

OCT 12 1959

JAMES R. BROWNING, Clerk

MOTION FILED SEP 30 1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA
Plaintiff,

v.

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

MEMORANDUM OF ADDITIONAL RESEARCH CON-
CERNING CORRESPONDENCE WITH SPAIN DUR-
ING MR. JEFFERSON'S ADMINISTRATION
AND MOTION FOR LEAVE TO FILE

WILL WILSON
Attorney General of Texas
JAMES N. LUDLUM
First Assistant Attorney General
HOUGHTON BROWNLEE, JR.
JAMES H. ROGERS
JOHN FLOWERS

Of Counsel:

PRICE DANIEL	Assistant Attorneys General
Governor of Texas	Capitol Station
Austin, Texas	Austin, Texas
JAMES P. HART	
Brown Building	
Austin, Texas	
J. CHRYS DOUGHERTY	
ROBERT J. HEARON, JR.	
Capital National Bank Building	
Austin, Texas	

September 30, 1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA
Plaintiff,
v.

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

MOTION FOR LEAVE TO FILE
MEMORANDUM OF ADDITIONAL RESEARCH
CONCERNING CORRESPONDENCE WITH
SPAIN DURING MR. JEFFERSON'S
ADMINISTRATION

The State of Texas desires to present to the Court the attached memorandum of historical research completed during the interim since its earlier brief was filed and moves for leave to file the same.

Respectfully submitted,

WILL WILSON

Attorney General of Texas

JAMES N. LUDLUM

First Assistant Attorney General

HOUGHTON BROWNLEE, JR.

JAMES H. ROGERS

JOHN FLOWERS

Of Counsel:

PRICE DANIEL

Governor of Texas Assistant Attorneys General

Austin, Texas

Capitol Station

JAMES P. HART

Austin, Texas

Brown Building

Austin, Texas

J. CHRYS DOUGHERTY

ROBERT J. HEARON, JR.

Capital National Bank Building

Austin, Texas

September 30, 1959

1870

1871

1872

1873

1874

1875

1876

1877

1878

1879

1880

1881

1882

1883

1884

1885

1886

1887

1888

1889

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

IN THE
Supreme Court of the United States

October Term, 1959

No. 10, Original

UNITED STATES OF AMERICA

Plaintiff,

v.

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

Defendants.

MEMORANDUM OF ADDITIONAL RESEARCH
CONCERNING CORRESPONDENCE WITH
SPAIN DURING MR. JEFFERSON'S
ADMINISTRATION

The State of Texas continues to assert the immateriality of "foreign policy" to the issues at bar. However, at the risk of making the matter assume more important than it has, the results of additional investigation concerning one narrow area of diplomatic history should be before the Court.

The United States relies (Gov. Br. 64, 75; Gov. Rep. Br. 31) upon a statement of Secretary of State Bayard made in 1886 (long after the admission of the respective defendant States and the Congressional approval of their historic boundaries) to the effect that

"When we were involved, in the earlier part of Mr. Jefferson's Administration, in difficulties

with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more;. . . .” Secretary of State Bayard to Secretary of Treasury Daniel Manning, 170 Ms. Domestic Letters 348; 1 Moore, *Digest of International Law* 720 (Washington, 1906).

In the year since the filing of the States’ briefs an intensive effort has been made to locate correspondence between the United States and the Spanish Government which would support the assertion made by Secretary Bayard.

A thorough search of the National Archives in Washington, of the Archivo Historico Nacional in Madrid, and of all published papers and memoirs of Thomas Jefferson and each of the persons charged with negotiations with Spain during the period from March 4, 1801, through March 4, 1809, when Thomas Jefferson served as President of the United States, has failed to reveal any evidence that any correspondence, such as Secretary Bayard describes in 1886, ever took place.

Three affidavits evidencing this thorough search are attached as Exhibits A, B, and C. The originals of these affidavits have been deposited with the Clerk of the Court to be filed with the papers in this case.

We infer that the Government has not been able to find any such correspondence; thus far, the Solicitor General has cited only Secretary Bayard’s letter, written more than 80 years after “the earlier part of Jefferson’s Administration.”

Actually, Mr. Jefferson, as Secretary of State in 1793, referred to one league (3 miles) as a minimum territorial distance and called it "the smallest distance, I believe, claimed by any nation whatever", adding immediately that the distance "of three sea-leagues has some authority in its favor."¹ Furthermore, in 1805 while President, Mr. Jefferson advocated a wider area² and ordered the arrest of all "vessels found hovering on our coasts within the limits of the Gulf Stream".³ He never fixed a maximum limit for the United States or refused to recognize any limit in excess of 3 miles asserted by any other nation.

Secretary Bayard's statement is an historically inaccurate one. It attributes to an earlier time the 1855 Marcy correspondence with Spain concerning the limits of Cuba and then incorrectly reports even that. See Joint Brief, p. 124.

Bayard wrote this letter only shortly after the expiration of the 1871 Treaty of Washington and after the renewal of Canadian ship seizures had caused him to begin a personal study of the North Atlantic Coast Fisheries. See Tansill, *The Foreign Policy of Thomas F. Bayard, 1885-1897*, 212-222 (New York, 1940).

Francis Wharton, then Solicitor of the Department of State, gave a great deal more study to the

¹ 1 *American State Papers (Class I Foreign Relations)* 183 (Lourie & Clarke ed. 1832); Joint Brief p. 76-78.

² 1 *Memoirs of John Quincy Adams* 375-376 (Adams ed. 1874); Letter Thomas Jefferson to James Monroe, U. S. Minister to Great Britain, May 4, 1806, 8 *Writings of Thomas Jefferson* 447, 449-50 (Ford ed. 1897).

³ Message to Congress, December 3, 1805, 1 *American State Papers (Class I Foreign Relations)* 66.

problem in connection with the new questions being raised by the slaughter of seals in the Bering Sea by Canadian and British fishermen, and on September 4, 1887, he wrote Secretary Bayard that there was a

“...good deal worth considering in the position taken by you [Bayard] when we first began to work at the fishery question, that the three-mile zone was not an arbitrary cosmopolitan rule, but a rule adopted by compromise and custom for certain specific coasts, among which that of North East America was conspicuous. I am positive that this is the conclusion we came to, for in making up the *Digest*, after talking with you and Mr. Moore, I was careful to state and restrict the three-mile rule so as to apply it to the N. E. Coast on the basis of custom and diplomatic settlement. In fact, with the authorities before me, I could not do otherwise. Mr. Jefferson, for instance, while adhering to the three-mile rule, as the basis of custom for the N. E. coast, maintained, and so we quoted him, that the territorial waters of the United States extended on the S. E., for the purposes of police protection, over the Gulf Stream to Cuba.

“Now this does not mean that we are to claim Behring’s Sea. That is absurd. But it does mean, I think, that the principle of territorial waters is that wherever a sovereign has property, there he is to have sufficient police control over the waters adjacent to such property as enable him to protect it. This is the rule of the law of nations, a rule as much growing out of the conditions of the times as did the three-mile rule grow out of the conditions of the times in which it was generated. Observe,

I do not say that the three-mile rule is not applicable to the N. E. fisheries. It is, by force of adoption and custom and diplomatic correspondence, but I do not think it is applicable to the Seal Fisheries whose protection and preservation require a larger margin. Old precedents do not make present law under conditions to which they are not applicable.

"As far as I recollect, the three-mile rule has never applied to the North Pacific. We fought against territorialising of Behring Sea. But we never... set up as against it the three-mile rule. As a matter of International Law,... I do not think the three-mile rule binds the seal fisheries." Bayard Ms. reprinted in Tansill, *Id.* at 466-467.⁴

Thus, as late as 1887 the ablest men in the Department of State were not ready to assert that three miles was a maximum limit for all seas bordering the United States. This circumstance demonstrates again the necessity for close inspection of the historical facts at the critical dates and the dangers of attempting to deduce a consistent policy from isolated statements culled from diplomatic correspondence and memoranda.

One more general example should be cited. It is often said in the literature that the British

⁴ Francis Wharton had been the editor of *A Digest of International Law* (3 vol., Washington, 1886) printed by direction of a Congressional Resolution of July 28, 1886. "Mr. Moore" referred to by Wharton was John Bassett Moore, then Third Assistant Secretary of State and later editor of *A Digest of International Law* (8 vol., Washington, 1906).

Government has consistently adhered to three miles as a maximum limit, contending it to be an established rule of international law. But close inspection of the British record during the 19th Century reveals many of the same inconsistencies that show themselves in the practice of the United States.⁵ Even after nearly a century of fostering the rule, the British conceded in 1910 that no universal agreement existed and that what general agreement there was "fixed three miles only as a minimum." In the "Case of Great Britain" filed in the North Atlantic Coast Fisheries Arbitration it is said:

"It is undoubted law that a State has territorial sovereignty over a belt of sea adjoining its coast, subject to the right of passage by the commercial vessels of other nations. The extent of this belt was not definitely fixed by international law at the time the treaty [of 1818] was entered into, and though a width of three miles has since become generally accepted as the minimum limit of waters over which sovereignty may be exercised, there is not even now [1910] universal agreement on the point. Wider claims are put forward by some nations and by some writers, and the Institute of International Law in 1894 unanimously agreed to recommend six miles as the maximum." 4 *Proceedings in the North Atlantic Coast Fisheries Arbitration* 92 (Washington, 1912).

The problem before the Court is one of the application of the Submerged Lands Act. Congress could

⁵ Smith, H. A., *Great Britain and the Law of Nations* 144-164 (London, 1935). See Texas Brief 123-124; Joint Rep. Br. 29-31.

not have intended in the Submerged Lands Act to make the "existence" of the historic boundaries of the Gulf States depend upon isolated extracts from diplomatic notes dealing with distinct problems or written years after the dates made determinative by that Act when Governmental policy had changed and the Secretary of State was at pains to justify the new policy in the light of past events.

Respectfully submitted,

WILL WILSON

Attorney General of Texas

JAMES N. LUDLUM

First Assistant Attorney General

HOUGHTON BROWNLEE, JR.

JAMES H. ROGERS

JOHN FLOWERS

Assistant Attorneys General

Capitol Station

Austin, Texas

Of Counsel:

PRICE DANIEL

Governor of Texas

Austin, Texas

JAMES P. HART

Brown Building

Austin, Texas

J. CHRYS DOUGHERTY

ROBERT J. HEARON, JR.

Capital National Bank Building

Austin, Texas

September 30, 1959

I certify that I have served copies of the foregoing motion and the attached memorandum by mailing them to the offices of the Attorney General and the Solicitor General of the United States, Washington, D. C., this the..... day of September, 1959.

Will Wilson

EXHIBIT A

**CITY OF WASHINGTON
DISTRICT OF COLUMBIA**

BEFORE ME, the undersigned authority, on this day personally appeared Clarence L. Kulisheck, of 986 Patrick Henry Drive, Arlington 5, Virginia, who being by me here and now duly sworn upon his oath says:

My name is Clarence L. Kulisheck and I reside at 986 Patrick Henry Drive, Arlington 5, Virginia. I am qualified to do and have done research in the National Archives at Washington, D. C.

At the request of J. Chrys Dougherty, one of the counsel in No. 10, Original, styled United States v. The States of Louisiana, Texas, Mississippi, Alabama, and Florida, now pending in the Supreme Court of the United States, I made a thorough search in the National Archives in the month of September, 1958, in an effort to locate the correspondence referred to by Secretary of State Bayard in his letter of May 28, 1886, to Secretary of the Treasury Manning, 160 Ms. Dom. Set. 348, quoted in 1 Moore, Digest of International Law at 720, as follows:

“When we were involved, in the earlier part of Mr. Jefferson’s Administration, in difficulties with Spain, we then told Spain that we conceded to her, as far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more;”

My thorough search of the pertinent records in the National Archives reveals the existence of no correspondence between the United States and Spain during "Mr. Jefferson's Administration" [Thomas Jefferson was President from March 4, 1801, to March 8, 1809, and he served as Secretary of State from March 22, 1790, to December 31, 1793] which contains, or supports in any way, the above-quoted assertion made by Secretary of State Bayard.

Further affiant saith not.

/s/ Clarence L. Kulisheck

Clarence L. Kulisheck

Sworn to and subscribed before me by the said Clarence L. Kulisheck this the 14th day of September, 1959, to certify which witness my hand and seal of office.

/s/ Maurice R. Smith

SEAL

Notary Public
District of Columbia

EXHIBIT B

NATIONAL HISTORICAL ARCHIVE

Assistant-Director

Mr. Eugenio Sarrablo Aguarales

Secretary

Mrs. Ma. Teresa de la Peña Marazuela

Affidavit at the request of Mr. J. CHRYS DOUGHERTY, residing at Austin, Texas (U.S.A.), relating to the fact that there does not exist any document in this Archive referring to a communication sent by the President, Mr. Jefferson, to the Spanish Government, between the years 1801 and 1809, about boundaries of territorial waters for the Isle of Cuba.

Madrid, July 14th., 1959.

Registered No. 8.497.

6178131

16^a Clase

Mrs. Maria Teresa de la Peña Marazuela, Licentiate in Philosophy and Letters, belonging to the facultative body of Archivists, Bibliothecaries and Archaeologists, and Secretary of the National Historical Archive,

CERTIFIES: That, after examining thoroughly the catalogues, indexes, and card-indexes of this Archive, specially those of the section of the State,

and ever so particularly the bundles of documents marked with the numbers sixthousand threehundred and sixty-six, sixthousand threehundred and sixty-seven, sixthousand threehundred and sixty-eight, threethousand eighthundred and ninety-one, and threethousand eighthundred and ninety-one, bis, and threethousand eighthundred and ninety-two, there was not found any document referring to a communication sent by the President of the United States of America, Mr. Jefferson, to the Spanish Government, between the years eighteenthundred and one, and eighteenthundred and nine, inclusive, stating that the United States of America will grant Cuba the same boundary for its territorial waters, as those already established for their own country. And that the diplomatic correspondence of the period referred to, with all other series of documents, has been deposited in this Archive, proceeding from the General Archive of Alcalá de Henares (at present destroyed), in the year eighteenthundred and ninety-seven. And by virtue of this and where it may be convenient, and at the request of Mr. J. Chrys Dougherty, residing in Austin, Texas (United States of America), I issue the present document, with the stamp of this Archive and the approval of the Illustrious Director of same, consisting of this sheet of stamped paper of the 16th class, number: six million onehundred and seventy-eight thousand onehundred and thirty-one, to which is joined at the back a receipt of stamp-duty of five pesetas, B 157449, to comply with the ruling dis-

positions. Madrid, fourteenth of July, nineteen hundred and fifty-nine.

Signed: Ma. Teresa de la Peña

Approved:

The Director

P. A.

The Assistant-Director

Signed: Eugenio Sarrablo

Registered No. 8.497.

Approved in the Ministry of National Education, to legalize the signature of Mr. Eugenio Sarrablo Aguilera, Sub-Director of the National Historical Archive, to be, to all appearances, his.

Madrid, August 1st., 1959.

P. D. The Sub-Secretary,

Signed: Antonio Gonzalez.

No. 2693.

Approved in the Department of Foreign Affairs, to legalize the signature of Mr. Antonio Gonzalez, of the Ministry of National Education, to be, to all appearances, his.

Madrid, August 3rd., 1959.

P. The Sub-Secretary,
Signed:

Federico Ferrer y Sicars.

EXHIBIT C

THE STATE OF TEXAS
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, on this day personally appeared J. Chrys Dougherty, whose address is No. 6 Green Lanes, Austin, Texas, who being by me here and now duly sworn upon his oath says:

My name is J. Chrys Dougherty, and I reside at No. 6 Green Lanes, Austin, Texas. I am one of the counsel of record in No. 10, Original, styled United States of America v. States of Louisiana, Texas, Mississippi, Alabama, and Florida, now pending in the Supreme Court of the United States.

I have endeavored to locate the correspondence between the United States and Spain, referred to by Secretary of State Bayard in his letter of May 28, 1886, to Secretary of the Treasury Manning, 160 Ms. Domestic Letters 348, reprinted in 1 Moore, *Digest of International Law* at pages 718, 720 (Washington, 1906), as follows:

“When we were involved, in the earlier part of Mr. Jefferson’s Administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; . . .

The undersigned and individual researchers working under my supervision have examined all of the published diplomatic correspondence of the United States during any period which could be referred to as "Mr. Jefferson's Administration" [Thomas Jefferson was President from March 4, 1801, to March 8, 1809, and he served as Secretary of State from March 22, 1790, to December 31, 1793]. In addition, we have examined the published personal papers of Thomas Jefferson and of each of the persons charged with negotiations with Spain during those periods.

We have found nothing to substantiate the statement made by Secretary Bayard.

Further affiant saith not.

/s/ J. Chrys Dougherty

J .Chrys Dougherty

Sworn to and subscribed before me by the said J. Chrys Dougherty on this the 15th day of September, 1959, to certify which witness my hand and seal of office.

/s/ Annette H. Westbrook

Notary Public in and for
Travis County, Texas

Seal

My commission expires
June 1, 1961