No. 10 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 1958

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

Reply of the State of Louisiana to Brief of the United States on Motion For Judgment

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Louisiana's original brief in opposition to the motion of the United States for judgment was in the hands of the printer when the Plaintiff's brief in support of its motion for judgment was served. This reply of the State has therefore been prepared separately. We will not endeavor here to answer all points set out in Plaintiff's brief for the reason that many of these points were anticipated and answered in our original brief. We will, instead, direct attention only to certain erroneous statements and conclusions of law and fact contained in the Federal Government's brief.

Louisiana particularly challenges those portions of the plaintiff's brief directed at the following untenable propositions:

1. The untenable proposition that the Court's decree of December 11, 1950 in *United States v. Louisiana*, 340 U. S. 899, is *res judicata* with respect to lands and resources within twenty-seven miles of the coast, and that the United States is entitled to an accounting of funds derived therefrom.

2. The untenable proposition that the United States is entitled to judgment on it's motion as a matter of law.

3. The untenable proposition that although the boundaries of the State and of the United States are co-extensive, the boundaries of the United States now extend and have always extended only three miles offshore.

4. The untenable proposition that the United States has never recognized or approved a three league boundary in the Gulf of Mexico.

5. The untenable proposition that submerged lands were not attributes of sovereignty, did not pass to states upon admission, and that Spain and France never claimed anything seaward of the Gulf shores of the Louisiana territory.

6. The untenable proposition that the Submerged Lands Act and the Outer Continental Shelf Lands Act did not infringe on the Constitutional rights of the State of Louisiana.

7. The untenable proposition that the equal footing clause does not entitle Louisiana to boundaries more than three miles offshore.

I

THE COURT'S DECREE OF DECEMBER 11, 1950 IN UNITED STATES v. LOUISIANA, 340 U. S. 899, IS NOT RES JUDICATA AS TO THE ISSUES INVOLVED IN THE PRESENT CONTROVERSY

The original proceeding brought by the United States against Louisiana and decided by the decree of this Court of December 11, 1950 involved issues which are different and distinct from the matters presented to the Court in the present controversy. In that case the United States alleged that it was the owner in fee simple of lands, minerals and other things underlying the Gulf of Mexico and lying seaward 27 marine miles. Neither the Submerged Lands Act nor the Outer Continental Shelf Lands Act were involved in that case, because the Acts were not passed until three years after the case had been decided. No question was presented as to the location of the State's boundaries or of the national maritime boundary. In fact the Court in its opinion stated (339 U.S. 699, 705):

> "The matter of State boundaries has no bearing on the present problem."

In the present proceeding the matter of State boundaries and the matter of the national maritime boundary are squarely presented. Thus, on page 11 of the government's brief in support of its motion for leave to file the complaint in this case, govern-

ment counsel discusses the Submerged Lands Act and the location of State boundaries pursuant to that Act, and then states "Congress expressed no view as to the location of the boundary, intending and expecting any dispute regarding its location to be determined by this Court." Again, in its memorandum in reply to Louisiana's brief in opposition to the motion for leave to file complaint, government counsel states on page 2, that "our present problem involves finding, as a limiting factor, the location the national maritime boundary" and that "the State's boundary cannot extend beyond that of the nation." Furthermore, in the motion for judgment and statement with respect to that motion, Plaintiff's counsel states that the cl a i m of the United States in the present controversy rests upon the e f f ect of this Court's former decision "and the location of the national maritime boundary along the coast of the State." Similar statements are contained in the government's memorandum in opposition to the motion by the State of Louisiana to take depositions.

Not only were different issues involved in the original proceeding but the decision of the Court in that proceeding did not decide the issues that are presented in the present controversy. The original decree did not hold that the United States had any property rights in the continental shelf but that it had "paramount rights" 27 miles offshore from the State of Louisiana. The decree was based upon the decision

in the California case, and Mr. Justice Frankfurter pointed out in his dissenting opinion (339 U.S. 699, 706):

> "In rejecting California's claim of ownership in the offshore oil the Court carefully abstained from recognizing such claim of ownership by the United States. This was emphasized when the Court struck out the proprietary claim of the United States from the terms of the decree proposed by the United States in the California case."

This Court has therefore not decided the question of ownership of the subsoil, seabed and natural resources of the continental shelf offshore from Louisiana, nor has it determined the boundaries of the State nor the national maritime boundary in the Gulf of Mexico. In any event it has rendered no decision as to the bearing which the Acts of Congress, passed in 1953, have on this subject.

As we have pointed out in Louisiana's answer and in our original brief, the Fifth Circuit Court of Appeals has held that the Acts of Congress relating to the submerged lands and the outer continental shelf have nullified the theory of paramount rights and extra territorial sovereignty on which the three original tidelands decisions were based.[1]

Furthermore, constitutional questions are presented here (paragraph IV of Louisiana's answer),

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[1]Superior Oil Company v. Fontenot, 213 F 2d. 565, 569, cert. den. 348 U.S. 837, 99 L.Ed. 660.

which questions were not involved in any of the prior proceedings.

As stated in our original brief the Court was without the benefit of a declaration by Congress as to the extent of American territory when it decided the original tidelands cases, and since these three decisions were rendered Congress has declared the extent of the American territory. The present controversy therefore involves questions of fact and questions of law which were not considered in the original proceeding and were not decided by the Court.

When the original motion to modify decree was filed by the United States on May 19, 1955, in this current phase of the controversy, Louisiana successfully opposed that motion to modify the courts original decree of 1950 on the basis of it being an entirely different case. This court must have considered the different natures of the original suit against Louisiana and the present one, when it dismissed the governments motion to modify the former decree.

The principle of *res judicata* extends only to the facts and conditions as they were at the time the judgement was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined. When new facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and hence the former judgment cannot be pleaded in bar in the subsequent action. Thus,

if a relevant change in the law has taken place, matters arising thereunder are not concluded by a judgment rendered under the law as it formerly existed.

In *Commissioner v. Sunnen*, 333 U. S. 591, 600, 92 L. Ed. 898, 907, this Court said:

> "... If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. See Travelers Ins. Co. v. Commissioner (CCA 2d) 161 F2d 93. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U. S. 154, 162, 89 L.Ed. 812, 818, 65 S. Ct. 573; 2 Freeman, Judgments, 5th ed. (1925) § 713."
>
> * * *
>
> " . . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. . . "[2]

No judicial estoppel results which would prevent litigating points not at issue previously. Plaintiff's argument that the prior decision against Louisiana is *res judicata* has no merit.

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[2]See also:
State Farm Mutual Insurance Co. v. Duel, 324 U. S. 154, 162, 89 L.Ed. 812, 819;
Blair v. Commissioner, 300 U. S. 5, 8, 81 L.Ed. 465, 469;
Cromwell v. Sac County, 94 U. S. 351, 24 L.Ed. 195, 198.

Since the court's former decision cannot be *res judicata* as to this case, the government counsel's allegation that an accounting due by virtue of that former decree is owed by the state is neither factually correct nor legally sound. The Submerged Lands Act released all money claims of the United States (Section 3 (b)) when recognizing the pre-existing right of the State to the subsoil, seabed, and natural resources therein. There is no other provision in the act relating to any other accounting.

Louisiana wishes to reiterate and preserve its asserted right (Answer p. 8) to an accounting from the United States of all sums derived by it from the area ultimately determined to belong to the State.

II

THE UNITED STATES IS NOT ENTITLED TO JUDGMENT ON ITS MOTION

Government counsel assert . . . "that all facts material to the Government's claim are subject to judicial notice, and that the United States is entitled to judgment as a matter of law" (Government's brief, p. 10). These bald conclusions are refuted by the very statements which follow, that the Submerged Lands Act ". . . left those states free to make what proof they could as to their boundary locations . . ." (Government's brief p. 28), and that the ". . . . Boundaries claimed to lie more than three miles from the coast are not among those 'approved and confirmed' by Section 4, but on the other hand that section provides

that it is not to be construed as 'questioning or in any manner prejudicing' such boundaries. The court, then, must look beyond the face of the act . . ." (Government's Brief, p. 27.), and illustrate pointedly why the court should grant Louisiana's motion to take depositions and deny the Government's motion for judgment.

Certainly this court cannot take judicial notice of all facts which go to prove Louisiana's historic boundary beyond three miles, which has not been prejudiced or questioned by the Submerged Lands Act, except by limitation. If no state can exceed the "foreign policy three mile limit", has not Congress done a useless thing in expressly stating this lack of prejudice of a state's historic boundary beyond three miles?

III

BOUNDARIES OF THE UNITED STATES HAVE BEEN DECLARED TO EXTEND TO THE EDGE OF THE CONTINENTAL SHELF AND THE BOUNDARIES OF THE COASTAL STATES ARE COEXTENSIVE WITH THOSE OF THE UNITED STATES

Plaintiff's counsel states on pages 12, 13 and 86 of his brief that the rights asserted by the United States in the submerged lands and resources of the Continental Shelf seaward of the alleged three mile limit are "extra territorial in their nature", and then states that the assertion of those rights by the Sub-

merged Lands Act did not constitute an enlargement of the national boundary.

Before discussing the foregoing statement attention should be directed to the fact that the Submerged Lands Act of May 22, 1953 did not attempt to enlarge the national boundary. It merely recognized, confirmed, established and vested in and assigned to the respective States title to and ownership of the lands beneath navigable waters, and the rights to use and administer resources thereunder. It was the Outer Continental Shelf Lands Act of August 7, 1953 which declared that "the subsoil and seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided for in this Act." (Sec. 3, 67 Stat. 462.)

There can be no doubt that the Outer Continental Shelf Lands Act deals with territorial rights and with property rights. This is apparent in the reading of the Act itself and it is also apparent from the reading of the Reports of the House and Senate Committees which recommended passage of the law. Section 8 of H. R. 4484 which became a part of the Outer Continental Shelf Lands Act and asserts federal jurisdiction and control over the outer continental shelf is explained thus in House Report No. 215, 83rd Congress, 1st session, page 27:

> "Section 8 of H. R. 4484 asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus

> bringing the lands and resources within such areas into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed."

If the assertion of federal jurisdiction and control over the continental shelf brings the lands and resources within this area into the same legal status as those acquired by the United States through cession or annexation, as stated in the Committee Report, then it is evident that these lands and resources are a part of the territory of the United States, and are included in its boundaries. In effect this is the meaning of the House Committee Report. The reports and explanatory statements of Legislative Committees may be resorted to as indicative of the intent of Congress. [3]

This Court has defined "territory" as including waters of the sea over which the United States asserts and exercises jurisdiction. In *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122, 67 L. Ed. 894, 901, the opinion reads:

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[3]U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 125, 86 L.Ed. 726, 736;

Wright v. Mountain Trust Bank, 300 U. S. 440, 463, 81 L.Ed. 736, 744.

> "Various meanings are sought to be attributed to the term 'territory' in the phrase, 'the United States and all territory subject to the jurisdiction thereof.' We are of opinion that it means the regional areas—of land and adjacent waters —over which the United States claims and exercises dominion and control as a sovereign power . . ."

Territory, jurisdiction and ownership are coextensive. Jurisdiction can only be exercised within the boundaries of the territory owned by the government. So an extension of jurisdiction and control over the Continental Shelf can result only from a recognition that the boundaries of the nation include the Shelf.

"Generally speaking, the proposition is true that, as to States, jurisdiction and the right of soil, go together".

> *New York v. Conn.*, 4 Dall. 1, 4, 1 L.Ed. 715, 716.

"The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power." (Marshall C. J.)

> *U. S. v. Bevans*, 3 Wheat. 336, 386-7, 4 L.Ed. 404, 416, affd., *Manchester v. Mass.*, 139 U. S. 240, 263, 35 L.Ed. 159, 166.

The following quotation from Hackworth's Digest of International Law, Volume II, page 674, demonstrates that the United States claims of the subsoil, seabed and natural resources of the continental shelf are property or territorial claims.

> "Vattel's statement 'Who can doubt that the

> pearl fisheries of Bahrein and Ceylon may lawfully become property?' ceases to cause any difficulty to even the stoutest upholders of the principle that the limits of the territorial belt are not more than three miles if it is realised that the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea where the banks were situated, and not from any claim to maritime jurisdiction over the waters. . ."

In part B of the Appendix filed with it's brief, Louisiana set forth many international authorities which recognize that claims such as those made by the United States in the outer continental shelf are territorial claims.[4]

It therefore follows that the rights claimed by the United States are territorial rather than "extraterritorial" rights as asserted on pages 12, and 13 and 86 of the United States brief.

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[4]Mouton's "The Continental Shelf," pages 32, 33, 145, 146 and 154;

De Rayneval's "Institutions du droit de la nature et des gens" (Paris, 1803), page 161;

Riesenfeld's "Protection of Coastal Fisheries Under International Law," pages 165-170;

Westlake's "International Law," part I, pages 190 and 191;

Sir Cecil Hurst's "British Yearbook of International Law" (1923-1924) page 40;

Colombos' "International Law of the Sea" (1954), Third Edition, Section 353, pages 306 and 307;

Hackworth's "Digest of International Law", Volume II, pages 674-675.

Plaintiff's Theory of So-Called "Extraterritorial" Rights Is Untenable.

There is nothing in the Constitution and domestic laws of the United States, nothing in the common law, and nothing in international law that would give the federal government extraterritorial rights of the kind claimed here in any property anywhere.

The existence of any such extraterritorial rights was questioned by the Congressional Committees that recommended passage of the Submerged Lands Act. So in answer to this Court's ruling in the *California* case that the oil under these submerged lands "might well become the subject of international dispute and settlement", the Committee, in House Report No. 215, at page 38, replied:

> "The same thing might be said about oil under uplands."

In this connection Senate Report No. 133 at page 58 states:

> "Many witnesses were of the opinion that the construction of paramount rights as including fee ownership would, if carried to its logical conclusion, destroy the basic legal distinction between governmental powers under the Constitution on the one hand, and State or private ownership of real property on the other, b e c a u s e the 'paramount powers' of the United States do not depend upon whether the point at which they may need to be exercised is above or below low-water mark or on one side or the other of a line dividing a bay from the coastal waters."

The Senate Committee then repeats the House Committee's statement that the paramount rights of the United States in the submerged lands of the sea are no different from those possessed by it in the uplands, and concludes on page 59 of its report:

> "It is beyond doubt that the Federal Government cannot assert any lawful control over lands or resources that are not located within the borders of the several States or the Territories or which has not been committed to it by treaty or other international negotiations.
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> "In *Massachusetts v. Manchester, the* Supreme Court said:
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> 'There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States.' "

These statements of the Congressional Committees pin-point the error in plaintiff's argument that the conduct of foreign relations and the national defense either require or justify ownership of the lands to be protected.

Section 4 of Article IV of the Constitution requires the United States to protect each State against invasion. It would therefore follow that defense on land as well as by sea "is a national, not a State concern," (*U. S. v. Louisiana*, 339 U. S. 699, 704). "National interests, national responsibilities, national concerns are involved" in the uplands of Louisiana and their resources, and in the rivers and lakes, as well as the seas and submerged lands beyond the coast

line of the State. But these national interests, responsibilities, and concerns of the federal government do not require that it have ownership or power of disposition over any of the properties of the State.

The power of eminent domain of the United States extends for federal purposes over the entire land, and private land may be used for national defense throughout the whole state; but this paramount right does not exclude the right of State ownership, or of private ownership. *Carried to its logical and proper conclusion, the theory of extraterritorial rights, based on the proposition that sovereignty with responsibility for defense and international relations necessarily and inseparably involve ownership of land, would result in the abandonment of all right of private ownership of land anywhere in the United States.*

The conclusion is therefore inescapable that the claims of the United States in this controversy are strictly territorial, and that only through an extension of the national boundary can the United States exercise jurisdiction over the Continental Shelf.

On page 100 of the plaintiff's brief the statement is made that no part of the Outer Continental Shelf was acquired by the United States in the Treaty of Cession by France in 1803. This is, of course, in keeping with plaintiff's insistence on ownership through extraterritorial sovereignty. But the legislative history of the Submerged Lands Act (House Report No. 215, p. 27) says that this federal jurisdiction over the shelf brings "the lands and resources within such areas

into the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery." The Committee of Congress was obviously referring to territorial as distinguished from so-called *extraterritorial rights* which it later, on page 38 of its report, *rejected as an unsound theory.* The Committee's reference to cession or annexation can only refer to the Louisiana Purchase of 1803, because no other cession or annexation agreement has ever been made with respect to the area.

The alternative proposition that these lands and resources are subject to the doctrine of discovery can give no title to the United States. The shelf was not acquired by occupation and prescription on behalf of federal government because the United States has never occupied it until this controversy arose, and such occupation was forced against the protest of Louisiana. Prior to this dispute the Shelf has always been exclusively occupied by the State.

Nor did the Federal Government acquire the Shelf or its resources by discovery. The resources, especially oil and gas, were discovered and developed by Louisiana. The United States must therefore, of necessity, rely on the so-called "extraterritorial rights" theory which has been discarded by Congress, and simply does not exist under our republican form of government.

The fact that the Outer Continental Shelf Lands

Act in Section 3 recognizes the character of the waters above the Shelf as high seas, and provides that the right to navigation and fishing therein shall not be affected, does not change the territorial nature of the claims asserted by the United States in the sea-bed and its resources. Plaintiff, of necessity, admits the territorial nature of submerged lands within three miles of the coast. Yet the right of innocent passage and navigation of the waters of this belt is recognized by the law of nations and by the laws of the United States. It is therefore not necessary to have absolute sovereignty over the seas above the submerged lands in order to have territorial rights in the subsoil, sea-bed, and natural resources of the shelf.

Plaintiff's counsel says that the concept of a marginal belt of territorial waters, subject to the jurisdiction of a coastal nation, is an encroachment upon the principle of freedom of the seas (Brief p. 39). Yet the United States claims that the exercise of jurisdiction, control, and power of disposition by it over the entire continental Shelf does not violate this principle. The only justification for this paradoxical statement by government counsel is that the term "Extraterritorial rights" possesses a magical formula which enables the government to by-pass the principle. This is indeed a proposition without precedent.

The statement of Secretary of State Dulles that "maintainance of the territorial three mile policy is more than ever a matter of vital interest to the United States" assumes that the United States is not now

claiming jurisdiction and control equivalent to title and ownership beyond the asserted three mile territorial boundary of the United States.

It is obvious that this self-serving statement has been used by counsel for the government where it best suits his purpose for a particular argument but such statement likewise points out the impossible situation counsel for the government has put himself in, and would put the United States in, in the conduct of its foreign affairs.

If we were to make the unsupported assumption that the boundary of the United States and the State of Louisiana does not extend to the edge of the continental shelf, by what authority would the United States exclude a foreign oil company from exploring and exploiting natural resources on the continental shelf beyond that territorial boundary of the state and the United States? From what source has this "special jurisdiction, extraterritorial in its nature," which ". . . does not constitute an extension of the territorial boundary of the nation . . ." been derived? (Govt's brief p. 86). And how does it coincide with the statement of Secretary of State Dulles that ". . . in view of the serious attacks which are now being made upon the freedom of the seas in various parts of the world, the maintenance of the traditional three-mile policy is more than ever a matter of vital importance to the United States"? (Letter of Secretary of State Dulles to Herbert Brownell, Jr., Attorney General, June 15, 1956, Govt. Br. p. 180).

Statements Of Congressmen Inadmissable in Construing Statute.

"On pages 27 to 31 of the plaintiff's brief statements made by various Congressmen are quoted to the effect that the Submerged Lands Act does not determine the location of the State boundaries in the Gulf of Mexico. Again we call attention to the fact that it is the Outer Continental Shelf Lands Act which extends the boundaries of the United States to the edge of the Continental Shelf. It would therefore follow that the statements made by Congressmen concerning State boundaries in the Submerged Lands Act are not relevant there. In any event it is generally held that statements by individual members of a legislative body as to the meaning of a bill, and which are made during general debate following its presentation by a Standing Committee, are inadmissible as an aid in construing the statute. In *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 474, 65 L.Ed. 349 this Court stated that legislative debates are "expressive of the views and the motives of individual members, and are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law making body."[5]

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[5]See also:

Sutherland, Statutory Construction, Third Ed., Vol. II, page 499, Section 5011;

McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 493-4, 75 L.Ed. 1183, 1187;

Aldridge, et al v. Williams, 44 U. S. (3 How.) 924, 11 L.Ed. 469, 476.

Executive Determination of National Boundaries Is Not Conclusive on the Court

Government counsel says on page 63 of his brief that the Courts are bound to accept as correct and conclusive all declarations and determinations with respect to foreign affairs made by the Executive Branch of the government, and on page 65 et seq. states that a question as to the territorial boundaries of the United States is a political matter which can only be determined by the Executive Department. Then on page 71 *plaintiff's counsel makes makes the astonishing statement that the Secretary of State has advised the Attorney General in this very case that the national boundaries extend only three miles off-shore and that "the Secretary's statement alone is enough to conclude the matter here."* Never before have we been faced with such an astounding proposition that the Department of Justice can bring a suit on behalf of the United States for judicial determination, and then for another Executive department to determine the issues by a self-serving declaration as to a correct settlement of the controversy in the Court. This would indeed prove that "the King can do no wrong." As a matter of fact, plaintiff does cite the British Courts as authority for this incredibly one-sided principle of law. So on page 74 of plaintiff's brief Lord Sumner is quoted as having said:

> "The best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf."

Again on page 77 of the government brief Lord Justice Atkin is quoted:

> "Any definite statement from the proper representative of the Crown must be treated as conclusive."

The decisions of our own Courts which are set forth on pages 65 to 68 of plaintiff's brief merely refer to decisions made by the Executive Department in the handling of matters connected with our foreign relations such as the political status of foreign governments, the qualifications of Ambassadors and foreign representatives, and the like. It would be indeed an anomalous and unheard-of principle in our Republican form of government if the Department of State were permitted to make a conclusive determination as to the meaning of Acts of Congress which declare the extent of the national domain. The principle of the separation of powers inherent in our form of government would be utterly destroyed if such power of interpretation could be taken away from the Courts and lodged in the executive.

However this Court has many times held that an executive or administrative construction of a statute, though sometimes entitled to weight, is not controlling on the Courts.[6]

Counsel for plaintiff on page 76 of his brief insti-

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[6]Burnet v. Chicago Portrait Co., 285 U. S. 1, 16, 76 L.Ed. 587, 595;

Automatic Canteen Co. v. F.T.C., 346 U. S. 61, 74, 97 L.Ed. 1454, 1463.

tutes a discourse on the proposition that the State Department's declaration is binding and conclusive on the Court, and cannot be controverted by other evidence or proof, and again quotes British and American cases dealing with the diplomatic status of persons, and the political status of foreign sovereigns. The boundaries of the United States and of the individual States on land and on sea are matters involving interpretation of Acts of Congress, of treaties entered into by the executive with the consent and approval of two-thirds of the Senate, as well as facts of history and other facts of an evidentuary nature. This Court has never held that such matters can be determined by any branch of the Executive Department in a way which cannot be contradicted or controverted in a judicial proceeding. It is a well known rule of law that Courts are not bound to follow, nor are they justified in following an executive construction which is clearly erroneous or which lacks uniformity, clarity or notoriety, and that where such an interpretation is unreasonable and clearly erroneous it should always be rejected.[7]

The statement of the Secretary of State that the

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[7]Sutherland, Statutory Construction, Third Ed., Vol. II, page 514 and 515, Section 5104;

L & N Railway Co. v. U. S., 282 U. S. 740, 75 L.Ed. 672, 684;

Burnet v. Chicago Portrait Co., 285 U. S. 1, 76 L.Ed. 587;

T & P v. U. S., 289 U. S. 627, 640, 77 L.Ed. 1410, 1423;

Norwegian Products Co. v. U. S., 288 U. S. 294, 315, 77 L.Ed. 796, 807.

maritime boundaries of the United States extend only three miles offshore, and that it has always been the policy of the United States to so restrict its maritime boundary, is not in accord with the facts and is utterly erroneous.

In our original brief beginning at page 109, and in Section E of the Appendix filed separately with that brief, we have pointed out numerous instances in which the Department of State has asserted territorial ownership of submerged lands and waters in excess of three miles. This is particularly true in the Gulf of Mexico where the three mile limit has never been asserted. A further discussion of this subject will be made later on in this brief.

A reference to many of the statements made by representatives of the Department of State and quoted on pages 39 to 53 of the plaintiff's brief show that recognition of the three mile rule was either a temporary expedient, or related only to the Atlantic sea board, or both.

The statement of Thomas Jefferson of November 8, 1793 quoted on page 39 of the government's brief specifically states that the United States is entitled to a much broader marginal belt and that the ultimate extent of this nation's claims in the sea is reserved "for future deliberation," and that the three mile limit would be accepted "for the present" and in connection with the war then prevailing among European powers.

John Quincy Adams in his memoirs, Vol. 1 p. 375-6 quotes President Jefferson's views on this subject as follows, (I Moore 703):

> "The President (Mr. Jefferson, in an informal conversation) mentioned a late act of hostility committed by a French privateer near Charleston, S.C., and said we ought to assume, as a principle, that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed. Mr. Gaillard observed that on a former occasion in Mr. Jefferson's correspondence with Genet, and by an act of Congress at that period, we had seemed only to claim the usual distance of three miles from the coast; but the President replied that he had then assumed that principle because Genet, by his intemperance, forced us to fix on some point, and we were not then prepared to assert the claim of jurisdiction to the extent we are in reason entitled to; but he had taken care to reserve this subject for further consideration with a view to this same doctrine for which he now contends."

The misinterpretation given to the letter written by Thomas Jefferson, then Secretary of State, on November 8, 1793, to the British Minister and to Genet, the French Minister, that our nation's maritime boundary was three miles from the seashores was repudiated by President Jefferson. The following is taken from Fulton's "The Sovereignty Of The Sea", 1911, p. 575:

> "It may be mentioned here that the claims

which have been put forward by the United States as to the extent of their territorial or jurisdictional waters have varied greatly on different occasions. The above declaration to M. Genet was, for instance, repudiated by President Jefferson as establishing a fixed limit; and it was claimed that the limit of neutrality should extend '*to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed.*' On another occasion, in a controversy about the right of jurisdiction they claimed that the extent of neutral immunity off the American coast ought at least to correspond with the claims maintained by Great Britain around her own territory, and that no belligerent rights should be exercised within 'the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another.' The American Government endeavored to obtain from England in the same year the recognition of a territorial belt six miles in breadth, and in the draft treaty proposed in 1807 a distance of five miles was in reality specified."

Mr. Jefferson's repudiation of the temporary three mile expedient set forth in his letter of November 8, 1793 and his support for a boundary to the Gulf Stream appears in his 5th Annual Message to Congress on December 3, 1805, quoted on page 115 of our original brief. Following this message of the President, Congress passed the Act of February 10, 1807. This Act requested the President to cause a survey to be made of the coasts of the United States within 20 leagues

of its shores, and authorized President Jefferson to take steps beyond 20 leagues and to the Gulf Stream to serve the commercial interests of the United States. The following provisions are contained in Section 2 of the Act:

> "Sec. 2. And be it further enacted, That it shall be lawful for the President of the United States, to cause such examinations and observations to be made, with respect to St. George's bank, and any other bank or shoal and the soundings and currents beyond the distance aforesaid to the Gulf Stream, as in his opinion may be especially subservient to the commercial interests of the United States."

The policies of the United States respecting its maritime jurisdiction in the sea at the time of Louisiana's admission into the Union, and as reflected in the documents quoted above would justify a marginal belt of territorial waters and submerged lands substantially in excess of three leagues from Louisiana's coast. Other documentary evidence supporting this statement appears on pages 109 and to 119 of Louisiana's original brief.

The Treaty between the United States and Great Britain of November 19, 1794 quoted on page 41 of the government brief did not recognize the range of cannon shot as marking the territorial limits of the two countries in the sea. All that this Treaty stipulated on this subject was that "neither of the said parties shall permit the ships or goods belonging

to the subject or citizens of the other, to be taken within cannon shot of the coast." The purpose of limiting protection to the range of cannon was to relieve either party of engaging in naval warfare further at sea. It was reasonable to stipulate for protection within the range of cannon from the shore, but it would have been an entirely different proposition to agree to protect the ships of another power any greater distance from the shore. This agreement, too, related specifically to the European war prevailing at that time.

The statement of Timothy Pickering on September 2, 1796, quoted on page 42 of plaintiff's brief specifically states that the three mile limit had been fixed "for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war".

The Treaty between the United States and Algiers of July 6, 1815 referred to on page 43 of the United States brief did not limit territorial jurisdiction to three miles but merely agreed that if "either of the contracting parties shall be attacked by an enemy within cannon shot of the fort of the other, she shall be protected as much as is possible."

Similarly, the Treaty of October 20, 1818 with Great Britain (U.S. Brief, page 43) did not fix territorial limits with either Great Britian or the United States. In fact the Treaty did not refer to the waters of the United States at all. In that Treaty the United States merely renounced its right to fish within three miles of the British dominions in America.

Secretary of State Seward is quoted on pages 45 to 47 of plaintiff's brief to the effect that the United States insists uniformly on a three-mile limit. It was Secretary of State Seward who negotiated the Treaty with Russia for the purchase of the Alaska territory in March, 1867. On April 5, 1824, Great Britain and Russia had executed a Treaty fixing the maritime boundaries west of Canada and Alaska "not to exceed 10 marine leagues from the line of coast." This description was made the basis of negotiations between Russia and the United States conducted by the same Secretary Seward. (See Senate Documents Vol. 48, 6lst Cong. 2d Sess., 1909-1910, Treaties, etc., 1776-1909, Vol. 2, p. 1521, Convention ceding Alaska.) Article IV, 2nd Section of the Treaty provides for an Alaska territory maritime boundary not to exceed 10 marine leagues from coast. (2 Malloy's Treaties 1522)

Even though Secretary Seward filed a mild protest with the Spanish Minister in 1862 to accommodate Great Britain in its quarrel with Spain, the fact remains that Spain did not accede. (See Masterson, "Jurisdiction In Marginal Seas", p. 268)

Regarding the claim made for the United States in Mr. Dulles' letter to Mr. Brownell that, traditionally foreign policy fixed the nation's maritime boundary at 3 miles, it is well to note that a careful reading of these treaties and diplomatic exchanges will show that they only subscribed "in principle" to such 3 mile-belt ideas, but that none of these treaties, conventions,

conversations and diplomatic exchanges ever fixed the maritime limit of the United States at 3 miles. (See Masterson p. 399, footnote 54).

A statement of Secretary of State Bayard is quoted on pages 48 and 49 of plaintiff's brief, and in this statement Mr. Bayard indicates that the three mile rule has been settled *in so far as the eastern coast of America is concerned.* In this connection he states that "so far concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles." He further states (U. S. Brief 49) "and during our fishery negotiations with Great Britain we have insisted that beyond the three mile line British territorial waters on the *northeastern coast* do not extend. Such was our position in 1783, in 1794, in 1815, in 1818".

Opinions of other State Department officials and attorneys are quoted on pages 91 and 92 of plaintiff's brief to the effect that the Outer Continental Shelf Lands Act does not extend State or national boundaries beyond three miles from coast. These statements were made during hearings on the Submerged Lands Act, and it is significant that Congress rejected the opinions and conclusions of these witnesses. The Submerged Lands Act as passed by Congress specifically provides that historic boundaries in the Gulf of Mexico are recognized as far as three leagues from the coast line. (Sec. 2b, 67 Stat. 29, 43 U. S. C. 1301 (b).

The statement of Assistant Secretary Morton (U. S. Brief 92) that the claim made by the United States to the seabed, subsoil, and natural resources of the Continental Shelf "is without precedent" is a great understatement in one respect; that is, that it is without support or authority in the Constitution of the United States and in the history of the nation. Never before has the Federal Government made such an unwarranted excursion into the domain and sovereign rights of the States of the Union.

The United States has therefore not uniformly insisted on a limit of three miles to territorial jurisdiction on all of its coasts, and it has particularly not done so with reference to the Gulf of Mexico. In any event the Outer Continental Shelf Lands Act has declared the territorial jurisdiction of the Nation and of the coastal States to extend to the edge of the continental shelf on all the sea coasts of the continental United States.

The Executive Department is not the only department of our government which is charged with responsibility for, and power over, the foreign relations of the United States. Article I, Section 8 of the Constitution delegates to Congress many powers concerning foreign relations including the national defense, commerce with foreign nations, naturalization laws, the definition and punishment of piracies and felonies commited on the high seas, and defenses against the law of nations, declaring war, granting letters or marque and reprisal, and making rules con-

cerning captures on land and on water, and approval by the Senate of all treaties made with foreign nations. This Court has therefore repeatedly ruled that questions relating to the foreign affairs of the nation are committed to the Legislative and Executive Departments of the government.[8]

In *Oetjen v. Central Leather Company*, 246 U. S. 297, 302, 62 L.Ed. 726, 732, this Court said:

> "The conduct of the foreign relations of our government is committed by the Constituion to the executive and legislative — 'the political' — departments of the government . . ."

Since the conduct of our foreign relations is entrusted to the legislative as well as the executive branches of the government, the latter cannot by executive interpretation nullify or modify what Congress sees fit to do in the legislative forum. Nor can Congress contradict or modify the words of a treaty by a subsequent resolution.

In the case of *The Diamond Rings*, 183 U. S. 176, 180, 46 L Ed. 138, 142, we find:

> "The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention

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[8]Oetjen v. Central Leather Co., 246 U. S. 297, 62 L.Ed. 726;
Jones v. U. S., 137 U. S. 202, 212, 34 L.Ed. 691, 696;
U. S. v. Lynde, 11 Wall. 632, 20 L.Ed. 230;
State v. Reynes, 9 How. 127, 13 L.Ed. 74.

> of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated."

If the Congress cannot thus explain away a treaty, by what superior prerogative can the Secretary of State do so?

Plaintiff's entire argument on this subject is based on a false premise. That premise is that the question of boundary in this case involves foreign relations. This Court has made it clear that controversies over boundaries between the United States and any of the States of the Union do not involve political determinations of an international nature. Mr. Justice Harlan pointed out the difference between the rules governing the determination of domestic and those governing the determination of international questions in boundary disputes, in the case of *United States v. Texas*, 143 U. S. 621, 638-641, 36 L.Ed. 285, 290-291, thus:

> "In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the states of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites Foster v. Neilson, 27 U. S. 2 Pet 253, 307, 307 (7:415, 433, 434); Cherokee Nation v. Georgia, 30 U. S. 5 Pet. 1, 21 (8:25, 32); United States v. Arredondo, 31 U. S. 6 Pet. 691,

711 (8:547, 554); and Garcia v. Lee, 37 U. S. 12 Pet. 511, 517 (9:1176, 1178).

In Foster v. Neilson, which was an action to recover certain lands in Louisiana, the controlling question was to whom the country between the Iberville and Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired . . .. After examining various articles of the Treaty of St. Ildefonso, Chief Justice Marshall, speaking for the court, said:

'In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided . . .'

In United States v. Arredondo, the court, referring to Foster v. Neilson, said: 'This court did not deem the settlement of boundaries a judicial but a political question — that it was not its duty to lead, but to follow the action of the other departments of the government.' The same principles were recognized in Cherokee Nation v. Georgia and Garcia v. Lee.

These authorities do not control the present case. They relate to question of boundary between independent nations, and have no application to a question of that character arising between the general government and one of the states com-

posing the Union, or between two states of the Union. . . that a controversy between two or more states, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court...

In view of these cases, it cannot, with propriety, be said that a question of boundary between a Territory of the United States and one of the states of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy..."

Although the above quoted case did not involve the external boundaries of the United States the principle is not different.

As between the United States and other nations, the political branches declare the extent of our national boundaries. As between the states, or the states on the one hand and some adjoining Federal territory on the other, the boundary is a judicial question. Whether Louisiana's boundary is three leagues from our coast is specifically left a judicial question by the Congress and the President. Whether Louisiana's boundary is further from our coast is a constitutional question which we raise.

The Government's brief states (page 11):

"Under the submerged Lands Act, the location of the State boundary is left to be judicially ascertained. We consider it fundamental that the state boundary cannot be farther seaward than

> the national boundary. The location of the national boundary is a political matter to be determined *by the political branches* of the government; their determination regarding it is binding upon the courts and is subject to judicial notice."

We agree with all this. From that point the government's brief proceeds to a conclusion utterly ignoring the import of what was just said.

For the Submerged Lands Act did determine a political matter. It was passed by Congress and signed by the President and is the determination by b*oth political branches* which is binding upon the courts so far as it is legal.

In the appendix to the brief on page 167 the Government quotes a portion of the Submerged Lands Act, thus:

> "SEC. 4 (43 U. S. C. (1952 ed.) Supp. III, 1312). SEAWARD BOUNDARIES . . . Any State admited subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast . . . Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it

was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

"SEC. 9 (43 U. S. C. (1952 ed.) Supp. III, 1302). Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in Section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed."

The *political branches* of the government thus recognize that a state's seaward boundary could be beyond three geographical miles, if so previously approved by Congress or if it so existed when the state entered the Union. (See page 3 of the Government's brief)

Since the state boundary cannot be farther seaward than the national boundary, this is an absolute statement by the political branches of the Government that the national boundary extended farther seaward than three miles when the states entered the union.

Nothing to the contrary which may have been said by a single member of the Government can override this clear and deliberate determination by both political branches of the government made for this issue specifically. This is so whether it be the self serving letter of June 15, 1956 from Mr. John Foster

Dulles to Mr. Brownell wherein the writer undertakes to decide this case for the court, or whether it be from any one else at any earlier time and directed to a different problem elsewhere and related here, if at all, only by analogy.

The boundary remains to be judicially determined.

There remains also for judicial determination the validity of the congressional limitations of three leagues.

The Congress knew the content of the Enabling Act and of the Act of Admission, and that the 1812 Constitution of Louisiana contains the same definition of the limits of the state.

The Congress also knew that this Honorable Court had held three times that there had been no *express* declaration by the Federal Government that any of the states owned the submerged lands off their coasts.

Nevertheless, the Congress having supplied the political determination as to the outer national boundary which the court had found to be lacking and that the national boundary extended farther than three miles, specifically left for judicial determination and without "questioning or in any manner prejudicing" the *prior* existence of state boundaries beyond three miles.

All of this solemn procedure was meaningless entirely unless it meant, as we say it does, that this Honorable Court should seek here the meaning of prior

enactments by the State of Louisiana and by the federal Congress.

The Act admitting Louisiana to the Union included "all islands within three leagues of the coast." The government says in its brief that this "does not appear to mean 'including all waters and submerged lands within three leagues of the coast'."

The case of *Louisiana vs. Mississippi* (202 U. S. 1, 50 L.Ed. 913) clearly shows that the description of the boundaries of Louisiana in the Act of admission was intended to include all submerged lands and waters, as well as all islands, within three leagues of the coast. The Louisiana case just cited points out the wording of the Act that the newly admitted State of Louisiana consists of that part of the territory of Louisiana. . . "contained within the following limits".

The following excerpts from the opinion in the case of Louisiana v. Mississippi support the point for which we contend:

> "In order to reach the open waters of the Gulf of Mexico the line ran through Lake Borgne. . . to get from Lake Borgne into the open water of the Gulf of Mexico beyond Chandeleur Island and around the Western boundary of Louisiana, it was necessary, as Louisiana contends, to follow the deep water channel. . . into the open Gulf." (202 U. S. 37, 50 L.Ed. 925)
>
> "The Eastern boundary thus described is a water boundary, and, in extending this water boundary to the open sea, or Gulf of Mexico, we

think it included the Rigolets and the deep water sailing Channel to get around to the Westward." (202 U. S. 43-44, 50 L.Ed. 928.)

"And when the Louisiana Act used the words: 'Thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast', the coast referred to is the whole coast of the State." (202 U.S. 46, 50 L.Ed. 929.)

"We are of the opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana; that the Louisiana marshes at the eastern extremity thereof form part of the coast line of the State." (202 U. S. 47, 50 L. Ed. 930.)

The decree in the above quoted case reads, in part, as follows: "The State of Louisiana, complainent, is entitled to a decree recognizing and declaring the real, certain, and true boundary. . . to be the deep water channel sailing line emerging from the most Eastern mouth of Pearl River into Lake Borgne, extending through the Northeast corner of Lake Borgne. . . to the Gulf of Mexico, as delineated on the following map made up of the parts of charts number 190 and 191 of the U. S. Coast and Geodetic Survey." (202 U. S. 58, 50 L. Ed. 934.)

These maps referred to in the decree, and other maps published as a part of the courts opinion show a water boundary around the entire coast of Louisiana which includes islands, submerged lands, and waters withing three leagues of the entire coast of the State.

The Government is hard pressed to find some way of arguing that the submerged lands connecting the mainland with the islands within three leagues of the coast does not belong to Louisiana. It seeks to find an analogy by saying that though the United States received by the 1783 Treaty of Paris islands within 20 leagues of the shores of the United States. ". . . That has never been understood as meaning that the boundary of the United States was a line twenty leagues from shore in the sea; on the contrary, the United States has consistently taken the position that its boundary in the sea is three nautical miles, or one league, from the shore."

If the United States took the position that its boundary was only three nautical miles from the shore in the Gulf of Mexico this would be analagous. And, this is what the court thought when these cases were lost here. But since then the *political branches* of the government have *unmistakably determined* that the national boundary in the Gulf of Mexico is at least three leagues from the coast and the court, as the government says, is bound by that. We think this court so understood, in denying a writ of certiorari in the *Fontenot Case*, and we hope for an affirmative declaration to that effect now.

In 1812 no one was extracting oil and gas from the seabed. No need for precise and express statements of the sort now essential were then needed. But ever since 1812 to the knowledge of the federal government Louisiana Citizens have taken oysters from the sea-

bed, have been held amenable to the laws of Louisiana on the islands within three leagues of our coast and in going to and fro.

No conceivable reason has been, or we think could be, advanced why the federal government by the Enabling Act intended and could have intended to retain the seabed between the islands and the mainland and we submit that it did not do so.

As will be shown in the following section of this brief the statement made by the Secretary of State for the purpose of deciding this controversy, and the statements made by former Secretaries that the United States has consistently and uniformly maintained that its boundaries extend only three miles into the sea are not correct statements of fact or policy. The Court, in line with its prior decisions on the subject, should therefore disregard these statements.

The statement of the Secretary of State that the seaward boundaries of the United States are now only three miles offshore assumes that the Court cannot read and interpret the Outer Continental Shelf Lands Act which specifically extends federal jurisdiction, control and power of disposition seaward to the edge of the Continental Shelf. There is no provision in the Constitution or the laws of the nation which confers on the Department of State the power to interpret and conclusively decide the meaning of this Act, or any other Acts of Congress, relating to the extent of the sovereignty of the United States and the separate States of the Union. The determination of

national and State boundaries is the function of Congress acting within Constitutional limitations. The duty of interpreting the acts of congress is committed to the courts and not to the Executive Department of the government.

IV

THE UNITED STATES HAS CONSISTENTLY RECOGNIZED AND APPROVED A THREE LEAGUE BOUNDARY IN THE GULF OF MEXICO UNTIL THE LIMIT WAS DECLARED TO EXTEND TO THE EDGE OF THE CONTINENTAL SHELF IN 1953.

The fourth defense set forth in Louisiana's answer, pages 21-23, sets forth various treaties and Acts of Congress approving a three league boundary in the Gulf of Mexico. Plaintiff's brief does not set forth any acts of congress or treaties which declare that the marginal belt is less than three leagues in width. However, on page 19 of the government brief the statement is made that the United States has never recognized that States or Nations bordering on the Gulf of Mexico have boundaries extending three leagues therein. This subject is completely covered in our original brief beginning at page 96 and ending at page 106, and that argument need not be repeated here. However, the State does desire to answer specific statements made in the Plaintiff's brief regarding the purpose and effect of the various laws and treaties made

by the United States with reference to its boundary in the Gulf of Mexico.

On page 19 of the government's brief the statement is made that our diplomatic recognition of the Republic of Texas was not a recognition of the territorial boundary which it claimed, including a boundary three leagues in the Gulf, and that our annexation of Texas reserved all questions of boundary. This is not an accurate statement of the situation. The Joint Resolution of Congress of March, 1845 provided for the annexation of Texas to the United States and stated "that Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas; . . . in order that the same may be admitted as one of the States of this Union." (4 Miller's Treaties, 689.)

The second paragraph of the Resolution for the annexation of Texas stated that the State was to be formed "subject to the adjustment by this government of all questions of boundary that may arise with other governments." (4 Miller's Treaties, 689.) This is the only provision relating to the boundary of Texas in the Resolution of Annexation. Prior to this date the boundary between Texas and the United States had been fixed by a Convention for the marking of the boundary on April 25, 1838 (8 Stat. 511, 4 Miller's Treaties, 133). In the negotiation of this Treaty both of the governments recognized the boundaries fixed by the earlier treaties of the United States with Spain

in 1819 and with Mexico in 1828 as binding, and the boundary was agreed upon as beginning at the Mouth of the Sabine River three leagues from land and running west along the Gulf three leagues from land to the Mouth of the Rio Grande. (See notes of the Department of State, 4 Miller's Treaties 135, 136.) There can be no doubt that the United States recognized the boundaries of Texas in the Gulf of Mexico as extending three leagues seaward at that time.

This Court recognized the fact that the Texas boundaries extended three leagues into the Gulf of Mexico when Texas was annexed to the United States in 1845. In the case of *United States v. Texas*, 339 U.S. 707, 717, 94 L.Ed. 1221, 1227, the Court, after setting forth Texas history relating to its three league boundary in the sea, stated:

> ". . . Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words we assume that it then had the dominium and imperium in and over this belt which the United States now claims . . ."

The assumption stated by the Court was necessarily made from the facts recited in the opinion.

Plaintiff states on page 19 of its brief that the Treaty of Guadalupe Hidalgo of 1848 and the Gadsden Treaty of 1853 extending the boundary between the United States and Mexico three leagues into the

Gulf were only to prevent smuggling at that point, and did not recognize any right to a three league maritime belt. This is a distortion of the meaning of the language of these treaties which cannot be justified by the words of the treaties themselves. Nor does it make sense to say that these treaties "were only *to prevent smuggling at that point.*" The boundary did not happen to be a point. Article V of the Treaty of Guadalupe Hidalgo, (9 Stat. 942-3, 5 Miller's Treaties 207, 213) describes a *boundary line* between the two Republics commencing in the Gulf of Mexico three leagues from land and ending in the Pacific Ocean almost 2000 miles away. Nothing is said in the Treaty with regard to smuggling at any point nor is there any indication that the three league boundary seaward into the Gulf of Mexico should be regarded as surplusage.

Likewise in the Gadsden Treaty of 1853 (10 Stat. 1031, 6 Miller's Treaties 293) a boundary between the two Republics is described as beginning in the Gulf of Mexico three leagues from land and, with certain additional territory added, following generally the line described in the Treaty of Guadalupe Hidalgo. In the notes to the above Treaty found in Volume 6 of Miller's Treaties various boundary maps that were authenticated pursuant to the provisions of the Treaty are described. Map No. 1 is thus described on page 398:

"Map 1 covers the boundary from a point

in the Gulf of Mexico, 'three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte . . . from thence, up the middle of that river, following the deepest channel', to a point above Brownsville, Texas. It is entitled, 'Boundary Between The United States And Mexico Agreed upon by the Joint Commission under the treaty of Guadalupe Hidalgo; Surveyed in 1853 under the direction of Bvt. Major W. H. Emory, Corps of Topographical Engineers, Chief Astronomer and Surveyor; by Mr. Cha Radziminski, Prin. Ass. Surveyor, and Mr. Arthur Schott, Ass. Surveyor'."

In the Map Appendix filed with it's original brief, Louisiana submits two official maps showing the International Boundary between the United States and Mexico three leagues seaward in the Gulf of Mexico.

Map No. 6, prepared by the Consulting Engineers of the International Boundary Commission, United States and Mexico, shows the three league boundary in the sea, and is entitled: "Sheet No. 7, Topographical Map of the Rio Grande from Roma to the Gulf of Mexico showing Boundary between the United States and Mexico."

Map No. 7 is described as follows:

"REDUCED SCALE REPRODUCTION OF MAP SHEETS 29 and 30 OF "Department of State — PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION, UNITED STATES AND MEXICO — Joint Report of the Consulting Engineers on Field Operations of 1910-

1911. American Section." (Department of State, 1913).

This map also shows a line into the Gulf which has the inscription: "International Boundary Begins Three Leagues from land and opposite the Mouth of the Rio Grande." Both of these maps show the end of this surveyed three league boundary line to be in water 27.3 meters deep.

Nothing in the Treaty or in the notes to the Treaty indicate that the boundary between the two Republics was established merely to prevent smuggling at a certain point, and there is nothing to negative the existence of a three league maritime belt which is necessarily implied in the language of the Treaty.

On page 47 of the government brief a letter from Secretary of State Hamilton Fish is quoted wherein he refers to the Treaty of Guadalupe Hidalgo and states "that it was probably suggested" by the Act of Congress authorizing the revenue-cutters of the United States to board vessels any where within four leagues of their coast. The Secretary then states that the Treaty was probably designed "for the same purpose, that of preventing smuggling."

Even if the purpose of the treaty were to prevent smuggling, the fact remains that the extensive boundary fixed for that purpose was a boundary extending three leagues into the Gulf, which necessarily meant that the territories of the two nations extended seaward that distance. All boundaries, whether public

or private, are fixed with an idea of maintaining territorial integrity and preventing trespassing. Smuggling is an act of trespass and the fixing of a boundary to prevent it does not alter the fact that a territorial boundary has been fixed for all purposes.

Secretary of State Fish in this communication was merely temporizing with the British Foreign Minister, and his speculation as to his probable purpose of the Treaty of Guadalupe Hidalgo can be in no sense be considered as an executive determination. As pointed out hereinabove the Secretary of State is not the sole judge of the meaning of the language of treaties. This particular Secretary came along nearly 40 years after the treaty referred to had been made. In any event the Court is the proper arm of the government to determine the meaning of words and phrases used in treaties made by the President with the concurrence of the United States Senate. As stated in *Jones v. Meehan*, 175 U.S. 1, 32, 44 L.Ed. 49, 62, the Court said:

> ". . . The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. Wilson v. Wall, 6 Wall. 83, 89, 18 L.Ed. 727, 729; Reichart v. Felps, 6 Wall. 160, 18 L. Ed. 849; Smith v. Stevens, 10 Wall. 321, 327, 19 L.Ed. 933, 935; Holden v. Joy, 17 Wall. 211, 247, 21 L.Ed. 523, 535."

In the light of the authorities set forth hereinabove and in part III of this brief the Court in construing treaties entered into by the United States is not bound by the diplomatic correspondence of the Department of State. It would be an anomaly to permit an appointed official to distort the language of treaties and statutes passed by the Congress. Since the foreign affairs of the nation are under the jurisdiction of both the Legislative and the Executive Departments of the government, neither should be permitted to effectively contradict the acts of the other, and statutes as well as treaties should be construed in accordance with the ordinary and accepted meaning of the words used.

In the case of *The Amiable Isabella*, 6 Wheat. 1, 72, 5 L.Ed. 191, 208, this Court emphasized the fact that treaties must be construed in accordance with their language, and not otherwise, saying:

> ". . . This court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties . . ."

Similarly, in *Sullivan v. Kidd*, 254 U. S. 433, 439, 65 L.Ed. 344, 347, your Honors held:

> "Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction, with a view to giving a fair operation to the whole. 5 Moore, International Law Dig. 249 . . ."

In the interpretation of contracts this Court has many times held that the words in a statute should be given their common meaning and that common terms in a statute are presumed to have been used in their common sense.[9]

Since the word "boundary" was repeatedly used in the treaties made by the United States with Spain, Mexico and Texas, and the line shown on the surveys made pursuant to such treaties are described as boundary lines, the term "boundary" should be used in its generally accepted sense. The word "boundary" is thus defined in Bouvier's Law Dictionary (3rd Rev. p. 384):

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[9]Wolford Realty Co. v. Rose, 286 U.S. 319, 76 L.Ed. 1128; Old Colony R. Co. v. Commissioner of Internal Rev., 284 U.S. 552, 76 L.Ed. 484;

Columbia Water Power Co. v. Columbia Elec St. Ry Co., 172 U.S. 475, 43 L.Ed. 521.

"*Boundary.* Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation."

A similar definition is contained in Webster's International Dictionary (2nd ed., p. 317) where it is referred to as "that which marks a bound, as of a territory."[10]

It does not require a grade school education to know that boundaries are lines which mark the limit and the extent of any piece of ground or territory. The word is therefore a very common word. However, United States counsel on page 97 of his brief says that Congress has used the word boundary "as a term of art in defining the extent of the rights granted to the States." There is nothing in any of the treaties which fix the United States boundaries three leagues in the Gulf, nor is there anything in the diplomatic correspondence concerning these treaties which suggests that the word "boundary" is a term of art or that it has any meaning other than that of the commonly accepted definition of the term. Opposing counsel gives no authority for his statement that this word is a term of art other than his own *ipse dixit.* The only occasion that we know of where a boundary is

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[10]See also: 5 Words and Phrases (Perm. ed.) 729.

a term of art is in the British game of Cricket where "a hit to the boundary" counts a definite number of runs. Even in the game of Cricket the boundary is a line which encloses a definite plot of ground on which the players sport.

Without laboring the subject too much we might refer to the statement in Words and Phrases (Perm. ed.), page 729:

> " 'Boundary' is a word having no technical signification."

There is therefore no need to look for some curious or narrow definition of the term. As this Court said in *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U. S. 552, 560, 76 L.Ed. 484, 489:

> ". . .As was said in Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370, 69 L.ED. 660, 662, 45 S. Ct. 274, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover' . . ."

Louisiana in its answer and in its original brief refers to the Act of June 25, 1868, 15 Stat. 73, readmitting Florida to the Union, and approving Florida's boundaries five leagues in the Gulf. (This was subsequently reduced to three leagues in the Constitution of 1885) However, plaintiff's brief on page 19 says this was not an approval of Florida's territorial limits but was only a determination that Florida had estab-

lished a Republican form of government. Congress and this Court have both found to the contrary. By an Act of June 20, 1906, 34 Stat. 313, Congress passed a law regulating the taking of sponges and this act was interpreted by this Court in the case of *Abbey Dodge v. U. S.*, 223 U. S. 166, 56 L.Ed. 390. In that case the defendant was charged with illegally taking sponges from the waters of the Gulf of Mexico and the straits of Florida. After holding that the States own their territorial waters and the fish in them, this Court said (223 U. S. 177):

> "By the interpretation which we have given the statute, its operation is confined to the landing of sponges taken outside of the territorial limits of a State, and the libel does not so charge ----that is, its averments do not negative the fact that the sponges may have been taken from waters within the territorial limits of a State. . ."

The Attorney General of the United States had argued that because the United States has the right to regulate foreign commerce and since the sponge beds were from 15 to 60 or 65 miles offshore the United States had jurisdiction thereof (223 U. S. 177). It is therefore evident that the Court in referring to the territorial limits of the State was referring to its limits in the Gulf of Mexico.

Congress recognized the fact that Florida had territorial limits extending into the Gulf of Mexico and must have known what these limits were when it passed the Act of August 15, 1914, 38 Stat. 692, 16

U. S. C. 781, regarding the taking of sponges in the waters of the Gulf of Mexico or the Straits of Florida. Section 1 of that Act reads as follows:

> § 781. *Taking or catching, in waters of Gulf or Straits of Florida, commercial sponges of less than prescribed size, and landing or possession of same*:
>
> It is unlawful for any citizen of the United States, or person owing duty of obedience to the laws of the United States, or any boat or vessel of the United States, or person belonging to or on any such boat or vessel, to take or catch, by any means or method, in the waters of the Gulf of Mexico or the Straits of Florida outside of State territorial limits, any commercial sponges measuring when wet less than five inches in their maximum diameter, or for any person or vessel to land, deliver, cure, offer for sale, or have in possession at any port or place in the United States, or on any boat or vessel of the United States, any such commercial sponges. Aug. 15, 1914, c. 253, § 1, 38 Stat. 692."

In thus limiting the jurisdiction of Congress to an area beyond the territorial limits of Florida in the Gulf of Mexico Congress has undoubtedly recognized the well known fact that Florida boundaries do extend three leagues into the Gulf of Mexico.

The Congressional Committees that recommended passage of the Submerged Lands Act were not ignorant of the fact that the boundary of Texas and Florida both extend three leagues into the Gulf of

Mexico. House Report No. 215, 83rd Congress, 1st Session makes the following statement on this subject, pages 43 and 44:

> ". .In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico. Texas' boundary was fixed 3 marine leagues into the Gulf of Mexico at the time it was admitted to the Union in 1845 by the annexation agreement . . .
>
> These affirmative acts by the Congress, and its failure to deny State ownership at any time in our history, establish conclusively that the congressional policy, at least since 1850, consistently has been to recognize State ownership of the lands in question."

The United States brief on page 53 refers to a Mexican decree of August 30, 1935 which is the basis for a protest by the Department of State against Mexico's claim to this maritime belt. Plaintiff's counsel does not set forth the rest of the diplomatic correspondence on this subject. This correspondence terminated in a letter from the Department of State to the Mexican foreign office on May 23, 1936. In this letter the United States admitted that Mexican territorial waters extended three leagues from land in the Gulf of Mexico by virtue of the terms of the Treaty of Guadalupe Hidalgo, and limited its protest to that portion of the coasts of Mexico which bordered on the Pacific Ocean. The following paragraph is taken

from the reply of the Department of State of the United States. (I Hackworth, 640, 641):

> "The treaty provisions (art. V of the treaty of 1848) in question read as follows:
>
> 'The dividing line between the two Republics shall begin in the Gulf of Mexico, three leagues from land at the mouth of the Rio Grande. . .'
>
> The Foreign Office has not taken into account the remaining words of the paragraph from which the quotation is taken, which words delimit the boundary line between its eastern end in the Gulf of Mexico and its western end which is said to be 'the Pacific Ocean.' It will be observed that the Western limit of the boundary line is not stated to be 'three leagues from land' . . .
>
> Wholly aside from the question of the boundary line between the two countries, there remains to be considered the total great extent of the Mexican coast and the bordering territorial waters. To say that because the United States agreed that in one area, so far as the United States was concerned, Mexican territorial waters extended three leagues from land, therefore Mexico was entitled to claim such an extent of territorial waters adjacent to her entire coast line is an unwarranted deduction from the terms of Article V of the Treaty of 1848."

The entire diplomatic correspondence on this subject appears in Hackworth's Digest of International Law, Volume I, pages 639-642.

V

SUBMERGED LANDS WERE ATTRIBUTES OF SOVEREIGNTY AND PASSED TO THE STATES UPON ADMISSION. SPAIN AND FRANCE HAVE ALWAYS CLAIMED OWNERSHIP OF TERRITORIAL WATERS AND SUBMERGED LANDS INCLUDING THOSE BORDERING THE LOUISIANA TERRITORY IN THE GULF OF MEXICO

In its second defense in its answer, pages 13-17, Louisiana claims historic boundaries extending to the 27th parallel of latitude. This boundary is based upon the Proclamation of LaSalle of April 9, 1682 wherein he took possession of Louisiana, ". . . the seas, harbors, ports, bays, adjacent straits" as far as the Mouth of the Mississippi River ". . . . in the sea, or Gulf of Mexico, about the 27th degree of the elevation of the North Pole." Government counsel on pages 111-114 says that LaSalle was in error in that he believed that the Mouth of the Mississippi River was at the 27th parallel of latitude, and that LaSalle only intended to claim the territory as far as the Mouth of the River. In support of this statement he refers to the proces'-verbal of the Notary who reported the expedition and who stated in his report that the place where LaSalle erected a column and a cross and laid claim to Louisiana was at about the 27th parallel of latitude. From this report of the Notary plaintiff's counsel says that LaSalle mistakenly believed that he was then at about the 27th parallel of latitude.

Plaintiff's counsel is the first person in 275 years, to the day, to suggest that LaSalle's claim to the Louisiana territory to the 27th parallel of latitude was made in error. As pointed out in our original brief, John Quincy Adams, Secretary of State on March 12, 1818, addressed a letter to the Spanish Minister De Onis wherein he stated that of all enterprises of discovery on this continent, none "is more certain, authentic, and particular than those of LaSalle." It is evident that it was the Notary and not LaSalle who was in error, because LaSalle took possession not only of the province of Louisiana but of "the seas . . . as far as . . . the 27th degree of the elevation of the North Pole, and also to the mouth of the River of Palms." Old maps show that the River of Palms emptied into Palm Sound, which is now Sarasota Bay, and is located at the 27th parallel. Current maps show the Mouth of the Mississippi River at the 29th parallel of latitude, and in view of the ease of determining latitude by means of the quadrant, even in olden times, it cannot be reasonably concluded that LaSalle would have committed an error of 2 degrees in the reading of his quadrant.

Beginning at page 111 of Plaintiff's brief there is an argument that neither France nor Spain claimed the territorial jurisdiction seaward of the shore of Louisiana. Plaintiff does not cite any treaties, laws or other documents whereby either France or Spain disclaimed any title or right to territorial waters in the Gulf of Mexico and none of the treaties or diplomatic

correspondence quoted in the brief have this effect. On the contrary Spain and France have both claimed ownership of territorial waters both on the European Continent and in the waters bordering their possessions in America, including the Gulf of Mexico.

Plaintiff's statement that France has never claimed territorial jurisdiction seaward of the shore of Louisiana simply ignores the facts of history and of international law. That nation has been a party to many treaties with other world powers wherein it has recognized territorial jurisdiction in America not less than three leagues and on some coasts to the extent of thirty leagues in the sea. These treaties are set forth in Section F of the Appendix filed with Louisiana's brief. These treaties include the following:

Treaty of Utrecht, March 4, 1713 between Great Britain, France, Spain, and other European nations (Journal of the House of Commons, 1713, pages 229, 230)

Preliminary Articles of Peace signed at Fontainebleau, November 3, 1762 by Great Britain, France and Spain (3 Davenport, European Treaties 227-231)

Definitive Treaty of Peace signed at Paris, February 10, 1763 between Great Britain, Spain and France, (Journal of the House of Commons, Vol 29 p. 364-367)

Definitive Treaty of Peace and Friendship between Britain and France at Versailles September 3, 1783, (Journal of the House of Commons, Vol. 29, p. 588-594)

Aside from the Proclamation of LaSalle in 1682 these treaties, executed and observed over a long period of time, establish a definite policy of France and the other world powers of the 18th century to recognize and approve the ownership of territorial waters to the extent of thirty leagues and not less than three leagues offshore. Treaties, custom, and usage are the foundations of international law. The Territory of Louisiana is no exception to the rule.[11]

French Juriconsults at the time of, and prior to the Louisiana Purchase, all asserted the right of France to territorial waters on the Continent and in America. See Section G of Louisiana's Appendix quoting:

> Vattel, "*Le Droit des Gens*" (1758) Vol. I, p. 247, 249;
>
> De Rayneval, "*Institutions du Droit de la Nature et des Gens*" (1803) p. 161;
>
> G. Masse' "*Le Droit Commercial dans Ses Rupports avec le Droit des Gens*" (1844) Vol. I p. 114-115.

On October 31, 1563, Phillip II of Spain promolgated an Ordinance in which he asserted territorial jurisdiction "within sight of land or port" on the shores of Spain and its possessions. See Ernest Nys "Le Droit International" Vol. I, p. 542. This Ordinance

[11]The Paquete Habana, 175 U.S. 677, 44 L.Ed. 320
Hilton v. Guyot, 159 U.S. 113, 40 L.Ed. 95
U. S. v. de la Maza Arredondo, 6 Pet. 691, 8 L.Ed. 547
The Antelope, 10 Wheat. 66, 6 L.Ed. 268

is referred to by the Spanish Ambassador De Onis in a communication to the Department of State at Washington under date of January 5, 1818, wherein he said: (Am. State Papers, Vol IV, p. 455)

> ". . . in pursuance of a royal order issued for that purpose . . . Spain was established as the mistress and possessor of all that coast and territory, and she never permitted foreigners to enter the Gulf of Mexico, nor any of the territories lying around it, having repeated the royal order by which she then enforced the said prohibition, and charged the Spanish viceroys and governors with the most strict observance of the same."

In this same document the Spanish Minister after describing the discoveries and conquests of the Spanish Crown in North and Central America goes on to say (Am. State Papers, Vol IV, p. 456):

> "These dominions and settlements of the Crown of Spain were connected with those which we had on the Gulf of Mexico, that is to say, with those of Florida and the coasts of the province of Texas, which, being on the same Gulf, must be acknowledged to belong to Spain, since the whole circumference of the Gulf was hers; which property, incontestably acquired, she had constantly maintained among her possessions, not because she occupied it throughout its whole extent, which was impossible, but on the principle generally recognized, that the property of a lake or narrow sea, and that of a country, however extensive, provided no other Power is already established in the interior, is acquired by the occupation of its principal points."

A Treaty between Spain and Great Britain in 1670 (I Ferrater 327-328) specifically provided in Article 15 that the parties recognized the rights and dominions of each other in the American seas and waters.[12]

Again in 1742 Spain in a Treaty with Denmark, excepted "the countries and seas of the Spanish Indies" from the general provision establishing free trade between the contracting parties (I Ferrater 89). Spain used the words "Indies" to apply to America and especially the Spanish dominion there (Shepherd's Historical Atlas, 1956, p. 107-8).

We pointed out in our original brief the fact that Spain recognized the existence of territorial waters on the continent of North America in the preliminary Treaty between Great Britain, France and Spain of November 3, 1762 as well as in the Treaty of Paris of February 10, 1763 (I Marten's 92, 108). Since in these treaties Great Britain's right to exclude France from fishing within three leagues of the Canadian coast in some places and up to thirty leagues in others, was thus recognized by Spain, it is proper to treat this as a recognition by the latter of an exclusive right of a riparian State to the territorial seas on the North American Continent.

In a Treaty of Peace and Amity between Spain and Tripoli, September 10, 1784 (I Ferrater 488-489) Article 4 prohibited the capture of any vessel within ten leagues "from coasts of the dominions of Spain."

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[12]Esteban de Ferrater, "Codigo de Derecho Internacional", (Barcelona, 1846).

The Treaty between Spain and Great Britain of October 28, 1790 (I Ferrater 332-333) has already been referred to in our original brief wherein Britain and Spain recognized their respective rights to territorial waters within the space of ten leagues from any part of the coast already occupied by the other in the Pacific Ocean and the South seas on the American coasts.

In the Treaty between Spain and the United States of October 27, 1795 (8 Stat. 138, 2 Miller's Treaties 318) provision is made in Article 6 whereby "Each party shall endeavor by all means in their power to protect and defend all vessels and other effects belonging to the Citizens or Subjects of the other, which shall be within the extent of their jurisdiction by sea or by land."

While this Treaty did not define the extent of the territorial seas the United States and Spain both recognized that each possessed rights of dominion and ownership in the marginal seas.

On January 16, 1817 Spain protested the seizure of a Spanish ship "within sight of the Balize" which was then a Gulf port at the Mouth of the Mississippi River. The communication stated that this capture by a pirate vessel was "manifestly in violation of the territory of the United States" (Letter from Spanish minister Don Louis De Onis to Department of State, Janauary 16, 1817, 5 British State Papers 368-71).

The domestic laws of Spain have always recogniz-

ed and regulated the maritime belt both in continental Spain and in the Spanish dominions in America. The "Recopilacion de Indias" (1680) contained minutely detailed regulations for the establishment and conduct of sedentary pearl fisheries in the new world. This was an assertion of the territorial jurisdiction of Spain to the natural resources of the bed of the sea. It will be remembered that the British Commonwealths have from time immemorial claimed such rights to natural resources in the bed of the sea.

Spanish authorities on International Law have asserted the rights of Spain in the territorial seas. Esteban de Ferrater, in his Code of International Law, Vol. II, page 151 says:

> "The sea belongs to the State which it washes only so far as a distance of three leagues measured by a line parallel to the coast."

Abreu y Bertadano, in his "Tratado Juridico-Politico Sobre Presas de Mer," (1746), says with reference to the open sea (pages 68-69):

> "But since the subjection of these seas is repugnant to the Law of Nations and to their own nature, our only question concerns the Adjacent Seas, which, without any doubt it cannot be denied, are like the ports which they join, equally subject to dominion.
>
> Assuming that, I believe that the Prince which is the Sovereign of a region, province or island is also sovereign (just as he is of the land territory of a section of the sea which washes and

surrounds it for a space of 100 miles seaward. This is an infallible tradition among the jurists of all nations."

As an authority for this last statement he cites the Italian author, Crespi. He later defends this broad extent of territorial waters as against the then existing British claim of only two leagues on the ground that the narrowness of the channels around England prevents broad claims which would interfere with the rights of other nations and with the normal course of navigation, whereas Spain is not, geographically speaking, faced with the same difficulty (page 78-81).

Don Antonio Riquelme, who published his treatise *Elementos de Derecho Publico Internacional* in 1849 while he was Chief of Section in the Spanish Ministry of State, represented the official view of the Government of Spain. This is a permissible inference from the position he occupied in that government. His work was published with royal permission. From our point of view, his is therefore the most authoritative source among these later publications. In Volume I, page 23, he says:

"By the term territory belonging to a State is understood not only its land territory, but also its .... littoral seas."

The author further states on page 200 of this work:

"The rule recognized by the law of nations for determining the legal status of the littoral

seas is based on the idea that all is lawful for the lord of the coasts which his own preservation demands . . ."

He again states on page 213:

"Therefore, the opinion of the best publicists who have written on this subject is that each State, according to the physical characteristics of its adjacent seas, the configuration of its coasts, its real means of defense and the kind of dangers to which it is exposed, may determine with the knowledge of other nations, how far the action of its coast guard and the exercise of its jurisdiction shall extend; and that this maritime limit thus established, must be respected if freedom of navigation is not thereby hindered.

"The maritime limits of Spain have been fixed at 6 miles since 1760 by the royal decree of December 17 of that year, confirmed by royal resolution of May 1, 1775, and by Article 15 of the royal decree of May 3, 1830. The royal orders which determine the extent of the sea in which the vigilance of the coast guard can be exercised, and the kind of ships which may be the object of this policing and the circumstances under which such precautions must be taken, have been consented to by all the maritime powers, because no protest or claim has been presented concerning them."

The foregoing statement regarding the maritime limits of Spain having been fixed at six miles apparently refers to the territory of Spain on the contnent of Europe.

It therefore appears that Spain has always claim-

ed territorial waters in the American dominions and that prior to the Louisiana Purchase in 1803 a limit of ten leagues was claimed.

In view of these claims to territorial waters asserted and approved by France and Spain during the eighteenth century it does not comport with reason to say that either of these nations intended that their claims to the Louisiana Territory stopped at the shore.

VI

LOUISIANA'S CONSTITUTIONAL RIGHTS ARE INVOLVED. THE UNITED STATES CANNOT GAIN TERRITORY CONTRARY TO ITS OBLIGATIONS AS TRUSTEE.

The extent to which Louisiana's Constitutional Rights are involved, by the claim of the United States here, is fully discussed on pages 47 to 64 of its original brief on the Motion for Judgment. We have shown there, and hereinabove, that the United States acquired the Louisiana Territory as well as the bordering seas *in trust* for the State of Louisiana and other States to be formed therefrom.[13]

We have also cited numerous decisions of this Court to the effect that ownership of marginal waters

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[13]Art. III Treaty of Paris, 8 Stat. 200, 2 Miller's Treaties 498

Pollard v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565

Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57, 21 L.Ed. 798

Hardin v. Jordan, 140 U.S. 371, 381, 35 L.Ed. 428, 433.

of the sea belong to the coastal States of the United States as an incident of their sovereignty.[14]

Since the United States acquired both the land and the seas in trust for the State it cannot gain territory in the Gulf of Mexico by substraction from the sovereignty of the State. Because of the trust relation it cannot take away from the State sovereignty over the submerged lands which passed to the State as an incident of State sovereignty and as one of the properties of the trust.

A trustee is prohibited from using the advantage of its position to gain any benefit for itself at the expense of the cestui que trust of placing itself in any position where self-interest will, or may, conflict with its duties as trustee. Nor can a trustee compete with the beneficiary in the acquisition of property. The rule applies whether the trust be a public or a private one. The rule on this subject was stated in an early decision of this Court which has been consistently followed in later cases. The case of *Michoud v. Girod*, 4 How. 503, 555, 11 L.Ed. 1076, 1099 states the principle thus:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all

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[14]Den v. Jersey Co., 15 How. 426, 432-3, 14 L.Ed. 757, 760-1;

Mass. v. New York, 271 U.S. 65, 89, 70 L.Ed. 838, 849; See also cases cited in Note 17, page 71 of Original Brief.

> agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. . .It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. . . In the case of Wormley v. Wormley (8 Wheat. 421) this Court declared that no rule is better settled than that a trustee cannot become the purchaser of the trust estate. . . ."[15]

Applying the principles of these cases to the present controversy, the United States cannot by limiting Louisiana's boundary at the time of its admission to the Union (if we assume that it did limit such boundary) gain sovereign ownership over submerged lands by means of a later extension of the national boundary. Such an extension of boundary can only be made "according to the principles of the federal constitu-

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[15]See Also:

Magruder v. Drury, 235 U.S. 106, 119, 120, 59 L.Ed. 151, 156;

C. M. and St. P. Ry. Co. v. Des Moines Co., 254 U.S. 196, 220, 65 L.Ed. 219, 232.

tion" as provided in the third article of the Treaty of Cession with France.

It is true that a treaty can be abrogated by a subsequent act of Congress but vested rights cannot be taken away in that manner nor can trust obligations be extinguished. It must be remembered that treaties like the Louisiana Purchase create multi-partite obligations; namely obligations running in favor of the parties to the treaty, those in favor of the States to be formed, and those in favor of the inhabitants of the territory. The rights of France stipulated in the treaty are moral rather than legal obligations (*Edye v. Robertson*, 112 U. S. 580, 28 L.Ed. 798). The rights stipulated in favor of Louisiana and those running in favor of the inhabitants of the territory are legal rights protected by the Constitution. Termination or abrogation of a treaty does not divest vested rights (*Society v. New Haven*, 8 Wheat. 464, 5 L.Ed. 562).

Plaintiff's brief (page 99-100) states that the Treaty for the Louisiana Purchase ceased to operate when the State was admitted to the Union and cites *New Orleans v. De Armas*, 9 Pet. 224, 235, 9 L.Ed. 109, 113 on this proposition. The opinion and decree of the court does not go that far. All that was involved in that case was a question as to whether or not the federal courts had jurisdiction to decide a question as to the title to a lot of ground in New Orleans. The appellees claimed title under a Spanish grant which had been confirmed by a patent from the United

States. New Orleans claimed title by public use, and invoked the provisions of the Treaty with France which required that the inhabitants of the territory be admitted to the Union "to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." The court held that this provision of the treaty had been discharged by the admission of the State to the Union, and further said: (9 Pet. 235)

> ". . . The right to bring questions of title decided in a State court before this tribunal, is not classed among these immunities. The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister States, when their titles are decided by the tribunals of the State.
>
> . . . If in any case such jurisdiction could be supposed to be given, it might be where an act of Congress attempted to divest a title which was vested under the pre-existing government."

Neither this case nor any other case we have read holds that all obligations of a treaty cease to operate by the admission of a state to the Union.

VII

THE EQUAL FOOTING CLAUSE RELATES TO SOVEREIGNTY OVER SUBMERGED LANDS AND ENTITLES LOUISIANA TO EQUAL SOVEREIGNTY WITH OTHER GULF COASTAL STATES

In its fourth defense (Answer page 23) Louisiana avers that it is entitled to sovereignty over the submerged lands in the Gulf of Mexico on an equal footing with the States of Texas and Florida whose boundaries are recognized as three leagues seaward in the Gulf of Mexico, citing *U. S. v. Texas*, 339 U. S. 707, 94 L.Ed. 1221. Plaintiff's brief on page 20 and 150 states that Louisiana's claim to an equal footing with Florida and Texas is without legal foundation because both of these States entered the Union after Louisiana. Counsel cites no authority in support of his argument that equality in sovereign power of various States of the Union depends solely upon conditions existing as of the date of the admission of the State. In fact both reason and law would dictate the contrary.

In the Texas case this Court stated (339 U. S. 716):

> "The 'equal footing' clause had long been held to refer to political rights and to sovereignty."

The opinion then goes on to state:

> "Yet the 'equal footing' clause has long been held to have a direct effect on certain property rights."

Of course, the property rights that the Court was referring to in that case were property rights to submerged lands in the Gulf of Mexico, which rights this Court has always said were "attributes of sovereignty" in the coastal States (See numerous cases cited in original brief page 71, footnote 17).

Other decisions of this Court indicate very clearly that the States of the Union are not only to be admitted on an equal footing in so far as their sovereign status is concerned, but are to be maintained on an equal footing. If this were not so the equal footing clause could be made meaningless. The whole theory of our Government rests upon the assumption that each one of the 48 states is to be of equal dignity in so far as its sovereign powers and perogatives are concerned. Thus in *Coyle v. Smith*, 221 U. S. 559, 566-567, 55 L.Ed. 853, 858, this Court said:

> "But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states.'
>
> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residium of sovereignty not delegated to the United States by the Constitu-

tion itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission . . ."

Later on in the opinion of this case the following statement is made (221 U. S. 570):

> "So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms in which the acts admitting them to the Union have been framed."

The Court in an earlier case made the statement that this equality of sovereign power not only comes into being upon the admission of a State into the Union but must *thereafter* be given force and effect. So in *Dick v. U. S.*, 208 U. S. 340, 353, 52 L.Ed. 520, 525, the Court held:

> "A State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has complete and full jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution."

Again in *Boyd v. State of Nebraska*, 143 U. S. 135, 170, 36 L. Ed. 103, 113, this principle is asserted:

> "Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled."

Attention is also directed to the following statement in the case of *Escanaba Transportation Co. v. Chicago*, 107 U. S. 678, 689, 27 L.Ed. 442, 447:

> "Equality of constitutional right and power is the condition of all the States of the Union, old and new."

It therefore follows that Louisiana has the same constitutional rights and the same sovereign prerogatives as all other States have in the Gulf of Mexico. The Act of Admission which describes the southern boundary of Louisiana as including all islands within three leagues of its coast should therfore be construed to include all submerged lands and waters within three leagues of its coast.

In our original brief we called attention to the fact that the Submerged Lands Act had made a different provision for the limits of State sovereignty on different coasts of the nation. It recognized the boundaries of States on the Great Lakes as extending to the international boundary which is considerably more than three leagues, and in some instances extends as much as 40 leagues from the shore. On the two great oceans the Submerged Lands Act limits the boundaries to three miles from coast. In the Gulf

of Mexico the boundary extends three leagues. These differences in the extent of sovereignty on different coasts can only be justified by the differences in location, and the character of the seas which adjoin these coasts. In other words Congress has classified the States in accordance with the nature of the seas where their coastal regions lie.

Equality and uniformity are not violated where a reasonable classification is made, but all parties in the same classification must be treated alike, or else the principle of equality is violated.

The equal protection clause of the Fourteenth Amendment may in this respect be compared to the equal footing clause in the Constitution.

In *Fort Smith L & T Co. v. Board of Improvement*, 274 U. S. 387, 391, 71 L.Ed. 1112, 1115, the Court cited a long list of cases supporting the following propositions:

> "The 14th Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state . . .
>
> Nor need we cite authority for the proposition that the 14th Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. . . "

In the later case of *Caskey Baking Co. v. Virginia*, 313 U. S. 117, 121, 85 L.Ed. 1223, 1227, the Court

emphasized the point that those in the same class must be treated equally, saying:

> "As we have repeatedly held, the equal protion clause of the Fourteenth Amendment does not prevent a state from classifying business for taxation or impose any iron rule of equality. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimnation. It is enough that those in the same class are treated with equality . . ."

Further citation of authority on this point is of course unnecessary. The conclusion to be drawn from the authorities on the subject is that Louisiana is entitled to the same sovereignty in the Gulf of Mexico that other States have in that body of water.

The legislative history of the Submerged Lands Act indicates that the coast line from which the marginal sea belt is to be measured is not intended to be the shore line of the State. On page 4 of the House Report No. 215, 83rd Congress, 1st Session the Committee reported:

> "Section 2 (b) defines 'coastline' which is the baseline from which the State boundaries are projected seaward. It means not only the line of ordinary low water along the coast which directly contacts the open sea but it also means the line marking the seaward limit of inland waters.
>
> Inland waters include all ports, estuaries, harbors, bays, channels, straits, historic bays,

sounds, and also other bodies of water which join the open sea."

Reference can also be made to the official Report by the Senate Committee on Interior and Insular Affairs on S. J. Res. 13, same as R. R. 4198, finally enacted.

On p. 18 of Senate Report 133, 83rd Congress, 1st Session, the Committee stated with regard to the definition of the term "coast line" that,

> "(12) The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast *and the lands underneath waters behind it.* (Emphasis added)

The "lands underneath waters behind" Louisiana's coast line are those inland of the line of demarcation between the inland waters and the open sea as fixed by the United States pursuant to the Act of February 19, 1895 (28 Stat.672, 33 U. S. C. 1351), and as adopted by Louisiana in Act 33 of 1954. See original Brief pages 119-131.

Evidence Is Admissable In Support of Louisiana's Pleas of Acquiescence, Prescription and Estoppel

In closing we desire to supplement briefly the argument made on pages 131 to 141 of our original brief concerning Louisiana's pleas of acquiescence, prescription and estoppel. These pleas are not necessarily directed at the United States, although as a matter of principle there is no reason why the Federal Government should not be subject to the effect of such pleas. As a matter of fact these pleas are primarily supported by the principles of international law which permit a coastal State to acquire the sub-soil, sea-bed, and resources of the Continental Shelf by effective occupation thereof. This principle of international law is covered by the argument presented on pages 85 to 95 inclusive of Louisiana's original brief, and is more fully discussed in the Appendix filed with that brief (Section B, pages 38 to 51 inclusive). It must be remembered that the United States was never in possession of the Continental Shelf offshore from Louisiana, and never made any claim thereto until after the State through its Lessees had explored the sea-bed of the Gulf of Mexico for minerals, and had begun to produce oil and gas therefrom in large quantities. On the contrary the State of Louisiana had exercised jurisdiction and had effectively occupied the bed of the Gulf far out on the Continental Shelf in the manner of the cultivation and taking of shrimp, oysters and other sedentary fisheries for a long period of time, as well as for the

exploration, development and production of minerals since the year 1920.

A hearing should be afforded the State to take the testimony of witnesses concerning Louisiana's possession of the Continental Shelf in support of the above mentioned pleas, and as an aid in interpreting the act admitting Louisiana to the Union.

CONCLUSION

Lousiana submits that the former decision of this Court in *United States v. Louisiana*, December 11, 1950 is not res judicata in the present controversy. In view of the Submerged Lands Act and the Outer Continental Shelf Lands Act of 1953, the entire subject matter of this controversy should be reconsidered and this case decided in the light of this subsequent legislation, because the theory on which the former decision was based is contrary to the rationale of these later Acts of Congress.

This controversy involves an interpretation of the Submerged Lands Act and the Outer Continental Shelf Lands Act, as well as provisions of the Constitution and Treaties of the United States, relating to the national and State boundaries in the sea, and the respective limits of sovereign power and dominion of the federal and state governments. These are questions for the Court, and are not to be decided on the basis of executive statements of policy or fact, especially where such statements ignore the generally accepted meaning of

words employed in the laws or treaties concerning these questions, and do not take into consideration well known facts to the contrary.

Prior to the passage of the Acts of Congress in 1953 the United States has uniformly asserted a three league national maritime boundary in the Gulf of Mexico, and has recognized the fact that the States bordering on the Gulf have boundaries to that extent. These facts are found in the words of Treaties and Congressional Acts, and cannot be modified or controverted by diplomatic opinions or statements of officials of the State Department of the federal government. Louisiana is entitled to the same sovereign rights and prerogatives in the marginal sea and is entitled to be maintained on an equal footing therewith other Gulf Coastal States.

The claim asserted by the Attorney General that the United States has "extra-territorial sovereignty," to the exclusion of the coastal states, is repugnant to the principles of our republican form of government, and has no basis either under the constitution or in international law, and should be rejected by the court.

Government counsel is anxious for this court to protect the principle of the freedom of the seas, yet he asserts extra-territorial rights to the edge of the continental shelf. The existence of a maritime boundary to the limits of the continental shelf is no more violative of the principle of the freedom of the seas than is the so-called extraterritorial rights that plaintiff's counsel claims to champion.

The Outer Continental Shelf Lands Act by asserting jurisdiction, control, and power of disposition over the entire Continental Shelf has declared the national maritime boundary to include that area. Since the boundaries of the continental United States and of the States of the Union are co-terminous and co-extensive, the boundaries of the States must coincide with the maritime boundary of the nation.

Within the extended maritime boundaries of the nation the United States can only exercise those powers conferred on it by the Constitution. To the extent that the Acts of Congress deny State ownership of the submerged lands within this area they violate Louisiana's constitutional rights, and also violate the trust whereby the United States acquired this territory for the benefit of the State.

The basis in international law for any claim to the sub-soil and sea-bed of the Continental Shelf rests upon long continued possession by the coastal state with the acquiescence of the family of nations. Louisiana has exercised such effective occupation of the Continental Shelf as to confer on it title to the soil and the resources of that area.

In order to fully develop these facts, Louisiana is entitled to take testimony of witnesses and to present relevant documentary evidence. In the present state

of the record there is no basis for the plaintiff's motion for judgment.

Respectfully submitted,

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PROOF OF SERVICE

I,.....one of the attorneys for the State of Louisiana, defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that on the.....day of ....., 1957, I served copies of the foregoing Reply to Brief of the United States on Motion for Judgment, by leaving copies thereof at the offices of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington, D. C.

.....
Of Counsel