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LEGAL LIMITS OF COASTAL FISHERY PROTECTION

EDWARD W. ALLEN

Lawyers of the Pacific Coast and all lawyers dealing with international law will be interested in President Truman's proclamation of September 28th,¹ wherein he sets forth a constructive policy for the control and conservation of the coastal fisheries of this and other nations. Thus is brought to consummation a campaign originating on this coast some ten years ago to demand that our government review the subject of ocean fisheries and adopt an affirmative policy consistent with existing facts and a rational interpretation of international law.

In the past, our government frequently acted on the assumption that the so-called "Three Mile Rule"—that a nation owns a strip of water along its coast just three miles wide—was determinative of all off-shore jurisdictional problems. This was such an easy yardstick to apply that there was an overpowering temptation to ignore the origin and history of this so-called rule, as well as the contemporary foreign practice concerning it, except when rum-running or war disturbed this complacent attitude.

Protection of our coastal fisheries seemed to some of our officials to be such a minor matter internationally that it was not until the Japanese invasion of the Alaska salmon fishery threatened largely to destroy this exceedingly valuable American industry and even to involve this country in bloodshed and war that serious official attention to this subject could be secured.

It has been incontestably proved that some of the most valuable coastal fisheries, such as salmon and halibut, are susceptible to depletion by over-fishing, though such fishing be pursued more than three miles off shore. Also, it has been demonstrated by Canada and the United States that these same fisheries can be restored and maintained by proper conservation methods. In the case of Pacific Coast halibut, almost nine-tenths of which is caught on the continental shelf but more than three miles off shore, the success of conservation was due to a joint effort—through the International Fisheries Commission created by treaty between this country and Canada.²

¹ 10 FED. REG. 12, 304 (1945).

² For factual background see: THOMAS W. FULTON, *THE SOVEREIGNTY OF THE SEA*, Edinburgh and London, 1911; GREGORY and BARNES, *NORTH PACIFIC FISHERIES*, New York, 1939; JOZO TOMASEVICH, *INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES*, Stanford University, 1943.

The international law involved has not been so clear. The modern development of the law of marginal or territorial waters commenced with Hugo Grotius in the early part of the seventeenth century. Grotius, though a profound scholar, was also an aggressive advocate of Dutch interests. He was in thorough sympathy with the two great Dutch ambitions relating to the sea: (1) desire to fish for herring off the British and Scotch coasts, and (2) desire to promote Dutch seaborne trade. Grotius, therefore, became the great exponent of the doctrine of freedom of the seas. Bynkershoek, another Dutchman, later developed the so-called cannonball doctrine—that a nation is entitled to paramount jurisdiction over so much, but so much only, of the sea as it can defend from the shore with cannon.

Although England under the Stuarts opposed the Dutch theories, when later England became dominant on the seas, she also became the aggressive proponent of the three-mile limitation into which the cannonball concept had been rationalized on the premise that cannon would never shoot farther than that distance.

England's position was due to a desire to reduce to a minimum the waters from which her fishing vessels might be excluded or in which her merchant marine and navy might be subject to restrictions of the coastal state. That the United States in the first instance acquiesced in this policy was largely due to the fact that New England fishermen wished to frequent the waters adjacent to Canada and Newfoundland. Subsequently treaties and arbitration defined these Atlantic Coast rights, but the basis for this country's adherence to the rule was not re-examined. It will hardly be asserted that the origin or promotion of the so-called three-mile rule was due to that "sense of justice, humanity, righteousness, evolved under the reign of God in the hearts and minds of thinking men" which Andrew D. White attributes to Grotius.³ On the contrary, it was due to conflicting pressures of dominant national interests of strong naval powers.

So much has been written within the last ten years concerning the three-mile rule⁴ that it is sufficient to say that two divergent points of view existed both within and without governmental circles. One group looked upon the rule as such a settled and immutable principle of international law that it could only be modified by universal international agreement. If, therefore, such universal agreement were unobtainable,

³ 1 HYDE, *INTERNATIONAL LAW* (2d rev. ed. 1945) 2.

⁴ For an historical and analytical review of the subject, see: STEFAN A. RISENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW*, Washington, 1942, reviewed in (1942) 52 *YALE L. J.* 196. For static academic adherence to the Three Mile Rule see: L. LARRY LEONARD, *INTERNATIONAL REGULATION OF FISHERIES*, Washington, 1944, reviewed in (1945) 58 *HARV. L. REV.* 1106. For constructive criticism of the static academic view of the subject see: JOSEPH W. BINGHAM, *REPORT ON THE INTERNATIONAL LAW OF PACIFIC COASTAL FISHERIES*, Stanford University, 1938, reviewed in (1939) 14 *WASH. L. REV.* 91, under title: "Control of Fisheries Beyond Three Miles," by Edward W. Allen.

a nation would have to sit supinely by while foreigners came across the sea to destroy its coastal fisheries.

The other group maintained: (1) that there has never been anything peculiarly sacrosanct about the rule; (2) that, in fact, the concept had never become an "established principle" of international law, but no more than a rule of policy for such nations as chose to adopt it—which many nations, perhaps a majority, had not chosen to do—and could be abandoned at will by any nation which had previously espoused it; (3) that even if the rule should be accepted or adhered to as defining the bounds of national territory, it did not constitute a geographical limit for all purposes, and particularly that the assertion of a nation's right to protect its coastal fisheries an adequate distance off shore is not inconsistent with maintenance of the three-mile limit as defining the bounds of national territory.

The view last expressed appears to be that which the President and the present Secretary of State have adopted. The proclamation defines the purposes of the United States to be: (1) to establish zones, and exercise fishery control thereover, in areas of the high seas contiguous to our coasts adequate for the conservation of fisheries developed alone by our nationals. (The proclamation does not confine the zones to the continental shelf.) This will apply to practically all of our coastal fisheries from California to Alaska except such as have been developed jointly with Canada. (2) To establish similar zones in conjunction with another nation where the fisheries have been jointly developed by its nationals and ours. This will apply to all the fisheries from California to Alaska except those covered by the first provision, as no nationals other than Canadians can be credited with joint development with us of any Pacific Coast fisheries. Canada and the United States have already demonstrated ability to cooperate in the control of joint fisheries. (3) To recognize in other nations rights correlative to ours. (4) Not to affect rights of navigation.

In an executive order of the same date,⁵ President Truman has placed the duty of implementing the proclamation in the hands of the Secretary of State and the Secretary of the Interior. It remains to be seen how promptly these officials will act and what they will propose. A feeling exists that some of the subordinate officials to whom fishery matters have recently been assigned in the Department of State may not be in sympathy with the proclamation. For this and other reasons an effort is being made to induce the Secretary of State in his pending reorganization to reestablish a fishery division on a high level, such as was done by Secretary Hull, and to appoint to it officials who not only are in accord with the spirit of the proclamation but have the background and ability to make immediate application of its principles.

⁵ Executive Order No. 9634, 10 FED. REG. 12, 305 (1945).

Past administrative adherence to an unsound international policy which lacks universal acceptance cannot estop a nation from reconsidering such policy and then aligning itself with those nations which, despite attempts to coerce them, have refused to acquiesce in that which is basically wrong. Certainly a policy which promotes the unnecessary destruction of one of the world's greatest natural food resources—the fish of the sea—is both unsound and antisocial. In partial extenuation of past indifference to the subject it should be noted that the exhaustibility of ocean fisheries is a fact of only recent ascertainment and that the concept of ocean fishery conservation is wholly modern.

It would be legitimate for this country, if so minded, to abandon earlier contentions and claim a greater width for our territorial waters. Our government has not hesitated to abandon principles of international law which were far more firmly established, when it was felt that the exigencies of war justified such a course. Certainly the preservation of a gigantic food supply urgently needed by a hungry world should be no less justifiable.

However, the proclamation does not purport to abandon the three-mile rule. Yet it is clearly inferred that the rule cannot be so applied as to interfere with this country's right to conserve its coastal fisheries. The rule may still continue to govern the delimitation of territorial boundaries. In fact, the official release which accompanied the announcement of the fishery proclamation, as well as a concurrent proclamation concerning oil and mineral rights on the continental shelf, states, as to the latter, that it "in no wise abridges the right of free and unimpeded navigation of waters of the character of high seas above the shelf, nor does it extend the present limits of the Territorial waters of the United States." There is nothing novel about such an interpretation of current international law. Indeed, there have been so many exceptions to and qualifications of the three-mile rule that it would be difficult for this or any country to determine what it does embrace. Even England has skillfully avoided commitment to such an arbitrary interpretation of the rule as would interfere with the assumption of whatever position might appear at any particular time to be in the interest of the Empire.

The proclamation does assert, in effect, that this nation has a special interest in the fisheries adjacent to its coast which its own fishermen have exclusively developed and that the welfare of the nation is vitally involved in their conservation, hence that control will be exercised over them to whatever distance is deemed to be necessary. Less than this would be an admission of impotence with respect to a great responsibility. International law must be made responsive to realities if it is to attain the wholesome development which the United Nations' Charter contemplates.