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No. ~~15~~, Original

In the Supreme Court of the United States

OCTOBER TERM, ~~1955~~ 1958

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MEMORANDUM FOR THE UNITED STATES IN REPLY TO LOUISIANA'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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Louisiana's brief in opposition to the Government's motion reflects so serious a misunderstanding of the issues that it seems desirable, without attempting to discuss it in detail, to point out briefly wherein it fails to meet the real considerations advanced in support of the Government's motion.

I

THE LOCATION OF THE STATE'S MARITIME BOUNDARY INVOLVES EXTREMELY IMPORTANT AND SENSITIVE QUESTIONS OF FOREIGN POLICY

Louisiana derides (pp. 31–34) the Government's allegation that "the fundamental question in issue is the width of the marginal sea

within the jurisdiction of the United States, which involves inquiry into and application of the foreign policy of the United States in a matter of peculiar importance and delicacy" (Complaint, par. IX, p. 7), characterizing it as "wishful thinking" (Brief, p. 31) and "frivolous" (p. 32). However, the State's discussion of this question rests entirely upon the misconception that the matter of foreign relations referred to by the United States is the danger that offshore drilling will be objectionable to other nations or vulnerable to attack by them. The United States does not regard these considerations as frivolous, nor has this Court so regarded them, *United States* v. *California,* 332 U. S. 19, 34–36, but they are not our present concern. Congress has determined that, with certain limitations, State ownership of submerged lands within State boundaries is compatible with the national interest, and has granted such lands to the States by the Submerged Lands Act, limiting the grant to lands within the States' boundaries at the time they entered the Union or as since approved by Congress (67 Stat. 29, 43 U. S. C., Supp. II, 1301–1315). We are here concerned with determining the scope of that grant, which depends upon the location of the maritime boundary. In our view, the State's boundary cannot extend beyond that of the nation. Thus our present problem involves finding, as a limiting factor, the location of the national maritime boundary.

It would be difficult to conceive of any governmental problem more essentially concerned with foreign relations than that of maritime boundary. It affects not merely a single other nation, as an inland boundary does, but rather is of immediate concern to every nation whose citizens have access to the oceans of the world. Maritime boundary claims have been the subject of repeated diplomatic exchanges, international litigation, arbitration, and even the use of armed force. From its very beginning, this nation has held firmly to the principle that three miles is the proper limit for the extension of a nation's jurisdiction over the sea, and has insisted on our right to enjoy freedom of the seas to within that distance of the coasts of foreign nations. This policy is not, as Louisiana seems to imply (Brief, p. 31), a mere device opportunistically contrived to secure federal rather than State ownership for the greatest possible number of oil wells in the present controversy. It has been a cornerstone of our foreign policy, thoughtfully adopted in the light of our most fundamental interests as a great naval and mercantile power, and has been uniformly defended by administrations of every political complexion, from 1793 to the present day. The United States and the other principal maritime powers are now engaged in a continuing struggle to maintain the 3-mile limit, against a rising tide of claims by smaller nations to territorial

sovereignty over much broader belts of the ocean, extending seaward in some cases as much as 200 miles. As recently as February, 1956, at the Third Meeting of the Inter-American Council of Jurists (an organ of the Organization of American States), the United States vigorously opposed a resolution rejecting the 3-mile limit, and only with difficulty succeeded in having the adoption of the resolution characterized as "preparatory study" rather than as a definitive adoption of policy. Clearly, any adjudication of the width of the marginal sea in domestic litigation will have its international repercussions. In these circumstances, the United States submits that the issue of its territorial jurisdiction over the sea cannot be viewed otherwise than as a serious and delicate matter of foreign policy.

II

FACTUAL EVIDENCE IS NOT NECESSARY OR APPROPRIATE FOR ESTABLISHING THE WIDTH OF THE MARGINAL SEA

The major portion of Louisiana's brief (pp. 8–36) is devoted to the proposition that the case will require presentation of much factual testimony and evidence of which the Court will not take judicial notice. That discussion misconceives the issue actually presented here. First, Louisiana refers to foreign treaties, statutes and proclamations relating to the marginal belt of

Louisiana before its purchase by the United States. These are plainly irrelevant. The extent of the maritime jurisdiction of the United States depends upon the foreign policy of the United States, not that of any predecessor sovereign. The boundary in question, under the relevant provision of the Submerged Lands Act, is that which "existed at the time such State became a member of the Union." Sec. 2 (b), 67 Stat. 29, 43 U. S. C., Supp. II, 1301 (b). When Louisiana entered the Union, in 1812, its maritime boundary depended on the law of the United States, and had depended on that law since the Louisiana Purchase in 1803. The law of predecessor sovereigns need not be considered.[1]

As pointed out above, the territorial extent to which the United States asserts jurisdiction over the adjoining seas is a political question involving foreign relations. As to such questions, courts do not take evidence, but seek and accept as binding the statements of the executive branch of the

[1] The treaties referred to, if material, would properly be subject to judicial notice as facts of history. Many have appeared in official publications subject to judicial notice. *E. g.*, the treaties of Fountainbleau of 1762 and San Ildefonso of 1800 (Louisiana's Brief, p. 12) are set out in 13 Cong. Deb. (24th Cong., 2d Sess., 1837), Pt. 2, App., at pages 226 and 229, respectively. If other foreign treaties, statutes or proclamations should be considered material, receipt of authenticated copies in evidence should present no difficulties to this Court; there is no reason to anticipate any dispute over the authenticity of any such documents.

Government. *Jones* v. *United States,* 137 U. S. 202 (jurisdiction of the United States over the island of Navassa); *Pearcy* v. *Stranahan,* 205 U. S. 257 (non-jurisdiction of the United States over the Isle of Pines); *In re Cooper,* 143 U. S. 472 (jurisdiction of the United States over the waters of Bering Sea);[2] *The Alleganean: Stetson* v. *United States* (Second Court of Commissioners of *Alabama* Claims), IV Moore, *International Arbitrations,* 4332, 4341 (jurisdiction of the United States over Chesapeake Bay). Thus in *United States* v. *California,* 332 U. S. 19, 33–34, this Court relied on legislative and executive declarations of adherence to the 3-mile rule when it said:

> That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * * And this assertion of national dominion over the three-mile belt is binding upon this Court. * * *

At an appropriate time, the United States will furnish to the Court references to executive statements fixing the national boundaries. It is respectfully submitted that such statements will

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[2] The jurisdiction there asserted was later disavowed by the Executive Branch of the Government. XII *Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration at Paris. 1893*, Oral Argument for the United States, pp. 107–110. This does not, of course, detract from the force of the holding of *In re Cooper* that the courts will follow executive determinations in such matters. *Cf.* II *op. cit.*, Case of the United States, p. 84.

be determinative of the question.[3] Certainly the question is not an appropriate subject for testimony or detailed factual evidence of the sort suggested by Louisiana.

Louisiana argues (Brief, p. 27) that its title to a 3-league marginal belt can be established by evidence of long-continued conduct of the State. Such is not the case. Since the primary question is the width of the *national* marginal belt, the answer must be found in national assertions, whether by words or by conduct. State conduct would be material only to the extent that it was ratified or adopted by the Nation; since the conduct of national affairs not merely fails to disclose, but in fact affirmatively refutes, the ex-

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[3] The diplomatic history of the United States amply demonstrates that this nation has indeed consistently adhered to the 3-mile limit. Assertions of this position appear in letters of Secretaries of State from 1793 to the present day, set out in I Moore, *Digest of International Law* (1906) 702–732; I Hackworth, *Digest of International Law* (1940) 623–642; 99 Cong. Rec. 3620–3625 (1953); Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 321–323. Treaties of the United States have repeatedly adopted the same position. Treaty with Great Britain, Oct. 20, 1818, 8 Stat. 248, 249; Treaty with Great Britain, Jan. 23, 1924, 43 Stat. 1761; Treaty with Germany, May 19, 1924, 43 Stat. 1815; Treaty with Panama, June 6, 1924, 43 Stat. 1875; Treaty with the Netherlands, Aug. 21, 1924, 44 Stat. 2013; Treaty with Cuba, Mar. 4, 1926, 44 Stat. 2395; Treaty with Japan, May 31, 1928, 46 Stat. 2446; *cf.* Treaty with Great Britain, Nov. 19, 1794, 8 Stat. 116, 128 (referring to taking of prizes within cannon-shot of the coast as a violation of territorial rights); Treaty with Algiers, June 30 and July 6, 1815, 8 Stat. 224, 225.

istence of any federal ratification or adoption of such assertions by the State, claims or conduct by the State can have no significance, and evidence regarding them would be wholly immaterial.[4]

Louisiana argues (Brief, pp. 35–36) that evidence of its long-continued conduct will be proper evidence in support of its defenses of laches, estoppel or prescription. That is urged on the theory that those defenses, though admittedly not ordinarily available against the United States, are available as between sovereigns and so may be raised here. It is true that those defenses are proper ones as between equal sovereigns, whether nations or States of the United States; but the Nation and its constituent States, though both sovereign, are not equal sovereigns, and those defenses may not be asserted by a State against the Nation. *United States* v. *California,* 332 U. S. 19, 39.

Louisiana's argument that it is entitled to introduce factual evidence as to the physical location of its coast line will be discussed under Point III, *infra.*

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[4] The considerations which we deem relevant to the determination of the issue of whether Louisiana's boundary is located, under the Submerged Lands Act, a distance of three miles or three leagues seaward from the coast are set forth at some length in our Brief in Support of Motion for Modification of Decree, *United States* v. *Louisiana,* No. 7, Original, October Term, 1954.

III

THE WIDTH OF THE MARGINAL SEA SHOULD BE DETERMINED BEFORE MAKING A DETAILED FACTUAL INQUIRY INTO THE PHYSICAL LOCATION OF ALL POINTS ON THE COAST LINE

Louisiana argues (Brief, pp. 38–41) that leave to file the Government's complaint should be denied on the ground that it seeks a "piecemeal" determination of the controversy between the parties. The contention is that the parties are in disagreement not only as to the width of the marginal belt but also as to the location of the base line from which that width is to be measured, *i. e.,* the line of the ordinary low-water mark and outer limit of inland waters. The State urges that since these two disputes both enter into the ultimate question of the boundary between State and federal submerged lands, it would be improper to permit the filing of a complaint that sought to resolve only one of them. Further, it is said that the question of location of the base line will require the taking of a large amount of factual evidence.

There can be no doubt that any adjudication of the location of the base line will require the taking of factual evidence. The Louisiana coast line is an extraordinarily complicated one. Some idea of its complexity can be gained from the fact that while the "general coast line" of the State is only 397 miles long, the detailed tidal shore line has a

length of 7,721 miles. *World Almanac* (1955), p. 258. In addition to its involved configuration, it presents through much of its length a contour so nearly level that even minor wind variations can cause very substantial differences in the point to which the tide retreats. Finally, the shore line is not a stable one, but is subject through most of its length to rapid and substantial changes. To insist, as Louisiana does, that the width of the marginal belt cannot be decided except as part of a decision as to the precise location of the entire length of this elusive coast injects unnecessary delay and complexity. A judicial inquiry into the precise location of the entire shore line might be stretched to require many years for completion.

It is for these reasons that the United States has cast its complaint in a form that will permit this Court to decide, separately and at the outset, the independent legal question of the width of the marginal belt. Such a decision will immediately reduce by six miles the width of the area in dispute between the parties. Once the controversy is put in such posture that only the location of the base line remains in doubt, it may be possible for the parties to come to an agreement as to its location, at least in some places. Even where that cannot be done, supplemental decrees can be entered, as necessary, fixing the location of limited portions of the base line, from which the width of the marginal belt

can then be laid off without further delay. The evidence for such purpose could be taken by a Special Master, appointed by this Court for that purpose, who could sit in Louisiana, Washington, or both, according to the particular testimony or evidence to be offered.

The United States submits that this is the most reasonable and practical way to handle this case. It corresponds to the procedure followed in *United States* v. *California,* 332 U. S. 19; *United States* v. *Louisiana,* 339 U. S. 699; and *United States* v. *Texas,* 339 U. S. 707. When California objected that the decree sought against it was in general terms and did not specifically identify the land to which it referred, this Court rejected that objection, saying (332 U. S. at 26):

> We may assume that location of the exact coastal line will involve many complexities and difficulties. But that does not make this any the less a justiciable controversy. Certainly demarcation of the boundary is not an impossibility. * * * And there is no reason why, after determining in general who owns the three-mile belt here involved, the Court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary. * * * Such practice is commonplace in actions similar to this which are in the nature of equitable proceedings.

Since it would require many years to reach a specific decision as to the precise location of every inch of the Louisiana shore, no District Court should be burdened with such a lawsuit if it can be handled in another way.[5] The United States submits that it has proposed a very much better way to handle this case.

IV

THIS COURT IS THE APPROPRIATE FORUM

The considerations we have discussed—both affirmative and negative—mark this Court as the appropriate forum. The special nature of the subject matter, the non-factual and unencumbered character of the issue which the proposed Complaint presents, as well as the direct precedents in this field, all combine to sustain this controversy as a proper one for the Court's original jurisdiction. The Congress which enacted the Submerged Lands Act contemplated that the question of a State's boundary would be determined by this Court (see our Brief in Support of Motion, p. 11; also, Brief in Support of Motion for Modifica-

[5] Louisiana does not here repeat its claim of right to a jury trial, asserted in its Plea to the Jurisdiction filed Aug. 29, 1955, in *United States* v. *Louisiana*, No. 7, Orig., Oct. Term, 1955, page 4. Presumably, if the United States were relegated to a District Court, the State would renew its claim there. The mere thought of condemning a jury to such a protracted trial shows the impracticality of the State's position.

tion of Decree, pp. 12–17, No. 7, Orig., Oct. Term, 1954), and the Court has already decided issues under that Act. *Alabama* v. *Texas,* 347 U. S. 272. In sum, the question raised by the Complaint is of the calibre and character, and is presented in a posture, appropriate for resolution by this Court, rather than some other tribunal.

CONCLUSION

For the foregoing reasons, and those in its Brief in Support of the Motion, the United States submits that leave to file the Complaint should be granted.

Respectfully submitted.

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