IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

JOINT REPLY BRIEF OF THE STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA AND MOTION FOR LEAVE TO FILE

JACK P. F. GREMILLION
Attorney General, State of Louisiana
Baton Rouge, Louisiana

WILL WILSON
Attorney General, State of Texas
Austin, Texas

JOE T. PATTERSON
Attorney General, State of Mississippi
Jackson, Mississippi

JOHN PATTERSON
Attorney General, State of Alabama
Montgomery, Alabama

RICHARD W. ERVIN
Attorney General, State of Florida
Tallahassee, Florida

HOUGHTON BROWNI
Assistant Attorney G

November 7, 1958.

INDEX

INDEX OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

MOTION OF THE STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA FOR LEAVE TO FILE JOINT REPLY BRIEF

Pursuant to the order entered on April 14, 1958, the States of Louisiana, Texas, Mississippi, Alabama, and Florida move for leave to file the attached Joint Reply Brief.

As grounds for this motion, the States show the Court that the Reply Brief for the United States filed on September 15, 1958, contains new matters which the States have not heretofore had the opportunity to answer. Specifically the Reply Brief for the United States includes two new letters, one from Mr. Adrian S. Fisher, a Reporter for the American Law Institute, and the other from the Honorable John Foster Dulles, Secretary of State of the United States, and arguments based on these new letters. The Reply Brief for the United States also includes for the first time citations to a report of a subcommittee of the 82nd Congress and to opinions of

this Court not heretofore cited and new arguments in connection with these new citations.

The States show the Court that a full and fair consideration of this cause requires that the States be permitted to answer the new matters contained in the Reply Brief for the United States. This motion and the attached Joint Reply Brief are presented to the Court as soon as they could be prepared and printed and before this cause is set for hearing.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General, State of Louisiana
Baton Rouge, Louisiana

WILL WILSON
Attorney General, State of Texas
Austin, Texas

JOE T. PATTERSON
Attorney General, State of Mississippi
Jackson, Mississippi

JOHN PATTERSON
Attorney General, State of Alabama
Montgomery, Alabama

RICHARD W. ERVIN
Attorney General, State of Florida
Tallahassee, Florida

November 7, 1958.

I certify that I have served copies of the foregoing motion and the attached brief by mailing them to the offices of the Attorney General and the Solicitor General of the United States, Washington, D. C., this the 7th day of November, 1958.

Attorney General, State of Texas.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA and FLORIDA,
Defendants.

JOINT REPLY BRIEF FOR THE DEFENDANT STATES

I.

The Second Letter from Secretary Dulles

After the States had filed their briefs on August 15, 1958, the Government secured a new letter from Secretary Dulles dated September 8, 1958 (Gov. Rep. Br. 99) supplementing his first letter of June 15, 1956. Since the Government continues to argue that this Court can rest the entire decision of this case solely upon the Dulles letters, we point out fallacies contained in the Government's arguments based on the new letter.

A. *The Dulles letters are based on an incorrect assumption of the issues of law involved in this case.*

The States can only arrive at the meaning of Mr. Dulles' letters from what he says in them. His second letter makes it plain to us that in his first letter he intended only to answer the particular inquiry of the Attorney General, who (it now appears) wrote Mr. Dulles that "our immediate concern is only with the width of the marginal sea, and the statement which I now seek need not go beyond that question." (Gov. Rep. Br. 99)

Accepting Mr. Dulles' statement that his first letter "was not intended to indicate any distinction between the national boundary of the United States and the outer limit of the territorial sea," we submit that even when construed together the two letters cannot be held to control this Court on the issues in this case.

In the first letter written by Secretary Dulles, we were not informed as to what statements were made to him by the Attorney General, except as they are paraphrased in the first paragraph of Secretary Dulles' letter.[1] (Gov. Br. 342) In this paragraph Secretary Dulles says:

> "You state that the purpose of the suit is to determine the extent of the submerged off shore area which the United States granted to the

[1] We respectfully suggest that if the decision of issues in this case is to be affected by letters between Federal departments, the letters from the Attorney General and the Acting Attorney General to the Secretary of State should be filed, so that the entire correspondence will be before the Court.

States by the Submerged Lands Act of May 22, 1953 (67 Stat. 29, 43 U. S. C. (1952) Supp. II, Secs. 1301-1315). *You point out that this issue involves the location of the maritime boundary of the United States* and you request a statement of the position of the United States concerning the extent of its territorial waters, particularly during the early years of its history." [2]

It is plain from this statement that the Attorney General assumed for the Secretary of State that, in the interpretation of the Submerged Lands Act, the issue involved is "the location of the maritime boundary of the United States," that is, that the Government is correct on a fundamental issue which the States strongly dispute. Mr. Dulles' new letter is based on the same erroneous assumption.

The States have consistently taken the position that the interpretation of the Submerged Lands Act does *not* involve the location of the maritime boundary of the United States. The American Law Institute, after making a deliberate appraisal of the Act, concluded that the Act "does *not* depend on the breadth of the territorial sea claimed by the United States under international law." (American Law Institute, *Restatement of the Foreign Relations Law of the United States*, Tentative Draft No. 2, May 8, 1958, p. 23.) The obvious reason why the interpretation of the Submerged Lands Act does not depend on the location of a national maritime boundary or a determination of the breadth of the territorial sea claimed by the United States is that the Act does not

[2] All emphasis in this brief is ours, unless otherwise noted.

specify either of these standards as the measure of the property rights transferred to the States. The standard specified by the Act is the *boundaries of the States* as they existed when the States became members of the Union or as approved by Congress.

Moreover, the arguments based on Mr. Dulles' letters are erroneous in that they assume that the outer limit of the territorial sea claimed by the United States for certain purposes is the equivalent of the national boundary.

Mr. Dulles says in his second letter that he did not intend in his first letter to indicate "any distinction between the national boundary of the United States and the outer limit of its territorial sea . . ." (Gov. Rep. Br. 99) Nevertheless, there is in fact a distinction between boundaries, which are fixed by treaties, statutes, or constitutions, and the outer limits of the territorial sea, when considered as the outer limits of the exercise of power or jurisdiction over the seas for various purposes. The boundaries do not change, if they have once been fixed by treaty, statute, or constitution, unless they are changed by an act of at least equal dignity, but the outer limit of the exercise of power or jurisdiction over the sea may vary from time to time, depending upon policy considerations which may be dominant in relations with other nations.

The boundaries of the United States were originally fixed by the Treaty of Paris of 1783 (8 Stat. 80, 82), which provided in part as follows:

> "And that all Disputes which might arise in future on the Subject of the *Boundaries of the said United States* may be prevented, it is here-

by agreed and declared, that the following are and shall be their *Boundaries*, Viz. [describing the land boundaries]

"... ; comprehending all Islands *within twenty Leagues of any Part of the Shores* of the United States, *& lying between Lines to be drawn due East from the Points where the aforesaid Boundaries between Nova Scotia on the one Part and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean*, excepting such Islands as now are or heretofore have been within the Limits of the said Province of Nova Scotia."

A national boundary on the Atlantic Ocean between Nova Scotia and Florida was thus defined as a line running parallel with and twenty leagues seaward from the shore. In spite of the existence of this boundary line in the Atlantic Ocean, Thomas Jefferson, as Mr. Dulles says, in 1793 tentatively restricted our "right of prohibiting the commitment of hostilities" to a distance of only three miles from the Atlantic Coast. (Gov. Br. 343) This limitation, by executive policy, of the exercise of the United States' power for this particular purpose did not purport to be, and was not, a relinquishment of the rights of the United States to the boundaries established by the Treaty of Paris in 1783. On the contrary, Jefferson's action illustrates the fact that a boundary in the sea cannot properly be regarded as identical in its characteristics with a land boundary, and also that a nation may exercise jurisdiction for different purposes at different distances from its shores into the sea. For neutrality purposes it may adopt a distance of three

miles; for prevention of smuggling it may be four leagues; for security purposes it may be two hundred miles; and all of these various distances may be different from the nation's boundary established by treaty or otherwise.

In the Treaty of Guadalupe Hidalgo, the national seaward boundary in the Gulf of Mexico was defined even more precisely as follows: (9 Stat. 922)

> "The Boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land. . ."

This national boundary has never been changed. It remains three leagues from land in the Gulf of Mexico, regardless of whether the United States wishes to exercise its jurisdiction to a lesser distance for neutrality purposes or to extend it further into the Gulf of Mexico for smuggling and security purposes.

Just as seaward boundaries of the United States were fixed by the treaties of Paris and Guadalupe Hidalgo, the boundaries of the various Gulf States have been fixed by statutory or constitutional provisions. The enabling act relating to the "limits" of Louisiana defined them as "including all islands within three leagues of the coast" and the same provision was contained in the Louisiana Constitution when Louisiana was admitted to the Union. (La. Br. 13-14) The Alabama "boundaries" in the enabling act and in the Alabama Constitution were defined as "including all islands within six leagues of the shore." (Ala. Br. 2-5) The Mississippi "limits" were

defined in its Constitution at the time of admission and in the enabling act as "including all of the islands within six leagues of the shore." (Miss. Br. 11-14) Florida's historic boundary was defined as "including all islands within six leagues of the seacoast" (Fla. Br. 64-67) and its Constitution of 1868, approved by Congress, defined its "boundaries" in the Gulf of Mexico as being "three leagues from land." (Fla. Br. App. 18) The Congress of the Republic of Texas by statute defined its "boundaries" in the Gulf of Mexico as being "three leagues from land." (Tex. Br. 74)

It was these States' *boundaries* that Congress had in mind when it used the word "boundaries" in the Submerged Lands Act as the measure of its grant (with the proviso that the grant should not extend beyond three leagues into the Gulf of Mexico). These boundaries were fixed lines, defined by statutes and constitutions. Conversely, Congress did *not* have in mind any of the various limits on the exercise of national jurisdiction for different purposes (such as neutrality, customs, or security) that may in part depend on shifting foreign policy and the expediency of the moment.

So Mr. Dulles' letters, undertaking to state the historical policy of the United States regarding the extent of territorial waters for the purposes of exercising control over navigation, fishing, commerce, and defense, do not bear on the point at issue in this case. Congress in the Submerged Lands Act was not limiting the freedom of the seas, and considerations sustaining this traditional policy (with which Mr. Dulles is mainly concerned in his letters)

are irrelevant in deciding the extent of the property rights transferred to the States by the Act. The *States' boundaries* are the measure Congress adopted. To see what they were the Court has only to look at the relevant boundary statutes and constitutional provisions. There is no necessity for delving into the history of our foreign policy. Mr. Dulles' letters are irrelevant because they are based on the Attorney General's erroneous assumption that foreign policy controls this case.

B. *Since relations with foreign nations are not involved in the issues actually to be decided, national foreign policy (either past or current) is irrelevant.*

Of course the political branches of the government, the Congress and the Executive, have the authority to determine the foreign policy and to conduct the international relations of the United States. However, in this case even the Government concedes that whether control over the resources of the continental shelf "is to be exercised by the National Government or by the States is a matter of domestic distribution of powers which does not concern other nations" (Gov. Br. 148) and that "foreign nations are not concerned with the outcome of the actual controversy between the United States and the States." (Gov. Br. 148-149)

So it is clear that the Court does not have to delve into or decide issues of foreign policy or international relations. It should not be asked to do so in an effort to render vain and meaningless all provisions

of the Submerged Lands Act pertaining to grants beyond three geographical miles in the Gulf of Mexico.

C. *Even under the Government's theory of the case, current foreign policy clearly is not involved in this case.*

Certainly, even under the Government's theory, no issue of *current* foreign policy is before the Court. The Government concedes that "the critical period of foreign policy for the purpose of determining [the States'] boundaries is that which surrounds the time of their admission." (Gov. Rep. Br. 29) Nevertheless, the Government sees fit to try to gain some advantage by referring to the present controversies with Communist China (Gov. Rep. Br. 31, 95) and the dispute between Iceland and Great Britain (Gov. Rep. Br. 94).

These current controversies obviously have nothing to do with the issues in this case. A finding that United States foreign policy on territorial waters over a hundred years ago was not definitely settled or was not formulated in a manner precisely consistent with present policy will not either alter the present policy or jeopardize its continued implementation. It was made clear to the Congress by the State Department and has been recently recognized by the American Law Institute that the three-mile limit policy with respect to territorial waters will not be affected by the distribution of powers in the Gulf seabed and subsoil envisaged in the Submerged Lands Act. There could be no basis for a British

protest against a decision here favorable to the Gulf States. Recognition of the facts of a century ago will not interfere with national policy in the dispute over the new Communist claim to the seas between Quemoy and Formosa. Neither Great Britain nor Red China is concerned if Congress is found to have recognized original or subsequently approved State boundary lines in the seabed of the Gulf of Mexico as the measure of the grant made to the Gulf Coast States. If it serves the national policy, the three mile limit can still be applied in the superjacent waters. Rights to explore and develop the valuable resources of the seabed will not be affected thereby.

D. *This Court is not bound to accept the Secretary of State's interpretation of historical facts or the legal status resulting therefrom.*

As it now stands the Government asks the Court to consider only what it says were the views of the several Secretaries of State as to international law concerning the extent of coastal jurisdiction (Gov. Rep. Br. 3, 63). Beyond that, however, it asks the Court to consider only the conclusions of the present Secretary of State as to the views of past Secretaries of State, asserting in effect that these conclusions are binding on the Court, even if demonstrably erroneous. (Gov. Rep. Br. 3, 26-34)

While the Executive Department can, when not in conflict with the Legislative Department, make decisions on current foreign relations, the facts of history are a matter for this Court to determine from

evidence. Although on questions of history the Secretary of State may express a personal opinion, clearly he is not entitled to bind the Court as an historian, and his duties as Secretary of State do not include by any stretch of the imagination the duty to serve as a fact finder for this Court. Furthermore this Court has always performed an essential function in determining international law as accepted and applied by the United States. It has not relinquished this function to the Secretary of State.

As the Court held in *Vermilya-Brown Company v. Connell*, 335 U.S. 377, 380, this Court itself must decide a controversy over "the geographical coverage" of an Act of Congress and the Court is not debarred by executive declarations "from examining the status resulting from prior action."

In other words, as applied to this case, the Court is entitled to decide first, whether the interpretation of the Submerged Lands Act depends upon international law as interpreted and applied by the United States or upon the foreign policy of the United States at the relevant times one hundred years or more ago, and, if it feels required to go into these matters (which we submit is not necessary), then the Court should decide for itself, based upon all relevant historical evidence, what in fact was the then United States view of the requirements of international law and what the foreign policy of the United States then was, and finally the legal effect of such past action. We do not question the right of Secretary Dulles to conduct foreign relations for President Eisenhower.

We do challenge the correctness of his scholarship when speaking as an historian of the foreign policy of President Polk, and we say that the Government is completely in error in claiming that this Court cannot test the accuracy of Mr. Dulles' historical views.

None of the cases cited by the Government, in which the action of a political branch was treated as binding on this Court, involved a situation analogous to the present case. Rather they all deal with the ascertainment of matters of fact and the interpretation of events occurring in foreign countries.[5]

---

[5] The decisions of this Court cited by the Government may be classified as follows:

(1) Who is the sovereign, *de jure* or *de facto*, of a foreign territory is a political question; a determination of it by the political departments binds the Court. *Rose v. Hinely*, 4 Cranch 241; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *United States v. Belmont*, 301 U. S. 324; *Guaranty Trust Co. v. United States*, 304 U. S. 126.

(2) Whether a foreign government should be recognized by the United States is a political matter. *Kennett v. Chambers*, 14 How. 38; *United States v. Pink*, 315 U. S. 203; *United States v. Palmer*, 3 Wheat. 610.

(3) Whether a state of civil war exists, and the parties are consequently vested with the rights of belligerents, is a political question. The *Divina Pastora*, 4 Wheat. 52.

(4) Whether a vessel sought to be libeled in our port is immune as a public vessel of a foreign country can be established by State Department Certificate, *Compania Española v. Navemar*, 303 U. S. 68; Ex Parte *Peru*, 318 U. S. 578; *Mexico v. Hoffman*, 324 U. S. 30 (absence of immunity found from all evidence, including the lack of a State Department certificate.)

(5) Diplomatic immmunity from suit is not established on equivocal evidence in the absence of a certificate from the State Department. In re *Baiz*, 135 U. S. 403.

Here, the Government contends, the sole matter at issue is the position of the United States with respect to the extent of national territorial jurisdiction at the relevant dates. The facts as to this are history, now a hundred years beyond recall, and these facts are as accessible to this Court as they are to the Secretary of State.

E. *The Dulles letters are based upon incorrect assumptions as to historical facts.*

We do not dispute that from the 1893 Behring Fur Seal Arbitration until the Truman Proclamation of

---

(6) In a dispute between private parties, the Court will adopt the political position of the United States as to the status or ownership of territory. *Williams v. Suffolk Insurance Co.*, 13 Pet. 415 (whether the Falkland Islands are free or the property of Argentina is determined, so far as the Court is concerned, by the foreign relations position of the United States); *Foster v. Nielson*, 2 Pet. 253 (the construction placed by the United States on a treaty, as expressed by legislative and executive pronouncements, will be respected by the Court. Note, however, that Chief Justice Marshall, four years later, felt entirely free to adopt a different interpretation of this same treaty when the Spanish version of it was available to the Court. See *United States v. Percheman*, 7 Pet. 51, 89.)

(7) Presidential rejection of an overseas air permit, possibly based on information available only to the President, is not reviewable judicially. *Chicago & S. Air Lines v. Waterman Corp.*, 333 U. S. 103.

The only instances in which *ex parte* certificates from the State Department have played any significant role are in items (4) and (5) above, dealing with the public character of a foreign ship, and diplomatic immunity of an individual.

1945,[4] the Secretaries of State at various times asserted the proposition that three miles was the maximum extent of territorial waters. Before 1893, however, this notion was not fixed. Refusal to recognize the claims of other nations to limits in excess of three marine miles for any purpose appears not to have been definitely asserted until 1855. The details of this early evolution are apparent from Executive actions set forth in the Joint Brief (107-120) and the Government's Brief (59-67).

Two events which occurred before the adoption of the Federal Constitution in 1789 must be considered.

In 1763, in the Treaty of Paris, Great Britain acquired the right to exclude French subjects from fishing within an offshore belt three leagues (and in some places as much as fifteen leagues) in width along the coast of the North American colonies. (Article V, Treaty of Paris between Great Britain, France and Spain, February 10, 1763, 1 *British and Foreign State Papers* (Pt. 1) 422) These exclusive rights passed to the United States when they won

[4] The only relevance of the Truman Proclamation of 1945 and of the international acceptance of the continental shelf doctrine to the present time is that these events remove any question with respect to the power of Congress to consider not only the seabed and subsoil within three miles as a part of the territory of the United States but also the full right to explore and develop the natural resources of the seabed and subsoil outside three miles as a part of the property of the United States. That any international question as to this right has been removed is recognized by the Government (Gov. Rep. Br. 28). In dividing these areas between the States and the Federal Government the Congress could select original or subsequently approved state boundaries as the measure of the grant.

their independence, and no portions of them were relinquished by the United States until at least 1818. (Treaty with Great Britain, October 20, 1818; 8 Stat. 248, 249) The existence of an exclusive three-league fishing zone in these waters is important to an understanding of the Washington-Jefferson-Madison foreign policy.

The second event was the Treaty of Paris in 1783 terminating the American revolution, (8 Stat. 80, 82) quoted above, pages 6-7.

This treaty was well known to all who participated in the formation of the Washington-Jefferson-Madison foreign policy. The important thing about it is that it *did* fix a boundary, but *not* three miles at sea. See pages 6-8, above.

The Jefferson letter, it will be recalled, involved the adoption of a provisional three-mile zone limited to neutrality purposes. (1 *American State Papers (Class I, Foreign Relations)* 183). It expressly recognized that there was authority for a three-league limit and Jefferson later even considered that a proper limit for the United States was the Gulf Stream. (1 *Memoirs of John Quincy Adams* 375)

Clearly Secretary Jefferson did not think in terms of a single national maritime boundary. During this period both France and England were capturing each other's ships within sight of our shores. Jefferson's concern was as to how far from shore the United States should assume the burden of keeping the peace through the establishment of a neutrality zone. A close examination of the evidence available makes it clear that he was establishing a neutrality policy primarily for the Executive Branch of the Government

and was not thinking in terms of "boundary." The Atlantic maritime boundary as such had already been established by the Treaty of Peace, and he made no effort to negotiate a change in that treaty. Plainly, Secretary Jefferson did not consider the regulation of fishing, the four league smuggling zone, and the three mile minimum security zone, as having any necessary connection with each other or as involving any change in the national maritime boundary established by the Treaty of Peace.

The content and wording of the question prepared by Secretary of the Treasury Hamilton at President Washington's request to be propounded to the Supreme Court gives a good key to the thinking of that administration. (VI *Writings of Thomas Jefferson* (Ford Edition) 351-352) Of course, this question was not answered because the Supreme Court has no jurisdiction to render advisory opinions, but notice carefully just what President Washington wanted to know. The question is:

> "To what distance, by the laws and usages of nations, may the United States exercise the right of prohibiting the hostilities of foreign powers at war with each other, within rivers, bays, and arms of the sea and upon the sea along the coast of the United States?"

The question does not ask about "boundary" but about the "right of prohibiting the hostilities of foreign powers at war with each other." The words are "to what distance, by the laws and usage of nations. . ." may hostilities be prohibited "upon the sea along the coast. . . ." The question was not as to

how far to sea an all-inclusive dominion might be exercised or a general boundary established.

It is clear that the Washington administration did not regard Secretary Jefferson's four letters to France, Britain, Spain, and the Netherlands, in which he informed the governments of the tentative neutrality policy, as changing or establishing a maritime boundary.

First, the letters made the three-mile neutrality zone provisional.

Second, they did not use the word "boundary."

Third, they confined the matter to the "exercise of the Executive powers." Two days after the four Jefferson letters were written, Secretary Jefferson issued a circular to United States Attorneys containing the following language: (Gov. Br. 61)

> ". . . and the law of nations admitting as a common convenience that every nation inhabiting the sea coast may extend its jurisdiction and protection some distance into the sea, the President has been frequently appealed to by the subjects of the belligerent powers for the benefit of that protection. . . . but as in the meantime it is necessary to exercise the right to some distance, the President has thought it best, *so far as shall concern the exercise of the Executive powers*, to take the distance of a sea-league which being settled by treaty between some of the belligerent powers, and as little as any of them claim on their own coasts, can admit of no reasonable opposition on their part. The Executive officers are therefore instructed to consider a margin of one sea-league on our coast

> as that within which all hostilities are interdicted for the present, until it shall be otherwise signified to them."

Fourth, there is no evidence that President Washington sought legislation establishing a general maritime boundary of three nautical miles or establishing general jurisdiction out to three miles.

Fifth, the Congress did enact a statute extending the jurisdiction of Federal District Courts for a single purpose. (Act of June 5, 1794; 1 Stat. 381, 384)

> "The district court shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league of the coast or shores therefrom."

This indicates two things:

1. The Washington Administration did not regard the Jefferson letters as themselves establishing a boundary or the jurisdiction of the Federal Courts.
2. There is no evidence that it sought (and the Congress did not adopt) a statute extending jurisdiction to three miles for purposes other than captures.

Sixth, this same limitation for neutrality purposes was carried forward in Art. XXV of the Jay Treaty of November 19, 1794. (8 Stat. 116, 128)

Seventh, the limited and provisional nature of the extension of security jurisdiction is demonstrated by

a letter dated September 2, 1796, from Secretary of State Pickering to the Lieutenant Governor of Virginia. (1 Moore, *Digest of International Law* 704)

> "Our jurisdiction . . . has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European War) to extend three geographical miles (or nearly 3½ English miles) from our shores; . . ."

Eighth, in 1799, a statute was passed reenacting a provision of an earlier 1790 statute (Act of August 4, 1790, Sec. 31, 1 Stat. 145, 164) extending the jurisdiction of the United States for the purpose of the prevention of smuggling to four leagues from the coast. (Act of March 2, 1799, Sec. 54, 1 Stat. 627, 668)

Ninth, that President Jefferson regarded the security zone as a matter of Executive policy subject to change from time to time rather than as an action definitely fixing a national boundary (e.g., by statute or treaty) is illustrated by a Message to Congress on December 3, 1805. After reciting grievances, he said: (1 *American State Papers (Class 1, Foreign Relations)* 66)

> ". . . I found it necessary to equip a force to cruise within our own seas, to arrest all vessels of these descriptions found hovering on our coasts, *within the limits of the Gulf Stream*, and to bring the offenders in for trial as pirates. . ."

Professor Riesenfeld's careful study confirms these conclusions. (Exhibit II, Joint Br. 210-14) As

to the United States-British negotiations of 1806 in which the United States "took active steps toward an extension of her territorial waters," Professor Riesenfeld finds:

> "(39) The positions taken by Great Britain and the United States in these negotiations show clearly that as of 1806 the United States did not accept the three-mile principle as a universal and inflexible rule of international law, while conversely Great Britain, as a consequence of having emerged as the principal naval power upon the victory at Trafalgar, from then on found it to be in her national interest to proclaim and insist on the three-mile principle as the established rule of international law, suffering exceptions only upon historic title.
>
> "(40) The conclusion must be reached therefore, that at least at that period there still was neither international agreement on the three-mile principle, nor was it accepted as binding by the United States." (Jt. Br., Ex. II, p. 217)

Clearly Washington, Jefferson and Madison did not entertain the concept of a single three-mile national boundary for all purposes comparable to a land boundary. The truth is that during the Washington-Jefferson-Madison period seaward extensions of jurisdiction were on an *ad hoc* basis with the width of each extension being determined by its particular function.

This same matter-by-matter treatment of issues characterizes the entire relevant period. The Secretaries of State looked separately at fisheries, at

neutrality, at collection of revenue, but at no time did they talk in terms of a single national boundary and at no time before 1855 did anyone even state that the civil jurisdiction of a country in no case extends further than a marine league from its coast.

Nineteen persons served as Secretary or Acting Secretary of State during the period from 1811-1853, including James Monroe, John Quincy Adams, Henry Clay, John Forsyth, Daniel Webster, Abel Upshur, John C. Calhoun and James Buchanan.[5] None refused to recognize the claim of another nation to sea limits extending a reasonable distance beyond three miles. In particular, none refused to recognize three leagues as a proper limit. Congress was not asked to fix an all-purpose three-mile boundary.

The Secretary of State as a Cabinet Officer of the President has the duty to keep the President informed and advised on matters of foreign policy and, particularly, on proposed action of any branch of the Government which may affect foreign policy. Whenever the President acts (including the approving of legislation), it is to be presumed that he has been advised by the Secretary of State on the foreign policy aspects of his action.

So when we consider the events surrounding the admission of each of the Gulf Coast States, and particularly, the events surounding both the annexation of the Republic of Texas and the approval of the

---

[5] 1 Miller, *Treaties and Other International Acts of the United States of America,* 184-185 (short print).

Florida Constitution, it becomes evident that the responsible Secretaries of State did not deem it necessary to advise the President to raise any issue about the boundary act of the Republic of Texas or the boundary provisions of the three other Gulf coastal states or the Florida Constitution.[6]

---

[6] One reasonable explanation of the failure of the several Secretaries of State to make any objection to the boundaries more than three miles in the Gulf of Mexico is the geographical difference between the Gulf of Mexico and the Atlantic and Pacific Oceans. Even the opponents of the Submerged Lands Act recognized these differences. Senator Anderson, for example, proposed a limitation of three miles on the Atlantic and Pacific coasts, but was willing to agree to three leagues on the Gulf Coast. At the hearings he said:

"I would like to include the Atlantic and Pacific, because I want to add a limiting phase on there that in no event shall the boundary of the State exceed 3 miles on the Atlantic or the Pacific coast, nor more than 3 leagues in the Gulf of Mexico." (Senate Interior Committee Hearings on S. J. Res. 13, Executive Session, 83rd Cong., 1st Sess. 1348)

"I think that *the Gulf of Mexico is somewhat different than the open sea off the Atlantic and Pacific coasts.* Therefore, I wanted to put in the limitation there." (Id. 1348)

"I am just trying to make this explicit, that they could not possibly exceed more than *3 leagues on the Gulf* and *3 miles on the Atlantic and Pacific coasts.*

"I do it on this theory: That if someone would argue, that we are trying to upset the State Department, we might be able to say the State Department is mainly concerned with the Atlantic and Pacific coasts. But in the Gulf, *if you take a look at Cuba, and various islands in that Carribbean area, you can almost enclose the Gulf of Mexico* and say it is not quite as much open ocean as the Atlantic and Pacific and therefore we might be excused with 3 leagues." (Id. 1349)

In the debate on the Senate Floor he repeated the same views:

"In the committee I tried to point out that the Government of the United States has had a policy regarding the

All these events were such as would have most surely called forth objection, or at least mention of the national policy, if that policy had in fact been as clearly defined and inflexible at the relevant dates as the Solicitor General and the Secretary of State now assert. Instead, there was no protest to Congress, no mention by diplomatic correspondence (except long after the event), no message by the Chief Executive asserting national sea policy, no appearance of State Department representatives before congressional committees, no public addresses by Department personnel, no presentation of the Department's views by any member of the Congress.

Since there was no announced change, it will be presumed that the Jefferson-Madison policy, recognizing that the three mile limit is only a minimum limit and that the three league limit had sufficient authority in its favor, remained in effect. The fact that nineteen Secretaries of State did not fix or even mention a uniform maximum limit when events within their knowledge put the matter in issue is proof that they regarded three-league boundaries in the Gulf of Mexico as conforming to,

---

3 mile line and the 3 mile marginal sea, and I thought it very important to preserve that in the case of the Atlantic Ocean and the Pacific Ocean. I then tried to point out that in the case of the Gulf of Mexico, because of the islands lying off the coast—for instance, the Florida Keys and the islands of the Caribbean, such as Cuba—that region might be regarded as a sort of enclosed area, with the result that *the coast along the Gulf of Mexico might properly be considered as being in a somewhat different category,* so far as the Nation was concerned, as compared to the Atlantic coast and the Pacific coast." (99 Cong. Rec. 2916)

rather than conflicting with, the then prevailing United States foreign policy. This conduct amounts, at the very least, to a continuation of the Jefferson policy, rather than an abandonment of it and especially so where there is no evidence of the adoption of an invariable three-mile limit. Two of the most eminent American writers of the period, Kent and Wharton, both well acquainted with American foreign policy, considered the three mile limit to be entirely unsatisfactory for the United States. Kent, *Commentaries on American Law* 29-30 (1st ed., 1826. Same text in 2d to 11th ed., 1866); 1 Wharton, *International Law Digest* 114-15, Sec. 32.

But not only was there silence when protest or mention of national policy was called for; Secretary of State Buchanan negotiated the treaty of Guadalupe Hidalgo with Mexico, which adopted as the joint boundary between the two nations a line commencing "in the Gulf of Mexico 3 leagues from land." (9 Stat. 922)[7]

---

[7] The Government makes the assertion (Gov. Rep. Br. 4) that Mexico interpreted the Treaty of Guadalupe Hidalgo "as not fixing a three league belt in the Gulf of Mexico." Nothing is cited to support this statement. It is contrary to the conclusions of the expert on Mexican law, Lic. Santiago Oñate, whose memorandum is an exhibit to the Texas Brief (192-198). In its original brief (Gov. Br. 84) the Government refers to Mexican diplomatic correspondence justifying its claim of nine nautical miles by the provisions of the treaty of Guadalupe Hidalgo. Mexico's assertions of jurisdiction in the Gulf of Mexico three leagues from land are well known, as in the shrimping cases, which were mentioned in the Senate debate on the Submerged Lands Act. (99 Cong. Rec. 2893-2895).

The answer given by Secretary Buchanan to the British protest directed to this provision of the treaty emphasizes the fact that the Jefferson policy was still followed. This officially brought the question to the attention of the Secretary of State and was answered in a manner consistent with the continuance of the Jefferson policy regarding the question of the extent of territorial waters as distinct from that of boundary. Under that policy each extension of jurisdiction over the sea for a particular purpose was regarded as a separate question, independent of the location of the boundary. Buchanan's answer did not commit this Government on the issue of what Great Britain's rights were under then-existing international law. (Jt. Br. 99-100).

President Fillmore advised the Congress in 1850 that, among matters still to be adjusted with Great Britain was

> ". . . an agreement fixing the distance from the shore within which belligerent maritime operations shall not be carried on." (H. Exec. Doc. 1, 31st Cong. 2nd Sess. Dec. 2, 1850; 595 Cong. Series, 6.)

President Fillmore's message and Secretary Buchanan's answer to the British note show the United States policy in 1850 still was consistent with Jefferson's policy of considering the limit of each exercise of national jurisdiction on its own merits rather than attempting to establish a single limit of jurisdiction for all purposes.

Further consideration of the question of maritime jurisdiction apparently resulted from the renewal

in May, 1852, after twenty-five years of relative quiet, of the controversy with the British over fishing rights in the bays of Nova Scotia and Newfoundland. See Public Letter of Daniel Webster, Secretary of State, on the American Fisheries (XIV *Writings and Speeches of Daniel Webster* 555). While the immediate issues were settled by the Reciprocity Treaty of 1854 (6 Miller, *Treaties and Other International Acts of the United States of America* 667), the effect of reversal of the British position on the meaning of the word "bays" in the Treaty of 1818 caused a full re-examination of the United States' views.[8] Since the fishing interests had always desired to fish as close to the shore as possible (Jt. Br. 119-122), the three-mile provision of the Treaty of 1818 was relied upon to protect the American right to fish in the Bays of Fundy and Chaleurs and in the Gulf of St. Lawrence whose entrances exceeded 6 geographical miles.

It was only after he had participated in this dispute in his early days in office (after Webster's death),[9] that Secretary of State Marcy in 1855—dealing this time with Spain over the customs limits of Cuba — specifically refused to accept a foreign claim to customs jurisdiction beyond three miles in the Florida straits, basing his refusal on an "existing rule of international law." 11 Manning, *Diplomatic Correspondence of the United States,Inter-American Affairs, 1831-1860*, at 214, 217.

---

[8] See Speech of Senator Soulé, United States Senate, August 12, 1852, 25 Cong. Globe (N.S.) 907.

[9] See 6 Miller, *id.* 698-733.

This declaration of Mr. Marcy constituted a clearer statement than any previous ones about the rules of international law relating to maritime jurisdiction. To some extent it went, however, beyond the necessities of the case as it applied principally to the Florida straits which constituted important "thoroughfares of commerce," and as such were subject to special rules. It may be also noted that this statement applied to the exercise of customs jurisdiction about nine miles from Cuba and, under the United States' own rules, such jurisdiction could be exercised up to four leagues.

Even if it can be assumed that Mr. Marcy's letter established clearly the United States' policy on the subject, it was acknowledged at that time that this was not an affirmation of old policy, but an entirely new policy. This is made crystal clear by the British reaction reflected in a letter from Mr. Crampton, British Minister at Washington, to the Earl of Clarendon, British Secretary of State for Foreign Affairs, on April 25, 1856.[10] He said in part;

> "These I have received, and have the honor to enclose with a copy of the note from Mr. Marcy which accompanied them—
>
> "I have underlined in red ink the passage which Mr. Marcy has substituted for that which I suggested.[11]

---

[10] 4 *Proceedings in the North Atlantic Coast Fisheries Arbitration* 353, 354-55.

[11] The words underlined in red were:

"By granting the mutual use of the inshore fisheries neither party has yielded its right to civil jurisdiction over

"Although the instruction is now in general more satisfactory inasmuch as it admits that the laws of each country within its own jurisdiction are as obligatory upon the citizens or subjects of the other as upon its own, Your Lordship will remark that Mr. Marcy has taken the opportunity of introducing a phrase by which the extent of the maritime jurisdiction of each country is defined in conformity with the recently adopted American doctrine that the civil jurisdiction of a country *in no case extends* further than 'a marine league along its coast.' [Emphasis in the original]

"I say the recently adopted doctrine, for although it is certain that the American Executive has asserted this doctrine in the discussion which preceded the Reciprocity Treaty with Great Britain, and that they are now maintaining it in a controversy with the Spanish Government respecting the search of the American steamer 'El Dorado' by the Spanish frigate 'Ferrolana,' it is equally certain that this doctrine is at variance with that laid down by eminent American jurists (see Chancellor Kent's Commentaries page 32, 7th edition and Wheaton's Elements of the Law of Nations chap. 4 § 6.), that it has never directly or indirectly received the countenance of Congress, that its unqualified admission is firmly resisted by the Government of Spain, and that it has not, unless I am mistaken been ever acquiesced in by Her Majesty's Government."

---

a marine league along its coast. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British Provinces not in conflict with the provisions of the reciprocity treaty would be as binding upon citizens of the United States within that jurisdiction as upon British subjects."

This last statement made in 1856 — "it has not, unless I am mistaken been ever acquiesced in by Her Majesty's Government"—coming from the very man who wrote the 1848 British protest letter to Buchanan over the Treaty of Guadalupe Hidalgo, demonstrates that not even the British had any clearly defined maximum sea limit policy as late as 1856.

The 1855 new idea of Marcy's was again employed in the continued controversy with Spain by Secretary Seward in 1862-64, but not without significant additional statements indicating that its use was related to the exigencies of the existing Civil War (Joint Br. 124-26). Moreover, Secretary Seward, the very Secretary of State who in the heat of the Civil War opposed the Spanish neutrality limits of six miles on the Cuban coast sat silent [12] while the Florida Constitution of 1868 with a three-league Gulf of Mexico boundary in the very first paragraph was approved by the Congress,[13] and later negotiated

---

[12] Mr. Seward served as Secretary of State from March 5, 1861, until he retired March 4, 1869. 1 Miller, *Id.* 186.

[13] At the Senate Committee's hearing on the Submerged Lands Act, Mr. Jack B. Tate, Deputy Legal Adviser, Department of State, was questioned by Senator Daniel regarding the admission of Texas with its three-league boundary statute and the approval by Congress after the Civil War of the Florida constitution with its provision for a three-league boundary in the Gulf of Mexico:

> "Senator Daniel. So there at least are two instances in which our Nation by official action has recognized boundaries in the Gulf of Mexico a greater distance than 3 miles from shore; is that not correct, sir?
>
> "Mr. Tate. I think so; yes." (Senate Interior Committee Hearings on S. J. Res. 13, 83rd Cong., Ist Sess., 1078)

This passage was quoted by Senator Holland in the debate in the Senate. (99 Cong. Rec. 2894)

the purchase from Russia of Alaska—a purchase which included all of the Behring Sea within a line drawn from the center of the Behring Strait to the tip of the Aleutians. (Treaty of Cession from Russia, 15 Stat. 539-41) Nothing could more strongly indicate that his policy declarations were born of the exigencies of civil strife and did not represent, so far as the Gulf of Mexico was concerned, a building stone in an uninterrupted, inflexible maximum sea limit rule for the United States.

As late as 1902, the Secretary of State caused the official position of the United States to be stated as follows:

> "The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league, *unless a different rule is fixed by treaty between two states; even then the treaty States alone are affected by the agreement.*"[14]

The precise exception there made to the general rule is here involved. The Government cannot be heard to say that the three-league provision (never abrogated) is not now binding upon the United States, a party to the treaty of Guadalupe Hidalgo. (See the discussion of the negotiations leading up to this treaty at pages 101-106 of the Texas Brief)

Moreover, under accepted principles of international law, this action, coming after a long course

---

[14] *Foreign Relations of the United States*, 1902, Appendix I, 440.

of conduct with respect to the Republic and State of Texas, was a recognition and acceptance of the Texas three-league boundary. (Memorandum of Professor Stefan Riesenfeld, Exhibit II, Joint Br. 219-23; Memorandum of C. John Colombos, Q. C., Exhibit III, Joint Br. 231-40)

In the 1920's the United States entered into treaties with fifteen nations permitting the seizure of ships engaged in liquor smuggling within an hour's sailing distance of the coast.[14a] Again in 1935 the Anti-Smuggling Act authorized the President to establish custom-enforcement areas extending at least fifty miles beyond the twelve miles customs waters. (49 Stat. 517)

By the declaration of Panama of October 3, 1939, the United States and other American republics prohibited hostilities between the warring nations of Great Britain and Germany in "waters adjacent to the American continents" within, in some instances, more than 300 miles of the shores. 34 *American Journal of International Law, Supp.* 17. Shortly thereafter the United States joined in protesting to both beligerents the British attack on the German battleship *Graf Spee* within this security zone. Department of State *Bulletin*, December 23, 1939, p. 723.

[14a]The Government points out that in six of these treaties the parties declared their intention to uphold the three-mile "principle" (Govt. Brief, 82-83); but in nine other contemporary treaties the parties merely reserved their rights with respect to "the extent of their territorial jurisdiction" without naming any distance. See 1 Hackworth, *Digest of International Law* 678 (1940).

The Declaration of Panama rests upon the same basis as Jefferson's declarations in his letters to Genet and Hammond; i.e., the exercise by the executive of jurisdiction to prevent hostilities in the seas adjacent to our coasts. Yet no one would contend that the Declaration of Panama established an all-purpose boundary several hundred miles at sea. In other words, the policy relating to the establishment of a neutrality or security zone remains the same, but the width of the zone was increased by President Roosevelt from the three miles first provisionally adopted by Jefferson. The outer limit of the security zone was in both cases decided independently of any questions of boundary. (See Professor Sohn's Memorandum, Exhibit I, Jt. Br. 155, 158)

Air Defense Identification Zones have been established by administrative regulations (20 Fed. Reg. 8184) pursuant to statutory authority (64 Stat. 825), extending no less than one hour's average cruising distance seaward.

In order that the Court may understand the full burden which the Government has assumed in attacking the boundary laws of the defendant States, we quote from the Government Brief, p. 59, as follows:

> ". . . the United States has always insisted that the width of the marginal belt of territorial waters which it would claim for itself or recognize for other nations must be held to a min-

> imum. By the time when Louisiana, first of the defendant States to achieve statehood, was admitted to the Union in 1812, the national policy was already well settled to claim sovereignty over no more than three miles of marginal sea and to recognize no greater claims by other nations. The policy had its beginning in the administration of George Washington, when Thomas Jefferson, then Secretary of State, on November 8, 1793, wrote to George Hammond, the British Minister (H. Exec. Doc. No. 324, 42nd Cong., 2d Sess., 553), and to Edmond Genet, the French minister. . . ."

The brief then quotes from the Jefferson-Genet letter and the Jefferson Circular to United States Attorneys and then says:

> "The policy thus tentatively announced has never been modified, and soon became the settled view of this nation on the subject." (Gov. Br. 62)

On page 64 of the Government Brief is this statement:

> "These actions, all taken before 1812 show that the policy of the United States to claim and recognize territorial waters of three miles and no more was well established before Louisiana became a State."

On page 30 of the Government Reply Brief the Government's position is changed somewhat from the statement quoted above that the Jefferson policy was "to claim sovereignty over no more than three

miles of marginal sea and to recognize no greater claims by other nations." We quote:

> "The defendants attack our statement of the United States' policy first of all on the ground that it was merely a tentative policy adopted for the time being with the reservation of full freedom to claim a wider area in the future (Jt. Br. 110-119). While this was of course true of Jefferson's original declaration in 1793, the fact is that neither during the ensuing nineteen years before the first of the critical dates (1812) nor in the fifty-two years before the admission of Texas and Florida (1845) was either the statement of policy or the statute implementing it (1 Stat. 384) changed or extended to a more extensive belt. Rather, it was repeated in the contemporary correspondence and treaties (U.S. Br. 63-67) and in later diplomatic correspondence was recognized as being established during that period. (U.S. Br. 67-94) . . . .
>
> "The second attack by the defendants on our statement of the American foreign policy is that it was a claim as to the minimum width and did not fix the maximum claim for the United States nor the limit which the United States would recognize for other countries. Again, Jefferson's initial statement in 1793 does not contain in itself the entire matured position of the United States. It was just the beginning. . . ." (Gov. Rep. Br. 30-31)

Jefferson himself asserted and exercised jurisdiction for security purposes within the Gulf Stream.

(Message of President Jefferson, Dec. 3, 1805, *I American State Papers (Class 1, Foreign Relations)* 66) Still a failure to go beyond three miles is no authority at all for the proposition asserted in the Government's original brief (Gov. Br. 59) that Jefferson would have recognized no greater claim than three miles by other nations. This is squarely contrary to both his letter and his actions. In its Reply Brief the Government apparently concedes that Jefferson would not have prevented another nation's going beyond three miles.

The Government argues that this Court can find as a fact that American foreign policy during the relevant dates was to refuse to recognize any extension of territorial waters beyond three miles upon the basis of the Dulles letters alone. Mr. Dulles correctly states that the Jeffersonian policy was to assert three miles as a minimum and to reserve for further consideration the right to extend further:

> "The caution which led Jefferson to reserve for further consideration the claims of the United States in this matter continued to mark the position of this Government for a few years after the turn of the century. There are indications that our statesmen kept an open mind on the possibility of extending the limit, although they remained firm in their conviction that three miles was the smallest limit claimed by any nation and hence a limit which could not be questioned by any one." (Gov. Br. 344)

Mr. Dulles says that this continued through 1807 and then states:

> "But this Government soon resolved any doubts it had in the matter in favor of a firm stand on a three-mile limit and opposition to claims to broader limits." (Gov't. Br. 345)

The first evidence Mr. Dulles cites after 1807 is a letter from Secretary Seward written in 1862. He gives no evidence at all upon which a court could make a finding as to a specific date when a foreign policy change occurred.

Had Mr. Dulles mentioned all the relevant facts above set forth it would have been made fully clear that the change of foreign policy to which he referred in fact was a gradual growth maturing after—not before—the dates relevant to this case. It was never a change of boundary.

The Government relies heavily upon the Bayard letter of 1866 (Gov. Br. 75). Mr. Bayard is obviously referring to events long before his time and outside of his knowledge and is simply drawing his historical conclusions from the same evidence now before the Court. He cites no evidence upon which this Court could base a finding of fact as to a change of the Jeffersonian foreign policy before the 1850's. He is confused as to the date of the Spanish dispute and is in factual error in placing it during the Jeffersonian period.

The Reply Brief for the United States has added two new citations of events to support its allegation of consistency (Gov. Rep. Br. 32-34). Both deal with ships on the high seas and neither is an authoritative

declaration that the United States was then claiming for herself, and refusing to recognize the claims of other nations beyond, a maximum limit of three geographical miles. It is apparent from the context that in each instance no particular consideration or research had been devoted to, nor was there intended any formulation of, national policy on the maximum limit of coastal jurisdiction. These, in common with all the other pronouncements of the pre-Civil War period, show that no positive and unequivocal position was established on the issues of maximum territorial limit.

Thus, the full facts of history, including those not referred to by Mr. Dulles but readily available to this Court, demonstrate that at the relevant dates the United States did not have that kind of consistent, inflexible national three-mile maximum seaward limit policy which is essential to the Government's attack upon the State boundary laws, but, on the contrary, considered three leagues as a permissible width.

F. *Although foreign policy may be changed from time to time, a change in policy does not alter treaties or the law.*

Under our Constitution the Secretary of State is an official of the Executive and not of the Legislative Department. Declarations of executive policy, evidenced by letters of the Secretary of State and not embodied in treaties or executive agreements, can never overrule or alter treaties or acts of Congress. The principal laws in existence touching our maritime boundaries in the Gulf of Mexico are found in the Treaty of Guadalupe Hidalgo, in the Congres-

sional enabling and admission statutes and State constitutions fixing State boundaries as they existed at the time the States became members of the Union, in the Florida Constitution as approved by Congress, in the boundary act of the Republic of Texas, and in the Submerged Lands Act and its companion, the Outer Continental Shelf Lands Act. Moreover, a four-league anti-smuggling limit law has been in existence since 1799. (1 Stat. 627, 668) Boundaries, including maritime boundaries, should be fixed by law and not by shifting executive policy. But the Government argues that boundaries are fixed by policy:

> "It is manifestly necessary that the maritime boundary of Texas automatically and instantaneously, from the moment of its statehood, should conform to that prescribed by the foreign policy of the United States." (Gov. Br. 238)[14b]

Mr. Dulles, in his first letter (Gov. Br. 344) makes it clear that he is not discussing "law" in the sense of a treaty or an act of Congress when he states:

> "The caution which led Jefferson to reserve for further consideration the claims of the United States in this matter continued to mark the position of this Government for a few years after the turn of the century. There are indica-

---

[14b]It is the States' position that by boundaries "at the time of" admission Congress meant the States' boundaries as they existed before admission and continuing in effect up to the time of admission into the Union. (Jt. Br. 34-36) The States do not concede that Texas' boundary *after or as a result of* its admission to the Union is determinative.

> tions that our statesmen kept an open mind on the possibilty of extending the limit, although they remained firm in their conviction that three miles was the smallest limit claimed by any nation and hence a limit which could not be questioned by any one. . . ."

He then points out that in 1807 Mr. Madison regarded three miles as a minimum and quite clearly not as a maximum.

Mr. Dulles is discussing not law but the state of mind and mental processses of Executive officials. His letter is clear on this: *(Ibid.*, 345)

> "But this Government soon resolved any doubts it had in the matter in favor of a firm stand on a three-mile limit and opposition to claims to broader limits. From the outset, it had adopted freedom of the seas as an axiom of its foreign policy. It rapidly perceived that, in order to give maximum effect to this policy, it must adhere strictly to the three-mile limit. This position was clearly illustrated in a note addressed by Secretary Seward to the Spanish Minister on December 16, 1862. . . ."

The protest of Spain's action clearly was not intended to fix our maritime boundaries. Congress might have considered the "policy" evidenced by such a protest, but it was not bound to follow that policy or even honor it if it chose not to do so. The Secretary of State in formulating policy must conform to the laws passed by Congress.

Treaties and statutes are public documents, well known and readily available to Congress. Often the

letters of the Secretary of State are secret and are not available to the public until transferred to the Archives many years after being written. Congress, in referring to State boundaries in the Submerged Lands Act, did not have in mind references in an obscure lot of notes and letters resting in the Archives, dealing with miscellaneous matters of maritime jurisdiction for special purposes unrelated to the fixing of a single national boundary. It was not referring to a changeable policy. Congress was referring to specific laws, such as the Boundary Act of the Republic of Texas, the various State Boundary Acts, and the Florida Constitution. The only thing material to a decision of this case is the intent of Congress in fixing the measure of the grant in the Submerged Lands Act. That intent clearly was to grant to the States rights in the seabed in the Gulf of Mexico to such extent beyond three miles as the States' boundaries "existed" at the time each State became a member of the Union or "as heretofore approved by Congress."

G. *The policy questions involved in the transfer to the States in the Submerged Lands Act have been decided in favor of the States and the letters of the Secretary of State cannot serve to defeat that policy.*

The Government concedes in its reply brief (p. 8) that:

> "The President's view, as well as that of Secretary of the Interior McKay . . . was that the historic boundary of Texas was three leagues from shore . . ."

If statements of the Executive Department are to be taken as controlling on the issues involved in this case, we submit that the views of the President on this subject should be entitled to more weight than those of his subordinate, the Secretary of State. As the Government admits, the President has consistently taken the position that the boundary of Texas at the time it entered the Union was three leagues from the shore and he urged the passage of the Submerged Lands Act by the Congress, repeating the views on Texas boundary which he had earlier asserted. (Jt. Br. 39-41) The President evidently signed the Submerged Lands Act with this belief. (Jt. Br. 41)

Moreover, since the only question at issue is the division of property rights in the continental shelf and not "sovereignty" in the overlying waters, the interpretation of the law by the Secretary of the Interior, the executive officer responsible for the administration of the property of the United States in this connection, should be given more weight than the views of the Secretary of State, whose department actually has nothing to do with the matter which is at issue before the Court.

In the present instance, the State Department presented its views to the Congress and to the Chief Executive (Jt. Br. 25-29, 30-44,) and both its chief —the President—and the Congress, after having heard its arguments, have decided that original or congressionally-approved State boundaries three leagues from the coast in the Gulf of Mexico can be the measure of the transfer of rights to the States

without embarrassment to the nation in the conduct of its foreign relations, with respect to the extent of "territorial waters." (Jt. Br. 25-29)

H. *International law should not be confused with foreign policy.*

In the Government's Reply Brief on page 63 is the following passage:

> "Texas argues (Tex. Br. 113-123) that the Republic of Texas was free to adopt a three-league maritime limit because there was no universally accepted rule of international law restricting maritime limits more narrowly. This, however, approaches the question from the wrong direction. *We are not concerned with Texas' right to claim three leagues, but with the right of the United States to refuse recognition to that claim.*"

The historical facts are that the United States did not refuse to recognize the Texas three-league boundary or even protest it.

Still the Government's argument proceeds upon the assumption that "what the political branches of the Government have adopted as the foreign policy of the United States" is identical with "international law as accepted and applied by the United States." (Gov. Rep. Br. 27) This assumption is the basic reason for the Government's securing the two letters from Secretary Dulles on foreign policy. In making this assumption, the Government confuses two different things. Policy and law are not the same. While

the foreign policy of the United States is formulated by the political branches of the Government, international law as accepted and applied by the United States has its origin in many sources. The scope and content of international law at the relevant times in this case must be determined by this Court. Moreover, the United States cannot take the position that international law is only what the State Department unilaterally considers it to be without reducing our moral position to that of other countries who refuse to acknowledge the rules generally accepted by civilized nations.

The Government denies the relevancy of international law as applied by other nations or as accepted by recognized publicists, (Gov. Rep. Br. 63) and insists that this Court act not as an impartial tribunal but merely as an instrument for carrying out State Department policy (Gov. Rep. Br. 27, 63). The whole tone of this argument reflects a narrowness of view which is inconsistent with the position of this nation as an international moral leader and with the exalted role of this Court as an independent arbiter in this controversy between sovereigns.

Indeed the whole argument advanced against the States in this case, including:

(a) the insistence that the unilateral view of the State Department as to the content of international law is alone controlling,

(b) the insistence that the Court cannot go beyond the statements of historical fact by the present Secretary of State, and determine for itself historical truth, and

(c) the insistence that the Court must view the annexation negotiations and agreements with Texas not as an international tribunal would view them,

demonstrates a failure to appreciate the appropriate position of the United States. It reflects a standard the United States would not tolerate in its dealing with another nation under international law.

The Government has conceded that at the relevant dates "some nations asserted claims to a marginal sea of three leagues, . . . and that some publicists supported their right to make such claims." (Gov. Rep. Br. 3). There was no rule of international law which prohibited a nation from making such a claim (Joint Br. 67-83). It is significant that whenever, throughout the entire relevant period, the United States asserted its position it did so in reliance upon the law of nations—not upon its own unilateral view of that law. Hence, one reason for there having been no controversy over three-league boundaries in the Gulf of Mexico was Jefferson's statement that the distance of "three sea leagues has some authority in its favor." It is reasonable to assume that, had controversy arisen at the time over the maritime boundaries of the Gulf States, the United States would have followed existing international law, which permitted three-league maritime boundaries. The United States in fact in 1848 (only three years after Texas' admission) adopted the Texas three-league boundary in fixing the international boundary at three leagues from land in the Treaty of Guadalupe Hidalgo.

Congress in the Submerged Lands Act made a transfer of property rights based upon historic State boundaries. The Government now seeks to nullify this Congresssional action by resort to a nebulous notion of an allegedly contrary foreign policy of the United States existing one hundred or more years ago. Congress did not make the effectiveness of the transfer to the States dependent on the consistency of the States' historic boundaries with the foreign policy of the United States at that time or at present. Foreign policy is entirely extraneous to the considerations involved in the Congressional determination of the extent of the transfer of property rights by the Act. The issue in this case is not what was the foreign policy of the United States in the early part of the 19th century, but simply where, as a matter of historical fact, the boundaries of the states were at the relevant times, as provided by the states' laws or constitutions or by the relevant acts of Congress.

II.

The comment of the American Law Institute on the Submerged Lands Act.

The Government's reply brief (p. 7, fn. 3) makes an astonishing attack upon the processes of the American Law Institute in an effort to discredit the following comment which was quoted in full in the joint brief of the States (pp.

7-9) from the most recent draft of the *Restatement of the Foreign Relations Law of the United States:*

> "d. The Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. Supp. Sec. 1301, et seq. which gave to certain states of the United States bordering on the Gulf of Mexico title to oil and other resources beneath the waters of the Gulf of Mexico extending nine miles from the coast, does not require the United States to change its traditional position regarding the three-mile limit. The resources in question were on the continental shelf and the United States as a national state asserted jurisdiction and control over the resources of the continental shelf not on the basis of territory but under the rule described in s. 23. Whether this jurisdiction is exercised by a state of the United States or by the United States itself is purely a domestic matter.
>
> "The issue was confused by the fact that Sections 2(b) and 4 of the Submerged Lands Act used the term 'boundaries' as a criterion for determining whether a state of the United States bordering on the Gulf of Mexico should exercise the jurisdiction over these resources or whether such jurisdiction should be exercised by the federal government of the United States under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. Supp. Sec. 1331 et seq. This appeared to put the question on a territorial basis and led to an attack on the constitutionality of the Act on the ground that it permitted some states of the United States to exercise territorial jurisdiction over a nine-mile belt while restricting other states to a three-mile belt, and thus violated the 'equal footing' clause

on which states were admitted to the Union. The decision of the Court upholding the act was placed squarely on the ground that there was no limitation on the authority of Congress to dispose of property of the United States. Alabama v. Texas, 347 U.S. 272 (1954). Construed in this manner, the act does not depend on the breadth of the territorial sea claimed by the United States under international law." (A.L.I. *Restatement of the Foreign Relations Law of the United States*, Tentative Draft No. 2, May 8, 1958, p. 22)

The Government says that it has been informed "that the language seized upon in the defendants' joint brief was inadvertently included in the comment" and that there was "no intention of interpreting the Submerged Lands Act." (Gov. Rep. Br. p. 7, fn. 3)

A comparison of what is said in that footnote in the Government's Reply Brief with the letter from Mr. Adrian S. Fisher, the Reporter for the American Law Institute,[15] (Gov. Rep. Br., p. 97) shows that the Government's interpretation of Mr. Fisher's letter goes substantially beyond what Mr. Fisher actually says. The Government apparently would have the Court believe that this comment was simply a heedless mistake.

We do not think that a reporter of the Institute is authorized to write letters detracting from the

[15] The inclusion of this letter in the Government's Reply Brief raises fundamental questions of procedure. Should the Court consider ex parte statements of this kind, particularly when there is no disclosure of what was said or written to Mr. Fisher to cause him to write this letter?

text of a comment or adding his personal observations or predicting what the Institute will do in the way of revising it. Surely the Council and the membership will have something to say about any revision.

We would also be very much surprised if it were true that anything of substance was included by inadvertence in a second draft of a restatement submitted by the Council of the American Law Institute to its members. Our information is that the regular practice of the American Law Institute is to select competent and careful reporters and that Mr. Fisher is so qualified. We also understand that drafts of restatements, including comments, are submitted to the membership only after consideration and discussion by the Council. In this instance, however, we do not have to rely only upon the usual practice and procedure. The record shows that this particular comment was certainly not "inadvertently included."

Tentative Draft No. 2, A.L.I. *Restatement of the Foreign Relations Law of the United States*, dated May 8, 1958, shows on its face that it was "submitted by the Council to the members for discussion at the Thirty-fifth Annual Meeting May 21, 22, 23, and 24, 1958." It was sent to all members of the American Law Institute. In the States' Joint Brief (p. 9, fn. 5) we stated that at the May, 1958, meeting of the American Law Institute in Washington, this comment, in the identical form quoted was accepted by the American Law Institute membership without disagreement. This fact has not been disputed by the Government.

This was not the first time that this comment on the Submerged Lands Act had been submitted to the American Law Institute membership. Tentative Draft No. 1. of the *Restatement of the Foreign Relations Law of the United States*, dated April 26, 1957, shows on its face that it was "submitted by the Council to the members for discussion at the Thirty-fourth Annual Meeting May 22, 23, 24 and 25, 1957." In that draft, the comment on the Submerged Lands Act was included as paragraph e of the comment under Section 7, page 24. We copy this comment below, italicizing the words which were changed in the second draft:

> "e. The Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. Supp. Sec. 1311 et seq. which gave to certain states of the *Union* bordering on the Gulf of Mexico title to oil and other resources beneath the waters of the Gulf of Mexico extending nine miles from the coast does not require the United States to change its traditional position regarding the three-mile limit. The resources in question were on the continental shelf and the United States as a national state asserted jurisdiction and control over the resources of the continental shelf not on the basis of territory but under the rule described in s 23 *of Chapter 4 of this Restatement.* Whether this jurisdiction *was* exercised by a state of the *Union* or by the United States is purely a domestic matter.
>
> "The issue was confused by the fact that Sections 2(b) and 4 of the Submerged Lands Act used the term 'boundaries' as a criterion for determining whether a state of the Union bordering on the Gulf of Mexico should exercise the

jurisdiction over these resources or whether such jurisdiction should be exercised by the federal government of the United States under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. Supp. Sec. 1331 et seq. This appeared to put *this* question on a territorial basis and led to an attack on the constitutionality of the Act on the grounds that *the Act was permitting* some states of the Union to exercise territorial jurisdiction over a nine-mile belt while restricting other states to a three-mile belt and thus *was invalid in violation* of the 'equal footing' clause on which states *of the Union* were admitted to the Union. The decision of the Court upholding the Act was placed squarely on the ground that there was no limitation on the authority of Congress to dispose of property of the United States. Alabama v. Texas, 347 U.S. 272 (1934). Construed in this manner, the Act *has nothing to do with territory and does not in any way affect the U.S. position in favor of the three-mile limit.*"

A comparison of Draft No. 1 with Draft No. 2, quoted above, pp. 46-47, will show that the interpretation given to the Submerged Lands Act is the same in both drafts and that the only differences between the drafts relate to verbal style.

In the notice which was sent to the members of the American Law Institute [16] regarding the meeting in May, 1957, along with copies of the drafts of the restatements, there was included a pamphlet entitled "Questions to be Considered." On page (x) of this

[16] The Attorney General and the Solicitor General of the United States are ex officio members of the American Law Institute. (Section 3, By-Laws, A.L.I., paragraph 3, copied in *Proceedings*, 34th Annual Meeting, 1957, p. 558-559)

pamphlet, there is the following notice from the Reporter with reference to the *Restatement of the Foreign Relations Law of the United States:*

> "To the Members of The American Law Institute:
>
> "At the May Meeting I intend to discuss primarily the following material: . . . .
>
> "The relationship between Section 7, Outward Limit of Territorial Sea, and Section 21, Customs and Immigration Zone and Section 23, Continental Shelf. . . ."

These subjects, including the interpretation of the Submerged Lands Act, were discussed by the Reporter and the members at the 1957 meeting of the American Law Institute. (See *Proceedings of the American Law Institute,* Thirty-fourth Annual Meeting, 1957, pp. 476-478, 482-505).[17]

---

[17] The Submerged Lands Act was specifically mentioned. (*Proceedings,* A.L.I. 34th Annual Meeting, 1957, pp. 487-488, 493). The litigation which was then pending in this Court between the United States and Louisiana only, before the other States were joined as defendants, was specifically called to the attention of the meeting by Mr. Victor Sachse, one of the counsel for Louisiana, who objected to the inclusion of any interpretation of the Submerged Lands Act in the Restatement. (Id. 476-477). This objection was overruled by Director Goodrich on the ground that "of course, we have to continue our discussion of these things regardless of pending litigation on this or any other subject in the United States Supreme Court or any other court." (Id. 477) The positions taken by the United States and Louisiana were summarized in the discussion. (Id. 477, 493) Mr. Fisher, the Reporter, defended the position taken in the comment that, as construed in *Alabama v. Texas,* the Submerged Lands Act simply deals with a disposition of property rights and does not involve the international relations of the United States. (Id. 487-488, 491-493)

Following the 1957 membership meeting, the second draft was prepared and submitted to the membership by the Council of the American Law Institute. Section 7 was renumbered Section 6, and the comment on the Submerged Lands Act was relettered d. No change was made in the interpretation of the Submerged Lands Act.

The report of the Director of the American Law Institute, sent to the members prior to the 1958 meeting, refers to the *Restatement of the Foreign Relations Law of the United States*, and in this connection says: (p. 11)

> "This subject will be discussed all of Saturday. You will notice that with the revision of the sections submitted last year and the new material added now that we have now covered the big and important division 'Jurisdiction.' "

While no particular attention was called to the comment on the Submerged Lands Act, it was one of the sections which had been revised and submitted for consideration and discussion by the members. The Government says (Gov. Rep. Br. p. 7, fn 3), that "the specific language of the draft was not called to the attention of the membership in Washington." This statement is correct only in the sense that the comment on the Submerged Lands Act was not singled out for special attention; its specific language was included in the revised draft, and the whole draft was called to the attention of the membership.[18]

---

[18] The question of territorial waters was discussed by Mr. Fisher, the Reporter, in the session of May 24, 1958.

Referring to the 1958 membership meeting of the American Law Institute, the Government further says: (Gov. Rep. Br. p. 7, fn. 3), ". . . nor was the position of the United States in the present litigation brought to their attention in this connection."

At the time the American Law Institute met in Washington on May 21-24, 1958 the Government had already filed its "Brief for the United States in Support of Motion for Judgment on Amended Complaint" on May 15, 1958. As the Court well knows, this brief received considerable publicity [19] and it is only reasonable to believe that interested members of the Institute were informed of the position of the Government. Moreover, the Government had previously taken substantially the same position in its "Brief for the United States in Support of Motion for Judgment" filed in February, 1957, when only Louisiana was a defendant, before even the first draft of the American Law Institute *Restatement* was considered and discussed by the membership,

---

(*Proceedings*, A.L.I. 35th Annual Meeting, 1958, pp. 386-388) His discussion related principally to the effect of the Geneva Conference on the three-mile limit. Section 6 of the revised draft was mentioned (Id. p. 388), but there was no discussion and no objection raised to any part of that section, including the comments. These citations to the 1958 proceedings are from a photostatic copy of the transcript of the *Proceedings* furnished to us by the A.L.I. office, which we will file with the Court if there is any question of their accuracy, since these *Proceedings* have not yet been printed.

[19] See, for example, New York Times, May 16, 1958, page 1.

and the Government's position had been discussed at the 1957 meeting.[20]

The Government's Brief filed on May 15, 1958, shows that it was then familiar with the American Law Institute *Restatement of the Foreign Relations Law of the United States.* On pages 110-113 of that brief appear extensive quotations from Tentative Draft No. 1, pages 50-53.

The Government now says (Gov. Rep. Br. p, 7, fn. 3) that the interpretation of the Submerged Lands Act is "a matter outside the Institute's purpose or policy." There are several answers to this assertion. The purpose and policy of the Institute are for its Council and membership, not for the Government counsel, or even a Reporter, to decide.[21] Since the Submerged Lands Act deals with questions of great public importance, it seems proper for the Institute to give its impartial interpretation of the Act. The Government evidently thought it was appropriate for the Institute to interpret the Outer Continental Shelf Lands Act and the Presidential Proclamation of September 28, 1945, since it quoted extensively in its brief filed May 15, 1958 (Gov. Br. pp. 110-113) from Section 23 of Tentative Draft No. 1 of the *Restatement of the Foreign Relations Law of the United States*, pages 50-53, which

---

[20] See *Proceedings*, A.L.I. 34th Annual Meeting 1957, pp. 477, 493.

[21] When Director Goodrich at the 1957 meeting overruled the objection to the interpretation of the Submerged Lands Act on the ground that the matter was in litigation, there was no objection or dissent from the other members present. (*Proceedings*, A.L.I. 34th Annual Meeting, 1957, pp. 477-478)

interprets that statute and that proclamation, although the Government in its quotations omits the portions of the comment where they are specifically cited.

Is there any valid reason why it should be thought proper for the Institute to interpret one statute but not the other, when both the Submerged Lands Act and the Outer Continental Shelf Lands Act were part of one plan for the allocation of rights in the continental shelf? We submit that the Institute was acting properly, within its purpose and authority, in interpreting these statutes so that both can be given full effect without in any way conflicting with the policy of the United States in its international relations.

To summarize, the American Law Institute, in a comment in its *Restatement* which was twice submitted to the membership and in its present form accepted without disagreement, concludes:

(1) that the Submerged Lands Act "gave to certain States of the United States bordering on the Gulf of Mexico title to oil and other resources beneath the waters of the Gulf of Mexico extending nine [nautical] miles from the coast";

(2) that the Act as so construed "does not require the United States to change its traditional position regarding the three-mile limit," because

(3) "construed in this manner, the Act does not depend on the breadth of the territorial sea claimed by the United States under international law." (American Law Institute, *Restatement of the For-*

eign Relations Law of the United States, Tentative Draft No. 2, May 8, 1958, pages 22-23).

These comments are not inadvertent. They are the carefully reasoned conclusions of impartial lawyers as to the proper interpretation of the Act. Their construction effectuates all of its provisions without conflicting with or endangering the foreign policy of the United States. This was the clear intent of Congress. (Joint Br. 16-31)

III.

References to the States' Historic Boundaries as "Mere Paper Claims."

Since the Government relies so heavily on statements contained in mere letters, it is surprising to find the Government's Brief speaking slightingly, if not in derision, of the original boundaries declared in the laws of the defendant States as "mere paper claims." (Gov. Rep. Br. 19, 20) No maritime boundary is marked by a fence or wall, or even by a chain or cable stretched over the water or on the seabed. All boundaries referred to by all parties to this case —both three miles and three leagues—depend upon words on paper. We had never thought, for example, that the duly enacted boundary statute of the Congress of the Republic of Texas, in force throughout almost the entire history of the Republic and remaining in effect at the time of admission of Texas to the Union, would be characterized as a "mere paper claim." The Government virtually concedes (Gov. Rep. Br. 63) that under international law as *gener-*

ally accepted and applied, Texas, as an independent republic, had a perfect right to establish a boundary at three leagues from land in the Gulf of Mexico.[22] As was shown in the Texas brief (76-86), this claim was maintained by the Texas Navy. Obviously the fact that control of the sea was maintained beyond the boundary of Texas, as well as within the boundary, fortifies the Texas rights, and does not detract from them, as the Government apparently argues. (Gov. Rep. Br. 65, fn. 34)[23]

In any event, it is clear that the Texas Boundary Act, the Louisiana, Alabama, Mississippi and Florida Constitutions, and the statutory and other legal assertions of boundaries of the States, were what Congress had in mind when it referred to the States' boundaries as they were provided by their laws or constitutions at the respective times of admission, or as approved by Congress, and Congress was certainly not thinking that the States' boundaries at the relevant times would be decided by letters exchanged between federal departments several years after the passage of the Submerged Lands Act.

---

[22] It is no answer to the question of validity of the existing State boundaries to say, as the Government does (Gov. Rep. Br. p. 22), that there was then no interest in the seabed and subsoil at these dates. It is elementary that property rights within fixed boundaries do not depend on knowledge of the owner as to what may be there.

[23] The Government argues this point both ways. After saying, as indicated above, that Texas' control extended too far, in the very next footnote the Government argues that Texas had "less control" of the Gulf than our historical evidence shows, solely because of a diplomatic note suggesting United States support for the Texas Navy. (Gov. Rep. Br. 65, fn. 35)

It would be entirely contrary to the purpose of the Act to hold as to Texas that the boundary intended is not the boundary which Texas provided by its laws and which existed at the time of admission, but an alleged national boundary after admission, which is to be inferred and deduced from letters of various officials, relating to entirely different matters. The Government has not produced any evidence to support its statement (Gov. Rep. Br. 63) that the United States refused to recognize Texas' three-league boundary.

The Government likewise misinterprets historical fact when it asserts that the Republic of Texas never insisted that the United States recognize its three-league claim. (Gov. Rep. Br. 67) The assurances by President Polk to Sam Houston that Texas' boundary and "rights of territory" would be maintained could not have been more emphatic. (See Texas Br. 95-101, especially 98) The negotiations as to other boundaries (Gov. Rep. Br. 67-72) related to a treaty which was never adopted. The letter of November 18, 1836, (Gov. Rep. Br. 67-69) was written by Stephen F. Austin before the Texas Boundary Act was passed on December 19, 1836. The provision for a boundary beginning three leagues from land in the Treaty of Guadalupe Hidalgo in 1848 was plainly a recognition of the Texas maritime boundary, carrying out President Polk's pledge to Sam Houston. (Texas Br. 101-106)

The Government in its reply brief says that the Boundary Act of the Republic of Texas is not tested by abstract international law, but instead solely by

United States foreign policy. (Gov. Rep. Br. 3) It, in effect, concedes that there is no generally accepted principle of international law limiting a maritime nation to three miles. (Gov. Rep. Br. 63)

The Government's precise contention is: (Gov. Rep. Br. 3)

> "The United States asserts that it is not international 'law' in the abstract, but the international position of the United States, that controls; and that at the crucial times the United States claimed for itself, and limited its recognition of claims by other nations to, three miles and no more."

The Government has fallen back to a more restricted line of argument after failing to establish a positive rule of international law limiting all coastal nations to a three-mile territorial sea. Having to admit that there is no such rule [24] the Government falls back upon later State Department efforts to establish such a rule,[25] and argues that those efforts determined a United States foreign policy which retroactively invalidates the Republic of Texas three-league boundary and the historic boundaries of the other States.

This argument amounts to the assertion that maritime boundaries do not achieve a general or

---

[24] This is an unavoidable admission, since the evidence presented to, and the results of, the recent Geneva Conference conclusively prove that there is not now and never has been the amount of international agreement necessary to establish the three-mile rule as a principle of international law.

[25] No real consistency can be shown until after the 1893 Fur Seal Arbitration. (Joint Br. 122-129)

universal validity, but are a part of the separate relationship between a coastal nation and each of the other nations. For example, under this proposition, it might be said that the Republic of Texas had a valid three-league maritime boundary as between itself and Spain, but not as between itself and England. And so a coastal nation might have many maritime boundaries depending upon the foreign policy of other nations. Since a nation's foreign policy is changeable, a coastal nation's maritime boundary might change overnight with changes in policy or internal shifts in the administration of any nation.

The obvious fallacy in this argument is that no nation is going to submit to having the validity of its maritime boundary determined by the foreign policy of another nation. Yet the Government is asking this Court to write that very proposition into the law of the United States when it asks this Court to hold invalid the boundary act of the Republic of Texas because it argues that this violated the foreign policy of the United States at that time. This Court should not be called upon to write into our law a proposition so patently unsound. The boundary of the Republic of Texas in the Gulf of Mexico was not a "mere paper claim," but was a validly existing boundary at the time Texas entered the Union. It has been consistently so regarded by President Eisenhower (Joint Br. 39-44). Likewise, the historic boundaries of the other States, asserted in their constitutions or laws, or in Congressional acts or in proclamations, are not properly to be characterized as "mere paper claims."

IV.

The Report of a Subcommittee of the 82nd Congress.

The Government mentions for the first time in its reply brief (41)the report of a subcommittee of the House Interior Committee, made at the end of the second session of the 82nd Congress on January 2, 1953.

It is obvious that this subcommittee report is entitled to no weight whatever in the decision of any question before this Court. The subcommittee was not considering the Submerged Lands Act or any similar legislation. In fact, the session of Congress which considered the Submerged Lands Act (83rd Cong., 1st Sess.) had not even convened. The report itself (House Report No. 2515, 82nd Cong., 2nd Sess., January 2, 1953) shows that the subcommittee held only two hearings of two days each, one at Los Angeles, California, on October 3 and 4, 1952, and the other at New Orleans, Louisiana, on December 10 and 11, 1952. Even so, the study of the committee was limited almost entirely to the question of the outer limit of inland waters. The statement quoted in the Government Reply Brief (42) was merely introductory to the real question the subcommittee was considering. The subcommittee included only two members of the House from the Gulf States, both from Texas, and both of whom noted their disagreement with the statement regarding the width of the marginal belt as applied to Texas. (House Report No. 2515, 82nd Cong. 2nd Sess., January 2, 1953, 5)

Even as to the matters to which it was able to give its real attention during the short time allotted for its work, the subcommittee disclaimed any intention to convey the impression that the questions had been thoroughly studied: (Ibid., 21)

> "Your subcommittee has not tried to give a definitive answer to the seaward boundaries problem. The time at our disposal for study of this complicated problem has been too short to attempt more than a definition of the problem."

In conclusion, the committee made the following recommendation: (Ibid., 21)

> "Our study has convinced us that the inquiry should be continued in the next Congress, and that the new committee should be provided adequate funds to employ the necessary experts to assist it in resolving the complex economic, legal and policy questions which we have outlined in this report."

The whole matter was therefore left open for further consideration in the next Congress. There the Submerged Lands Act was introduced and was given the thorough and careful study which we have outlined in the briefs already on file. There the questions actually before this Court were thoroughly discussed and considered and there the committee reports, the debates in Congress, and the declarations of the President in urging the passage of the bill, all show that it was intended that Texas' three-league boundary should be the measure of the rights

transferred to Texas, and that the historic boundaries of Louisiana, Mississippi, Alabama, and Florida at the time of their admission or as approved by Congress were likewise the measure of the transfer to the other Gulf States.

V.

The Contention That the Submerged Lands Act Must Be "Construed Strictly Against" the States and Must Be "Construed Favorably to the United States."

In its reply brief, page 15, the Government for the first time cites cases which it says sustain the proposition that if the construction of the Submerged Lands Act is doubtful, it must be "construed strictly against the grantee," meaning the States who are defendants herein, and "must be construed favorably to the United States."

The Court should not be asked to apply such rules of construction to an Act of Congress intended to be a settlement of rights and jurisdiction as between the Federal Government and the States. The States should not be treated as ordinary private individuals or corporations. An Act of Congress should not be treated as an ordinary deed, when its purpose is to settle grave political problems as to the distribution of rights between governmental units of our federal system. While it is true that property rights are at issue, the Submerged Lands Act was the result of a deliberate decision of governmental policy by the political branches of the Government

on a matter of great public concern and importance.

This is the kind of case which this Court referred to in *United States v. Texas*, 339 U. S. 707, 715, as a controversy "between sovereigns which involves issues of high public importance."

In such a case the rights of the States should not be regarded "strictly" while, at the same time, the claims of the Federal Government are looked upon "favorably."

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State Capitol
Baton Rouge, Louisiana

W. SCOTT WILKINSON
Special Assistant Attorney General
17th Floor Beck Building
Shreveport, Louisiana

VICTOR A. SACHSE
Special Assistant Attorney General
620 Commerce Building
Baton Rouge, Louisiana

EDWARD M. CARMOUCHE
Special Assistant Attorney General
Kirby Building
Lake Charles, Louisiana

JOHN L. MADDEN
Special Assistant Attorney General
Capitol Building
Baton Rouge, Louisiana

BAILEY WALSH
Special Counsel
1025 Connecticut Avenue, N. W.
Washington, D. C.

Attorneys for the State of Louisiana

Of Counsel:

HUGH M. WILKINSON
MORRIS WRIGHT
JAMES R. FULLER
MARC DUPUY, JR.
FRANK B. ELLIS

Of Counsel:

JAMES P. HART
Brown Building
Austin, Texas

WILL WILSON
Attorney General

JAMES N. LUDLUM
First Assistant Attorney General

HOUGHTON BROWNLEE, JR.
Assistant Attorney General

J. CHRYS DOUGHERTY
ROBERT J. HEARON, JR
Capital National Bank
Building
Austin, Texas

JAMES H. ROGERS
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for the State of Texas

JOE T. PATTERSON
Attorney General

JOHN H. PRICE, JR.
Assistant Attorney General
New Capitol Building
Jackson, Mississippi

Attorneys for the State of Mississippi

Of Counsel:

E. C. BOSWELL
Geneva, Alabama
Legal Advisor to
James E. Folsom
Governor of Alabama

NEIL METCALF
Geneva, Alabama
Representing
James E. Folsom
Governor of Alabama

JOHN PATTERSON
Attorney General
Judicial Building
Montgomery, Alabama

WILLIAM G. O'REAR
Assistant Attorney General
711 High Street
Montgomery, Alabama

GORDON MADISON
Assistant Attorney General
Judicial Building
Montgomery, Alabama

E. K. HANBY
Special Assistant Attorney General
403 Noojin Building
Gadsden, Alabama

Attorneys for the State of Alabama

Of Counsel:

SPESSARD L. HOLLAND
United States Senator
Washington, D. C.

GUY CORDON
1625 Eye St., N. W.
Washington, D. C.

RICHARD W. ERVIN
Attorney General

J. R. MCCLURE
First Assistant Attorney General

FRED M. BURNS
Assistant Attorney General

ROBERT J. KELLY
Special Assistant Attorney General
Capitol Building
Tallahassee, Florida

Attorneys for the State of Florida

November 7, 1958.