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.

POST-SUBMISSION REPLY ARGUMENT AND MEMORANDUM ON BEHALF OF THE STATE OF TEXAS

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In response to the invitation of the Court at the close of oral argument on October 15, Texas herewith submits its post-submission reply argument and memorandum.*

*Included in the Appendix to this brief are translated excerpts from a recent publication of the Mexican Government concerning the history of its 3 league boundary and maritime jurisdiction (App. A); extracts from the testimony of the State Department Deputy Legal Advisor during hearings on the Submerged Lands Act. (App. B); an additional memorandum by Professor Louis B. Sohn of Harvard Law School which was prepared after his observation and analysis of oral arguments submitted to the Court (App. C); and under separate cover labeled Appendix D the State is filing a chronological chart of the evidence presented by both sides on seaward and maritime jurisdiction from 1763 to 1868.

I

AS SURELY AS THE UNITED STATES CAN HAVE AN EXISTING THREE LEAGUE BOUNDARY IN THE GULF OF MEXICO (TREATY OF GUADALUPE-HIDALGO) AND COMPLETE JURISDICTION OVER THE OUTER SHELF WHILE CLAIMING A LESSER MARITIME JURISDICTION IN THE OVERLYING WATERS, SO CAN THIS CASE BE DECIDED WITHOUT REFERENCE TO THE EXTENT OF TERRITORIAL WATERS OR EMBARRASSMENT TO PRESENT FOREIGN POLICY.

The Solicitor General argues that this case involves international questions "of peculiar importance and delicacy." (Amended Complaint, 6.) If this be true, it is due solely to the Solicitor's own attempt to inject the extent of territorial waters as a determining factor in the case. The Congress did not do it, and neither did the defendant States.

The Congress dealt only with the seabed and subsoil out to the original State boundaries, or to such boundaries as were approved by Congress. It did not refer to territorial waters, or even to present boundaries, as the measure of the grant. Congress clearly separated the submerged land from the overlying waters and left complete national and international rights in the overlying waters in the hands of the Federal Government. (Sec. 6, Submerged Lands Act; Sec. 3, Outer Shelf Act).

If the present national foreign policy has declined to assert certain maritime jurisdiction in the waters beyond three miles, that is a matter which has nothing whatever to do with this lawsuit. The Complaint seeks judgment only for the "lands, minerals and other things *underlying*" the waters, and

the judgment of this Court can give complete effect to Congress' grant beyond three miles without reference to the breadth of maritime jurisdiction or national policy concerning use of the waters above this land.[1]

If interpreted in the manner intended and enacted by the Congress and as construed by this Court in *Alabama v. Texas*, 347 U.S. 272, the three league grant to Texas will not embarrass those who wish to insist on a foreign policy which would allow free use of the overlying waters to other nations. This was the conclusion of the American Law Institute's Restatement. (Tentative Draft No. 2, May 8, 1958, p. 22) See Joint Brief, pp. 7-10.

This was the interpretation of the State Department's Deputy Legal Advisor, Mr. Jack B. Tate, who represented Secretary Dulles at the Senate hearings.[2]

Even the Solicitor General recognizes the validity of this construction when at page 148 of the Government's Brief he concedes:

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[1] The State recognizes that its rights in the subsoil are subordinate to, and shall not interfere with, the waters and such uses as the Nation may permit in its control of navigation, commerce, and international affairs. In fact, the State and its lessees cannot construct a pier, lighthouse, derrick or anything else within these waters without approval of the United States Department of Defense, which is charged with protection of navigation.

[2] Senate Interior Committee Hearings on S.J.R. 13, 83rd Cong., 1st Sess., 1067-1068, 1070. Mr. Tate is a member of the Advisory Committee for the American Law Institute Restatement on the Foreign Relations Law of the United States referred to above. (A.L.I. Restatement, Foreign Relations Law, Tentative Draft No. 2, p. V).

> "It is perfectly true that the United States claims control over the resources of the seabed beyond its maritime boundary, as far as the edge of the continental shelf, and that whether such control 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."

Although the Act does not refer to the terms, the Solicitor General gratuitously injects "maritime jurisdiction" and "territorial waters" into the case in an attempt to assimilate them with "boundary" and thus postulate his theory that the Texas three league boundary shrank to three miles the moment after Texas became a member of the Union.

This attempted synthesis simply will not work in the Gulf of Mexico. That is because the United States still has a national boundary of three leagues in the Gulf between this Nation and Mexico despite the State Department's present assertion of a lesser extent of exclusive maritime jurisdiction. In oral argument the Solicitor General conceded that this boundary is valid and that the treaty (Guadalupe-Hidalgo), by which it became the supreme law of the land, is still in effect. Thus, even under the State Department's present foreign policy, the extent of "boundary" in the Gulf is not the same as the asserted extent of exclusive maritime jurisdiction. The boundary has not been changed or shrunk —only the present assertion of exclusive rights in the waters has been lessened. This has no effect on the rights in the seabed or subsoil or the "boundary"

which was used as the extent of the submerged lands grant.

After 1848 Mexico consistently adhered to its three league boundary for control of fishing and other governmental purposes, although it limited its exclusive maritime jurisdiction ("territorial waters") to three miles until 1935, when this jurisdiction also was extended to nine marine miles.[3] This history of its boundary and territorial water jurisdiction and its present position is fully stated in "The Geneva Conference and the Law of Territorial Waters," by Dr. Alfonso Garcia Robles, a book published last month by the Mexican Government. Translated excerpts are attached as Appendix A, page 39.

Thus, the Solicitor General is mistaken in his argument that boundaries of the Nation (and boundaries of a State at the time it entered the Union) are necessarily limited to the distance to which the Nation asserts exclusive control of the waters.[4]

To be consistent, the Solicitor General was forced to argue that the Outer Shelf Act asserts rights of an *extraterritorial* nature. (Government Brief, 107-127). Here again he is mistaken because the Outer Shelf Act extends both "civil and political jurisdiction" to "the subsoil and seabed" of the Outer Shelf

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[3] The State Department did not object to this 9-mile (3-league) distance as a boundary for general purposes. It merely notified Mexico "that the United States of America reserves all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of this legislation." (Gov. Br., 84)

[4] See testimony of State Department Deputy Legal Advisor Jack B. Tate attached hereto as Appendix B, p. 46, 47.

and brings this land within the domestic jurisdiction of the Nation, as follows:

> "Sec. 4. (43 U.S.C., Supp. V, 1333) LAWS APPLICABLE TO OUTER CONTINENTAL SHELF.—(a) (1) *The Constitution and laws and civil and political jurisdiction of the United States** are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State:* Provided, However, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.
>
> "(2) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this Act are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such

*Emphasis is supplied throughout this brief unless otherwise indicated.

area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the Outer Continental Shelf."[5]

Clearly, the Congress intended both in the Submerged Lands Act and the Outer Shelf Act to treat the land mass of the Continental Shelf as part of the territory of the United States,[6] giving to the States the 1/10 of the shelf within their original or approved boundaries and providing Federal control of the remaining 9/10ths. As heretofore stated, the existing nature of the overlying waters and national and international rights therein were preserved by special provisions in both bills.

Since the Congress treated the land and waters separately and measured none of its grant to the States by the width of maritime jurisdiction, territorial waters, or present boundaries, the Solicitor General's attempt to bring these criteria into the case should be rejected. That will eliminate all for-

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[5] The British practice is to *annex* the seabed and subsoil and extend boundaries thereto (excepting the waters). Senate Interior Committee Hearings on S.1901, the Outer Shelf Act, 83d Cong., 1st Sess. 438, 445-447. Mr. Tate, Deputy Legal Advisor of the State Department said our Nation's action was tantamount to "sovereignty" (id, 585); the area is subject to "domestic legislation" (584); and that there is no practical difference between our action and the British use of the terms annexation, boundaries, sovereignty or territory. (593) See also statement by Raymond T. Yingling, Assistant Legal Advisor, Department of State, cited at page 138, Texas Brief.

[6] See statement of legislative intent, with respect to the Submerged Lands Act, by Senator Cordon on behalf of the Committee, Texas Brief, 16-17.

eign policy matters relating to the waters and dispense with any necessity for findings with relation to present boundaries or territorial waters.

II

EVEN IF RELEVANT, THE UNITED STATES HAD NO THREE MILE MAXIMUM LIMIT AS TO MARITIME JURISDICTION ON THE DATES MADE CONTROLLING BY THE SUBMERGED LANDS ACT.

Even if the Solicitor General could show that an established breadth of exclusive maritime jurisdiction restricts general boundaries for other purposes, he has completely failed to show that the United States had a consistent foreign policy limiting territorial water jurisdiction to three miles on the dates made relevant by the Submerged Lands Act.

Texas has attached to its main brief, Exhibit IV, page 199, a table of policy actions by the United States and other Nations, and statements of text writers, showing that three leagues was used as an acceptable and reasonable distance for both seaward boundaries and maritime jurisdiction during the period from 1763 to 1899.

In addition, for the convenience of the Court, a chronological chart of the evidence cited by all parties relating to sea boundaries and maritime jurisdiction has been prepared. Because of its bulk it is bound separately and labeled Appendix D.

It demonstrates what has so often been pointed out in the briefs and in oral argument, that matters of state boundaries in the Gulf of Mexico were treated specially throughout the dates made relevant by

the Submerged Lands Act. The peculiar physical characteristics of this shallow, enclosed body of waters make this treatment reasonable.[7] Not until after all Gulf States were admitted to the Union was any 3 mile maximum placed on exclusive maritime jurisdiction by the State Department. Even then the policy was not consistently followed until after 1893, long after any date important to this controversy. The change in policy did not in any manner revoke or repudiate this Nation's undisputed three league national boundary in the Gulf of Mexico.

Professor Louis Sohn has prepared an additional memorandum in the light of the oral argument, which appears as Appendix C of this brief. This memorandum makes even more clear the lack of foundation which the Government's contentions possess under either general international law or the view which the United States chose to take of that law at the dates here in question in the first part of the 19th century.

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[7] In the Gulf of Mexico, the question of breadth of exclusive maritime jurisdiction is almost strictly academic due to the shallow waters within three leagues of the shore. As shown on the U. S. Coast and Geodetic Maps exhibited to the Court, the depth of waters for about 200 miles opposite the Florida coast does not exceed six feet along the three league line. The Texas three league line averages 42 feet in depth. Hostile vessels would be grounded if they came closer to shore than three leagues in most of the Gulf. A 12 mile contiguous zone for many governmental purposes has been agreed upon by the United Nations Conference on the Law of the Sea, and the United States itself proposed at this conference a 12 mile limit for fisheries. (Texas Brief, 135-136). Furthermore, during World War II the entire Gulf was closed to enemy vessels by the Declaration of Panama. (U.S. Foreign Relations, 1939, Vol. 5, 35-37).

III

THE LEGISLATIVE HISTORY OF THE SUBMERGED LANDS ACT AND ITS PREDECESSOR BILLS SHOWS CONCLUSIVELY THAT CONGRESS INTENDED THE MEASURE OF THE GRANT, "BOUNDARY AS IT EXISTED AT THE TIME SUCH STATE BECAME A MEMBER OF THE UNION" TO MEAN THE BOUNDARY WHICH EXISTED IMMEDIATELY PRIOR TO AND AT THE TIME OF ADMISSION RATHER THAN AFTER ADMISSION.

The Solicitor General concedes that the boundary of the Republic of Texas existed in its laws at three leagues in the Gulf of Mexico the moment before annexation. However, as a necessary postulate for applying his theory of automatic boundary shrinkage, he insists that Congress intended the words "boundary as it existed at the time such State became a member of the Union" to refer to the moment *after* admission.

There are several reasons why this argument is untenable. They are summarizd as follows:

1. All dealings between the United States and the Republic of Texas contemplated that the territory described in the Texas Boundary Act of 1836 would be incorporated into the Union. (Texas Brief, 95-111). President Polk promised Sam Houston "we will maintain all your rights of territory, and will not suffer them to be sacrificed." (Texas Brief, 98). In his War Message to Congress after Texas' annexation, President Polk referred to the Texas Boundary Act of 1836, and in his second annual message, after again referring to the same act, said "This is the

Texas which was admitted into the Union."[8] After the War with Mexico, President Polk instructed his treaty negotiator to follow the Texas Boundary Act, and it was followed in the Treaty of Guadalupe Hidalgo by commencing the seaward boundary "in the Gulf of Mexico three leagues from land." (Texas Brief, 101-106).

All of this positively shows that the Gulfward boundary of Texas, which existed three leagues from land immediately prior to annexation, was the same as existed *at the time* this State became a member of the Union. It negates any theory of unannounced and unknown seaward boundary shrinkage either at the moment of or after annexation. The Solicitor General has cited no legislative history in connection with the Texas annexation that would support his theory or contradict the plain intention of the parties that Texas should be annexed in accordance with its existing boundaries.[9]

True, in the Annexation Resolution, Congress retained the right to adjust boundary questions "that may arise with *other* governments," but there were in fact no such "adjustments" (in the sense of changes) of the three-league boundary or of any other boundary set forth in the Texas Boundary Act

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[8]Document No. 4, 29th Cong., 2d Sess., House of Representatives, Executive Documents.

[9] As stated in Point II above, the Solicitor has shown no existing foreign policy in 1845 which would support a shrinkage theory, even as to the extent of maritime jurisdiction in the waters. The United States at that time followed a three league policy in the Gulf of Mexico. (Texas Brief, 143-149; Joint Brief 110-122). See also Chart of Evidence, Appendix D to this brief, which has been filed separately.

of 1836. On the contrary, the power to adjust was exercised by following the limits set out in the Texas Boundary Act, specifically including the boundary "in the Gulf of Mexico, 3 leagues from land," in the Treaty of Guadalupe Hidalgo (1848). This was less than three years after the date of annexation.

2. The plain wording of the Submerged Lands Act (Section 2b) includes boundaries as they "*existed* at the time such State *became* a member of the Union". Note that two past tenses are used. The wording does not refer to boundaries *after* admission to the Union, unless they were approved by Congress.

Section 4 of the Act plainly recognizes that the "existence" of a State's boundaries beyond three geographical miles is evidenced "if it was so provided by its Constitution or laws *prior to or at the time* such State became a member of the Union..." (Texas Brief, 25-26; 49-54.)

3. All of the legislative history of the Submerged Lands Act indicates that Congress meant what it said—that the grant should extend to the boundaries as they already existed immediately prior to and at the time of admission rather than *after* admission. (Texas Brief, 27-35, 49-56).

4. The Solicitor General has cited no evidence in the committee reports, hearings or floor debates in support of his contention that Congress meant "the moment after admission," or that Congress intended to limit its grant by the application of any theory of automatic boundary shrinkage *after* admission into the Union.

5. The Committees handling this Act were quite familiar with the fact that boundaries of new States are always fixed in their constitutions or laws, or in Congressional enabling acts, prior to the final act or moment of admission to the Union; that boundaries are determined by legislative action of the prospective State as well as the Congress; and that they cannot be altered or changed after admission without the consent of both the State and the Congress. *New Mexico v. Colorado*, 267 U.S. 30, 41; *New Mexico v. Texas*, 276 U.S. 557; *Louisiana v. Mississippi*, 202 U.S. 1, 40-41. (Texas Brief, 50-55). In this respect boundaries, which must be fixed by legislative enactments, are more permanent and sacred than breadths of maritime jurisdiction which vary for different purposes and during different periods without legislative sanction.

In fact, the same committees in the same Congress that considered the Submerged Lands Act also reported Hawaiian Statehood bills, and the Senate Committee amended its bill to require that the boundaries of the Territory of Hawaii be changed and the change be approved by a vote of the people prior to admission.[10]

The same Senate Committee recognized that the words "immediately prior to" admission are synonymous with "at the time of" admission in its report on the Hawaii Statehood Bill. In explaining the pur-

[10] Senate Interior Committee Report No. 886, Hawaii Statehood, 83d Cong., 2d Sess., 1, 16-17. Solicitor General Rankin, then Assistant Attorney General, advised the committee by letter of the desirability of this action before admission. Id. 38-40. (This provision was later included in the 1958 Hawaii Statehood Act. P.L. 86-3, 73 Stat. 4.)

pose of a proposed amendment, the Committee stated:

> "8. On page 7, line 24, after the comma following the word 'further', insert the following:
>
> " 'That as to any such lands or other property not so set aside which, *immediately prior to* the admission of the State of Hawaii into the Union, is in the control of the Territory of Hawaii . . .'
>
> "Purpose: This amendment would insure that the new State will receive title to all those parcels of unreserved public lands and other public property that *at the time of* its admission are actually being used by the Territory . . . "[11]

The Solicitor General was challenged during oral argument to cite any case of a State being finally admitted to the Union without its boundaries having been fixed prior thereto. No such instance was cited, and certainly none exists in the cases now before this Court.

6. The prior legislative history of the phrase "as they existed at the time such State became a member of the Union" demonstrates that Congress intended to adopt as the measure of the grant historical state boundaries which already existed at the time of admission rather than after admission.

S. 1988, 80th Congress (1948).

The clause in question crystallized in S. 1988 in the 80th Congress, and appeared in practically every

[11] *Id.*, 30.

subsequent measure introduced in the following sessions up to and including Senate Joint Resolution 13 in the 83rd Congress, which became the Submerged Lands Act. The legislative history of S. 1988 and other predecessor bills is, therefore, relevant in the interpretation of that phrase in the Submerged Lands Act. *T.W.A. v. Civil Aeronautics Board*, 336 U.S. 601, 607; see also *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672. This is especially appropriate in the present case, because at the inception of the Senate hearings on S. J. Res. 13 all of the previous hearings on earlier bills were expressly made a part of the record,[12] and the Senate Judiciary Committee Report on S. 1988 was incorporated into the Senate Interior Committee's Report on S. J. Res. 13, the Submerged Lands Act, as Appendix E, page 50.

It is significant that S. 1988 as originally introduced in the 80th Congress referred to "*the boundary* line of each such State where *in any case* such boundary extends seaward (or into the Great Lakes or Gulf of Mexico) beyond three geographical miles." It did not contain the words "boundary as it existed at the time such State became a member of the Union."[13]

It is apparent from the joint hearings on S. 1988 before the Senate and House Judiciary Committees in 1948 that these words were added to the bill for

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[12] Senate Interior and Insular Affairs Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess. 6.

[13] See full text of bill as originally introduced. Joint Hearings before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess., (1948), p. 2.

two reasons: (1) to make certain that the grant would *not* encompass attempted extensions of seaward boundaries by some of the states *after* admission (unless approved by Congress); and (2), to make certain that the historic boundaries which were already fixed at the time of admission, regardless of present boundaries or present interpretations of the extent of territorial waters, were used as the measure of the grant.

Both Attorney General Clark and Secretary of the Interior Krug expressed their particular opposition to the original language ("the boundary line . . . where in any case") because it might include such recent unilateral State boundary extensions as Louisiana's 1938 legislative extension to 27 miles, and the 1947 Texas claim to the edge of the Continental Shelf.[14] Because the "boundaries" referred to in the bill as introduced were not limited to those which existed at any particular time, they were criticized as "open end" proposals which Secretary Krug said,

> "can probably be regarded as proposals to grant to the coastal States all the lands and mineral resources of the Continental Shelves contiguous to the coasts of the United States."[15]

On the other hand, the testimony of Attorney General Daniel of Texas, Attorney General Howser of California, the Attorney General of Oregon, and the Assistant Commissioner of Public Lands of Washington, all appearing in support of the legislation

[14] *Id.*, p. 618, 653, 734.
[15] *Id.*, p. 734.

(S. 1988), relied heavily on the States' *historic* and original boundaries as the intended measure of the proposed grant to the States.[16]

It was Mr. Leander I. Shelley, general counsel of the Port of New York Authority and representative of the American Association of Port Authorities, who, on the 11th day of the hearings, suggested the addition of the words "as they existed at the time of its [the State's] admission to the Union, or as heretofore approved by Congress . . ."

Mr. Shelley also suggested the addition of the wording now contained in the first portion of Section 4 of the Submerged Lands Act. He said that he and his association would not support the bill unless these amendments were adopted. His proposed amendment in its entirety reads as follows:

> "Sec. ..... Any State which has not already done so may extend its seaward boundaries (or its boundaries in the Gulf of Mexico or any of the Great Lakes) to a line three geographical miles distant from its coast line. Any claim heretofore or hereafter asserted either by constitutional provision statute or otherwise; indicating the intent of a State to extend its boundaries to a line three geographical miles distant from its coast line is hereby irrevocably approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line.
>
> "As used in this act, the term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of

[16] *Id.*, p. 933, 936, 1099, 1473.

> the Great Lakes, *as they existed at the time of its admission to the Union, or as heretofore approved by Congress*, or as now or hereafter extended or confirmed pursuant to this section, or as otherwise legally established."[17]

Mr. Shelley's chief concern seemed to be the effect of the California decision on the present existence of any state boundaries further "than low-water mark along the open sea."[18] In the course of his testimony he said that whether the failure of the States to be in the position they thought they were in with reference to the submerged lands

> "is because of a title question or boundary question is immaterial to us. Our position is that they should be restored to where they thought they were."[19]

The Senate Judiciary Committee Report on S. 1988 adopted most of the Shelley suggestion. The words added to Section 2 of the original bill by the Committee amendment are italicized:

> "Sec. 2. As used in this Act—
>
> "(a) the term 'lands beneath navigable waters' includes (1) all lands within the boundaries *of each* of the respective States which *were* covered by waters navigable under the laws of the United States, *at the time such State became a member of the Union*, and all lands perma-

[17] *Id.*, p. 886. Mr. Shelley's suggested amendment was expressly agreed to by the National Association of Attorneys General, which was sponsoring the bill. *Id.*, p. 887.

[18] *Id.*, p. 884.

[19] *Id.*, p. 894.

nently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each *such* State *and* to the boundary line of each such State where in any case such boundary, *as it existed at the time such State became a member of the Union, or as heretofore or hereafter approved by Congress,* extends seaward (or into the Great Lakes or Gulf of Mexico) beyond three geographical miles, and (2) all lands formerly beneath navigable waters, as herein defined, which have been filled or reclaimed; *the term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore or hereafter approved by the Congress, or as extended or confirmed pursuant to section 3 hereof;*"[20]

This Senate Report clearly shows that the language of the amendment was intended to extend the grant to historic boundaries which already existed in the constitutions and laws of the states at the time of admission. This report states:

"In 1850 Congress approved the constitutional boundaries of California upon its admission to the Union. Its boundaries were specifically described as extending 3 miles into the Pacific Ocean. In 1859 Congress admitted Oregon into

[20] Report No. 1592, Senate Committee on the Judiciary, S. 1988, 80th Cong., 2d Sess., 2. This report is reproduced in full as Appendix E to Report No. 133, Senate Committee on Interior and Insular Affairs, S. J. Res. 13, 83d Cong., 1st Sess., 50-81. The committee amendment quoted above appears at page 51 of this reprint.

> the Union with its constitutional boundaries specifically defined as being 1 marine league from its coast line. In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico. Texas' boundary was fixed 3 marine leagues into the Gulf of Mexico *at the time* it was admitted to the Union in 1845 by the annexation agreement."[21]

It is important that this was the interpretation of the Senate Judiciary Committee when the significant words were first added to submerged lands legislation, and that this interpretation was made before the last sentence of Section 4 of the Submerged Lands Act became a part of the bill. The last sentence of Section 4 was first added in Senate Joint Resolution 13 by Senator Holland and forty co-authors in 1953.

As introduced and as passed (except for the bracketed phrase, which was deleted on the Senate floor) it read as follows:

> "Nothing in this section is to be construed as questioning or in any manner prejudicing the *existence* of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws *prior to or at the time* such State became a member of the Union, or if it has been heretofore [or is hereafter] approved by Congress."[21a]

Obviously, this sentence was intended merely to clarify the effect already contained in the bill con-

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[21] *Id.*, p. 15-16; Reprint, p. 64-5.

[21a] Senate Committee on Interior and Insular Affairs, Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 9, 11; 67 Stat. 31, 43 U.S.C. § 1312.

sidered by previous committees and as a further explanation of what was meant by the "existence" of boundaries beyond three miles, and how such existence was to be proved.

H. R. 5991 and 5992, (1949).

H. R. 5991, introduced in the 81st Congress, First Session, a bill favored by the States, in Section 2(b) carried forward the language:

> "or to the boundary line of any State where in any case such boundary, as it existed at the time such State became a member of the Union, extends beyond three geographical miles from said coast line,..."[22]

H. R. 5992, an alternative measure which was drafted to attempt to meet some of the objections of the administration, defined submerged lands as those outside of inland waters "and which extend three geographical miles seaward from the coast line of the United States and of Alaska,..."[23]

Attorney General Hall Hammond of Maryland, President of the National Association of Attorneys General, in comparing the two bills pointed out that in H. R. 5991:

> "State boundaries of coastal States are defined as extending three geographical miles from their coast lines—or to such distance as such coast

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[22] Subcommittee of the House Judiciary Committee, Hearings on H. R. 5991 and H. R. 5992, 81st Cong., 1st Sess., 1.

[23] *Id.*, p. 8.

lines existed at the time a State became a member of the Union—which we feel is very important."[24]

Referring to H. R. 5992 he said:

"It will also be noted that in section 2(b) of H. R. 5992, setting forth the definitions, and in section 14, relating to State Boundaries, the clause setting forth the provision recognizing the boundary of any State which, at the time it became a member of the Union, extended *beyond* 3 miles from its coast line—*notably, the State of Texas*—has been deleted by the Department of the Interior. It is our belief that this clause remain as incorporated in H. R. 5991 and that the Congress should have the right to pass upon this question.

"[Congressman] Walter. It certainly seems to me that no attention whatsoever has been paid by the Interior Department to the different ways the States become a part of the Union. I think that is of great importance."[25]

Attorney General Daniel of Texas, referring to the three league boundary of Texas, stated:

"The Federal bill now before you, H. R. 5992, would attempt to repudiate this boundary after 100 years and reduce it to 3 miles. On the other hand, H. R. 5991 would recognize the seaward boundaries of each State as they existed *at the time* the State entered the Union.

"I want to point out this to the committee. I am sure Judge Perez did not intend to, but

[24] *Id.*, p. 23.

[25] *Id.*, pp. 25-6.

I am sure he did not understand the difference between the two bills on that point, because H. R. 5991 does provide that the boundaries of the marginal belt shall be as the boundaries of the States existed *at the times* they entered the Union.

"This provision of H. R. 5991 should be retained in any act passed by Congress on the subject. This will be in accord with the settled rule of law quoted by the Supreme Court in the case of *New Mexico v. Colorado* (267 U.S. 33, 43), as follows: I quote from that decision just a short phrase:

" '. . . the right of a State, upon its admission into the Union, to rely upon its established boundary lines, cannot be impaired by subsequent action on the part of the United States.' "[26]

S. 940, 82nd Congress (1951).

Solicitor General Perlman, in commenting on this measure, which perpetuated the language originally incorporated into S. 1988, stated:

"The area covered by the measure would extend seaward for a distance of three geographical miles or to the seaward boundary of a coastal State where such boundary *as it originally existed*, or as approved by the Congress, is situated more than three miles from shore."[27]

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[26] *Id.*, p. 85.

[27] Senate Committee on Interior and Insular Affairs, Hearings on S. J. Res. 20, 81st Cong., 1st Sess., 349.

Senate Joint Resolution 13, 83d Congress, 1953, (The Submerged Lands Act.)

John J. Real, attorney for the Fishermen's Co-operative Association of San Pedro, California, during the Senate Committee hearings on this measure, which utimately became the Submerged Lands Act, proposed an amendment which would eliminate the language "at the time such State became a member of the Union" from the definition of lands beneath navigable waters.[28] This the committee declined to do. Senator Kuchel, a member of the committee, in quired of the witness:

> "I ask this question: Assuming that that is the intention, in part, of the Holland bill, why do you propose to eliminate the language, 'At the time such State became a member of the Union'? Would you by striking that language evince an intention to restore to the States less than they had at the time they became members of the Union?
>
> "Mr. Real. No, Senator. If the Congress feels that they should be restored to what they declared were their boundaries at the time of entrance into the Union or prior to that time, as in the case of Texas, then that could be done in a different way. Our problem is this: Texas, for instance, has claimed that they have a 3-league boundary. The Holland bill would return to them the resources and the waters for 3 leagues.
>
> "Senator Kuchel. Or, would you not agree, more accurately, what was Texas' at the time Texas entered the Union?

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[28] Senate Committee on Interior and Insular Affairs, Hearing on S. J. Res. 13, 83d Cong., 1st Sess., 311.

"Mr. Real. That is putting the same thing in a little different way."[29]

Attorney General Brownell in his appearance before this committee made his proposal that a "line on a map" show the extent of the intended grant. Senator Holland asked:

"Where a constitution of a state draws a line, that would be the line which you think the statute which is proposed here should cover as the outside line of the state, provided that the constitution has been approved by the Federal Congress? Is that what you have in mind?

"Attorney General Brownell. In order that there may be no misunderstanding, generally speaking what we have in mind, is the three mile line, except for the coasts of Texas and the west coast of Florida, where three leagues would generally prevail.

"Senator Holland. The reason you make those two exceptions is because it is your understanding that the constitutions of Texas and Florida provide that the three league offshore limit is the limit clear across Texas and along the west coast of Florida in the Gulf of Mexico?

"Attorney General Brownell: That plus the action of the Congress in relation to it."[30]

A memorandum by Stewart French, Chief Counsel for the Senate Committee, of sea boundaries in enabling acts or state constitutions approved by Con-

[29] *Id.*, p. 316.
[30] *Id.*, p. 957.

gress was prepared at the request of the Chairman and was set forth in the hearings. This states that:

> "There has been considerable discussion in the submerged lands hearings as to historic state seaward boundaries. For convenient reference, I submit the following table of provisions with respect to sea boundaries in the enabling acts under which the coastal states, other than the original 13, entered the Union, or in pertinent state constitutions, which were approved by Congress."[31]

He thereafter lists enactments for Washington, Oregon, California, Texas (the 1836 Boundary Act), Louisiana, Mississippi, Alabama, Florida, and Maine, in all of which boundaries were fixed by the States, by the Congress, or both, prior to the date of admission.

Even the minority in its report on S. J. Res. 13 recognized that boundaries *before* rather than *after* admission applied:

> ". . . [I]t is perfectly obvious that many coastal States may advance 'historical claims' on the basis of their colonial charters, early State statutes, or constitutions (Appendix D)."[32]

During the testimony of Secretary McKay in the House hearings on this measure, the following occurred:

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[31] *Id.*, p. 1232.

[32] Senate Committee on Interior and Insular Affairs, Report No. 133, Part 2, Minority Views, 83d Cong., 1st Sess., 28.

"Miss Thompson. I take it when you speak of historical boundaries, you mean 10 miles or 10-1/2 miles?

"Secretary McKay. I mean whatever the State had when it came into the Nation. Most of the States are 3 miles. Texas is 3 leagues, I believe. Florida is 3 leagues."[33]

After this remark Representative Celler pointed out the recent claims to more extensive areas made by Louisiana and California and inquired whether these claims were inconsistent with the historic boundaries. This colloquy followed:

"Mr. Celler. What do you mean by historic boundaries? That is what I am trying to get at.

"Secretary McKay. The historic boundaries have been recognized by the States, in the case of my State for 94 years, when we came into the Union with the description that we came in with. With Texas, they came in by a treaty as a Republic. Those are historic boundaries. I do not think there is any question about that."[34]

Thus, the prior legislative history of the measure that eventually became the Submerged Lands Act, as well as the history of S. J. Res. 13 itself, demonstrates plainly that Congress by referring to boundaries "as they existed at the time such State became a member of the Union" intended to adopt, as the measure of the transfer to the States, historical State

[33]Subcommittee of the House Judiciary Committee, Hearings on H. R. 2948 and Similar Bills, 83d Cong., 1st Sess., 195.

[34] *Id.*, p. 196.

boundaries as they already existed in their laws and constitutions at the time of admission rather than *after* admission.

Boundary "Heretofore Approved"

In any event, the Texas three league boundary was "heretofore approved" by Congress in the Act of Admission of the Republic of Texas with its established boundary. Again, it was approved by its adoption in the 1848 Treaty of Guadalupe Hidalgo and by subsequent Acts of Congress which gave effect to this boundary (Texas Brief, 111-113; App. C., 257). It has been argued that this treaty and subsequent Acts of Congress relating to the marking of the three league national boundary in the Gulf of Mexico amounts to an implied, if not express, approval of all Gulf State boundaries to this extent. The approval of the 1868 Florida Constitution with its three league Gulfward boundary lends weight to such argument. Regardless of the merit of such argument as to the other States, it seems beyond question that these actions of Congress gave both express and implied approval to the three league boundary of Texas.

IV

DESPITE THE SOLICITOR GENERAL'S ORAL ARGUMENT TO THE CONTRARY, THE HISTORY OF POST-ANNEXATION CONSTRUCTION OF THE TEXAS BOUNDARY ACT BY CONGRESS AND THIS COURT SUPPORTS THE ACT'S VALIDITY.

During oral argument, the Solicitor General presented a mimeographed map depicting the bounda-

ries fixed by the Republic of Texas in its 1836 Boundary Act, the area ceded by Texas to the United States in 1850, and the area litigated in the Greer County case *(United States v. Texas*, 162 U.S. 1).

Because of the cession to the United States of the western area outside of Texas' present boundaries and the area lost in the Greer County case, the Solicitor General argued that the boundaries contained in the Texas Boundary Act of 1836 were not recognized by the United States upon annexation. Actually, both events strengthen the Texas position that it was admitted as a State in accordance with the limits fixed in its 1836 Boundary Act because (1) the 1850 Compromise involved a cession of territory within such limits for which the State was paid $10,000,000, and (2) the Greer County case recognized the Act of 1836 as the boundary which Texas had *at the time* of admission, and merely held that Greer County lay outside of such boundary.

The 1850 Compromise

The Solicitor argues that upon admission Texas had no fixed boundaries at all, even as late as 1850, and that the State was admitted merely as an undefined land mass.

Because we considered the 1850 Compromise to be totally irrelevant to the issues in this case, we made only passing reference to this portion of the State's history in our main brief. However, since the Solicitor argues that this dispute was somehow a denial of the validity of Texas' claim to all her boundaries, we wish to place before the

Court additional historical material dealing with this contention. For the convenience of the Court, we have listed in the note below additional references to material dealing with Texas' boundaries.[34a]

The Government's concept is clearly refuted by the history of the period in question. Several important historical facts stand out:

(1) The boundary adjustment "with other governments" clause in the annexation proposal related particularly to the anticipated war with Mexico and the subsequent treaty negotiations and was not used to effectuate the 1850 Compromise.

While it was true that there was concern over the possibility of war with Mexico because of declared boundaries west of the present Texas-New Mexico

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[34a] In addition to the historical material cited in the main Texas Brief such as Hunter Miller, *Treaties and Other International Acts of the United States,* Vol. 4 p.. 133-143 (1838 Boundary Convention), 5 *Id.,* p. 207 (Treaty of Guadalupe Hidalgo) and 4 *Id.,* 689 (Annexation); 1 Emory, *Report on the United States and Mexican Boundary Survey* 58 (Washington, 1857) (the report made by Emory after measuring the three-league boundary by taking soundings); and the bibliography on the Texas Navy (Texas Brief, App. F, p. 289), other works on Texas history during the period 1836-1850 include: Binkley, William Campbell, *The Expansionist Movement in Texas* (Berkeley, California, University of California Press, 1925, 253 pp.); Goetzmann, W. H., "The United States-Mexican Boundary Survey, 1848-1853," *The Southwestern Historical Quarterly,* LXII (October, 1958), 164-190; Ogier, William Calvin, *Settlement of the Texas-New Mexico Boundary Dispute,* M. A. Thesis, University of Texas, 1930; Richardson, Rupert Norvall, *Texas, The Lone Star State,* New Jersey, Prentice Hall, Inc. 1943; Smith, Justin H., *The Annexation of Texas* (New York, Barnes and Noble, Inc., 1941); Spillman, W. J., "Adjustment of the Texas Boundary in 1850," Texas State Historical Association, *Quarterly,* VII, (1904), 177-195.

boundary, the "adjustment" contemplated was with Mexico, or other foreign powers, not with the United States. The area of particular concern was the area between the Nueces and the Rio Grande Rivers. The negotiations between the United States and Mexico that led to the Treaty of Guadalupe-Hidalgo show that this area involved the major dispute between the parties in the negotiation of the treaty. (Texas Brief, 102-106).

(2) President Polk and the Democratic Party based the United States' claim to all of the territory north and east of the Rio Grande upon the boundary claims of the former Republic of Texas.

The Texas boundaries were fixed and definite when Texas entered the Union, and the President of the United States at the time of annexation made an executive policy determination with reference to such boundaries. Perhaps the clearest statement of the Executive determination of the area included within the new State is to be found in President Polk's message to Congress at the commencement of the 2d Session of the 29th Congress on December 8, 1846. In this message President Polk said:

> "The Congress of Texas, on the 19th of December, 1836, passed an 'Act to define the boundaries of the Republic of Texas', . . ."
>
> "*This was the Texas* which by the Act of our Congress of the twenty-ninth of December, 1845, was admitted as one of the States of our Union."[35]

[35] Document No. 4, 29th Cong., 2nd Sess., House of Representatives, Executive Documents.

Although this speech dealt primarily with the area between the Nueces and Rio Grande Rivers, President Polk at no time in this speech or any other qualified his acceptance of the Texas Boundary Act in its entirety.

(3) Texas, through instructions to her Senators in the United States Congress, insisted that the 1836 Boundary Act be maintained by the United States in the settlement of the War with Mexico.

By joint resolution of the Texas Legislature, passed while the United States was negotiating with Mexico, it was provided:

> "That our Senators be further instructed to oppose any treaty with Mexico which may provide for lessening the boundaries of Texas, as established by an act to define the boundaries of the Republic of Texas; approved December 19, 1836." Acts 2nd Leg. 1848, Vol. 2, 151, 218; 3 Gammel's Laws of Texas 218.

We have already developed in some detail the fact that the three league portion of Article V of the Treaty of Guadalupe-Hidalgo resulted from the policy of President Polk to follow the 1836 Boundary Act of the Republic (Texas Brief 97, et seq.).

(4) The 1850 Compromise was a recognition that under the terms of the annexation agreement a formal compromise by the joint action of Congress and the Texas Legislature was necessary before the Texas Boundary as fixed in the Act of 1836 could be altered.

The Texas-New Mexico boundary controversy created a national crisis and was debated for two years

in the Congress of the United States. The controversy involved much more than Texas' claims to territory. The slavery issue was injected and extreme and partisan statements were made by various members of Congress. The debates themselves show that the members of Congress were well acquainted with the provisions of the 1836 Boundary Act. Senator Foote, of Mississippi, speaking to the Senate on January 16, 1850, said:

> ". . . title to all the territory claimed for her by the Act of 1836, entitled 'an Act for defining the boundaries of the Republic of Texas,' is one which no ingenuity can undermine and no sophistry elude. Indeed, I suppose that the true limits of Texas will never again be disputed in the Congress of the United States . . ."[36]

And on July 30, 1850, Senator Sam Houston of Texas, stated to the Senate:

> "We have had the same boundary from first to last. We commenced our existence as a nation with a declared boundary; we maintained it in a revolution for eight years, and contended for that boundary when the United States was substituted in the place of Texas, and the contest was going on for the attainment of that boundary. None other was ever thought of . . ."[37]

The President considered the consent of the State of Texas to the Compromise to be necessary for

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[36] Congressional Globe, 31st Congress, 1st Session 166.

[37] Appendix to Congressional Globe, 31st Congress, 1st Session, 1447.

the settlement of the question.[38] The Compromise Bill itself was so framed as to constitute an offer to the State of Texas which would become effective only upon its acceptance. The Preamble to the Bill (9 U. S. Statutes at Large 446-452, 31st Congress, 1st Session, Ch. 49, September 9, 1850) recites:

> "Be it enacted . . . that the following propositions shall be, and the same hereby are, *offered* to the State of Texas, *which when agreed to by the said State* in an Act passed by the General Assembly, *shall be binding* and obligating upon the United States and upon the State of Texas."

The offer of the United States to settle the controversy by the payment of $10,000,000 to the State of Texas was accepted by the Texas Legislature and the controversy ended.[39]

The payment of $10,000,000 by the United States for the area in dispute represented a recognition

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[38] See Executive Document No. 82, House of Representatives, 31st Congress, 1st Session, August 6, 1850. Congressional Globe, 1525-1527. In his message to Congress the President said in part:

> "The Executive Government of the United States has no power or authority to determine what was the true line of boundary between Mexico and the United States before the treaty of Guadalupe Hidalgo, nor has it any such power now, since the question has become a question between the State of Texas and the United States. So far as this boundary is doubtful, that doubt can only be removed by some act of Congress, to which the assent of the State of Texas may be necessary, or by some appropriate mode of legal adjudication; . . ."

[39] Acts 1850, 3rd Leg. Vol. III, Part IV, Ch. 2, p. 3; 3 Gammel's Laws of Texas, 832.

rather than a rejection of Texas' Boundary Act. We do not contend that the 1850 Compromise constituted a specific approval of the *three league portion* of the 1836 Texas Boundary Act, since that portion of the Texas boundary was not in dispute. Indeed, that portion of the Act had already been approved by the United States by the terms of Article V of the Treaty of Guadalupe-Hidalgo. We have carefully examined all of the debates relating to the settlement of the Texas-New Mexico dispute. There is absolutely nothing in these debates to question the already established three league boundary adopted in the Treaty of Guadalupe-Hidalgo.

The Greer County Case (United States v. Texas, *162 U.S. 1)*

The decision of this Court in the Greer County case was a recognition by the Court that the Texas Boundary Act of 1836 defined the area properly included within the State at the time of its annexation. It supports rather than detracts from the validity of the Texas Boundary Act. The question decided was the location of the boundary declared in the 1836 Texas Act *on the ground,* with special reference to that portion of the Act which called for the line fixed in the 1819 treaty between the United States and Spain. The Court decided that the south or Prairie Dog Fork of the Red River was actually called for rather than the north fork of the Red River.

The Court, as shown by its decree, did adjudicate that in order to determine what territory was 'properly included within or rightfully belonging to Tex-

as *at the time of the* admission of that State into the Union" (See 162 U.S. at 91) it was necessary to find the true ground location of the boundary as fixed by the 1836 Boundary Act, which the Court cited and quoted twice (162 U.S. at 29 and 38).

Summary of Post-Annexation History

The three league portion of the Texas Boundary Act was further approved in the Gadsden Purchase Treaty in 1853. The truly significant feature of the entire post-annexation history of Texas' boundary is the fact that there is absolutely no break in recognition of *this* boundary by the United States.

Although the Texas boundary was the object of extended Congressional scrutiny during debates concerning the 1850 Compromise, *the three league portion of the Treaty of Guadalupe-Hidalgo was never questioned by the State Department or any member of Congress.* This was true despite the earlier British protest over the three league provision of the Treaty of Guadalupe-Hidalgo.

The significant thing about the power reserved to the United States to adjust the question of boundary with other nations after Texas' admission to the Union is that there have been no adjustments of the three league Gulfward boundary. Presumably the United States might have initiated a different territorial boundary with Mexico in the Gulf in the negotiations which culminated in the Gadsden Purchase of 1853. But this did not occur. It seems appropriate to inquire of the Government: If the United States had had a firm foreign policy as early as 1853, which advocated a three mile boundary for the Gulf Coast, why was this question not even dis-

cussed during the negotiations concerning the Gadsden Purchase? It is obvious that no such policy existed at the time insofar as the Gulf of Mexico was concerned. The Gadsden Treaty *repeated* the established three league boundary off the Texas coast. specifically providing that Article V of the Treaty of Guadalupe-Hidalgo should continue in force.[40]

This Treaty, which followed the 1850 Compromise, reveals a *continuous* policy of the United States dating from President Polk's assurances during annexation negotiations that the 1836 Texas Boundary Act would be defended by the United States, through the 1853 Gadsden Treaty, which finally accomplished all major boundary "adjustments." The three league boundary specified in these treaties still exists.

Respectfully submitted,

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November 2, 1959

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[40] Article I of the Gadsden Treaty, quoted at p. 107, main Texas Brief.

I, ----------, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ---------- day of October, 1959, I served copies of the foregoing brief by mailing, postage prepaid copies thereof to the office of the Attorney General and of the Solicitor General of the United States, respectively, and to the Attorneys General of the States of Alabama, Florida, Louisiana, and Mississippi, respectively.

APPENDIX A

Translated Excerpts from "The Geneva Conference and the Width of the Territorial Sea"

by Alfonso Garcia Robles*
(Published by the Mexican Government, 1959)

CHAPTER IV

Mexico's Case

The width of 9 marine miles (16,668 meters) of the national legislation in force to date that fixes Mexico's territorial sea, has deep historical roots in numerous international instruments to which the Mexican State has been a party for more than a century.

Mexico's case, therefore, is of special value to prove the lack of any foundation to the theory that pretended to give the so-called "rule of three miles" the character of a rule of International Law.

In fact, from 1848 to 1908—that is to say, during the second half of the nineteenth century and the beginning of the present century, which period corresponds to that in which the distance of three miles obtained its most ample application—Mexcio subscribed to no less than *thirteen* bilateral treaties in

*Ambassador Plenipotentiary; Undersecretary of Foreign Affairs of Mexico for European, Asian, and African Affairs and for International Associations, 1957 to date; Mexican Delegate to Geneva Law of the Sea Conference, 1958; Delegate to United Nations General Assembly, 12th and 13th Sessions; Delegate to the Economic Conference of the Organization of American States, 1957; Director, Division of Political Matters, United Nations Secretariat, 1946-57; Mexican Advisor to Inter-American Conference on Problems of War and Peace, Chapultepec (1945) and to San Franciso Conference (1945).

which it was agreed to recognize her territorial sea to a width of 3 leagues, or 9 marine miles, in seven cases, and 20 kilometers in six cases. These treaties of which five are still in force follow this chronological order:

Treaty Countries	Celebration Date	Territorial Sea Width Fixed
Mexico and the United States	February 2, 1848	9 marine miles
Mexico and the United States	December 30, 1853	9 marine miles
Mexico and Guatemala	September 27, 1882	9 marine miles
Mexico and Germany	December 5, 1882	9 marine miles
Mexico and the Kingdom of Sweden and Norway	July 29, 1885	9 marine miles
Mexico and France	November 27, 1886	20 kilometers
Mexico and Ecuador	July 10, 1888	20 kilometers
Mexico and Great Britain	November 27, 1888	9 marine miles
Mexico and the Dominican Republic	March 29, 1890	20 kilometers
Mexico and El Salvador	April 24, 1893	20 kilometers
Mexico and Holland	September 22, 1897	20 kilometers
Mexico and China	December 14, 1899	9 marine miles
Mexico and Honduras	March 24, 1908	20 kilometers

All these treaties expressly recognize, as can be seen on the texts of the pertinent parts partly reproduced in the Appendix, as the extension or width of the territorial sea of the contracting parties, either nine marine miles or twenty kilometers. Besides, in none of them exists any reference whatsoever, direct or indirect, expressed or tacit, to the distance of three miles.

In the first treaty with the United States, subscribed in 1848, Article V stipulates that "the boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land opposite the mouth of the Rio Grande." Similar terminology is used in Article I of the second treaty with the United States (1853) and Article III of the treaty with Guatemala (1882).

The treaties with Germany (1882), with the Kingdom of Sweden and Norway (1885), and with Great Britain (1888) contain identical stipulations in the sense that "the two contracting Parties agree to consider as the limit of the territorial sea on their respective shores the distance of three marine leagues, established from the line of low tide."

The treaties with France (1886), with Ecuador (1888), with the Dominican Republic (1890), with El Salvador (1893), with Holland (1897), and with Honduras (1908) include within themselves almost to the "distance of twenty kilometers* measured from the line of the lowest tide" as constituting the "*limit of their sovereignty* in the territorial waters adjacent to their respective coasts" (as is stipulated in two of the treaties) or the "*limit of territorial* sovereignty in their respective coasts" (as is stated in the other four treaties).

It should be worthwhile to point out that, with the exception of the treaty with China that has different wording, all treaties refer to— and in this they are considerably ahead of the epoch in which they were signed, and far removed from the Con-

*Twenty kilometers are 20,000 meters. Three marine leagues are 16,670 meters. (Footnote supplied)

ference of The Hague, in which the desirable definition of the zones adjacent to coastlines was finally obtained—*the territorial sea as we understand it today*, inasmuch as it cannot be doubted that in all of them the sovereignty of the State with shores on said sea has been clearly recognized. In fact, the two treaties with the United States and the treaty with Guatemala fix no less than *the border* between the contracting States, thus assimilating the zone of three leagues of sea or nine marine miles to their territory. The treaties with France, with Ecuador, with the Dominican Republic, and El Salvador, with Holland, and with Honduras expressly fix the distance of twenty kilometers as the limit of "*territorial sovereignty*," or "*sovereignty in territorial waters.*" The treaties with Germany, with the Kingdom of Sweden and Norway and with Great Britain, if it is true that they only refer to the "*territorial sea*," it is obvious that that sea could only be understood as that in which the State exercises all the attributes of sovereignty, because in any other way the following autolimitation agreed to by the contracting Parties would be inexplicable, in the sense that the fixed limits would only be applied, on a reciprocal basis, in the exercise of specific rights of the States, such as, for example, those relative to the safeguard and application of customs regulations.

* * *

Mexico, as has been stated, has had two treaties with the United States for more than one hundred years that are still in force and which established a territorial sea of a width of nine marine miles. The text is clear: "The boundary line between

the two Republics," reads the Treaty of Guadalupe (1848), "shall commence in the Gulf of Mexico three leagues from land, opposite the mouth of the Rio Grande," and the Treaty of La Mesilla (1853) ratifying the foregoing states: "the boundary between the two Republics will be as follows: beginning in the Gulf of Mexico, a distance of three leagues from land, opposite the mouth of the Rio Grande, such as is stipulated in Article V of the Treaty of Guadalupe Hidalgo." The significance of these texts, which certainly cannot be called ambiguous, was recognized in an official document that dates back to the same year in which the Treaty of Guadalupe was signed and that bears the signature of the then Secretary of State of the United States, Mr. James Buchanan.

The British Government, in fact, in a note addressed to the United States on April 30, 1848, expressed, among other things, the following:

> "As the tenour of this Article appears to Her Majesty's Government to involve an assumption of Jurisdiction on the part of the United States and Mexico, over the Sea, beyond the usual limit of one Marine League (or three geographical miles), which is acknowledged by International Law and Practise as the Extent of Territorial Jurisdiction, over the Sea that washes the Coasts of States,—I have been directed to state to the United States' Government that, in order to prevent future misunderstanding, Her Majesty's Government think it right to declare that they cannot acquiesce in the extent of Maritime Jurisdiction assumed by the

United (States) and by Mexico in the Article in question."

In reply to this note, the Secretary of State of the United States, on August 19, 1848, addressed another note to the Minister of Great Britain in Washington, and the pertinent paragraphs were worded as follows:

"I have had the honor to receive your note of the 30th April last objecting, on behalf of the British Government, to that clause in the fifth article of the late treaty between Mexico and the United States by which it is declared that 'the boundary line between the two Republics shall commence in the Gulf of Mexico three leagues from land,' instead of one league from land, which you observe 'is acknowledged by international law and practice as the extent of territorial jurisdiction over the sea that washes the coasts of states.'

"In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations."

The Government of the United States, consequently, through its Secretary of State, accepted in the transcribed note that Article V of the Treaty of Guadalupe *effectively extended the maritime juris-*

diction of the two contracting countries to nine miles from the coast or, in other words, it fixed this width to their respective territorial seas. The Secretary of State *agreed to the interpretation that the British Government gave to this Article* and the only objection that was considered appropriate to incorporate into its note was that the terms of the treaty were only binding on Mexico and the United States and not on third parties, which is the same as to say that they could be considered as *res inter alios acta.*

It was only in 1875, or *27 years after the Treaty of Guadalupe had been signed,* when the Government of the United States, wishing to demonstrate the continunity of its adhesion to a distance of 3 miles, thought of the *sui generis* interpretation of the terms of this Treaty.

* * * *

APPENDIX B

EXCERPTS FROM TESTIMONY OF STATE DEPARTMENT DEPUTY LEGAL ADVISER, JACK B. TATE, SHOWING DISAGREEMENT WITH SOLICITOR GENERAL'S THEORY OF TEXAS BOUNDARY SHRINKAGE AND RECOGNIZING THAT "BOUNDARY" AND "TERRITORIAL WATERS" ARE NOT SYNONYMOUS AS APPLIED TO THIS CASE.

(All page refernces are to Senate Interior Committee Hearing on S. J. Res. 13, the Submerged Lands Act, 83d Cong., 1st Sess., 1953.)

Senator Daniel. Have you ever known at any time since these treaties were entered into and since Texas came into the Union, that the United States Government has denied Texas' territorial limits as being 3 leagues from shore?

Mr. Tate. Not at the boundary point, no.

Senator Daniel. Not at the boundary point... I just want to ask you again, it is not your contention that by coming into the United States our Nation went back on its word on Texas' boundary and let these riches outside of the 3 miles go back into the ownership of the family of nations, is it?

Mr. Tate. I am not making any contention on that score, Senator.

Senator Daniel. As to the State of Florida, its constitution, after the Civil War, provided that on the Gulf coast side, that is the shallow-water side, its boundary should go out 3 leagues from shore, and

that was approved by the United States Congress. You are familiar with that, are you not?

Mr. Tate. I understand that to be true; yes.

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.

(pp. 1077-1978)

Mr. Tate. That is correct. The United States recognizes the treaty [Guadalupe Hidalgo] as setting the *boundary* as between Texas and Mexico. I do not think the State Department has had occasion to pass on the question as to the *territorial waters* claimed by Texas vis-a-vis other nations because of Guadalupe Hidalgo. We have as far as Mexico is concerned. The treaty only purports to set a boundary as between the United States and Mexico. We recognize that that *boundary* has been set by the treaty, but I think we have not had to pass on the question of what are the *territorial waters* because of the treaty.

I would think that that matter beween Texas and the United States would be a matter for the Attorney General and the Department of Justice, not for the Department of State. . . .

Senator Murray. You are familiar with the letter from Senator Connally which has been introduced in the record here?

Mr. Tate. That is right.

Senator Murray. That contains a discussion of this matter. Are you in accord with the conclusions in that letter?

Mr. Tate. I am, sir, but I do not think that letter bears on the question—

Senator Murray. I beg your pardon, sir?

Mr. Tate. I do not think that letter passes on the question of Texas' territorial waters.

Senator Murray. Texas' territorial waters?

Mr. Tate. That is right.

Senator Murray. But the letter discusses negotiations between Texas and the United States.

Mr. Tate. That is correct. *It recognizes the boundary as set forth in the treaty.*

(pp. 1080-1081)

APPENDIX C

Memorandum on The International Law Questions Raised During Oral Argument of United States v. States of Louisiana, et al.

by Louis B. Sohn *
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It seems to me that the questions asked by the justices have narrowed down the issues to the following points.

1. The legislative history shows beyond the shadow of a doubt that the Submerged Lands Act has granted the area between three miles and three leagues automatically to all those Gulf States who had clear provisions in their laws or constitutions as to the extent of their boundaries in the Gulf (e. g., Texas and Florida). It left, however, to the Supreme Court the decision about the location of the boundaries in the case of those States the boundaries of which were not defined clearly in their constitutions and laws, i.e., in case of States the claims of which were based only on a perimeter boundary. Also, it left to the Court's determination the implied approval of these boundaries at least to the extent of three leagues by the Treaty of Guadalupe Hidalgo, which adopted a national boundary of three leagues

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in the Gulf of Mexico, and the subsequent Acts of Congress implementing that Treaty and boundary. (See Texas Brief for list of these Acts, p. 109; App. C, p. 257.)

2. The Solicitor General has raised, however, an additional question, not considered at all at the time the Act was adopted, i.e., whether the boundaries which were clearly defined in constitutions or laws did not "legally exist" because they were in the Solicitor General's view contrary to international law and to the foreign policy of the United States.

3. The legal existence of the boundaries of a State is determined in the first place by the constitution and laws of the State concerned. In the case of all the Gulf States the relevant documents were approved by the Congress of the United States either prior to the admission or, as in the case of Florida, by later action. In no case has the Congress made an exception with respect to the maritime boundary of any State and both the land and maritime boundaries were approved simultaneously by Congress. If certain changes in State boundaries were desired by Congress, such changes were usually specified in the Enabling Act as conditions of admission and were always approved by the State concerned. (This happened, e.g., recently with respect to Hawaii.) Any changes in the boundaries of a State after its admission to the Union require the consent of the State concerned. As the Supreme Court stated in *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, at 540-41 (1884), "The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be ob-

tained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britian and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the co-operation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State, and after much negotiation the claims of the two States were adjusted, and the disputed questions of boundary settled." It may be noted that the Court required in this case consent of the State of Maine not only with respect to cession of sovereignty and jurisdiction, but also with respect to "title to territory *claimed by her.*" (For further information on the Northeastern boundary dispute and the role played by Maine in its solution, see N. P. Mitchell, State Interests in American Treaties, 1936, pp. 19-37.) This principle applies clearly to the maritime boundary of a State to the same extent as it applies to land boundaries and no claims to maritime boundaries may be taken away from States without their consent. There is no indication that such consent was ever obtained from the Gulf States.

4. The maritime jurisdiction of the United States does not necessarily coincide with the boundaries of

the several States. The boundaries of States may be used by the States for all purposes authorized by the law of the respective States, provided that in so doing the States do not violate the Constitution of the United States or the rules of international law binding on the United States. Similarly, Congress can use the boundaries of States for delimitation of property rights between the States and the Federal Government, and it can make exactly that use of State boundaries in the Submerged Lands Act. The maritime boundaries of the United States are not mentioned at all in that Act, and that Act clearly admits the possibility that State boundaries may extend to three leagues from the shore.

5. The question of the general maritime boundary of the United States is anyway only a theoretical question as there is no official Act of Congress delineating expressly the whole maritime boundary of the United States. It cannot be argued, therefore, that the boundaries of the Gulf States are in violation of any law of the United States and thus constitute a breach of paragraph 2 of Section 3 of Article IV of the Constitution which authorizes the Congress, and only the Congress, to make all needful rules respecting the territory belonging to the United States. See 1 Hackworth, *Digest of International Law*, 634 (Dept. of State, 1940).

6. The only national maritime boundary which has been fixed by proper authority is the boundary in the Gulf of Mexico which was approved in 1848 by the Guadalupe Hidalgo Treaty with Mexico, which was ratified by the President with the advice

and consent of the Senate. This treaty is still in force and the maritime boundary established in pursuance thereof was never changed by subsequent treaty or congressional enactment.

7. The maritime boundary in the Gulf established under the 1848 Treaty was in no way invalidated by the British protest. Domestically, such a protest had no effect, as only a later treaty or an Act of Congress can amend a treaty. Internationally, a single protest is not sufficient to impugn the validity of an international act. Especially it is true in this case where the protest was not renewed after the conclusion of the Gadsden Treaty of 1853. If it is claimed that there was no need for further protests because in its reply of 19 August 1848 the United States explained that it had no intention "to question the rights which Great Britain or any other power may possess under the law of nations," it can be argued that this reply left to Great Britain the burden of proof that she had some rights in the three-league area under international law, or the Treaty of 1818, and Great Britain has not in the crucial period made any effort to establish any such rights. Even if such rights were clearly established, the validity of the maritime boundary would not have been impugned. The only consequence of the recognition of the British rights would have been the establishment of a special privilege for British shipping in the Gulf, similar to the privileges established in the Pacific by the treaties of 1824 and 1825 between United States and Great Britain, respectively, and Russia, which are cited in the Solicitor General's Supplemental Memorandum of October 1959.

8. Thus throughout the crucial period and up to the present time the maritime boundary of the United States in the Gulf has been three leagues from the coast. If the United States has chosen to assert that in other areas, maritime jurisdiction should be limited to three miles, such pronouncements could have no effect on the United States boundary in the Gulf. It seems highly improbable that Congress has ever intended that statements made in diplomatic correspondence relating to rights of other countries in foreign waters should be considered as affecting the rights of our States in waters close to the American shores. At most, it could be argued that the United States has voluntarily agreed not to exercise certain rights beyond the three-mile area and that this abandonment of certain rights concerning maritime jurisdiction was applied also to the Gulf. But such renunciation of sovereign rights must be strictly interpreted and can apply only to rights expressly renounced. The burden of proof is on the Solicitor General and he has not shown that the Gulf boundary established by the 1848 Treaty was ever abandoned by an express action of the competent authorities. Consequently this boundary can be properly used for the delimitation of those rights which have never been abandoned; in particular, it can be used for the purpose of delimiting the property rights in the continental shelf.

9. The only remaining bases for limiting the maritime boundary of the United States to three miles from shore are the Neutrality Acts of 1794, 1797, 1800 and 1818. But those Acts do not speak of boundaries; they are limited to the exercise of a

particular jurisdiction. Their history shows clearly that they were designed to deal with a special problem which was embarrassing our relations with France and Great Britain at that time. They cannot be interpreted, therefore, as establishing the maritime boundary of the United States at three miles for all purposes, in particular as contemporaneous diplomatic correspondence shows that they were intended to establish a temporary minimum limit for the exercise of this particular type of maritime jurisdiction. It may be noted that for other purposes other legislative acts established different jurisdiction during the same period. Thus, an ordinance of the Continental Congress of 4 December 1781 authorized the capture of British goods "within three leagues of the coasts" (21 Journals of the Continental Congress, 1912 ed., pp. 1153-54), and the Customs Acts of 1790 and 1799 extended the customs jurisdiction to "four leagues" off the coast. All these acts are of equal value and there is no basis for arguing that one of them establishes a boundary and the others only extraterritorial rights. That distinction was anyway entirely unknown in the first half of the nineteenth century. The only possible conclusion is that none of these acts was intended to establish the permanent maritime boundary of the United States and that such a boundary, if it exists at all, must be found in some other act (see Nos. 6-7, above).

10. The constitutions and statutes establishing a three-league boundary in the Gulf were also valid under the rules of international law prevailing in the crucial period. The Solicitor General has not proven that a three-mile rule was at that time firm-

ly established, even with respect to maritime jurisdiction, and the evidence to the contrary presented by the States has not been refuted. If there is any doubt about the existence of the rule of international law invalidating the three-league boundary, that boundary must be considered as valid internationally. Even more, it must be considered as having sufficient domestic validity for the purposes of this case.