99-594

No. _____

In The

Supreme Court of the United States

KANE FISHER AND SALVORS, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the admiralty right to salvage, and other user rights, are automatically invalidated upon the designation of a National Marine Sanctuary by Congress prior to the subsequent promulgation of rules and regulations for approval by Congress, and when applicable the State, that will govern the sanctuary and salvage activities upon taking effect?

II.

Whether a right of maritime salvage constitutes a federal law within the meaning of 16 U.S.C. § 1443 providing a "person may avoid liability" for injury to the sanctuary "caused by an activity authorized by federal or state law"?

LIST OF PARTIES

There were two consolidated cases in the District Court that were appealed to the Eleventh Circuit from one final judgment. The first case filed on April 21, 1992 was *United States v. Kane Fisher and Salvors, Inc.* (the other defendants were dismissed prior to final judgment). In the first case, a preliminary injunction was entered which was appealed to the Eleventh Circuit. The Eleventh Circuit's opinion is set forth in Appendix B. After remand, the second case was filed on August 3, 1995, *Motivation, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel.* The *in rem* defendant, the vessel, was a nominal party in the *in rem* admiralty action. The United States intervened.

Petitioners in this Court involving both cases are Kane Fisher, Salvors, Inc. and Motivation, Inc.

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OPINIONS BELOW

The recommendation of the magistrate and the order of the district court granting in part the government's request for preliminary injunction, unreported, are set out in Appendix "C" and "D," *infra*. The decision of the Eleventh Circuit affirming the preliminary injunction, *United States v. Fisher, et al.*, 22 F.3d 262 (11th Cir. 1994) is set out in Appendix "B," *infra*. The order of the district court granting partial summary judgment in favor of the government, holding no right to salvage existed, unreported, and is set out in Appendix "E," *infra*. The order of the district court granting a permanent injunction assessing damages for injury to 1.63 acres of seagrass and awarding the artifacts located, recovered and preserved by the salvors to the government, 977 F. Supp. 1193 (S.D. Fla. 1997), is set out in Appendix "F," *infra*. The final judgment of the district court, unreported, is set out in Appendix "G," *infra*. The Rule 36 affirmance by the Eleventh Circuit, unreported, is set out in Appendix "A," *infra*. The denial of the Petition for Rehearing, unreported, is set out in Appendix "H," *infra*.

STATEMENT OF JURISDICTION

The United States commenced an admiralty action on April 21, 1992, in the Southern District of Florida under 28 U.S.C. § 1333 against Melvin A. Fisher, Kane Fisher, Salvors, Inc. and three salvage boats. Motivation filed on August 3, 1995, an admiralty action in the Southern District of Florida under 28 U.S.C. § 1333 against an identified wrecked and abandoned vessel in which the United

States intervened on June 18, 1996. The two actions were consolidated in the district court and a final judgment was entered on September 5, 1997. A timely Motion for Rehearing was denied on October 16, 1997. Timely Notices of Appeal to the Eleventh Circuit were filed on November 13, 1997 by Salvors, Inc. and Kane Fisher, and on December 12, 1997 by Motivation, Inc. The decision by the Eleventh Circuit was entered on February 26, 1999. A timely Petition for Rehearing was denied on July 8, 1999. The Petition for Writ of Certiorari is being mailed this 4th day of October 1999. This Court has jurisdiction under 28 U.S.C. § 1254

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431 et seq., as amended, and the Florida Keys National Marine Sanctuary Act, 104 Stat. 3089 (1990) are set forth in Appendix I and J.

STATEMENT OF THE CASE

This case concerns two interrelated issues (1) the right of Congress and Florida, after public input, to approve regulations before the sanctuary may "take effect" and (2) the right of maritime salvage on the outer continental shelf during the multi-year interval between the designation of a National Marine Sanctuary and the effective date following the promulgation and approval of rules and regulations.

The Coffins Patch area in the Florida Keys off the coast of Marathon historically has been the subject of extensive salvage activity for remnants of the Spanish treasure fleet wrecked by a 1733 hurricane spawning litigation and literature (see for example *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F. Supp 311 (S.D. Fla. 1986), and Meylach, *Diving to a Flash of Gold,* Fla. Classic Lib. (1986 Ed). R8-31-241. This area is now encompassed in the Florida Keys National Marine Sanctuary, initially designated by Congress in 1990 and finally approved by Congress to take effect under 16 U.S.C. § 1434(b) on July 1, 1997, after adoption of changes to proposed regulations requested by Florida that included provisions for commercial treasure salvage. 62 F.R. 32154, 32161 (June 12, 1997).

During various days in January, February, and March of 1992, Defendants Kane Fisher and Salvors, Inc., using three boats, engaged in maritime salvage on the outer continental shelf in Coffins Patch. At the time of the 1992 salvage operations, no rules or regulations for the sanctuary existed. R5-185-12. The government admitted the Florida Keys Sanctuary Act provisions did not prohibit salvage. A permit was not required under the Archaeological Protection Act for the salvage activities for the outer continental shelf. 16 U.S.C. § 1470(b)(b). The salvors located, recovered, restored and maintained various artifacts.

The United States filed an admiralty action on April 21, 1992, seeking damages and an injunction preventing the Fisher defendants from conducting maritime salvage. The government moved for a preliminary injunction, and the defendants cross-moved for an injunction to restrain

the government from interfering with their salvage activities. No rules or regulations for the sanctuary to "take effect" had been submitted to Congress or the State of Florida, or even proposed at the time of the hearing. The district court referred the motions to a magistrate who, after a hearing, recommended that the district court issue a preliminary injunction restraining the defendants from using prop wash deflectors in conducting salvage operations in Coffins Patch but expressly allowing salvage activities to continue using "other salvage techniques." The magistrate further recommended that the court deny the defendants' request for an injunction. Pet.App. C. The district court adopted the magistrate's recommendation and issued a preliminary injunction, which allowed salvage to continue without the use of prop wash deflectors. Pet.App. D.

The Eleventh Circuit affirmed noting the "limited injunction prohibiting only the use of prop wash deflectors" in salvage operations. *United States v. Fisher, et al.*, 22 F.3d 262, 270 (11th Cir. 1994). Pet.App. B. A prop wash deflector or mailbox, one of several types of salvage tools, consists of an aluminum elbow shaped tube that directs the prop wash to the ocean floor to remove sand that may be covering articles of salvage.

As the basis for its 1994 ruling affirming the preliminary injunction, the Eleventh Circuit determined that submission to Congress and Florida by the Secretary of proposed rules and regulations was not required by the sanctuary act for the sanctuary to take effect. 22 F.3d 262, 267-269, Pet.App. B. Contra wise in 1997 proposed rules and regulations by the National Oceanic and Atmospheric Administration (NOAA), with changes requested

by Florida to **allow treasure salvage**, were submitted and approved in accordance with federal law, with an effective date of July 1, 1997. 62 F.R. 32154 (June 12, 1997).

Following the affirmance by the Eleventh Circuit of the preliminary injunction, Motivation, Inc. filed its *in rem* action against an unidentified, wrecked and abandoned vessel, seeking title and a salvage award for the same artifacts that the Fishers had recovered in Coffins Patch, Case Number 95-10051. On June 18, 1996, the district court allowed the United States (NOAA) to intervene. The court consolidated both cases for discovery and trial.

Based upon the prior decision of the Eleventh Circuit that submission of rules and regulations was not required, the district court granted partial Summary Judgment for the United States. The court ruled the Fishers had no right to have engaged in any salvage activity notwithstanding the preliminary injunction, which allowed salvage without using mailboxes, and notwithstanding that proposed rules and regulations had in fact been submitted to Congress and to Florida for approval. The court further ruled under 16 U.S.C. § 1443 that maritime salvage was not an "activity authorized by federal law." Pet.App. E, 48. The United States (NOAA) *in rem* claim against the three salvage boats had been dismissed. The only remaining issue then concerned liability and damages for injury to seagrass.

The court's ruling on Summary Judgment that there was no right to salvage by the Defendants was ruled dispositive of Motivation's claim for admiralty arrest and adjudication of title. Pet.App. F. As a result of the ruling,

the artifacts that had been recovered, restored and preserved by the Fishers, were awarded to the government and damages determined at the subsequent bench trial were awarded to NOAA of approximately $600,000 for injury to 1.63 acres of seagrass.[1] At the close of the government's evidentiary case, the court granted the motion to dismiss Defendant Melvin A. Fisher for failure of proof. Pet.App. F. The government's claim against Motivation was also dismissed. Pet.App. F.

The Eleventh Circuit's per curiam affirmance of the district court's final judgment avoided correction of its earlier opinion, at the preliminary injunction phase, that the Sanctuary Act did not require submission of proposed rules and regulations to Congress and to Florida in order for the sanctuary to take effect. Not only was the prior prediction proven to be factually wrong, and contrary to law, the very proposed rules and regulations were changed to accommodate Florida's objections. In essence,

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[1] Using the Habitat Equivalency Analysis authorized for oil spills, but not for admiralty claims of impact injury, and the retroactive application of various statutes and regulations, the district court awarded $351,648 for restoration, $211,130 for response costs under 16 U.S.C. § 1432(6)(C) and (7), and $26,533 for interest under 16 U.S.C. § 1443(a)(1)(B). R7-244-18, 19; R20-97-18, 19. The rules and regulations including the statutory provision for monetary costs and interest, 16 U.S.C. §§ 1432(6)(C) and 1443(a)(1)(B) used to award damages were not published or enacted until after all salvage activity had ceased and after the government's complaint was filed. There was no statutory provision for retroactivity. By comparison, the measure of damages for injury to seagrass under the Florida Statute § 376.121(5)(a), would have been $1 a foot or approximately $70,000.00.

the salvors were fined and their salvage confiscated for engaging in traditional and long standing salvage activities, now authorized by the 1997 regulations, and which had not been proscribed by any rule, regulation or statute in 1992.

The Eleventh Circuit denied a Petition for Rehearing, Pet.App. H, and this timely Petition follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. Public Importance.

The Secretary of Commerce (National Oceanic and Atmospheric Administration – NOAA, Designee) must submit proposed rules and regulations to Congress and to the relevant State before a National Marine Sanctuary can take effect. NOAA may not usurp Congress nor the sovereignty of the State by maintaining that such submission is a mere courtesy of no substantive import. Although the 1990 Keys Act was "in effect" or existence upon presidential signing, the implementation of regulations necessary for management and enforcement did not "take effect" until 1997. Maritime rights to salvage should not be automatically terminated by the mere designation of a National Marine Sanctuary. The holding below is contrary to the express mandates of the statute, its avowed purpose, and conflicts with decisions of this Court recognizing the existence of federal admiralty law. It even conflicts with the final regulations, which authorize procedures for commercial treasure salvage of submerged cultural resources.

The case is of substantial public interest because of the change in procedure for national marine sanctuaries in their designation and subsequent implementation of rules and regulations and because of the importance of recognizing maritime salvage as an activity authorized by federal law. The 1972 Marine Protection, Research and Sanctuaries Act contemplated a vast network of offshore areas under direct federal management. See 16 U.S.C. § 1431. Today, there are a dozen such sanctuaries in existence, with more being planned.

In previous years, the designation of a proposed sanctuary was by the Secretary of Commence. See 16 U.S.C. § 1433. At the time of designation by the Secretary, the proposed rules and regulations were submitted to Congress, and to the State whose lands and waters were involved, to take effect in the absence of objection after 45 days of continuous session of Congress. See id. § 1434(b)(1), Pet.App. J.

In recent years, instead of the Secretary designating marine sanctuaries, Congress has opted to designate them and require the Commerce Secretary (through the National Oceans and Atmospheric Administration (NOAA)) to complete the necessary regulatory process. Thus, after very lengthy consultations with the public and users of the proposed sanctuary, the Secretary promulgated proposed rules and regulations for approval by Congress and, when applicable, the respective State before the sanctuary may take effect.

The result, as in the case of the Florida Keys National Marine Sanctuary, was an interval of four to six or more years between designation by Congress and the date the

rules and regulations promulgated by the Secretary took effect. During this interval, Florida insisted upon changes to allow historic salvage operations to continue in the designated sanctuary area. (In a non-binding referendum the voters of Monroe County, the principal location of the sanctuary, rejected the proposed sanctuary 60% to 40%.) NOAA acquiesced to Florida's objections. See 62 F.R. 32154 (June 12, 1997).

The Eleventh Circuit had ruled the procedure mandated by Section 7 of the Florida Keys National Marine Sanctuary Act did not require submission of proposed rules and regulations to Congress and to Florida for approval under 16 U.S.C. § 1434(b) for the Sanctuary to "take effect" and for damages to be assessed by 16 U.S.C. § 1443.

The Eleventh Circuit's rulings contradict the history of the Florida Keys National Marine Sanctuary Act, which expressly recognized treasure salvage activities, and other user rights should be protected and allowed. The House Committee Report explicably recognized that rules and regulations were to be submitted. This Report, containing the statements of Congressman Fascel of Florida, the bill's co-author, is instructive:

> . . . The Management Plan that is implemented should enable those who make their livelihood from the reefs ***to continue to be able to do so.*** While the reefs as an ecological treasure, they are also a valuable economic recreational resource. For various cultural, historic and economic needs, activities such as commercial and recreational fishing and ***treasure salvaging must be allowed to continue*** responsibly where they

> will not cause damage to the reef itself. The consideration of the ***continuation of these activities*** must be a factor in the formulation of the management plan in a manner, which is consistent with the NMSP's mission.

Hearing, Committee On Merchant Marine And Fisheries, May 10, 1990, H.R. 3719, Serial No. 101-94, admitted Ex. 4, R8-31-149. [Emphasis Added]

The Eleventh Circuit, in upholding NOAA's argument that the submission of proposed rules is a discretionary superfluous act to the right of enforcement, repudiated the importance of federalism in the sharing of power between the United States and Florida in the management of resources as well as the right of the public for input. Besides input by sanctuary users, there is the due process importance of fair notice of what is and is not proscribed. There was no notice that maritime salvage was now illegal and unlawful and would subject salvors to substantial damage assessments and forfeiture of artifacts of salvage. Under the principle of separation of powers, the deprivation of existing rights of citizens by bureaucratic fiat, without any rules and regulations, needs the protection of the judiciary and warrants review by this Court.

The courts below further disregarded admiralty precedent in ruling that the 1992 maritime salvage activities were not authorized by federal law and thus not a defense to damage and property claims under 16 U.S.C. § 1443. This holding was made notwithstanding (1) that prior rights of maritime salvage had not been modified by any rule or regulation existing in 1992, and (2) that final rules, in accordance with State of Florida's objection,

recognized commercial treasure salvage activity existing prior to the effective date of July 1, 1997.

B. The Rulings Below, Contrary To Terms Of Statute, Allowed NOAA To Usurp Prerogatives Of Congress, Of The State Of Florida, And Of The Public.

The Fishers contended that the designation by Congress, instead of by the Secretary, still required, under the very wording of the Florida Keys Sanctuary Act, approval by Congress upon the expiration of the 45-day waiting period following publication **and** submission of the proposed regulations by the Secretary **and** the acceptance or rejection of changes requested by the State of Florida. Section 7(a) of the Florida Keys Sanctuary Act, 104 Stat. 3089, 3092, provided:

> SEC. 7(a) PREPARATION OF PLAN. – . . . The Secretary of Commerce shall complete such comprehensive management plan and final regulations for the Sanctuary not later than 30 months after the date of enactment of this Act. In developing the plan and regulations, the Secretary of Commerce **shall follow** the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1433 and 1434), **except** those procedures requiring the delineation of Sanctuary boundaries and development of a resource assessment report. [emphasis added]

Florida Keys National Marine Sanctuary and Protection Act, 104 Stat 3089, 3092 (1990).

Under Section 7(a), the difference between designation by Congress and by the Secretary was expressly

recognized. If by Congress, delineation of Sanctuary boundaries and assessment report were not required to be submitted – this was done by Congress in the designation. NOAA's argument in the prior appeal to the Eleventh Circuit contended 16 U.S.C. § 1434(b), Pet.App. J, did not require submission to Congress and Florida of proposed rules for the sanctuary to take effect. Contrary to the express language of Section 7(a), making § 1434 applicable (Section 304 of the Act of 1972), NOAA maintained that its interpretation of the Act was entitled to special deference. Brief of the United States (Appellee), 11th Cir. No. 92-4799 at 30, 32. Unfortunately, the Eleventh Circuit accepted NOAA's prediction and rejected Fisher's argument:

> These provisions show that the Florida Keys Act itself established the Florida Keys Sanctuary and did not require any further action by the Administration for the sanctuary to come into existence.
>
> . . .
>
> Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved that right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands

> in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

Fisher, 22 F.3d, at 267 and 268, Pet.App. B, 14-15.

The federal law, as now promulgated in the Federal Register, proves that NOAA's prediction was wrong and that Fishers' contention was correct. Indeed the thirty-month period was extended to over six and one-half years. The Federal Regulations were submitted by NOAA to Congress after complying with the provisions of the Florida Keys Sanctuary Act, including § 1434(b). The Federal Regulations as duly promulgated are now federal law, including the modifications made after the objection by the State of Florida and acceptance by NOAA relating to the protection of commercial treasure salvage rights. 62 F.R. 32154, 32160, 32161 (June 12, 1997).

NOAA's arguments to this Eleventh Circuit in the prior appeal on the preliminary injunction mislead the lower courts into making predictions that NOAA knew were incorrect. NOAA's counsel argued one position to the court – even contending Fisher's argument was absurd,[2] and then NOAA turned around as acknowledged in the federal regulations, and did exactly the

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[2] NOAA argued to the Eleventh Circuit:

> The absurdity of the Fishers' argument is illustrated by their contention that upon promulgation of the management plan, the designation of the Florida Keys National Marine Sanctuary must be resubmitted to Congress for forty-five legislative days before taking effect. First, the forty-five day period required in 16 U.S.C. § 1443

opposite with Congress. When confronted with the reality that the rules were submitted, NOAA then successfully contended that the submission was a mere accommodation.[3]

The Governor of Florida's objections and requested changes were made because of the need to protect the treasure salvors industry in the Florida Keys. 62 F.R. 32154, 32160 and 32161 (June 12, 1997). Recognition that "treasure salvaging must be allowed to continue," as set forth in the House Report quoted, *supra*, p. 8, was embodied in the State of Florida's objection that NOAA acceded to for implementation in the entire sanctuary.

> During the forty-five day review period the governor submitted to the Secretary of Commerce a certification that implementation of the specific amendments were made to the regulations. In response to the Governor's certification, NOAA amended those regulations certified

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> begins from the notice of designation: even if Congress had intended the Sanctuary Act to be a mere "notice of designation," this period already has passed. Second the statutory delay is intended to provide Congress with an opportunity to review, and possibly veto, an administrative designation; Congress had no need for a "waiting period" to review a law passed by both Houses and signed by the President.

NOAA's Brief, No. 92- 4799, at 39.

[3] Brief of United States, 11th Cir. No. 97-5800, pp. 30-32:

> "In sum, Fisher's argument that the Sanctuary designation by Congress in 1990, may only take effect after NOAA has published regulations for the Sanctuary is without merit." Id. at 31.

> as unacceptable to incorporate the Governor's changes. Consequently, upon their effective date the regulations, as modified by this notice, and management plan, in their entirety, will apply throughout the **Sanctuary**, including within State waters of the **Sanctuary**.

62 FR 32154 (June 12, 1997)

Florida objections specifically recognized the obligation of the Secretary to submit proposed rules under § 1434(b).[4] These regulations now provide for issuance of salvage permits for new salvage activities as well as recognizing preexisting salvage rights.[5] The Eleventh Circuit graciously suggested that the Fishers should have applied for a permit. *Fisher*, 22 F.3d at 269, 270, Pet.App.

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[4] In accordance with subsection 304(b)(1) [16 U.S.C. § 1434(b)] of the National Marine Sanctuaries Act and that resolution, the following terms are certified as unacceptable in state waters:

62 FR 32155 (June 12, 1997)

> WHEREAS, the management plan development period was extended to six years to provide the maximum opportunity for participation by all segments of government, industry, and the citizens of Florida and the United States; and
>
> WHEREAS, Memoranda of Agreement of the Florida Keys through a cooperative partnership have been developed and included in the management plan, including the:
>
> . . . (3) Submerged Cultural Resources Agreement

62 FR 32156 (June 12, 1997)

[5] 15 C.F.R. § 922.167 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity. 62 F.R. 32169

B, 19-20. However, NOAA admitted there were no rules or regulations authorizing a permit in 1992.[6] In negating the principals of federalism that recognize Florida's role, the court glossed over separation of powers and the duty of the legislature to enact law and the duty of the judiciary to protect the rights of citizens from well meaning but arbitrary and capricious bureaucratic acts. Enforcement should follow, not precede, enactment of rules and regulations. The contrary view of the Eleventh Circuit and NOAA deserve scrutiny by this Court.

C. The Ruling Below Conflicts With This Court's Holdings That Salvage Is Authorized By Federal Law.

This case comes as a consequence of nearly three decades of litigation involving access to historic shipwrecks off the Florida coast, a matter to which this Court's attention has been previously drawn. All of the cases relied upon by the courts below involved salvage where a permit was required under existing laws and regulations. The courts ignored directly relevant salvage cases (even involving related parties) upholding salvage rights on the Outer Continental Shelf. *Florida Department*

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[6] Testimony of Bill Causey the sanctuary manager.

Q: Isn't it true in January of 1992 there were no written procedures in effect for issuing permits?

A: That's true.

Q: Okay. Didn't you also tell Mel Fisher that N.O.A.A. was not writing permits at that time?

A: That's correct.

R12-226-130, 131.

of Insurance v. Treasure Salvors, 458 U.S. 670 (1982). See also *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978) (rejecting claim of the United States to articles of salvage). *MDV Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F. Supp. 311 (S.D. Fla. 1986) (involving the same area of Coffins Patch as the instant case).

The ruling below "that the Government has established as a matter of law that the Defendants had no preexisting salvage rights in the Florida Keys Sanctuary" (Pet.App. F, 54) conflicts with these rulings unless the mere act of designation without rules abolished all salvage rights.

The Florida Keys Act does not preclude any preexisting lawful activity by its express terms, except for certain designated matters, none of which could be construed to mean maritime salvage.[7] At the time of the 1992 salvage activity in question, the government admitted at trial that the Florida Keys Sanctuary Act did not bar salvage, and acknowledged that no regulations in the Florida Keys

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[7] Under 6(b) mineral and hydrocarbon leasing, exploration, development and production were immediately barred. Section 6(a), 104 Stat. 3091-3092 expressly prohibited certain vessel traffic activity effective with new charts or. . . . *Other uses were subject to future regulations* that were to be recommended in the Management Plan, Section 7, 104 Stat. 3092-93 and Section 9, 104 Stat. 3094. Pet.App. I.

National Marine Sanctuary then existed for purposes of preventing or regulating salvage.[8]

NOAA contended, and the courts below agreed, that even without any rules, regulations, or final approval by Congress and Florida for the Florida Keys National Marine Sanctuary to "take effect," that damages were mandated by 16 U.S.C. §§ 1437 & 1443 of the Marine Sanctuary Act of 1972. To the contrary, even if the general sanctuary provisions were fully applicable to the Florida Keys Sanctuary in 1992 prior to any approval of its rules and regulations, there still would be no liability because the maritime salvage was then lawful activity that had not been modified or restricted until the 1997 regulations became effective.

The courts below expressly noted, but failed to properly apply, 16 U.S.C. § 1443(a)(3).

> A person is not liable under this subsection if that person establishes that –
>
> . . .
>
> (B) the destruction, loss or injury was caused by an activity authorized by Federal or State law. . . .

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[8] Ole Vermer, the designated representative of NOAA, testified at trial:

> Q: And I think you've already stipulated no regulation prohibited the prior lawful activity of salvaging?
>
> A: I said the Florida Marine Sanctuary Protection Act did not expressly prohibit commercial salvage.

R16-235-39.

The district court erred in not recognizing that the maritime salvage law is federal law. A prior right to salvage under admiralty law existed ("an activity authorized by Federal . . . law"). Admiralty law is part of the law of the United States. See *Romero v. International Terminal Operating Co.*, 4 U.S. 354 (1959) (Admiralty or maritime law is expressly provided under Article III of the Constitution). Admiralty jurisdiction was the cardinal reason why the Constitution provided for the existence of federal courts. With deference to the courts below, there should have been no doubt that maritime law is a federal law under *Romero* and earlier Supreme Court cases.

Today, there is no room for any doubt that maritime salvage law is an aspect of federal law. See *California State Lands v. Deep Sea Research*, 118 S.Ct. 1464 (1998) which involved jurisdiction in *in rem* salvage actions where a state had interposed a claim over the *res*. Although this appeal does not involve the Eleventh Amendment, it does implicate whether maritime salvage law is a body of federal law.

> The judicial power of federal courts extends "to all Cases of admiralty and maritime Jurisdiction." Art. III, § 2, cl. 1. The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was . . . the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." Ibid. The constitutional provision was incorporated into the first Judiciary Act in 1789,

> and federal courts have retained "admiralty or maritime jurisdiction" since then. See 28 U.S.C. § 1333(1).

Id., at 1470.

Under 16 U.S.C. § 1443(a)(3)(B), there is no liability for damages "caused by an activity authorized by federal . . . law", and maritime salvage is an integral part of federal admiralty law. This should have ended the matter and NOAA's claim should have been dismissed. The court of appeals and United States would rewrite the statute to read: there is no liability for damages *only if the activity was expressly authorized by NOAA*. The text of the existing statute is plain, clear, and unambiguous. No regulations existed at the time (1992) prohibiting maritime salvage. Indeed, the current regulations (from 1997) provide procedures to obtain a permit to continue to engage in such salvage activities, based on rights and usage prior to July 1, 1997, not 1990, the date the Keys Act was signed.

Under decisions by this Court governing statutory construction, the intent to exclude maritime salvage from being considered federal law, a meaning literally satisfying the plain language of the statute, must be "clearly expressed." The inquiry begins with the language of the statute, see *Ardestani v. INS*, 502 U.S. 129, 135 (1991) which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-36 (citation omitted) (quoting

Rubin v. United States, 449 U.S. 424, 430 (1981). In the absence of that rare and exceptional circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838, 841 (1998).

The government contended below that the statute § 1443 is to be narrowly construed in accordance with the provisions' Congressional history. The House Report states:

> This defense is intended to be construed narrowly, and the authorization giving rise to the defense must be for the specific activity giving rise to the damage. Thus, where a vessel runs aground within a sanctuary, it cannot use this defense to assert that the license to operate within the territorial waters of the United States entitles it to a defense because the authority to operate in territorial waters does not constitute the authority to run aground within a marine sanctuary.

House Report 100-739 (100th Cong. 2d Series), June 8, 1988, p. 22.

Using the illustration contained in the report, a maritime salvage would come within the statute. Unlike a vessel that has run aground – activity not authorized by maritime law, the salvage operation using mailboxes to remove overburden (causing injury to seagrass) to locate and recover artifacts is the very essence of maritime salvage activity regarding ancient shipwrecks. Salvage of shallow shipwrecks, particularly ancient wooden vessels, unlike deep water wrecks, is complicated because the succession of storms and currents continually cover and uncover the scatters of the vessel remains and cargo from

the time of its initial breakup from first striking a reef during a hurricane until the present. Salvors looked to find a line of scatter buried under the sand or mud to lead to a primary deposit or major portion of the vessel's remains or cargo. Magnotometers, airlifts, sonar, and mailboxes are used to locate and recover items. See Meylach, *Diving to a Flash of Gold*, Fla. Classic Lib. (1986 Ed). R. 8-31-241.

The history of the statutory provision "activities authorized by federal law" does not excise maritime salvage from inclusion as "federal law." Indeed, in addition to general federal maritime law regarding salvage, Congress, by statute, 46 U.S.C. § 722, has provided specific recognition of salvage off the Florida coast:

> All property, of any description whatsoever, which shall be taken from any wreck, from the sea, or from any of the keys and shoals within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

The admiralty courts even have promulgated special standards for arrest and salvage of historic wrecks. See, e.g., *Cobb Coin Co. v. Unidentified Wreck*, 549 F. Supp. 54 (S.D. Fla. 1982).

The Archaeological Resources Protection Act expressly excludes the salvage area on the "Outer Continental Shelf," at issue in this case, from the requirement of a permit to engage in maritime artifact recovery. 16 U.S.C. § 470(b)(b). This is where the salvage occurred.

Petitioners do not doubt that Congress has the right to modify general admiralty law. The courts below erred, however, by misstating the issue. The question is not whether Congress could regulate maritime salvage, but rather had Congress in fact done so in reference to salvage activities in this case. Congress had not.

Litigation regarding the effect of sanctuary published rules and regulations on pre-existing rights have been contentious. In *Craft v. National Park Service*, 34 F.3d 918 (9th Cir. 1994), the Ninth Circuit implicitly held that the defenses to civil liability under 16 U.S.C. § 1443(a)(3), were to be broadly construed and gracious towards pre-existing uses of marine sanctuary resources, especially when such uses were consistent with federal law. See id. at 922-23. To that extent, there is at least a tacit conflict in circuit authority on the issues raised here regarding enforcement rights prior to existence of published regulations.

Additionally, Petitioners would note that analogous issues of state and federal regulatory authority for maritime activities are currently before the Court in *United States v. Locke* and *Int'l Assoc. Of Independent Tanker Owners v. Locke*, cert. Granted, Docket Nos. 98-1701 & 98-1706, 1999 WL 128655 (Sept. 10, 1999) (reviewing *INTERTANKO v. Locke*, 148 F.3d 1053 (9th Cir. 1998)). Although the Petitions in those cases primarily focus on the preemptive effect of federal legislation over state regulation in the maritime field, the concern presented here (interpreting the marine sanctuaries legislation as consistent with both State regulatory interests and the traditional contours of the general maritime law) is certainly relevant.

National marine sanctuaries such as the Florida Keys affect activity of countless citizens, including those whose livelihoods are directly governed. At issue here is the Eleventh Circuit's ostensible rejection of principles of federalism. At stake is the right of Congress, and of a State, to control fiat by a governmental agency. The Eleventh Circuit and NOAA's contention that the approval process is a discretional courtesy negates those values and rights. The ruling rejecting maritime salvage, not otherwise prohibited, as a federal law under 16 U.S.C. § 1443, is inexplicable in view of holdings by this Court on admiralty.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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