No. 12—Original

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

INDEX

CITATIONS

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This supplemental brief is submitted in response to California's contentions, raised for the first time in its brief in opposition to the motion for judgment, that there is not here a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States (Br. 11–14; Appendix to Br. 1–31), and that the Attorney General is not authorized to bring or maintain this proceeding (Br. 15; Appendix to Br. 33–38). This brief also undertakes to supplement our discussion of California's contention, strongly pressed at the oral argument, that its alleged title is confirmed by the "practical construction" of the parties.

I

THERE HAS BEEN NO "PRACTICAL CONSTRUCTION" OF THE PARTIES REQUIRING THAT TITLE BE AWARDED TO CALIFORNIA

1. During the oral argument, counsel for California gave the impression that, over a long period of years, the United States had always treated the area in controversy as belonging to the State and had accepted a great many deeds to various parcels of land in this area from the State.

We respectfully submit that the great majority of those deeds did not involve lands within the three-mile belt, here in controversy, and that they involved only tidelands or lands under inland waters, as developed more fully in our main brief, pp. 165–182.

We have stated many times, and we repeat again, that the United States does not claim any such lands, and that it recognizes State ownership of such lands. Counsel for California, nevertheless, unfolded a map of Los Angeles harbor which he examined with the Court, pointing out the large number of structures and filled land. That area is entirely within San Pedro Bay, which counsel himself stated as not being within the three-mile belt, in his judgment. Similarly, we do not think it is within the three-mile belt. (The area was classified as "doubtful" in our main brief, pp. 167, 228, merely because the status of San Pedro Bay has not yet been authoritatively determined, but we indicated that a lower court had already

ruled that it was not within the three-mile belt and that the area was "probably" to be regarded as inland waters. There was no intention whatever to lay claim to that area.)

As our main brief points out, however, we do concede that there were some instances in which the United States did accept deeds to submerged lands within the three-mile belt from various coastal States (pp. 166–182). But those instances were comparatively isolated and did not represent any consistent or studied policy. Thus, as pointed out at pp. 172–174, the United States accepted a deed in 1912 which included a jetty within the three-mile belt that the War Department had constructed at Galveston in 1897. As we demonstrated, it appears that the War Department asked for a deed to certain adjacent lands, not within the three-mile belt, and it was probably merely fortuitous that the jetty was included along with those other lands in the 1912 deed. This conclusion is confirmed not only by the fact that the War Department had built the jetty years before without regard to any possible claims of the State, but also by the further fact that this jetty was one of a pair of companion jetties at Galveston and the United States has never taken any deed to the land under the other jetty which it had similarly constructed.[1] And we are in-

[1] See our main brief, p. 181, footnote 37. A similar situation existed with respect to the two jetties at the mouth of

formed by the War Department that it has constructed a number of other jetties within the three-mile belt, along the coasts of Washington, Oregon, California, and Florida, without undertaking to obtain any title to the submerged lands, although it has taken title to the adjacent dry lands to which the jetties are anchored.

Similarly, we have inquired of the United States Coast Guard [2] as to its practice with respect to the construction of lighthouses on submerged sites, seaward of the low-water mark; and we have been informed that although the United States has taken title to a few such sites, there appear to be some twenty others on which the United States has built lighthouses without receiving any grant of title from a State or anyone else.

We submit that there has not in fact been that long standing, consistent, uniform practice which the State alleges. It is true that there have been instances in which the United States has accepted deeds to lands within the three-mile belt. But those instances were isolated examples. Only by com-

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the St. Johns River, Florida, where the United States built two jetties and many years later took title merely to the land under one of them. Counsel for California err when they say that title to both was accepted by the United States. (Appendix to Br. 270.) It is true that there were deeds dealing with a second parcel in the vicinity of the mouth of the St. Johns River, but they did not include the second jetty.

[2] The Bureau of Lighthouses was consolidated with the Coast Guard in 1939. 53 Stat. 1432.

bining them with the concededly large number of deeds as to lands in inland waters is one able to create the illusion which California's contentions suggest. And the acceptance of deeds in the few instances concededly within the three-mile belt is no more significant than the comparable administrative and legislative action which this Court held to be immaterial in *Oklahoma* v. *Texas,* 258 U. S. 574, 585, 586.

2. Moreover, it should be borne in mind that only a relatively small portion of the marginal sea has as yet been exploited or occupied. Existing investments may well prove to be minor in extent in comparison with the untold resources of the remaining area. If this area in fact belongs to the United States, every consideration of public policy calls for its dedication to the interests of all of the people of the United States. In this connection it is pertinent to note, as stated by the Attorney General at oral argument, that the President had authorized him to say that there is no desire on the part of the President or of any federal official to destroy or confiscate any honest or bona fide investment, or to deprive the State or its subdivisions of any reasonable expectation of return from the areas that have been developed.

The President recognizes that in the event the decision of this Court is favorable to the United States, it will be necessary to have Congressional action looking toward the future management of the resources in this area. And he also intends to

recommend to the Congress that legislation be enacted recognizing both prospectively and retrospectively, any equities of the State and those who have operated under it, to the fullest extent consistent with the national interest.[3] Cf. *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32. But the existence of possible equities in so relatively a minor portion of the entire 3,000 square miles of marginal sea should not be a reason for refusing to give effect to the dominant interest of all the people of the United States in this area.

II

ON THE COMPLAINT AND THE ANSWER, THERE IS A CASE OR CONTROVERSY WITHIN THE JURISDICTION OF THIS COURT

California's challenge to the jurisdiction of this Court has two aspects. It urges (1) that "there is no controversy in a legal sense, but only a difference of opinion between Federal and State officials" (Br. 11–12; Appendix to Br. 2–10), and (2) that the United States "has failed to identify the lands claimed" by it in this action sufficiently to enable this Court to render a decree "which

[3] Compare the situation growing out of the Gold Rush during the preceding century. Extensive mining operations had been carried on by private individuals without any authority on lands owned by the United States. Legislation enacted by Congress a number of years later ratified much of what had already occurred, but nevertheless asserted the rights of the United States in regard to the future exploitation of the nation's mineral lands. See our main brief, pp. 211–213.

could be made to apply to any particular land" (Br. 13–14; Appendix to Br. 12–31). We shall consider these arguments seriatim.

1. *The claim that there is no controversy between the parties "in a legal sense, but only a difference of opinion between Federal and State officials."*—In its complaint filed in this case, the United States alleges that at all times material it was and is the fee simple owner of, or possessed of paramount rights in and powers over, the lands underlying the Pacific Ocean, lying seaward of the ordinary low-water mark on the coast of California and outside of the inland waters of the State and extending seaward three nautical miles (Complaint, par. II). The United States further alleges, and California in its answer admits, that California claims some right, title or interest in said lands adverse to the United States and that, in the exercise of the rights claimed by it, California has authorized the leasing of such lands for the exploitation of the petroleum, gas, and other mineral deposits (Complaint, pars. III and IV; Answer, par. I). The complaint alleges further that, pursuant to such authorization, California has negotiated and executed leases with many persons who have entered upon the lands in question and drilled wells therein for the recovery of petroleum, gas, and other such substances (Complaint, pars. V and VI), but that California has no title to, or interest in, the lands in contro-

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versy (Complaint, par. VII), despite which fact California has denied the rights, powers, and title of the United States thereto and has claimed fee simple title to the area for itself (Complaint, par. VIII). In its answer, California admits that it has negotiated and executed oil and gas leases on lands underlying the Pacific Ocean, and that neither it nor its lessees have recognized any title of the United States in or to such lands (Answer, par. III). California also asserts that it is the fee simple owner of all lands underlying all navigable waters within the State's boundaries (Answer, p. 10), which "extend into the Pacific Ocean, at least three English miles from and along the coast of California" (Answer, p. 13).

We believe that the complaint clearly shows the existence of a justiciable controversy between the parties and, moreover, that the answer, when read with the complaint, supports this view.

It has long been established that disputes as to the title to real estate or as to the boundaries between the lands of two States or between the lands of the United States and a State are questions "of a justiciable nature, and can properly be determined in a judicial proceeding" (*Minnesota* v. *Hitchcock,* 185 U. S. 373, 388). Specifically, in cases within its original jurisdiction, this Court may properly resolve such questions. *United States* v. *Texas,* 143 U. S. 621; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *United States* v. *Oregon,* 295 U. S. 1.

In *United States* v. *Texas,* 143 U. S. 621, the action took the form of a bill in equity seeking "a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called 'Greer County', is within the boundary and jurisdiction of the United States or of the State of Texas." 143 U. S. at 637. The United States prayed "that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require." *Ibid.* While the case involved "the larger question of governmental authority and jurisdiction over" the disputed territory, it also involved a determination of "the legal title to, and the ownership of, the lands constituting Greer County." 143 U. S. at 648. This Court there held that it had jurisdiction to determine the dispute. 143 U. S. at 646.

Minnesota v. *Hitchcock,* 185 U. S. 373, took the form of a suit by Minnesota to enjoin the Secretary of the Interior from selling certain lands, claiming that such lands had, in the act establishing the territorial government of Minnesota, been "reserved for the purpose of being applied to schools in said Territory and in the State and Territories hereafter to be erected out of the same." 185 U. S. at 373. As indicated above, this Court held that the dispute was one as to the title to real estate; that such a dispute "is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the

United States is to be taken, for the purposes of this case, as the real party in interest adverse to the State." 185 U. S. at 388. This Court held, therefore, that it had jurisdiction of the controversy and was called upon to decide the case on the merits. *Ibid.*

United States v. *Oregon*, 295 U. S. 1, was a suit to quiet title. In that case, the United States claimed title to the lands in question and had exercised certain control over them by setting aside the area as a bird reservation, posting notices prohibiting hunting in the area, etc. 295 U. S. at 25. "This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with." *Ibid.* This Court held it sufficient to enable the United States to maintain the suit. The instant case would appear to differ only in that here the assertion of possession and control under claim of title has been by the State rather than by the United States, that the State's action can be justified only in terms of ownership, not mere jurisdictional power, and that its right to possession, under claim of title, has been actively disputed by the United States. Because of these differences, this case would appear to be an *a fortiori* one.

While the form which the action took in each of these cases differs, to some extent, from the form it takes in this case, the substance of the action and the nature of the relief sought in the cited cases is closely similar to the substance of this

action and the relief sought by the United States here. The "Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked." *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 264.

The cases cited by California in its brief (p. 12), in support of the assertion that there is no controversy between the parties "in a legal sense," are, we believe, readily distinguishable on their facts, as are also such cases as *Arizona* v. *California,* 283 U. S. 423. The latter case was a bill for an injunction involving questions of appropriation of the waters of the Colorado River. The Court held merely that the matters of which Arizona complained had not yet occurred; consequently, the bill was dismissed as premature "without prejudice to an application for relief in case the stored water [in the Boulder Dam] is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." 283 U. S. at 464. In this case, California is presently and irrevocably draining oil from the marginal sea area, and is thus preventing such use or preservation as the United States may deem appropriate.

Willing v. *Chicago Auditorium,* 277 U. S. 274, cited by California (Br. 12), presented a situation far different from that in this case. That was an action, in the nature of a suit to remove cloud on title, brought by the lessee of real estate against the lessors, seeking a determination as to whether the lessee was authorized, under the leases, to tear down the building located on the premises and replace it with a new building. This Court's holding in that case, that there was no case or controversy within the meaning of Article III of the Constitution, must be read in the light of the following facts found by the Court: that neither the bill nor the evidence contained "even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised premises authorized by the leases;" that there had been "neither hostile act nor a threat;" and that there was "no evidence of a claim of any kind made by any defendant, except the expression by Willing, in an amicable, private conversation, of an opinion on a question of law," Willing having "merely declined orally to concur in the opinion of the [lessee] that it has the right asserted." 277 U. S. at 288. This Court held that "Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease * * * is not an actionable wrong, either at law or in equity," and that the case lacked "elements essential to the maintenance in

a federal court of a bill to remove a cloud upon title," since "The alleged doubt as to plaintiff's right under the leases arises on the face of the instruments by which the plaintiff derives title." *ibid.*

The situation in the instant case differs markedly from that upon which this Court based its decision in the *Willing* case. Here the complaint shows and the answer admits that the State has acted, with respect to the lands in question, inconsistently with the title thereto asserted by the United States, that the State asserts that the title to the lands is in it, and that it has acted as if that were the fact. The conflicting claims of the State and the United States have been asserted frequently, publicly, and notoriously. The United States asserts paramount rights, not rights derived from California. There is here no mere difference in opinion between the parties as to their respective rights arising out of their relationship, as there was in the *Willing* case. Rather, there is a genuine dispute. Each party claims title to the lands in question. The State has acted consistently with its claim by taking possession of certain of the lands and executing leases with respect thereto. The United States has acted consistently with its claim by, *inter alia,* bringing this action for the purpose of preventing the State or its lessees from interfering further with the property of the United States.

United States v. *West Virginia,* 295 U. S. 463, also cited by California in support of its position (Br. 12), is likewise distinguishable from the present case. There, as in the *Willing* case, this Court dismissed the bill on the ground that there was no justiciable controversy between the parties, but it based its action upon findings that the bill "neither asks the protection nor alleges the invasion of any property right;" that it "asserts no title in the United States * * * which might afford a basis for a suit to remove a cloud on title" (295 U. S. at 471); and that it "alleges no act or threat of interference by the State * * * with the exercise of the authority claimed by the United States." 295 U. S. at 472. The complaint in the instant case, on the other hand, alleges just such an invasion of a property right as was absent in the *United States* v. *West Virginia.* It asserts the existence of title in the United States to the lands in question. It alleges interference by California with the lands in question and acts by California with respect to such lands inconsistent with the title of the United States. The answer, moreover, puts these allegations in issue. The present case thus falls within the well established rule, which this Court reasserted in dismissing the bill in *United States* v. *West Virginia,* that "the issue presented by adverse claims of title to identified land is a case or controversy traditionally within the jurisdiction of courts of equity." 295 U. S. at 475.

There is here at issue between the United States and California "a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution. *Missouri* v. *Illinois*, 180 U. S. 208, 241; *Georgia* v. *Tennessee Copper Co.* 206 U. S. 230, 237." *Nebraska* v. *Wyoming*, 325 U. S. 589, 608, 610. This principle, applied to disputes between sovereign States of equal rank, is likewise applicable where, as in the instant case, one of the sovereign litigants occupies a paramount position. See *United States* v. *Texas*, 143 U. S. 621, 631, 641, 644–645.

"This Court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 263. Surely, it is within this Court's judicial power to adjudicate the conflicting rights of the United States and California in a suit in which injunctive relief is, indeed, sought.

2. *The claim that "it is impossible to identify the subject matter of the action".*—In its complaint, the United States alleges that it is fee simple owner of "the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on

the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California." (Complaint, par. II.) In its statement in support of its motion for leave to file the complaint herein (p. 2), the United States set forth that the "suit does not involve any bays, harbors, rivers or other inland waters of California, nor does it involve the so-called tidelands, namely those lands which are covered and uncovered by the daily flux and reflux of the tides", but is "limited solely to that portion of the open sea embraced within the three-mile belt, sometimes referred to as the marginal sea".

The State asserts that "It is impossible to ascertain" the lands which are the subject of the suit and therefore that a decree adjudicating their ownership "would be purely hypothetical" (Br. 13). We submit that the argument lacks merit. In settling controversies of this nature, it has not been uncommon for this Court to enter decrees describing boundaries by such marks as "low water mark", which is the mark seaward of which the United States here claims title. See *New Jersey* v. *Delaware,* 291 U. S. 361, 295 U. S. 694. Nor, in settling title disputes, have the courts heretofore hesitated to define the area of the tidelands, despite the obvious difficulties involved in so doing. See *Borax, Ltd.* v. *Los An-*

geles, 296 U. S. 10, 21–27 in which case the controversy concerned, in part, the extent of the lands which were to be deemed tidelands subject to State ownership. Nor is it necessary that it be crystal-clear at this point of the litigation precisely what the boundaries are of the lands claimed herein by the United States. The determination of those boundaries and their definition is something which can be left to future stages of the case after a decree is entered herein upholding the title of the United States, and a judicial determination of the boundaries will be necessary at that time only if the United States and California then find themselves unable to agree upon the boundaries in question. If, at that time, this Court should be asked to determine those boundaries, there are recognized procedures available to enable it to do so.

In *Oklahoma* v. *Texas,* 256 U. S. 70, a case which involved not only the question of the governmental boundary between the States, but also the concomitant question of title of the States, the United States, and their grantees, to some 500 miles of submerged lands involved in the boundary dispute (see 258 U. S. at 582), this Court settled the boundary dispute by entering an interlocutory decree declaring the boundary in question to be "along the south bank of Red River". 256 U. S. at 608. The Court then appointed a commissioner to take further evidence on the questions "as to what constitutes the south bank of Red River, as

to where along that bank the true boundary line is, and as to the proper mode of locating the same upon the ground". 256 U. S. at 608–609. Thereafter, a further hearing was had and additional evidence taken filling several printed volumes. 260 U. S. at 625. The problem involved determining what constituted the south bank of Red River in 1821, when a treaty between the United States and Spain, which established that bank as the boundary line between this country and the Spanish possessions to the southwest, became effective. Despite the obvious difficulties involved in going back a century to determine what in 1821 constituted the south bank of the river, which also involved determining the extent to which that bank was moved over that period of time by erosion and accretion and the extent to which the river channel had been changed by avulsion, this Court did not hesitate to make such determinations. 260 U. S. at 625–640, 261 U. S. 340–344. We submit that the difficulties inherent in determining the line of demarcation between the lands the title to which is herein claimed by the United States, and the tidelands and lands under the bays, harbors, and rivers bordering them on the east, are no greater than were involved in this Court's determination of the comparable dispute which existed in *Oklahoma* v. *Texas*. The determinations which will have to be made as to particular areas may raise difficulties, but they do not stand as an obstacle to the present decision

by this Court as to the ownership of the land below the ordinary low-water mark on the coast of California.

Whether certain waters are inland or part of the open sea is a problem susceptible of judicial determination. California itself refers to instances in which such issues have been judicially resolved, notwithstanding the absence of authoritative guides. Appendix to Br. 18, particularly note 15. And the books are not barren of materials which can be of use in the treatment of this problem. See, e. g., *Research in International Law,* 23 A. J. I. L. (Spec. Supp.) 265–274, 275–280. The State lays much stress on the difficulty of determining such matters as what constituted true bays in 1850, when California was admitted to statehood (9 Stat. 452), pointing out that "Not only would physical conditions have to be ascertained *as of that date,* but the state of the history and tradition with regard to any particular body of water on Sepember 9, 1850 would have to be determined." App. to Br. 20. The problems involved in *Oklahoma* v. *Texas* required turning back a century to determine the course of a river and the extent to which there had, over that period of time, been accretion, erosion, and avulsion. This necessity did not, however, prevent this Court from entering a decree determining the boundary between the two States and thereafter appointing a commissioner to take evidence with respect to those problems. 256 U. S. at 608–609.

And the Court was able to make its subsequent determinations as to the location of the boundary line despite such obstacles as the absence of surveys or records depicting the situation a century earlier and the absence as well of human witnesses who knew the Red River at that time. 260 U. S. at 638.

Nor has this Court hesitated to settle similar disputes in other cases involving determinations of similar matters as of times long prior to decision by this Court. See *United States* v. *Utah,* 283 U. S. 64, where this Court in 1931 settled questions of the navigability of the Colorado River and certain other rivers flowing within the State of Utah as of 1896, the date of the admission of Utah to the Union. See, also, *United States* v. *Oregon,* 295 U. S. 1, where this Court in 1935 determined the navigability of certain waters in Oregon at the time of her admission to statehood in 1859. See 295 U. S. at 8–24, for a description and discussion of the type of evidence which the master considered in that case. If it should become necessary, in this case, to turn back over the years, that necessity hardly stands as a barrier to the justiciability of this controversy.

III

THE INSTITUTION OF THIS ACTION WAS WITHIN THE AUTHORITY OF THE ATTORNEY GENERAL

The State does not contend that the Attorney General must have specific statutory authoriza-

tion from Congress before he can institute a proceeding, such as the case at bar, to protect or conserve the property of the United States. Instead, its contention seems to be that Congress has expressly taken away from the Attorney General the power to institute this particular action or that the proceeding is contrary to the general "policy" of Congress (Br. 15, Appendix to Br. 35–38).

The general authority of the Attorney General to institute proceedings on behalf of the United States was considered and affirmed by this Court in *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278–284, in which the specific ruling was that the Attorney General, despite the absence of express statutory authorization, could maintain an action in the name of the United States to cancel a land patent obtained by fraud. The Court noted that the Attorney General is invested with the general superintendence of all suits to which the United States is a party and noted further that where resort to the courts is the required remedy to protect the interests of the United States, it is necessarily the Attorney General who has the power and duty to invoke that remedy.[4] The Court said (p. 279):

[4] 5 U. S. C. 309 provides, in part, that "the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

> And notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we cannot believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government.

In subsequent cases in which the authority of the Attorney General to institute an action without specific authorization has been challenged, this Court has consistently applied the rule of the *San Jacinto* case and has sustained the authority of the Attorney General. Thus, in *United States* v. *Bell Telephone Co.,* 128 U. S. 315, 358, 367, it was held that the Attorney General could maintain an action to cancel basic telephone patents; in *United States* v. *Missouri, etc. R. R. Co.,* 141 U. S. 358, 381, an action brought for the purpose of cancelling a land patent issued by mistake was sustained; in *Kern River Co.* v. *United States,* 257 U. S. 147, 154–155, specific statutory authorization was held unnecessary in an action instituted by the Attorney General to declare a forfeiture for failure to live up to the conditions of a land patent; in *Sanitary District*

v. *United States,* 266 U. S. 405, 426, the right of the United States, acting through the Attorney General, to resort to equity to prevent a diversion of waters from Lake Michigan was upheld; and in *Swift & Co.* v. *United States,* 276 U. S. 311, 331–332, the Attorney General's inherent authority to enter into consent decrees was upheld. Cf. *Ponzi* v. *Fessenden,* 258 U. S. 254, discussing the authority of the Attorney General in the control of federal prisoners; *In Re Debs,* 158 U. S. 564, 584, upholding the power of the United States, acting through the Attorney General, to resort to equity for the purpose of protecting its property or to promote the general welfare.

Although the precise point has not been raised, the Attorney General's authority to institute an original action against a State to determine conflicting land titles has been approved, *sub silentio,* in the many cases of that type in this Court. *United States* v. *Michigan,* 190 U. S. 379 (an action for an accounting, resulting from certain swamp land grants to the State); *United States* v. *Minnesota,* 270 U. S. 181 (an action to recover title to Indian lands claimed by the State); *United States* v. *Utah,* 283 U. S. 64 (an action to quiet title to lands in the bed of the Colorado River); *United States* v. *Oregon,* 295 U. S. 1, 24 (a suit to quiet title to unsurveyed lands underlying certain lakes in Oregon); *United States* v. *Arizona,* 295 U. S. 174 (a suit to enjoin interference with construction of Parker Dam); *United States* v.

Alabama, 313 U. S. 274 (a suit to determine the validity of tax liens and a tax deed title claimed by the State); *United States* v. *Wyoming,* 323 U. S. 669 (granting leave to file a complaint involving title to certain oil lands in Wyoming).

Apparently recognizing the futility of attacking the well-settled doctrine of the foregoing cases, the State attempts to argue that, in the present case, Congress has specifically restricted the authority of the Attorney General to bring this action. No act of Congress effecting this result is cited. Instead, this assertion is based upon (1) the failure of Congress on two occasions to enact into law proposed legislation which would have directed the Attorney General to bring a similar proceeding; (2) the fact that a joint resolution to quit-claim the Government's interest to the various States once passed both Houses, even though the measure was vetoed and failed of passage over the veto. Neither basis for the claim lends it any support.

On the first point, the State refers to S. J. Res. 208, 75th Cong., 1st Sess., and S. J. Res. 83, 92, 76th Cong., 1st Sess. The first resolution consisted of an assertion of title to coastal waters and a direction to the Attorney General to institute proceedings to establish that title. It passed the Senate on August 19, 1937, 81 Cong. Rec. 9326, and was favorably reported by the House Judiciary Committee (H. Rep. No. 2378, 75th Cong.,

3d Sess.; reported May 19, 1938, 83 Cong. Rec. 7178), but was never acted upon by the House itself. In the next Congress, hearings were held on the very similar S. J. Res. 83 and 92 before the Senate Committee on Public Lands and Surveys in March, 1939, but no further action was taken.

In no sense can it be asserted that the action taken by the Congress on these resolutions constituted a restriction on the Attorney General's established general authority to bring this proceeding. The Congress did not have before it a question of restricting the Attorney General's authority. Instead, the proposed legislation would merely have directed that his authority be exercised.[5]

It is plain that inaction of the Congress cannot be transposed into a positive restriction of the Attorney General's powers. Congressional inactivity cannot be taken to indicate a policy of Congress. Even where inactivity may have a bearing on the question of that body's concurrence in a judicial decision, this Court has said: "It is at best treacherous to find in congressional silence

[5] During both hearings, committee members repeatedly raised objections to the proposed legislation on the ground that it was superfluous in that the Attorney General had the right to bring the suit if he so desired, which made legislative direction unnecessary. Hearings on S. J. Res. 83 and 92, pp. 27–30; Hearings on S. J. Res. 208, pp. 42–45, 59–61.

alone the adoption of a controlling rule of law * * *. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." *Girouard* v. *United States,* 328 U. S. 61, 69, 70. Cf. *Gemsco* v. *Walling,* 324 U. S. 244, 260, 263.

It is equally impossible to create a restriction on the powers of the Attorney General to bring this suit from the situation arising out of H. J. Res. 225, 79th Cong., 2d Sess. That measure would have quit-claimed to various States all lands below ordinary high water mark. It contained no reference to the Attorney General's action in bringing this litigation, although at the time a vote was taken on the resolution, the present suit had already been filed.[6] The resolution passed both Houses of Congress but was returned unapproved by the President and failed of passage over the veto. The point need hardly be labored that a measure which fails to be passed over a veto is a nullity. The Constitution requires that proposed legislation be approved by the President, or,

[6] The complaint was filed in this Court on October 19, 1945. H. J. Res. 225, 79th Cong., 2d Sess., passed the Senate, with amendments, on July 22, 1946 (92 Cong. Rec. 9642). The House, which had previously passed the resolution, concurred in the Senate amendments on July 27, 1946 (92 Cong. Rec. 10316). The proposed legislation was vetoed on August 1, 1946 (92 Cong. Rec. 10660), and the veto was sustained on August 2, 1946 (92 Cong. Rec. 10745).

failing that, adopted by the requisite vote to override. A vetoed measure, when the veto is sustained, has no force in law. But if the resolution's original passage is to be construed as a restriction on the Attorney General's power to bring this suit, then its failure to pass over the veto can equally well be construed as a direction that the pending action go forward. Congressional action following a veto is as much a part of the legislative process as are the earlier steps in the history of proposed legislation. It is unusual indeed even to argue that the will of Congress has been expressed by the mere passage of a resolution which thereafter fails to become law.[7]

[7] Compare Attorney General Caleb Cushing's Opinion with respect to a contention not unlike that here made by California (6 Op. Att'y. Gen. 680, 691–692):

"In the first place, the President is not bound to yield up his own judgment, even to the most unequivocally expressed opinion of the two Houses, in the form of a bill passed through all the solemnities of constitutional enactment. But, if the hypothesis under consideration be maintainable, a separate resolution of either House will constrain the Executive, when a bill, solemnly passed to be enacted, would not. Of course this idea would afford easy means of striking the veto power and the rights of minorities out of the Constitution, and conferring on a bare majority of the two Houses that legislative omnipotence, which it was one of the great objects of the Constitution to guard against and avoid.

"According to the letter of the Constitution, resolutions of the two Houses, even a joint resolution, when submitted to the President and disapproved by him, do not acquire the force of law until passed anew by a concurrent vote of two-

Such a contention eliminates from the legislative process one of the outstanding features of the legislative system established by the Constitution. See *The Pocket Veto Case,* 279 U. S. 655, 677. Moreover, with respect to the argument that the Congress has restricted the powers of the Attorney General, it may be noted that had H. J. Res. 225, 79th Cong., 2d Sess., been passed over the veto, its only effect on this suit would have been to render it moot. It would not have constituted a restriction on the Attorney General's power to institute the proceeding.

The so-called "Congressional policy" argument has been met elsewhere (Gov't. Br. 185–189). Suffice it to say that the Attorney General is guided by Congressional policy. But his authority and duty to protect the interests of the United States, as recognized by this Court, cannot be de-

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thirds of each House. On the present hypothesis, the better way would be not to present the resolution to the President at all, and then to call on him to accept it as law, with closed eyes, and, however against law he may know it to be, yet to execute it out of deference to the assumed opinion of Congress.

"In the second place, the hypothesis puts an end to all the forms of legislative scrutiny on the part of Congress. A declaratory law, especially if it involves the expenditure of the public treasure, has forms of legislation to go through to insure due consideration. All these time-honored means of securing right legislation will pass into desuetude, if the simple acceptance of a resolution, reported by a committee, is to be received as a constitutional enactment, obligatory on all concerned, including the Executive."

limited by strained inferences from legislative inaction.

Respectfully submitted.

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