Seventeenth Century And Eighteenth Century Bases For The Exercise Of Protective Jurisdiction In The Marginal Sea Area

by

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CERTIFICATE OF AUTHORSHIP

I, Ralph J. Gillis, hereby certify that this dissertation is in every part my original work, undertaken in satisfaction of the requirements for the degree of Master of Laws (LL.M.) in the Department of International Law at the University of Edinburgh.

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SUMMARY OF CONTENTS

Introduction

The continuing Third United Nations Law of the Sea Conference, which met at Caracas, Venezuela, during the summer of 1974, has focused the attention of the community of nations on sovereign rights over coastal seas in international law. Littoral nations have become concerned with their potential right to exercise exclusive jurisdiction for various purposes as far seaward from their coastline as 200 miles. Such a broad expanse of high seas as this 200 mile belt has traditionally been subject to the lawful exercise of high seas freedoms, especially navigation and fishing by all nations. It is the limiting of present high seas freedoms within the proposed 200 mile belt which has caused a problem for the United States. As a matter of municipal law, the right to exercise jurisdiction and retrieve resources within the seas adjacent to the coastline of the United States is allocated between the several states and the federal government.

The federal government and the states have been disputing the property rights and jurisdictional rights over the coastal sea since at least 1947 when the United States Supreme Court handed down its decision in United States v. California.[1] That decision determined that rights of the federal government seaward of low-water mark were paramount to any rights of the states. Further, the

justices stated that rights held over this area of coastal seas, or adjacent seas, were held by virtue of the ability of the federal government to exercise the rights of the nation in international law. Therefore the Court determined that the exercise of those rights over portions of the coastal seas must as a matter of existing municipal law be an exclusive exercise of jurisdiction by the United States. This exercise of sovereign rights over the coastal sea was described as the product of an exercise of "external sovereignty" by the federal government.[2]

Because of the federal system of government in the United States the individual states were able to contest property rights and jurisdictional rights of the federal government seaward of low-water mark. Such contest did not challenge the California decision to the extent that coastal waters were described as held by the exercise of external sovereignty or sovereign authority of the nation. Rather the states attacked in a series of litigations which claimed that as a matter of "internal sovereignty", that is, the allocation of governmental rights between the states and the federal government, it was the states and not the federal government, which held the right to exercise jurisdiction and retrieve resources within the coastal seas, even though those seas were held by

authority of the national exercise of sovereignty.[3] The states were unsuccessful in achieving the objective of such litigation, but nonetheless in 1953 Congress enacted the Submerged Lands Act which essentially quitclaimed property rights in the coastal seas to the states within the area of the territorial sea.[4] However, both the State of Florida and the State of Texas were able to establish historic rights over resources in the Gulf of Mexico out to nine nautical miles from the coastline of the United States and their grant extended to these historic areas as a matter of municipal law. Other states along the Gulf of Mexico were unsuccessful in attempting to establish similar historic rights.[5]

Control over resources out to nine nautical miles from the coastline gave the State of Florida and the State of Texas a valuable property right over oil deposits out to nine nautical miles from shore, and eventually the grant came to include a jurisdictional right to control valuable offshore fisheries, especially shrimp through the exclusive right to exploit resources beyond the boundary of the territorial sea out to nine nautical miles from the coastline. Prompted by the success of the State of Florida and the State of Texas, as well as by the discovery of oil deposits in the continental shelf under the Atlantic Ocean and a desire to manage valuable offshore fisheries, now

over-fished, the states of the Atlantic seaboard in 1969 entered into litigation with the United States.[6] That litigation was primarily an attempt by most of the original states, former British colonies, to establish that they held exclusive property rights and jurisdictional rights over their coastal seas since colonial times. The establishment of those alleged historic rights encompassed arguments that English law and international law of the seventeenth and eighteenth centuries recognized such exclsuive rights over coastal sea resources as inherent in the sovereign status of a nation in the community of nations. When these rights were argued for in the seas adjacent to the American colonies the position taken by the states was that colonial charters transferred the rights of exclusive exploitation of resources and jurisdiction over the coastal seas to the colonies, and that these rights remained with the states at the time of the revolution, 1776, and were not granted to the federal government in the 1789 Constitution.

It is the purpose of this dissertation to analyse the historical evidence as to the seventeenth and eighteenth century rights of Great Britain over its adjacent seas. By examining international law of this two-century period not only will the rights which Great Britain could have claimed in the seas adjacent to the British Isles be

identified, but also identified will be those rights which could have been exercised in the seas adjacent to the American colonies. Moreover, this dissertation will examine English law of the period to determine whether rights were claimed as a matter of municipal law in the seas adjacent to the British Isles as well as those adjacent to the American colonies. Then it must be resolved whether such rights were passed to the colonies through their charters or whether they were reserved in Great Britain and thus subsequently applied by the United States, not the individual states, after the War of the American Revolution, 1776-1783.

Two analytical tools have been adopted in order to carry out this analysis and they are presented at this point in order to familiarize the reader. The first tool of analysis is the "possession standard". This standard is employed in order to determine the degree of control exercised in the area of the coastal seas by Great Britain and the American colonies so as to determine whether a claim of ownership or some lesser claim of a limited jurisdiction can be supported in fact and law. The second analytical tool is analysis according to the "protective jurisdiction test". This is a test which when applied to municipal law and international law of this period reveals whether there was an implicit intent to claim exclusive

general jurisdiction or ownership over the coastal seas, or whether there was only a limited exercise of littoral national jurisdiction for the peace, order and safety of the nation.

Employment of both these tools presents an analysis which will accurately identify the authority and rights of Great Britain over coastal seas during the seventeenth century and eighteenth century. With respect to the United States, and the problem of allocation of these rights under its municipal law and its application of such rights in international law, this analysis will determine whether the individual coastal states have historic rights to exclusive exploitation of property and resources in the adjacent sea as well as general jurisdiction over the seas adjacent to the coastline of the United States. If such historic rights do not exist the claims of the Atlantic seaboard states to the exclusive right to manage and extract resources of the continental shelf must fail. Thus the rights of these states will not be able to conflict with the exercise of the foreign affairs power under the United States Constitution by the federal government now formulating policy for exploitation of the world's ocean resources to be presented at the continuing Third United Nations Conference on the Law of the Sea.

PART A

Introduction

The first part of this dissertation is offered to establish that governmental power was applied by Great Britain over its coastal seas as an exercise of protective jurisdiction during the seventeenth and eighteenth centuries. That governmental power was exercised under authority of a sovereign in the community of nations. Such exercise of protective jurisdiction is reflected by application of contemporary customs laws, admiralty jurisdiction, criminal jurisdiction and general common law jurisdiction over citizens and others.

This paper is concerned with only English law which came to form the basis for the various state legal systems and bodies of law. English law is therefore often referred to as municipal law, a term which is not inclusive of the law of Scotland or any other jurisdiction within today's United Kingdom. The law of Scotland would be important for an analysis of colonial law in provinces such as the Province of Nova Scotia, which was initially granted under the Scottish Crown unlike the group of colonies forming today's states and referred to herein as the

American colonies.

Analysis of the protective jurisdiction exercised by Great Britain reveals that such jurisdiction encompassed allocation of property rights recognized by municipal law. These property rights accrued in the high seas according to the criteria set out in municipal law, because as sovereign in international law Great Britain held the authority to take cognizance of various property rights arising under the municipal law of Crown prerogative right, although accruing upon or within the high seas which were subject to international law.

Analysis of the writings of international law jurists and Crown prerogative right applied under protective jurisdiction indicates a common test of "possession", that is, exclusive control, being applied as the standard for vesting of ownership under seventeenth century and eighteenth century international law and municipal law. No property right vested over any object within the coastal sea during the seventeenth century and eighteenth century unless the object was intended to be possessed, was capable of being possessed, and was then actually possessed.

Possession was a test which applied to ownership generally during this period. Thus ownership of objects within the sea and claims of ownership of the sea itself may be evaluated by a "possession standard". The requirement

of such a standard for analysis is clear because as a matter of governmental policy during the Stuart period (1603-1688), the Crown considered that the high seas could be owned, through possession, by the activities of commercial fishing vessels and military vessels.[7] Although contrary to contemporary precepts of international law, this theory of possession of the high seas by vessels was offered by the Crown to bolster its foreign policy objectives, for example, restraint of Dutch fishing activities.

Seeking foreign policy objectives, including ownership of large portions of the high seas to secure exclusive control of fisheries, the British government sought to influence existing international law during the Stuart period. Imposition of treaty terms on losers in war, and reliance upon the works of writers in international law with a patriotic bent were tactics employed by the Crown to back its claimed ownership of the high seas. Elaborate legal arguments were offered by these British writers to substantiate the proposition that possession and ownership of the high seas was possible and had been achieved. Such ownership was equated with ownership over land territory. However, unlike the sea, ownership over land territory in the seventeenth century was comprised of control over,

administration of, and usually settlement in the territory concerned.

It is clear that regardless of Stuart pretensions, at no point did the claimed high seas meet these criteria for ownership so as to be considered appurtenant to national territory as a matter of municipal law or international law. The attempt was made by Charles I to claim ownership over the high seas based on the Stuart claims of exclusive fishing rights.[8] That effort failed as a matter of international law because it was impossible to possess the high seas and thus there could be no ownership of the high seas. If sovereignty had been established it would have contained a full panoply of rights, including full rights of jurisdiction and control over, along with a valid title to the sea. However, at most, the Crown was able to exercise only limited protective jurisdiction on the high seas by government vessels. All instances of the exercise of such protective jurisdiction show it to be limited to the preservation of property rights, or for defense and national security. Certainly no sovereignty was actually established over the high seas, nor was ownership of those seas ever accepted as a matter of international law, although there is some indication that Selden and Hale writing in the Stuart period thought that certain areas of the sea came to be owned by the Crown

because those areas had been claimed, occupied and thus possessed.

Constant assertion of British claims to ownership in portions of the high seas during the seventeenth century pressed international law to refine the concept of possession in ocean areas. Eventually application of various national rights in the coastal sea were acknowledged to be legally undertaken, but only through limited qualified possession of the sea near the shore. As a result, prompted by British understanding of the need to extend protective jurisdiction over coastal waters, during the eighteenth century international law came to recognize that the exercise of protective jurisdiction was a governmental right to the extent it could be exerted effectively from shore. But not until the nineteenth century did the concept of territorial sea, a sea appurtenant to the adjacent territory of a sovereign and subject to the same full sovereign rights as territory, begin to be accepted in international law.

CHAPTER I

Crown, Public, And Private Property Rights Arising Within The Coastal Sea Under Municipal Law

Seventeenth and eighteenth century municipal law is examined in this section to isolate the domestic standard for possession governing ownership of res within the coastal sea. Possession is a useful analytical tool to determine an object's physical capability of being owned. When possession is applied as a test of ownership, it eliminates theories of property rights to the sea based on seventeenth century Stuart claims to ownership of the sea without actual possession thereof. That elimination results because the sea could not be possessed and therefore owned by subjects as a matter of municipal law or the nation as a matter of international law. Thus municipal law never recognized possession of the sea as within the capacity of a subject, and correspondingly international law prevented perfection of the Stuart ownership claim as an act of the nation. The sea could not be possessed because it was physically incapable of possession due to the absence of bounds and the fluid and uncontrollable nature of its

component waters. Moreover this examination of prerogative property rights and governmental rights is important because colonial charters purported to convey various prerogative property rights and governmental rights. Whether such conveyance included ownership of the sea adjacent to the colonies can only be determined by understanding the rights accruing to the Crown through its prerogative and those which could have been granted to the colonies as a matter of municipal law.

A. Prerogative Right of the Crown

Prerogative right was a term of art which, applied in the seventeenth century and eighteenth century, was used to describe the special rights and capacities which the Crown as sovereign alone enjoyed.[9] While no one other than the Crown could enjoy prerogative right, the Crown did grant franchises under that right.[10] Franchises vested a present legal right in the grantee which enabled him to receive the benefits of royalties which were the various proprietary rights held by the Crown under prerogative right to property. Some of these franchises included rights to title over ownerless property, both personal property and real property. For example, waste land, the foreshore, and lands taken by escheat or forfeiture all

came to the Crown as ownerless property under the prerogative right to such property and were royalties which could be granted to subjects by franchise.[11] Among objects of personal property coming to the Crown through the prerogative right to property were salmon, swans, estrays, waifs, escheats, wreck, fines, amercements, and deodands.[12] These also could be granted to a subject by franchise. Moreover, not only ownerless property was within the Crown prerogative right and capable of being granted, but also granted were various commissions of employment such as judgeships in the admiralty courts and even the office of king's printer. These commissions of employment were issued pursuant to governmental power under the prerogative right.[13]

The Crown could not divest itself of prerogative right and therefore the prerogative right itself could not be granted to a subject or lesser domestic government. Also property of the Crown could not be granted in derogation of the jus publicum and thereby destroy the paramount territorial title of the state. Thus part of the realm could not be granted away by the Crown acting under prerogative right. As with property, so also many national governmental rights of the Crown could not be divested in derogation of the jus publicum. For example, the governmental power could not be absolutely granted.

It could only be granted so that when exercised such exercise was subject to national authority thus enabling prevention of an exercise of governmental power in derogation of the law or the constitution. Thus as early as the year 1340 an opinion of the justices was issued which set out that the Crown could not itself be delegated, nor could parts of the kingdom, the crown jewels, power to pardon treason or felony within the realm, power to create judges, justices of the peace, sheriffs, nor any other thing pertaining to government in any essential way.[14] Therefore lands and governmental powers held by prerogative right could not be granted by franchise so as to lessen the realm or lessen the governmental power of the nation or sovereign. A general rule governing Crown grants under franchises was that nothing held in trust for the nation by prerogative right and protected by the jus publicum, could be derogated by grant of the Crown under the jus privatum, that is, by franchises.[15]

The prerogative governmental right of the Crown gave rise to certain other rights. These other rights were rights of purveyance which superseded even vested private property rights, if reasonable compensation was paid for property taken. Thus, for royal pleasure but justified as done for the public benefit, woods could be afforested,

which did not affect the underlying fee in the land, wines and food taken for the king's table, and timber taken for the king's castles.[16] Execution of prerogative governmental purveyances such as these of necessity required delegation, but the purveyance right itself which allowed such takings and the goods taken under that right could not be delegated to a subject.

One prerogative governmental right is of interest for analysis according to the possession standard because it was often conveyed in colonial charters. That right is the right to royal mines. This was an absolute right to the very unextracted gold and silver in the earth within the realm. According to the prerogative governmental right, only the Crown had the status or capacity to possess royal mines within the realm. The important aspect is that gold and silver of royal mines was exclusively and totally controlled by the Crown through location in the national territory. Because royal mines in the North American colonies were not within the nation they were probably held by prerogative right to property, and thus not limited by the jus publicum which gave rise to the prerogative right to such mines within the realm. Therefore such mines could be conveyed as franchises to a colony as a governmental right of that colony without damage to the jus publicum

right of the nation to royal mines within the nation.[17] This right to royal mines within the nation has been poorly analogized to the Crown right to treasure trove. Actually treasure trove was ownerless property and came to the Crown under prerogative right to ownerless property. The right to royal mines within the realm came to the Crown under prerogative governmental right ancillary to the governmental power to coin money.[18]

While gold and silver could be possessed by the national sovereign as a prerogative right because such minerals were located within the nation, objects in the coastal sea could not be so constructively possessed. The coastal sea itself was not within the nation and thus it could not be possessed as gold and silver mines were possessed by simply being within a territorial boundary. However, though the coastal sea was not within the nation, the Crown claimed possession of the sea as a matter of municipal law under prerogative right. But that prerogative right to the sea as a matter of municipal law was merely a tool or legal fiction for allocation of property rights in emerged lands, as is shown by the decisions of municipal courts, and did not create any claim to the sea as a matter of international law.[19]

Certainly natural resources of the sea and other objects in the sea were subject to possession under

prerogative property right once they were extracted or appropriated, but no Crown property right has been shown in the decisions of municipal courts to actually have existed in the sea or seabed itself as a matter of municipal law or international law. At best, the Crown held prerogative property right to actually possessed objects and extracted resources of the sea such as flotsam, jetsam, ligan, royal fish, wreck, oysters and coral.[20] The abstract prerogative property right allowed the granting of present franchises to such royalties creating a legal right, but no property right or ownership vested in the franchise holder over the objects until objects or resources were possessed or extracted.[21]

By applying the standard of possession to each incident of governmental right or property right under the Crown prerogative right it has been demonstrated that the Crown's grant of franchise conveyed only a right to the benefits of the prerogative right. It was the grantee's legal right under the franchise which became the contested point in litigation of the period, and it is in such litigation that the common law gave its attention to benefits which accrued under the prerogative right. At that point some <u>res</u> was possessed and any generalization in the court's decision about abstract Crown ownership of

the sea under prerogative right merely served as make-weight argument.[22]

In one sense the sea was in fact possessed by prerogative right. That sense was possession for a limited governmental exercise of jurisdiction with a protective nature. The exercise of such "protective jurisdiction" was for preservation of national order, safety, peace and good government.[23] Unlike the seventeenth century, the exercise of protective jurisdiction in the eighteenth century became identified with a narrow belt of coastal waters as opposed to the earlier exercise over wide areas of high seas. By the eighteenth century such limited possession of the coastal sea for the exercise of protective jurisdiction, rather than the complete possession required for ownership, was in accord with the recognized precepts of contemporary international law. In fact municipal law placed defense of the realm under governmental prerogative right as a Crown responsibility, and thus such defense became a strong domestic basis for the exercise of protective jurisdiction.[24]

B. Municipal Law, Real Property and Personal Property Rights Arising Within the Coastal Sea

1. Common law real property rights within the coastal

sea. -- Common law often recited Crown ownership of the sea and seabed under the prerogative right to waste in cases dealing with property rights to the foreshore or derelict lands. At common law when possession of a res was a mere possibility no one was able to have actual possession of the res and thus could not own the res. In the case of real property this test for actual possession was referred to as seisin. As a result of the inability to actually possess no one could have seisin at common law over the sea and seabed.[25] Apparently avoiding the requirement of seisin at common law, the Crown was alleged to hold the sea and seabed by prerogative right, which was not part of the common law though acknowledged by it.[26]

No litigation ever evaluated such prerogative ownership according to the possession standard in order to determine whether the Crown was actually seised of the sea and seabed. That is, no litigation ever determined as a contested issue whether there was exclusive control and thus possession of the sea and seabed by the Crown. Since at common law no property right could be held of an object which could not be possessed, no one could hold a property right to the sea and seabed, and thus no one had a property right which could have been asserted against the Crown prerogative right. For that reason, litigation never tested Crown ownership of the sea and seabed under municipal law.[27]

Real property rights in the coastal sea which were litigated and could be evaluated by the possession standard involved the foreshore, derelict lands and newly emerged islands.[28] The foreshore was that area of shore inundated by tides but considered capable of being possessed at common law and therefore a proper object of grant. Large marsh areas used as salt pans for the evaporation of sea water provide an example of the foreshore capable of being possessed and made the object of Crown grant through a franchise.[29]

Derelict lands were areas composed of formerly submerged soil along the coast where suddenly the sea retreated and left the submerged soil dry. Derelict lands were a proper subject of grant because they could be identified and possessed. They were often granted, and even special commissions were issued to encourage the discovery of such areas. Similarly, submerged soil which came to form a new island, once emerged, was also capable of present possession at common law and thus could be the proper subject of grant.[30]

Frequently litigation over property rights in the foreshore or derelict lands occurred when occasionally soil on the shore was subjected to erosion by the sea, or submerged soil was cast upon the shore, or the sea receded exposing as waste land areas that had been formerly

submerged. Ownership in soil emerging or submerging depended on whether the process was one of accretion, reliction or avulsion. The slow addition of submerged soil to the adjoining estate on the shore was termed accretion and the reversed process of slow erosion was termed reliction. When removal of soil from one estate to another was by accretion or reliction, an imperceptible process over time, a prior owner not immediately recognizing his loss of possession was not permitted to later assert his claim against the new possessor. Avulsion was the sudden change of submerged soil to dry soil, or of dry soil to submerged soil.[31] When soil was subject to avulsive change, it was sometimes possible to continue to identify it as a particular area although submerged. Therefore the owner could still demarcate such area and common law recognized continued possession by the original owner.[32]

Common law as a legal fiction ascribed ownership of submerged soil in the coastal sea to the Crown, and in the case of soil adjacent to the shore such ownership could probably withstand the test of actual possession. However, the only actual evidence of the granting of submerged soil near the shore in the open sea was for erection of fishing weirs.[33]

When submerged soil of the coastal sea became dry through avulsion the property of the soil remained in the

king through the legal fiction, deferred to by common law though never tested, that the Crown held and possessed the sea and seabed by the prerogative. This result is consistent with the upland owner's demarcation of his estate once submerged and thus continuing in possession and ownership. It is also a result consonant with common law recognition that the Crown could actually possess the seabed in shallow water close to shore. Therefore property right to the newly emerged soil did not pass to the adjacent littoral owner as it would have if the change was the result of accretion. Rather the derelict land was ascribed to the Crown under prerogative right.[34]

Aside from the area of seabed adjacent to the shore, which could be possessed sufficiently to grant limited property rights in the submerged soil, common law deferred to the legal fiction ascribing general ownership of the sea and seabed to the Crown. The affect of that legal fiction, as has been shown, was to give the Crown a primary right of possession over derelict land and newly emerged islands, thereby preempting the opportunity of others to establish opposing possession of such real property before it was discovered and claimed by the Crown. The fiction served its function and ownership of derelict lands was fixed in the Crown pursuant to prerogative right because litigation never tested the possession of the Crown in the

coastal sea.

Application of the possession standard shows that the common law required present possession, that is, seisin, before a grantee could legally hold a property right to real property along the coast. Almost exclusively the real property rights forming the subject of litigation during the seventeenth century and eighteenth century involved dry land which was occupied and possessed or capable of being occupied and possessed by a subject. Apparently submerged soil of the coastal sea could not be possessed at common law unless it was in shallow water close to shore, and then only to the extent that it could be demarcated. The alleged Crown prerogative right to the sea and seabed as waste was not a matter created by or tested by common law. That right served only as a fiction to allocate other ownership rights among subjects whom actually possessed real property. As a matter of municipal law it cannot be shown that the Crown actually possessed and owned the high seas around the British Isles during the seventeenth century and eighteenth century.

2. Municipal law personal property rights within the coastal sea. -- Municipal, that is, common law and admiralty law as well as other bodies of municipal law applicable to citizens and their rights on the sea, recognized personal

property rights of grantees to objects and resources within the coastal sea.[35] Such rights were dependent upon underlying Crown grants of franchise, or upon prescriptive rights which presumed a grant, because all objects within the coastal sea as a matter of municipal law belonged to the Crown as ownerless property under prerogative property right applied through protective jurisdiction. Aside from objects in the sea, all resources, such as minerals, belonged to the Crown under the prerogative property right.[36] Present legal right to such objects and resources could be granted to subjects by franchise. Municipal law would protect the legal right of the grantee in the grant and in the property right to the objects once secured pursuant to the grant. But prior to possession of the object or extraction of the resource, a grantee held only a legal interest to have a property right to the object once it was possessed or extracted.[37]

Among the property rights developed in coastal waters as a matter of municipal law, pursuant to the underlying Crown prerogative right to property were fisheries, oyster beds, mussel beds, sand and gravel deposits, seaweed, flotsam, jetsam, ligan, wreck and royal fish.[38] Each of these items of property were "royalties" under Crown prerogative right which were granted as

franchises, and in some cases by lease. Such grants are best defined as licenses to possess objects and extract natural resources described in the grant. Thus, a grant to a fishery was not a grant of property right over fish but rather to the legal right to carry on an exclusive fishery, that is, the activity of fishing with the right to possess and own whatever fish were caught. Likewise, oyster beds were made the object of lease for the removal of oysters, and as well the benefits of Crown prerogative right to flotsam, jetsam, ligan, wreck and royal fish were often granted by franchise. These franchises allowed the grantee to hold the legal right to subsequently possess and own a particular object on the basis of the present legal right created by the grant. However, right to particular objects which were not natural resources, such as flotsam, jetsam, ligan and wreck, were subject to any prior ownership because the right to these items was based on their status as ownerless goods. Thus if a prior ownership were asserted within a year and a day from the taking of possession such prior ownership would prevent the vesting of the franchise grantee's ownership.[39] Because the Crown did not hold prerogative right over all objects and resources in the sea the Crown was able to allocate property rights only to those objects or resources which had been appropriated or extracted. This allocation

of property rights to objects and resources in the sea and seabed demonstrates that the Crown did not have a general property right to the sea and seabed, although as a matter of municipal law it could allocate legal rights to a particular res before it was possessed based on jurisdiction over citizens and subsequent to possession protect the vested property right under municipal law.

Natural resources present the best example of Crown prerogative right used as a means for allocating future grantee property rights in the coastal sea. The Crown was able to grant presently vested legal rights to resources when no possession of the resources was possible until some future technological feasibility allowed extraction and then possession.[40] Undersea coal as one such resource claimed by Crown prerogative right, but technologically incapable of extraction and possession, except in small quantities, until the late eighteenth century.

Although a matter of the law of Scotland, one example of the grant of a franchise where the resource could not be extracted until much later in time, and the sustaining of the franchise as a vested legal right, occurred with litigation concerning the baronial charter to the Estate of Grange, which was granted in 1643. Under that charter, a grant was made of the specific legal right to remove coal from the manor and adjacent seabed within and without

the tidal flow, that is from the foreshore as well as below low-water mark and such grant was made before it was technologically possible to extract such coal.[41] There is no record of coal being removed at Grange prior to the nineteenth century when litigation over the content of the baronial charter determined that the grant of undersea coal pursuant to the charter was a valid and proper conveyance.[42] The conveyance was proper and remained in the grantee because the right to carry on the activity of extracting coal had been conveyed and vested in subsequent grantees. The Estate of Grange is more than ample evidence that municipal law viewed such grants as validly vesting legal rights and applied no theory of lapse where the rights were consistently maintained and conveyed to subsequent owners. In fact, undersea coal at Grange was mined in 1860 on the basis of the 1643 grant, regardless of the nonoccurrence of actual mining in the interim.

The seabed to which this right extended was an arm of the sea, the Firth of Forth, and as an arm of the sea the seabed thereof was regarded as inter regalia, that is, property of the Crown within the prerogative right.[43] Most likely the Crown could have granted such legal right as a franchise to extract coal from the seabed even outside the realm, as a matter of prerogative governmental right to

order the activities of citizens. There are two cases of undersea coal being mined prior to the nineteenth century which evidence that even the extraction and possession of undersea minerals was not a matter of fantasy, although certainly beyond the knowledge and means of most people at the time. Prior to 1625 the extraction of seabed coal was carried on through an undersea mine which extended a mile from shore at the Estate of Culross, also in Scotland. This mine could be entered by land as well as through an artificial island. The Culross mine ran out to a depth of five fathoms of water and forty fathoms of seabed, with drainage achieved by a horse-drawn chain carrying thirty-six buckets emptying a central well in the mine. Certainly Culross evidences a limited ability to mine undersea coal, but apparently it was unique in the seventeenth century.[44]

In the eighteenth century, 1715, Thomas Newcomen rented his recently invented steam pump to James Lowther to be installed at a mine in Whitehaven, England. This pump was used to drain the Saltdom mine shaft, which was sunk above high-water mark in 1729 and by 1731 was at a depth of 456 feet extending seaward and extracting coal from beneath the Solway Firth. But, like the mine at Culross, the Saltdom shaft was apparently unique during its period of operation.[45]

Both Culross and Saltdom witness a limited ability to extract undersea minerals and coal from the seabed during the seventeenth and eighteenth centuries. It is not by terms of the grants but probably only by chance that both mines were under an arm of the sea and not under the open sea. Thus these mines were within the bodies of counties. Common law recognized that the bottom soil and minerals of arms of the sea within the bodies of counties were possessed and owned by the Crown under prerogative right.[46] This Crown ownership of the bottom soil and minerals of arms of the sea is substantiated by the national possession of such areas through their location within the nation and thereby subject to control by the nation; much the same as the Crown ownership of gold and silver in the territory of the realm discussed earlier. But even in the mining of coal within an arm of the sea, the subject grantee's only legal rights were the grant or franchise to mine the resources and the property right to resources actually removed. The subject grantee was incapable of possessing the resources before extraction.

While it is coincidental that the coal at Culross and Saltdom ran under an arm of the sea, be it the Firth of Forth or the Solway Firth, the Crown grant for these mines did not limit the right to extract resources by the bounds of counties. Thus the right was not restricted within the national boundaries. Arguably, if these mines had been

beneath the open coast, it is most likely that the same grant would have been made. However, if such mines ran under the coastal sea the Crown would not thereby possess the sea or seabed. The most that could be possessed of the seabed and its resources by an undersea mine would have been the general area within which the shaft penetrated the seabed and mining activity was carried on.

Moreover, a Crown grant of such unextracted seabed coal would have actually been only a license allocating property rights among subjects, which license allowed one subject to carry on coal mining in a particular place and prevented others from conducting that same activity in the same place. Extraction of resources under claims of prerogative property right evidences no vested property right in the sea and seabed as a matter of municipal or international law. Rather such extraction demonstrates a limited capacity to possess, sufficient only to allocate rights through the exercise of protective jurisdiction by the sovereign over activities of its subjects, even though ordering their individual rights and activities external to the nation.

Therefore for ownership of objects or resources the possession required was such that the object or the resource be appropriated or extracted and exclusively controlled before any property right of the grantee would vest over the <u>res</u>. The fiction of an underlying Crown prerogative

right to property of unextracted resources and objects in the coastal sea beyond the bodies of counties is the same fiction as that which claimed Crown possession of the sea and seabed as prerogative right. As a matter of municipal law sufficient possession and control has not been shown to support claims of ownership of the bed or water of the coastal sea. In short what the Crown did hold over the coastal sea and seabed was not a property right but a governmental right. That governmental right gave the Crown the primary or paramount authority to grant and allocate legal rights and property rights to appropriated objects and extracted resources possessed by subjects. This governmental right and authority should not be confused as evidence of ownership of the coastal sea and seabed. There is no evidence of the ownership rights of subjects being allocated as a matter of general jurisdiction applied over the coastal sea such that rights of foreigners would be affected, but only as a matter of limited and specific jurisdiction of a protective nature to guard certain interests of citizens.

C. Municipal Law Allocation of Public Rights in Coastal Waters

Municipal law, that is, common law and admiralty law protected public rights of fishing and navigation in all

inland navigable waters including ports, harbors, havens, arms of the sea, as well as in the coastal sea. These rights were vested in the public much the same as prerogative rights were vested in the Crown, and neither the Crown nor individuals were able to place any unreasonable restriction upon the public's full enjoyment of either fishing or navigation.[47] But neither of these public rights was based on ownership or possession of the sea or other navigable waters. The protection of such rights in the coastal sea was merely a matter of application of protective jurisdiction over the activities of citizens without regard to "ownership".

1. The public right to navigation. -- Navigation was the highest priority public right in the sea and inland navigable waters at common law. Although circumstances and usage might ultimately determine what constituted navigable waters, waters within the flux and reflux of the tide were prima facie navigable. Because a navigable waterway was considered to be in the nature of a highway, all riparian and littoral owners of real property could have their property rights subjected to public activities conducted pursuant to the navigation servitude. Thus, even when there was no public right to a towpath along riparian real property and littoral real property at common law, if such

a path were made through custom and it was essential to navigation the common law would protect the public right to the towpath.[48]

Another public activity, but one which could be established by grant as well as by custom, was the digging of ballast on the foreshore. This digging of ballast withstood the attacks of adjacent private property owners because of its connection with the public right to navigation. The reason these public activities were allowed to exist under the aegis of the navigation servitude was that the public good depended upon the unimpeded exercise of the right to navigation. Therefore, once an established public activity was connected with the right to navigation, no private property right could hinder it.[49]

Not only were individuals unable to overcome established public rights to digging of ballast or usage of a towpath, but no individual, group, or town could place restrictions on navigation by way of tolls, harbor duties or other charges unless some reasonable needed benefit to the public right to navigation would be created or maintained with the proceeds. Among the needs of navigation which were considered to form a reasonable basis for levies against vessels in navigable waters were the construction and maintenance of aids to navigation such as anchorage areas, beacons and buoys.[50]

Most problems with the navigation servitude resulting in litigation were created by impedements to navigation through fishing operations using weirs or other obstructions fixed in the submerged bottom soil or the foreshore. But no exercise of the right to fish, either public or private, was permitted to interfere with navigation. Thus encroachment from the foreshore or below low-water mark which impeded the public right to navigation could be attacked under the navigation servitude as a purpresture or nuisance and by action at common law could be ordered abated by removal.[51]

Relying on the possession standard as a tool of analysis, what appears from the above examination of navigation as a public right is that the navigation servitude enforced at common law was merely an application of protective jurisdiction for the ordering of the maritime activities of subjects. The navigation servitude was in no way connected with any ownership of even inland waters such as harbors, havens, rivers and arms of the sea, let alone with possession and ownership of the coastal sea and seabed. The jurisdiction which was exercised over activities in the coastal sea harming free exercise of the public right to navigation was protective in nature because it was maintained to establish order and peace among citizens. In fact there is no evidence that such jurisdiction was

applied on any basis other than citizenship, or personal jurisdiction over foreigners within the bodies of counties.

2. The public right to fishing. -- Generally the public right to fisheries existed in all inland navigable waters as well as in the coastal sea, but there were also several or private rights to fisheries which in some cases were appendant to the bottom soil. Appendency of the private fishery right to the property right of the bottom soil occurred in non-navigable waters where the riparian owner possessed and owned the bottom soil to the midline or thread of the stream or beyond as part of the riparian estate. The exclusive right to a fishery in non-navigable waters was said to be appendant because a grant of the riparian estate would include ownership of the non-navigable river bottom and without specific words would also grant ownership of the fishery to the riparian estate. In inland navigable waters the Crown held the possession of the bottom soil, and the public right to fisheries was neither appendant to that bottom soil, nor based upon continuing Crown ownership of it. Thus the Crown could grant the bottom soil of harbors to the harbor towns without any affect upon the public right to fisheries. In coastal seas the seabed was not actually owned, except by the uncontested fiction of prerogative right. As within inland navigable waters the public right to the fishery was maintained by

the Crown through the exercise of protective jurisdiction.[52]

If a river was navigable above the tidal flow, riparian owners in some cases could establish a prescriptive fishery right based on their adjacent real property right which included a right to exclusive quiet possession of riparian property. Prescription, however, did not lie within the tidal flow against the public right to fisheries in arms of the sea, harbors, havens and beyond the tidal flow in the coastal sea. The public right to fish in those bodies of water was in fact so strong that the public could cross private real property to exercise the right.[53] Evidently the more navigable waters approached the public nature of the coastal sea, that is, as the capacity of individuals to possess navigable waters and the fish therein diminished, the less common law was willing to allow the establishment of private property rights to the exclusion of the public right to fish. Apparently this result was arrived at because the more the waters containing a fishery approached the nature of the ocean the less the fishery was contained or controlled and consequently the weaker became any claim to possession of the fishery according to common law standards. After Magna Carta such fisheries could not be granted by the Crown without Parliament's consent within navigable waters and the coastal sea outside the boundaries of counties, that is, beyond rivers, harbors, havens and

arms of the sea.[54]

Common law had vested in the public the right to fish in navigable waters as well as in the coastal sea, and then protected that right by exercising its municipal jurisdiction. Thus disputes over fishing rights in inland navigable waters and the coastal sea were resolved under that municipal jurisdiction of common law when the public right was encroached upon by private activities. As against foreign nationals fishing on the high seas admiralty jurisdiction was exercised to enforce Stuart claims to high seas fisheries, but common law had jurisdiction to settle disputes under Crown grants to several fisheries such as monopolies to whaling granted by Elizabeth, which restricted the public fishery right in the coastal sea. That exercise of common law jurisdiction and admiralty jurisdiction constituted an exercise of protective jurisdiction by the national sovereign not a claim of ownership of the high seas.

Analysis of these fisheries rights, both public and private, suggests that private rights obtained by prescription were established over time, in waters which could be exclusively controlled by one individual or group to the exclusion of others.[55] Private individuals were not capable as a matter of municipal law of acquiring a fishery in the coastal sea by prescription because they

did not have the capacity to possess the sea and thereby establish the prescriptive right. Private fishery rights, in inland navigable waters and the coastal sea, when gained by Crown grant arose immediately and required no exclusion of others over time from the bottom soil or the matrix water. Although in inland waters the Crown possessed that water and bottom soil through the prerogative right to property, fishery rights granted in the coastal seas were not based on possession of the sea in a property sense, such as would be required for ownership at common law. Rather, beyond the shallow waters close to shore where weirs were erected, that possession was in fact an exercise of protective jurisdiction over citizens for the ordering of their activities and the allocation of property rights under municipal law.

Therefore, an exclusive fishery in the coastal sea as a matter of municipal law at best could only provide possession for ownership within the limited area where the fishery was conducted, in the fishery for the time it was conducted, and of the fish actually caught. No ownership of that sea or seabed resulted from the exercise of exclusive fishery rights as a matter of international law because the possession was transient[56] and, other than during the reign of Charles I, did not include a claim to ownership or an intent to claim ownership of the seas as

a matter of international law. Thus no general ownership of the sea, seabed, or their resources formed the basis for Crown grants of exclusive fisheries in coastal waters or the high seas.

D. Summary, Chapter I

Examination of prerogative right, municipal law real property rights and personal property rights, as well as public rights in the coastal sea has demonstrated that the Crown did not actually possess the coastal sea within the prerogative right to property. The Crown regulated activities and allocated property rights in the coastal sea through the prerogative governmental power to control activities of citizens to the extent that those activities were occurring, and limited to the place where they were occurring. Such control of citizens external to the nation was an exercise of protective jurisdiction to maintain order, safety, peace and good government.

Prerogative property right applied in the coastal sea was based on abstract theories of a general property right to waste and ownerless goods. The prerogative property right when applied to the coastal sea was useful as a legal fiction which created constructive primary or paramount interest in the Crown to <u>res</u> from the sea possessed by

appropriation or extraction. By such fiction the Crown was able to allocate ownership among citizens over extracted resources and appropriated objects in the coastal sea. No indication is given that a foreigner traversing the coastal sea, finding a floating locker, and continuing on his voyage, without entering within the territorial jurisdiction of Great Britain, would discover that he did not own the locker because of some metaphysical property right of the Crown. Thus the Crown prerogative right to property in the coastal sea applied as a legal fiction only under protective jurisdiction to those persons and res coming within the governmental jurisdiction of the Crown. Citizens, and only foreigners entering within territorial jurisdiction with res possessed by them, became subject to the exercise of protective jurisdiction through the fiction of Crown ownership of the sea under the prerogative right to property.

It is clear from the use of franchises granted under the prerogative right that jurisdiction of a protective nature was exercised by the Crown over citizens so as to allocate their property rights to extracted resources and objects taken from the coastal sea. Such ordering was the act of a sovereign, not with a view to possession of the coastal sea, but to provide for the order, safety, peace and good government of the nation. None of the interests

in the coastal sea, including public rights to navigation and fisheries, as well as the extraction of resources and appropriation of objects, suffices alone or cumulatively to show sufficient Crown possession of the coastal sea for national ownership. The reason is that during the seventeenth century and eighteenth century none of these activities showed exclusive control of the sea and seabed coupled with the intent to claim ownership of the sea. At best the ownership right which is shown was restricted to infrequent localized activities, and even those activities were not carried on in order to gain possession of the coastal sea but with a view to the possession of particular identified resources and objects.

CHAPTER II

Great Britain Exercised Protective Jurisdiction External To The Nation

Great Britain exercised limited jurisdiction of a protective nature over the sea external to the nation during both the seventeenth century and eighteenth century. This limited jurisdiction was an extension of national power for defense and regulation of activities on the high seas which tended to affect the well-being of the nation. Such jurisdiction in fact constituted protective jurisdiction, but for political purposes was often described by contemporaries -- for example John Selden[57] -- as a claim of sovereignty over the sea. Perhaps because the initial seventeenth century attempt at distant application and exercise of protective jurisdiction was a national act at the direction of James I, contemporary writers thought it proper to refer to that extension as a claim of sovereignty. But, insofar as "sovereignty" brings to mind territorial rights, ownership rights or rights to exercise general jurisdiction, the word only serves to obscure the fact that the jurisdiction actually asserted was limited and protective in nature being directed toward safeguarding a national commercial interest in the North Sea herring fishery.

In the previous chapter the concept of possession was used as an analytical tool to isolate whether the sea was capable of ownership as a matter of municipal law. That analysis demonstrated that the sea was not considered capable of being owned because it could not be possessed. Now a similar analysis is made of the exercise of national jurisdiction over the coastal sea external to the nation in order to establish whether this extended jurisdiction was intended, as both a matter of municipal law and international law, to include a claim of ownership over the high seas. Through the use of protective jurisdiction as an analytical tool, the exercise of jurisdiction by the sovereign in the forms of customs, admiralty, and criminal jurisdictions, will be shown not to have been an assertion of ownership or an attempt to claim exclusive possession of or general jurisdiction over the coastal sea.

A. Protective Jurisdiction as the Basis for Exercise of Customs Jurisdiction External to the Nation

Britain as an island nation benefited greatly from maritime commerce. As a means of controlling that commerce for protection of domestic industries, customs regulations were enacted to prohibit importation of various foreign goods and exportation of various domestic goods. Customs duties were levied on the permitted importation and

exportation of other goods. The evasion of such customs regulations and customs duties became a serious problem during the seventeenth century and eighteenth century as a result of rather extensive smuggling operations. In order to protect the integrity of municipal customs laws during the seventeenth century, vessels were ordered to cruise the coast to discover smugglers.[58] By the eighteenth century the effort to control smuggling became more sophisticated and enforcement of customs laws was applied for delimited distances into the coastal sea pursuant to Parliamentary enactment of "hovering acts".

Hovering acts, a peculiar type of customs statutes, were first enacted in 1719.[59] Under provisions of these hovering acts certain defined activities carried on in the coastal sea within a certain distance of shore, usually two to four leagues, were considered violations of the customs laws. For example, the act of breaking bulk within two leagues of the shore, or the breaking of bulk and transfer of goods from one vessel to another within four leagues of the shore were prohibited actions.[60] The basis of this prohibition was that such acts usually occurred only as part of a smuggling operation. Likewise, vessels holding customable goods not marked by customs officers, found at anchor or hovering, that is, cruising off the coast without proceeding on their voyage, would be subject

to seizure and condemnation of both the goods comprising the cargo and the vessel.[61] Not only were the goods and vessels subject to seizure, but a heavy fine was to be assessed against the vessel's captain for his part in the smuggling operation.[62]

The Exchequer Court dealt with application of municipal law to customs violations, whether those violations were in port or within the defined statutory distances into the coastal sea. When violations occurred outside the boundaries of counties, the Exchequer Court jurisdiction was applied prior to the jurisdiction of the Admiralty Court. Thus primary customs jurisdiction in the Exchequer Court eliminated any secondary jurisdiction in the Admiralty Court. For example, if customable goods were taken to sea without payment of the duty, the customs statutes were violated and ownership of the goods was forfeited so that they took on the nature of flotsam and came within admiralty jurisdiction. But when duty had not been paid on customable goods, the Exchequer Court jurisdiction was primary and existed over the goods from the commencement of the voyage thereby excluding any secondary jurisdiction in the Admiralty Court.[63] Therefore the Exchequer Court held exclusive jurisdiction over violations of the customs laws, which controlled the flow of goods into and out from the nation, regardless of where

they occurred. Such jurisdiction was not connected with any ownership of the coastal seas because only goods destined to enter the nation legally or illegally, and not goods simply carried in innocent passage through coastal waters, came within the jurisdiction of the customs laws. Only those vessels involved in the proscribed activities of hovering, breaking bulk, or transferring goods within four leagues of the shore, or in other actions directed against the national customs laws, came within municipal law customs jurisdiction.[64]

Application of the provisions of hovering acts for two to four leagues into the coastal sea was an extension of municipal law external to the nation on the basis of jurisdiction designed to guard the integrity of municipal law. Such protective jurisdiction was asserted by the sovereign because the coastal waters were an area wherein the municipal law would be evaded and subsequently violated by the illegal entry into or exit from the nation of proscribed goods as well as acceptable goods. These customs statutes presented the first instance when Great Britain defined and delimited the extent of any national governmental interest within an area of coastal water seaward to a specific distance beyond low-water mark. Each instance of customs legislation was based on the governmental need to regulate activities on the coastal sea for the protection of municipal

law. Customs laws applied as an exercise of protective jurisdiction accomplished that regulation. Without the governmental need to protect the integrity of municipal law there would have been no basis for an exercise of jurisdiction upon the coastal sea which restricted high seas freedoms such as navigation, or subjected foreign nationals to municipal law upon the high seas. The application of municipal customs statutes, restricting high seas freedoms by searches and seizures, required that the restriction be limited to a particular identifiable governmental need of the littoral sovereign. Protection of the municipal laws therefore was the governmental need which allowed Great Britain to exercise the limited protective jurisdiction over activities in the coastal seas set out in the hovering acts.

Many examples of the activities resulting in prosecution for violation of the customs laws appear in the Exchequer Court Rolls. Several of these provide an insight into the need of the national sovereign to exercise protective jurisdiction on the coastal sea. One vessel was caught illegally loading wine within four leagues of the coast with the result that she was seized and both goods and vessel were forfeited.[65] A second vessel, The Endeavor, was seized because she did not disclose to customs officials an illegal cargo of proscribed goods, including muslin,

china and earthenware after reaching the first port in Great Britain.[66] The goods on board The Endeavor had been loaded at a foreign port, but at the trial the Exchequer barons applied the customs regulation of loading goods within four leagues of the coast to the voyage of The Endeavor, because approaching a British port with such goods was considered a continuing violation of the law which lasted after entering the customs zone at a distance of four leagues seaward from the coast enabling the assertion of customs jurisdiction. A third vessel, the Uffro Anna, was described in another case report as having been "hovering within a port of this kingdom". That hovering resulted in her seizure and forfeiture when she was discovered to have illegal goods on board.[67] Two other vessels were seized and forfeited; the Willing Mind was discovered at anchor within two leagues of shore with illegal goods in her hold, and the N. S. Concerio was caught in the act of smuggling rum.[68] These seizures show that the customs laws applied to the coastal sea were directed at activities designed to evade the law and had no relation to sovereignty or ownership of the coastal sea. In fact the act of illegally loading goods within four leagues of the coast was constructively applied to The Endeavor simply as a means to describe when the intent, and the act, directed at evasion of the municipal law would come within

the customs law of Great Britain applied under an exercise of protective jurisdiction.

Customs laws applied to all persons regardless of citizenship. Because customs laws were penal in nature, they appear to be a general application of municipal criminal law over the coastal sea. However, the activities to which the customs laws applied were not criminal because they occurred within any general jurisdiction enabling their classification as such. Rather the proscribed activities were within the criminal jurisdiction because they were directed at violation of municipal law within the national boundaries. No territorial interest or ownership was claimed over the coastal sea in order to support the application of customs laws as a matter of general criminal law. All that appears is that the sovereign's exercise of protective jurisdiction over customs laws violations was to control illegal smuggling activity aimed at avoidance of municipal law. Enforcement of customs laws in coastal waters was based on a strong awareness that the municipal law could be flaunted within the boundaries of counties by operations from the coastal sea using the very character of the coastal sea as a highway to the shore. Vessels using those shores for access to the nation with illegal goods were therefore properly subject to municipal law as an exercise of protective jurisdiction.

B. Protective Jurisdiction was the Basis for Exercise of Admiralty Jurisdiction

Admiralty courts dealing with criminal offenses, civil disputes, and matters of prize reflect the application of admiralty jurisdiction as an exercise of protective jurisdiction. The application of such admiralty jurisdiction was a function of the sovereign's power to exercise protective jurisdiction and apply municipal law to events occurring within the coastal sea and beyond. Admiralty protective jurisdiction was not intended to be an exercise whereby the sovereign would possess the coastal sea. As with the jurisdiction exercised for customs laws, admiralty law had no foundation in territorial or general jurisdiction and was exercised solely for the protective purpose of maintaining the public safety, order, peace and good government.[69]

Admiralty jurisdiction was historically intertwined with common law jurisdiction. In fact, a running jurisdictional dispute kept admiralty judges and common law judges at loggerheads for several centuries. The disputes arose when the exercise of admiralty jurisdiction intruded on the territorial jurisdiction of common law, which was limited to the geographical area of the nation. Among the main reasons why admiralty jurisdiction was rebuffed by the common law courts was that admiralty applied

civil law, which was a rival, although sometimes more desirable, body of law. Thus, exercise of admiralty jurisdiction tended to encroach on common law subject-matter jurisdiction on inland coastal waters within the bodies of counties, that is, within the nation. As a result common law courts took every opportunity to gain exclusive cognizance of matters arising within maritime areas under the territorial jurisdiction of the common law, such as ports, harbors, havens, arms of the sea and navigable rivers.[70]

Admiralty jurisdiction was by nature a subject-matter jurisdiction concerned with matters having a maritime "essence". That subject-matter jurisdiction of admiralty law was restricted to events occurring on the seas outside the territorial jurisdiction of the common law. But admiralty's application of subject-matter jurisdiction to events and dealings having a maritime essence, that is, directly affecting maritime matters, presents an excellent example of protective jurisdiction exercised without any element of ownership of or general jurisdiction over the sea.

1. Jurisdiction of the Instance Admiralty Court. -- The Admiralty Court when applying its instance jurisdiction took cognizance of all events, exclusive of criminal acts and prize matters, having the essential maritime nature.

Thus the Admiralty Court under instance jurisdiction, held subject-matter jurisdiction in all civil suits arising from "all Sea-faring, and in all Sea-faring Causes".[71]

The Admiralty Court was a desirable forum for plaintiffs, often more attractive than common law courts, because of the advantage of being able to prosecute a cause of action by proceeding directly against a vessel through use of a libel in rem. Such suits to a large extent involved matters which were based in contract and tort. Suits in tort usually pertained to damage to cargo, vessels, and persons while suits in contract usually pertained to seamen's wages and hypothecation bonds.

The application of admiralty jurisdiction to suits in contract and in tort must be examined in light of admiralty's jurisdictional relationship to common law. Generally, during the seventeenth century if it appeared that admiralty jurisdiction could be eliminated, the common law courts would issue a "prohibition" preventing the admiralty courts from continuing to hold jurisdiction of the suit.[72] Such interaction between the admiralty courts and the common law courts is important to this analysis because it will demonstrate that the Admiralty Court applied a subject-matter jurisdiction founded upon the exercise of protective jurisdiction rather than on general jurisdiction over the coastal sea based on its inherent appurtenance to national territory or ownership by the littoral sovereign.

Suits in contract possibly involve the most confusing assertion of admiralty subject-matter jurisdiction. Thus, such suits required that contracts not dealing with furtherance of a voyage, and therefore non-maritime in nature, be distinguished from contracts which were for the furtherance of a voyage and therefore having an essence or nature which was maritime. The test to determine whether admiralty subject-matter jurisdiction applied to a contract was to ascertain whether the purpose of the contract was for the furtherance of a voyage. Even if a contract was signed and sealed on land within the territorial jurisdiction of the common law courts, admiralty law subject-matter jurisdiction over matters for the furtherance of a voyage and having a maritime essence was so strong as to exclude common law subject-matter jurisdiction.[73]

Bottomry bonds and hypothecations are perhaps the best examples of contracts the essence of which was maritime. In a bottomry bond contract the vessel's master in effect pledged the keel of the vessel for the value of repairs and supplies required in the course of a voyage and absolutely necessary to continue the voyage. Similarly, in an hypothecation contract the master pledged the vessel for the repairs or supplies.[74] The vessel's master could give a bottomry bond or hypothecate a vessel only outside the territorial jurisdiction of the common law. Within the

territorial jurisdiction of the common law the vessel was not considered to be on a voyage, and repairs done to the vessel or supplies obtained for her therefore could not be necessary to the continuation of a voyage. Because such a contract could not be for the continuation of a voyage it failed to have the maritime nature or essence which was required for application of admiralty subject-matter jurisdiction. Further, when credit was extended to the vessel's master within the territorial jurisdiction of the common law, the common law subject-matter jurisdiction was asserted over the contract by describing it as one of personal obligation first, with security in the collateral second.[75] Admiralty subject-matter jurisdiction required a contract with a maritime essence or nature, and without that maritime essence no subject-matter jurisdiction could be raised to rebut such characterization of the contract bringing it within the subject-matter jurisdiction of the common law.

When goods were purchased for a vessel in a foreign port which were not required by necessity for the voyage, the contract was not one of hypothecation and lacked the maritime nature essential for admiralty subject-matter jurisdiction. Initially, although such contracts did not have a maritime nature, common law courts did not have jurisdiction over such foreign contracts, that is, contracts

made "beyond seas", because they were made outside the territorial jurisdiction of the common law. Later, by pleading locus of the contract as within one of the counties of the realm, common law courts were able to assert subject-matter jurisdiction over such contracts. By the eighteenth century, when common law had assumed full subject-matter jurisdiction over foreign contracts, any attempt by the admiralty courts to assert jurisdiction was met with issuance of a writ of prohibition.[76]

Charter party contracts, as well as contracts for insurance, are also examples of agreements where maritime matters were involved, but the essence of the contract was not maritime in nature. Still another example occurred when the admiralty courts required a majority group of owners to post a bond for the security of a vessel when the minority group of owners protested against sending the vessel on a hazardous voyage. This posting of bond was for the furtherance of a voyage, but the enforcement was not. Attempts made to enforce these bonds in the Admiralty Court under instance jurisdiction, usually in order to avoid a jury trial, were met by common law courts jealous of their jurisdiction. Therefore, prohibitions were issued against attempts by the admiralty courts to enforce these bonds. Common law courts obtained jurisdiction to enforce such bonds by denying admiralty

subject-matter jurisdiction, and asserting common law subject-matter jurisdiction thereby allowing an action on the case if the vessel was lost. Admiralty subject-matter jurisdiction was not applicable to enforcement of these contracts because enforcement was not essential to the furtherance of a voyage.[77]

Suits by seamen for wages present an example where the admiralty courts and the common law courts held concurrent jurisdiction. Seamen were obviously essential to furtherance of any voyage, indeed their wages were earned by furthering the voyage. So on the one hand admiralty law allowed seamen a remedy for wages owed, in rem against the vessel on which they sailed. That remedy was allowed because of the maritime nature of their work. And on the other hand common law allowed the seamen a remedy by subjecting the vessel owner to liability in personam on the basis of the employment contract. Common law courts could thus describe the seamen's employment contract as within common law subject-matter jurisdiction. By so doing a common law court could then issue a writ of prohibition against any attempt by the Admiralty Court to assert jurisdiction over such contract. The justification for issuance of a writ of prohibition was that the attempted assertion of admiralty jurisdiction was in derogation of substantive contract rights under common law. However,

most times common law courts did not issue prohibitions because it was perceived that admiralty courts were beneficial to seamen. One benefit was that admiralty law allowed seamen to proceed directly against a vessel, thereby eliminating the need to find an elusive owner. Another benefit was that the admiralty courts allowed class suits which enabled the crew to sue for wages at a time when most sailors could not have afforded to bring suit individually.[78]

By the eighteenth century the jurisdictional dispute between the admiralty courts and the common law courts quieted. The common law courts then interfered with application of admiralty law only when the action of the admiralty court appeared to infringe upon common law subject-matter jurisdiction and thus affect rights created and protected by substantive common law. Therefore a prohibition would be issued against the admiralty courts when they entertained suits for seamen's wages which were under seal or which deviated from accepted maritime standards by inclusion of special agreements which involved substantive common law rights.[79]

This analysis reveals that only contracts which contained the essential maritime nature came within the exclusive subject-matter of admiralty instance jurisdiction. The place where the contract was negotiated, signed, or

performed had a bearing on whether the contract would be allocated to either admiralty or common law subject-matter jurisdiction only insofar as it affected the nature of the contract. Once the maritime essence or nature of the contract was identified, the admiralty subject-matter jurisdiction applied and was not affected by the location of the parties to the contract within the territorial jurisdiction of common law. For example, if a vessel were hypothecated on the high seas or in a foreign port out of necessity of the voyage, the vessel could be libeled in rem when later found within the boundaries of a county regardless of common law territorial jurisdiction.[80] The negotiation, signature, and performance all tended to establish a maritime nature in the contract but hypothecation due to the necessity of the voyage gave the contract the maritime essence which allowed the admiratly court to hold continuing jurisdiction.

Matters of contract which were not initially within the subject-matter of the Admiralty Court's instance jurisdiction, such as a crewman's or a shipwright's claim for the value of work done within the boundaries of counties, remained within the subject-matter jurisdiction of common law.[81] At one time even contracts without a maritime essence entered into "beyond seas" were within the jurisdiction of the admiralty court because the contract had a foreign locus

and was therefore not within common law territorial jurisdiction. Later the use of fictional pleading brought such contracts within territorial jurisdiction of the common law courts so that they could be allocated to common law subject-matter jurisdiction.[82] Clearly this allocation points to the fact that the only territorial jurisdiction involved was that of the common law. It appears therefore, that as to matters arising in contract the instance jurisdiction applied on the basis of personal jurisdiction over the parties or their property which thereby enabled the court to proceed on the libel and grant the appropriate relief. There was no general jurisdiction or claim of ownership over the high seas which sustained application of admiralty jurisdiction.

When this analysis of jurisdiction is applied to suits in tort the same result is reached, and admiralty jurisdiction clearly appears to be a subject-matter jurisdiction which was not dependent on any general jurisdiction over or ownership of the sea. Torts having a maritime nature or essence were within the subject-matter of admiralty instance jurisdiction. Torts differed from contracts only in that the territorial jurisdiction of common law immediately determined which torts would be considered to be of a maritime nature. For example, a tort situation such as collision between two vessels on a

navigable river was not considered to be within admiralty subject-matter jurisdiction because a river was infra corpus commitatis, that is, within projecting headlands and thus within the body of a county. For admiralty subject-matter jurisdiction to apply the vessel must have reached the high seas before it would be considered to have begun its voyage and the seaward boundaries of counties separated the high seas from inland waters. Thus it was only when the event of the collision occurred on the high seas beyond the territorial jurisdiction of the common law, outside the body of a county, that a collision would have the maritime nature necessary to come within the subject-matter of admiralty instance jurisdiction.[83]

Usually torts involving damages to persons, cargo or vessels caused in the course of a voyage on the high seas came within the admiralty subject-matter jurisdiction. Tortious damage to persons, cargo or vessels while not on the high seas in the course of a voyage came under common law subject-matter jurisdiction, solely because the tort occurred within the common law territorial jurisdiction. Personal injury and other torts not resulting from navigation of the vessel but occurring on the high seas, were treated the same way as charter party contracts, that is, as being connected with maritime matters by happenstance and therefore not within the subject-matter of admiralty

instance jurisdiction. For example, assault and battery on the high seas came under common law subject-matter jurisdiction. The exercise of common law subject-matter jurisdiction over such a case was achieved by a fictional description of the locus of the incident as within a county thereby giving the common law courts a basis on which to assert territorial jurisdiction on the face of the pleading.[84]

Analysis of matters in tort reveals continuing jurisdiction of the Admiralty Court when a tort with a maritime essence occurred outside the territorial jurisdiction of the common law, and the parties or vessel subsequently entered within that territorial jurisdiction. Thus a vessel becoming derelict on the high seas was within admiralty subject-matter jurisdiction for the damages it might cause while adrift. Such a vessel remained within admiralty jurisdiction after causing damage even if it drifted within common law territorial jurisdiction. In contrast, if a vessel became derelict in a port, or otherwise within the body of a county, the common law had subject-matter and territorial jurisdiction. So a vessel at anchor infra corpus commitatis was not within the subject-matter of admiralty instance jurisdiction for damage caused after becoming derelict and drifting into other vessels. For torts occurring outside the boundaries of counties having a

maritime essence or nature an arrest could be made of the vessel through a libel in rem. For torts caused within territorial jurisdiction of common law the obligation was personal and against the vessel owner, although the vessel could also be seized and attached for the value of the damage.[85]

What this analysis demonstrates, about the interaction between admiralty and common law subject-matter jurisdictions over torts and contracts, is that the territorial jurisdiction of the common law was often the determining factor as to which subject-matter jurisdiction governed. The common law territorial jurisdiction in effect became the test for "maritimeness" when the event or contract did not occur on the high seas with some essential connection to the conduct of a voyage. Further, while the subject-matter of admiralty instance jurisdiction was not limited by territory as was common law jurisdiction, concomitantly admiralty jurisdiction did not have the advantage of a territorial basis to determine what matters would come within its subject-matter jurisdiction.

Admiralty subject-matter jurisdiction applied to citizens, as well as to all those whose conduct brought them within the Admiralty Court's power to assert instance jurisdiction over them or their property. The in rem jurisdiction of the Admiralty Court required only that the

property arrested be within the power of the sovereign to exercise jurisdiction. This analysis has established that no ownership of or general jurisdiction in the sea or coastal sea was indicated by the exercise of jurisdiction in application of the instance subject-matter jurisdiction of the Admiralty Court, which jurisdiction was protective in nature.

2. Admiralty Court criminal jurisdiction. -- During the seventeenth century and eighteenth century criminal activities came within the jurisdiction of the Admiralty Court when a commission was issued to that Court under the great seal. Such commission conferred criminal jurisdiction on the court. The crimes included within that jurisdiction involved offenses committed on the high seas outside the boundaries of counties. But admiralty criminal jurisdiction was a subject-matter jurisdiction which also extended into harbors, havens, ports, arms of the sea, and navigable rivers below the first bridges. At this time the criminal jurisdiction exercised by the Admiralty Court in those maritime coastal areas, within the boundaries of counties, was limited to acts of murder and mayhem.[86]

Beyond the boundaries of counties, seventeenth century and eighteenth century admiralty subject-matter jurisdiction was exclusive over crimes having a maritime essence or nature, particularly over acts of piracy. Within the boundaries of counties admiralty criminal jurisdiction was

restricted by the same jurisdictional dispute with the common law that limited the Admiralty Court instance jurisdiction to things done upon the sea.[87] The restriction in criminal matters was achieved by slow elimination of the exclusivity of admiralty jurisdiction. Thus, in Lacy's Case a murder committed on the submerged foreshore in 1583 was within the exclusive subject-matter jurisdiction of the Admiralty Court because the common law territorial jurisdiction, at that time, had not been able to assert a superior common law subject-matter jurisdiction.[88] By the eighteenth century, common law territorial jurisdiction enabled the county coroner to investigate deaths in these areas where formerly admiralty criminal jurisdiction had been exclusive of any common law subject-matter jurisdiction. In fact, when a death occurred aboard a man-of-war anchored in Portsmouth harbor in 1738, a criminal information was issued against the vessel's captain for refusing the coroner access to investigate the incident.[89]

Common law territorial jurisdiction also allowed the common law to characterize criminal acts which constituted acts of piracy as felonies and thus assert subject-matter jurisdiction over these acts within the bodies of counties. Thus if a man died within a county, regardless of the fact that the fatal wound had been received on the high seas,

the coroner could investigate the death. The coroner's power in such a situation was founded upon the common law conception of murder, which placed the locus of the crime where the man died and not where the wound was received.[90]

In case of goods taken by pirates, the Admiralty Court held jurisdiction over such goods when initially taken by piratical act, and later when brought ashore these goods remained within admiralty criminal jurisdiction. Because piracy was a crime of a maritime nature, goods taken by pirates took on the maritime nature of the crime. As a result, the Admiralty Court had the initial jurisdiction over the goods and the common law courts could not intervene when the goods came within common law territorial jurisdiction. If, subsequent to landing, the goods were sold in a market overt the common law would assert its subject-matter jurisdiction to protect property rights created by its substantive law when such a sale occurred. When goods were taken by pirates within maritime areas of counties, such as the River Thames, common law courts would assert jurisdiction over the property and the crime through characterization of the act taking the goods as a felony. Any attempt by the Admiralty Court to assert jurisdiction over these goods would result in the issuance of a prohibition.[91]

Therefore acts which would constitute the crime of piracy if committed on the high seas when committed within

the boundaries of counties were treated as felonies or as acts of high treason.[92] When tried as felonies or as acts of high treason such criminal activities again demonstrate the common law territorial jurisdiction being used to define common law subject-matter jurisdiction and thereby reducing application of admiralty subject-matter jurisdiction. The result was that the common law, by constant pressure against exclusive admiralty criminal jurisdiction in maritime areas within the bodies of counties, was able to restrict admiralty jurisdiction over criminal subject-matter within those areas.

The common law courts applied criminal subject-matter jurisdiction within the geographical area of the nation. Common law criminal jurisdiction was a general jurisdiction based on territory and therefore applied to all persons regardless of citizenship, and regardless of the citizenship of the victim or owner of the property receiving injury from the criminal act. Therefore common law applied its criminal jurisdiction not only to citizens, but to all persons who had sufficient contact with the national territory and laws of the sovereign to allow personal jurisdiction to be asserted over them. For example, common law applied to the aliens residing within the realm, or traversing the national territory. Aside from the personal jurisdiction which could be forcibly

asserted over aliens within the national territory, such aliens were considered to be under an obligation of "local obedience" which supplied the justification for application of municipal law to them. By the theory of "local obedience" aliens coming within a nation were under the protection of the laws of that nation and could be prosecuted for violation of the law from which they benefited.[93]

Admiralty criminal jurisdiction, however, was not based on territory; and although not a general criminal jurisdiction, it applied to citizens and non-citizens. The distinction is that admiralty criminal jurisdiction was applied on the basis of protective jurisdiction exercised by the sovereign which required that some criminal act be directed against the nation, its citizens, or their property. One example of an act on the high seas against the sovereign which brought the offender within the exercise of protective admiralty jurisdiction was the failure of an alien to give the flag salute to the King's vessels in the narrow seas. Requirement of such flag salute was historically an act of protective jurisdiction enabling the King's vessels to determine the nature of the saluting vessel, although in the seventeenth century it involved claims of ownership of the sea. Thus enemies and pirates slowing to give the salute would presumably be discovered, and those fleeing the salute were presumably pirates or enemies. There is no

evidence that the flag salute was ever given as an acknowledgement of ownership, general jurisdiction, or sovereignty over the sea or coastal sea.[94]

Generally, aliens became subject to admiralty criminal jurisdiction in two instances. First, aliens could commit crimes on board a British vessel while proceeding on a voyage outside the boundaries of counties. Vessels flying the British flag were thought to be within admiralty jurisdiction through the legal fiction that vessels were extensions of the sovereign's territory outside the nation,[95] but not subject to the territorial jurisdiction of common law because they were beyond the boundaries of counties. Criminal jurisdiction applied to these vessels met the requirements of territorial jurisdiction in that it was general, effective and exclusive, but to characterize a vessel as territory was an egregious legal fiction. The jurisdiction over vessels outside the boundaries of counties was actually an exercise of protective jurisdiction by the sovereign based on citizenship of the owners and crew for the safety, order, peace, and good government of the vessel, its crew, passengers and cargo. Aliens, through their contact with the vessel, were under the authority exercised by the sovereign under the exercise of protective jurisdiction applying municipal law.

In three cases of murder on British vessels in 1709, 1799 and 1806, the sovereign exercised protective

jurisdiction under admiralty criminal jurisdiction to try the offenders for murder.[96] In all three cases both the victim and the murderer were aliens. The reason for application of municipal law by the exercise of such protective jurisdiction was that the national sovereign's interest in preserving public tranquility and security on the vessels of its citizens was violated by the criminal acts of the aliens. The contact with the British vessel provided the basis for application of the admiralty criminal jurisdiction over the offending aliens. The test for application of that admiralty criminal jurisdiction to aliens was not based on the fiction of the vessels being an extension of the sovereign's territory. Rather disruptive contact with national governmental interests of the sovereign in maintaining safety, order, peace and good government was sufficient to apply municipal law to these activities. Such application of admiralty criminal jurisdiction was especially necessary as an exercise of protective jurisdiction when damage caused by the criminal act was inflicted upon a citizen.[97]

Second, acts of piracy subjected aliens to admiralty criminal law; acts of piracy even when perpetrated by one alien on another far from the shores of Great Britain were within the admiralty subject-matter jurisdiction. The reason that all pirates were subject to the exercise of

protective jurisdiction was because they were considered to be the enemies of all nations. Piracy was an international criminal offense and the courts of all nations, as an exercise of protective jurisdiction, had criminal subject-matter jurisdiction over them. The protective jurisdiction exercised by the sovereign was exercised for the benefit of all persons, aliens as well as citizens.[98] No other sovereign would be offended by the exercise of subject-matter jurisdiction over pirates, and such jurisdiction was totally in keeping with the law of nations but unrelated to any claim of ownership over the high seas.

The international nature of the crime of piracy, and its international suppression through the exercise of protective jurisdiction by the community of nations, support the position that national exercise of jurisdiction over pirates was without any territorial basis. Thus, while under municipal law acts of piracy were within the admiralty criminal subject-matter jurisdiction, only personal jurisdiction over the offenders was required to bring the pirates to trial. After conviction for piracy, all admiralty courts holding a commission to try criminal offenders were empowered not only to execute such offenders but also to confiscate their property which was located within the area of the court's authority.[99]

Piratical acts by citizens, or aliens owing the duty

of "local obedience", were also acts of high treason. Between the conflicting jurisdiction of the Admiralty Court and the common law courts, if the act of piracy was committed by one not a citizen or not owing a duty of "local obedience" the offender could not be tried at common law for high treason. In such situation the common law had no territorial or general jurisdiction over the offense and no personal or citizenship jurisdiction over the offender. Therefore the isolated crime of piracy on the high seas did not come within the common law subject-matter jurisdiction over acts constituting high treason. In contrast, when acts of piracy were committed by a citizen, or one owing the duty of "local obedience", there first could be a trial for high treason. If the accused was acquitted, he could then be tried by the Admiralty Court for piracy because acquittal on the charge of high treason was not dispositive of the elements of the crime of piracy. However, where an offender was tried by the Admiralty Court and acquitted on the charge of piracy, he could not then be tried for high treason because the subject-matter jurisdiction had been destroyed by removal of the treasonable offense.[100] Common law did not need territorial jurisdiction to assert its subject-matter jurisdiction where citizenship was present, or where the alien owed the duty of "local obedience", because in those cases there was a continuing personal jurisdiction over the offenders. Thus the

application of common law to try an offender for high treason does not support any claim of ownership to the high seas and was simply based on citizenship jurisdiction, an accepted precept of international law.

Admiralty subject-matter jurisdiction over acts of piracy arose from the maritime nature of the criminal act. The consistent thread for admiralty subject-matter jurisdiction in criminal cases is therefore identical with that in tort and contract. Thus admiralty jurisdiction included criminal acts when the act interfered with a voyage on the high seas or otherwise outside the bodies of counties, or with some other matter arising from and dependent upon a voyage. An example is presented by the practice of seizing a vessel and holding her for ransom, or taking her captain or a crewman as hostage for ransom. Such acts as the seizure of vessels and taking of hostages for ransom were acts of piracy and triable as such. However, ransom ordinarily would not have a maritime nature but it gained such a maritime nature when the hostage entered captivity in order to ransom the ship. Therefore because of the ransom to further the voyage the hostage was accorded a remedy in admiralty law against the vessel, an action in rem, in an amount up to the value of his ransom.[101]

In the sixteenth century, common law courts forced

enactment of a statute which required the Admiralty Court to adopt common law rules when trying pirates. The reason for the statutory imposition of common law rules on the Admiralty Court was due to frequent failure of the admiralty courts to obtain convictions of pirates under civil law procedures. Those procedures required a confession, or the testimony of two witnesses for conviction. Needless to say, pirates seldom gave voluntary confessions and witnesses were difficult to find after a piratical attack.[102] Nevertheless, the subject-matter jurisdiction of the Admiralty Court was not affected by imposition of such common law rules, and that jurisdiction continued to be applied as an exercise of protective jurisdiction.

In the eighteenth century a statute was enacted which eliminated the need to return pirates to Great Britain for trial. Commissions were then issued to vice-admiralty courts in the colonies. As a result trials of pirates pursuant to the commissions were moved from Great Britain to any of the colonial vice-admiralty courts. Beyond the nation the common law rules did not apply to admiralty criminal proceedings and the trials were held according to the traditional civil law procedure.[103] It is clear therefore that the statutes which constricted admiralty jurisdiction, or directed the procedural rules to be

applied in certain instances, had no affect upon the application of admiralty subject-matter jurisdiction as an exercise under the national protective jurisdiction. Moreover, the purpose of extending commissions to colonial vice-admiralty courts was not to restrict the application of admiralty subject-matter jurisdiction, but rather to facilitate the trial of pirates by eliminating the long journey back to Britain. Trial of pirates in the colonies, as well as in the nation, was pursuant to an exercise of protective jurisdiction by the national sovereign to ensure safety, order, peace and good government. In fact, admiralty court jurisdiction over pirates was always a subject-matter jurisdiction, applied as an exercise of protective jurisdiction. The only territorial jurisdiction which might be involved was that of common law, but then the act of piracy was tried as a felony when committed within the nation or capable of being construed as an act of high treason as was described earlier.

Apparently at one time the Admiralty Court claimed jurisdiction over all vessels and persons within the narrow seas around England.[104] Such jurisdiction was never based on territory or ownership of the seas. The admiral's subject-matter jurisdiction was always applied on the basis of an exercise of protective jurisdiction. In the seventeenth century such protective jurisdiction was extended beyond the narrow seas by the attempts of James I

and Charles I to assert an exclusive ownership right over high seas fisheries.[105] But during the seventeenth century, even in the Stuart era, and eighteenth century it is certain that criminal jurisdiction as applied to aliens required some interference with the integrity of the sovereign's law, or on the sovereign's citizens or their property. As the attempt by Stuart kings to claim exclusive rights in the high seas fishery faded, admiralty criminal jurisdiction in the late seventeenth century, as well as in the eighteenth century, became primarily concerned with the activities of pirates. The assertion of criminal jurisdiction over pirates or over those in some way harming the sovereign, its citizens or their goods, was never abandoned with the Stuart claims of property in high seas fisheries, nor was it ever limited by territorial boundaries to any sea or distance into the sea, especially to the sea adjacent to the coast.

3. Admiralty Prize Court jurisdiction. -- The Admiralty Court held exclusive prize jurisdiction, which was a subject-matter jurisdiction over all goods and vessels taken from an enemy in time of war, or by authority of letters of marque. The only prerequisite to be met before coming under this court's subject-matter jurisdiction seemed to be that a naval force take the prize. Even when such force operated by land and seized real property, as long as the seizure was

performed by a naval force the issue of the validity of the taking was properly within the subject-matter of admiralty prize jurisdiction.[106]

Condemnation of a vessel, cargo, or other res as a prize by the Admiralty Court affixed validity to the act of taking such goods so that the taking was not open to being prosecuted as an act of piracy. When a vessel or goods were captured from the enemy the only property interest to change, at the time of taking and before the Admiralty Prize Court condemned the res, was that of the enemy. The enemy's property over the res ceased as of the time of capture. After condemnation of the res as prize, the property rights to the res vested in the captors and any conflict among the captors over moiety property interests to the res were brought in proceedings at common law. Similarly a suit by the former owners of the res for wrongfully condemning the res as prize was brought against the captors as a suit in trover at common law. An exception to common law jurisdiction over such property right disputes occurred when the condemnation proceedings included the property disputes under ancillary or appendant jurisdiction of Admiralty Court prize jurisdiction.[107]

For the most part the common law courts would try to assert jurisdiction over property disputes about prize, that is, the captured res. The common law interest in such

property disputes was that the property rights of captors were a matter of substantive common law once the prize was declared to be validly taken.[108] But in matters of prize, even the common law territorial jurisdiction, which usually served to bring matters within the common law subject-matter jurisdiction, could not characterize the taking as within that common law subject-matter jurisdiction in order to dislodge the subject-matter jurisdiction of the Admiralty Prize Court.

Goods and vessels coming within the admiralty prize jurisdiction remained within that jurisdiction even if landed and sold. The only basis for a common law court to obtain jurisdiction over the prize goods, before the prize was declared valid, was when such goods were sold by the captors in a market overt. Such a sale created a change of property interest and allowed the common law courts to assert subject-matter jurisdiction and issue writs of prohibition to the Admiralty Court. The prohibition was to prevent admiralty law from infringing the substantive common law theory which accorded vested rights of property to purchasers of goods in market overt. Thus the common law courts continued to consistently prevent the admiralty courts from acting contrary to the vested rights of citizens which were created by statutes or established by substantive principles of common law.

When possible, the common law would allow only its legal theories to establish property rights over a res.[109]

The Admiralty Court applying prize jurisdiction was a municipal court, though its subject-matter jurisdiction was distinct from that of Admiralty Court instance jurisdiction and criminal jurisdiction. Like the other admiralty jurisdiction, the jurisdiction of the Admiralty Court over matters in prize depended on the sovereign's exercise of protective jurisdiction. The body of law which the Admiralty Court applied under the exercise of that protective jurisdiction was an international prize law, similar to that which was being applied by the prize courts of other nations. As a municipal court, the Admiralty Court was subject to the sovereign's interest in enforcing municipal law. Thus, although international law was applied by the Admiralty Court in matters of prize, that application was constrained in that it could not avoid requirements of municipal law.[110] However, this constraint required only that the Admiralty Court, when dealing with prize law not act in derogation of municipal law. It was merely a requirement of protective jurisdiction so that application of essentially international law would not harm the national interest in the integrity of municipal law.

A point which tends to confuse the issue of general jurisdiction over or ownership of the coastal sea is that

no vessel could be condemned as prize which was captured in neutral waters. Neutral waters were merely areas of the coastal sea, such as the King's Chambers, where a littoral sovereign exerted protective jurisdiction to prevent hostile actions which would endanger citizens and their property.[111] By refusing to condemn vessels captured in such neutral waters as valid prize, the Admiralty Court did not recognize any ownership of, or general jurisdiction over the coastal sea area which had been declared neutral. What was recognized by such declaration of neutral waters was the international law right and obligation of a neutral littoral sovereign to protect its coastal sea from potentially harmful hostilities by vessels of other nations against its own citizens and aliens with whom the littoral sovereign was at peace.

This right and obligation to enforce neutrality under international law was superior to the interest of citizens or foreign nationals in allocating property rights to goods and vessels taken from enemies. As a consequence, the rule adopted internationally was that no property right would be vested by prize courts in the captors of vessels which were captured in neutral waters. That rule was a matter of protective jurisdiction and did not acknowledge or claim ownership of or general jurisdiction over the neutral waters.

C. Summary, Chapter II

Elizabeth I had described the admiralty jurisdiction as one of things foreign as well as maritime.[112] But that admiralty subject-matter jurisdiction was eventually limited to things maritime, and only to things foreign which could not be brought before the common law courts by alleging a fictional locus of the matter within a county. When the admiralty subject-matter jurisdiction began to encroach on the subject-matter jurisdiction of common law, admiralty courts were restricted by statute to "things done upon the sea". A further enactment removed wreck and all matters arising within the bodies of counties whether by land or water, from admiralty jurisdiction. Also, the admiral's criminal jurisdiction on navigable rivers was to extend no further than the first bridge. By these enactments the common law courts were able to limit admiralty subject-matter jurisdiction to things maritime and to characterize matters within the maritime areas of counties so as to bring them within common law, not admiralty subject-matter jurisdiction.[113]

Restriction of admiralty subject-matter jurisdiction by common law territorial jurisdiction indicates that, while admiralty jurisdiction was concerned with matters of maritime essence, the occurrence of such matters on the sea merely raised a presumption of their maritime essence.

That presumption was not based on any theory of right of general jurisdiction over or ownership of the sea. In contrast, common law subject-matter jurisdiction relied on general territorial jurisdiction in the maritime areas of counties which enabled characterization of matters occurring there as being without a maritime essence, thus negating the presumption.

The jurisdiction of the admiralty courts was therefore similar to the subject-matter jurisdiction of the Exchequer Court in customs matters. Because there was no ownership of or right of general jurisdiction over the coastal sea, the littoral national sovereign exercised only that subject-matter jurisdiction which was required because of national protective need. The basis of application of such subject-matter jurisdiction by both the Exchequer Court and the various admiralty jurisdictions has been shown by analysis to be protective in nature.

CHAPTER III

Seventeenth Century And Eighteenth Century Exercise Of Jurisdiction In The Coastal Sea From The Perspective Of International Law

This chapter applies the possession standard and protective jurisdiction analysis in an examination of seventeenth century and eighteenth century writings in international law by British experts and experts of other nations on national interests in the sea. That analysis is also applied to actual state practice concerning ownership of or general jurisdiction over the sea by examining the terms of treaties to which Great Britain was a signatory. This analysis is presented to demonstrate that as a matter of international law, ignoring the rhetoric of the Stuarts, notably Charles I, legally there was only a British claim to the right to exercise protective jurisdiction on the high seas external to the nation.

A. Works of Seventeenth Century and Eighteenth Century Jurists Describing International Law on the Possession of the Sea

John Selden published Mare Clausum in 1635 under his own signature at the behest of Charles I. Charles I

intended to use the book as support for his claim of possession over wide areas of ocean. This work and its projected use were aimed at opposing Hugo Grotius' scholarly work entitled Mare Liberum, which was written in 1609 to support Dutch contentions to the effect that the sea was incapable of possession. These two views were elaborated upon and attacked for the remainder of the seventeenth century.[114] But neither attack nor elaboration affected the basic propositions of either work, with the result that near the end of the seventeenth century the two views were merged in the concept of possession of the coastal sea for limited governmental purposes through the exercise of national jurisdiction of a protective nature from shore.

Many eminent eighteenth century experts in international law discussed the activities carried out on the high seas, such as fishing and commerce. The municipal bodies of law applied to those activities have been shown to have been applied through exercises of protective jurisdiction. Contemporary international law experts also saw municipal law being applied over activities on the coastal sea as an exercise of jurisdiction with a protective nature. For example Barbeyrac, Bynkershoek, Valin, and especially Wolff, agreed that jurisdiction exercised beyond the coastal sea would fail to create possession of the high seas. Analysis

reveals that the jurisdiction which they considered as properly exercised upon the high seas was protective in nature. These eighteenth century jurists also formulated the theory of limited possession of the coastal sea in accord with the analytical concept of protective jurisdiction. Views of both seventeenth century and eighteenth century writers are examined at this point in order to isolate what national interests international law came to recognize as acceptable when developed in the high seas and maintained through the exercise of protective jurisdiction.

1. Seventeenth century treatises. -- The first jurist to assert that the Crown held the seabed by prerogative right, as a matter of municipal law, was Thomas Digges in 1569. Digges wrote in support of the Crown's attempt to claim ownership of the foreshore around England. To bolster the proposition of Crown ownership of the foreshore Digges advanced the theory that the Crown held the seabed and the sea by prerogative right, and therefore by its intimate connection with the seabed the foreshore also came within the prerogative right.[115] Apparently the Crown did not claim ownership as a matter of international law, and allocation of property rights in the sea and seabed by prerogative right was only a matter of municipal law providing the Crown with a prior right in newly emerged

lands.

Later, in the seventeenth century, Robert Callis followed Digges' theory of foreshore ownership. Writing in 1622 Callis evolved that ownership into a prerogative property right, that is, a proprietary right to new islands and waste land, as well as a general property interest in the bed of the sea. Callis reasoned that the Crown could be seised of the sea and seabed because under municipal law only a view of part of the real property was required to pass ownership. This partial view of the real property was sufficient to pass even submerged lands when the superjacent water could be viewed. Thus, there was no need to view the seabed when the sea was viewed with the intent to take possession of both the sea and the seabed. However, there is no indication that Callis understood the sea to be owned by the Crown as a matter of international law.[116]

For Callis, the prerogative property right over the sea formed the basis for the ancient prerogative right to wreck, royal fish, flotsam, jetsam, and ligan. These lesser proprietary interests arising under prerogative right were maintained by the exercise of jurisdiction by the sovereign which enabled the admiral to exercise jurisdiction over objects found in the sea. Because the prerogative proprietary rights were enforced by jurisdiction

exercised under authority of the sovereign, Callis reasoned that proprietary rights coupled with sovereign presence through such exercise of jurisdiction must mean that the sea and seabed were infra regnum Angliae and thus held by the Crown prerogative right. The same prerogative property right to the seabed was then offered by Callis as the basis for Crown ownership of seabed and soil of the seabed which might be cast up and become foreshore, waste land, or a new island.[117]

Earlier analysis by use of the possession standard established that the Crown property right to an object or resource within the coastal sea accrued under prerogative right only when that object was appropriated or a resource was extracted. Moreover, that analysis brought out that allocation of property rights by the Crown through franchises to royalties was controlled by the exercise of protective jurisdiction. Analysis by the possession standard, when applied to Callis' attempt to bring the sea and seabed infra regnum Angliae, causes his argument to fail by the limited nature of his purpose in making that argument. Thus, Callis wrote not to claim possession and ownership of the sea for the Crown as a matter of international law, but to support the jurisdiction for the Commissioner of Sewers over the foreshore, waste lands and other lands newly emerged from the sea. Callis like Digges, employed the prerogative right of the Crown to establish a prior

property right in the sovereign for possession of such lands once they were part of the territory of the realm. The argument advanced by Callis demonstrated no actual property of the Crown over the sea and seabed, nor was the argument intended to do so. Such possession and prior ownership enabled extension of the jurisdiction under the Statute of Sewers to such lands. Thus the prerogative right of the Crown in the sea and seabed was offered as axiomatic and never was subjected to critical legal examination by Callis, in much the same way that such prerogative property right of the Crown was never tested by litigation.

Digges obviously wrote to please the Tudor monarch Elizabeth I and support the Queen's claim to the foreshore. Also because Callis wrote with a purpose in achieving broad application of the Statute of Sewers he conveniently relied on Digges' theory of prerogative ownership of the English seas. But the main interest of the seventeenth century Stuart monarchs was not initially in any prerogative property right to the sea such as Callis and Digges described. It was rather an interest in claims to diverse high seas fisheries. Later arguments for Crown ownership of the sea by the prerogative right were offered merely to support claims of Stuart ownership of fisheries in the North Atlantic and the North Sea. The British

position claiming such ownership was initiated by James I, and most strongly insisted upon by his successor Charles I.[118]

Stuart claims to ownership of high seas fisheries were first confronted in 1609 by Mare Liberum, the work of Hugo Grotius mentioned earlier. The arguments of that book supported the political and legal position of the Dutch shipping in the East Indies. Thus Grotius insisted that the seas were free to all, and because the sea was simply not capable of being possessed, no national sovereign could claim ownership over it. Relying on his own possession analysis, Grotius argued that in order to establish ownership of the sea there must be exclusive possession. But for Grotius the sea was conceptualized as having a communal status. Such communal status made the sea subject to the use of all nations but incapable of being the property of any one nation. Even were a nation able to possess some one element of the sea, such as a fishery, once the arbitrary exclusive possession of that element was released it returned to its status as res communis.[119]

The result of Grotius' analysis was that fish might be possessed permanently whereas a fishery might be possessed only for a time. The element of the sea, be it a res or a right, which was possessed either permanently or for a time according to Grotius must be capable of "exhaustion". Assumedly he meant total exclusive possession

capable of being maintained for a period of time. Certain elements pertaining to the sea could not be so held and were so recognized by Grotius, for example, high seas freedoms such as the freedom of navigation as well as the very waters of the sea. Those elements of the sea which could not be exhausted could not be possessed and under Grotius argument therefore could not be subject to national claims of ownership.[120]

Among the first British writers responding to Grotius were William Welwood in 1613, and Sir John Burroughs in 1633. William Welwood, a Scot, in response to Grotius' arguments initiated the British argument for ownership of the British seas as a matter of international law by listing possession by occupation through fisheries activities; and regulation of those activities as the product of British possession. Referring specifically to the ability to possess, Welwood stated that the sea was as traversable as land, and because ownership of the land did not include being everywhere at once neither did ownership of the sea. He suggested that bounds were plentiful from landmarks such as islands and rocks, which used together with a compass to ascertain position, enabled a national sovereign to determine, identify and delimit that portion of the sea subject to its interest. Occupation and possession of the sea area claimed occurred by identification of the area through delimiting its bounds as well as through the

fisheries activities. But even Welwood recognized that claims of ownership in the sea must be limited to portions of the sea which were properly the object of national interest. Welwood thought that mare vastum was by definition beyond the just bounds of any national interest for ownership.[121] That view was essentially the view adopted in the eighteenth century which was to the effect that the littoral nation could possess the coastal sea as an area in which to apply protective jurisdiction.

Burroughs made his argument against the theories of Grotius by pointing out that the natural law arguments made by Grotius as a means of identifying the sea as res communis were mere theories and did not coincide with state practice. Therefore Burroughs affirmed the legality of Stuart claims to ownership over unbounded areas of sea as an acceptable matter of state practice and labeled that ownership as one based on "sovereignty" over the sea.[122]

The ultimate respondant to Grotian theories was John Selden. When pressing their claims against the Dutch to the utmost the Stuarts relied upon Mare Clausum written by John Selden in 1618 but not published under Selden's signature until 1635 when it received official approval by Charles I. Selden first of all presented a case for British sovereignty over the English Channel. That argument was simply that because the Channel was controlled

from both shores by the same sovereign it was occupied and possessed. The English control of the French shore was based on Crown claims to several French dutchies. In 1663 Richard Zouche confirmed this theory of Selden by also asserting that jurisdiction would accrue over a channel when both shores were held by the same sovereign. But Zouche asserted only jurisdiction not "sovereignty" arising from such control of the water. Selden had claimed sovereignty from that control, and in Mare Clausum he extended that claim of sovereignty to whole oceans.[123]

Second, Selden argued for sovereignty over the sea, although his argument was directed at support of Stuart claims of ownership of high seas fisheries. Selden cited control of those fisheries by Great Britain as indicative of the underlying dominium held by the Crown of the sea. Selden concluded that, Grotius to the contrary, such right to sovereignty over the sea was lawful because he understood it to be the custom of nations. Thus he relied upon the example of Denmark and Norway receiving tolls from navigation of the Baltic Sea, Henry III of France receiving the Crown of Poland with dominion of the sea, and the licenses given by France to Turkey allowing fishing and the removal of coral off the coasts of Tunis and Algeria. But none of these examples offered by Selden to establish a custom of nations contrary to the Grotian theories, in

fact, shows any ownership of or general jurisdiction over the high seas. Each example merely presents an incident of some form of protective jurisdiction over the Baltic Sea, which was almost a closed sea, or some identifiable and individual interest allowing removal of a resource of the sea such as fish or coral.[124]

Selden relied on occupation, which produces possession as the test to determine when ownership of the sea accrued to the national sovereign.[125] He argued that Great Britain met that test and held ownership of the sea because the area claimed as "British seas" could be identified within boundaries and was occupied by active fisheries endeavors and naval power. When Selden advanced the proposition that the British seas had been so occupied he offered as evidence of that occupation the Crown's requirement that foreigners obtain fishing licenses. Such licenses to fish on the high seas of the North Sea restricted the number of vessels and their size, but the requirement to purchase these licenses was enforced only from 1633 to 1635 and not generally but primarily against the Dutch. As other indications of the occupation, ownership and consequent "sovereignty" Great Britain held over the sea Selden listed homage to the flag and enforcement of neutrality in the narrow coastal waters known as the King's Chambers. It has already been demonstrated by analysis under the protective jurisdiction standard that neither homage to the flag nor

enforcement of neutrality were or support assertions of "sovereignty" over the sea.

Upon examination most of Selden's arguments for Crown ownership of the sea amount to no more than exercises of protective jurisdiction. But Selden argued for ownership of the sea based on occupation as a matter of international law and not simply with regard to municipal law as earlier British writers had done.[126] Although Selden did not show full sovereignty to be legally obtained over the sea, he did show an apparently legal but unsuccessful attempt to claim exclusive property in a high seas fishery. However, even Selden's theory of occupation of the sea providing a basis for the establishment of sovereignty did not admit the power to restrict navigation without some overwhelming national interest in the enforcing littoral nation. Thus high seas freedoms were not excluded by national activities in the high seas fisheries, or by limited exercise of protective jurisdiction. Such jurisdictional exercise at best constituted acts of occupation for possession of no more than the coastal sea, and not possession for ownership but merely as an area in which to apply particular aspects of municipal law. Eventually Selden's argument that the sea could be possessed by occupation developed into a modification of Grotius' unlimited freedom of the sea with the result that international law began to accept the

premise that there could be an effective occupation, control or possession of the coastal sea based on national interest for limited objectives of a protective nature.

Writing about 1667 Matthew Hale followed Selden's argument that the sea was owned by England, but he understood that ownership to apply only to the "narrow seas" around the coasts, and not the broad high seas areas Selden claimed. Hale's writing demonstrates that he understood national interests as limited to the coastal sea. Thus in Hale's understanding the sovereign's jurisdiction over the sea contained two main components. First, jurisdiction was applied in the public interest for safety of the realm by land and sea. Second, jurisdiction was applied because of the need to allocate ownership of objects appropriated from the sea and made the subject of grant by franchises issued under the Crown prerogative property right. These components were distinct in Hale's understanding. Jurisdiction for national safety might range over considerable sea areas quite distant from shore and varying in area from time to time. Jurisdiction for the allocation of ownership over objects in the sea accruing under prerogative right was applied only to objects possessed within coastal sea areas. Hale understood that the national sovereign exercised protective jurisdiction over various sea areas as a function of various public purposes which were for protective purposes as shown through this analysis.

Analysis of the need and obligation to provide for order and safety on the coastal sea, in Hale's second level of jurisdiction, reveals the protective nature of that jurisdiction.[127]

However, Hale considered that the English seas were held as more than a part of the Crown's prerogative right because the sea was actually occupied through fishery activities and the presence of commercial and naval vessels. By such occupation Hale regarded the coastal seas as possessed and owned by the Crown. Therefore the coastal seabed was the proper subject of grant by franchise where it was capable of possession under municipal law, for example, where seabed was granted for the erection of fishing weirs.

Like Callis and Digges, Hale relied upon the prerogative right of the Crown in order to argue for paramount rights of the sovereign over those parts of the seabed which were newly emerged or which could be possessed near shore. But again, this prerogative right of the Crown was a matter of municipal law. Insofar as the general prerogative argument for sea ownership is offered, that argument appears as one which is make-weight and offered solely to lend support to the author's limited purpose of showing a primary Crown right to the newly emerged seabed. Hale, therefore, considered that as a matter of international

law the littoral state could exercise exclusive but limited protective jurisdiction in its coastal sea. Ownership of the sea was another matter and even according to Hale's understanding that the coastal sea was occupied, it certainly could not be claimed even as a matter of municipal law as being possessed more than a short distance from shore.[128]

None of the British writers, other than Selden and Hale, present arguments which demonstrate any actual indication of ownership of the sea. That is, they have not shown actual occupation sufficient for possession and dominium of the sea. It has already been established that the limited imperium which the Crown exercised over the coastal sea was merely the application of municipal law on the basis of need for the exercise of protective jurisdiction. The British writers cannot be offered to show that"sovereignty" was established over the sea, although that term was used it has not been shown to refer to more than the exercise of protective jurisdiction. The sea was simply not part of the nation, nor was it subject to the sovereignty of the nation, and no metaphysical argument by Selden, or even Hale, would make it such.

The Dutch were the main source of concern for British fisheries interests in the high seas of the North Atlantic and the North Sea. As a result, the Crown over-reacted in

presentation of its claims after Grotius' Mare Liberum. Thus the Stuarts had characterized the British interests in fisheries as based on "sovereignty" over the sea. The Crown stubbornly upheld its asserted maritime sovereignty right in the high seas in order to protect its claim to the high seas fisheries against Dutch intrusion. The result was that three wars were fought between Great Britain and the Netherlands during the seventeenth century. The North Sea herring fishery, which was the focal point of these wars ironically declined bringing the whole issue of rights over the fishery to naught. Moreover, British claims of ownership over the seas ceased to be voiced after the fall of the Stuarts in 1688.[129]

Analysis of arguments for sovereignty of the sea, using the protective jurisdiction analysis, reveals that what was in fact argued for was much less than sovereignty. These writers argued for an exclusive right to the fisheries or ownership of emerged lands both of which were distinct rights which once asserted were protected by the exercise of the sovereign's power; protective jurisdiction. The exercise of the sovereign power was only for protection of the national interest in such economic ventures as the high seas fisheries, or appropriation and extraction of particular objects and resources subject to a municipal law property right. Although "sovereignty" was identified as

the right applicable over the seas by the writers arguing for ownership of high seas fisheries, such alleged sovereignty was again merely overstatement of the case in order to bolster the lesser objectives of possession and protection of the fishery.

In the 1688 edition of De Jure Naturae et Gentium Samuel Pufendorf presented an analysis which merged the views of Grotius and Selden with regard to sovereignty over the coastal sea. Pufendorf wisely recognized that a coastal zone of sea as a matter of state practice was becoming subject to exclusive jurisdictional exercises by littoral sovereigns. However, Pufendorf prescribed a rigorous test which must be met before any littoral nation could claim an exclusive interest in the coastal zone of sea. That test required first, that there be an intent to possess the zone, second, actual possession of the zone, third, division of that zone from the high seas by delimiting its bounds, and fourth, assertion of exclusive sovereignty over the zone. Although he did not know the extent to which an area of sea could be subjected to the littoral nation's governmental interest Pufendorf assumed that actual practice of states and agreements with neighbors would determine the bounds.[130]

It is apparent that Pufendorf marks a transition from arguments in support of Grotius and Selden in theoretical development of international law on possession and ownership

of the coastal sea. Pufendorf refined theories advocated both by Selden and by Grotius and eventually projected his own theory of coastal zone ownership which in fact accorded with state practice. At the close of the seventeenth century British writers, represented by Sir Philip Meadows in his Observations Concerning the Dominion and the Sovereignty of the Sea, written in 1689, were in accord with the precepts of international law, as described by Pufendorf. Generally they recognized that while Selden's outlandish claims could not be supported, his theory of occupation did give rise to limited possession and that limited possession could be actually established only over the coastal sea.[131]

2. Eighteenth century writers. -- In the eighteenth cnetury, rather than questioning whether fishing, commercial, naval and other activities provided sufficient occupation to create possession of the sea, writers began to consider precisely what possession was acquired by such activities and accompanying exercises of protective jurisdiction.

Although Grotius' theory of freedom of the sea, taken in the extreme, was criticised by continental writers the general theory continued to carry much weight with those same writers. Jean Barbeyrac voiced what appears to be the central criticism of Grotius' theory. Barbeyrac's

criticism was essentially that Grotius offered a natural law theory which, although sound in the abstract, as a matter of international law it was undeveloped because it did not involve considerations of state practice in coastal seas. Barbeyrac gave much authority to the custom of nations as a source for international law, whether that custom was overt or tacit. Barbeyrac understood the natural law theories of Grotius, positing freedom of the seas, to be moderated by state practice. He thereby understood exclusive national interests and rights to be applied only in coastal waters as a matter of international law.[132]

Cornelius van Bynkersoek was another writer who recognized the importance of international conditions in formulating rules of international law. For Bynkershoek the high seas could not be occupied, but coastal waters could be occupied from shore. However, possession of the coastal sea required acts of occupation. According to Bynkershoek a prerequisite to acts of occupation giving possession was the intention to occupy and possess.

Pufendorf in the seventeenth century, had also prescribed the requirement of an intention to possess. Bynkershoek wrote that this national intention to possess the coastal sea should be declared expressly though it could be implied from activity such as fortification of the shore and military as well as commercial navigation.

in the coastal sea. Such activities must be capable of characterization as exercises for exclusive control of the coastal sea area being occupied.[133]

Once possession of coastal waters was recognized as an achievable fact, writers examined the elements of occupation supporting possession. Vattel described any sea areas as subject to sovereignty when the sovereign's exercise of jurisdiction was coupled with possession of the sea. Vattel recognized that no nation was able to possess the high seas because navigation and fishing were not sufficient activities to occupy it. Navigation and fishing were, however, sufficient activities to occupy the coastal sea. Thus he inserted a test of sufficiency for the occupying activities. Because of the limited number of activities which could be carried out on the sea Vattel posited that national ownership might be asserted only over coastal seas. According to Vattel exclusive possession would grant the sovereign an interest identical to that held in land by similar occupation,[134] which according to this analysis would be general jurisdiction.

Vattel based the right to possession on the sole criterion of defensive need. It is not surprising therefore that his theory of possession required the sovereign to have adequate power to protect the coastal

sea area claimed on the basis of defensive need. He acknowledged only one sea area where the sovereign's power could be actually exerted for defense and possession, and that was within cannon range of the shore. There can be no doubt that Vattel understood the national exercise of protective jurisdiction to be comprised of activities which constituted the intention and capacity to enjoy exclusive possession over the coastal sea. The occupation of the coastal sea by various exercises of protective jurisdiction for defense, became a continuous possession along the entire coast by the legal fiction of constant occupation exercised from shore by military means such as fortification. Slowly protective jurisdiction exercised under national power and authority was evolving into an activity which, as a matter of international law, subjected the coastal sea to paramount national interest of the littoral sovereign.[135]

One of the foremost eighteenth century writers, Christan Wolff, also postulated that a littoral nation may occupy and possess only those parts of its coastal sea which it could protect. Occupation of the coastal sea under Wolff's theory was based on national defense as well as protection of economic interests. It was the use and appropriation of things in the coastal sea which eventually gave rise to economic interests and consequent acts of occupation in

coastal waters. According to Wolff through the extension of jurisdiction, based on acts of defense and economic appropriation, sovereignty was asserted in the coastal sea when the coastal sea was owned through possession.[136]

Ownership of the high seas was impossible under Wolff's theory because he was convinced that such areas were common to all nations and therefore not subject to establishment of any individual national proprietary interest, that is, property right. Because the high seas were res communis Wolff did not conceive of them as being a proper object for ownership. The theory of res communis for Wolff meant that the seas could not be possessed by any one nation. Without possession there could be no ownership, and ownership was a necessary element to Wolff's theory for assertion of sovereignty of the coastal sea. Since only the coastal sea could be owned, sovereignty could not be extended beyond that area,[137] and under this analysis general jurisdiction was not asserted over the coastal sea.

Valin was another writer who agreed with the concept of littoral state possession and exertion of sovereignty over coastal seas. However, he reasoned that civil law and international law recognized rights of navigation and fishing antedating and superior to any individual national assertion of sovereignty over the coastal seas. Thus navigation and fishing could not be unreasonably restricted

either by jurisdictional exercises on the high seas or by assertions of sovereignty. For Valin no sovereign held sovereignty over the high seas because there was no legal right to ownership of the high seas. Those nations asserting ownership over areas of the high seas according to Valin, did so not by the law of nations but by the force of arms.[138]

Arthur Browne, an Irish writer, wrote in the civil law tradition concerning ownership of the coastal sea. Browne understood force to be an adequate act of occupation and support for claims of ownership by establishing possession. But Browne pointed out that if the exercise of force was to be terminated, the act of occupation also terminated and possession was lost with the result that ownership would cease. The only exception Browne saw to the use of force for possession of the coastal sea, was where an agreement or treaty allowed ownership over the coastal sea. However, Browne indicated that he did not know of any international treaty or rule of international law at the time he wrote which would support a claim of ownership over the coastal sea without the application of force. The force which was understood to support a claim of ownership in Browne's theory was comprised of naval power and coastal fortification which he understood to limit automatically the seaward extent of the area owned to a narrow band of coastal waters.[139] Browne's theory was similar to those

of both Selden and Hale, whom had relied on the exercise of naval power to establish occupation and possession of the seas which they claimed ownership over as a matter of international law.

Although their various arguments had favored divergent interests over areas vastly different in size, writers of the eighteenth century were almost unanimous in disagreeing with any pretension to ownership of the high seas. Generally only the coastal sea was considered by them to be an area which could be occupied and possessed. Such possession was by both coastal fortification and naval presence together with other maritime activities. Such possession was the result of the exercise of protective jurisdiction for defense and maintenance of maritime activity. When protective jurisdiction was exercised with an intent to possess the coastal sea, that exercise took on the character of an act of occupation which eventually provided possession and ownership enabling littoral nations to assert sovereignty. However, whatever "sovereignty" was asserted over the coastal sea was restricted by historical fishing rights and rights of navigation. Moreover, as a matter of international law it was not until the nineteenth century that sovereignty over the coastal sea was recognized and as a matter of municipal law it was late in the nineteenth century when general legal jurisdiction was at last asserted.[140]

In the eighteenth century no definite area of coastal sea was recognized as within exclusive control of the littoral sovereign. The cannon range rule was usually offered as a suggestion of the least extent seaward which a national sovereign could claim as subject to such exclusive control but that was not commonly adopted until the nineteenth century. Actually it was not until 1782 that an Italian, Galiani, suggested cannon range as the measure for the outer boundary of exclusive control in international law. He standardized cannon range as three miles. However, disagreement on the distance persisted so that in 1805 Azuni was prompted to propose a treaty to be signed among all maritime powers settling the issue. This proposed treaty would have adopted the cannon range rule from among the various rules offered. It was acknowledged by Azuni to be the most practical means to determine the seaward extent of national jurisdiction. Within that seaward boundary the littoral sovereign was to have rights identical to those held in its land territory by the extension of sovereignty and therefore, by this analysis, the application of general jurisdiction. Similar to those theories of Valin and other earlier writers Azuni understood littoral state sovereignty over coastal seas to be subject to the exercise of rights to fishing and navigation guaranteed by international law.[141]

Hall, writing in the early nineteenth century, was the

last writer who can properly be connected with the eighteenth century conceptualizations regarding the essence of ownership of the coastal sea. By looking to municipal law, Hall ascribed ownership of the British seas to the Crown. The writings of Callis and Hale helped him to maintain conceptualization of the sea and seabed of the British seas as property of the Crown. Although Hall never defined the extent of the British seas, the question of ownership in other than a coastal sea area had certainly been settled before he wrote and assumedly he did not consider the broad seventeenth century British seas claimed by the Stuarts to be so owned.[142] Regardless of the sea area which Hall thought to be owned by the Crown, his position was that any interest of the Crown in the coastal sea and seabed was not mere usufruct, but actual possession and jurisdiction.

The important aspect of Hall's work for this dissertation is that he argued for possession of the sea and exercise of jurisdiction over it as a national act which brought that possession within international law, and not as a prerogative right according to municipal law.[143] Thus while the Crown held prerogative rights within the coastal sea as a matter of municipal law, the coastal sea was not possessed by the prerogative. This perception is confirmed by Callis' discussion of prerogative property rights which indicated

that such right was subject to the jus publicum right of the nation. And it was the right of the nation which was later exercised to claim possession of the coastal sea. Therefore the prerogative right argued for by Selden and others was not sufficient to itself to hold ownership of the coastal sea as a matter of international law. In order to appreciate the nature of Great Britain's governmental interest in the coastal seas of her North American colonies, when compared with grants in the colonial charters, it is important to understand the property rights involved both as a matter of municipal law and international law. Thus it was through the exercise of protective jurisdiction as an act of the sovereign, rather than as an act of the Crown under the prerogative right, that the coastal sea was eventually possessed by Great Britain. Because such national possession did not occur until after 1776, no possession was held over the coastal sea adjacent to the American Colonies. Colonial coastal seas, as the coastal seas around Great Britain, were not possessed by an act of the sovereign until the late eighteenth century or early nineteenth century. Prior to that possession only various prerogative rights were applied to the coastal seas and as a matter of municipal law under the national exercise of protective jurisdiction.

The long interval from Selden in the seventeenth century to Vattel and Valin in the eighteenth century retarded the

evolution of international law concerning possession and ownership of the coastal sea. That interval was largely the result of political considerations. Thus, in the seventeenth century especially, abstract problems of international legal theory were far from the sole reasons for much of the argument offered by the international law writers with regard to possession and ownership of the sea. Evidently patriotism inspired many of these writers and clouded their analysis with bias resulting in the unnecessary delay.[144]

While political considerations had a delaying affect on the evolution of international law regarding possession of the coastal sea, state practice had a positive affect on the direction of international law in recognizing that the coastal sea could be subject to the jurisdiction of the littoral sovereign. Examination of state practice through treaties, such as those with the Barbary states which dealt with neutral waters and the taking of prizes off their coasts as well as off the coasts of British possessions in the Mediterranean, will indicate Great Britain's governmental policy toward possession of coastal seas.

B. Constitutional Control of Foreign Policy and Protective Jurisdiction in Treaties

The exercise of protective jurisdiction by the sovereign in its coastal seas is evidenced by state practice. For

example, Norway, Denmark and Great Britain each asserted various governmental rights over coastal seas by executive authority as a matter of governmental policy.[145] Among such governmental rights were defense, protection of maritime industries, delimitation of neutrality zones to protect citizens from warring neighbors, suppression of piracy, creation of customs zones for the prevention of smuggling, and the placing of aids to navigation along coasts as well as near harbors.

Because the sea is an area where commercial and governmental interests of many nations overlap, it is not surprising that conflict arose in the seventeenth century as a result of the assertion by Great Britain that its rights in the sea were exclusive. Conflict was an inevitable result of disregard for interests and rights of other nations, especially with regard to uninhibited fishing and navigation on the high seas. Early Stuart policy caused this clash by claiming exclusive ownership of high seas fisheries in the North Sea, and later, ownership of the North Sea as part of the British seas. In fact the three Anglo-Dutch wars of the seventeenth century were a direct result of such conflict, but by the eighteenth century British claims to ownership of the sea had disappeared and the fishery controversy had subsided.[146] Later, when eighteenth century international law writers

faced the problem of a littoral state's right to exercise commercial and governmental interests in the sea, they argued that the international law rights of navigation and fishing should not be impeded by the national interests of littoral states. However, it was not until the close of the eighteenth century that any resolution was approached between the governmental and commercial interests of the littoral state and those of the international community.

Aside from state practice, actual governmental policy concerning the coastal sea is evident in the terms of treaties. Treaties present the national sovereign's understanding of the acceptable interests which could be asserted in the coastal sea by executive authority as a matter of governmental policy. Three treaties point to what was essentially the Crown's foreign policy respecting acceptable governmental rights to be exercised within the coastal sea for safety, order, peace and good government. In a 1654 treaty Great Britain opened harbors to Swedish vessels and exempted those vessels from certain customs levies. As a defensive measure the Swedish treaty excluded warships from British waters and harbors, without notice of innocent intent prior to arrival. Harbors and coastal waters were apparently considered to be proper areas for the exercise of protective jurisdiction not only for enforcing customs regulations over foreign vessels but also

for provision of defensive measures against foreign warships.[147]

Sweden was again favored in 1656 when fishing rights were extended to her on the "coasts which are in the domain" of England.[148] At this time the Crown considered that the nation had the right to exclude foreigners from fishing in coastal waters in order to protect the domestic commercial interests in coastal fisheries. Although appearing as a concession here, actual enforcement of claims to exclusive coastal fishery rights never came about in the seventeenth century. This treaty also included a restriction on the Swedish right to fish by limiting Sweden to 1,000 vessels. That limitation in the number of vessels was for protective purposes. The right to fish in coastal fisheries was extended by Great Britain in 1761 to Denmark by a treaty which also acknowledged a mutual right of navigation through the Danish and English seas.[149] Thus control of coastal waters through the exercise of protective jurisdiction proved to be an effective bargaining tool for negotiated concessions in foreign affairs and treaty making.

The liberal treatment of Sweden and Denmark in treaty terms, in relation to the exercise of protective jurisdiction, may be contrasted with the British treatment of the Netherlands. In 1654 England and the Netherlands signed a treaty which required homage to be paid by Dutch vessels

to the English flag on the high seas.[150] Only the Netherlands was subjected to such a treaty requirement, and then only before the eighteenth century. Originally, as described above, homage was developed as a means for detecting pirates and enemies, and thus was a defensive governmental exercise under protective jurisdiction. Enforcing homage to the English flag, or making such homage the requirement of a treaty does not without more make homage to the flag a recognition or acknowledgement of ownership of or general jurisdiction over the sea. Homage in these treaties was merely a political ritual imposed by the winner in war on the loser.

Treaties signed between the years 1661 and 1776 demonstrate a reduction in the coastal sea area within which protective jurisdiction was being exercised. The term "British seas" which referred to the area wherein Great Britain considered itself to have authority to exercise protective jurisdiction, was used frequently. Originally the term encompassed a broad high seas area. Selden used that meaning of British seas in the seventeenth century, but the definition changed by the eighteenth century. The changed definition was a narrowing so that British seas referred to a margin of coastal sea where protective jurisdiction was exercised to protect acknowledged national governmental interests of safety, order, peace and

good government under municipal law. Although British seas was used as a term to indicate the area subject to the exercise of protective jurisdiction, no precise definition of the area was made in either the seventeenth century or the eighteenth century.

Other treaties evidence a continued governmental policy of Great Britain to apply municipal law by exercising protective jurisdiction over some area of coastal sea. For example, when Portugal transferred the Island of Bombain to Great Britain in 1661, the treaty described Great Britain as receiving all territories of the island with full sovereignty of the "Port, Island, and the Premises".[151] That Whitehall treaty ceding Bombain probably carried a right of protective jurisdiction in the coastal sea as included in the term "Port" because the common understanding of the term "Port" included an adjacent area of coastal sea. Other treaties used the term "dominion" or "dominions" to indicate an area where foreign navigation would be allowed, but only subject to the authority of a littoral sovereign's protective jurisdiction. Thus "dominion" or "dominions" were used in the sense of meaning an area of coastal sea sufficiently possessed to be subject to national authority through the exercise of protective jurisdiction. Use of the term dominion is never precise but the Treaty of Breda, between Great Britain and the Netherlands, is representative in

allowing a freedom of navigation in the sea and other dominions.[152] The implication of "other dominions" is that ports, harbors, rivers and arms of the sea were also included.

Up to 1664 the Netherlands continued to agree to afford homage to the English flag. However, succeeding treaties between the Netherlands and Great Britain became more like commercial agreements with commercial not military concessions. Among such concessions was the reciprocal right to navigate coastal seas with a vessel passport. Such document required protection of a vessel by the littoral nation while the vessel was in coastal waters of that nation, reserving a right in the littoral sovereign to examine a vessel's passport while in those coastal waters. A passport was a great advantage to commercial vessels because the document afforded the vessel holding the passport immunity from attack by the littoral nation, privateers and pirates under a guarantee of safe conduct.[153]

The idea that protective jurisdiction was exercised in coastal sea areas, described by treaties as within the "dominion" of a littoral sovereign, was reinforced when Great Britain received Gibraltar from Spain in the Treaty of Utrecht, 1713.[154] All property and jurisdiction over the Island of Minorca as well as over Gibraltar were transferred to Great Britain by Spain. Probably the best

interpretation of Great Britain's perception of the seaward extent of the coastal sea area for the exercise of protective jurisdiction received with Gibraltar and Minorca may be seen in a contemporary series of treaties with the Barbary States. In 1716 separate peace treaties were signed with Tripoli, Tunis, and Algeria.[155] By these treaties vessels of the Barbary States could not cruise within sight of the ports of Gibraltar or Minorca. In the treaty with Tunis, it was specified that no prize was to be taken within ten miles of Minorca or Gibraltar. Through treaties such as these Great Britain was establishing jurisdiction with a definitely protective nature over a body of coastal water adjacent to the ports involved, and apparently without regard of whether the right to exercise protective jurisdiction was included in the original cession of the port. Therefore it appears that Great Britain perceived the exercise of this protective jurisdiction to be an inherent power of sovereignty. Broadening of the area covered by the exercise of protective jurisdiction developed later so as to apply along the entire coast.

In the Treaty of Utrecht by which Great Britain received Gibraltar and Minorca, Spain was allowed to retain her fishing rights off Nova Scotia.[156] By such retention Great Britain acknowledged that an interest

could be held in a fishery without ownership of the matrix sea. Thus the interest in the fishery could be held by one sovereign while the right to exercise protective jurisdiction over the matrix sea was held by another sovereign, but the treaty does not show that either sovereign considered that it owned the matrix sea. The treaty actually ceded or quit-claimed to Great Britain the right to apply municipal law by the exercise of protective jurisdiction over the Grand Banks and coastal waters off Nova Scotia and Newfoundland, where Spain had formerly asserted a weak claim to the land and the fisheries. Passing of the land territory to a succeeding sovereign did not entail passing any inherent right to ownership of the sea and during the seventeenth and eighteenth centuries would only have enabled that sovereign to apply municipal law as an exercise of protective jurisdiction over the adjacent coastal sea.

Treaties with Tripoli and Tunis in 1751 reassert the neutrality of coastal waters within sight of Minorca and Gibraltar, again applying the "no prize within ten miles of a port" rule in a treaty with Tunis.[157] In 1762, Great Britain acknowledged by treaties with Algeria and Tunis that she had no right to carry on hostilities against Christian princes within cannon range of their shores.[158] This was a recognition of the right of those states to

apply municipal law as an exercise of protective jurisdiction not just near ports but in the broad area of their coastal waters to enforce neutrality for the safety of their citizens and vessels and to meet their treaty obligations with other nations. These treaties went on to recognize that no ship of a "Mohatmetan prince" was to be attacked within sight of the Alerian or Tunisian shores. By agreeing to such restriction on the right to engage in hostilities on the high seas, in a negotiated treaty term, Great Britain was accepting the exercise of protective jurisdiction by other littoral sovereigns which enabled them to establish neutral waters adjacent to their coasts. The point is that Great Britain was acknowledging the right of a foreign power to apply its municipal law as an exercise of protective jurisdiction over its coastal sea in a fashion which would entail restriction on the activities of British ships within coastal sea areas.

When dealing with her own coastal waters Great Britain reserved the right to apply domestic law to Russian and Swedish vessels.[159] The area where such right would apply off the coast of Great Britain was undefined according to these treaties which was apparently in keeping with British policy at that time. Therefore domestic law would apply when a foreign vessel came in sufficient contact with

British coastal waters so as to require the application of municipal law to that vessel as a national exercise of protective jurisdiction. Treaties of commerce with both Russia and Sweden had opened British harbors to their merchant vessels and allowed them freedom of navigation in the coastal seas. Application of municipal law to the vessels of either power demonstrates the British intent to govern and assert protective jurisdiction in her coastal waters. The treaties also present the recognition by Russia and Sweden of the British right to exercise such protective jurisdiction over coastal waters through the application of municipal law to vessels under their flags.

Finally, in preparation for the end of the Seven Years War (1756-1763) in 1762 Great Britain presented France and Spain with preliminary terms of peace at Fontainebleau.[160] By terms of the preliminaries France was to quit her interests in Canada and Acadia in favor of Great Britain. France was allowed to retain her interest in the Newfoundland fishery, including a right to dry nets ashore. Further the French were to also have fishing rights in the Gulf of Saint Lawrence, but were not to come within three leagues of British territory or fifteen leagues of Cape Breton Island. All rights which Spain held in the Newfoundland fishery were terminated. In the final peace treaty signed at Paris in 1763 the above terms were agreed upon.[161]

By allowing France to retain fishing rights in the North Atlantic fisheries off Newfoundland and Cape Breton Island, as well as in the Gulf of Saint Lawrence, Great Britain again demonstrated that her governmental policy agreed with the concept of high seas fisheries as an interest separate from any territorial right in or ownership of the sea. The distances set offshore, to restrain legal approaches toward shore under the French right to fish, were set as an exercise of protective jurisdiction and incorporated in the treaty term. Thus potentially hostile foreign fishermen were prevented from entering coastal waters where they were a threat to the safety of British citizens and their property.[162]

Notably the issue dealt with by those drafting the 1763 Treaty of Paris was not whether jurisdiction for protective purposes could be exercised, but rather the distance into the coastal waters over which such authority would be exercised. Certainly recognition of the national right to exercise protective jurisdiction in coastal seas underlined several of the treaties just described. Only a general rule limiting the extent seaward to which coastal waters were subject to application of such protective jurisdiction was left largely unresolved at the close of the eighteenth century.

C. Summary, Chapter III

Stuart claims to ownership of broad areas of sea were shown to be without foundation. Analysis of seventeenth century works on international law both supporting and contesting Stuart claims to the sea through the possession standard demonstrated that the high seas were physically incapable of being exclusively occupied and possessed. That analysis also brought out that the high seas were not capable of legal possession under international law because of their res communis nature. Analysis under protective jurisdiction of those same international law works demonstrated that authors writing to support Stuart claims were actually describing a national economic interest in a high seas fishery. Both James I and Charles I had protected these interests through the exercise of jurisdiction applied to the two bases of occupation described by Selden and Hale, fishery activity and naval power. In fact neither base continued, and for the short time when they occurred they were insufficient to support any exclusive rights as a matter of international law. Eventually in the eighteenth century experts in international law indicated that municipal law applied through acts of protective jurisdiction, when intended to be acts for occupation and possession, could provide a basis for possession of the coastal sea within

cannon range of shore. What precisely might be possessed was not resolved. Some argued for sovereignty with full rights similar to those in national territory. But only paramount rights to identified personal property and real property were shown to have actually accrued on behalf of a littoral sovereign. That accrual was by application of municipal law creating limited possession of the coastal sea under an exercise of protective jurisdiction as a national act.

By the time of the War of the American Revolution, 1776-1783, the right of a sovereign to apply municipal law, as an exercise of protective jurisdiction over the coastal sea, was well established. More than that was not established, except that the governmental rights and property rights of a littoral sovereign within the coastal sea were paramount and exclusive under international law from the rights of other sovereigns. Although discussed by writers no right of general jurisdiction or other general rights such as those held over territory were established in the coastal sea during this period, and thus general high seas freedoms such as a right of navigation were not restricted.

Conclusion, PART A

Seventeenth century and eighteenth century international law did not recognize that a littoral sovereign held a right of ownership over its coastal sea. Similarly, municipal law did not recognize that the coastal sea was owned by the nation, although the legal fiction that the Crown held the coastal sea under the prerogative right to waste was relied upon to allocate legal rights of British subjects.

Great Britain did apply certain bodies of municipal law, such as customs, admiralty and prize jurisdiction, over the coastal sea. Analysis has shown that the application of such municipal law was protective in nature. Analysis has also revealed that the exercise of protective jurisdiction was insufficient to create possession of the coastal sea for ownership, but by the eighteenth century was sufficient to create a belt of coastal sea subject to the exclusive exercise of protective jurisdiction by the littoral sovereign.

The issues remaining for this dissertation deal with whether the American colonies exercised protective jurisdiction over their adjacent sea, or whether that right was one strictly within the authority of a sovereign and remained with Great Britain. Finally, the issue must be resolved whether at the time of the War of the American Revolution the United States or the several states possessed the authority to apply municipal law over the adjacent sea as an exercise of protective jurisdiction.

PART B

Introduction

The second part of this dissertation undertakes to determine whether as a matter of American constitutional law the United States or the several states held an exclusive right to exercise protective jurisdiction over the adjacent sea during the eighteenth century. Because of the federal system of national government adopted by the United States there is doubt as to whether the United States or the several states succeeded to the right of Great Britain to exercise protective jurisdiction at the time of the War of the American Revolution. This doubt is complicated by whether prior to that war Great Britain retained the right to exercise protective jurisdiction solely within national sovereign authority, or whether the exercise of such jurisdiction could be or was delegated to colonial governments. The complication is that if such authority was delegated by Great Britain in colonial charters, that authority would remain with the new state governments in their several capacity unless granted to the federal government in the Constitution.

Analysis has shown the exercise of protective

jurisdiction over the coastal seas to be a right of sovereignty. The state governments were not national governments and thus held no capacity to independently exercise such a right. A further complication arises from the exercise of protective jurisdiction over seas adjacent to the colonies, because the argument can be made that, while as a matter of international law it was Great Britain as sovereign that held the right to exercise protective jurisdiction, as a matter of municipal law it was the colonial governments which exercised the right.

The result of such reasoning is that, if it cannot be demonstrated that the right to exercise protective jurisdiction was granted to the federal government at the time of the War of the American Revolution, 1776-1783, then today state governments would be able to enforce state laws over foreign nationals on the adjacent seas causing serious problems for the federal government in the conduct of foreign affairs.

Analysis makes it clear, however, that in fact Great Britain did not delegate a right to exercise protective jurisdiction over the adjacent seas to her colonies. Moreover, by signing the 1783 Treaty of Paris ending the War of the American REvolution Great Britain acknowledged the nationhood of the United States. It is from the status

and authority of a nation in the world community that the United States continued the application of municipal law over the adjacent sea as an exercise of protective jurisdiction.

Finally, examination of the constitutional development of the United States in the eighteenth century supports the conclusion that the several states at no point possessed an independent authority to exercise protective jurisdiction. If the several states did exercise protective jurisdiction over the coastal sea during the War of the American Revolution they did so only at the request or with the authorization of the national sovereign and subject to review by the national sovereign.

CHAPTER IV

Colonial Charters For The American Colonies

The objects and resources in seas adjacent to North America were made a matter of grant in colonial charters. Those charters conveyed franchise interests to prerogative rights over the adjacent seas, such as franchises for ownership of flotsam and jetsam, as well as governmental authority over both regulation of commercial activity and prosecution for criminal acts including piratical attacks. Colonial governmental powers, general property rights and legal rights were created as franchise interests and thus were subordinate to the sovereign. Also colonial franchise interests were granted and held subject to municipal law requiring that such interests accord with the precepts of that law.

The analytical tools applied earlier, that is, the possession standard to examine ownership rights and the protective jurisdiction test to examine governmental powers, will be employed now to evaluate colonial interests and Crown rights in the seas adjacent to North America. However, before either of those analytical tools can be applied to colonial interests and Crown rights over the adjacent seas, it is necessary to isolate the particular

interests and rights involved. As a result the language and terms of colonial charters must be examined and analysed according to the rules of construction of municipal law. The product of that analysis will be identification of colonial interests and Crown rights dealing with objects and resources within the adjacent seas. The general property rights, governmental and legal rights and interests which are identified as being conveyed by the language of colonial charters, as a matter of municipal law, will indicate any right of ownership over such objects or resources claimed by either the colonies or the Crown. At that point the possession standard and the protective jurisdiction test will be applied to isolate and identify colonial interests and Crown rights which might have existed over the adjacent seas as a matter of international law and municipal law.

A. Great Britain's Creation of Colonial Legal and Governmental Rights Through Colonial Charters

After discovery of the "new world" and limited exploration by means of the early discovery voyages, the Crown determined to settle the discovered areas as a means of support for its territorial claims arising from discovery. Colonies were generally created through the efforts of private groups during the early part of the

colonial period. Great Britain issued charters to these groups, which included individuals and groups, as well as corporations. Colonial charters granted the legal authority to found and establish a colony. Thus these charters became the vehicle adopted by the Crown in the seventeenth century and early eighteenth century to achieve settlement and encourage economic exploitation of the Atlantic Coast area of North America.

Use of charters to encourage and control activities of subjects in North America was not new to the Crown. Prior to the interest in establishing colonies, charters which were issued for early discovery voyages effectively made the subjects holding such charters agents for the Crown, and their claims to newly discovered lands and resources became claims to those same lands and resources for the British nation. Thus, the sixteenth century charters for exploration and discovery issued to Sir Humphrey Gilbert, Sir Philip Sydney, Adrian Gilbert and Sir Walter Raleigh helped to form a basis from which the Crown claimed ownership over the vast and unknown North American Continent.[163]

The later seventeenth century colonial charters expanded the purpose of exploration and discovery with a new primary objective, that is, to establish economically productive settlements in the form of colonies. From

necessity these settlement charters created local colonial governments, three types of which may be distinguished among the North American colonies.[164] First, colonial governments were created pursuant to charters known as "corporate charters", which were granted to incorporated groups wishing to establish a colony. Second, colonial governments were created pursuant to charters, known as "proprietary charters", which were issued to an individual or groups of individuals. As with corporate charters these proprietary charters were issued to those seeking economic profit. However, proprietary charters also were granted to those seeking to form colonies allowing a greater latitude of religious belief and practice than was allowed in England. Both these types of colony were known by the charter they held, that is, as proprietary colonies or corporate colonies. Third, some colonies were governed directly by the Crown, either without charters or, subsequent to the failure of colonial government, pursuant to charters. These Crown controlled colonies were referred to as royal colonies. The primary example occurred in Virginia. After Virginia's third charter of 1612 was revoked that colony ceased to be a proprietary colony and became a royal colony governed directly by the Crown.[165] Another example of a royal colony with a unique background history was Georgia which

initially was established by a trusteeship charter that expired in 1756 thereby passing colonial government to the direct control of the Crown and so creating a royal colony.[166] Georgia's charter was initially issued only for a trusteeship period because by the eighteenth century the Crown began to recognize that chartered colonies were far too independent and difficult to control. The events of 1776-1783, that is, the War of the American Revolution, confirmed that perception.

Colonial governments were generally formed on the pattern of a locally elected legislative assembly and Crown approved governor. Local participation in responsible government was so much a part of colonial way of government that even the Crown colonies generally retained their legislative assemblies after their charters either had been revoked or terminated. These legislative assemblies became the actual governing bodies of both royal and chartered colonies. The royal and chartered colonies also received designated grants of territory to govern, in which they held governmental authority as well as various governmental interests and property rights. Each charter granted franchise interests to governmental rights and property rights. The conveyance of such interests was achieved through the use of general terms in colonial charters such as "franchises", "jurisdictions" and

"royalties". These words were usually found in the first portion of the grant. Elsewhere in the charters the particular prerogative governmental powers and prerogative property rights and legal rights intended to pass were specifically set out. The purpose of using the general words such as franchises and royalties was in order to characterize the legal nature of the interest being passed as an interest under prerogative right, whereas the actual grant was set out in the later particular words which specified the franchise interest intended to be passed. Such grants clearly point to the subordinate nature of colonial government in comparison with the underlying constitutional authority of Great Britain.

Charles Viner, in his eighteenth century abridgement of English law postulated the general common law rule of construction that particular words of grant narrowed and limited general words.[167] Other eighteenth century writers including William Nelson, Sir John Comyns and Matthew Bacon confirmed the application of this common law rule of construction.[168] Thus royal grants, as distinct from grants by private individuals in documents such as wills and deeds, were subject to special rules of construction. Other than under a quickly passing Elizabethan rule favoring grantees, royal grants, according

to the common law rule, were to be construed strictly and against the grantee.[169] Nothing would be allowed to pass in a grant from the Crown by implication and Crown grants were restricted to particular words only. Unclear or ambiguous grants of franchise interests were eliminated by the rule of construction which prohibited their passing anything by general words.

The very issuance of a royal grant, such as the colonial charters and the lesser grants included in them, was required to be under the great seal and made a matter of record.[170] This requirement assured that Crown interests would not be inadvertently passed or be claimed to have passed when there was no record of the grant. As a consequence of formalities required for a royal grant, any surrender of a royal grant was also required to be a formal matter of record. Obviously royalties arising under Crown prerogative right were conservatively guarded. Such conservative treatment requiring that royal grants be a matter of record is in accord with the general rule of construction that general words of grant without more were too indefinite and would pass nothing. Because the colonial governmental powers and interests, as well as legal rights, arose from charter grants to subordinate colonies, whether those colonies held any interest or right in the adjacent seas depends on

whether the Crown intended to pass those rights and interests and used sufficiently specific charter language to convey such rights and interests.

In 1629 a charter was issued for the colony of Carolina. That 1629 Charter for Carolina is presented here as an example of the creation of subordinate governmental powers and limited rights and interests in the adjacent seas by charter language. Charter language governed the content and extent of governmental powers passed to the colonies. Thus, as was stated in the Charter for Carolina, the colony received the right to establish a government:

> ...Together with all singular these and these soe apply, Rights Jurisdictions, privileges prerogatives Royalties libertyes immunities with Royal rights and franchises whatsoever as well by sea as by land, within that Region Territory Isles and limits aforesaid.[171]

But the specific governmental powers included within such general words as "jurisdictions", "prerogatives", "franchises", and "royalties" did not pass by such general words and were only passed when identified by particular words.[172] Particular words enabled the franchise interest in governmental powers to pass and thereby enabled creation of colonial courts, ordination of colonial judges, and establishment of jurisdictional capacity for those colonial courts in order that they might have cognizance of cases

arising by land and sea.

There is some question whether early grants, such as the 1629 Carolina Charter, which gave jurisdiction over "matters arising by land and sea" was a grant of admiralty jurisdiction. It is unlikely that admiralty jurisdiction was passed by such broad or general words. This position is supported by the fact that the standard form of granting admiralty jurisdiction, as with all other prerogative interests, came to be by specific words. Once the charter granted the right to have a vice-admiralty court, a commission was subsequently and independently issued by the Lord High Admiral, or later by the Commissioners of the Admiralty. That commission set out specifics of the Admiralty jurisdiction to be exercised. The earlier grants of jurisdiction over matters arising on the sea were appendant to the grant of jurisdiction over matters arising on land and thus can best be described as a grant which allowed common law remedies for matters occurring on the sea. Later grants of admiralty jurisdiction through commissions set out a broad admiralty jurisdiction, and as in England that admiralty jurisdiction excluded common law jurisdiction from matters with a maritime essence.[173] The granting of vice-admiralty commissions with broad jurisdiction external to the charter grant allowed the Crown to directly control colonial vice-admiralty courts by summary revocation or issuance of commissions. In fact by 1692 the

Crown had effectively excluded colonial jurisdiction over maritime matters through the Crown-controlled system of vice-admiralty courts.[174] Moreover the admiralty jurisdiction applied by the colonial vice-admiralty courts remained a subject-matter jurisdiction, protective in nature, and never became based on any general jurisdiction or claim of ownership over the seas adjacent to the colonies.

Colonial charters empowered colonial governments to make laws for citizens and those persons within their jurisdictions. But that charter language as it appears in the 1629 Charter for Carolina typically restricted the nature and scope of law which colonial governments could create and apply:

> .../Y/et soe that the foresaid lawes and ordinances be consonant to Reason and not repugnant or contrary but (as conveniently as may be done) consonant to lawes, statutes, customes and rights of our Realme of England.[175]

Among the other governmental powers granted in the 1629 Charter for Carolina were a limited power to make war and raise a militia for the purpose of pursuing enemies by land and sea, even beyond the colonial boundaries. Also, along the seacoast the colonial government could create ports and was entrusted with safeguarding the public right to sea fishing.[176] These were both governmental powers which allowed the exercise of protective jurisdiction over the

adjacent sea for the benefit of the colony, but neither indicates a grant of ownership of the sea adjacent to the colony or even a grant of power to exercise exclusive or general protective jurisdiction over those adjacent seas.

In a similar fashion, rights to real property and personal property, as well as other legal rights included within the general charter grants of "franchises", "prerogatives" and "royalties", were elsewhere identified in the charter as franchise interests giving a right to the benefits and profits of the prerogative right. For example, waifs, estrays, wreck, royal fish, flotsam, jetsam and ligan all were specified as franchise interests held by the colony. As a further example, in a second Carolina document, the 1669 Fundamental Constitution for Carolina drafted by John Locke, property rights and legal rights did not pass by the general grant of "franchises" and therefore they were later specifically set out in the charter:

> All wrecks, mines, minerals, quarries of gems, and precious stones, with pearl-fishing, whale-fishing, and one-half of all ambergris, by whomsoever found, shall wholly belong to the lords proprietors.[177]

Another example which demonstrates the specific grant to the colonies of real property and personal property, as well as the legal rights over such objects and resources before their appropriation or extraction, appears in the

1612 Virginia Charter, the third charter for that colony:

> ...together with all and singular Soils, Lands, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals, Pearls, precious stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises and Preheminences, both within the said Tract of Land upon the Maine, and also within the said Islands and Seas adjoining whatsoever and thereunto or thereabouts, both by Sea and Land being or situate...[178]

As can be seen by this charter language, and that of the 1629 and 1669 Carolina charters, when charter language is interpreted by the common law rule that nothing passed by royal grant unless by specific words only specifically granted governmental rights and interests as well as property rights were conveyed, One exception is a general grant, such as franchises in the sea in the 1612 Virginia charter. If a charter had granted "franchises pertaining to the sea" such franchises would have been identified, for example, flotsam, jetsam, and ligan. Because they could be identified although not individually mentioned they would become particular grants and pass by that ability to be identified. Thus these identifiable legal rights were made particular by circumstances outside the grant and would pass.[179]

Before examining what governmental powers, property rights and legal rights passed to each colony through their

charters it is important to distinguish those rights which could be held only by the colony and those which could be held both by individuals and the colony. First, governmental powers and interests were granted by way of the charters in order to allow the corporation or proprietors creating the colony to hold franchise rights of government which would not have been available to them in their individual capacity as private persons. For example, the power to establish courts or designate harbors is not one that could be granted to private persons in their individual capacity. Similarly, in the 1612 Charter for Virginia, a right to royal mines was passed to the colony as well as the right to raise a militia.[180] Neither right could be held by private persons in their individual capacity. To grant powers such as these to an individual would have been a violation of the jus publicum because it would lessen the governmental rights of the Crown. By passing such rights to a subordinate government the Crown did not lessen its sovereign governmental control and the jus publicum was not damaged.

Second, some of the franchises and property rights passed to the corporations or proprietors in the colonial charters could be held by the colony under general governmental rights and interests, or be delegated to individuals. Franchises and property rights which passed

from the colonial governments to individuals, passed as vested legal rights. The advantage to holding a vested franchise interest in an individual capacity, as a private person rather than in the capacity of a colonial government or proprietor, was that the vested legal rights of individuals were not terminated when the colonial charters were surrendered, revoked, or expired.[181]

Once vested, an individual's property rights or legal rights could not be altered by unilateral Crown action terminating a colonial charter. Any revocation or alteration in the property rights or legal rights of individuals was required to be in accord with common law, and unilateral Crown action could not terminate substantive vested rights created at common law. Even those holding the colonial charters held a vested legal right to those charters and thus another reason appears for the requirement of formal surrender of vested legal rights and property rights created by the charters, or the charters themselves.[182]

Revocation of charters, or specific legal rights held by corporations and colonial proprietors as well as their charters, was usually achieved through the use of legal writs of quo warranto and scire facias. But in fact not all colonial charters were terminated by such legal action pursuant to formal writs. In fact several charters were simply understood to be terminated when a second charter

was issued. Grant of a second inconsistent charter provided the Crown with a record of its intent to revoke the prior grant. But issuance of a new charter or revocation of an earlier charter did not affect private property rights and legal rights held by persons in their individual capacity.[183] These interests and rights remained vested and protected by common law.

The governmental rights and interests created by the charters, as limited by the common law, were subordinate to Crown control and had no independent status. It is clear that colonial charters and the governments they created existed by Crown authority, and that those governments remained subordinate to Crown authority, and could be terminated by that authority.[184] As a result abuses of governmental powers by the colonies or attempts to assert independence from the national sovereign were met by revocations of charters or charter rights according to municipal law. Moreover, when charters terminated it was common law and the substantive rights created by that municipal law of the sovereign which protected and preserved the property rights and the legal rights of colonials as subjects of Great Britain, not as colonists in any distinct status.

B. The American Colonies and their Charter-Created Rights

The colonial charters of concern here were issued in the seventeenth century and early eighteenth century. Charters issued for the northeast area of the colonies included the 1620 Charter for New England and two charters subsequently issued under authority of the 1620 Charter for New England; one for New Plymouth in 1629, and the other for Massachusetts Bay in the same year. Also issued was the second Charter for Massachusetts Bay in 1691, and charters for the colonies of New Hampshire in 1620, Rhode Island in 1643, and Connecticut in 1662. In the central colonial area, including the present State of New York south to the State of Maryland, charters were issued in 1632 for Maryland, 1660 for New York, 1664 and 1674 for New Jersey, 1681 for Pennsylvania, and 1701 for Delaware. In the southern area charters were issued for Virginia in 1606, 1609 and 1612, for Carolina in 1663 and 1669, and for Georgia in 1732.

These colonial charters will be examined to demonstrate that the grants of franchise to prerogative property rights and legal rights as well as governmental rights and interests were essentially similar among the colonies. Moreover it will be shown that while often broad governmental powers and numerous franchises to prerogative rights were granted, at all times the colonies remained

local governments subject to Great Britain as sovereign and thus subservient to the laws of England.[185] As a result colonies could hold no greater rights and interests over their adjacent seas than were exercised by Great Britain or were delegated by Great Britain to the colonies.

Along with governmental powers and franchises to prerogative royalties, areas of territory were granted within which these powers and franchises applied generally. Islands in the seas adjacent to the colonies were also conveyed by the charters and it is reasonable to assume that these islands were part of the colonial territory. However, there is no reason to assume that the grant of islands conveyed ownership or created possession of the intervening seas. The use of particular words to convey islands, and the absence of particular or even general words to convey the intervening seas in the colonial charters, confirms that ownership of the adjacent seas was neither included nor intended to be included within a grant of islands.

Governmental powers and franchises granted in colonial charters applied to these islands, and they were also understood and even described in some charters as applying over the adjacent seas.[186] The argument could be made that by application of governmental powers and grant of franchises to royalties within the adjacent sea it was intended to grant ownership of or general jurisdiction over

the adjacent seas to the colonies, at least to the distance offshore within which islands were granted. But examination shows that the colonial governmental powers were protective in nature and included only authority over appropriated objects and extracted resources as well as defensive measures for colonial safety. No general jurisdiction over or ownership of the adjacent sea was granted in the colonial charters.

There is little doubt that colonial governments held power to exercise a limited jurisdiction over the coastal seas. The nature of that jurisdiction was not general but protective, and as such involved only foreign nationals who were enemies, pirates, or criminals by violation of colonial law and thus under colonial jurisdiction in the same manner that similar offenders were under Great Britain's jurisdiction in the seas adjoining the coasts of the British Isles, that is, by personal jurisdiction over them.[187] Similarly the allocation of property rights over objects and resources appropriated and extracted from the adjacent seas was a matter of municipal law dealing with legal rights of citizens and no indication is given that such jurisdiction generally applied to foreign citizens.

Examining the colonial charters according to the three geographic areas described earlier, that is, northeast, central and south, it becomes apparent that no ownership

of or general jurisdiction over the adjacent coastal seas was conveyed or intended to be conveyed:

1. The northeast geographic area of colonies. -- In the northeast, under the 1620 Charter for New England, grants of governmental rights and powers, and legal rights as well as property rights, were made similar to the grants made in the 1629 Carolina Charter. A body known as the Council for New England was created by that 1620 Charter. This Council supervised colonial laws in the New England region to ensure that those laws would be consonant with the municipal law of England. The Council for New England was also responsible for designating colonial courts and appointing the colonial governors and their assistants. Notably the general governmental authority of this Council, or the colonial governments created under its charter, did not automatically apply over the adjacent seas. For example, even the right to pursue enemies over seas was a matter of special authorization in the colonial charter and did not exist as an inherent governmental right. Also, the grant of territory in the 1620 New England Charter did not include any grant of ownership over an appurtenant coastal sea. In fact the colonial territorial boundaries described in that charter specifically ran "from Sea to Sea", and no general governmental power was created beyond the boundary of the sea.[188]

Aside from the application of colonial municipal law to colonists and other British subjects, no general grant of jurisdiction was made in the New England Charter, or by other colonial charters. The jurisdictional authority created in colonial charters allowed only limited exercise of authority over the adjacent seas. As with the jurisdiction exercised by Great Britain over the seas adjacent to the British Isles the jurisdiction exercised under the authority of the New England Charter involved application of municipal law on the basis of citizenship jurisdiction. The only basis for the exercise of colonial jurisdiction over foreigners on the seas adjacent to the colonies in this charter and others was protective in nature and involved crimes such as piracy or acts of war by enemies.[189] Earlier it was demonstrated that this application of municipal law to foreigners was based upon the exercise of protective jurisdiction. Thus it was that the subordinate colonial governments, created and extant by the authority of the municipal law of Great Britain, applied their local law over the adjacent seas only under the authority of and subject to that municipal law of Great Britain.

By authorizing the colonies to act defensively or for protective purposes on the adjacent seas, Great Britain effectively made the colonial governments agents of the sovereign. Therefore acts enforcing protective jurisdiction

would be considered the act of the nation from the perspective of international law, and as such the colonies cannot be described as having any independent authority to exercise protective jurisdiction. Moreover, the colonies held no de facto status as a personality recognized in international law which could translate their exercise of protective jurisdiction into a claim of ownership over the adjacent seas.

Two charters in the northeast area, both of which were subgrants by the Council for New England under authority of the 1620 New England Charter, fail to create ownership in the sea although ownership of islands was granted and offshore fishing rights were conveyed in the adjacent seas.[190] First, the Council for New England granted a charter to William Bradford in 1629, for the colony of New Plymouth. That charter conveyed a right of fishing in the adjacent sea and limited control of coastal seas, but ownership of or general jurisdiction over the coastal seas was not granted. Second, the Council for New England granted the 1629 Massachusetts Bay Charter which gave a right of fishing offshore as well as control over harbors, creeks, ports and islands, but did not give unlimited control over the adjacent seas.

Indeed the right to fish in the adjacent seas granted in colonial charters was not a grant of exclusive control

because such grant was to enjoy the rights of all Englishmen to fish in the sea and in the arms of the sea, without reference to any power of exclusion over other colonists or foreigners. Further the boundaries for Massachusetts Bay Colony were described by its charter language as running "from the Atlantick and Westerne Sea and Ocean on the East Parte, to the South Sea on the West Parte." Clearly no ownership of or general jurisdictional interest over the adjacent seas was granted by such boundaries and any exercise of colonial jurisdiction beyond those boundaries has been shown to be protective in nature; largely involving British subjects.

Charters issued by the Council for New England are peculiar in that the Council could grant no more in the charters which it issued than it held under the 1620 New England Charter. Ironically the 1620 New England Charter was revoked in 1635 and all rights of the Council for New England were relinquished.[191] Both the 1629 Massachusetts Bay Charter and the 1629 Charter for New Plymouth were still extant at this time and apparently neither was revoked by the termination of the 1620 Charter for New England. The explanation appears to be that legal rights created by the Council for New England pursuant to the authorization of the 1620 New England Charter were considered to be created on behalf of the Crown. As such these two charters, which

could contain grants to no more legal rights than were held under the 1620 New England Charter, were held independently as presently conveyed and vested legal rights under municipal law and thus were not affected by the termination of the creating authority.

The sea around England was not considered to be possessed and owned under municipal law, except during the Stuart period which coincides roughly with these early charters. However, such claims of ownership applied only to the English seas. Even Selden who was most vocal for Stuart pretensions to ownership of the English Seas based his claim on occupation of the sea by naval vessels and fisheries activities which thus allowed English possession of those seas. In the seas adjacent to the American colonies there simply was no such fisheries activity or naval occupation by either the colonies or the Crown, and thus there was no basis for a claim to ownership of seas adjacent to the American colonies even had that claim been made.[192] This reality substantiates the position that the Crown never intended to convey interests and rights over the seas adjacent to the colonies to the extent which Great Britain claimed and exercised those interests and rights in the English seas. In fact it is quite clear from Crown use of the colonial vice-admiralty courts that Great Britain reserved an essential part of the rights and

interests in the seas adjacent to the colonies to herself.

In 1683 the 1629 Massachusetts Bay Charter was revoked by a writ of scire facias. A second charter for Massachusetts Bay was issued in 1691. That 1691 Charter for Massachusetts Bay included the standard grant of ports, havens, isles, commodities and jurisdictions. In fact all islands within ten leagues of the shore were granted, and a right to sea fishing was confirmed in the colonists, but no ownership over the adjacent seas was conveyed and no indication of a general jurisdiction over the adjacent sea appears in this charter.[193]

Other charters were issued by the Council for New England among which was a 1629 Grant of New Hampshire to John Mason. Mason as proprietor of the colony received franchises to escheats, flotsam, jetsam, ligan and maritime jurisdiction together with "all the rights of the Council in the premises". The Council's rights included islands, and the Council specifically granted islands within five leagues of the coastline as well as the adjoining seas.[194] This grant of adjacent seas is unique. The sea could not actually be conveyed by the Council because under the 1620 New England Charter the Council was given no right of ownership or general jurisdiction over the adjacent seas. Since the grant to Mason was limited to the "rights of the Council in the premises" the explanation is that Mason was

granted franchises to the royalties arising under the prerogative property right pertaining to the adjacent seas, and these franchises were simply meant to apply seaward to five leagues exclusive of the interests of any other colonial grantee. Therefore the term "seas adjoining" was used by the Council without intention that the adjacent seas should pass.

What actually passed to Mason were exclusive franchise rights within a designated sea area, but not ownership of the area or even general jurisdiction within it. One interesting aspect of the rule establishing the need for specificity in Crown grants was that even with this purported grant of adjacent seas it was necessary in the Charter for New Hampshire to specifically mention islands as being granted. Moreover because the adjacent seas had never been granted to the Council by specific words or otherwise, it could not legally grant to Mason that which it did not hold.

Because Mason's rights were specifically based on the rights of the Council, rather than being created without reference to the rights of the Council as the Massachusetts Bay Charter had been, it was necessary that a new charter be issued for Mason after the 1620 New England Charter was revoked in 1635. The new 1635 Charter for New Hampshire granted Mason the same mainland territory, isles and seas as were held under the 1629 Grant of New Hampshire.[195]

This grant of seas may also be explained as not passing ownership of the adjacent seas, but merely creating an area where maritime franchises held under the charter would apply, as his former charter had done.

New Hampshire and its grant of adjacent seas, referred to as "seas adjoining", which phrase itself indicates the seas were beyond the boundaries of the colony, was unique among the American colonies. However, any ownership interest which the New Hampshire colony may arguably have held over that adjacent coastal sea terminated when Mason relinquished all his rights and surrendered the 1635 Charter to the Crown in 1679. Thereafter New Hampshire remained a royal colony and all interests which Mason had held as proprietor were either merged in the Crown prerogative right or held independently by the Crown.

Besides the colonies founded pursuant to charters issued by the Council for New England, the northeast area contained the colonies of Rhode Island and Connecticut which were created pursuant to independent charters issued by the Crown. Rhode Island began its existence as a colony in 1643 when the Patent for the Providence Plantations was issued. Later, in 1663, a colonial charter was granted for Rhode Island and Providence Plantations. Both the original 1643 patent and the later 1663 charter required

that colonial law comply with the law of England.[196] It is quite clear that whatever status these colonies held as a legal matter, they were always inferior governments and subordinate to the national sovereign which granted their charters.

As with the other colonies the national sovereign granted the Rhode Island colony franchise rights over harbors, havens, ports and islands, as well as a right to offshore fishing in the 1663 charter. But no grant of ownership or general jurisdiction over the seas was made; in fact the colonial territory was described as "bounded on the south by the ocean" which clearly placed the sea beyond the colonial boundaries wherein general jurisdiction was exercised. Thus Rhode Island was not granted ownership of or general governmental interest and jurisdiction over the adjacent seas. As a matter of municipal law the colony of Rhode Island did not have independent capacity to own the sea, or assert de facto general jurisdiction without authorization or ratification of such act by the Crown as national sovereign. Neither any such assertion or ratification ever occurred.

Connecticut was first issued a charter in 1662.[197] That charter contained governmental powers, property rights and legal rights in the form of franchises which were very similar to those granted in all the other colonial charters.

No exclusive fishing rights were given to Connecticut on the adjacent seas. There was simply a reiteration of the inter-colonial right of sea fishing, which precluded any colonial assertions of exclusive fishing rights. By this general right to fish one colony could not exclude the fishermen of other colonies from their coastal seas. Moreover the general public rights to fishing and navigation in the adjacent seas by British subjects and friends was clearly set out in this charter by the reservation of a general fishing right. That reservation evidences that no attempt was made to set aside the seas adjacent to the colonies as subject to exclusive colonial rights and interests. However, the charter implies that protective jurisdiction may be exercised to exclude enemies, but this neither creates authority to establish an exclusive fishery nor creates a general jurisdiction over the adjacent seas.

This 1662 Connecticut Charter granted governmental powers and property rights as franchise interests by the following language:

> .../T/ogether with all firm Lands, Soils, Grounds, Havens, Ports, Rivers, Waters, Fishing, Mines, Minerals, Precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, Preheminences, and Hereditaments whatsoever, within the said Tract Bounds, Lands, and Islands aforesaid or to them or any of them belonging.[198]

Clearly no ownership of the sea or seabed adjacent to the

colony was granted.

2. The central geographic area of colonies. -- The central area of colonial America comprised five colonies, New York, Pennsylvania, New Jersey, Delaware and Maryland. New York was originally a Dutch colony which Charles II gave to James, Duke of York, in 1660.[199] At that time "New Amsterdam" was under Dutch control, but the Duke of York secured it from the Dutch in short order. When James became king in 1685, New York became a royal colony and remained so until the revolution. There was a grant of islands in the charter for New York when it was issued to James, together with a grant of mainland territory, but no ownership rights or rights of general jurisdiction were conveyed over the ocean.

Pennsylvania was a proprietary colony granted to William Penn in 1681 by the Duke of York.[200] Its territory was formed by a slice from the Duke of York's grant from Charles II in 1660. As with the Duke of York's grant, this colony was not concerned with ownership of the sea, especially after Pennsylvania relinquished any claim to a seacoast with a grant of some territory to other proprietors forming the colony of Delaware in 1701.[201] The Delaware grant from Penn required that the proprietors acknowledge the sovereignty of the Crown as a condition for the grant. Further Delaware's grant ultimately was

based on that of the Duke of York through the grant to Penn, and as such it did not and could not contain any ownership right or right of general jurisdiction over the adjacent seas.

New Jersey came into being as a separate colony in 1664 when the Duke of York conveyed the area to Lord Berkeley and Sir George Carteret. In 1674 Charles II made another grant in the central area of the colonies to form the colony of West Jersey. This grant was made to Carteret, and incorporated the terms of the 1664 Charter for New Jersey given by the Duke of York in order to identify the governmental rights and property rights that were to pass to Carteret as proprietor. East Jersey originally under Lord Berkeley incorporated itself pursuant to adoption of a "fundamental constitution" in 1683 under a grant to a number of proprietors. Both East Jersey and West Jersey as separate colonies remained subject to the national sovereign authority of the Crown. Both these colonies eventually surrendered their governmental charter rights to Queen Anne in 1702. However, the proprietors specifically retained their property rights, vested in them by the original charters, as part of their formal surrender, although a royal colony was created by the surrender of their governmental rights under the charter.[202]

In 1632 a charter for the colony of Maryland was issued.[203] The proprietor holding the charter rights was

Lord Baltimore (Calvert). As part of Lord Baltimore's grant of territory that charter conveyed ports, bays, havens and straits as well as all islands within 10 leagues of the shore, but the adjacent sea was not conveyed. Also conveyed was general right to fishing in the adjacent seas but no general jurisdiction over the adjacent sea was so conveyed. The governmental power under the Charter for Maryland was vested in Lord Baltimore, and as with the other colonies such authority was restricted by the provision that charter rights in the colonies were not to be exercised contrary to the laws of England. Nothing appears in this charter to indicate any intention to claim ownership of, exclusive rights in, or general jurisdiction over the adjacent seas and seabed.

3. The southern geographic area of colonies. -- Finally, in the southern colonial area charters were issued for Virginia, Carolina and Georgia. Virginia received its first charter in 1606.[204] That charter conveyed all islands within 100 miles of the coast together with ports and havens as well as a right to offshore fishing. The intervening sea between the mainland and the islands, within which the right to fishing applied, was not itself conveyed by the charter. In fact the colonial boundary was "along the said Coast" clearly indicating that no ownership interest of or general jurisdiction over the sea

was granted. The second Virginia Charter was issued in 1609 and granted essentially the same rights and interests by the first charter within a colonial territory bounded by the coastline from "Sea to Sea".[205] Notably this charter was issued during the period when an inland sea was thought to exist which explains the use of from "Sea to Sea" describing the territorial boundary. Thus the grant from sea to sea did not actually convey the sea because the great western sea (Atlantic Ocean), and an unknown inland sea were intended as the territorial bounds for colonial administration.

A third Virginia Charter was issued in 1612.[206] That charter conveyed all islands within 300 leagues of the coast. The extension seaward of the islands to be included within the colony was in order to bring Bermuda within the governmental administration of the Virginia colony, as well as to assert ownership over any undiscovered islands in that area. As with the two prior charters no ownership of or general right of jurisdiction over the intervening sea was created by the third Charter for Virginia. There is no doubt that as a colonial government Virginia was considered to be very much subordinate to the Crown as sovereign.

Under the third Virginia Charter the usual provision was made that colonial laws of Virginia were to be in accord with the law of England.[207] In fact Virginia

later came under direct government by the sovereign in 1623 when it became a royal colony after its third charter was revoked by a quo warranto writ. A fourth Charter for Virginia was drafted in 1676 but was never officially issued and Virginia remained a royal colony until 1776, and the War of the American Revolution.

A charter was issued in 1629 creating the colony of Carolina.[208] That charter was a proprietary charter issued to Robert Heath. When the 1629 Carolina Charter was examined in part earlier, it was used for the purpose of showing the model charter language which was relied upon to grant governmental powers, property rights and franchise rights. Among the many important governmental powers which this charter granted were the power to establish courts with jurisdiction of cases arising by land and sea, to make war, to raise a militia, and to pursue enemies by land and sea. The colonial boundary under this 1629 charter ran "to the Ocean upon the east side", and neither included ownership of the adjacent sea or seabed within the area of grant, nor broadened any grant of jurisdiction in the charter into a grant of general jurisdiction over the adjacent seas.

In 1663 a second charter for Carolina was issued.[209] The recipient of this charter was Clarendon and his grant included ports, havens and harbors, but not adjacent seas.

A 1665 Charter for Carolina was also issued and it contained a recital of conveyance of the right to grounds in the Virginia seas.[210] This was simply a grant to existing or future islands in the adjacent sea. Next in the history of Carolina was a 1669 "Fundamental Constitution of Carolina" which did not create any ownership interest in or general right of jurisdiction over the adjacent seas.[211]

Carolina was a proprietary colony which eventually developed two distinct areas of settlement; North Carolina and South Carolina. In 1729 the proprietary rights in both the Carolina settlements were surrendered. The governmental rights and property rights of the proprietors were passed to the Crown, and subsequently two royal provinces, North Carolina and South Carolina were created.

The Georgia Charter issued in 1732 was the last colonial charter granted to an American colony.[212] That charter in fact was distinct from earlier proprietary charters in that it created a temporary trusteeship which terminated in 1756. After the trusteeship terminated, Georgia became a royal colony. In the charter which Georgia initially received, the usual franchise interests, property rights, legal rights, and governmental powers, were granted. As with thecharters issued to other colonies Georgia received no ownership interest or general right of jurisdiction over the adjacent seas. Also, similar to other colonial

territorial boundaries, the colonial boundary of Georgia did not include the adjacent sea and ran "along the sea coast".

Not one of these charters for American colonies contained any grant of ownership of or general jurisdiction over the sea or seabed in the seas adjacent to the colonies. Analysis has shown as a matter of construction, according to the common law principles, that the colonial charters were legally inadequate to pass any such ownership interest or general jurisdiction had that been the intent. Moreover, as a matter of municipal law and international law at this time, examined earlier, the adjacent seas could not be claimed unless they were occupied and possessed by the littoral sovereign. While such claims of ownership were made by the Stuarts with regard to the English seas even those unsubstantiated claims were based on fisheries activities and the presence of naval forces. No fisheries or naval force was present in the seas adjacent to the American colonies which would have been sufficient to occupy those seas and thus allow possession adequate to form a basis for any claim of ownership over those seas. Moreover there appears to be no implicit or explicit intention by Great Britain to occupy and possess the seas adjacent to the American colonies let alone attempt to convey such authority to occupy and possess to the colonies.

C. Summary, Chapter IV

Colonial charters were the legal method adopted by the Crown to establish overseas subordinate governments designed for the economic support of England's economy. These colonies were established with local governments comprised of a governor and legislative assembly with authority over and within the territorial boundary of a particular colonial area. The colonial governments were authorized in the colonial charters to exercise limited jurisdiction which has been shown to be protective in nature. The limited jurisdiction was granted to colonial governments along with certain franchise rights over various prerogative royalties, especially to objects appropriated and resources extracted from the adjacent seas. Colonial authority extended to allocation of these franchise rights among British subjects within the colony, but no authorization was made in the charters which indicated that the Crown attempted to pass to the colonial governments any right of ownership of or general jurisdiction over the seas adjacent to North America.

Further, the colonial governments were authorized to apply an exercise of limited jurisdiction over the adjacent seas to repel enemies and suppress piracy. Also included within the exercise of limited jurisdiction was a right to assert personal jurisdiction over those committing

criminal acts on the adjacent seas affecting colonists and English subjects or their property in the colonies. This limited jurisdiction was protective in nature. At no point do any of the colonial charters issued to the American colonies admit of an interpretation that ownership of the sea or seabed in the adjacent seas was conveyed to the colonies or that the colonial governments received a grant of general jurisdiction over those adjacent seas such as would be applicable within the colonial territorial boundaries.

CHAPTER V

Great Britain As National Sovereign Controlled Colonial Governments During The Seventeenth Century And Eighteenth Century

Throughout the colonial period of the seventeenth century and eighteenth century Parliament enacted much legislation which affected and directed colonial commerce, property and government. Upon examination such legislation demonstrates that the colonial governments were not only a creation of municipal law but also a form of government subordinate to the national government. As subordinate domestic governments the colonies held no de jure or de facto status under principles of international law which would have enabled them to act independently in order to occupy and possess the adjacent seas for ownership or protective purposes. Thus Great Britain holding the powers of national government effectively exercised sovereign rights over her colonies. As sovereign any right to possess the adjacent seas for protective purposes resided with Great Britain and therefore Great Britain was able to act external to the national territorial boundaries and exercise limited jurisdiction over the coastal sea. Any colonial measures attempting occupation or claiming

possession of those adjacent seas should not be considered to be independently performed as a matter of international law. Rather such acts should be viewed in international law as acts of the sovereign, and such acts by the colonies would be conducted as British subjects or agents of the sovereign.[213]

Turning to the exercise of national governmental authority over the colonies it appears that commencing in 1660 and continuing throughout the colonial period a series of Parliamentary enactments were aimed at directing and controlling colonial commerce. This series of legislation contained measures known as the "navigation acts" which exerted control over colonial affairs making it apparent that the conduct of external commerce by the colonies was manipulated and directed by the sovereign authority of Great Britain. The navigation acts were especially pervasive in their control over the goods exported or imported by the colonies. The effective direction of colonial commerce was achieved by the initial move in 1660 which restricted the carriage of exports or imports in the colonies to English or colonial vessels.[214] Moreover, wool, sugar, indigo, tobacco, ginger and fustic were specified goods which could not be exported indiscriminately; in fact, those goods could be shipped only to England or other British colonies. Violation of this act carried substantial

penalties: a fine in the amount of £1,000 would be levied for a vessel under 100 tons, and £2,000 for vessels larger than 100 tons. A second act, passed in 1663, required all colonial exports bound for Europe, which were earlier required to be shipped in English or colonial vessels, first to pass through certain English ports thereby imposing new duties upon the goods entering and leaving England.[215] Ten years later, in 1673, Parliament enacted a statute which required a bond to be posted for the value of colonial goods when they were being exported in order to ensure that such goods would be landed in England before arriving on the continent.[216] Some colonials had apparently discovered that Great Britain was easily avoided on an Atlantic crossing.

It is not surprising that faced with such restrictive measures on colonial commerce the independent-minded colonials took every opportunity to avoid the consequences of the navigation acts. Thus enforcement of the acts created more than a minor problem for Great Britain especially because of "...the artifice and cunning of ill-disposed persons...".[217] These enforcement difficulties were such a cause of concern to the sovereign that Parliament enacted more legislation requiring that each vessel owner, its master, and three-quarters of the crew be either colonials or Englishmen.[218] This statute was designed to ensure

compliance with the sovereign's law by placing the duty of obedience squarely on his patriotic subjects. But just to be certain that the navigation acts were complied with, the Crown sought to exert a more immediate form of control in the colonies through the colonial governors. Therefore colonial governors were required to take an oath to enforce these navigation acts. Failure of the governor to take the oath, or neglect, or complicity on the part of the governor enabling evasion of the navigation acts' requirements would result in dismissal of the governor from office and a 1,000 fine. It is not surprising that colonial governors were for all purposes the Crown's agents within the colonial governments. This agency is supported by the commissions which the Crown issued to these governors. The commissions enumerated among the governors' responsibilities power to direct administration of government, authority over the colonial judiciary, and power to disallow legislation enacted by the colonial assembly.[219]

Usually the power to erect a vice-admiralty court was also set out in a commission to the governor. Thus in accord with grants in most colonial charters, subsequent to the Crown's issuance of the governor's commission authorizing him to exercise the admiralty jurisdiction, the Lord High Admiral or Commissioners of the Admiralty

would send an admiralty commission setting out admiralty jurisdiction for the colony as broad as it had ever been in England. Such admiralty jurisdiction was identical with the admiralty jurisdiction exercised in England. It was also the same subject-matter jurisdiction, without any element of general jurisdiction as exercised within the colonies or Great Britain. Thus vice-admiralty commissions issued to colonial governors included within their broad admiralty subject-matter jurisdiction contracts signed beyond the seas to be performed within the colony, matters dealing with flotsam, jetsam, ligan, derelict vessels, royal fish, anchorages, ballast, illegal fishing, wreck, death on the sea below the high water mark, mayhem, and all causes civil and maritime between merchants, owners and proprietors of vessels.[220]

The broad jurisdiction of the colonial vice-admiralty courts, and their ability to act without reliance upon biased colonial juries made these courts an effective tool for immediate Crown control in the enforcement of British law directing the colonies for national economic welfare. The statutory measures taken for the national economic welfare, such as the navigation acts, usually ran against colonial interests and thus failed to gain approval from the colonists. But Crown management over affairs of trade and customs was tightened through the vice-admiralty

courts. By 1763 nine vice-admiralty courts existed, one in each of the royal colonies.[221] By 1767 four central appellate vice-admiralty courts were established in Halifax, Boston, Philadelphia and Charleston.[222] These appellate vice-admiralty courts made Crown presence and authority more immediate by placing appellate judges in the colonies thereby obviating the old time-consuming appeal process to the high Court of Admiralty in England. Placing agents of immediate Crown authority within the midst of the colonies enabled Great Britain to demonstrate that it held sovereign power and legal authority over the subordinate colonial governments.

During the eighteenth century enforcement of customs laws was placed with vice-admiralty court jurisdiction. Enforcement of those laws in the vice-admiralty courts also avoided the colonial jury. Thus in 1676, the vice-admiralty courts were given jurisdiction over the collection of penalties and forfeitures arising from violations of the trade laws, as well as jurisdiction to collect revenues for violations of Parliamentary statutory regulations enacted for application within the respective colonies.[223] Moreover, under the authority of the Lord High Admiral vice-admiralty courts had been invested with power to issue privateer's commissions. Not only did these courts issue privateer's commissions but they held exclusive jurisdiction over prize cases. Clearly

the subject-matter jurisdiction vested in the vice-admiralty courts by the Crown excluded the colonial governments from exercising a protective jurisdiction and applying an important body of law over the adjacent seas. Thus customs regulation, admiralty and prize jurisdiction, each intimately connected with exercises of protective jurisdiction as shown earlier were reserved in the sovereign, Great Britain and not delegated to the colonies.

Not satisfied with the requirements imposed by national authority under the navigation acts and the oaths of colonial governors, Parliament enacted a further requirement that customs officers stationed in the colonies post security with the governor for performance of their duties.[224] The customs inspection of vessels performed by these men was directed to be with the same thoroughness and according to the standards of such inspections performed in England. Then Parliament specifically declared null and void any colonial laws existing or to be enacted which conflicted with laws established by Parliament on customs enforcement or the navigation acts. It is clear that this important aspect of national authority, exercised as a protective jurisdiction, was being retained under authority of the sovereign, Great Britain.

Great Britain directed colonial trade to accord with the economic theory of mercantilism followed at that time. As such Great Britain sought to bolster domestic industry

for export purposes by manipulating the colonies as a source of raw materials and goods, as well as using them as a secured potential market for British manufacturers. For example, in 1699 American and Irish producers were flooding the potential British wool market in Europe. Parliament's reaction was to enact legislation which prevented the exportation of wool from the colonies.[225] In 1732 colonial manufacture began to take over domestic British markets for felt hats. Parliament responded by prohibiting the export of hats from the colonies, and by requiring a seven-year apprenticeship for colonial hat makers.[226] Another example occurred in 1750 with Parliament's measure directing the colonial governments not to permit the construction of any mills for the manufacture of steel.[227]

But Great Britain was not concerned with domestic manufacturers and producers alone. Thus in 1733 when the colonies were importing sugar and molasses from non-British colonies, and thereby hurting these products in the West Indian colonies, Parliament placed a high tariff on sugar and molasses imported from colonies under foreign control.[228] Clearly trade and industry in colonial America, as a matter of municipal law, was within the control of sovereign authority under the Crown and Parliament. The colonies did not have sufficient status under

municipal law to control their exports and imports. Such control might be an indication of some de facto independent status of the colonies, but in fact they were clearly subordinate municipal governments.

Interference with colonial governmental rights and interests began to take on a more direct approach in the eighteenth century with a series of enactments by Parliament known as the "white pine acts". These acts were the product of the Crown's governmental prerogative responsibility for defense of the realm, coupled with the rich supply of naval stores and tall straight white pine trees in the American colonies. Thus, the need to provide masts and spars for naval vessels prompted Parliament to claim these colonial white pine trees as Crown property. According to the first of these acts in 1711, white pine trees not privately owned and larger than twenty-four inches in diameter at one foot from the ground were to be marked with the king's broad arrow indicating that they were Crown property.[229] In order to cut these trees a license was required. Should someone fell a white pine marked with the king's arrow without a license a fine of 100 was to be swiftly imposed by a justice of the peace.

In 1721 Parliament passed a second white pine act.[230] That 1721 act restricted the cutting of all white pines not within townships. Violations of this act were to be

tried in the colonial vice-admiralty courts. By trial in these vice-admiralty courts only two witnesses were needed for conviction, and as mentioned earlier a colonial jury was avoided. Such a jury in other courts was usually reluctant to convict colonials violating measures such as the white pine acts. By 1729 another white pine act claimed for the Crown all white pines that were not on private property.[231] This law applied even to those trees which were located within townships, but not to those subject to private property rights. The taking of white pines by the Crown demonstrates the power of Great Britain as sovereign to reclaim property rights granted to colonial governments in colonial charters in order to pursue national needs and objectives, as well as to enact criminal laws enforcing that sovereign right. Such taking also shows the advantage of holding vested property rights not dependent on the continued existence of a colonial charter.

Clearly Great Britain as sovereign had retained and exercised the right of a sovereign over subordinate colonial governments in order to control the exporting and importing of goods in each of the colonies. Such authority in the sovereign, and the exercise of that authority as a matter of municipal law, clearly indicate that the colonial governments served no more than the

subordinate function of fulfilling inferior local administration. Thus Great Britain could act to limit the legal authority of inferior local colonial governments by authority of its sovereign status and national governmental authority.

Not only were laws enacted by colonial legislatures subject to review and disallowance but also the governmental rights held under colonial charters were restricted in the eighteenth century so that charter holders could not create an independent grant of territory and governmental authority passing those charter rights to a new grantee as was done in the seventeenth century by the Council for New England. For example, when the proprietors of Carolina decided to cede a portion of their territory to Sir Robot Mountgomery, to be under his governorship, the proprietors were told that such a grant could not be made by them directly. As part of the Crown's tightened controls on the colonies the Carolina proprietors were told that they first would have to surrender their charter and subsequent to such surrender two new charters would be issued, one to the Carolina proprietors and one to Mountgomery. But even this plan to create a new colonial government did not achieve fruition because the Council for Trade and Plantations recommended that no further proprietary charters be issued due to the difficulties

proprietary colonies were causing Crown administration. As a result of that recommendation Mountgomery's bid for a charter failed and no new colonial charters were issued for the American colonies thereafter.[232]

Great Britain's control over colonial property was not limited to disposition of charter rights or reclamation of property in emblements such as the white pines. Parliament, in fact, could even order restrictions on the sale of real property in all the colonies; proprietary, corporate and royal. Thus Parliament enacted legislation which ordered that no land in the colonies was to be sold to other than British subjects.[233] There is little question that Great Britain was the ultimate sovereign authority over the colonial governments. By the time of the revolution in 1776, all unappropriated public lands were again claimed by the Crown in all colonies where governmental charter rights had been surrendered.

Other controls were exercised by Great Britain over land within the colonies. For example, in 1761 royal governors were ordered not to grant any real estate adjacent to or within lands reserved to the American Indians. This order was the result of the 1763 Peace of Paris. Under the terms of that treaty Canada and lands east of the Mississippi were brought into the British empire through a cession from France based on conquest. Subsequent to the

cession of these lands the Proclamation of 1763 was issued. That Proclamation prohibited settlement in the new "western lands". Moreover these "western lands", which were not subject to charter grants to the American colonies, were to be reserved for the American Indians.[234] Through this Proclamation the Crown demonstrated that it had the authority as sovereign to allocate new lands in the colonies taken by conquest, as well as the right to restrict the use of land already allocated to the colonies by charter, in order to achieve superior national interests.

There can be no question that the national government of Great Britain perceived itself to be a sovereign with sovereign authority over her American colonies. Thus each colonial government was limited to the authority which the Crown was willing to allow and no colony existed as a government separate from the sovereign. Perhaps the most clear statement depicting the colonial governments in their subordinate position appeared in a Parliamentary enactment in 1766.[235] In this legislation the Crown and Parliament were described as having full power and authority to enact laws and statutes binding the "colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever". Time and again Parliament's enactments recited that colonial ordinances or statutes at variance with the laws of Great Britain were completely null and void and thereby indicated Parliament's perception of the

colonies as inferior and subordinate governmental organizations.

William Blackstone discussed the relationship of the law in the American colonies to the law in Great Britain. He submitted that the colonies were subject to municipal law insofar as it was applicable to the colonial situation. Apparently as the date 1776 approached the Crown considered that the colonial situation required colonial law to accord more closely with that of Great Britain. However, due to the complicated appeal process to the Privy Council for colonial laws which were challenged or had been disallowed by the colonial governors, the colonies were largely able to direct the structure of their own laws, especially when they did not conflict directly with Parliament's legislation. Another consideration in review of colonial laws was that such laws were not consistent from colony to colony and therefore a certain latitude for innovation was allowed by local circumstances.

The governmental jurisdiction exercised over the seas adjacent to the colonies was so exercised at the discretion of Great Britain. Upon analysis such exercise appears to be of the same protective nature as that jurisdiction exercised over the seas adjacent to the British Isles.[236] Most of the municipal laws applied over the seas adjacent to the colonies were applied under the authority of Great

Britain and involved admiralty and prize law as well as customs laws which a protective jurisdiction analysis has already demonstrated did not contain a claim of ownership or general jurisdiction over the sea. Moreover it has been shown that the colonies did not possess any attributes of de facto legal personalities in international law; they did not control imports or exports nor was their governmental authority over colonial affairs and territory exclusive of the sovereign's needs and direction.

Summary, Chapter V

It is not surprising that customs laws formed the bulk of legislation to be applied to the colonies. Over the years, in both the seventeenth century and eighteenth century, British attention had been consistently focused on external colonial trade. The colonies were started with the idea that they should aid the national economy by providing raw materials and promoting the development of British commerce. It was not until the early eighteenth century, when the colonies became difficult to govern, that any real attention was paid to their internal activities of trade and government. By that time the effort to control independent internal colonial affairs was understandably largely a failure.[237]

Laws in favor of British industry had been enacted

pursuant to sovereign authority to control colonial industries, and pursuant to that same authority vice-admiralty courts eventually became the tool for Crown enforcement of navigation acts, white pine acts, and customs laws over British subjects within the colonies. But the Crown adopted other methods to ensure the enforcement of Parliament's legislation. For example, control of local officials, such as customs officers, was not left in the hands of colonial governments, or even Crown controlled governors, but was placed and retained under immediate and direct Crown authority. Also reports were filed by the Commissioners for Trade and Plantations which described the performance of governors in enforcement of the national tax laws. Also receivers-general were directly appointed by the Crown in the colonies to handle the Crown's interest in quit-rents, fines, forfeitures, amercements, as well as in all items which were seized and condemned in the vice-admiralty courts.[238]

Colonial governments as a matter of municipal law were not independent entities. Rather they were subordinate to British national interests. Commerce, property and government in the colonies were all manipulated for expedient service to national interests. There is no question that the sovereign authority was Great Britain's, so much that the colonies held no <u>de facto</u> status as

governments which would have enabled their independent occupation and possession of the adjacent seas for claims of ownership or assertions of general jurisdiction as a matter of international law.

Independent of administering her colonies or in conjunction therewith Great Britain had neither claimed nor conveyed any ownership of or general jurisdiction over the seas adjacent to the colonies. As a matter of municipal law not only did the colonies lack authority to make such an appropriation of the adjacent seas, but there is no evidence that any of them acted sua sponte to do so. Moreover, even if such a claim had been made it could only have been made by British subjects on behalf of the sovereign because of the incapacity of colonial governments to appropriate the adjacent seas as a matter of either municipal law or international law.

The authority exercised by Great Britain over colonial governments and over exercises of protective jurisdiction in the form of customs and criminal jurisdiction establish that no rights or interests of the sovereign over the seas adjacent to the colonies had been delegated to those colonies. Colonial governments were set up under municipal law only as administrative units for colonial territory, not as sovereigns with independent de jure or de facto legal personalities capable of independently

effecting and exercising full international law rights over their adjacent seas.

CHAPTER VI

Succession Of The United States To The Status Of Sovereign In North America

The War of the American Revolution, 1776-1783, brought the colonial status of the American colonies to an end. Prior to adoption of the Articles of Confederation after the war the only "national" governmental organization was the Continental Congress, formed initially by delegates from the colonies and subsequently from the states. The organizational process designing the national government both during and subsequent to the revolution has given rise to an issue of American constitutional law which bears upon this dissertation. That issue is, whether the former colonies which engaged in the War of the American Revolution attained independence separately, thereby creating as a matter of international law thirteen states or, whether one nation entered that struggle and emerged as the United States. It is the resolution of that issue which controls the rights of the states as opposed to the United States over the adjacent seas, as those rights passed from Great Britain, and were thereafter allocated between the states and the United States under the governmental organization of the new nation.

Analysis of Great Britain's legal position toward her colonies in the previous chapter revealed that those colonies held no international legal personality. Further, that Great Britain was the sovereign over the colonies, and external activities were regulated by the sovereign. Now analysis of the American Revolution will demonstrate that in fact it was not an act of thirteen individual domestic states which rejected Great Britain's status as sovereign. Rather the people of those colonies rejected British rule. Their act of rejection was as a whole, as an act of a single nation not of thirteen nations.

At the time of the War of the American Revolution the colonies formed the territorial and governmental basis upon which the original states came to be constructed. Although the War of the American Revolution may be said to have formally begun with the American Declaration of Independence on July 4, 1776, the colonies which partook in that revolution did not organize a federal government under the present Constitution until 1789. In fact it was not until 1781 that these colonies were organized under the temporary and ineffective Articles of Confederation. Thus it was necessary that the structure of federal government in the United States adopted during and after the War of the American Revolution provide the component states with certain governmental capacities participating

in the domestic rights of sovereignty. As a result, the states are referred to as sovereign, but this is a matter of municipal law and these states possess no sovereign capacity as a matter of international law, nor are they legal personalities as a matter of international law.

A. Revolution and Confederation, 1756-1787

During the eighteenth century the colonies made several attempts at a supra-colonial level to coordinate their defense against raids by the French from colonies in Canada, as well as by American Indians. Attempts at such coordinated action among several colonies had even been made before the eighteenth century. In 1643 the colonies of Massachusetts Bay, New Plymouth, Connecticut and New Haven had formed a league for protection.[239] But that league in no way limited or shaped the chartered governmental powers of the colonies involved. Eventually the league evaporated when the external threat from Indian attacks subsided.

The first serious attempt at major unification among all the American colonies occurred in 1754.[240] A meeting of delegates was held in Albany, New York, to discuss a document for unification known as the "Albany Plan" presented by Benjamin Franklin. Franklin urged the colonies to awareness of their mutual problems and interests. Not

only was his Albany Plan designed to enable the colonies to defend themselves more effectively but if adopted it would have enabled the colonies to present a united front for colonial petitions to the King and Parliament. At all times this Albany Plan for union was understood to be undertaken with the specification that the union would take no action contrary to the laws of England. There was to be no question that this proposed union, which would have set up a central colonial government, fostered settlements in western lands, and established a common defense including commissioning of vessels for a coast guard was to be subordinate to the sovereignty of Great Britain. Ultimately the Albany Plan came to naught once the delegates returned home because of a lack of mutual interest among the colonies. But the very fact that the conference at Albany could have been called indicates that the colonies were troubled and that mutual interests were emerging as a result of their common restlessness and dissatisfaction.

Ultimately the continuing troubles with Great Britain led to a meeting of delegates called for September 5, 1774 in Philadelphia. This meeting of delegates was known as the First Continental Congress and it was the beginning of a national government. The original objective of the Congress was not to direct a movement for independence

but to reconcile the colonies with the sovereign. However, that objective failed and the first battles of the War of the American Revolution were fought on April 18-19, 1775, at Lexington and Concord, west of Boston in the Massachusetts colony.

The Second Continental Congress met in Philadelphia on May 10, 1775. Even in this later meeting the objective of Congress was again to explain by apology the taking up of arms and thus to be reconciled with Great Britain. To that end a petition was sent to George III on July 8, 1775 from the Continental Congress, but he refused to look at it. Perhaps looking at such a petition would have been to no avail for the desired reconciliation because by the time the petition arrived in Great Britain, war was underway. Thus when George III received the petition a battle had been fought on Breed's Hill, outside Boston at Charlestown, and General Benedict Arnold was then leading a military expedition against Quebec.[241]

The people of the American colonies were in revolt and it was their revolt coupled with the colonial tradition of local government that created the foundation for the domestic governmental structure of the United States. Thus the people were the sovereign not the government. In their sovereign capacity the people were citizens of their national government, which government only exercised the sovereignty delegated from the people.

The individual colonies had provided local government in the form of legislatures and courts, and after commencement of the revolution continued to provide those governmental services while receiving from the people the right to exercise limited sovereignty for internal domestic government. Residents of these former colonies, now domestic states, were citizens of their states as well as citizens of the nation. In consequence national representation of local interests was achieved by delegates sent from the states to the national Continental Congress.[242] These delegates voiced concerns of the citizens of their several states, but as members of a national body they also represented citizens of the nation and they directed the government of a nation not a single domestic state. The local government of the several states exercising a limited internal sovereignty was left to state governors, legislatures and courts.[243]

After two Continental Congresses had met the colonists entered upon the national act of formally beginning a revolution by issuing the Declaration of Independence on July 4, 1776.[244] Prior to this national declaration of independence several of the states had articulated their own declarations of independence and formulated constitutions for state governments. But these state actions were the result of a national direction from the

Continental Congress and were not attempts to create a number of independent nations. Therefore the Congress became the vehicle of representation for the people of the American colonies, and it was as a nation that the people in the several states acted together "to alter their former systems of government".

Congress assumed the role of sovereign as a matter of international law, with its formal notice of independnece directed to Great Britain and the world. All national rights of sovereignty were claimed for the nation in the name of "United Colonies", or "States of America". Congress, representing the people of the nation, had set forth grievances of the people in the Declaration of Independence and thereby claimed the rights of a nation assuming the rights of sovereignty for the entire people in the name of the "United Colonies". Thus it was stated that the nation "as Free and Independent States, ... have full Power to levy War, conclude Peace, contract Alliances which Independent States may of right do." The point is clear: national rights were not assumed for the states separately, but only for the nation in its states and people as a whole.[245]

Since the earliest days of the nation there have been strong advocates for "states' rights" which are set up in opposition to those rights of government held by the

sovereign. Among state delegates to the Continental Congresses were those who argued that the states were "sovereign" or that they were "free and independent". These were largely arguments for states' governmental rights, which would have allowed a large degree of local autonomy. Later in American history such claims were tested by civil war. In a few cases, delegates held to the view that the states were legal personalities, such as sovereigns in international law, and that the states were therefore separately sovereign, free and independent, with only few rights held by the national government. Thus the states' rights argument maintained that each state held a distinct territory and government with complete control of both the territory and government in the local sovereign populace. However, under the national system of government, and as stated in the Declaration of Independence, sovereignty was vested in the people as a whole. It was the sovereign people, not the several states, that created the United States. That national government then either succeeded to the rights of the previous sovereign, Great Britain, or it developed its own national interest distinct from those previously held by Great Britain. As a matter of internal government the people vested their several states with domestic sovereignty for the regulation of local concerns only.[246] Such vesting

did not lessen the authority of the national government as sovereign in international law. The Continental Congresses had acted in the role of a national government with the authority of a sovereign. From that point onward the United States acted as a sovereign, a legal national personality in international law.

Several examples demonstrate the national government acting as the sovereign and exercising sovereign rights. In June, 1775, George Washington was issued a commission as "Commander in chief, of the army of the 'United Colonies'" by the Continental Congress.[247] The purpose of that army, of the commission, and of the Continental Congress was the defense of the national interest of the American people--not the interests of thirteen temporarily and loosely allied international sovereigns. Moreover, the Continental Congress acted from the beginning to secure to itself the traditional functions of national authority. Thus a standing committee of the Continental Congress was appointed with power of final disposition to review "sentences passed on libels in the courts of Admiralty in the respective states..."[248] That authority had been reserved previously for the sovereign Great Britain in the vice-admiralty courts. Further, the Continental Congress alone had the supreme power over "war and peace", "international affairs", and thus "captures" or prize cases

which traditionally were a matter of international law with foreign affairs consequences.[249] Where a national interest was identified uniformity and consistency were required and provided for by a right of appeal from local governmental and court rulings to Congress. As a matter of municipal law ultimate authority over national concerns was placed in the Continental Congress.

A formal document for the national government of the United States appeared in the Congress in 1779.[250] This document, known as the Articles of Confederation, became operative in 1781 when the State of Maryland provided the last necessary signature to the Articles. These Articles were not a treaty between sovereign nations, they were more than that because they were a plan for national government. Thus a perpetual union under a national government was formed under the provisions of the Articles, not a loose confederation of nations. The title adopted for the nation, its people and their government in these Articles of Confederation became the "United States of America".

The Articles of Confederation were poor as a document for government and this was a consequence of the failure to grant sufficient authority over state governments to the national government.[251] It was therefore easy for internal state politics to cripple conduct of national

government as well as the exercise of "external sovereignty", that is, the conduct of foreign affairs. Paranoia had been pervasive in America during the revolution because in many quarters it was feared that the war would be fought only to establish a national government equally abusive of its citizens as the former colonies considered Great Britain to have been. Therefore the Articles set out very limited powers for the national government, which were drafted and adopted while the revolution was in progress. Failure to vest the national government with sufficient power had subjected the national government to local and regional influences with the result that state governments largely received the burden of providing governmental continuity both during the violent change from colonies to a nation, and during the formulation of a national document of government. It was the governments in the several states which stabilized the nation while the people formulated the structure to be adopted for the national government.

However much state governments were relied upon during the turmoil of revolutionary war, the state governments never were or ever became severally sovereign. Examination of Article 5 of the Articles of Confederation[252] shows that the delegates to the national Congress were to be appointed by the state legislatures, subject to recall by those

legislatures. Such control of delegates to the national Congress by state legislatures points to the establishment of a system of domestic state authority over delegates retaining authority over the national government in the hands of the people initially through the state legislatures. But sovereign authority--the right to act as a legal personality in international law--was clearly set out for the national government in Article 6 which granted Congress, not state legislatures, power to send and receive ambassadors, negotiate treaties, conduct war and formulate peace, as well as the right to issue letters of marque. The participation of state legislatures was a matter of local concern for those legislatures which never entered upon any national act, and they exercised only functions of internal sovereignty in the domestic conduct of government.[253]

The structure of government under the Articles of Confederation contained several defects which eventually led to their termination. For example, a unanimous vote was required to enact amendments, while assent of nine states out of thirteen was required for important matters. The most notable of all the defects was that Congress was given no taxing power. Thus the national government was dependent on contributions from parsimonious state legislatures for funds. Moreover, because of the loose

structure of government under the Articles, as well as possible Indian or pirate attacks occurring in the colonies while the Continental Army was engaged with the British, it was necessary that the exercise of certain powers usually considered "national" be delegated to the states. As a result the organization of state navies and militias was encouraged. However, Congress retained the authority to regulate the states' armed bodies in time of peace after disbanding of the national army. To Congress was reserved also a power to review the exercise of such delegated powers, which power confirms the authority of the national government as sovereign.

During the war the states were authorized to issue letters of marque against the enemy.[254] The authority to issue such letters had previously been exercised by Great Britain because it was retained as a right of the sovereign. However, this grant of authority to the states was merely a war measure and during times of peace the Articles of Confederation strictly reserved the right to the Congress. Also reserved to the Congress by the Articles as an exercise of sovereign authority was the right to try pirates or felons operating on the high seas, as well as jurisdiction over prize cases. Under the authority over prize cases a Court of Capture Appeals was created. That Court had the

right of final determination over all cases of capture determined in state courts.

Actually the Articles delegated a good deal of control over state activities to Congress, especially those acts ordinarily understood to be external exercises of power by a sovereign. While the states could raise a navy or militia under the Articles the states had no individual power to wage war unless based on the immediate need to repel invasion and when they did so they were agents of the national government acting pursuant to prior authorization from that government. The states were also restricted from negotiating any treaties among themselves or with foreign nations, unless Congress ratified the treaty.[255]

Adoption of the Articles of Confederation formalized the national government under the authority of Congress. In a similar fashion the various states adopted their own documents for government. These state documents established the form of government to be followed in each of the former colonies, as well as the applicable body of law to be applied within the state jurisdiction. Often these state constitutions created state admiralty courts, the decisions of which in matters of prize were subject to appeal to the national Court of Capture Appeals established under the Articles. The national government was allocated a necessary

element of the foreign affairs power by this control over state courts applying international law to captures.

Most state constitutions adopted the familiar body of the common law of England as the state's law. Also most state constitutions clearly set government upon the sovereignty of the people who were citizens of the particular state.[256] Thus Delaware in 1776, Maryland in 1776, and Georgia in 1777 recited the sovereignty of the people as the basis of government. Consistent with the declaration of a sovereign people in those constitutions were declarations in the constitutions of other states. It is obvious that at all levels of government American jurisprudence understood constitutional government to be dependent on the sovereignty of its constituent people.

Representatives of the sovereign people in their national capacity negotiated the Treaty of Paris in 1783 which ended the War of the American Revolution. The power to enter into treaties was not set out for Congress in the Articles of Confederation, but Congress regarded the treaty power as derived from the exclusive power of war and peace.[257] Therefore Congress exercised its sovereign power and appointed representatives to negotiate a treaty of peace with Great Britain. Through commissions to those delegates Congress directed them to act for the nation as a whole, not for thirteen separate states. The commissions

were issued in the style of an authorization to negotiate for the "United States" to establish the independence of the "United States".[258] Because Great Britain had created the colonies by several charters and held sovereignty over them severally it was necessary for her to relinquish claims to all thirteen colonies.[259] But the actual negotiations were carried on with the representatives of the new national sovereign sent by Congress not with representatives of the several states.

In short, one nation emerged from the struggles of the War of the American Revolution because the people of the nation made the revolution not the colonial governments. The sovereign people acting in their national capacity, through local delegates sent to Congress, formed a national government.

B. Adoption of the United States Constitution, 1787-1789

Not many years passed under the Articles of Confederation before it became evident that a different system of government was necessary. The critical need was to vest more governmental power at the national level. Interests of the states in the internal affairs of their several governments were the primary reason that under the Articles of Confederation certain necessary powers, such as the right of taxation or control of customs duties, had not

been granted to the national sovereign. The effect of that failure to grant a taxing power to the national sovereign was that when delegates to Congress could agree that funds were necessary in certain amounts from the several states they could not then obtain funds.

In 1787 a convention was called in Philadelphia charged with the task of revising the Articles of Confederation. Instead that Philadelphia Convention drafted a new document for government, the Constitution. No official records were kept of the proceedings of the Philadelphia Convention; in fact secrecy was insisted upon. However, two unofficial journals were kept, one by George Washington and the other by James Madison. Both of these journals were subsequently deposited with the Department of State and are relied upon by historians today as if they were official records.

For the most part the journals of Washington and Madison indicate that the delegates to the Constitutional Convention realized that although they were appointed by the several states, their duty was to the entire people of America. As a result the Constitution which was drafted by these delegates was for a national government, for the United States, not for a federation of thirteen nations. Actually some delegates regarded the existence of the states as temporary, simply existing for the period in which a

federal government was evolving. Those delegates considered that the status of a national government would require elimination of pretentious state sovereignty. Contrarywise, delegates opposing a strong national government raised again the fear that such a national government would obliterate the rights of its citizens and override state governments which protected those rights. However, the journals of the Convention demonstrate that generally the delegates understood that state governments were not sovereign in the international law sense. Rather, the states were sovereign only in the internal functions of government which they carried on as a matter of domestic government. Indeed the journals clearly demonstrate that a vast majority of delegates considered the act of severance with Great Britain to be a national act, but that in pursuing independence the colonies acted as a nation in such a manner that state governments achieved a secure position in the evolving municipal aspect of the national system of government.[260]

In contrast to the vast majority of delegates, there were those who considered that they had only been empowered to review the Articles of Confederation at the 1787 Philadelphia Convention rather than to design a new document of government. These delegates voiced serious concern that the Convention lacked sufficient authority to

draft a new constitution. Although their concern was not frivolous, it was belied by the fact that as delegates of the people, rather than as delegates of state governments they had authority to draft a new instrument for national government.[261]

When the draft Constitution was produced it was forwarded for ratification to the several states. Ratification was achieved in each of the states through specially called conventions, not through state legislatures, emphasizing again that it was the people creating this new government for the nation. In these state conventions, various points of concern were raised and debated. For example, at the convention in Massachusetts concern was voiced that state government would be eviscerated if too much sovereign authority was given to the federal government. The thought was that state governments would be unable to check the exercise of sovereign power over matters of state government. In the end the Massachusetts convention realized the critical need for strong national control and that convention ratified the Constitution.[262]

In Pennsylvania the state convention recognized that too much control in the states over the exercise of sovereign power by the federal government would only harm the Union. That convention voiced the theory that the people as sovereign had the authority to ratify this new

Constitution because they had the right to allocate portions of delegated sovereignty between the national sovereign and the states. At the convention held in North Carolina one delegate accurately observed that the form of government ratified by the sovereign people for their prosperity must include sufficient power and authority to provide for that prosperity.[263]

Ratification of the Constitution was not simply a formality. Indeed it involved a serious debate in the state conventions which lasted more than two years and it was also the subject of considerable debate in the various publications of the day. Thus opposition to ratification of the new Constitution occurred as more than a murmur during this period. The dissent which was voided was based in large part on a theory of the individual sovereignty of each state, that is, each state's supremacy in domestic affairs and in all matters affecting those affairs. Opposition to the new Constitution argued that national sovereignty ought not to be allowed authority to interfere with state sovereignty. The opposition effort included the emotional argument that the War of the American Revolution had been fought to redress transgressions against freedoms, rights and liberties, and that government under the Constitution was provided with the mechanisms capable of destroying once more those freedoms, rights and

liberties. Opposition to the new Constitution was legitimately focused on the possibility that the states had struggled for independence only to succumb to a new and equally odious authority.[264]

A series of essays known as the Federalist Papers, or The Federalist, appeared in support of the adoption of the Constitution.[265] These essays are the most famous and authoritative writings of the time on government according to the new Constitution. Their authors were intimately familiar with the proposed Constitution because they were involved in its drafting. Their participation in the drafting of the Constitution adds greatly to their authority. Thus Alexander Hamilton, John Jay and James Madison wrote their Federalist Papers to expound the need and advantages of a strong central government with internal checks and balances. Essentially they were arguing for a national government which was capable of exercising protective jurisdiction. Therefore they argued for a navy to protect commerce from pirates and enemies, a unitary policy on customs regulations to control exports and imports as well as to create a system for effective taxation, a national admiralty jurisdiction which would consistently apply a uniform body of law, clear supremacy of the national government in matters of defense, and a system of national courts to avoid the bias of state courts in matters requiring national uniformity, especially the application

of federal law. These authors of the Federalist Papers understood the Constitution to provide the national powers needed by the federal government. Also they argued against continuation of government under the Articles of Confederation by contrasting the inefficacy of the Articles during the preceding years with the efficacious government designed in the Constitution.

In 1789 the United States Constitution was adopted by both the states and the people. Ratification in the state conventions was necessary because many of the sovereign powers which the people had formerly exercised in their states through state governments, such as control of customs, were now transferred to the national government. The people were acting not only on behalf of the states in the ratifications from their conventions but also on their own behalf as a sovereign people, as a nation. Thus the people constituted the sovereign authority for adoption of the new form of national government. They ratified the Constitution in their state conventions and thereby invested national sovereign authority in the government of the United States. Popular assent for the Constitution was necessary for the further reason that had state governments acted they would have done so without authority to create a new national government.[266]

The Constitution was an intricate work which did not

automatically exclude state governmental authority in all areas. The powers of the federal government were set out in the Constitution, although certain powers of government were too numerous to be specifically described in the Constitution and thus several constitutional theories evolved to describe the exercise of these powers by the federal government. First were inherent powers which belonged to the federal government simply by reason of the national sovereignty delegated to it from the people. The foreign affairs power is an example of such an inherent power because only the federal government may act externally in the community of nations on behalf of the United States by reason of its delegated national sovereignty.[267]

Other powers were either "resulting powers" or "implied powers".[268] Resulting powers were those powers of government derived from the conjunction of two or more federal powers specifically enumerated in the Constitution. An example of a resulting power arose in litigation over the federal power to maintain national monuments at the Civil War battlefield in Gettysburg, Pennsylvania.[269] That power was confirmed and described by the United States Supreme Court as resulting from the power to declare war, the power to tax, and the power to equip the armed forces. The final group of powers arising in the Constitution are implied powers which exist as a matter of necessity for

the use of enumerated powers. The theory is that without certain implied powers some of the enumerated powers would be useless, and it cannot be presumed that the Constitution would make useless grants of power. Also, under the "necessary and proper" clause Congress can make those laws necessary and proper to the carrying out of the powers enumerated. An example is the enumerated power to establish post offices with implied power to obtain land for those post offices and the further implied power to take that land by eminent domain.[270] Each of these implied powers is both necessary and proper in order to exercise the enumerated power to establish post offices.

The powers of federal government, although those of a sovereign, were not always automatically exclusive. While the foreign affairs power and other powers for the external exercise of sovereignty were by their nature exclusive, other powers were exclusive only when state law conflicted with the national exercise of Constitutional powers through federal legislation.[271] One example appears in state quarantine regulations which were held to be valid law unless they became an impediment to an act of Congress in the area of health laws.[272] In some areas of law the states were allowed to enact legislation until preempted by enactments of Congress. Such matters usually arose in the area of trade when conflict arose with the federal

exercise of power under the Constitution's "commerce clause", which allowed the federal government to regulate commerce between the several states as well as with foreign governments.[273] Thus the states were not allowed to enact their own customs regulations for interstate or international imports or exports. The reason was that the area for such legislation had been preempted by the federal government and such enactments would destroy the national objective of uniform customs regulations for purposes of commerce and foreign affairs.

Among the powers delegated to the United States in the Constitution allowing non-conflicting state legislation was the grant of jurisdiction in the admiralty and maritime clause of Article III. That grant of jurisdiction coupled with the "necessary and proper" clause created a resulting power which gave ultimate maritime judicial and legislative authority to the United States. State legislatures could not enact laws within this exclusively federal body of admiralty and maritime law but they could regulate matters within the purview of federal authority by providing supplemental or alternative remedies for suits that might also be brought in admiralty and thus in federal courts. This power of state law was confirmed by the 1789 Judiciary Act's "saving to suitors" clause which gave a right to seek a common law remedy where one was

available, enabling avoidance of an admiralty proceeding if that was desirable. Such state law remained valid as long as it provided alternative or supplemental relief and did not conflict with federal law in the conduct of federal affairs.[274]

Great Britain had maintained admiralty jurisdiction within the national governmental prerogatives of the Crown. Vice-admiralty courts established in the colonies under Crown authority had even become a tool for the enforcement of unpopular enactments by Parliament. As a result, after the commencement of the revolution the colonists decided to remove the hated admiralty jurisdiction from any national control. But the need to place total control over foreign affairs in the national government placed prize jurisdiction within the power delegated by the people to the national government under the Articles of Confederation. Later it became apparent that the protective jurisdiction function performed by the specialized subject matter admiralty jurisdiction required a system of national courts to apply that law effectively and consistently. Therefore, when the Constitution was drafted a national court system was delineated with full admiralty and maritime jurisdiction. Details for this court system appeared in the 1789 Judiciary Act, which followed the constitutional directive that admiralty and maritime jurisdiction be

strictly federal. Although the state courts could offer remedies for matters arising on navigable water where admiralty and maritime jurisdiction ran they could not offer admiralty law as a means of providing that remedy.[275]

Admiralty and maritime jurisdiction included all maritime matters on the high seas and on navigable waters of the United States including ports, harbors and rivers. Prize jurisdiction as well as a very broad admiralty jurisdiction came within the Constitution's grant of admiralty and maritime jurisdiction. The reason prize jurisdiction remained a matter of federal concern was the same reason that such jurisdiction had been vested in the national government under the Articles of Confederation. That reason was that prize cases required the application of international law. Furthermore, because prize matters would have serious consequences for the conduct of foreign affairs, it was necessary that such jurisdiction be given to the national government under the Constitution. It can easily be seen that, from the perspective of national needs in the community of nations, it was most important that prize cases come within national admiralty and maritime jurisdiction.[276]

Admiralty and maritime jurisdiction remained a subject-matter jurisdiction as it had been in the colonial vice-admiralty courts and in the admiralty courts of England.

However, although American admiralty and maritime jurisdiction did not have a territorial basis or any relation to a possessed marginal belt of sea, the application of prize jurisdiction did come to bear on the development of a three-mile belt of neutral waters adjacent to the coastline of the United States, and it was the three-mile belt of coastal waters which was later considered to form the territorial sea.[277]

Notably the Constitution specifically granted admiralty and maritime jurisdiction as a federal subject-matter jurisdiction.[278] No other body of law was so specifically designated. This grant carried a body of admiralty law to be applied in admiralty and maritime cases exclusive of common law. The body of admiralty law and jurisdiction was broadly interpreted and not limited by the strictures which common law and statutes had imposed on it in England. But that body of general maritime law was applied as subject-matter jurisdiction, as it had been in England, and did not evidence any ownership, or general jurisdiction over the waters adjacent to the coastline of the United States. General jurisdiction over the seas adjacent to the United States was later established through possession and ownership of those seas by the United States as sovereign. The general jurisdiction applied under the later extension of sovereignty

was restricted by the international law right of innocent passage.

The power of the federal government over the governments of the states is set out clearly in the "supremacy clause" of the Constitution which creates the sovereign federal government.[279] From the first meeting of the Continental Congress in 1774 at Philadelphia, the people of the United States took upon itself the sovereignty formerly exercised over the colonies by the Crown and Parliament of Great Britain. This authority in the people was delegated to Congress and ultimately delegated to the federal government, through the Constitution and clauses in that document of government such as the supremacy clause. Thus it was the American people and their national government, not thirteen states, which succeeded to the rights of sovereignty exercised by Great Britain over the seas adjacent to the colonies.

C. Summary, Chapter VI

At the time of the American Revolution the municipal law of Great Britain and international law both recognized the right of littoral national sovereigns to possess their adjacent seas for purposes of exclusively exercising governmental authority which analysis has shown to be protective jurisdiction. Because the right to exercise

that jurisdiction was a function of sovereignty it did not pass to the states as a governmental right either through their former status as colonies or their post-revolution status as domestic states. The states were not sovereigns, and neither held nor attained the capacity in international law to exercise independent protective jurisdiction over the adjacent sea. Whatever jurisdiction they had exercised by letters of marque, customs duties or the prosecution of pirates they exercised as a matter of authorization from the sovereign, essentially as agents of the national government. Although the United States immediately replaced Great Britain as sovereign, several years would pass before the form of national government would be developed. Similarly, several more years were to pass before the United States would exercise protective jurisdiction over the seas adjacent to the coastline. Initially the new nation exerted its protective jurisdiction over the coastal sea because maritime commerce was the strong point of the national economy and because there was a pressing need for defensive measures and the enforcement of custom resulations to be exercised over the adjacent seas.[280] Such exercise of national jurisdiction remained protective in nature.

CHAPTER VII

The United States' Exercise Of Protective Jurisdiction Over The Adjacent Sea

Between the adoption of the Constitution in 1789, and the beginning of the nineteenth century the United States asserted limited governmental jurisdiction over its adjacent sea. The right to exercise this jurisdiction was claimed by the sovereign as a national right and upon analysis such jurisdiction is shown to be protective in nature.

In accord with the period's standards of international law examined earlier, the United States occupied its coastal sea by controlling it through commerce and naval operations. Such occupation and control sufficiently possessed that sea to exercise protective jurisdiction over it. However, there is nothing to indicate that, as a matter of either political or legal doctrine, the federal government considered the adjacent sea to be owned by the United States, or by any of the several states, or that any right of general jurisdiction existed over the area. Rather, national concern was focused on westward expansion and national interest in the adjacent sea was limited to a protective concern focused on commerce as well as on its obligations under international law as a neutral nation.

The national interest in interstate and foreign commerce by sea was served under the exercise of protective jurisdiction which applied customs law as well as admiralty and maritime jurisdiction, and defense measures. Criminal law was applied generally upon the high seas over American vessels, American citizens, and those perpetrating acts of piracy. In conjunction with all of these exercises of protective jurisdiction, as discussed in this chapter, a belt of the coastal sea three nautical miles in width was adopted by the executive branch of government in 1794, as the area of adjacent sea where the presence of American national interests required enforcement of the international obligation of neutrality. However, the adoption of that neutral area of adjacent sea was not adoption of a territorial sea nor an assertion of ownership or right of general jurisdiction over the adjacent sea. In fact the exercises of protective jurisdiction, which prompted adoption of a belt of neutral water, were not confined to being exercised only in that belt.

A. National Authority of the United States Applied Over the Adjacent Sea through Municipal Law

The Statutes at Large examined for the period 1789 to 1801 reveal that a strong central government was erected by the Constitution. That government exercised national

authority over the "western lands" which were large areas west of the original states and east of the Mississippi River held in trust for the nation.[281] Those western lands were later developed into the territories for new states. Because the western lands were external to the territory of any component state, but not external to the nation, they evidence the sovereign power of the federal government to hold and exercise jurisdiction and control over territory within the nation, but outside territorial boundaries of states. The western lands are presented for comparison with the power and authority of the federal government to act also as a sovereign and exercise jurisdiction over the adjacent sea external to the states and external to the nation. Such jurisdiction over the adjacent sea was protective in nature, as is demonstrated by one early statute providing for defense of coasts and harbors of the United States and a later statute for the protection of commerce.[282] But like Great Britain and other nations the United States' exercise of protective jurisdiction also included the establishment of aids to navigation, redress of crimes against citizens and their property, enforcement of customs laws, application of admiralty jurisdiction, and prize jurisdiction as well as the provision of a neutral waters area in the adjacent seas.

Among the navigational aids which were established under

national authority for the benefit of commerce were lighthouses. Lighthouses also provide an example of the joint state-federal governmental authority over domestic territory. Initially lighthouses were built or subsidized by the federal government. Authority for the establishment by subsidization or acquisition of such navigational aids within state territory is found in the Constitution. Thus the navigation servitude included within the grant of commerce power to the federal government, coupled with the necessary and proper clause, permits federal action to take real property within state territory, under national authority and responsibility to erect aids necessary for navigation such as lighthouses.[283] Establishment of navigational aids therefore was a national, not a state responsibility and related to the general public right of navigation which had been protected throughout Great Britain and the colonies prior to the American revolution.

Jurisdiction over criminal acts by American citizens or on American vessels, as well as acts of piracy, was made a national responsibility under the Constitution's grant of admiralty and maritime jurisdiction to the national government. Federal jurisdiction was described in the Statutes at Large as pertaining to enumerated crimes such as murder, robbery, piracy, barratry and other felonies.[284] These criminal acts were within federal

jurisdiction exclusive of any state jurisdiction. The test for federal jurisdiction was that the crime occurred on the high seas or in rivers, basins, bays or havens outside the territory of any state, that is, beyond inland waters. Thus the federal criminal jurisdiction on the adjacent seas was exercised as a matter of protective jurisdiction by the national government exclusive of any state jurisdiction except, state personal jurisdiction over state citizens.

National courts of the United States issued decisions before and after adoption of the Constitution which indicate the protective nature of the national jurisdiction being exercised over adjacent seas. Jurisdiction of the national courts extended to matters subject to national legislation, and therefore the subject-matter jurisdiction of these courts included violations of national laws dealing with customs and revenue as well as admiralty and prize law.[285]

Authority to collect taxes and regulate commerce was granted in the Constitution to the federal government and is the basis for the creation of customs and revenue laws and jurisdiction.[286] These customs and revenue laws enacted by Congress were designed to be applied over the adjacent sea within one marine league of the United States coastline. Beyond a marine league into the adjacent sea customs jurisdiction was asserted over vessels discovered

hovering or otherwise demonstrating an intent to violate customs laws of the United States.[287] Such exercise of customs jurisdiction was a national act for the protection of the integrity of United States municipal customs laws, and did not consist of a series of thirteen acts by the several states. Thus the protective nature of customs jurisdiction applied to the coastal sea by the United States was similar to the customs jurisdiction applied by Great Britain over the seas adjacent to the British Isles.

General admiralty jurisdiction, which was also granted by the Constitution to the federal government, was exercised not only on navigable bodies of water within the territory of states but also on the high seas beyond inland waters and therefore outside the boundaries of states. The grant of admiralty jurisdiction in the Constitution extended national jurisdiction over inland waters and the high seas because in admiralty matters on both bodies of water the needs of United States citizens required that a uniform and traditional body of law be applied to their conduct and disputes involving their maritime interests. Analysis of traditional admiralty law has already shown that law to have been applied by Great Britain as a subject-matter jurisdiction without any territorial basis. That traditional body of admiralty law was adopted as the law of the United States and

subsequently applied as a subject-matter jurisdiction through the exercise of protective jurisdiction without any territorial basis.[288]

Prize jurisdiction exercised by national courts was vested in the national government from the beginning of the United States.[289] Before the adoption of the Constitution, a committee of Congress and later the Court of Capture Appeals held jurisdiction over the ultimate disposition of prize cases arising in the state courts. After the adoption of the Constitution exclusive jurisdiction over prize cases was vested in the federal district courts as part of their admiralty jurisdiction. The district courts were created by the 1789 Judiciary Act which was enacted to establish the judicial system according to the terms of the Constitution. Both the district courts and the earlier Court of Capture Appeals, under the Articles of Confederation, applied traditional international prize law. That traditional body of prize law was adopted by the Constitution in its broad grant of admiralty and maritime jruisdiction to the federal government. Thus the prize law of the United States before 1800 was essentially the same quasi-international body of law which had been enforced by the Admiralty Prize Court in the colonies and Great Britain before the revolution in 1776, and in Great Britain from then until 1800.

Prize law was of especial importance to the United States during its early years because of the international position of neutrality adopted by the young nation. The main cause for American concern with her neutral status was that three nations were at war. To each of these nations, Great Britain, Spain and France, the United States owed treaty obligations of neutrality and provision of neutral coastal waters. Vessels of these nations were visiting American ports and frequenting the sea adjacent to the United States. Thomas Jefferson, Secretary of State, thought that by employing all possible means to provide neutral waters in the adjacent sea under international law those nations would have no claim to compensation for violations of the American coastal waters neutral status based on any allegation of failure of the United States to provide neutral waters in the adjacent seas.[290]

The theory which Jefferson advocated was that neutrality ought to be enforced from the United States coastline out into the Atlantic Ocean as far as the Gulf Stream. This indicates that Jefferson did not consider the United States to have any specific area of adjacent sea which inherently or historically appertained to the nation or to its component states. Indeed Alexander Hamilton's view confirms that indication.[291] Hamilton simply argued that

the United States ought to extend national jurisdiction and authority over the adjacent seas and did not specify a distance. Clearly neither Jefferson nor Hamilton seem to have thought that Great Britain claimed jurisdiction over a specific area of the adjacent sea to which the United States had succeeded. What is indicated is that they understood such extensions of jurisdictions by international legal personalities to be in accord with then accepted principles of international law.

As men actively involved in state and federal government, it is unlikely that Jefferson and Hamilton were unaware that jurisdiction of a protective nature was exercised by Great Britain over the seas adjacent to the colonies. Their readiness to assert American jurisdiction over those same seas shows not only familiarity with accepted international law but with the prior exercise of such jurisdiction by Great Britain. That readiness to extend United States jurisdiction also demonstrates that their experience was not that the colonies had exercised such jurisdiction or that the states ought to do so. The difference between exercises of protective jurisdiction into the adjacent seas for varying distances, from cannon shot to four leagues, for various purposes, from customs to health, and the protective jurisdiction which Jefferson and Hamilton sought to establish was that a specific area

of adjacent sea was being claimed as peculiarly subject to exclusive American national interests for purposes of neutrality. Therefore a specific area of adjacent sea was delineated wherein treaty obligations would be considered to require the provision of neutral waters as a matter of international law and bilateral treaties. Ultimately President George Washington instructed Thomas Jefferson, Secretary of State, to consider one marine league into the adjacent sea as the official position for the United States under international law wherein the United States would consider itself obliged to provide neutral waters.[292]

Under the international law precepts which bound the United States to maintain the neutral status of inland waters and coastal waters out to three nautical miles, captures could not be legally effected by any belligerent nation against any vessel in those waters. If a belligerent vessel committed acts of war within neutral waters that vessel was no longer owed obligations of neutrality by the littoral nation or any other nation and it could be captured in neutral waters as valid prize under international law. Not only belligerent vessels, but also vessels of other neutrals could lose the littoral nation's obligation to afford protection in neutral waters. They lost that obligation of neutrality if vessels of such neutral nations violated the international laws of neutrality.

An example of such violation would be the carriage of contraband by one neutral in the neutral waters of another.[293]

Violations of neutral water status were considered to be an assault on the littoral neutral nation. As a result, if a foreign vessel violated the standards of international prize law as adopted by the municipal law of the littoral neutral nation, the municipal courts could seize and restore any vessel captured by the violator, or order that compensation be paid to its owners by the violator. It is clear that prevention of such assaults on the integrity of a national sovereign by flaunting the rules of neutrality was a matter of exercising protective jurisdiction over the adjacent seas. It was also a matter of serious concern for the conduct of foreign relations.

When foreign citizens violated municipal law, or the neutral water status of the adjacent seas within three nautical miles of the United States' coastline, they were brought within the jurisdiction of municipal law applied by the federal district courts.[294] That application of municipal law was pursuant to an exercise of protective jurisdiction.

The protective jurisdiction exercised through federal courts was not a general jurisdiction. Thus, when legal proceedings involved matters not affecting American citizens, the legal interests of American citizens, or the

peace and safety of the United States the exercise of jurisdiction was discretionary because the national interest in the protection of the nation, its citizens and their property was not involved. The usual rule followed by federal courts was to invoke a nascent forum non conveniens analysis, although not employing that label, and thereby deny the exercise of jurisdiction over matters concerning foreign parties and interests arising on the high seas.[295]

On the civil side of admiralty and maritime jurisdiction, an example of not denying jurisdiction over foreign parties and causes of action arises with suits by foreign seamen for wages or other contract rights when they were employed on foreign owned and registered vessels. Denial of jurisdiction in many such cases would have caused undue hardship. To avoid unnecessary hardship judicial discretion was exercised and the jurisdiction was granted.[296] The point raised is that the federal courts jurisdiction included a subject-matter jurisdiction which would be applied to citizens and others within the authority of the national law. But no general jurisdiction over the adjacent sea is indicated by foreign parties which acquiesced in such exercise of the national jurisdiction, or in application of municipal law over foreign parties and causes of action ultimately only when a decision of the

courts could be efficacious. Similarly the admiralty law applied by Great Britain over its adjacent seas had shown no indication of general jurisdiction being applied over all parties within a specific distance from shore. Thus American admiralty and maritime jurisdiction was like the admiralty jurisdiction of Great Britain, a subject-matter jurisdiction applied to particular matters occurring on the high seas on the basis of citizenship or protective jurisdiction and without any ownership right or general jurisdiction over the adjacent seas before 1800.

Analysis of the Constitution reveals that national authority was exclusive of independent state authority beyond the state territorial boundaries, except over state citizens.[297] But states held general jurisdiction over inland coastal waters, such as bays and harbors, within their territorial boundaries. Thus in such waters the states were able to assert general jurisdiction concurrent with federal subject-matter jurisdiction. For example, by an act of Congress a large portion of Lake Michigan was placed within the boundary of the State of Illinois.[298] The federal authority within such bodies of water could be applied only according to the terms of Constitutional grants of authority, such as the commerce clause as well as the grant of admiralty and maritime jurisdiction.[299] When state laws were applied to these waters the basis was general jurisdiction within state

boundaries as an incident of state sovereignty. But the state law applied to these rivers, bays and harbors through state courts could not include admiralty and maritime law which was an exclusive subject-matter reserved to the jurisdiction granted the federal government. State courts could offer only state statutory and state common law remedies.

Similar to international states the domestic states in some instances could extend their jurisdiction over the adjacent seas beyond state boundaries. But such state jurisdiction could not overlap and conflict with the law of other domestic states nor could it be applied on the high seas beyond an area adjacent to the coast reserved for national exercise of protective jurisdiction. State extensions of jurisdiction into the adjacent sea were associated with traditional authority to manage specific resources, for example, coastal fisheries.[300] However, any application of state law in this adjacent sea was subject to exclusion or preemption by federal authority under the several clauses of the Constitution which have been discussed, that is, the grant of admiralty and maritime jurisdiction, the grant of power to control interstate and international commerce, and the exclusive national right to conduct foreign affairs. Each of these Constitutional grants of authority was bolstered by the

grant of authority in the "necessary and proper" clause as well as the "supremacy" clause which gave the national government authority to act pursuant to these other grants of rights and powers.

Thus the United States held the right to act on the high seas external to the nation, and any state exercise of jurisdiction in that area was based on the federal jurisdiction. As a result the states when exercising jurisdiction seaward of low-water mark may be characterized as agents of the national government, acting with the acquiescence of the national government. The federal jurisdiction exercised over the adjacent sea, under which any state authority was exercised, was protective in nature and that nature could not be changed by any independent action of the states. There is therefore no basis for alleging state ownership over the adjacent sea or general jurisdiction therein as a consequence of the federal government's exercise of protective jurisdiction over those seas.

B. Exercise of Protective Jurisdiction Over the Adjacent Seas Shown in the United States' Conduct of Foreign Affairs

Concern with the adjacent seas at the national level occasioned the delimiting of neutral waters adjacent to the coastline of the United States. This concern was

demonstrated in a Special Session Message of 1797 delivered by President John Adams, third President of the United States, to Congress.[301] President Adams requested adequate naval power to protect the young nation's more than 2,000 miles of coastline. As part of the justification for such protection, he enumerated not only the economic interest in the fishing industry but also the economic interest in interstate and foreign commerce. In the next year, 1798, President Adams again addressed Congress, and on a similar note urged them to create naval power sufficient to act against depredations by French privateers in neutral waters adjacent to the coastline of the United States; violating American obligations under the internationl law of neutrality.[302] To show how helpless the United States was to fulfill its obligation to provide neutral waters President Adams pointed out that attacks by French privateers were even occurring within the very harbors of the nation. In 1800 President Adams had occasion to address Congress, and he again urged that the navy be strengthened and coastal fortification be increased.[303] In support of his argument, President Adams highlighted the national economic interest in secure foreign and interstate commerce. Clearly the exercise of protective jurisdiction in the adjacent seas was a matter of national economic and political interest,

and intimately connected with the exercise of the national foreign affairs power.

Defending commerce and meeting obligations under international law were matters affecting national interests on the high seas beyond the national boundary, or neutral waters adjacent to the United States. But the national conduct of foreign affairs was not limited to providing protection for international commerce and in fact the foreign affairs power was exercised to create treaty obligations with other nations affecting the obligations of the United States toward those nations within ocean areas adjacent to the United States coastline. These treaties were negotiated by the United States for the nation and only the United States had the status and capacity, as legal personality in international law, to enter into such treaties, or to create obligations affecting the national interest within the seas adjacent to the United States.[304]

Between 1778 and 1800 the United States became party to fourteen bilateral treaties of significance in this context. The subject-matter of these treaties, among other items, generally included the granting of most-favored-nation status with regard to duties and tariffs, thus demonstrating federal authority over commerce. Maritime matters appeared within these treaties, and those matters included protection of foreign vessels in American

waters, agreements by foreign nations to abstain from fishing in the sea areas adjacent to the coastline of the United States, agreement to respect American fishing rights on the Grand Banks off Newfoundland, reciprocal agreements to respect the passports of vessels from neutral states, agreements to lend assistance to mariners suffering shipwreck, and agreements to protect foreign vessels from piratical attacks within the adjacent seas.[305]

None of the items of agreement in these treaties indicate any claim to ownership of the adjacent seas. Even the 1783 Treaty of Paris ending the War of the American Revolution did not grant ownership of the adjacent sea among the governmental interests which it ceded or quit-claimed to the United States.[306] The national governmental interest over the adjacent seas which the United States had received from Great Britain in the Treaty of Paris, 1783, was not ownership of those seas but ownership of islands in those seas within twenty leagues of the coast. A line was drawn twenty leagues from the coastline of the United States on the now famous Mitchell map known as the "King George Map". This map was appended to the peace treaty for the purpose of showing the area of the adjacent sea within which the United States received islands. The line was drawn not so much to show islands belonging to the United States, as to show that Bermuda and the Bahamas still belonged to

Great Britain. No ownership or general jurisdiction over the sea was described by or can be implied from the line drawn on this map, and certainly such interests would not have passed to the states as domestic administrative units of government when the previous sovereign reserved to itself the exercise of protective jurisdiction over the adjacent sea. As such, the right to exercise that jurisdiction would have passed to the sovereign United States, the opposite signatory to the peace treaty, not to domestic states.

Both before and after the 1783 Treaty of Paris other treaties, treaties of amity and commerce, were negotiated and concluded by the national government on behalf of the United States with various sovereigns. Among these were treaties with Sweden (1783) and with Prussia (1785).[307] In these two treaties the United States agreed to protect the vessels of the other party while in the seas adjacent to the United States. The treaty with Prussia specifically gave permission to Prussian citizens to frequent the coastal waters of the United States.

The infamous Barbary Pirates were a plague to American vessels in the Mediterranean as much as to European vessels. After a de facto state of war had existed with several Barbary States for a number of years the United States concluded peace treaties with those states. These

treaties provide examples of the American perception of the breath of coastal waters subject to neutral rights, much the same as British treaties with these same states revealed Great Britain's perception as to the breath of such waters. In a 1786 Treaty of Peace with Morocco the United States received a pledge from Morocco to extend neutral waters privileges to American vessels within cannon-shot of her ports.[308] Similar treaties were signed with Tripoli and Algiers in 1797, which included the agreement that neutral waters privileges would be accorded American vessels in waters within range of coastal fortifications.[309] In a 1797 treaty with Tunis there was an agreement to reciprocally accord neutral waters rights.[310] Respect for the safety of American vessels in foreign ports was also the subject of a 1794 treaty with Great Britain.[311] That treaty contained a mutual pledge by the United States and Great Britain requiring the vessels of each nation to accord full respect to the municipal laws of the other when in that party's ports and waters. Such an exchange was similar to the treaty between Great Britain and Russia acknowledging the British right to exercise jurisdiction over coastal waters.

In 1795 neutral waters privileges were negotiated with Spain and in 1799 a supplemental treaty with Prussia made neutral waters privileges reciprocal between that nation

and the United States.[312] Finally, by 1800 even France, which had been engaged in a quasi-war with the United States, agreed to accord neutral privileges to American vessels when on the high seas.[313] The United States and France each further agreed to stay clear of the other's coastal fisheries.

What becomes apparent from the terms reached in these many treaties is that a sufficient national economic interest in commerce encouraged the United States to agree to provide neutral waters privileges to many nations within the seas adjacent to the coastline of the United States. Moreover these treaties also demonstrate that the United States did not claim ownership or a general jurisdiction over the seas adjacent to its coastline. At most, these treaties indicate an exercise of protective jurisdiction and the extension of that protection over foreign vessels and citizens as a matter of treaty obligation. This same technique was used in the twentieth century to claim jurisdiction over British vessels engaged in smuggling liquor into the United States during prohibition. If ownership of the adjacent seas was claimed by the United States where protective jurisdiction was exercised, or had been passed to the United States by Great Britain in 1783, the United States would have been obliged to maintain neutral status over the seas which it owned regardless of

the absence of treaty terms concerning neutral rights. These treaties show that the United States and other nations did not consider any obligation to provide neutral waters to be due beyond inland waters of the United States, including historic waters such as Delaware Bay, unless under a treaty term, or that the description of the adjacent seas as neutral water was in any way connected with a claim of ownership or general jurisdiction over those seas. In fact the United States did not exercise its sovereign power to claim ownership of the adjacent seas before 1800.[314]

The exercise of the exclusive foreign affairs power of the United States in negotiating these treaties demonstrates the exercise of protective jurisdiction for the benefit of other nations when an obligation of protection had been created as a matter of international law by the terms of a treaty. These international obligations in the adjacent sea were created by the United States in its capacity as sovereign--not by the several states in their capacity as domestic sovereigns under the municipal law of the United States.

C. Summary, Chapter VII

The jurisdiction exercised over the seas adjacent to the coastline of the United States was a national act of a

protective nature, much the same as that exercise of protective jurisdiction by Great Britain had been before the War of the American Revolution. Underlining the national authority and control over the adjacent seas the nation entered into several treaties granting various rights to foreign vessels within the seas adjacent to the United States, and creating corresponding duties for the foreign nations in their adjacent seas. International practice considered governmental interests in the seas adjacent to a littoral state to be created and directed as a right of sovereignty under international law. This international law right of sovereignty is confirmed by the rights to neutral waters established off the coastline of the United States, and in foreign adjacent seas, which the United States negotiated for her citizens. Governmental rights and interests over adjacent seas were always the product of the exercise of sovereign authority and neither the American colonies nor their successor states held that authority, or had the capacity to hold such authority even if it had been passed to them as colonies through their charters, or as states through the act of revolution or the treaty of peace in 1783.

Conclusion, PART B

The United States replaced Great Britain in the role of sovereign over the territory of America. That replacement gave the United States as sovereign all the authority, rights, and obligations of a nation in the world community.

The authority which the United States received included an inherent right under eighteenth century international law to apply municipal law over the adjacent seas as an exercise of protective jurisdiction. Prior to the United States' exercise of that right, Great Britain had exercised protective jurisdiction over the seas adjacent to the American colonies. The rights of each nation are distinct and therefore the United States cannot be said to have succeeded to the right of Great Britain. But the United States replaced Great Britain as sovereign over the territory of America and supplanted the exercise by Great Britain of protective jurisdiction over the seas adjacent to America. The several states never independently held the capacity to so act over the adjacent sea.

The American colonies never achieved as much as <u>de facto</u> status as legal personalities under international law. Thus any rights they exercised over the adjacent sea

were based on the underlying inherent right of Great Britain to exercise protective jurisdiction within that sea. Further, the colonies were always subordinate domestic governments. The charters which created them delegated no right to independently exercise protective jurisdiction over the adjacent sea, and the subordinate role which they subsequently played in the affairs of the sovereign establish that such right was never delegated to or developed by them at some later time.

At the time of the revolution it was the people of America and not thirteen local governments which revolted. Prosecution of the War of the American Revolution was a national act, and the constitutional development of the national government during and subsequent to that war vested the right to act for the sovereign people within the community of nations, exclusively in the federal government.

After the 1783 Treaty of Paris the United States formulated the application of municipal law under the exercise of protective jurisdiction so that national interests were understood to coalesce within a belt three nautical miles in width measured from the coastline. The United States considered that its international obligations required neutral waters to be provided within the area of the three-mile belt. Ownership over the area was not

claimed but the United States was the first nation to adopt the three nautical mile measure as the seaward extent for the exclusive exercise of protective jurisdiction for neutrality purposes.[315]

Conclusion

The international law concept of sovereignty over the coastal sea, which we know today, underwent an evolutionary process through several centuries. This dissertation has examined and analysed an early period in that evolution when the governmental interest of littoral nations did not encompass a right of ownership, general jurisdiction, or exclusive right of exploitation understood to be contained in sovereignty today. Rather, this analysis has shown that during the seventeenth century and the eighteenth century the governmental interest of a littoral nation, reflected in state practice, under international law was to apply limited bodies of municipal law to the coastal sea area through the exercise of "protective jurisdiction".

It was not until the nineteenth century that occupation of coastal waters had been sufficiently established for a littoral nation to assert rights of ownership which, when coupled with extended national jurisdiction, resulted in a national extension of sovereignty over coastal waters. As this dissertation has shown, governmental rights exercised by littoral nations in the coastal sea did not arise spontaneously but instead evolved slowly based upon

other older inherent or prescriptive governmental rights which were protective in nature, such as criminal jurisdiction, admiralty jurisdiction, revenue laws, defense measures, and property rights over appropriated objects and resources extracted from the coastal sea.

Delay in the development of international law's recognition of a right of ownership over the coastal sea, in the case of Great Britain, resulted from preoccupation with large areas of high seas rather than limited bands of coastal waters. The preoccupation with the high seas occurred during the seventeenth century as a result of national economic interest in the North Sea herring fishery. While no doubt jurisdiction was exercised over these high seas areas, that exercise occurred at different locations and at different times with the result that the degree of control or occupation effected by fishing vessels and naval vessels was transitory and thus would not support a claim of ownership.

In the seas adjacent to her American colonies Great Britain exercised jurisdiction of a protective nature during both the seventeenth century and the eighteenth century not as a consequence of the total occupation of the sea area concerned, but as an aspect of national governmental power much as in the coastal seas off the British Isles. When limited and local government powers

were granted to the colonies through colonial charters no power was granted to exercise general jurisdiction over the coastal sea. The American colonies did not hold any jurisdictional rights independent of Great Britain's assertions of jurisdiction within the area of their coastal seas.

As time passed, from the founding of the American colonies until 1776, Acts of Parliament and even colonial laws point to the continuing superior status of Great Britain as sovereign. Retention of one aspect of that sovereign status, the power to exercise jurisdiction over the seas adjacent to the colonies through the vice-admiralty courts, became a means by which Great Britain sought to reinstate herself in actual control of her colonial governments. In 1776, the attempt to regain control of the colonies failed and the status of Great Britain as sovereign ended. This dissertation established that the jurisdiction exercised over the seas adjacent to the colonies until 1776, was protective in nature and applied under authority of a sovereign.

The constituent states of the United States were never independent sovereign states either as colonies or from the time of revolution, and thus those states never individually and independently held the power to exercise jurisdiction for protection and regulation within the area of the adjacent seas. The American struggle for independence

from its inception was a national struggle, and it was the new nation, the United States, which asserted rights over the coastal sea as sovereign under international law. As a matter of history, as well as municipal law, the individual states possess no exclusive right to exploit resources and property, or assert any general jurisdiction over the adjacent seas. Any rights granted to the states within the coastal seas of the United States are a matter of the allocation of sovereign power and rights internally; a domestic matter. Thus the states have no claim to exclusive rights of exploitation or general jurisdiction over the continental shelf beyond what Congress might grant them. At present the states have no interest beyond three nautical miles seaward of the coastline in the Atlantic Ocean. Therefore the states cannot assert governmental rights or property rights having a historical basis or otherwise in international law which might interfere with or direct formulation of the United States policy for the Third United Nations Conference on law of the sea.

FOOTNOTES

1. 332 U.S. 19 (1947).

2. Id. at 34.

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

4. Submerged Lands Act, 43 U.S.C. §§ 1301, et. seq.

5. United States v. Louisiana et al., 364 U.S. 502 (1960); United States v. Florida et al., 363 U.S. 121 (1960); United States v. Louisiana et al., 363 U.S. 1 (1960).

6. United States v. Maine et al., Supreme Court, No. 35, Original (argued February 23-24, 1975).

7. Selden voiced the official Crown position on ownership of the seas in his 1635 edition of Mare Clausum, published under Crown auspices, in which he states that the sea has been occupied by ships setting forth "either to defend or make good the Dominion...". At that time such ships were naval vessels as well as commercial vessels, especially fishing boats. See Of the Dominion, or, Ownership of the Sea, 188 (Nedham's translation, 1652).

8. James I made the initial Stuart attempt to assert exclusive dominion or jurisdiction in wide areas of ocean by ordering restraint of unlicensed fishing activities. Proclamation of James I. For the Restraint of Foreigners Fishing on the British Coasts, dated May 6, 1609, printed in T. W. Fulton, Sovereignty of the Sea, 755 (1911).

Charles I then claimed ownership of the seas and the fishery. Report of the Admiralty to Charles I. As to the Employment of the Ship-Money Fleet in Wafting and Securing Foreign Merchants Passing through His Majesty's Seas, and in Protecting Foreign Fishermen who Accept the King's Licence, dated February 5, 1635, printed in id. at 762.

> 9. By the word prerogative we usually understand that special pre-eminence, which the King hath, over and above all persons, and out of the ordinary course of the common law, in right of his regal dignity. ...And hence it follows... that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys with any of his subjects.

W. Blackstone, 1 Commentaries on the Laws of England, 239 (R. Burn editor 1783).

10. Franchises were of two types. The first type was a right newly created by authority of the prerogative, but not itself a right of the prerogative, for example, a right to hold a fair or market. Such rights were often held in gross, and as required for all franchises could only be created by the use of particular or specific words. When held as appendant to the second type of franchise, that is, to a prerogative right, such as a manor or wreck, then the right was not in gross and depended on the underlying franchise. When the right to benefits arising under a franchise to a prerogative right was returned to the Crown the franchise right was not retained in gross but merged with and became again part of the prerogative right requiring specific words to pass again. A right appendant to a franchise right, or held in gross, which was not part of the prerogative right but created by it was held in gross by

the Crown and did not merge with or enlarge the prerogative right. See Ewelme Hospital v. Andover, 23 Eng. Rep. 460 (1684); Heddy v. Wheelhouse, 78 Eng. Rep. 834-835 (1597); Item en. Quo Warrant, 72 Eng. Rep. 309 (1327-77). For a discussion on the passing of appurtenant rights see generally Wiggon v. Branthwaite, infra note 20, at 1215.

11. Waste is in the King. Humbleton v. Bucke, 124 Eng. Rep. 295 (circa 1657); The Crown owned the foreshore, the land between high-water mark and low-water mark. Lowe, v. Govett, 110 Eng. Rep. 317, 319, 321 (1832).

See also the discussion of prerogative right in forfeit lands in D. Chalmers and H. Phillips, Constitutional Laws of Great Britain, 166-167 (6th edition 1946); and in G. Staundforde, An Exposition of the King's Prerogative - [Collected from Fitzherbert's Abridgment of Justice] (1577).

12. Royall Piscarie de le Banne, 80 Eng. Rep. 540, 543 (1610); Foxley's Case, 77 Eng. Rep. 224 (1601); Case of Swans, 77 Eng. Rep. 435-436 (1592).

See also Chalmers and Phillips, supra note 11, at 166-167; E. Coke, 1 Institutes of the Laws of England 13b (F. Hargrave and C. Butter editors 1812); C. Viner, 16 A General Abridgement of Law and Equity, 563 (2d edition 1793) (Hereafter cited as Viner, vol. ___, at ___.); Viner, vol. 17, at 91.

13. For example see Basket v. University of Cambridge, 96 Eng. Rep. 59, 63 (1758).

14. Case LV (Opinion of the Judges), 145 Eng. Rep. 56 (1340).

15. Parmeter v. Attorney General, 3 Eng. Rep. 713 (1813).

16. Chalmers and Phillips, supra note 11, at 167; Viner, vol. 16, at 563.

17. See the discussion of royal mines in The Case of the King's Prerogative in Saltpetre, 77 Eng. Rep. 1294-1295 (1606). As an example of Crown prerogative power to grant such rights to royal mines outside the nation, see Petition by Sir John Shorter 2d mayor of et al. to be incorporated to enjoy salt, saltpetre, naval stores, lead, copper and royal mines in America and Europe - (had by industry discovered these items.) 2 Acts of the Privy Council (Col.), 107 (1688).

18. Chalmers and Phillips, supra note 11, at 167.

19. The Crown was entitled to the submerged soil and the water of the sea around the coasts of England, according to municipal law. Attorney General v. Chambers, 43 Eng. Rep. 486, 489-490 (1854). The sea was held under the Crown's prerogative right. Henry Constable's Case, infra note 20.

20. Flotsam, jetsam and ligan were held by the Crown through prerogative right. See Sir Henry Constable's Case, 77 Eng. Rep. 218, 221 (1601). Wreck was also held by the Crown under prerogative right. Wiggon v. Branthwaite, 88 Eng. Rep. 1306 (1669). Similarly royal fish were held by prerogative right of the Crown. Admiral of the Cinque Ports v. The King, 166 Eng. Rep. 304, 305-306 (1831). Oysters and coral were likewise held by Crown prerogative right and subject to being granted by franchise. For example see State Papers Domestic, Car. II, 541 (1673-1675).

See also Scranton v. Brown, 107 Eng. Rep. 1140, 1148 (1825).

21. It is the inability to possess which rendered it impossible as a matter of common law to effectively convey a franchise right to the sea or seabed from the Crown to a grantee. Attorney General v. Richards, 145 Eng. Rep. 980, 982 (1795). See also Huntley's Case, 73 Eng. Rep. 736, 738 (1370), where the upland owner was able to identify, demarcate and thus possess his land once submerged by the sea.

22. As examples see Kirby v. Gibbs, 84 Eng. Rep. 183 (1668); Attorney General v. Sir Edward Farmer, 83 Eng. Rep. 125 (1667); John Constable's Case, 123 Eng. Rep. 367 (circa 1664).

The pre-seventeenth century municipal law view on ownership of the sea was expressed by Plowden in a denial of a property right of the Crown in the seabed. But that view was reversed by Callis writing during the reign of James I. See Fulton, supra note 8. The initial impetus toward development of a legal argument for Crown property right over the sea and seabed through prerogative right appeared in a book by Digges in 1569 entitled Arguments Prooving the Queens Maties propertye in the Sea Lands, and salt shores thereof, and that no subiect cann lawfully hould eny part thereof but by the Kinges especiall graunte. However both the views of Callis and Digges were also make-weight as discussed infra.

23. The jurisdiction exercised by a nation has been discussed by the late Professor Friedman of Columbia

University as being founded on four bases as follows:

> (a) territory, ...
> (b) nationality, ...
> (c) protection of certain state interests not covered under (a) & (b),
> (d) protection of certain universal interests.

W. Friedman, International Law, 440 (1965).

The coastal sea was not territory, and was not understood to be appurtenant to national territory until late in the eighteenth century or early nineteenth century. The other three bases for jurisdiction form the bases for a protective jurisdiction analysis. Thus nationality or citizenship always allows the sovereign to exercise jurisdiction. Foreigners come within the exercise of such protective jurisdiction in the last two categories. As an example under (c) customs laws were applied over activities on the high seas during the seventeenth century and eighteenth century. Similarly, under (d) acts of piracy were subject to the exercise of national jurisdiction for protective purposes.

24. See generally Broadfoot's Case, 168 Eng. Rep. 76, 83 (1743); Rex v. Hampden (Ship Money Case), Hargrave, 3 State Trials 826-1254 (1637). The Ship Money Case discusses at length the responsibility of the Crown to place naval vessels on the coastal seas for defense purposes as an obligation of prerogative governmental authority.

25. Attorney General v. Richards, supra note 21, at 982.

26. The basis of the prerogative right was in the common law. Halisbury, vol. 7, at 221, 226. Power vested in the Crown by prerogative right could not be used to

alter the law. Viner, vol. 16, at 561. Prerogative right was not created by common law but was contained by and dependent upon the common law. Proclamations (Anon.), 77 Eng. Rep. 1352, 1353-1354 (1611).

27. See note 22 supra, for examples.

28. See Lowe v. Govett, supra note 11 for a case dealing with foreshore property rights. For a case dealing with derelict lands see Gifford v. Yarborough, 4 Eng. Rep. 1087 (1828). For an example of a grant of a newly emerged island see XIX Calendar of Treasury Books, 96 [1704] (1961).

29. The Crown could grant the foreshore, the area between high-water mark and low-water mark. Capel v. Buszard, 130 Eng. Rep. 1237, 1242 (1829). For a grant of periodically inundated marshes to make salt, near Great Yarmouth see State Papers, Domestic, Car. I, 371 [1636-1637].

30. See XIX Calendar of Treasury Books, 62 [1704] (1961) for a grant of commissions to find derelict lands. See note 28 supra, for a grant of a newly emerged island.

A petition for lease of land left by the sea in Aulkborough, Lincoln Co. appears in XIX Calendar of Treasury Books, 191 [1704] (1961).

31. Land gained from the sea is of three kinds:

> 1st. Per alluvionem, alluvion, or land washed up by the sea.
> 2nd. Per relictionem, derelict land, or land left dry by the shrinking or retirement of the sea.
> 3rd. Per insulae productionem, i.e. islands or islets gradually or suddenly

> formed out of the sea, or at the mouths of rivers, & c.

R. Hall, On the Sea Shore, 103-104 (2d edition 1875).

Also, see generally Whitaker v. Wife and the Lady Newburgh, 84 Eng. Rep. 479 (1672); and see 39 Halisbury's Laws of England, 560 (3rd edition 1952) (hereafter cited as Halisbury, vol. ___, at ___.).

32. Huntley's Case, supra note 21.

33. The Crown held waste under prerogative right. Humbleton v. Bucke, supra note 11. When the sea entered and submerged land so that it could no longer be identified or reclaimed it too became the waste and subject to the Crown prerogative right. Wast. Inundation, 123 Eng. Rep. 276 (1564). But because such land could not be possessed it could not be granted under the prerogative right alleged to hold it. Attorney General v. Richards, supra note 21. The exception was where the submerged soil was close to shore on an open coast, or within arms of the sea or otherwise contained in the body of a county and thus within the nation. Grants of fishing weirs, or the right to erect such weirs on the open coasts demonstrated this actual but limited possession, by a subject, of the seabed. See Hargrave, A Collection of Tracts Relative to the Law of England, in which is reprinted Matthew Hale's De Jure Maris, 18-22 (1787).

34. See Halisbury, vol. 7, at 463.

35. See note 12, supra.

36. The seabed belonged to the Crown as waste under

the prerogative right. See Wast. Inundation, supra note 33.

37. Crown grants of franchise which vested a present legal right in the grantee and thus were not naked possibilities were valid even though no property right applied over objects until appropriated and resources until extractedd. See generally the example of a grant to mine coal in Campbell v. Leach, 27 Eng. Rep. 478 (1775). The King held the capacity to grant valid legal rights even when property rights arising under those legal rights were mere possibilities. See Sir Edward Turner's Case, 86 Eng. Rep. 968 (1678).

38. For examples see supra notes 11 and 20.

The leasing of an oyster bed is found in State Papers, Domestic, Car. II, 541 [1673-1675]. The leasing of derelict land and marsh areas is found in XXIV Calendar of Treasury Books, 321 [1710] (1961); and XXVIII Calendar of Treasury Books, 447 [1707] (1961). Even newly emerged islands were leased. See XIX Calendar of Treasury Books, 96 [1704] (1961).

The Crown held prerogative right to sundry types of ownerless property located within the coastal seas and retrieved by subjects. Silver bars lost off Cornwall belonged to the Crown. State Papers, Domestic, Jac. I, 97 [1619-1623]. Also ships sunk below low-water mark belonged to the Crown. See Kirby v. Gibbs, supra note 22. The privilege to recover items sunk in the sea was also granted by the Crown. State Papers, Domestic, Car. I, 536 [1627-1638]; State Papers, Domestic, Car. I, 313 [1625-1626].

39. For a discussion of rights to flotsam, jetsam, ligan and wreck see Sir Henry Constable's Case, supra note 20, at 221.

40. See Campbell v. Leach, supra note 37.

41. See Cadell MSS, Acc. No. 5381, box 8, folder 2, Joint Print of Documents Cadell v. Allan, 13-14 (dated October 17, 1903) located in special collections of the Scottish National Library, Edinburgh.

42. Id., box 11, folder 1, (letter dated May 12, 1860) The Opinion of George Dundas, (lawyer) at 1-3.

43. Id., folder 3, (map) entitled "Coallierys of Barronstounness and Grange" (depicts boundary between mines stretching into the Firth of Forth) (1784).

Arms of the sea were within the boundaries of a county and rights recognized at common law were sustained therein. See Cremer v. Tookley's Case, 78 Eng. Rep. 227 (1628); Towson v. Towson, 81 Eng. Rep. 342 (1615). It was bays, arms of the seas, and navigable rivers which the Crown actually possessed as waste through their location within the nation.

44. Coal was mined at Culross prior to 1625. A. Cochrane, Description of the Estate and Abbey of Culross, 127-128, 130-132 (1793).

In his book on Culross David Beveridge recites the description by John Taylor who visited Sir George Bruce's mine at Culross in 1618. According to that description the mine could be entered from land or through an artificial island. Drainage was achieved by a horse-mill pump, allowing removal of coal for twenty-nine years before the mine was destroyed by a storm in March, 1625. D. Beveridge, Culross and Tulliallan, 158-162 (1885).

45. For descriptions of the mine at Whitehaven see R. Galloway, A History of Coal Mining in Great Britain, 95, 98 (2d edition 1969); D. Hay, Whitehaven A Short History, 47, 49-50, 52 (1966).

46. The beds of navigable rivers and arms of the sea were property of the Crown under prerogative right. See The King v. Smith, 99 Eng. Rep. 283, 285 (1780); Blustrode v. Hall, 83 Eng. Rep. 1081 (1664); and Le Roy v. Trinity House, 82 Eng. Rep. 986 (1663).

47. See Blundell v. Carterall, 106 Eng. Rep. 1190, 1202-1204, 1207 (1821), for a discussion of the public rights to fishing and navigation under the jus publicum.

48. Tidal waters were presumed to be navigable waters. Miles v. Rose, 128 Eng. Rep. 868 (1814). A towpath could be established by custom along the shores of navigable waters for the public purpose of navigation, although there was no common law right to such use. Ball v. Herbert, 100 Eng. Rep. 560 (1789).

The navigation servitude was potentially applicable to all riparian property. See Parmeter v. Attorney General, supra note 15.

49. Digging of ballast could be established by custom over the foreshore based on the public purpose in navigation. Mayor of Lynn Regis v. Taylor, 83 Eng. Rep. 629 (1684).

The public purpose in exercise of the public right of navigation was superior to use of land by private property owner. See Blundell v. Carterall, supra note 47, at 1203.

50. Warfage duty could be levied on vessels and their cargo distrained for payment of the service. See for example Syeds v. Hay, 100 Eng. Rep. 1008 (1791). It was also possible to distrain anchor and sails of a vessel until harbor duties were paid. See Vinkestone v. Ebden, 91 Eng. Rep. 219 (1698). The restriction on such charges was that some benefit to navigation be created. Warn v. Prideaux, 84 Eng. Rep. 718 (1672).

51. Both public and private rights to fish were subject to the public right of navigation. Gray v. Bond, 129 Eng. Rep. 1123 (1821).

Any encroachment on the navigation right could be abated. A sunken vessel creating an obstacle to navigation could be removed at the owner's expense. R. Burn, 2 Justice of the Peace and Parish Officer, 384 (1764). The Admiralty Court had the authority to remove any nuisance obstructing the public right to navigation. No. 112, Admiral, 83 Eng. Rep. 1264 (1665).

52. A subject could exercise the public right to fishing in all navigable rivers, arms of the sea, and in the sea because as a matter of municipal law the fishery is prima facie in the Crown and thus common. Warren v. Matthews, 91 Eng. Rep. 312 (1703).

There are three types of fishery; that appendant to the soil, which occurs in non-navigable waters; that which is several, existing by grant or prescription in navigable waters; and that which is common, existing in navigable waters and the sea. See generally Smith v. Kemp, 91 Eng. Rep. 537 (1693).

53. A separate fishery in non-navigable waters carried a presumption of ownership of the soil. Separate Fishery, 98 Eng. Rep. 695 (1772). In navigable rivers an exclusive fishery could be prescribed by riparian property owners, Ward v. Cresswell, 125 Eng. Rep. 1165, 1166-1167 (1741), but the riverbed was presumed to be in the Crown. Carter v. Murcot, 98 Eng. Rep. 127, 128 (1768). Littoral landowners could not prescribe a fishery and their property remained subject to the public right, even to the extent of crossing the real estate. Blundell v. Carterall, supra note 47, at 1204.

54. After Magna Carta exclusive fisheries could be created only by act of Parliament (curia regis) if the fishery was in tidal water. See Halisbury, vol. 17, at 303.

55. Prescription presumes a grant prior to 1189, continuously and exclusively held, or may be established by a continuous use outside the memory of man. See generally Halisbury, vol. 12, at 546.

56. Claude Morisot, responding to Selden in 1643, rejected pretensions to British dominion of the high seas because he regarded the high seas as incapable of being occupied, that is, controlled, even by navigation which was at best transient. C. Morisot, Orbis Maritimi, 446-447, 463 (1643).

57. See infra note 114.

58. In the seventeenth century there was no seaward limit for the exercise of jurisdiction over smuggling

operations. Vessels were simply ordered to cruise the coasts to prevent smuggling. See W. Masterson, Jurisdiction in Marginal Seas, 3 (1929).

Laws were enacted to control the evasion of duties by smuggling thus attempting to gain funds to support the Crown's foreign policy. Such laws were not totally effectual:

> The battle with the smuggler went on continuously; operations were often on a major scale. Since 1723, 229 boats engaged in smuggling had been confiscated and some 2,000 persons prosecuted; in the process 250 Customs officers had been beaten up or otherwise abused, and six had been murdered. The extent of liquor smuggling was shown by the seizure of 192,515 gallons of brandy. As it must be presumed that far more cargoes escaped than were ever taken it is clear that there must have been a very large leak of potential revenue. As for tobacco it was calculated that the government was defrauded of one-third of the duties it should have had. Here the loss was due less to outright smuggling than to the ingenious ways in which the merchants manipulated the methods by which the duties were collected.

D. Marshall, Eighteenth Century England, 148 (1970).

59. See An Act for preventing Frauds and Abuses in the publick Revenues or Excise, Customs, Stamp-duties, Post-office and House-money, 6 Geo. 1, c. 21 §§ 29, 31 (1719).

For other examples see An Act for the more effectual Prevention of Smuggling in this Kingdom, 24 Geo. 3, c. 47 § 26 (1784); An Act for more effectually preventing the Mischiefs arising to the Revenue and Commerce of Great Britain and Ireland, from the Illicit and Clandestine trade to and from the Isle of Man, 5 Geo. 3, c. 39 § 7 (1765); An Act for the further Improvement of his Majesty's Revenue

and Customs, 3 Geo. 3, c. 22 § 5 (1762).

See also the version of these statutes enacted for application in the American colonies, An Act for granting certain Duties in the British Colonies and Plantations in America, 4 Geo. 3, c. 15 § 33 (1763).

60. An Act for indemnifying Persons who have been guilty of Offenses against the Law made for securing the Revenues of Customs and Excise, and for enforcing those Laws for the future, 9 Geo. 2, c. 35 § 23 (1736).

61. Id., §§ 6, 10, 13, 18, 25, 27; An Act for the better securing, and further Improvement, of the Revenue of Customs, Excise, and Inland and Salt Duties, 5 Geo. 3, c. 43 §§ 7, 27 (1765).

62. An Act for the more effectual Prevention of Smuggling in this Kingdom, 24 Geo. 3, c. 47 § 26 (1784); An Act for preventing frauds and abuses in the publick Revenue of Excise, customs, stamp-duties, post-office, and house-money, 6 Geo. 1, c. 21 § 32 (1719).

63. Flotsam as such was exclusively in the admiralty subject-matter jurisdiction. The Lady Wyndham's Case, 86 Eng. Rep. 1081 (1678). But customs violations were cognizable in the Exchequer Court, a court of record, which asserted a prior exclusive jurisdiction over goods involved in attempts to evade customs laws. Score v. The Lord Admiral, 114 Eng. Rep. 777, 778 (1709); Pidgeon v. Trent, 84 Eng. Rep. 426 (1675); Saunder's Case, 72 Eng. Rep. 545 (1586).

64. Discharging goods out of a ship within a prohibited distance from shore was considered to be tantamount to placing the goods on land and thus raised the legal fiction of being infra corpus commitatus allowing municipal courts to assert jurisdiction. See generally A Case of Custom, 77 Eng. Rep. 1299, 1300 (1582).

65. The Happy Isabel, Ex. Ct. Memoranda Roll, 29-30 Geo. 2, Trinity Term, No. 24 (1757) (located in the Public Record Office, London).

66. The Endeavor, Ex. Ct. Memoranda Roll, 11 Geo. 3 Easter Term, No. 108 (1771) (located in the Public Record Office, London).

67. The Uffro Anna, Ex. Ct. Memoranda Roll, 4 Geo. 3 Michaelmas Term, No. 222 (1764) (located in the Public Record Office, London).

68. The Willing Mind, Ex. Ct. Memoranda Roll, 13 Geo. 3 Easter Term, No. 222 (1773) (located in the Public Record Office, London); The N.S. Concerio, Ex. Ct. Memoranda Roll, 5 Geo. 3, Michaelmas Term, No. 222 (1810) (located in the Public Record Office, London).

69. See generally W. Blackstone, 3 Commentaries on the Laws of England, 70 (R. Burn editor 1783); J. Godolphin, A View of the Admiral Jurisdiction, 28, 61, 153 (1661).

See also a copy of a letter patent given to Sir Thomas Salisbury installing him as an admiralty judge in 1752, printed in Reports of Cases Determined by the High Court of Admiralty, 346-347 (R. Marsden editor 1885).

70. Common law courts attempted to oust admiralty jurisdiction from the maritime areas of counties by asserting common law jurisdiction over "arms of the sea" where it was possible to see the opposite shore. Such bodies of water were thus said to be infra corpus commitatus. See generally The Case of the Admiralty, 77 Eng. Rep. 1461 (1610); Halisbury, vol. 8, at 468.

The first of several statutes, enacted at the prompting of common law judges, limited the admiral's jurisdiction to things done upon the sea. What things the admiral and his deputies shall meddle, 13 Rich. 2, c. 5 (1389). See also, In what Places the Admiral's Jurisdiction doth lie, 15 Rich. 2, c. 3 (1391); A remedy for him who is wrongfully pursued in the Court of Admiralty, Hen. 4, c. 11 (1400). The Admiral had no non-criminal jurisdiction within the body of counties. John Constable's Case, supra note 22, at 369.

By the eighteenth century common law courts interfered with application of admiralty law only when substantive common law appeared to be infringed within common law jurisdiction. Anonymous, 91 Eng. Rep. 829 (1698). In contrast, from the reign of Elizabeth I to Charles II the jurisdiction apparently over every matter of which they could take cognizance. Halisbury, vol. 1, at 47.

71. The admiralty jurisdiction was in tidal waters and of things maritime. It was an exclusive jurisdiction over things maritime. See R. Zouche, The Jurisdiction of the Admiralty of England Asserted, 17 (1663).

72. As an example, a prohibition would issue against the Admiralty Court taking a case involving a suit for a seaman's wages when services were solely within the boundary

of a county. Didolph v. Bruce, 88 Eng. Rep. 1282 (1699).

73. The Admiralty Court could not take cognizance of a plea in contract unless the cause of action arose upon the sea. Don Diego Serviente D'Acune v. Jolliff, 80 Eng. Rep. 228 (circa 1724); see also Benzen v. Jeffries, 91 Eng. Rep. 994 (1697). But if a contract was for furtherance of an ocean voyage, such as that entered into by seamen, then a libel could be made against the vessel in the Admiralty Court for wages even when the ship never left the county. Osman v. Wells, 88 Eng. Rep. 864 (1705). Another example is a bottomry bond in which a "sea risk" was essential. The Royal Arch, 166 Eng. Rep. 1131 (1857).

74. See Justin v. Bellam, 92 Eng. Rep. 38 (1702). See also, as examples, Mentone v. Gibbons, 100 Eng. Rep. 974 (1685); and Cossart v. Lawdley, 87 Eng. Rep. 159 (1607).

75. Bottomry bond or hypothecation could only be done outside the boundaries of counties. Johnson v. Shippin, 91 Eng. Rep. 37 (1703). Contracts for ship supplies made in the body of a county, or made outside the body of a county but not necessary for continuance of a voyage were on the basis of personal obligation of the owner under common law jurisdiction. See Coomes v. Jenkinson, 84 Eng. Rep. 788 (1673); Anonymous, 83 Eng. Rep. 1088 (1664); and The Spanish Ambassadour v. Buntish, 80 Eng. Rep. 1157 (1615).

Even the Isle of Jersey was classified as a foreign place to order to uphold the maritimeness of a foreign bond. The Barbara, 165 Eng. Rep. 514 (1801).

76. Matters which were not of a "maritime nature", but were done on foreign soil, by the eighteenth century were excluded from admiralty jurisdiction. See Don Diego

Serviente D'Acune v. Jolliff, supra note 67. Prior to common law's assertion of jurisdiction over such matters by a fictional pleading of locus within a county (see Morten v. Spencer, 83 Eng. Rep. 905 (1662)) the Admiralty Court and the High Court of Chivalry took cases which involved foreign parties or which arose from circumstances beyond seas. See Houghton's Case, 123 Eng. Rep. 789 (1610). See also A. Harding, A Social History of English Law, 162 (1966). The Channel Islands and the Isle of Man were outside the common law and the Court of Admiralty and High Court of Chivalry had jurisdiction of complaints arising there. A. Harding, supra, at 301. Eventually the Court of Chivalry, which was not a court of record and thus could not fine or imprison although it could hear complaints civil and criminal, fell into disuse because it was a weak court.

The Isle of Man was not within the Kingdom of England, and thus the inhabitants were governed by their own law. Isle of Mann Case, 123 Eng. Rep. 575 (1598). The Isle of Gurnsey had a law separate from that of the common law. Clugas v. Penaluna, 100 Eng. Rep. 1122 (1791).

77. For examples of insurance contracts dealing with maritime matters see M. Dalton, The Country Justice, 232 (____), discussing common law jurisdiction over insurance fraud by causing a ship to founder. Similarly a contract for the purchase of a ship although arguably a maritime matter, especially when done at sea was nonetheless within common law jurisdiction. Edwards v. Harben, 100 Eng. Rep. 315 (1788); Hook v. Morston, 91 Eng. Rep. 1165 (1698). Also charter party contracts chartering the ship were within common law jurisdiction. The Royal Arch, supra note 73.

Posting of a bond protected reluctant minority owners.

Lambert v. Aeretree, 91 Eng. Rep. 911 (1695). But common law courts had jurisdiction for enforcement if the vessel were lost. More v. Rowbothom, 87 Eng. Rep. 919 (1705). Prohibitions prevented the Admiralty Court from enforcing its bonds. Knight v. Perry, 90 Eng. Rep. 373 (1690).

78. Seamen could libel in rem against the vessel for their wages. The Peerless, 15 Eng. Rep. 182, 185 (1860); Sandys v. East-India Company, 90 Eng. Rep. 43 (1684). The common law courts had jurisdiction over wage contracts through in personam actions. Brown v. Benn, 92 Eng. Rep. 322 (1706).

For example of class suits by seamen for wages see Mariners v. Jones, 124 Eng. Rep. 7 (1619); The Mariner's Case, 88 Eng. Rep. 269 (1725). Class suits enabled a group to bring a single suit as a class to recover their individual losses, rather than bringing separate actions for each claim.

79. See Day v. Searle, 93 Eng. Rep. 973 (1734). If under seal, a seaman's wage contract was removed from admiralty jurisdiction. Mentone v. Gibbons, supra note 74. If the wage contract was for labor solely within a county then the common law courts would issue a prohibition to the Admiralty Court if a libel was filed there for wages. Ross v. Walker, 95 Eng. Rep. 801, 802 (1765).

See also Howe v. Napier, 98 Eng. Rep. 13 (1766); Buck v. Atwood, 93 Eng. Rep. 832 (1727); and Opy v. Child, 91 Eng. Rep. 33 (1693) for examples where the contract for seaman's labor varied from recognized essential maritime standards and came within common law jurisdiction.

80. See Johnson v. Shippin, supra note 75.

81. When work was done on a vessel by a craftsman within the body of a county the common law courts had jurisdiction and suit was brought against the owner personally. On the other hand, if the work was done upon the sea in the course of a voyage the Admiralty Court held jurisdiction and the vessel could be libeled in rem. Watkinson v. Bernadiston, 24 Eng. Rep. 769 (1726).

82. See note 76 supra.

83. Collision within the body of a county was within common law jurisdiction. Drewry v. Twiss, 100 Eng. Rep. 1174 (1792); Goodwin v. Tomkins, 74 Eng. Rep. 110 (circa 1669).

84. See Caule v. Cooke, 84 Eng. Rep. 313 (1610), for a discussion of proceedings against a vessel, in the Court of Admiralty, for personal injury received in the course of a voyage through attempts at furtherance of the voyage. See Sparrow v. Caruthers, 93 Eng. Rep. 1153 (1746) for a case at common law dealing with damages to cargo while in a lighter at the port of London. See also Violet v. Blague, 79 Eng. Rep. 439 (1619). Were a plaintiff to libel a vessel in the Admiralty Court for such damages received while within common law jurisdiction, the defendant party would have an action at common law for any damages caused as a result of filing the libel in rem. Child v. Sands, 91 Eng. Rep. 33 (1693).

Examples of non-maritime torts arising on the high seas and suable at common law included a suit in trover for wrongful conversion of goods on the high seas see Le Pool v. Tryan, 82 Eng. Rep. 871 (1655); and see a case at common law dealing with assault and battery on the high

seas, Griffiths v. Dunnett, 135 Eng. Rep. 407 (1844).

The common law jurisdiction over non-maritime torts on the high seas was asserted through the pleading of a ficticious locus for the event within a county. See note 76 supra. The Admiralty Court was unable to assert jurisdiction by this technique of ficticious pleading. Johnson v. Drake, 83 Eng. Rep. 884 (1662); Anonymous, 77 Eng. Rep. 1355 (1611).

85. For an example of damages caused by a derelict vessel on the high seas later libeled in rem within the body of a county see Turner v. Smith, 82 Eng. Rep. 1161 (1668).

See also other examples Turner v. Neele, 83 Eng. Rep. 388 (1669); Duke of York v. Linstred, 83 Eng. Rep. 1169 (1664); Beak v. Thyrwhet, 87 Eng. Rep. 124 (1607).

For an example of a vessel becoming derelict in port and being within common law jurisdiction for damages see Le Seigneur Admiral v. Linsted, 82 Eng. Rep. 1042 (1664).

For cases dealing with common law jurisdiction over anchored vessels and other vessels within the boundaries of counties see Wood v. Hannah, (1669), printed in A. Browne, 1 A Compendius View of the Civil Law, 83 (appendix) (1797); Dorrington's Case, 72 Eng. Rep. 995 (1619). Such vessels could be seized and attacked at common law. Score v. The Lord Admiral, supra note 60, at 778 (1709); Polyxphen v. Branford, 83 Eng. Rep. 920 (1662).

86. Taking goods on the high seas vi et armis was an act of piracy triable by the Admiralty Court under the Great Seal. Don Diego Serviente D'Acune v. Jolliff, supra note 67. Admiralty criminal jurisdiction extended within

the bodies of counties for acts of murder and mayhem. See The Eliza Jane (1836), 3 Hag. Adm. 355; The Elleanor (1805), 5 Ch. Rob. 39; and The King v. Marsh, 81 Eng. Rep. 23 (1615).

See also Sandys v. East-India Company, supra note 78.

87. See Trial of Thomas Vaughan, 90 Eng. Rep. 1280 (1696).

88. Lacy's Case, 74 Eng. Rep. 246 (1583). Admiralty criminal jurisdiction was first limited to "great ships". The Eliza Jane, supra note 86.

89. See King v. Solgard, 93 Eng. Rep. 1055 (1738).

90. See for example The King v. Savage, 82 Eng. Rep. 542, 543 (1648); and The Case of the Admiralty, supra note 70.

91. Goods taken by a piratical act were within admiralty jurisdiction. No. 1044, Piracy, 72 Eng. Rep. 886 (1605). Admiralty had exclusive original jurisdiction over goods taken by piratical act on the high seas. Anonymous, 86 Eng. Rep. 199 (1678). Sale of such goods in a market overt created property rights at common law and brought the goods within that jurisdiction. Queen v. Steer, 91 Eng. Rep. 832 (1696).

Goods taken by pirates within the bodies of counties were within common law jurisdiction. See Sheers v. Martyn, 83 Eng. Rep. 1244 (1665); Hildegrand, Brimston and Baker's Case, 81 Eng. Rep. 488 (1616); Primston v. Court of Admiralty, 81 Eng. Rep. 126 (1616); and Opinion of the Justices, 73 Eng. Rep. 886 (1605). In these cases

prohibitions would issue to the Admiralty Court if it attempted to assert jurisdiction.

92. See Opinion of the Justices, supra note 84; and The Spanish Ambassador v. Pauntes, 81 Eng. Rep. 381 (1612).

93. For discussion of the theory of "local obedience" and obligations of foreigners within the national territory see M. Foster, Crown Cases, 185 (1762); and No. 188, 82 Eng. Rep. 434 (1641). Where the cause of action, the parties and the locus were all foreign jurisdiction would not be exercised. The Ida, 167 Eng. Rep. 3 (1860).

Protective jurisdiction analysis reveals that when municipal law was applied to foreigners it was a result of the sovereign's interest in requiring the foreigner's activity to conform with local activity. Maritime contexts provide examples of such interests, such as, rules of navigation, anchorage areas, pilot regulations, and liability for tortious injury. King v. Lambe, 101 Eng. Rep. 44 (1792); and King v. Neele, 101 Eng. Rep. 1367 (1799).

No general criminal jurisdiction was applied over coastal waters during the seventeenth and eighteenth centuries. See Lord Cockburn's Opinion in The Franconia (Queen v. Keyn), [1876] L. R. Exch. Div. 63.

See Sherley's Case, 77 Eng. Rep. 384 (1557).

94. John Selden in his Mare Clausum described the flag salute as follows:

> It was accounted Treason, if any Ship whatsoever had not acknowledged the Dominion of the King of England in his own Sea, by Striking Sail. And they were not to be protected upon Account of Amitie, who should in any wise presume to do the

> contrarie. Penalties also were appointed by the King of England in the same manner as if mention were made concerning a crime committed in some Territorie of his Island

Supra note 7, at 118.

Sir Leoline Jenkins in a charge to a grand jury at Southwark Admiralty Sessions, February 18, 1680, dealing with criminal matters, with regard to the flag salute and demonstrating its protective nature, stated as follows:

> Now the second part of your enquiry is of transgressions against the ancient laws and customs of the admiralty, such as are those relating to the flag; and in this enquiry you are to be very carefull, for thereon depends the honour of the nation, and if this be lost, all sovereignty and dominion will be lost and consequently trade; and thereupon you are to enquire whether commanders do their duty in requiring respect due the King's flag.

Reports of Cases Determined by the High Court of Admiralty, supra note 63, at 255.

95. A vessel was considered to be an extension of the territory of its flag. See generally The Peerless, supra note 72; and Halisbury, vol. 10, at 319.

96. The three cases of murder are Acow's Case, 127 Eng. Rep. 741 (1806); Sauvajot's Case, 127 Eng. Rep. 741 (1799); and Prevot's Case, 127 Eng. Rep. 777, 778 (1709).

97. For example foreign pirates seizing goods of a citizen while on the high seas were thought to be subject to the sovereign's authority because the goods were still the property of a subject. No. 188, supra note 93.

98. Piracy was an international offense. E. Coke, 1 Institutes of the Laws of England, The Fourth, 134-137 (1797). Acts of piracy were sufficient to support a charge

of treason. See An Act to amend an Act in the eleventh Year of the Reign of King William the Third, intituled, an Act for the more effectual suppression of Piracy, 18 Geo. 2, c. 30 §§ 2-3 (1745).

99. An Act to amend an Act in the eleventh Year of the Reign of King William the Third, intituled, an Act for the more effectual suppression of Piracy, 18 Geo. 2, c. 30 § 1 (1745).

100. Id. §§ 2-3.

101. The maritime essence was required for admiralty subject-matter jurisdiction over crimes. See Trial of Thomas Vaughan, supra note 87.

For cases dealing with ransom and the maritime essence of crimes connected with ransom of a vessel or crewman see Trantor v. Wilson, 87 Eng. Rep. 776 (1704); No. 29 Anonymous, 88 Eng. Rep. 849 (1703); and Wilson v. Bird, 91 Eng. Rep. 911 (1695).

102. Certain common law rules of procedure were imposed on criminal trials in the Admiralty Court. See the statute, For Pirates, 28 Hen. 8, c. 15 (1536).

103. Trial of pirates could be held out of the realm, but such trials were not restricted by common law rules. See An Act for the Effectual Suppression of Piracy, 11 & 12 W. & M., c. 7 (1700); made perpetual in An Act making perpetual...An Act of the eleventh and twelfth years of the Reign of King William the Third, for the more effectual Suppression of Piracy, 6 Geo. 1, c. 19 (1719).

104. For example see All Persons may buy Woolls. The Sea shall be open., 18 Edw. 3, Stat. 1, c. 5 (1389); and A Remedy for him who having a Safe Conduct is robbed upon the Sea, 31 Hen. 6, c. 4 (1452).

The exercise of protective jurisdiction under these two statutes accords with Bynkershoek's view of jurisdiction over sea areas much later:

> In this way it happened that, at the beginning of the seventeenth century, probably no part of the European Seas was looked upon as free from proprietary claims of some power. At any rate, most of them were actually subject in a greater or lesser degree to sovereign domination.

C. Van Bynkershoek, 1 De Dominio Maris Dissertatio, 15-16 (2d edition J. Scott editor 1744) [Carnegie Classics of International Law 1923].

105. For example, see Proclamation of James I. For the Restraint of Foreigners Fishing on the British Coasts, dated May 7, 1609, printed in T. W. Fulton, supra note 8. Also see note 8 supra.

106. Admiralty Prize Court jurisdiction was exclusive. Smart v. Wolff, 100 Eng. Rep. 600, 610 (1789). Although the prize jurisdiction began to develop only after 1520, by 1616 that jurisdiction was exclusive. E. Roscoe, A History of the English Prize Court, 18 (1924).

A naval force must take the prize for the capture to be valid under prize law. Broom's Case, 91 Eng. Rep. 34 (1697); Morris v. Bercley, 84 Eng. Rep. 277 (1669).

Letters of marque were issued to private persons making them privateers in times of war, or in times of peace enabling them to recover from foreign nationals the value of goods taken by one of their countrymen without

the holder of the letter of marque being classified as a pirate. Once a vessel and goods were seized as prize they were then condemned in the Admiralty Prize Court which vested ownership in the Captor. E. Statham, Privateers and Privateering, 7, 9 (1910).

107. The enemy lost its property right to a res at the time of capture. The Reynard, 165 Eng. Rep. 51, 52 (1778); Verdale v. Marten, 84 Eng. Rep. 787 (1673). After condemnation property rights to a res vested in the captor unless there was a dispute as to moiety interests which would be litigated at common law because they involved substantive common law's allocation of property rights. Beake v. Tirrell, 90 Eng. Rep. 379 (1690). The exception was when the dispute over property rights fell within ancillary jurisdiction of the Admiralty Prize Court. Broom's Case, supra note 99; Anonymous, 88 Eng. Rep. 1135 (1692); Somer's Case, 74 Eng. Rep. 461 (1590).

108. The common law courts would prevent the Admiralty Prize Court from acting contrary to property rights of citizens as vested by the substantive common law. Home v. Earl Camden, 126 Eng. Rep. 295 (1790). Common law allowed only its legal theories to establish property rights. For example see Thompson v. Smith, 84 Eng. Rep. 99 (1667). The Admiralty Prize Court had exclusive jurisdiction over matters of prize, and only ancillary jurisdiction over matters of property right. Smart v. Wolff, supra note 106. Once a prize was condemned by the Admiralty Prize Court, the common law vested property right over the res in the captor. Prior owners could not challenge the right of the new owner in the Admiralty Court or at common law. Weston's Case, 123 Eng. Rep. 785 (1611).

109. Items coming within prize jurisdiction remained there even if landed and sold. Thus rights of a purchaser of the res could not prevent the Admiralty Prize Court from deciding whether the prize was valid, and if invalid from returning the res to the original owner. Radly v. Whitwell, 84 Eng. Rep. 524 (1672). But if the res was sold in a market overt the prize jurisdiction ceased. Smart v. Wolffe, supra note 106; Sir John Watt's Case, 123 Eng. Rep. 797 (1611). See also Playes Case, 83 Eng. Rep. 1025 (1663).

110. The body of law applied by the Admiralty Prize Court was distinct from other bodies of admiralty law. See for example Le Caux v. Eden, 99 Eng. Rep. 375, 386 (1781). Ordinarily the Admiralty Prize Court decided according to international law, but it could not apply international law to avoid the strictures of municipal law. Huges v. Cornelius, 90 Eng. Rep. 38 (1684). See F. Wiswall, Development of Admiralty Jurisdiction and Practice Since 1800, 22-23 (1970).

See also The Walsingham Packet, 165 Eng. Rep. 244, 246-247 (1799).

111. Neither neutral nor enemy goods or vessels captured in neutral waters in violation of the recognized body of international prize law could be condemned as valid prize. See E. Roscoe, supra note 106, at 12-13. See also Twee Gebroeders (No. 1), 165 Eng. Rep. 422, 423 (1800); Twee Gebroeders (No. 2), 165 Eng. Rep. 485 (1801).

James I caused a map to be published, delimiting by a straight baseline method drawn from headland to headland around England, coastal pockets of water which were declared

neutral and thus were to be free of all hostile actions by vessels of nations hostile to other nations whose vessels were in these coastal waters. Such coastal pockets of water were known as the King's Chambers. See T. W. Fulton, supra note 8, at 119.

112. See Reports of Cases Determined by the High Court of Admiralty, supra note 69, at 231-233.

113. See A Remedy for him who is wrongfully pursued in the Court of Admiralty, Hen. 4, c. 11 (1400); In what Places the Admiral's Jurisdiction doth lie, 15 Rich. 2, c. 3 (1391); and What things the Admiral and his Deputies shall meddle, 13 Rich. 2, Stat. 1, c. 5 (1389).

114. J. Selden, Mare Clausum (M. Nedham translator 1652) [Carnegie Classics of International Law]; H. Grotius, Mare Liberum, (1635) [Carnegie Classics of International Law].

See a discussion of sixteenth century international law writers in, Senior, "Early Writers on Maritime Law", 37 L. Q. Rev. 323 (1921).

115. See Thomas Digges, Arguments prooving the Queens Maties propertye in the Sea Landes, and salt shores thereof, and that no subiect cann lawfully hould eny parte thereof but by the Kinges especiall graunte (1659).

116. R. Callis, Upon the Statute of Sewers, 39, 45, 57, 64, 76 (4th edition 1824).

117. Id. at 45-47, 64.

Callis was not wrong in arguing that the Crown exercised authority over the seas. But the authority was never shown to be generally applied over foreigners. Thus apparently only subjects were ordered not to harm friendly foreigners in a fourteenth century statute. No friendly stranger was to be harmed in the British Seas, 13 Rich. 2, c. 5 (1390).

118. See note 8 supra.

119. See H. Grotius, supra note 114, at 7, 10-12, 30, 47.

120. Id. at 22, 36.

121. W. Welwood, An Abridgement of All Sea-Lawes, 188, 193, 219-223, 236.

In an analysis of Welwood's works one author points out that Welwood's concept of possession of sea was based on the inherent contiguity of marginal sea areas to land. J. Oudendijk, Status and Extent of Adjacent Waters, 58 (1970).

122. J. Boroughs, Sovereignty of the British Seas, 12, 20, 30-32, 81-85, 92.

123. See J. Selden, supra note 114, at 118. See also R. Zouche, An Exposition of Fecial Law and Procedure or of Law between Nations, and Questions concerning the Same, 74 (J. Brierly translator 16__) [Carnegie Classics of International Law 1911].

124. J. Selden, supra note 114, at 119-126, 135-138,

355. See generally T. W. Fulton, supra note 8, at 118.

125. Id. at 355, 365, 429. The seas which Selden thought met the test of occupation through control are described by him as follows:

> The Sea encompassing great Britain, which in general wee term the British sea, is divided into four parts, according to the four Quarters of the World. On the West lie's the Vergivian Sea, which also takes the name of the Deucaledonian, where it washeth the Coast of Scotland. And this Vergivian, wherein Ireland is scituate, the Irish Sea is record to be a part, called in ancient time the Scythian Vale, but now the Channel of St. George. So that as well that which washeth the Western Coast of Ireland, as that which flowe's between great Britain and Ireland, is to be called the British sea.
>
> * * * * *
>
> Towards the North this Sea is named the Northern Caledonian, and Deucaledonian Sea, wherein lie scatter'd the Orcades islands, Thule, and others, which being called the British or Albionian Isles; yea, and Brittannides, give name to the neighboring Sea.
>
> * * * * *
>
> Upon the Eastern Coast of Britain flows the German Sea (so called by Ptolomie, because it lie's before the German Shore. On the South, flows that which is particularly noted by Ptolomie to be the British Sea. But all that was called also the British Sea, which extends itself like a half moon along the French Shore, through the Bay or Creek of Acquitain, unto the Northern Coast of Spain.

Id. 182-184.

126. Selden was arguing for ownership according to occupation and possession standards of contemporary international law. His argument for occupation was based on the presence of commercial vessels and naval vessels

as follows:

> It is true indeed which an eminent man saith: That the Sea hath beam enjoied by Occupation, not for this reason onely, becaus men had so enjoied the Land, nor is the Act or intent of the minde sufficient thereto; but that there is a necessitie of som external Act, from whence this Occupation may bee understood. Therefore Arguments are not to bee derived altogether from a bare Occupation or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoyment of the Sea, as consist's in a setting forth ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it, in receiving such Profits and Commodities as are peculiar to every kinde of Sea-Dominion whatsoever; and which is the principal, either in admitting or excluding others at pleasure.

Id. at 188.

127. M. Hale, De Jure Maris et Brachiorum Ejusdam, iii-iv, vi-ix-xi, xiv, xxxvi, xl-xli (circa 1663) [printed in R. Hall, On the Sea Shore (1830)].

128. Hale describes occupation of the coastal sea as follows:

> The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that propriety in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it....
>
> * * * * *
>
> The civilians tell us truly, nihil praeseribitur nisi quod possidetur. The king may prescribe the propriety of the narrow seas, because he may possess them by his navies and power. A

> subject cannot. But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest.

Id. at xxxi-xxxiii.

129. For a discussion of the Anglo-Dutch fishery dispute and the three seventeenth century wars resulting from it see T. W. Fulton, supra note 8, at 378-516.

130. S. Pufendorf, De Jure Naturae Et Gentium Libri Octo, 552, 556, 561-565 (C. Oldfather translator, 1688 edition) [Carnegie Classics of International Law 1931].

131. P. Meadows, Observations Concerning the Dominion and Sovereignty of the Sea, 28-29, 44 (1689).

132. 1 Traduction de Hugo Grotius, Le Droit de la Guerre et de la Paix, xxix-xxxi (J. Barbeyrac translator, 1724).

133. C. Van Bynkershoek, 1 De Dominio Maris Dissertatio, 17, 32, 43-49.

See S. Pufendorf, supra note 130.

134. E. de Vattel, The Law of Nations or the Principles of Natural Law, 21, 84, 87, 110 (C. Fenwick translator, 1758) [Carnegie Classics of International Law 1916].

135. Id. at 106-110. In fact Vattel wrote of the coastal sea occupation as follows:

> The various uses to which the sea near the shore can be put render it a natural object of ownership. Fish, shells, pearls, amber,

> etc., may be obtained from it. Now with respect to all these things the resources of the coast seas are not inexhaustible, so that the nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit.

Id. at 107.

136. C. Wolff, Jus Gentium Methods of Scientific Partractatum, 72-73 (J. Drake translator, 1764) [Carnegie Classics of International Law 1934].

137. Id. at 69-74, 184. Wolff stated his belief, that the high seas could not be owned, as follows:

> Therefore it is inconsistent that any nation should have ownership in the sea, consequently the open sea is not in the number of those things, the ownership of which can be acquired by occupation, therefore of itself it is not capable of occupation.

Id. at 71.

138. R. Valin, 2 Noveau Commentaire Sur L'Ordonnance De La Marine, Du Mois D'Aout 1681, 684, 698 (1766).

139. A. Browne, 1 A Compendius View of the Civil Law, 64 (1797).

140. Sir Henry Maine wrote that it was in the nineteenth century when nations came to exercise the same jurisdiction over their coastal seas as they had on their land territory. H. Maine, International Law, 39 (1888). Certainly this was true of general jurisdiction over the coastal seas

around Great Britain. See The Franconia (Queen v. Keyn), supra note 93, especially Lord Cockburn's opinion in that decision.

141. See the discussion of Galiani's proposal for a three-mile belt of coastal sea in T. W. Fulton, supra note 8, at 563.

See also M. Azuni, 1 Droit Maritime De L'Europe, 240, 252-253, 273-276, 305-306, 507, 509 (1805).

142. R. Hall, On the Sea Shore, 2, 16 (2d edition 1875).

143. Id. at 2, 16, 42-44, 103-104.

144. Considerations of international law were not the sole reasons for much of the argument offered by either position regarding the dominion of the sea. Evidently patriotism inspired many of these writers, and clouded their analysis with one or another bias. T. W. Fulton, supra note 8, at 340.

145. See J. Selden supra note 107, at 119 where he describes the collecting of tolls by Norway and Denmark in their adjacent seas. The tolls were paid for protection from pirates much the same as fishermen along the east coast of England purchased licenses for protection from the Dunkirk pirates. See generally T. W. Fulton, supra note 8.

146. See note 129 supra.

147. Treaty, England and Sweden, Upsala, April 11, 1654,

arts. 6, 9, 14. Printed in 3 Consolidated Treaty Series, 268-269 (C. Parry editor 1969).

148. Treaty, between Sweden and England, ____, July 17, 1656, art. 10. Printed in 4 Consolidated Treaty Series, 149 (C. Parry editor 1969).

149. Treaty, between Great Britain and Denmark, ____, February 13, 1661, art. 20. Printed in 6 Consolidated Treaty Series, 332 (C. Parry editor 1969).

150. Treaty of Peace, between England and the Netherlands, Westminster, April 5, 1654, art. 13. Printed in 3 Consolidated Treaty Series, 249 (C. Parry editor 1969).

For a discussion of the flag salute see note 94 supra.

151. Treaty, between Great Britain and Portugal, Whitehall, June 23, 1661, art. 11. Printed in 6 Consolidated Treaty Series, 332 (C. Parry editor 1969).

152. Treaty, between England and the Netherlands, Breda, July 21, 1667, art. 2. Printed in 10 Consolidated Treaty Series, 251 (C. Parry editor 1969).

153. See the Treaty, between England the Netherlands, Hague, February 17, 1668, art. 11. Printed in 10 Consolidated Treaty Series, 271-272 (C. Parry editor 1969); Treaty of Navigation and Commerce, between England and the Netherlands, London, December 1, 1674, art. 5. Printed in 13 Consolidated Treaty Series, 271-272 (C. Parry editor 1969).

154. Treaty of Peace and Friendship, between Great Britain and Spain, Utrecht, July 13, 1713, arts. 10, 11, 15. Printed in 28 Consolidated Treaty Series, 330-331 (C. Parry editor 1969).

155. The three Barbary State treaties are as follows: Treaty of Peace, between Great Britain and Tripoli, Tripoli, July 19, 1716, art. 24. Printed in 29 Consolidated Treaty Series, 499 (C. Parry editor 1969); Treaty of Peace and Commerce, between Great Britain and Tunis, Tunis, August 30, 1716 arts. 10, 11. Printed in 30 Consolidated Treaty Series, 4, 5 (C. Parry editor 1969); and Treaty of Peace and Commerce, between Great Britain and Algiers, Algiers, October 29, 1716, art. 2. Printed in 30 Consolidated Treaty Series, 30 (C. Parry editor 1969).

156. Treaty of Peace and Friendship, between Great Britain and Spain, supra note 154, arts. 11, 15, at 331, 334-335.

157. Treaty of Peace and Commerce, between Great Britain and Tripoli, Tripoli, September 19, 1751, art. 21. Printed in 39 Consolidated Treaty Series, 209 (C. Parry editor 1969); Treaty of Peace and Commerce, between Great Britain and Tunis, Bardo, October 19, 1751, art. 11. Printed in 39 Consolidated Treaty Series, 350 (C. Parry editor 1969).

158. Treaty of Peace, between Great Britain and Algiers, May 14, 1762, arts. 2, 3. Printed in 42 Consolidated Treaty Series, 162 (C. Parry editor 1969); Treaty of Peace and Commerce, between Great Britain and

Tunis, Bardo, June 22, 1762, art. 4. Printed in 42 Consolidated Treaty Series, 172 (C. Parry editor 1969).

159. Treaty of Amity and Commerce, between Great Britain and Russia, St. Petersburg, July 1, 1766, arts. 2-3. Printed in 43 Consolidated Treaty Series, 369-370 (C. Parry editor 1969); Treaty, between Great Britain and Sweden, Whitehall, October 21, 1661, art. 5. Printed in 6 Consolidated Treaty Series, 486-487 (C. Parry editor 1969); Treaty of Alliance, between Great Britain and Sweden, Stockholm, February 1, 1720, arts. 4, 15. Printed in 31 Consolidated Treaty Series, 114-115, 120 (C. Parry editor 1969).

160. Preliminary Articles of Peace, among France, Great Britain and Spain, Fontainebleau, November 3, 1762, arts. 2, 3, 17. Printed in 42 Consolidated Treaty Series, 229-230, 233 (C. Parry editor1969).

161. Definite Treaty of Peace, among France, Great Britain and Spain, Paris, signed February 10, 1763, arts. 4, 5, 18. Printed in 42 Consolidated Treaty Series, ____ (C. Parry editor 1969).

162. Id., arts. 4, 18 at ____.

163. See Sir Humphrey Gilbert's letter patent printed in R. Hakulyt, 8 The Principal Navigations Voyages Traffiques & Discoveries of the English Nation, 18 (1904). Sir Philip Sydney's charter is printed in State Papers, Colonial (Am. & W. Ind.), [1574-1674], nos. 28-29, at 24-25 (1583). Adrian Gilbert's charter, as well as that of Sir Walter Raliegh are printed in R. Hakulyt, supra at 289-294, 375-376.

As examples of the transition from charters designed for discovery and claims of ownership to charters for settlement see the charters issued to Richard Hakulyt and Sir Thomas Gates. Printed in State Papers Colonial (Am. & W. Ind.), [1574-1675], nos. 48-49, at 32, 34 (1606-1609).

For an excellent reference work on the early voyages of discovery across the North Atlantic see S. W. Morrison, The Northern Voyages, A. D. 500-1600 (1971).

164. For a discussion of the types of colonial charters see W. Blackstone, 1 Commentaries on the Laws of England, 93 (D. Lewis editor 1898).

Examples of corporate charters are the 1620 Charter for New England, printed in F. Thorpe, infra note 165, vol. 3, at 1827; and the First Virginia Charter, 1606, printed in id., vol. 7, at 3783. Examples of proprietary charters are those granted Lord Baltimore (Calvert) and William Penn: Lord Baltimore received the charter for Maryland, 1632, printed in id., vol. 3, at 1679; William Penn received the Charter for the Province of Pennsylvania, 1681, printed in id., vol. 5, at 3035.

165. The Third Charter for Virginia, 1612, is printed in F. Thorpe, 7 The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, 3802-3804 (1909). (Hereinafter cited as F. Thorpe, vol. ___, at ___.)

The Third Virginia Charter of 1612 was revoked in 1623 by a writ quo warranto. 1 Acts of the Privy Council (Col.), 69, 72, 79 (1624).

166. The Georgia Charter is printed in F. Thorpe, vol. 2, at 675.

167. C. Viner, 14 A General Abridgment of Law and Equity, 57-63 (2d edition 1793). (Hereinafter cited as C. Viner, vol. ___, at ___.)

168. See W. Nelson, Lex Testamentaria, 304-306 (1728); J. Comyns, 2 A Digest of the Laws of England, 679 (1st American Edition 1825). (Hereinafter cited as J. Comyns, vol. ___, at ___.); id. vol. 4, at 156; id. vol. 7, at 328; M. Bacon, A New Abridgment of the Law, 161 (1st American edition, from the 6th London edition 1813).

169. The prohibition against use of the liberal Elizabethan rule appears in, A Proclamation prohibiting use of any charter issued by Queen Elizabeth to achieve any monopolies. Printed in 8 Calendar of State Papers (Dom.) (1603-1610), 7 (1603).

170. Charters were required to be under the Great Seal. C. Viner, vol. 16, at 561, 563; C. Viner, vol. 17, at 69, 130, 134, 171. See also Halisbury, vol. 17, at 311; and Prerogative (Anon.), 73 Eng. Rep. 913 (circa 1547).

171. See Sir Robert Heath's Patent for Carolina, 1629, printed in F. Thorpe, vol. 1, at 69.

172. General words would pass nothing in a Crown grant. For a discussion of the effect of general words such as "franchises" used in Crown grants see Attorney-General v. Trustees of the British Museum, (1903) 2 Ch. 598.

No royal grant will imply or presume to pass anything

beyond what is undoubtedly intended and expressed. See J. Gould, A Treatise on the Law of Waters, 48-49 (1883).

173. See for example the grant of authority to establish a vice-admiralty court in the commission of Sir Edmund Andros as Governor for the Dominion of New England, 1688, in F. Thorpe, vol. 3, at 1863, 1867. But the specifics of that vice-admiralty court's jurisdiction was to follow later in the form of a special commission from the Lord High Admiral.

See also Sir William Phip's Commission as Governor of the Province of the Massachusetts Bay, Dec. 12, 1691 printed in 2 Publications of the Colonial Society of Massachusetts, ____ (1913); and Sir William Phip's Commission as Vice-Admiral of the Province of the Massachusetts Bay, Dec. 29, 1691, printed in id. at 372-378.

174. By 1692 Crown-controlled vice-admiralty courts were being established so as to effectively exempt colonial courts from control of the coastal sea. See the discussion of the vice-admiralty courts infra note 222. The Massachusetts Bay Charter, 1691, contains a grant of authority to have a vice-admiralty court, but a commission was still required before that jurisdiction could be exercised. See infra note 185, at 1885.

175. Sir Robert Heath's Patent for Carolina, 1629, supra note 171, at 71.

176. Id. at 73-75.

177. Fundamental Constitutionsof Carolina, 1669, in F. Thorpe, vol. 5, at 2772, 2785.

For a discussion of the various prerogative rights granted by franchise see note 11 supra.

178. Third Charter of Virginia, 1612, supra note 165, at 3804.

179. A grant of "franchises" was a grant by general words, but that grant could be valid if circumstances external to the granting document made the particular grant identifiable in fact. See Whistler's Case, 77 Eng. Rep. 1021, 1024 (1613).

180. Only the King could own royal mines. See Queen v. Earl of Northumberland, 75 Eng. Rep. 472 (1567). See generally, Instructions for John Jackson, Receiver-General of Rights of the Admiralty, 165 Eng. Rep. 17 (circa 1776); and Warram's Case, 72 Eng. Rep. 553-554 (1587).

The Crown could not exercise the prerogative right so as to lessen or restrict the rights of the nation under jus publicum. Parmeter v. Attorney-General, supra note 15. Moreover the Crown could not restrict any right pertaining to government in an essential way. See note 14 supra.

181. Thus private property rights were not affected by revocation of the Third Virginia Charter, 1612. Similarly, the proprietors of New Jersey reserved their property rights under the charter when they surrendered their right to government. See Surrender of the proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty, 1702, in F. Thorpe, vol. 5, at 2585.

See King v. Amery, 100 Eng. Rep. 278, 305-306 (1788);

and Delassus v. United States, 34 U. S. (9 Pet.) 117, 133 (1835). See also 1 Acts of the Privy Council (Col.), 70 (1623).

182. The Crown could not unilaterally revoke rights vested in charter holders by virtue of those documents. Revocation or surrender was required to be in a proceeding or by a method equally formal as the granting. See C. Viner, vol. 16, at 566-567; and C. Viner, vol. 17, at 125, 165, 177 and 180.

183. A breach of condition in a grant by fact or by law allowed the Crown to bring a writ scire facias against the grantee to revoke the grant. C. Viner, vol. 17, at 165. The writ quo warranto was used to force the grantee to demonstrate the authority by which the grantee claimed certain rights of franchise or the whole grant. Id. at 180.

Grant of a second inconsistent charter was a sufficient formal act showing intent to revoke the prior charter and thus the original charter holder could not use the scire facias writ to successfully challenge the new grantee's right on the basis that the initial revocation or surrender was not formal. See generally Basket v. University of Cambridge, supra note 13, at 63.

184. As an example of Crown authority over these American colonies, consider that the Crown altered boundaries of prior charters almost at will by placing descriptions of boundaries for adjacent new colonies in subsequent charters. See a discussion of this power to change boundaries in Henderson v. Poindexter's Lessee,

26 U.S. (12 Wheat.) 530, 533 (1827).

Determination of the location of colonial boundaries was, however, not considered a proper subject of inquiry for municipal courts. See Penn v. Lord Baltimore, 27 Eng. Rep. 1132, 1134-1135 (1750).

185. For example the grantees of the Delaware Charter given by William Penn were required to acknowledge the Crown as sovereign. See Charter for Delaware, 1701, in F. Thorpe, vol. 1, at 557-558. The Heath Charter for Carolina, 1629, contains the typical requirement that colonial laws be "consonant to the lawes, statutes, customes and rights of our Realme of England." See note 171, at 71.

186. See the Third Charter for Virginia which conveyed islands within 300 leagues of the Virginia coast. Note 165 supra.

187. See for example the language of the Heath Charter for Carolina, 1629, supra note 171.

188. See the Charter for New England, 1620, in F. Thorpe, vol. 3, at 1827, 1829, 1833.

189. Id. at 1833.

190. See the Charter of the Colony of New Plymouth, 1629, printed in F. Thorpe, vol. 3, at 1841, 1844; and the Charter of Massachusetts Bay, 1629, in F. Thorpe, vol. 3, at 1846-1847, 1850, 1859.

191. See The Act of Surrender of the Great Charter of New England to His Majesty, 1635, printed in F. Thorpe, vol. 3, at 1860. See also Order to the Attorney General to call in the patent for New England. 1 Acts of the Privy Council (Col.), 217 (1637).

192. The primary fishing areas at this time were on the Grand Banks west of Newfoundland. Colonial fishing was limited to inland waters south of Nova Scotia and was not an important part of the economy of any colony south of Massachusetts. In fact an early colonial fishery dispute arose when colonists from Virginia began to intrude on the fishing areas off southern Nova Scotia and east of Massachusetts. See 1 Acts of the Privy Council (Col.), 40-41, no. 65 (1621).

193. See The Charter of Massachusetts Bay, 1691, printed in F. Thorpe, vol. 3, at 1870-1873, 1875-1876, 1885.

In this 1691 charter the Province of Maine which had been the object of several earlier grants became part of the Massachusetts colony. It in fact remained part of Massachusetts until the early nineteenth century. The earlier grants of Maine are identified as follows: Grant of the Province of Maine to Sir Ferdinando Gorges and John Mason, Esquire, 1622, printed in id. at 1661; Grant of the Province of Maine, 1639, printed in id., at 1625; and Grant of the Province of Maine, 1664, printed in id., at 1637. None of these grants purport to convey ownership of the sea although islands are granted within certain distances of shore. Similar to other charters there was a requirement that laws be in accord with the laws of England.

194. Grant of New Hampshire to Captain John Mason, 1629, printed in F. Thorpe, vol. 4, at 2433-2434. See also a grant of New Hampshire to John Wallaston, 1635, printed in F. Thorpe, vol. 4, at 2437.

195. Grant of the Province of New Hampshire to J. Mason, 1635, printed in F. Thorpe, vol. 4, at 2443-2444.

Two settlements in New Hampshire under Mason acknowledged Charles I as sovereign and agreed to be governed by the laws of England. See Agreement of the Settlers at Exeter in New Hampshire, 1639, printed in id. at 2445; and the Combination of the Inhabitants Upon the Piscataqua River for Government, 1641, printed in id. at ____.

196. Patent for Providence Plantations, 1643, printed in F. Thorpe, vol. 6, at 3209-3210; Charter for Rhode Island and Providence Plantations, 1663, printed in F. Thorpe, vol. 6, at 3211-3215, 3219, 3221.

Rhode Island theoretically did not have jurisdiction over its coastal waters even for purposes of protection because that right had been granted to New England and Virginia. See 3 Acts of the Privy Council (Col.), 38 (1722).

197. See Charter for Connecticut, 1662, printed in F. Thorpe, vol. 1, at 529-530, 533-534, 535.

198. Id. at 535-536.

199. See Grant of the Province of Maine, (includes the Duke of York's entire grant), printed in F. Thorpe,

vol. 3, at 1637. See also S. E. Morrison, History of the American People, 77-78 (1965).

For Justice Cardozo's analysis of the Duke of York's charter see New Jersey v. Delaware, 291 U.S. 361, 365-368, 370-373, 378 (1934).

200. See the Charter for the Province of Pennsylvania, 1681, printed in F. Thorpe, vol. 5, at 3035-3038.

201. The Charter for Delaware, 1701, in F. Thorpe, vol. 1, at 557-558.

202. See the Duke of York's Release to John Lord Berkeley, and Sir George Carteret, 1664, printed in F. Thorpe, vol. 5, at 2533; His Royal Highness' Grant to the Lords Proprietors, Sir George Carteret, 1674, printed in F. Thorpe, vol. 5, at 2546; the Fundamental Constitution for the Province of East New Jersey in America, 1683, printed in F. Thorpe, vol. 5, at 2574; and Surrender of the proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty, 1702, printed in F. Thorpe, vol. 5, at 2585.

203. See the Charter of Maryland, 1632, printed in F. Thorpe, vol. 3, at 1679 (§ 4), 1683 (§ 16), 1686 (§ 22).

204. See the First Charter of Virginia, 1606, printed in F. Thorpe, vol. 7, at 3783-3784.

205. See the Second Charter for Virginia, 1609, printed in F. Thorpe, vol. 7, at 3790.

206. See the Third Charter of Virginia, 1612, printed in id. at 3802-3804, 3806-3807.

207. Id. at 3806.

See Henderson v. Poindexter's Lessee, supra note 166, at 533, concerning revocation of the Third Charter of Virginia.

208. See the Heath Patent for Carolina, supra note 154, at 69, 70, 71, 73-75.

209. See the Charter of Carolina, 1663, printed in F. Thorpe, vol. 5, at 2743-2744.

210. The Charter of Carolina, 1665, printed in F. Thorpe, vol. 5, at 2771-2772.

211. See the Fundamental Constitution of Carolina, 1669, printed in F. Thorpe, vol. 5, at 2772.

212. See the Charter of Georgia, 1732, printed in F. Thorpe, vol. 2, at 675.

213. A modern example is the enforcement of state fishing laws on the territorial sea of the United States, and in the case of the State of Florida and the State of Texas beyond the territorial sea. As a matter of international law such enforcement is considered to be by the United States, but domestically the enforcement is by state governments. The right of the states to unilaterally apply such enforcement is currently the subject of litigation. United States v. Florida and Texas, Supreme Court, No. 54, Original.

214. See An Act for the encouraging and increasing of shipping and navigation, 12 Chas. 2, c. 18 §§ 3, 18, 19 (1660).

215. See An Act for the encouragement of trade, 15 Chas. 2, c. 7 § 7 (1663).

216. See An Act for the encouragement of the Greenland and Eastland trades, and for the better securing the plantation trade, 25 Chas. 2, c. 7 § 11 (1673).

217. For the statute dealing with "ill-disposed persons" see An Act for preventing frauds, and regulating abuses in the plantation trade, 7 & 8 Wm. 3, c. 22 § 1 (1696). See a discussion of smuggling in the colonies in the Comment of J. Glen, Governor of South Carolina printed in D. Hawke, U. S. Colonial History Readings and Documents, 265 (1966).

218. An Act for preventing frauds, and regulating abuses in the plantation trade, 7 & 8 Wm. 3, c. 22 §§ 2, 4, 6, 9 (1696).

219. For an example of the commissions issued to colonial governors see Thomas Hutchinson's Commission as Governor of the Province of Massachusetts Bay, April 7, 1774, in 2 Publications of the Colonial Society of Massachusetts, 774 (1913).

220. For examples of commissions to colonial governors and subsequent admiralty commissions see William Shirley's Commission as Governor of the Province of the Massachusetts Bay, Feb. 25, 1757, printed in 2 Publications of the Colonial Society of Massachusetts, 128-129 (1913); and William Shirley's Commission as Vice-Admiral of the Province of the Massachusetts Bay, Aug. 21, 1741, in id. at 237.

For the subject-matter content of admiralty subject-matter jurisdiction applied in the colonies see Raynes v. Osborne, 2 Scl. Pl. Adm. (1579), printed in 11 Selden Society Publications, 156 (____); and Lord Willoughby's Commission as Vice-Admiral of Barbados and the rest of the Caribbee Islands, Jan. 26, 1666, printed in 2 Publications of the Colonial Society of Massachusetts, 357-361, 363-365 (1913).

The legitimate source of maritime law in the colonies was the admiralty commissions. See the discussion in E. Benedict, 4 The Law of American Admiralty, 434 (1940).

221. See L. Friedman, A History of American Law, 45 (1973).

222. By 1767 four appellate vice-admiralty courts were established in, An Act for the more easy and effectual recovery of the Penalties inflicted by the Acts of Parliament relating to the Trade or Revenues of the British Colonies and Plantations in America, 8 Geo. 3, c. 22 (1767).

The appellate vice-admiralty courts were designed to make Crown power and authority felt in the colonies. See a discussion of the use of these courts to exercise Crown power and authority in C. Andrews, 4 The Colonial Period of American History, 270 (1964).

Admiralty jurisdiction was as broad in the colonies as it had ever been in England. See The Volunteer, 28 F. Cas. 1260, 1263-1264 (No. 16,991) (C.C.D. Mass. 1834).

223. Customs laws were to be enforced by the vice-admiralty courts. See An Act for the more easy and effectual recovery of the penalties and forfeitures

inflicted by the acts of Parliament relating to the trade or revenues of the British colonies and plantations in America, 8 Geo. 3, c. 22, § 1 (1767).

Admiralty courts held exclusive prize jurisdiction and were empowered to issue commissions for privateers. See An Act for the encouragement of the trade to America, 6 A., c. 37 § 3 (1707).

224. An Act for preventing frauds, and regulating abuses in the plantation trade, 7 & 8 Wm. 3, c. 22, § 6 (1696). Contrary colonial laws were declared void by this statute, id. § 9.

225. See An Act to prevent the exportation of wooll out of the kingdom of Ireland and England into foreign ports; and for the encouragement of woollen manufacture in the kingdom of England, 10 & 11 Wm. 3, c. 10 § 19 (1699).

226. An Act to prevent the exportation of hats out of his Majesty's colonies or plantations in America and to restrain the number of apprentices taken by the hatmakers in the said colonies or plantations, and for the better encouraging the making of hats in Great Britain, 5 Geo. 2, c. 22 § 7 (1732).

227. An act to encourage the importation of pig and bar iron from his Majesty's colonies in America; and to prevent the erection of any mill or other engine for silting or rolling iron; or any plating forge to work with a tilt hammer; or any furnace for making steel in any of the said colonies, 23 Geo. 2, c. 29 § 9 (1750).

228. An act for the better securing and encouraging the trade of his Majesty's sugar colonies in America, 6 Geo. 2, c. 13 (1733).

229. See An act for the preservation of white and other pine trees growing in her Majesty's colonies of New Hampshire, the Massachusetts Bay, and Province of Maine, Rhode Island, and Providence Plantation, and Connecticut, in New England, and New York, and New Jersey, in America, for the masting of her Majesty's navy, 9 A., c. 17 §§ 1, 2 (1711).

230. See An act giving further encouragement for the importation of naval stores, and for other purposes therein mentioned, 8 Geo. 1, c. 12 § 5 (1721).

231. An act for the better preservation of his Majesty's woods in America, and for the encouragement of the importation of naval stores from thence; and to encourage the importation of masts, yards and bowsprits, from that part of Great Britain called Scotland, 2 Geo. 2, c. 35 §§ 1, 11 (1729).

232. For a discussion of this attempt by Carolina to set up a new colony see C. Andrews, 2 The Colonial Period of American History, 226-227 (1964).

233. See An act for the more easy and effectual recovery of the penalties and forfeitures inflicted by the act of Parliament relating to the trade or revenues of the British colonies and plantations in America, 8 Geo. 3, c. 22 § 16 (1767) which restricted land sales to British subjects. See also the discussion of all

unappropriated public lands again claimed by the Crown in C. Andrews, supra note 202, at 191-192.

234. For a discussion of the restrictions on sale of "western lands" see the Proclamation of 1763, printed in 2 Foundations of Colonial America, 2341-2343 (W. Kavenagh editor 1973).

235. See An act for the better securing the dependency of his Majesty's dominions in America upon the Crown and Parliament of Great Britain,,6 Geo. 3, c. 12 §§ 1, 2 (1766).

When issuing commissions to colonial governors among the responsibilities enumerated was a power of review and disallowance of colonial assembly enactments. For example see Trade Instructions to Benning Wentworth, July 21, 1741, printed in 2 The Laws of New Hampshire (1679-1801), 636, 643 (1917).

236. Colonial laws affecting coastal waters dealt either with regulation of activities over inland waters or with regulations affecting British subjects and those harming British subjects or their goods. For example see An Act to prevent the destruction of rockfish and oysters, March 9, 1771, printed in 1 Laws of the Commonwealth of Pennsylvania, 313 (1810); (Instructions to Governor-Wentworth), July 21, 1741, printed in 2 The Laws of New Hampshire (1679-1801), 636, 643 (1917); An Act providing in Case of Sickness, May 15, 1714, in 2 The Laws of New Hampshire (1679-1801), 129 (1917); An Act for Restraining and Punishing Privateers and Pirates, August 17, 1699, printed in 1 The Laws of New Hampshire (1679-1801), 653 (1917); (Order Regulating the Taking of of Mackerel), May 9, 1687, printed in 1 The Laws of New

Hampshire (1679-1801), 251 (1917).

237. Internal colonial affairs were not of much concern if they did not directly affect Great Britain. For example it was 1740 before the sovereign took action about as critical a problem as colonial currency. See Instructions to Governors on Colonial Currency, August 5, 1740, printed in 1 Foundations of Colonial America, 548 (W. Kavenagh editor 1973).

But British attention to colonial trade had been constant. For example even during the period of the Inter-Regnum in the seventeenth century enactments were directed at colonial trade. See An act for Increase of Shipping and Encouragement of the Navigation of this Nation, ____ printed in id. at 254.

238. The customs officials were appointed by the Commissioners of Customs, which body was located in Boston as a step to make Crown authority felt. See C. Andrews, supra note 222, at 270, 414, 421. The Commissioners for Trade and Plantations filed reports. See Order in Council for the Improved Government of the Colonies, March 11, 1752, printed in 2 Foundations of Colonial America, 1365-1366 (W. Kavenagh editor 1973). Receivers-General were appointed. See Orders, Rules and Instructions to be Observed by the Receivers-General of the several Colonies and Provinces in North America, July 24, 1761, printed in id. at 1378.

239. The Articles of Confederation of the United Colonies of New England, 1643-1684, printed in F. Thorpe, vol. 1, at 77-78.

240. The Albany Plan-1754, printed in id. at 83-86. This document was to have been transmitted to the King for his approval.

241. For a discussion of the beginning of the war of the American Revolution see S. Morrison, History of the American People, 205-223 (1964).

242. For a discussion of the American constitutional law theory of dual citizenship see the Slaughter House Cases, 83 U.S. (16 Wall.) 36, 73-76 (1873).

243. Sovereignty was vested in the federal government but state governments retained certain aspects of domestic sovereignty delegated by the people. For a discussion see these cases: Parker v. Brown, 317 U.S. 341, 359-369 (1943); McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cr.) 208, 211 (1808); Calder v. Bull, 3 U.S. (16 Wall.) 385-386 (1798); Ware v. Hylton, 3 U.S. (3 Dall.) 158, 176-184, 187-188, 210 (1796).

244. See the Declaration of Independence; "The unanimous Declaration of the Thirteen States of America", July 4, 1776, printed in J. Richardson, 1 A Compilation of the Messages and Papers of the Presidents 1789-1897, 3 (1896).

The colonies were directed to issue their own declaration of independence. See 4 Journals of the Continental Congress 1774-1789, 342 (C. Ford editor 1906). (Hereafter cited as J.C.C., vol. ___, at ___.)

Colonists formed a unified body. B. Schwartz, 1 A Commentary on the Constitution of the United States, 6

(1963); and J. Story, 1 Commentaries on the Constitution of the United States, 4, 6, 10, 13 (3rd edition 1858).

See generally, United States v. California, 332 U.S. 19, 33-34, 36, 38 (1947); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380-381, 388, 413-414 (1821); and Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 64, 73, 75-77, 90 (1795).

245. See J. Story, supra note 213, at 147-149, 151, 153.

> The true answer must be, that as soon as Congress assumed powers and passed measures which were in their nature national, to that extent the people, from whose acquiescence and consent they took effect, must be considered as agreeing to form a nation.

Id. at 149. See also B. Schwartz, supra note 244, at 30-31; and C. Warren, The Supreme Court and Sovereign States, 4-5 (reprint of the 1924 edition 1972).

Some question may arise as to the existence of one nation from the various titles used for the Union which mention the multiple states. However, those titles are all referring to a single entity, the new nation, as is evidenced by the constant use of "United". Thus in September 1776, the Congress changed the style "United Colonies" to "United States", witnessing the change in government from colonial status to that of an independent nation. See J.C.C., vol. 5, at 747.

Contra see C. Antieau, 2 Modern Constitutional Law, 4 (1969).

246. For a discussion of these states' rights positions see Letters of Fabius, (published anonymously by John Dickenson) (see letter no. 3, 1788), printed in P. Ford, Pamphlets on the Constitution of the United States, Published During its Discussion by the People 1787-1788, 179 (1968); and Tench Coxe, An Examination of the

Constitution, printed in id. at 136.

The sovereign nature of the national government is clearly pointed out by George Washington in a letter to the Rev. W. Gordon, dated July 8, 1783, in which he not only offers that the sovereign power was in the national government and so regarded by other nations but goes on to describe the international status of the states as follows:

> Massachusetts or Virginia is no better defined, nor any more thought of by Foreign Powers than the County of Worcester in Massachusetts is by Virginia or the County of Glouscester in Virginia is by Massachusetts. ...

27 The Writings of George Washington, 49-50 (J. Fitzpatrick editor 1938).

247. George Washington's commission from the Continental Congress placing him under command of the Congress is in J.C.C., vol. 2, at 96.

248. See the appointment of the admiralty committee in J.C.C., vol. 7, at 75.

249. See the description of the powers of the Continental Congress in J.C.C., vol. 13, at 283-284.

250. Congress had accepted the Articles of Confederation in 1777, but it was 1781 before the people accepted the Articles through their state governments. Maryland was the last necessary state to ratify. See J.C.C., vol. 19, at 223.

A discussion of the perpetual union formed under the Articles appears in B. Schwartz, supra note 244, at 33.

251. Insufficient power was granted to the national government. See B. Schwartz, supra note 244, at 6-7. Fear of a strong central government was pervasive. Id. at 5.

Under the Articles only a loose form of government was created, with much power retained by the state governments. See a discussion of that government in L. Friedman, A History of American Law, 101 (1973).

252. See Articles of Confederation, printed in J. Richardson, supra note 244, at 9, 10, 11.

253. Besides lacking a power to tax under the Articles there was no power to establish uniform customs laws, which allowed each state to levy its own duties. See for example, qui tam v. The Ship Anna, 1 Dall. 197 (Ct. of Pleas. of Phila. City) (1787).

For the other powers delegated to the national government in the Articles see Articles of Confederation printed in J. Richardson, supra note 244, at 10-11.

See a discussion of the states' powers over pirates under the Articles in Keane v. The Brig Gloucester, 2 Dall. 36 (Fed. Ct. of Capture Appeals) (1782); and The Speedwell, 2 Dall. 40 (Fed. Ct. of Capture Appeals) (1784).

254. States could issue letters of marque. See Keane v. The Brig Gloucester, supra note 253. The right to try pirates and authority over captures were vested in the national government. See Articles of Confederation in J. Richardson, supra note 244, article no. 9, at 14. See also United States v. Peters, 9 U.S. (5 Cr.) 115, 140 (1809).

255. In matters of national interest the states were controlled by the Articles. See the Articles of Confederation, article no. 9, printed in J. Richardson, supra note 244, at 14. The treaty making power and power to wage war were exclusively vested in the national government. See article 6 et seq. printed in id. at 10-11.

256. See Constitution of Delaware-1776, articles 12, 17, 25, printed in F. Thorpe, vol. 1, at 562-567; Constitution of Delaware-1792, printed in id. at 568; Constitution of Georgia-1777, printed in id. at 785; Constitution of Maryland-1776, printed in F. Thorpe, vol. 2, at 1687; Constitution of Formal Government for the Commonwealth of Massachusetts-1780, printed in F. Thorpe, vol. 3, at 1888-1890; Constitution of New Hampshire-1776, printed in F. Thorpe, vol. 4, at 2451; Constitution of New Hampshire-1784, in id. at 2453; Constitution of New Jersey-1776, in id. at 2594; Constitution of New York-1777, printed in F. Thorpe, vol. 5, at 2624-2625 (New York adopted the common law of England and laws of the colony on April 19, 1765, id. at 2635); Constitution of North Carolina-1776, printed in id. at 2787; Constitution of Pennsylvania-1776, printed id. at 3081; Constitution of Pennsylvania-1790, printed in id. at 3092; Constitution of South Carolina-1776, printed in F. Thorpe, vol. 6 at 3241, 3243; The Constitution of Virginia-1776, printed in id. at 3812-3813.

Virginia's Constitution contained a declaration of independence, promulgated prior to that issued by the United States, but that promulgation was at the direction of the Continental Congress so that Virginia acted at the direction of Congress and not as an independent nation. Id. at 3814-3815.

257. The treaty power of Congress under the articles is in article no. 6 of The Articles of Confederation, printed in J. Richardson, supra note 244, at 10. That treaty power is in the exclusive power of war and peace. See J.C.C., vol. 13, at 283-284.

258. Style of the negotiators commissions is printed in J.C.C., vol. 14, at 956.

259. Although the colonies were each mentioned as being independent they were so recognized as a group in one document and it is apparent that only one nation was understood to have come into existence. See J.C.C., vol. 14, at 957.

260. See the Journal of the Federal Convention, printed in J. Elliot, 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 139, 318-319 (2d edition 1941), (hereinafter cited as J. Elliot, vol. __, at ___.), which shows that the delegates understood that they were drafting a national document of government.

Some delegates thought of states as only temporary. Id. at 387. National status was thought to remove the need for pretentious state sovereignty. See Madison's Federal Constitutional Debates, printed in J. Elliot, vol. 5, at 176; Others feared a strong central government. Id. at 193, 212. Delegates understood that states were not sovereign in the international law sense. Id. at 212-213. Moreover those delegates understood that the states were not nations but comprised one nation. Id. at 213.

261. See Madison's Federal Constitutional Debates, supra note 260, at 217-218.

262. See the Massachusetts debates, in Debates of the States, printed in J. Elliot, vol. 2, at 54, 60.

263. See the Pennsylvania debates, Debates of the States, printed in id. at 429, 443-445; see also the North Carolina debates, Debates of the States, printed in J. Elliot, vol. 4 at 443, 455.

264. See note 246 supra.

265. See the constitutional discussions in The Federalist, 19, 70-71, 93, 157, 256-257, 275, 417, 538, 548 (J. Cooke editor 1962).

266. See the comments by then Justice Story on the adoption of the Constitution in J. Story, supra note 244, at 210, part of which reads as follows:

> From hence, not only the body politic of the several states, but all citizens thereof, may be considered as parties to the compact, and have bound themselves reciprocally to each other for the due observance of it; and also have bound themselves to the federal government, whose authority has been thereby created and established.

See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819).

267. Foreign affairs power is an inherent power of the federal government as sovereign. C. Antieau, supra note 245, at 192, 195. See United States v. Curtis-Wright Export Corp., 229 U.S. 304 (1936).

268. See a discussion of resulting powers and implied powers in C. Antieau, supra note 245, at 190-191.

269. See the discussion of resulting powers in connection with the Civil War monuments in United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 683 (1896).

270. See Ruppert v. Caffery, 251 U.S. 264, 300 (1920). For an analysis of sovereign powers of the national government under the Constitution see M. Forkosh, Constitutional Law, 116-128 (2d edition 1969).

271. See the discussion of concurrent non-conflicting jurisdiction in C. Antieau, supra note 214, at 4, 6, 9, 81. See also United States v. Lanza, 260 U.S. 377, 382 (1922); and M. Forkosh, supra note 270, at 78-80.

272. See Compagnie Francaise de Navigation v. Board of Health, 186 U.S. 380 (1902).

273. For the restriction on state enactment of customs levies or taxes on goods in commerce through preemption of the field by the national government see Sanneborn Bros. v. Cureton, 262 U.S. 506 (1923); and Board of Trustees of University of Illinois v. United States, 289 U.S. 48 (1933).

274. The grant of admiralty and maritime jurisdiction was exclusive but did not preempt alternative state remedies. See C. Antieau, supra note 214, at 28-32. The only restriction was that state law could not conflict with federal law. See also Cooley v. Port Wardens, 53 U.S. (12 How.) 299, 314 (1851).

See the United States Constitution, Article III, Section 2, and Article II, Section 8, for the admiralty and maritime clause as well as the necessary and proper

clause.

See also the 1789 Judiciary Act, 1 Stat. 73.

275. As an example of the removal of admiralty, but not prize jurisdiction from national control prior to adoption of the Constitution many states abolished admiralty courts within their territory. See for example An Act to prevent encroachments of the Court of Admiralty, Feb. 14, 1787, printed in 2 Laws of New York, 294 (1886). Because of the specialized body of law involved and the need for national uniformity admiralty jurisdiction was given to the federal government in the Constitution. This new admiralty jurisdiction was so broad that it even included jurisdiction over liens of suppliers and builders of vessels which arose according to state law. See An Act to secure the persons employed in the building and fitting of ships..., March 27, 1784, printed in 2 Laws of Commonwealth of Pennsylvania, 95 (1810).

As an example of the favorable light admiralty jurisdiction came under just prior to adoption of the Constitution see An Act for the Extending the Powers and Authority of the Maritime Court in this State, June 12, 1787, printed in 5 The Laws of New Hampshire, 1679-1801, 229 (1917). See also L. Friedman, supra note 251, at 46.

See also G. Gilmore & C. Black, The Law of Admiralty, 10n., 37 (1957); and H. Hart & H. Wechsler, The Federal Courts and the Federal System, 21 (1953).

See The Belfast, 74 U.S. (7 Wall.) 624, 636 (1868).

276. All maritime matters came within admiralty jurisdiction under the Constitution. See E. Benedict, 1 The Law of American Admiralty, 14, 84, 359, 371 (1940).

The jurisdiction of the admiralty law in the United States under the Constitution became more broad than it was in Great Britain in 1776. For a discussion of that jurisdiction see The Constitution of the United States of America; Analysis and Interpretations, 646 (published by the United States Government Printing Office).

Admiralty jurisdiction extended throughout the navigable waters of the United States. See The Montello, 78 U.S. 411 (1870); and The Daniel Ball, 77 U.S. 557 (1870).

The need for national jurisdiction over cases involving matters of prize law are discussed in Chapter VII, infra.

277. For a discussion of American prize law see Glass v. Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794). The development of a three-mile belt of neutral waters through prize law is evident in The Fame, 8 F. Cas. 948-985 (No. 4,634) (D. Me. 1822); and Soult v. L'Africaine, 22 F. Cas. 805-806 (No. 13,179) (D.C.S.C. 1804)

278. The United States Constitution, Article III, Section 2.

For a discussion of the body of general maritime law applied by the federal district courts sitting in admiralty see D. Roberston, Admiralty and Federalism, 65, 136-151 (1970).

See the discussion of admiralty law and jurisdiction in De Lovio v. Boit, 7 F. Cas. 418, 442-444 (No. 3,776) (D.C.C.D. D. 1815). See also Kynoch v. The S.C. Ives, 14 F. Cas. 888, 891-892 (No. 7,958) (D.C.N.D. Ohio 1856); and Steele v. Thacher, 22 F. Cas. 1204, 1206-1207 (No. 13,348) (D.C. D. Maine 1825).

279. The supremacy clause is found in The United States Constitution, Article VI.

For a discussion of the supremacy clause see B. Schwartz, supra note 244, at 37.

280. S. Morrison, supra note 241, at 331-335.

281. From 1789 until 1800 the various states with historic claims to western lands out to the Mississippi River relinquished their claims and ceded those areas to the national government. For example see An Act supplemental to the act intituled "An act for an amicable settlement of limits with the State of Georgia; and authorizing the establishment of a government in the Mississippi territory, 2 Stat. 69 (1800); and An Act to Provide for the Government of the Territory Northwest of the river Ohio, 1 Stat. 50 (1789).

The federal government provided the local government in these new territories until they became states. See for example An Act respecting the government of the territories of the United States northwest and south of the river Ohio, 1 Stat. 285 (1792).

282. Defense of the coasts as well as commerce in the adjacent sea is evidenced in a number of federal statutes, two of which are cited here as examples: An Act more effectively to protect the Commerce and Coasts of the United States, 1 Stat. 561 (1798); and An Act to provide for the Defense of Certain Ports and Harbors in the United States, 1 Stat. 345 (1794).

283. See for example An Act for the establishment and support of Lighthouses, Beacons, Bouys, and Public Piers,

1 Stat. 53 (1789); and An Act authorizing the Secretary of the Treasury to finish the Lighthouse on Portland Head in the District of Maine, 1 Stat. 184 (1790).

For the most part territory on which to erect lighthouses was ceded to the federal government with the provision that state jurisdiction for service of legal process would not be excluded from the ceded land. See An Act relative to dessions of jurisdiction in places where lighthouses, beacons, bouys, and public piers have been, or may hereafter be erected and fixed, 1 Stat. 426 (1795).

The commerce clause gave the federal government authority to take the action represented by the above statutes. See Knox v. Lee, 78 U.S. (12 Wall.) 457, 537 (1870).

284. See for example An Act in addition to the act for the punishment of certain crimes against the United States, 1 Stat. 381 (1794); An Act for the punishment of certain crimes against the United States, 1 Stat. 112 § 8 (1790).

285. Coastal commerce was the main method of transport for goods between cities. Coastal waters also provided an easy entry for smuggled goods which required federal legislation. For example see An Act providing Passports for the ships and vessels of the United States, 1 Stat. 489 (1796); An Act for enrollong and licensing ships or vessels to be employed in the coasting and fisheries, and for regulating the same, 1 Stat. 305 (1793); An Act to explain an Act, intituled An Act for registering and clearing Vessels, regulating the Coasting Trade, and for

other purposes, 1 Stat. 94 (1789); and An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, 1 Stat. 55 (1789).

The admiralty jurisdiction of the federal district courts was set out in the Judiciary Act, 1 Stat. 73 (1789). Prize jurisdiction was exercised by the district court of the first judicial district into which the prize was brought. See The Abby, 1 F. Cas. 26-27 (No. 14) (C.C. Mass. 1818).

286. Taxing and commerce regulating authority are set out in the Constitution, Article I, Section 8.

287. Customs jurisdiction extended one marine league seaward of the coastline, except for vessels hovering beyond that marine league. See The Antelope, 23 U.S. (10 Wheat.) 66, 124-125 (1825); and The Appollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

The similarity of American customs law and that of Great Britain is apparent in Woodruff v. The Levi Dearborne, 30 F. Cas. 525, 527 (No. 17,988) (C.C.D. Ga. 1811).

288. Admiralty jurisdiction applied on all navigable waters of the United States regardless of concurrent state jurisdiction within state territorial boundaries. See Gelson v. Hoyt, 16 U.S. (3 Wheat.) 246, 303, 311 (1818); Bains v. The James and Catherine, 2 F. Cas. 410, 412, 415-416 (No. 756) (C.C.D. Penn. 1832). See also Chisholm v. Georgia, 2 U.S. (2 Dall.) 363, 386, 389, 403-404 (1793).

289. Prize jurisdiction was always vested in the Congress, then the Court of Capture Appeals and finally the federal judiciary. See the Committee of Congress for review of prize decision appeals from state courts, J.C.C., vol. 7, at 75. Later Congress created the Court of Capture Appeals and finally the 1789 Judiciary Act vested exclusive original prize jurisdiction in the federal district courts. 1 Stat. 73.

The international nature of the body of prize law adopted by the United States is apparent in the opinions of Justice Story in De Lovio v. Boit, supra note 239, and The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

See also The Resolution, 2 Dall. 1 (Fed. Ct. of Capture Appeals 1781).

290. For Jefferson's views on this problem of neutral waters and treaty obligations see letter of T. Jefferson to George Hammond, dated September 5, 1793, annexed to, Treaty of Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, ____, November 19, 1794, printed in 8 Stat. 116.

291. For Hamilton's views on neutral waters in the adjacent seas see letter of T. Jefferson to George Hammond, British Minister, dated November 8, 1793, printed in J. Moore, 1 Digest of International Law, 702-704 (1906). In this letter Jefferson discussed the views of Hamilton.

292. In the November 8, 1793 letter by Jefferson to George Hammond, Jefferson described instructions he had received from President George Washington to consider one marine league from the shoreline as neutral territory. Id.

293. There could be no valid capture of prizes in neutral waters. Johnson v. Twenty-one Bales, 13 F. Cas. 855, 861 (No. 7.417) (C.C.D. N.Y. 1814); and The Joseph, 12 U.S. (8 Cr.) 451, 455 (1814). When a vessel illegally took a prize in neutral waters it could be forced to make restitution. Moxon v. The Fanny, 17 F. Cas. 942, 946-947 (No. 9,895) (D.C.D. Penn. 1793). Carriage of contraband was a violation of neutral water status which vitiated the obligation of the neutral to provide protection. See The Erstern, 1 Dall. 34 (Fed. Ct. of Capture Appeals 1782); and Miller v. The Ship Resolution, 2 Dall. 19, 21 (Fed. Ct. of Capture Appeals).

294. Violation of neutrality was an assault on the integrity of the neutral sovereign's law. See Letter of Mr. Clay, Secretary of State, to Mr. Vaughan, dated February 18, 1828, printed in J. Moore, 2 Digest of International Law, 4 (1906).

For municipal court jurisdiction over foreigners see Talbot v. Jansen, 3 U.S. (3 Dall.) 105, 127-128 (1795), dealing with acts of piracy by citizens and foreigners. See also United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95, 97, 104 (1820); and United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818).

295. Municipal courts had discretionary jurisdiction over cases involving solely foreign parties and interests. Public convenience was the standard employed to decide whether to entertain the suit if no objection to jurisdiction was made. See Mason v. Ship Balireau, 5-6 U.S. (2 Cr.) 177, 184-185 (1804).

296. Suits by foreign seamen for wages were usually entertained by American courts. See for example Willendson v. Forsoket, 29 F. Cas. 1283-1284 (No. 17,682) (D.C.D. Penn. 1801); and The Jerusalem, 13 F. Cas. 559, 561-563 (No. 7,293) (C.C.D. Mass. 1814).

297. The states have territorial jurisdiction over inland waters. See United States v. Bevans, 16 U.S. (3 Wheat.) 336, 386 (1818); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304-305, 307 (1795).

298. A large portion of Lake Michigan was placed within the boundaries of the State of Illinois. See Schooner Norway v. Jensen, 52 Ill. 373, 380 (1869).

299. The state jurisdiction over inland waters was concurrent with federal admiralty jurisdiction as well as federal jurisdiction under the commerce clause. See for example Bullock v. The Lamar, 4 F. Cas. 654, 658 (No. 2,129) (C.C.D. Ga. 1844); and The City of Panama, 101 U.S. 453, 460 (1880).

300. State extension of jurisdiction over coastal fisheries was acceptable. See Manchester v. Massachusetts, 139 U.S. 240, 257-258, 263-264, 266 (1890). See also The Martha Anne, 16 F. Cas. 868-870 (No. 9,146) (D.C.S.D. N.Y. 1843); and Bennett v. Boggs, 3 F. Cas. 221, 228 (No. 1,319) (C.C.D. N.J. 1830).

301. See Special Session Message of President John Adams, May 16, 1797, printed in J. Richardson, supra note 244, at 236.

302. Special Message of President John Adams, February 5, 1798, printed in id. at 262.

303. Fourth Annual Address of President John Adams, November 22, 1800, printed in id. at 307.

304. The foreign affairs power was exclusive in the federal government. See United States v. Curtis-Wright Export Corp., supra note 267.

See also the United States Constitution, Article II, Section 2, and Section 3. The exclusive power to enter into treaties with foreign nations was given to the federal government by the Constitution, id., Section 2.

305. See the following treaties for examples: Treaty of Amity and Commerce, between the United States and the Netherlands, the Hague, October 8, 1782, arts. 5, 16. Printed in 2 Treaties and Other International Acts of the United States of America, 59, 64, 73 (H. Miller editor 1931) (hereinafter cited as Treaties); and Treaty of Amity and Commerce, between France and the United States, Paris, February 6, 1778, arts. 3, 7-13, 21. Printed in id. at 5-13, 17.

306. See Preliminary Articles of Peace, between Great Britain and the United States of America, Paris, November 30, 1782, arts. 2, 3. Printed in 2 Treaties, 97, 98; and Definite Treaty of Peace, between the United States and Great Britain, Paris, September 3, 1783, art. 1. Printed in id. at 151.

As between the states and the United States coastal islands received under the 1783 Treaty of Peace became territory of the states, but intervening waters were not

considered appurtenant to the states and thus there is no basis for asserting that those waters were owned by the states. See for example Keyser v. Coe, 142 F. Cas. 442 (No. 7,750) (C.C.D. Conn. 1871). The Treaty of Peace did not grant ownership of adjacent coastal waters to the United States either explicitly or implicitly.

307. See Treaty of Amity and Commerce, between Sweden and the United States of America, Paris, April 3, 1783, art. 20, separate art. 2. Printed in 2 Treaties, 140, 145-146; and Treaty of Amity and Commerce, between the United States and Prussia, the Hague, September 10, 1785, art. 2. Printed in id. at 163.

308. Treaty of Peace and Friendship, with additional article, between the United States and Morocco, Morocco, June 28, 1786, additional art. Printed in id. at 217.

309. Treaty of Peace and Friendship, between the United States and Tripoli, January 3, 1797, art. 8. Printed in id. at 365; Treaty of Peace and Friendship, between the United States and Algiers, Algiers, January 3, 1797, art. 8. Printed in id. at 365.

310. Treaty of Peace and Friendship, between Tunis and the United States of America, Tunis, August 28, 1797, art. 10. Printed in id. at 406.

311. Treaty of Amity, Commerce and Navigation, between Great Britain and the United States, London, November 19, 1794, arts. 13, 23, Printed in id. at 256, 261.

312. See Treaty of Friendship, Limits, and Navigation, between the United States and Spain, San Lorenzo el Real, October 27, 1795, art. 6. Printed in id. at 323; and Treaty of Amity and Commerce between Prussia and the United States of America, Berlin, July 11, 1799, arts, 2, 3, 7. Printed in id. at 434-435, 438.

313. Convention, between France and the United States of America, Paris, September 30, 1800, arts. 18, 27. Printed in id. at 472, 478.

314. See the case of The Fame, supra note 238, which dealt with the waters of Passamaquoddy Bay in the present State of Maine. The waters of Delaware Bay were considered to be historic inland waters within the State of Delaware. See Opinion of the Attorney General to the Secretary of State, dated May 14, 1793, printed in Opinions of Attorneys General (1791-1838), 13-14 (1851).

315. The United States was the first nation to adopt a three nautical mile belt of coastal waters in which the obligation of neutral waters would be provided to other nations. See Soult v. L'Africaine, supra note 277, at 806-807.

The concept of territorial sea, appurtenant to and owned by the littoral nation was a nineteenth century development. See H. Maine, International Law, 55 (1888). The United States adopted the concept of territorial sea in the nineteenth century. See Cunard S. S. Co. v. Melon, 262 U.S. 100, 122-123 (1922).

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