheries zone, the State Department

23. Cmdr. F.R. Downs (U.S. Navy) to Rep. Edward A. Garmatz (May 20, 1966), in Hearings: Miscellaneous Fisheries Legislation, Before the Comm. on Merchant Marine and Fisheries, Subcomm. on Fisheries and Wildlife Conservation, 89th Cong., 2d Sess., (1966), Part I, at 241-42 (against straight baselines); id. (May 25, 1966), id. at 250-51 (against extending jurisdiction over fishing beyond the twelve-mile offshore line) [hereinafter cited as 1966 Hearings]. See also W.L. William Schachte, The History of the Territorial Sea from a National Security Perspective, 1 TERR. SEA J. 143 (1990); and David Larson, National Security Aspects of the U.S. Extension of the Territorial Sea to Twelve Nautical Miles, 2 TERR. SEA J. 209 (this issue), on the long-standing Navy commitment to the narrowest territorial sea that could reasonably be expected in light of international changes (and also on the shift that occurred in the 1980s, as Soviet submarines operating close to the U.S. coast created a problem that forced the Navy to reconsider its views).

believed that "action of this kind by the United States . . . would not be contrary to international practice or to international law.'

The principal opposition to this measure in the domestic political arena came from the tuna and shrimp industries, which relied on access to waters off foreign shores and feared the extension to twelve miles would validate claims that excluded them from important fishing grounds. The American Tunaboat Association, the tuna fishermen's political voice, took a strong public stand in opposition; nonetheless, the tuna people admitted that it was more a matter of standing firmly on principle, in support of the traditional three-mile limit, than a matter of facing serious actual losses of potential harvest, since most tuna fisheries were far out beyond the twelve-mile limit of any other nation.

The Twelve Mile Act, also known as the Bartlett Act, was signed into law by President Johnson in 1966. Thus the separation-of-powers issue was not then joined, though the issue was aired amply with respect to the other (unsuccessful) bills that would have extended jurisdiction as far out as two hundred miles. Open challenge to executive power in this area would soon appear, however; and executive-congressional tensions over policymaking for the oceans would reach an

25. 1966 HEARINGS, supra note 23, at 277, 281 (testimony of Raymond Yingling, Ass't Legal Adviser, Dep't of State). Cf. Gary Strieker, At Sea in the 89th Congress: The U.S. Fisheries Zone, 18 HASTINGS L.J. 937 (1976). For the development of U.S. policies (and ocean-law politics) in relation to ongoing Law of the Sea negotiations in that period, see also HOLlick, supra note 9, at 160-195.

26. Testimony of Wilbert Chapman on Territorial Seas, manuscript, 1966, Wilbert M. Chapman Papers, University of Washington Library. Indeed as early as 1959, when the U.S. position at the Geneva U.N. Law of the Sea meetings was being developed on the offshore limits of fishery zones, the American Tunaboat Association lobbyist admitted that from the ATA standpoint "The United States was free to trade away, for the needed votes (i.e., the votes needed to obtain agreement on a compromise six-mile limit), the entirety of our fishing rights within 12 miles." (Chapman, Memorandum on Law of the Sea meeting, Dec. 14, 1959, Wilbert M. Chapman Papers, University of Washington Library.)


28. Charges were also made by certain congressional representatives that the Administration was failing to fulfil its obligations under the Truman Proclamation. See 1966 HEARINGS, supra note 23, at 277, 298.
intense level in the debate over the 1976 Magnuson Fishery Conservation and Management Act (FCMA),\textsuperscript{29} whose history we consider next.\textsuperscript{30}

IV. THE FCMA AND THE 200-MILE ZONE

The 1976 FCMA, which won congressional approval after two years of continuous effort by its backers, provided, among other things, for a 200-mile fishing conservation zone -- an extension, that is, of U.S. fishery jurisdiction to a distance from the coast some sixteen times greater than had ever been claimed previously in the nation's history. As had been true of the 1966 Twelve Mile Act, the FCMA -- which was principally sponsored by Senator Warren Magnuson of Washington, a staunch champion of the Pacific Northwest's fishery interests throughout his long career in Congress -- enjoyed the strong support of New England fishing companies as well as those in Magnuson's own region.\textsuperscript{31} The main opposition from within the fisheries industries came once again from the politically powerful distant-water tuna fishing interests of California, joined as they had been in 1966 by the shrimping industry of the Gulf Coast.\textsuperscript{32} The American Tunaboat Association praised the Nixon and Ford Administrations' efforts in the U.N. LOS talks from 1971 onward to block any agreement on 200-mile exclusive zones unless an exception were specified to exempt from coastal nations' control the "highly migratory species," of which tuna, of course, would be the most prominent. By legitimating the 200-mile

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\textsuperscript{29} Pub. L. No. 94-265, Sec. 104, 90 Stat. 331.

\textsuperscript{30} Kenneth Kolb, Congress and the Ocean Policy Process, 3 OCEAN DEV'T & INT'L L, 261, 265-71 (1976) provides a useful brief overview of congressional impatience with the seeming drift in ocean policy formulation of the Johnson Administration and of the Nixon Administration in its early years.

\textsuperscript{31} This compressed account of the FCMA is based upon a monographic study of constitutionalism and the Magnuson Act that the present authors have in progress; this study will contain full documentation of the portrayal of policy process in this article, and can be obtained in working paper form from the authors.

\textsuperscript{32} Cf. Kline R. Swygard, Politics of the North Pacific Fisheries--With Special Reference to the Twelve-Mile Bill, 43 WASH L. REV. 269 (1976). Ironically, some leaders in the salmon industry of the Pacific Northwest and Alaska, long in the forefront of demands for extended jurisdiction to protect their fishery, now questioned the wisdom of a strict 200-mile zone because it did not extend far enough out to offer them effective coverage. On this and related economic and political issues in 1974, see GORDON C. BROADHEAD & CHARLES J. PECKHAM, THE POTENTIAL ECONOMIC IMPACT OF A 200-MILE FISHERY ZONE ON THE UNITED STATES FISHERIES FOR TUNA, SHRIMP AND SALMON (published by Living Marine Resources, Inc., for the Tuna Research Foundation) (June 1974).
zone globally, the tuna leadership declared, the FCMA would undermine existing international organizations that had made a fairly good record for effective management and conservation of tuna resources in the Eastern Pacific and other ocean regions.33

President Ford signed the bill into law on April 13, 1976, but did so with no great measure of enthusiasm for its terms and only after having strongly opposed its enactment. Indeed, Ford’s acceptance of the bill may be seen as a capitulation -- a serious political blow that brought to an awkward denouement what Magnuson termed "a classic confrontation between the executive and legislative branches of government in the area of foreign affairs."34

To a remarkable degree, the debate of the measure was impelled, and the specific terms of the debate were constrained, by the course of developments in the international negotiations for a new Law of the Sea Convention. Congress had been monitoring these negotiations in a systematic way since 1971, a year after President Nixon announced a comprehensive U.S. ocean-law policy that called for a twelve-mile territorial sea limit for all nations, linked to an international trusteeship over the seabed resources in the oceans beyond the depth of 200 meters.35 Subsequent to the resumption of U.N. talks on the seabed in March 1972, advocates of an extended jurisdiction over fisheries were constrained from pressing urgently for new legislation by the Administration’s repeated assertions that it was best to

33. U.S. Tuna Group Rejects Call for 200-Mile Limit, LOS ANGLES TIMES, March 30, 1974, at 2-4; August Felando (General Manager, American Tunaboat Association) to FISHERMEN’S NEWS, April 8, 1974, American Tunaboat Association Papers, Scripps Institution of Oceanography Archives, La Jolla (hereafter cited as SIO Archives). Management in the Eastern Pacific was being undertaken through the medium of the Inter-American Tropical Tuna Commission, which conducted continuous studies of tuna stocks and recommended management plans to member states. See JAMES JOSEPH & JOSEPH GREENOUGH, INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE, AND BILLFISH: BIOLOGICAL, LEGAL AND POLITICAL ASPECTS (1979). The FCMA did exempt highly migratory species from management in the extended fishery zone, a concession to the tuna industry’s concern to maintain the principle of exemption of tuna from coastal nations’ unilateral control in 200-mile zones elsewhere on the globe. This was the only practical function of the exemption clause, since only a tiny proportion, if any, of the U.S. tuna catch was from waters within the 200-mile boundary off the American coastline; the California tuna fleet was entirely a distant-water operation.


pursue fishery objectives through the new comprehensive Law of the Sea (LOS) agreement that was under negotiation. To do otherwise and act unilaterally, the Administration argued, would undermine the larger U.S. policy concerns for passage of the Navy’s ships on the world’s seas and through narrow straits, for international administration of deepwater seabed resources, and other policy objectives.36

By 1975, however, patience had run out, as Senator Magnuson and others declared. Magnuson and other supporters of immediate creation of a 200-mile zone increasingly expressed alarm at the rising evidence that many important species might be depleted in fishing waters off both the Atlantic and Pacific coasts. They now argued that, tactically, immediate unilateral action would contribute far more to the chances of an international agreement -- with the enactment of the FCMA serving as a warning shot -- than would continued waiting as the negotiations went on seemingly with little real hope of resolution.37 Indeed, by this time even the State Department was willing to admit privately to the White House that "the 200-mile fisheries bill is aimed at a real problem -- the depletion of fish stocks off the coast of New England and the Pacific Northwest due to heavy fishing pressure from Japanese, Soviet and other foreign fleets. . . ."38

Since 1973, Magnuson had been deploring the White House and State Department admonitions to Congress "to be patient and twiddle our thumbs" so long as the LOS talks were going on.39 To the State and Defense Departments, as he complained in a less than graceful metaphor, the marine fisheries were "the low man on the priority totem pole -- something to trade away or something to leave alone so that countries with strong fishing interests will not be unduly offended. . . . But how long will we need to wait? Until all the fish are gone?"40 In 1974, he joined with congressional members from the New England bloc, angry at the failures of international management in the Northwest Atlantic waters where the European

36. Magnuson, supra note 34.

37. Id.

38. Memo, Sec’y Henry Kissinger to President Ford (Sept. 23, 1974), Ford Presidential Papers, Gerald R. Ford Library, Ann Arbor. MI (copy in authors’ files).


40. Id.
nations had devastated stocks with their large-scale trawlers, to sponsor legislation for a 200-mile zone.

Full hearings were held on legislation to unilaterally create a 200-mile zone. As a counter, another bill was introduced in the House (H.R. 15,619) which would have had the United States act under terms of the existing international agreements (especially Article 7 of the 1958 Geneva Convention on Fishing and the Conservation of Living Resources of the Sea). The Administration contended that enactment of S. 1988 would lead to proliferation of similar unilateral claims by other nations that could quickly lead to a crazy quilt of uncontrolled national claims. Indeed, it was the threat of just such a result with its open ended invitation to conflicts and pressures on vital United States interests that led to a decision in two prior Administrations... that United States oceans interests and the stability of the world community would best be served by a broadly supported international agreement.41

The bill failed, but it did much to mobilize a coalition of both Atlantic and Pacific coastal states' political forces that would resume pressure for legislation in the next two years.42

By 1975, Magnuson was able to argue with some persuasiveness that the LOS negotiations were "inextricably bogged down," so that further delay in the creation of a U.S. 200-mile zone would lead to disastrous losses of valuable fishery stocks both in the Atlantic and the Pacific.43 (Interestingly, the Administration itself believed that it was "only somewhat realistic [sic] to assume that a [LOS] treaty can


42. The legislative fight is discussed in articles in the U.S. Committee for the Oceans publication SEA BREEZES, especially Vol. 2, No. 4 (Sept. 1974) at 1-3. The effort to get new legislation in 1974 failed; but the 1975-76 debate on FCMA was a reprise of the arguments and political alignments of 1974. See, e.g., articles in THE ALASKAN FISHERMAN, Vol. 3, No. 1 (Nov. 1, 1975); and SEA BREEZES, Vol. 4, No. 1 (January 1976).

43. Magnuson, supra note 34, at 433. Indeed a treaty would not emerge for another seven years.
be negotiated before 1977" because the members of the U.S. delegation "lack[ed] the qualifications for such an important assignment." \(^4\)

As the FCMA proposal underwent hearings and made its way through Congress, the Department of Defense mounted its opposition on grounds the bill would militate against Navy aims in the international LOS talks. Regarding the legislation as "clearly inconsistent with and [violative of] existing treaty obligations of the United States and customary international law as understood and practiced by the United States," the Department of Justice also recommended that Ford veto the bill if passed.\(^5\)

It was the State Department, however, that deployed the most sustained opposition to the bill, both in public and behind closed doors in Washington. In an August 1975 address to the American Bar Association, for example, Secretary Kissinger stated that unilateral action would be "both extremely dangerous and incompatible with the thrust of the [Law of the Sea negotiations]. . . . Unilateral legislation on our part would almost surely prompt others to assert extreme claims of their own. . . . [and] the very basis of international law will be shaken, ultimately to our own detriment." \(^6\) Kissinger's position merely reaffirmed in all particulars the official view of the Administration set forth for Congress nearly two years earlier, viz., that under existing international law, no State has the right unilaterally to extend its fisheries jurisdiction more than twelve miles from its coast . . . [and that] a departure from this principle by the United States could encourage similar claims by other countries. . . . Moreover, this could lead some States to seek to delay or to impede the work of the [LOS] Conference and could threaten the possibility of agreement. It would disrupt our cooperation.

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44. Schedule proposal (Sept. 22, 1975), folder "FO 3-1," Box 10, FO 3-1 Fish, Gerald R. Ford Library.

45. Letter, Mr. Uhlmann to Mr. Lynn (undated), folder "H.R. 200 (2)," Legal Case Files, Gerald R. Ford Library. The Justice Department singled out especially the negative consequences for international law of a provision in the draft bill extending unlimited jurisdiction over anadromous species such as salmon. \(\text{Id.}\)

46. Kissinger, Speech before the American Bar Association Annual Convention, Montreal, Canada (Aug. 11, 1975), copy in Ford Presidential Papers, Gerald R. Ford Presidential Library (copy in authors' files).
with like-minded States in the Law of the Sea negotiations, and could
directly undercut our fisheries proposal in the Conference.\footnote{47} 

Quite apart from the question of negotiating tactics and apart from objections
concerning other specific terms of the proposed FCMA, the Ford Administration was
alarmed most by a provision\footnote{48} concerning the foreign affairs power of the
Executive. This provision required the Secretary of State to negotiate new
international fishery agreements or renegotiate existing agreements with foreign
states wishing to fish in the new 200-mile U.S. zone. Such agreements, termed
"governing international fishery agreements" (GIFAs), were to be framed in terms
binding foreign nations to compliance with various statutory conditions;\footnote{49} and then
each GIFA was to be submitted to Congress by the President, and would go into
effect only if Congress passed a joint resolution of approval within sixty days.\footnote{50} 

Congressional mandates of this type, requiring the Executive to undertake
specified procedures associated with sanctions in the field of fisheries diplomacy,
were nothing new. The first such requirement had appeared in 1954, as a provision
of the Fishermen's Protective Act. Enacted despite the strenuous objections of the
State Department, which regarded it as an unconstitutional incursion on the
Executive's foreign policy powers, this statute required the U.S. government to pay
all fines levied against American fishing vessels that were convicted in foreign
nations of incursions into the zones beyond three miles in which those nations
maintained claims to jurisdiction; and it authorized suspension of foreign-aid

\footnote{47} John Norton Moore to Sen. Magnuson (Jan. 18, 1974), copy in American TunaBoat Association
Papers, SIO Archives. One contemporary scholarly analysis contended that not only the assertiveness of
Congress, but also continuing state-federal tensions, served to exercise "a deleterious cramping effect on
the federal government's conduct of foreign affairs." Eugene R. Fidell, \textit{Ten Years under the Bartlett Act:}


\footnote{49} 16 U.S.C.A., §§ 201(c), 1821(c) (West 1985); see discussion in Note, \textit{Congressional
Authorization and Oversight of International Fishery Agreements under the Fishery Conservation and
Management Act of 1976}, \textit{52 Wash. L.R.} 495, 495-97 (1977), whose text we have followed closely in
this paragraph.

\footnote{50} 16 U.S.C.A. §§ 203, 1823 (West 1985).
payments to the nations in question.\footnote{51} Similarly, the famed 1971 Pelly Amendment to the Fishermen’s Protective Act had required the Executive to institute proceedings that could lead to sanctions (discretionary with the President) when nationals of a foreign state were found to have engaged in activities that diminished the effectiveness of an international fishery management or conservation program.\footnote{52}

President Ford immediately raised constitutional objections to the Magnuson Act’s provisions for the GIFAs and the mechanism of ratification requiring congressional approval. A memorandum from the State Department to Brent Scowcroft, presidential assistant for national security affairs, stated in unequivocal terms the basis of Ford’s constitutional view: "As a legal matter, the decision to negotiate [with foreign states] at all, with whom to negotiate, and on what subjects to negotiate, is within the exclusive province of the President to conduct the foreign affairs of the United States."\footnote{53}

Despite the executive branch’s commitment to the resolution of jurisdictional questions through international agreement, the domestic political realities of the 1976 election campaign militated against a veto of the FCMA. Fearing the political damage which would result from a virtually certain veto override, and faced with the prospect of his political challenger Ronald Reagan making the presence of Soviet and Japanese fishing in waters off New Hampshire a major issue in that state’s presidential primary, Ford reluctantly signed the measure into law.\footnote{54} Upon signing, however, the President sent a signal that he might do less than comply fully with the


53. Memo, Mr. Springsteen to Scowcroft (April 20, 1976), Subject File NR2, Gerald R. Ford Library (copy in authors’ files).

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terms for implementation; Ford declared that the complexity of efforts required to make a transition to the prescribed 200-mile regime made it "possible that full implementation may take more time than is provided in the act." The signing statement also spelled out the President's other objections to the FCMA, including its impact on the American negotiating position in LOS talks and the prospect that the United States might be forced into violation of existing treaty and agreement obligations in the course of complying with the terms of the legislation. Ford also stated that the act's provisions providing for unilateral enforcement of the prohibition on fishing for native anadromous species in waters beyond 200 miles was in blatant contravention of the principle of freedom of the high seas; and so he clearly implied that the United States would not seek to enforce an extension of American jurisdiction in this manner.

This remarkable signing statement was evidence of how Ford stood with his back to the wall, politically, being forced to accept a policy whose constitutionality he doubted and whose implementation he was explicitly warning he would undertake reluctantly and perhaps incompletely. It was not the first time that a President had been forced to issue a statement of this kind in approving a major piece of fisheries legislation. In 1956, upon signing the Fish and Wildlife Act -- which reorganized fishery management administration and contained a statement of comprehensive policy regarding marine fisheries, but also a provision requiring the President to include specific federal officials in any U.S. delegation to


56. Id.


international meetings dealing with fisheries -- President Dwight Eisenhower issued a strongly worded signing statement. In it, he asserted that he "[did] not regard as a directive" the provisions concerning negotiations with foreign powers, those being, in his view, "unconstitutional as limitations on the authority of the President . . ." in conducting diplomacy.\textsuperscript{59} In Eisenhower's case, as in Ford's twenty-three years later, the occasion was the political necessity of accepting legislation that had been pushed successfully by the commercial fisheries interests in such a way as to challenge head-on the discretionary authority of the Executive in foreign affairs. It was indicative of the paramount importance of the foreign-policy and international-law context of marine fisheries policy that in each case the process of domestic lawmaking generated constitutional confrontations centering on the President's proper realm of authority in foreign relations. To this degree, in 1976 as earlier, the policy process regarding offshore jurisdiction of the United States was reactive and reflexive -- shaped in large measure by developments outside the domestic arena, particularly the UNCLOS negotiations.

As we seek to show in the following discussion of the events leading to the December 1988 Reagan proclamation extending the territorial sea to twelve miles, the importance of that international context has diminished considerably. Indeed, the conflict over separation of powers since the 1988 proclamation has proceeded mainly upon an agenda defined by considerations of constitutional federalism and national-state political relationships, rather than upon an agenda largely shaped (as had been true earlier) by the imperatives of U.S. foreign policy aims in the LOS negotiations being conducted on the international stage.\textsuperscript{60}

V. THE 1983 EXCLUSIVE ECONOMIC ZONE PROCLAMATION AND PROPOSALS FOR AN OCEAN POLICY COMMISSION

The triumph of the extended fishing zone concept embodied in the FCMA quieted congressional agitation of the offshore jurisdiction question for some years,


\textsuperscript{60} Indeed, one must think that Ford's signing statement on the FCMA was a message intended to reach beyond Capitol Hill and the domestic political scene -- one designed to influence the negotiations then going forward at the UNCLOS meetings in New York. With Ford's signing statement to put forward in evidence, the U.S. negotiators could plausibly contend that despite the unilateralism of FCMA, the President was prepared to act in a manner consistent with international law and with the developing consensus on a LOS convention.
as the LOS talks moved with painful slowness toward resolution in the Law of the Sea Convention of 1982. When it became clear that the final convention text would authorize the creation by coastal states of 200-mile "exclusive economic zones," to include not only fishery management (including management of tuna and other highly migratory species, a provision staunchly opposed by the United States) but also all other commercial activities, efforts stirred in Congress to declare a U.S. 200-mile EEZ. Any chance that the legislative branch would seize the initiative in this respect was undermined, however, when President Ronald Reagan announced that the United States would not accept the LOS Convention, and would instead take direct action to establish an EEZ. On March 10, 1983, Reagan proclaimed an EEZ of 200 miles for the United States, thus accepting the new global standard embodied in the LOS Convention while rejecting that document's provisions for the common sharing of seabed resources beyond 200 miles and for regulation of highly migratory species within the exclusive zones.

The only congressional response to the EEZ Proclamation that developed any momentum was a proposal initially framed by Rep. John Breaux of Louisiana -- an idea destined to be the precursor of several similar measures in the period that followed -- for the creation of an oceans policy commission with a broad mandate to "develop recommendations for the President and the Congress on a comprehensive national oceans policy for the United States." The broad scope of the commission's proposed mandate served as a lightning-rod for executive branch opposition, and the ensuing debate constitutes another chapter in the struggle between Congress and the President for primacy in

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61. A bipartisan bill was introduced in the House on Sept. 30, 1982 by Reps. John Breaux and Edwin Forsythe (H.R. 7225), and in the Senate identical legislation was introduced by Sen. Ted Stevens of Alaska (S. 2997). Both bills died in committee.


63. Hearing on H.R. 2853 Before the Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 123 (1983) [hereinafter 1983 Hearing]. It must be noted that the idea was not only forward-looking but also reflective of a famous past success -- the Stratton Commission (the National Commission on Marine Science, Engineering and Resources), headed by Dr. Julius Stratton, the report of which, OUR NATION AND THE SEA, in January 1969 greatly advanced the effort to produce a comprehensive ocean resources policy for the U.S. at that time. See HOLLICK, supra note 9, at 186-90.
the making of oceans policy. Both the State and the Interior Departments recommended that the section on "Duties of the Commission" be narrowed to focus on developing legislation to implement the President's EEZ proclamation. A broad, general mandate to develop recommendations for a comprehensive national oceans policy would allow the commission to range into international aspects of oceans policy that the Administration considered the exclusive province of the executive branch. The Reagan Administration considered the appointment mechanism for the proposed commission constitutionally suspect, since it required the President to select members from lists of nominees presented by the Speaker of the House and the Senate majority leader. Even the Republican supporters of the bill warned that a commission should not become "a prominent forum for 'second-guessing' the President's decision not to sign the LOS Convention." Although supporters of the commission idea in Congress probably varied widely in their readiness to second-guess the White House on this specific point of policy or others in the great spectrum of ocean issues that was before them, they seemed to share the view that Congress ought to send a strong signal that it was not abdicating the field of national ocean policy to the White House -- that it was concerned at least to share power, and that it would not be content merely to react to executive branch initiatives. Indeed, the report to the House by the Foreign Affairs Committee explicitly sought to "emphasize the importance of the foreign policy aspects of the Commission's work." This drew the lines clearly enough, and it went far toward assuring that the measure, passed by the House in October 1983, would die for lack of action in the Republican-controlled Senate.

The commission concept has persisted in subsequent discussions of ocean policy and the decision process, and it has achieved renewed vitality as the result of the uncertainties generated by the 1988 proclamation of the new twelve-mile zone. Thus, when H.R. 1171, the National Oceans Policy Commission Act of 1987, was introduced with bipartisan sponsorship, again providing for a commission that would
have a broad mandate to consider U.S. marine policies across the board in relation to Law of the Sea, supporters of the measure in the House argued that the commission was needed to give coherence to a policy that was in serious disarray. The Administration proffered a number of objections to the bill. The Justice Department opposed the commission on separation of powers grounds, condemning it as exemplary of "hybrid entities that do not belong clearly in either the executive or the legislative branch." Further, the Justice Department found constitutionally offensive the requirement that the commission report to both the President and Congress simultaneously, and objected to the method of selecting and appointing members as "suggest[ing] a blurring of the lines between the executive and legislative branches," and thus "constitutionally suspect on separation of powers grounds."

Once again the bill won support from the coastal states' commissions and representatives in Congress from the coastal regions, but after passage in the House it died in the Senate -- another monument to the thrust and parry between the President and Congress on ocean policy issues. These episodes did, however, both presage and provide specific precedent for the congressional and coastal states' main response to the establishment of the expanded territorial sea.

VI. COMMISSION REDUX: CHALLENGE OF THE TERRITORIAL SEA PROCLAMATION

Submission of the Law of the Sea Convention to the world community of states for ratification, despite the refusal of the United States to accept it, has dramatically changed the context of ocean policy debates in this country. As the history of the earlier bills for ocean policy commissions, in 1983 and 1987, already had indicated, the struggle was resolving itself into one involving the constitutional stress lines of politics -- lines that were drawn both vertically (pitting state governments against the national regime) and horizontally (pitting the Executive against Congress). The older, familiar context in which international negotiations over Law of the Sea


principles drove and constrained domestic debate in the United States was now subordinated almost completely.

President Reagan's abrupt and startling announcement of the twelve-mile territorial sea -- while Congress had under consideration a bill that would have provided for such an extension by statute -- must be understood as a trumpet call reasserting the powers of the Executive, and not only the resolution of the U.S. posture with regard to territorial waters and their status.

Of special concern to Congress was the effect on domestic laws and regulations of the change in the extent of the territorial sea. In addressing these issues, Congress focused attention upon Representative Lowry's proposal for creating a "National Ocean Policy Committee," to study the effect of extended jurisdiction on domestic laws, and to recommend appropriate technical amendments to existing legislation. In early hearings on the bill, Reagan Administration officials had concentrated upon assertion of the Executive power to effect the territorial-sea extension unilaterally and without congressional authorization: the territorial sea, according to the Administration's view, was "established by the executive under the foreign affairs power" and any extension would be "essentially an exercise of an international claim of right vis-a-vis other nations" rather than an appropriate matter for decision by Congress. In this respect the Lowry Bill became the focal point of another confrontation over separation of powers and the making of oceans policy, a clash of wills and claims to legitimate power not resolved but only placed on a different level by the President's decision in December 1988 to preempt the field and issue the territorial sea proclamation on his own authority. With the process of sorting out the effects of the Reagan proclamation on existing legislation and

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70. In July 1988 Rep. Mike Lowry of Washington had introduced legislation (H.R. 5069) to extend the territorial sea to 12 miles and the contiguous zone from 12 miles to 24 miles.


programs already well under way in early 1991,73 the dominating influence of
domestic political considerations and constitutionalism, crowding out contextual
influences of international negotiating imperatives, has become even more dramatic.

In the years immediately ahead, in this current phase of national debate
respecting the territorial sea and the more comprehensive issues of offshore
jurisdiction and marine policy, we think it likely that agendasetting, the establishing
of priorities, and decision-making as to who will profit from the exploitation of
offshore resources all will come increasingly from a process in which yet still
another political configuration will prevail. This newer configuration will feature
serious conflicts of purpose and interest that will find the coastal states, which have
most to gain by extending their authority beyond three miles -- whether for
conservationist, management, or revenue-driven policy goals -- aligned against the
other states, which may well line up with the Executive in favor of maintaining the
maximum degree possible of uniform national control and a perdurable discretion
for the President. It is thus easy to imagine, in this situation, that the making of
oceans policy will continue to be an arena of interesting and sometimes intensive
tensions over constitutional principle as well as over the substantive content of
policy.

73. For example, as in the recent amendments to the Coastal Zone Management Act. One might also
point to the abandonment, after so long and bitter a fight, of the highly migratory species exemption in
the FCMA, as further evidence of a trend toward compromise of issues that have for many years
implicated Executive discretion versus congressional claims of authority.