

Office of Legal Counsel  
U.S. Department of Justice

\*238 LEGAL ISSUES RAISED BY PROPOSED PRESIDENTIAL PROCLAMATION TO  
EXTEND THE TERRITORIAL SEA

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The President has the authority to issue a proclamation extending the jurisdiction of the United States over the territorial sea from three to twelve miles out.

The President also has the authority to assert the United States's sovereignty over the extended territorial sea, although most such claims in the nation's history have been executed by treaty.

There is a serious question whether Congress has the authority either to assert jurisdiction over an expanded territorial sea for purposes of international law or to assert the United States's sovereignty over it.

The domestic law effect on federal statutes of the extension of the territorial sea is to be determined by examining Congress's intent in enacting each affected statute.

The extension of the territorial sea will not affect the Coastal Zone Management Act.

MEMORANDUM OPINION FOR THE LEGAL ADVISER

DEPARTMENT OF STATE

Introduction and Summary

This responds to the requests, made by your Office and an inter-agency working group, for analysis of the constitutional and statutory questions raised by a proposed presidential proclamation to extend the territorial sea of the United States from its present breadth of three

miles to twelve miles. [FN1] In particular, we have been asked to address the following questions: First, does the President have the authority to declare, by presidential proclamation, the proposed extension? Second, assuming the President does have the authority, what effect would such a proclamation have on domestic legislation, such as the Coastal Zone Management Act? Third, can the President limit the effect the proclamation will have on domestic legislation? We have also been asked to comment on H.R. 5069, a bill that would extend the territorial sea by legislation.

We conclude that the President can extend the territorial sea from three to twelve miles by proclamation. While the most legally secure method of doing so would be by entering into a treaty with other nations on this issue, we believe that the President may extend the territorial sea by virtue of his constitutional role \*239 as the representative of the United States in foreign relations. The President's foreign relations authority under the Constitution clearly permits his unilateral assertion on behalf of the United States of jurisdiction over the territorial sea. Whether the President may individually assert sovereignty over the territorial sea is open to some question, although on the basis of several long-settled, historical examples of Presidents unilaterally claiming territory in this fashion, we believe that he may. Finally, we conclude that while Congress may establish state boundaries, there is a serious question whether it has the constitutional authority either to assert jurisdiction over an expanded territorial sea for international law purposes or to assert sovereignty over it.

With respect to the statutory issues, we believe that the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-1464, the statute that has been identified to us by the inter-agency working group as being of special concern. It must be acknowledged, however, that the effect of the proclamation on the CZMA is not entirely free from doubt and that the effect of the expansion on other federal statutes raises complex questions. We therefore recommend that the President seek legislation stating that federal statutes that rely upon the concept of the territorial sea are not affected by the President's proclamation extending the territorial sea from three miles to twelve miles.

## Analysis

### I. The Territorial Sea

In order to understand the legal issues raised by the proposal to extend the territorial sea, we begin by examining three concepts: the meaning of the "territorial sea" as that term is used in international law; the nature of the other areas of the sea over which a nation may assert some control under international law; and, finally, the distinction between a claim of sovereignty over the territorial sea and claims of jurisdiction over other areas of the sea.

The territorial sea is the belt of water immediately adjacent to the coast of a nation. See, e.g., Restatement (Third) of The Foreign Relations Law of the United States § 511(a)(1986) ("Restatement Third"); 1 L. Oppenheim, International Law § 172, at 416 (H. Lauterpacht ed., 7th ed. 1948) ("Oppenheim"). The territorial sea extends from the nation's coast to a distance of up to twelve miles from the coast, the maximum breadth now permitted by international law. Restatement Third § 511(a). Although the United States and some other nations continue to follow the historical practice of adhering to a three-mile territorial sea, most nations now assert sovereignty over a twelve-mile territorial sea. [FN2]

\*240 A nation is sovereign in its territorial sea. See Convention on the Territorial Sea, pt. I, art. 1, 15 U.S.T. at 1608. [FN3] Indeed, a nation has the same sovereignty over the territorial sea as it has over its land territory. See Restatement Third § 512 (sovereignty is the same over the territorial sea as it is over land territory); *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall, C.J.) (a nation exercises absolute and exclusive authority within its own territory, including the territorial sea); *The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, J.) (the territorial waters "are considered as a part of the territory of the sovereign"). [FN4]

By contrast, a nation is not sovereign over the high seas, which are the remainder of the ocean beyond the territorial sea, [FN5] and include areas such as the contiguous zone, the continental shelf, and the Exclusive Economic Zone ("EEZ"). [FN6] Rather, a nation may assert more limited forms of jurisdiction in such areas. In the contiguous zone, for example, a nation may only exercise control incident to the application of its customs, fiscal, immigration, and sanitary regulations in the territorial sea. Convention on the Territorial Sea, pt. II, art. 24 (1), \*241 15 U.S.T. at 1612. [FN7] A nation's authority over its continental shelf is restricted to the exploration and exploitation of natural resources. Restatement Third § 515(1). A nation's authority within its EEZ is restricted to activities for economic exploration and exploitation, scientific research, and the protection of the environment. *Id.* § 514(1). Outside these areas, a nation has no jurisdiction over the activities of other nations. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2313, 2314.

In sum, the United States may exercise full sovereign power within its territorial sea, while exercising more limited kinds of jurisdiction in three overlapping portions of the high seas -- the contiguous zone, the continental shelf, and the EEZ. [FN8]

## II. Constitutional Authority to Extend the Territorial Sea

The question of where the power to extend the territorial sea resides under our constitutional scheme is novel and complex. The Constitution does not discuss the matter and there has been no direct precedent since President Washington first claimed a three-mile territorial sea in 1793. The proposed extension raises issues of the ways in which the United States, through the executive and legislative branches, may acquire territory and assert sovereignty over it, as well as questions

about the President's foreign relations power.

With these concerns in mind, we conclude, for the reasons stated below, that the President undoubtedly has the power to assert jurisdiction over the territorial sea so as to establish a new territorial sea for the United States under international \*242 law. We also believe, although the issue is not entirely free from doubt, that he has the power to assert sovereignty over the territorial sea as a function of his power to acquire territory on behalf of the United States. Finally, we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.

#### A. The President's Power to Assert Jurisdiction

The President's power to assert jurisdiction over the territorial sea is based on his constitutional power over foreign relations. [FN9] The President's constitutional role as the sole representative of the United States in foreign relations has long been recognized. In the words of John Marshall, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800). [FN10] Thus, it is not surprising that Justice Sutherland explained the nature of the President's authority in expansive terms:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.

.....

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. \*243 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1935). As a leading constitutional scholar concluded, "[t]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations." Edward S. Corwin, *The President: Office and Powers, 1787-1984* 214 (footnote omitted).

The Supreme Court addressed the difficult issue of the relationship between the President's foreign relations power and his power to assert jurisdiction over the territorial sea on behalf of the United States in *United States v. Louisiana*, 363 U.S. 1 (1960) (Harlan, J.). In that case, which involved rights under the Submerged Lands Act, the Court considered the power to fix state boundaries for domestic purposes and the power to fix them for international purposes. The executive branch had argued that no state could have a boundary of more than three miles

because a state boundary must coincide with the three-mile limit of our claim to the territorial sea in order to avoid international embarrassment. The Court rejected that argument as an oversimplification of the issue. Justice Harlan described the relationship between the constitutional powers of the executive and the legislature branches as follows:

The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States. The exercise of Congress' power to admit new States, while it may have international consequences, also entails consequences as between Nation and State. We need not decide whether action by Congress fixing a State's territorial boundary more than three miles beyond its coast constitutes an overriding determination that the State, and therefore this country, are to claim that much territory against foreign nations. It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter.

Id. at 35 (emphasis added).

The Court thus established two principles: first, that determination of the scope of the territorial sea as against foreign nations is one of the President's constitutional powers, and second, that establishing state boundaries is one of Congress' constitutional powers. The Court left unanswered the question of whether congressional action fixing a state boundary could result in a claim on behalf of the United States for the purpose of international law. The Court proceeded to carefully distinguish between the state boundaries established for domestic purposes by the Submerged Lands Act and the boundary of the territorial sea established by the President for international purposes. Id. at 33-36. The Court then held that \*244 the state boundary for domestic purposes can be established by Congress irrespective of the limit of the territorial sea. Id. at 35-36.

Thus, it is clear that under Louisiana the President may use his power in the realm of foreign affairs to assert jurisdiction over the territorial sea on behalf of the United States as against other nations. We understand that this is the central purpose of the proposed proclamation and we have no doubt that the President may issue such an assertion of jurisdiction.

Indeed, history supports the Court's statement in Louisiana that the President's constitutional position as the representative of the United States in foreign relations authorizes him to make claims on behalf of the United States concerning the territorial sea. The primary example, of course, is the first claim of a three-mile territorial sea made on behalf of the United States by then-Secretary of State Thomas Jefferson in 1793. France, Great Britain, and Spain -- all of which held territory in North America -- were engaged in maritime hostilities off our Atlantic coast, an extension of wars ongoing in Europe. As part of an effort to undermine our policy of

neutrality, France pressured us to state the extent of our territorial sea. See Sayre A. Swarztrauber, *The Three-Mile Territorial Sea* 56-59 (1972). In response, and although "neither Washington nor Jefferson wished to be hurried" into establishing the limit of our claim, President Washington instructed Jefferson to make an initial claim for the United States. *Id.* at 57. [FN11] Jefferson sent letters to both the French and British Ministers fixing a provisional limit. The letter to the British minister states:

SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the mean time to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been theretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upward of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one-sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favor. The character of our coast, remarkable \*245 in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league or three geographical miles from the sea-shores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

Letter from Mr. Jefferson to British Minister George Hammond, Nov. 8, 1793, reprinted in H.R. Doc. No. 324, 42d Cong., 2d Sess. 553-54 (1872) (emphasis added).

Secretary of State Jefferson's letters, stating the President's determination, have traditionally been viewed as the vehicle by which the United States claimed a three-mile territorial sea. See, e.g., *United States v. California*, 332 U.S. 19, 33 n.16 (1947). Thus, the President was responsible for the initial assertion of jurisdiction over the territorial sea on behalf of the United States. Moreover, Jefferson indicated that the executive reserved the right to extend the territorial sea in the future. [FN12] We believe that the context makes it clear that the assertion of a claim over the territorial sea was done as a function of the President's power as the representative of the United States in foreign relations, and that the power to do so has been confirmed by the Supreme Court in *Louisiana*.

The actions of two other Presidents who individually asserted control over sections of the high seas provide further support for the argument that the President's constitutional power as the

representative of the United States in foreign relations includes the authority to claim portions of the sea for the United States for purposes of international law. In 1945 President Truman issued two proclamations, one concerning the continental shelf and another establishing a fisheries conservation zone. In the Continental Shelf Proclamation, President Truman stated that the "Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf . . . [as] subject to its jurisdiction and control." Proclamation No. 2667, 3 C.F.R. 67 (1943-1948). This Office approved the Proclamation and advised that it was lawful both as a statement of national policy in foreign affairs and as an expansion of the territorial jurisdiction of the United States. Memorandum for Harold W. Judson, Assistant Attorney General, Office of Assistant Solicitor General, from William H. Rose (Sept. 16, \*246 1945). On the same day, President Truman also issued a proclamation which stated that the United States regarded it as proper to establish fishery conservation zones in certain areas of the high seas contiguous to the United States. Proclamation No. 2668, 3 C.F.R. 68 (1943-1948). Where the fishing was by United States nationals alone, "the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." *Id.* The Proclamation then went on to declare that the United States' policy with respect to zones where nationals of other countries also fished would be determined by agreements between the United States and foreign states. This Proclamation, with its explicit statement of how the issue would be resolved with respect to other nations, was clearly based on the President's constitutional power to represent the United States' interests in the international arena. Finally, in 1983 President Reagan used the same power when he proclaimed "the sovereign rights and jurisdiction of the United States" to an exclusive economic zone extending two hundred miles from the coast of the United States. Proclamation No. 5030, 3 C.F.R. 22 (1984). [FN13] All of these precedents illustrate that the President's constitutional role as the representative of the United States in foreign relations permits him to proclaim jurisdiction over certain areas of the sea, consistent with international law, on behalf of the United States.

#### B. The President's Power to Assert Sovereignty

The more difficult issue is whether the President may assert sovereignty over the territorial sea. [FN14] The key difference between this and an assertion of jurisdiction is that an assertion of sovereignty means that the territorial sea would be considered a part of the territory of the United States -- i.e., as much a part of the continental United States as a piece of land. While originally subject to doubt by some, the modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea. [FN15] The issue therefore becomes whether the President has the authority to assert sovereignty over territory on behalf of the United States. As indicated below, Presidents have asserted this authority. Based on this historical record, we conclude that the President acting alone may assert sovereignty over an extended territorial sea on behalf of the United States, as a matter of discovery and occupation.

The Constitution does not specifically address the power to acquire territory on \*247 behalf of

the United States. [FN16] Nonetheless, it is now agreed that the United States has the power to acquire territory as an incident of national sovereignty. See, e.g., *Mormon Church v. United States*, 136 U.S. 1, 42 (1890). [FN17] The United States has acquired territory through cession, purchase, conquest, annexation, treaty, and discovery and occupation. [FN18] These methods are permissible under international law [FN19] and have been approved by the Supreme Court. [FN20] The executive and the legislature have performed different roles in the acquisition of territory by each of these means. Unfortunately, the historical practice does not supply a precise explanation of where the Constitution places the power to acquire territory for the United States.

### 1. Assertion of Sovereignty by Treaty

The clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either purchase or conquest. [FN21] Thus, "[i]t is too late in the history of the United \*248 States to question the right of acquiring territory by treaty." *Wilson v. Shaw*, 204 U.S. 24, 32 (1907). There is no doubt that the United States can acquire territory, including the territorial sea, by treaty.

### 2. Assertion of Sovereignty by the President Acting Alone - Discovery and Occupation

The more difficult issue is whether the President, acting alone, may acquire territory for the United States. Because of several venerable, and unchallenged, historical examples of such acquisitions, we believe that he can, even though the practice may be subject to some constitutional question. First and foremost, it can be reasonably argued that President Washington and Secretary of State Jefferson in making the original claim to the territorial sea relied on the President's constitutional power as the representative of the United States in foreign affairs to proclaim sovereignty, and not simply jurisdiction, over unclaimed territory. Although we have not found any evidence of Jefferson's view of the nature of the rights of the United States in the territorial sea, both Chief Justice Marshall and Justice Story viewed the territorial sea as part of the territory of the United States. See *Church v. Hubbard*, 6 U.S. (2 Cranch) at 234 (Marshall, C.J.); *The Ann*, 1 F. Cas. at 296- 27 (Story, J.).

Similarly, there are two instances in which the President acquired territory acting alone by discovery and occupation. [FN22] In 1869, "[t]he Midway Islands . . . were formally taken possession of in the name of the United States . . . by order of the Secretary of the Navy." S. Rep. No. 194, 40th Cong., 3d Sess. 1 (1869). See also S. Exec. Doc. No. 79, 40th Cong., 2d Sess. (1868). And "[t]he United States claim[ed] jurisdiction . . . over . . . Wake's Island . . . possession of which was taken by the U.S.S. *Bennington* on January 17, 1899." Letter from Mr. Hill, Assistant Secretary of State, to Mr. Page, Feb. 27, 1900, 243 MS Dom. Let. 246, quoted in 1 J.



Moore, International Law Digest § 111, at 555 (1906) ("Moore"). [FN23]

The acquisition of Midway and Wake Islands by the Navy confirms that the President has the constitutional authority to acquire territory by discovery and occupation. Professor Henkin, for example, has stated that the President can "acquire territory by discovery or prescription." Louis Henkin, *Foreign Affairs and the Constitution* 48 (1972). Another writer concluded that "[t]he President is competent to recognize the acquisition of territory by discovery and occupation." Q. Wright, *The Control of American Foreign Relations* § 197, at 274 (1922). Moreover, it appears that the power to acquire territory by discovery and occupation "flows from [the President's] constitutional position as the representative organ of the government" for purposes of foreign affairs. *Id.* § 73, at 134 n.12. [FN24]

Practical considerations also illuminate why the President's power to assert sovereignty as a matter of discovery and occupation has gone unchallenged. As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation. With Midway and Wake Islands, for example, the President -- through the Navy -- acted because there was no other governmental representative present who could assert sovereignty on behalf of the United States.

The President's authority to acquire territory by discovery and occupation suggests to us that the President may assert sovereignty over the contemplated extension of the territorial sea. When territory is acquired by discovery and occupation, it is acquired by the assertion of the acquiring nation that it is henceforth sovereign in that territory. Similarly, when a nation asserts sovereignty over an extended territorial sea, it acquires territory which is not subject to the sovereignty of another nation. Accordingly, the considerations which explain why the President's constitutional position as the representative of the United States in foreign affairs allows him to acquire territory by discovery and occupation counsel that the same constitutional status allows him to proclaim sovereignty over an extended territorial sea.

Justice Harlan's statement for the Court in *Louisiana* that the power to assert territorial rights in the sea derives from the President's power as the constitutional representative of the United States in foreign affairs also appears to affirm the President's authority to assert sovereignty over the territorial sea. Even though Justice Harlan expressed doubt whether the territorial sea was "territory," [FN25] he \*250 clearly indicated that the President has the power "to determine how far this country will claim territorial rights in the marginal sea as against other nations." [FN26]

In sum, we believe that the President may assert jurisdiction over an expanded territorial sea. Further, we believe that he may also assert sovereignty over an expanded territorial sea. To be sure, the historically more prevalent practice of territorial acquisition has been by treaty, but this in itself does not deny the authority of the President to make an assertion of sovereignty as a matter analogous to discovery and occupation. Nevertheless, to bolster the sufficiency of the

proposed proclamation, we strongly recommend that the proclamation state both that it is asserting jurisdiction and that it is asserting sovereignty over the expanded territorial sea. [FN27] We believe that this formulation provides the best defense to any hypothetical challenge to the President's exercise of power -- a challenge which, judging by the historical record, we would anticipate to be unlikely.

### C. Congress' Power to Assert Sovereignty over the Territorial Sea

We next consider whether H.R. 5069, which provides for the establishment of a territorial sea twelve miles wide, is within the constitutional power of Congress. H.R. 5069 states, "The sovereignty of the United States exists in accordance with international law over all areas that are part of the territorial sea of the United States." H.R. 5069, 100th Cong., 2d Sess., § 101(b) (1988). Congress, however, has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States. [FN28] Because the President -- not the Congress -- has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for international \*251 law purposes only if it possesses a specific constitutional power therefor. [FN29]

We have identified two instances in which the United States acquired territory by legislative action. In 1845, the United States annexed Texas by joint resolution. Joint Res. 8, 5 Stat. 797 (1845). Several earlier proposals to acquire Texas after it gained its independence from Mexico in 1836 had failed. In particular, in 1844 the Senate rejected an annexation treaty negotiated with Texas by President Tyler. 13 Cong. Globe, 28th Cong., 1st Sess. 652 (1844). Congress then considered a proposal to annex Texas by joint resolution of Congress. Opponents of the measure contended that the United States could only annex territory by treaty. See, e.g., 14 Cong. Globe, 28th Cong., 2d Sess. 247 (1845) (statement of Sen. Rives); id. at 278-81 (statement of Sen. Morehead); id. at 358-59 (statement of Sen. Crittenden). Supporters of the measure relied on Congress' power under Article IV, Section 3 of the Constitution to admit new states into the nation. See, e.g., id. at 246 (statement of Sen. Walker); id. at 297-98 (statement of Sen. Woodbury); id. at 334-36 (statement of Sen. McDuffie). These legislators emphasized that Texas was to enter the nation as a state, and that this situation was therefore distinguishable from prior instances in which the United States acquired land by treaty and subsequently governed it as territories. Congress' power to admit new states, it was argued, was the basis of constitutional power to affect the annexation. Congress approved the joint resolution, President Polk signed the measure, and Texas consented to the annexation in 1845.

The United States also annexed Hawaii by joint resolution in 1898. Joint Res. 55, 30 Stat. 750 (1898). Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again, Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report pronounced, "[t]he

joint resolution for the annexation of Hawaii to the United States . . . brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." S. Rep. No. 681, 55th Cong., 2d Sess. 1 (1898). This argument, however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, "the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition." Andrew C. McLaughlin, *A Constitutional History of the United States* 504 (1936). Opponents of the joint resolution stressed this distinction. See, e.g., \*252 31 Cong. Rec. 5975 (1898) (statement of Rep. Ball). [FN30] Moreover, as one constitutional scholar wrote:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. . . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force -- confined in its operation to the territory of the State by whose legislature it is enacted.

1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 427 (2d ed. 1929).

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. The stated justification for the joint resolution -- the previous acquisition of Texas -- simply ignores the reliance the 1845 Congress placed on its power to admit new states. It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea. [FN31]

We believe that the only clear congressional power to acquire territory derives from the constitutional power of Congress to admit new states into the union. The admission of Texas is an example of the exercise of this power. Additionally, the Supreme Court in *Louisiana* recognized that this power includes "the power to establish state boundaries." 363 U.S. at 35. The Court explained, however, that it is not this power, but rather the President's constitutional status as the representative \*253 of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. *Id.* Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect. *Id.* at 51.

In the time permitted for our review we are unable to resolve the matter definitively, but we believe that H.R. 5069 raises serious constitutional questions. We have been unable to identify a basis for the bill in any source of constitutional authority. Because of these concerns, we believe that, absent a treaty, the proposed proclamation represents the most defensible means of asserting sovereignty over the territorial sea.

### III. The Proclamation's Effect on Domestic Law

In this section, we consider what effect the proposed proclamation will have on domestic law. By its terms, the proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent. [FN32]

#### A. Statutory Intent

The statutes potentially affected by the proclamation are too numerous to consider individually in the time permitted. However, we can discuss some of the considerations relevant to a determination whether Congress intended the application of a statute to be affected by a change in the breadth of the United States' territorial sea, and then make such a determination with respect to the particular statute of interest to the inter-agency working group -- the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 ("CZMA" or "Act").

The most important consideration in determining whether Congress intended a statute to be affected by a change in the breadth of the territorial sea is the language of the statute. If a statute includes a provision that simply overlaps or coincides with the existing territorial sea -- such as the provision "three miles seaward from the coast of the United States" -- the operation of the statute will \*254 probably not, in the absence of special circumstances, be affected by a change in the territorial sea. Indeed, the statute does not appear to invoke the concept of the territorial sea at all, except for denoting an area that coincides with the territorial sea. A similar case is presented by a statute that uses the term "territorial sea" but then defines it as "three miles seaward from the coast of the United States." Although the statute refers to the territorial sea, the definition reveals that Congress understood the area involved as the three-mile territorial sea in existence when the statute was enacted.

Of course, the more difficult cases will arise where Congress has used more ambiguous language. The best example is a statute which refers to the term "territorial sea" without further defining it. Congress could have intended the term to refer to the three miles that history and