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.

BRIEF OF THE STATE OF FLORIDA FILED SUBSEQUENT TO ARGUMENT

Respectfully submitted,

SPESSARD L. HOLLAND
Washington, D. C.
Of Counsel

RICHARD W. ERVIN
Attorney General

J. ROBERT McCLURE
First Assistant Attorney General

FRED M. BURNS
Assistant Attorney General

SOLICITORS FOR THE STATE OF FLORIDA

INDEX

INDEX TO CITATIONS

IN THE

Supreme Court of The United States

OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA,

Plaintiff,

—vs—

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

Defendants.

BRIEF OF THE STATE OF FLORIDA FILED SUBSEQUENT TO ARGUMENT

Appreciation is expressed to the Court for the opportunity to file a final brief for Florida. This brief will cover three subjects:

1. INTENT OF THE SUBMERGED LANDS ACT.
2. FLORIDA'S CLAIM PRIOR TO, AND AT THE TIME OF STATEHOOD.
3. FLORIDA'S CLAIM AS APPROVED BY CONGRESS PRIOR TO PASSAGE OF THE SUBMERGED LANDS ACT.

In this brief we have given a short resume of our position on these three subjects, emphasizing points that appeared significant in the oral argument. For purposes of brevity, the Submerged Lands Act will hereafter be referred to in this brief as SLA.

1. INTENT OF THE SUBMERGED LANDS ACT.

The main purpose of the SLA was to follow the suggestion made by this Court in the California case (332 U. S. 27, 40) that the Tidelands controversy might be settled by Congress (Joint Brief of the Defendant States, page12.)

In drafting and adopting the SLA, Congress adopted the "historic" boundaries of the Gulf states, as they existed either at the time of statehood or as subsequently approved by the Congress, not as international boundaries but as a boundary limitation upon the extent of the conveyance and transfer to the states.

Congress found it to be in the public interest that the properties and property rights within "historic" boundaries, as described in said act, be vested in the states. The measure of the extent of this conveyance and transfer was the said "historic" boundaries limited, however, to three leagues from the coast.

Such boundaries, being for the purpose of transferring property and property rights, should not be confused with international boundaries (U. S. territorial sea) established by the political branches of the Government for international purposes. These are domestic boundaries which

need not be reduced to the dimensions of international boundaries, intended for international and not internal affairs. (Joint Brief of Defendant States, pages 7-17.)

These "historic" boundaries may serve state purposes only. For example, they mark the jurisdiction of states in internal domestic matters such as venue, county boundaries, private land titles and leases and serve other state purposes. They can also serve as the calls or conveyance lines of the congressional grants as between the states and the Federal Government of the natural resources in the sea bed and subsoil of the Gulf of Mexico. (Florida's Brief, pages 38 and 39.)

The national boundary (U. S. territorial sea) may be "rolled" forward or backward, as our international interests require. In Geneva last year the United States, at an International Conference on the Law of the Sea, proposed our national boundary be "rolled" forward to six miles. (Government's Brief, footnote, page 14.) Our national boundary may or may not be coincident with states' "historic" boundaries in the Gulf of Mexico, depending upon our nation's current international policy.

It is, we think, unsound logically and unduly technical for the Government to attempt to equate two essentially different things — a state boundary determined upon by Congress for the domestic purposes of a state which can only be changed by Congress with the consent of the state, and an international boundary (U. S. territorial sea) for foreign relations which may be changed from time to time unilaterally by the Federal Government. It is made clear in both the SLA and the Outer Continental Shelf Lands

Act (67 Stat. 462) that delegated national "imperium" in navigable waters is not to be confused, or deemed in conflict with "dominium" in the natural resources in the sea bed or subsoil which may be the subject of congressional apportionment between the states and the Federal Government. (See Florida's Reply Brief to Governmen's Reply Brief, pages 17 and 18.) "Dominium and imperium are normally separable and separate." *United States v. Texas*, 339 U. S. 707, text 719.

The national boundary (U. S. territorial sea) and states' "historic" boundaries should not be confounded or confused by the Solicitor General for the very transparent purpose of defeating the grants to the Gulf states. We think *Alabama v. Texas*, 347 U. S. 272, settled this confusion, yet the Solicitor General by rationalization seeks to reach over this case to the earlier cases of California, Louisiana and Texas and draw inferences from them to support his position (Government's Brief, pages 12 to 16, inclusive). He overlooks the fact that in the California case this Court pointed the way for settlement of the Tidelands controversy and in *Alabama v. Texas*, supra, held constitutional its suggested method (SLA) as a valid congressional disposal of property of the United States. The "historic" domestic boundaries of the states are the measures of the grants and are not to be confused or confounded by considerations of international law. [Joint Reply Brief of the Defendant States (second brief), pages 47 to 62, inclusive.]

The Tidelands cases (California, Louisiana and Texas) do not support the Government's contentions that the states have no legal offshore boundaries because they are mere "paper" boundaries, or that they shrank at statehood

to coincide with the national three mile belt. The rationale of these cases is that the states did not own the offshore areas or the property in a three mile offshore belt because the United States had paramount rights therein from low water mark, irrespective of states' boundaries. However, in the California case (332 U. S. 19, at pages 36 to 38, inclusive) the Court says it concedes states exercise local police power functions within their *declared boundaries*. Also in the California case the Court refers to two earlier cases where it recognized Florida had "territorial limits" in the Gulf of Mexico. (*The Abby Dodge*, 223 U. S. 166, and *Skiriotes v. Florida*, 313 U. S. 69.) These Florida Gulf limits were mistakenly presumed by the Court in the California case to be a three mile belt (332 U. S. 19, at page 37) because in the light of the facts of the instant case this Court will recall that Florida's limits in the Gulf declared by its constitution are three leagues. In the Louisiana Tidelands case (339 U. S. 699) the Court stated it expressed no opinion relative to the power of a state to define its external territorial limits so far as it affected persons other than the United States and that state boundaries had no bearing on the problem then before the Court.

The point made is that while these territorial offshore limits or marine boundaries of states had no efficacy in establishing state ownership in offshore submerged areas under the holdings in the Tidelands cases, they nevertheless were recognized to exist unshrunken for the exercise of other state functions. They were not held to be mere "paper" boundaries. There is nothing in these cases reducing them to the limits of the national three mile belt. Since Congress has complete constitutional power to dispose of the offshore natural resources without limitation

(*Alabama v. Texas*, supra), we submit there are no restrictions upon its power to choose these boundaries to measure this disposition to the Gulf states.

This analysis is in complete harmony with the legal principles enunciated in the Tidelands cases and does not attempt to relitigate those cases. While admitting these "historic" boundaries had no status for establishing ownership in natural resources offshore prior to SLA, it would now be a surprising contradiction if the irrelevant conclusions drawn by the Solicitor General from the Tidelands cases should produce the same result outward from the three mile limit as was reached in those cases at and beyond low water mark. Congress, following the suggestion of this Court, has exercised its power to grant natural resources within those "historic" boundaries to the Gulf states and there is not the slightest inference or implication in the adjudicated decisions of this Court that such boundaries are illegal, nonexistent or shrunken, or that such boundaries could not be the predicates upon which said grants are based.

By the provisions of the SLA the international boundary of the nation is excluded by the context of the SLA from supplanting or prejudicing "historic" boundaries of states found in their constitutions, enabling and admission acts. To import into the context of the SLA the extraneous element of a national boundary (U. S. territorial sea) does violence to the clear intent of Congress as expressed in the SLA and is contrary to recognized rules of statutory construction. (Joint Brief of Defendant States, pages 33 to 36, inclusive and Florida's Reply Brief to Government's Reply Brief, pages 15 and 16.)

What we have said in this portion of our brief relates to general propositions relative to the meaning of SLA and is intended to rebut extraneous arguments of the Government. We do not mean to give the impression that each Gulf state does not have to establish a pre-admission or postadmission boundary within the contemplation of SLA, but we do maintain that such boundaries if they exist are not cancelled out or shrunken by the holdings in the Tidelands cases.

2. FLORIDA'S CLAIM PRIOR TO, AND AT THE TIME OF STATEHOOD.

Florida was admitted into the Union in 1845. At that time its Constitution (1838) and its Admission Act described the boundaries of the state as embracing the " . . . Territories of East and West Florida, which by the Treaty of Amity, Settlement and Limits, between the United States and Spain, . . . were ceded to the United States" (1819). (Florida's Brief, pages 64, et seq.)

Reference to this Treaty discloses that "*the adjacent islands dependent on said provinces*" (East and West Florida) were ceded (emphasis supplied). In addition to ceding the Floridas to the United States, the Treaty fixed the boundary line between the United States and Spain "west of the Mississippi" (see Article III), which began "on the Gulf of Mexico, at the mouth of the river Sabine, *in the sea* . . ." (emphasis supplied).

Spain originally claimed the Floridas by discovery; however, by the Definitive Treaty of Friendship and Peace, concluded between Spain and Great Britain at

Paris on February 10, 1763 (1 Martens 108), Spain ceded the Floridas to Great Britain, whereupon the King of England (George III) by his proclamation of October 7, 1763 (Annual Register, 1763, pages 208 ff), declared that the government of West Florida was bounded" . . . *to the southward by the Gulf of Mexico, including all islands within six leagues of the coast* . . ." (Florida's Brief, page 67, emphasis supplied.)

The Floridas were retroceded by Great Britain to Spain by the Definitive Treaty of Peace and Friendship, signed at Versailles on September 3, 1783, merely by reference to the Floridas and without specific boundary description.

It was doubtless the purpose of both Great Britain and Spain that Great Britain recede to Spain all the Florida territories claimed by her, including those rights, properties and jurisdiction claimed under the above proclamation of October 7, 1763. Spain's claim, under the said treaty of September 3, 1783, doubtless included "*all islands within six leagues of the coast*," claimed by the King of England by his proclamation of October 7, 1763.

Examination of the United States Coast and Geodetic Survey Map 1007, left with the Court after oral argument as Florida's Exhibit, shows numerous islands of varying sizes bordering on the Straits of Florida, between Florida and Cuba, including the string of islands known as the Florida Keys extending from the tip of the Florida mainland to the Dry Tortugas Islands; and numerous islands along the west coast of Florida from Tampa Bay south, as well as from Tampa Bay to the Suwannee River. Large islands or groups of islands are also located off the coast of the northwestern portion of Florida and additional groups

of islands border the coasts of Alabama, Mississippi and Louisiana.

Piracy and buccaneering were prevalent in the Caribbean Sea and adjacent areas from an early date until around 1800 (*The Age of Piracy*, by Robert Carse; *Piracy was a Business*, by Cyrus H. Karraker; *The Buccaneers of America*, by John Esquemeling; *Our Navy and the West Indian Pirates*, by Gardner W. Allen; *Piracy in the West Indies and its Suppression*, by Francis B. C. Bradlee; *A History of the Robberies and Murders by the Most Notorious Pirates*, by Captain Charles Johnson; *The Encyclopedia Americana*, 1956 Edition, Volume 4, page 653; *Florida Historic Dramatic Contemporary*, by J. E. Dovell, of the University of Florida) and doubtless the islands in the Caribbean Sea and the Gulf of Mexico, as well as adjacent areas, were used as bases for piracy operations.

It doubtless was the thought of King George III of England, when he issued his proclamation of October 7, 1763, defining the boundaries of the Floridas in the Gulf as "including all islands within six leagues of the sea coast," that he was proclaiming to the world and particularly to all mariners that Britain asserted the right to protect its domain and interests within this boundary. This included, we believe, notice to pirates and privateers that Britain would give protection in this wider zone where coastal shipping had to sail farther from the coast because of the shallow waters of the Gulf. The above mentioned United States Coast and Geodetic Survey Map 1007 also shows the shallowness of the waters along the coast of Florida. The depths of waters in the Gulf as shown on this map are indicated in fathoms. For example, this map shows that the average depth within three leagues of coast between Tar-

pon Springs, Florida, northward to St. Marks, Florida, a distance of approximately 200 miles, is less than 8 feet.

As pointed out in oral argument, for several years now Florida citizens have undertaken extensive land fill developments in these offshore areas, including the building of highway causeways connecting the islands or keys, without any protest from the Government that any of the submerged areas filled belonged to the United States.

The claims of Louisiana, Mississippi, Alabama and Florida have several points of similarity. They all have boundary descriptions referring to islands lying within three or six leagues of coast or shore. Each state has a history of ownership of its territory by Spain or Britain, or both. Spain dominated all of the Gulf of Mexico at one time and made expansive marine claims. These four states inherited from Spain and Britain historic boundaries which represented marginal belts extending in the Gulf three leagues or more. These, we submit, are ancient territorial claims of control and domain, unlimited and undiminished by later inflections and rules of measurement which apply only to the territorial sea (3 mile belt) of the United States. It is true elaborate rules for measuring the territorial sea have been adopted as late as last year at the Law of the Sea Conference at Geneva. (See pamphlet entitled "Measurement of the U. S. Territorial Sea," by G. Etzel Pearcey, The Geographer, in the Department of State Bulletin, Volume XL, No. 1044, June 29, 1959.) But these rules apply only to "imperium" in overlying navigable waters and do not contravene, and could not contravene, without the approval of Congress and the consent of the Gulf states, the "historic" boundaries of these states which serve as the measures of grants of natural resources under SLA.

Even if these pre-statehood league dimensional boundaries were not described with the particularity which characterized Florida's three league boundary description in its 1868 Constitution, or the Texas boundary in its Enabling Act, it is implicit from the terms of these boundary descriptions and their scope that overall perimeter boundaries were contemplated. Though the niceties and exactness of language in the ancient treaties were not employed sufficiently well to satisfy some modern technical minds, we submit perimeter boundaries were nevertheless intended in point of fact.

The Treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, made no distinction between islands and intervening waters in fixing a three league boundary between these nations in the Gulf.

It is little wonder when Florida's 1868 Reconstruction Constitution was adopted that the Convention adopting it did not distinguish between islands and intervening waters. It considered it to be appropriate to prescribe a perimeter boundary including both islands and intervening waters.

Because of the clusters or groups of islands off the coast in the Gulf of Mexico, and the shallowness and shoalness of the waters around the margin of this landlocked inland sea, the marine boundary claims of the Gulf states were generally considered perimeter in nature and as including the waters as well as the islands. In the few decisions of courts where these boundaries were considered, they were regarded as perimeter boundaries. See *Louisiana vs. Mississippi*, 202 U. S. 1, text 37; Louisiana's Brief, pages 17 to 22, inclusive; Alabama's Brief, pages 10 and 11; Mississip-

pi's Brief, pages 13 to 19, inclusive. Later rules for measuring the territorial sea were wholly irrelevant to the issues presented in these cases.

There are several cogent reasons that can be assigned for this concept of a perimeter marine belt around these states. Professor Louis B. Sohn has set forth a number of the reasons why the Gulf is a special case. See his Memorandum, Exhibit I, Joint Brief of the Defendant States, pages 147, et seq. See also his letter of October 27, 1959 to the Attorney General of Florida. (Exhibit I, Appendix page 35, this brief.)

The language, "the adjacent islands dependent on said provinces," appearing in the Treaty of 1819, and the language in King George III's proclamation of 1763 that the government of West Florida was bounded " . . . by the Gulf of Mexico including all islands within *six* leagues of the Coast" connotes that something more than the islands themselves were embraced. These were "adjacent islands dependent on the said (Floridas) provinces" and control of the intervening waters around and between them and the mainland was, of course, essential to that dependency. True, there are stretches where but few islands lie off the coast on this long margin of the Gulf, but considered overall there are enough islands lying off the coast at intervals which justified bringing them within the protective reach of a three or six league perimeter in the 18th Century. The Florida Keys actually extend far beyond six leagues, which may have been one of the reasons the 1868 Reconstruction Constitution boundary was redrawn to envelop these Keys.

In ancient days when these provinces were possessed by

Great Britain and Spain, it would have been logical, even with the limited geographic knowledge of the times, to consider a six league perimeter boundary as necessary to satisfactorily encompass, protect and claim for the sovereign these islands bordering the Florida provinces in the Gulf.

It is not unreasonable, therefore, to consider these ancient boundaries of the four Gulf states, Louisiana, Mississippi, Alabama and Florida, as a three league or six league perimeter including both islands and intervening waters extending without break along the continuous margin of the Gulf coastline of the states.

Actually, in point of general historical and judicial considerations, until the rights of the United States in these natural resources were reviewed in the light of the paramount needs of the nation in 1945 by the Chief Executive and proclaimed to be superior to the claims of the coastal states, which this Court accepted perforce as a determination of a political branch of the Government, the concept or claim that the coastal states had proprietary rights out to the extent of their historic perimeter boundaries, unqualified or unrestricted to islands alone or to the limit of the United States territorial sea, was not generally questioned.

We believe that this Court will not be reluctant to view the "historic" boundary claims of Florida, Alabama, Mississippi and Louisiana in the light of contemporaneous constructions which these boundary claims received from the time of their original inception down to 1945. Actually this Court never held in the California, Louisiana and Texas tidelands cases that the ancient boundaries of the

Gulf coastal states were invalid per se. All that this Court actually held was that states' property claims within such boundaries must stand in abeyance to the paramount authority of the United States as pronounced by the President and the State Department, unless and until the Congress took a hand. This it has done in SLA. Section 4 of SLA neither questions nor prejudices "any state's seaward boundary beyond three geographical miles if it was so provided by its Constitution or laws prior to or at the time such state became a member of the Union, or if it has been heretofore approved by Congress."

These "historic" boundaries of the four states were interpreted and conceived by political and judicial authorities for many years to extend outwards from coastline beyond three miles as multiple league perimeter boundaries along the entire margins of these states and were not restricted to island areas alone, but were deemed to include the waters in such marginal perimeters and the sea bed under them. Such attributes were deemed logically complementary and dependent to the proper possession and control of these islands by these states. (*Pollard v. Hagan*, 3 How. 212; *Louisiana v. Mississippi*, 202 U. S. 1; *Commonwealth v. Manchester*, 152 Mass. 230, 241, 25 N. E. 113; *Manchester v. Massachusetts*, 139 U. S. 240; *Harcourt v. Gaillard*, 12 Wheat. 524, 6 L. Ed. 716. See Louisiana's Brief, pages 74 et seq.)

If the Court will lay aside the holdings in the Tidelands cases and modern rules of measuring the territorial sea when considering the precise question of whether these four states, Florida, Alabama, Mississippi and Louisiana, had prestatehood "historic" boundaries of three leagues or more, which we believe the Court should do in view of

the language of SLA and the intent of Congress expressed therein, despite the Government's repeated attempts to inject these extraneous holdings and rules in such consideration, and revert to a consideration of what was the authoritative nature, breadth and meaning of such "historic" boundaries during the relevant periods contemplated by SLA, we think the Court will find that the contemporaneous political and judicial constructions of such prestatehood "historic" boundaries during relevant periods were that they were perimeter in point of fact, being a belt of at least three leagues in the Gulf of Mexico and extending without break along the margins of each of the Gulf states.

Florida's statehood Constitution and admission act defined its boundaries by reference to the title of a predecessor sovereign. The original statehood documents of Louisiana, Mississippi and Alabama described their boundaries as they were understod to be possessed by predecessor sovereigns.

These boundaries, as provided in the statehood documents of the four states, were entirely different in terms from the U. S. territorial sea. Moreover, the context of the SLA does not admit into its purview the national three mile belt. *Expressio unius est exclusio alterius.* This context is limited to a criterion which confines inquiry to whether a state's original constitution and admission or enabling acts provided a seaward boundary extending beyond three miles in the Gulf. That is the boundary which the Congress and the state agreed upon and not a boundary for international purposes which we have seen may be unilaterally rolled backward or forward by the State Department for foreign relations purposes, irrespec-

tive of previously vested original boundaries of the state. There is no basis for an "after" admission national boundary telescoping or coalescing forward or backward an original statehood boundary in the context of the SLA or elsewhere.

Florida, Alabama, Mississippi and Louisiana satisfy the SLA's criterion and, as we have seen, their "historic" boundaries were three leagues or more perimeter boundaries. They were generally considered to be such at the time of statehood and long afterwards. In fact, in *United States v. Oregon*, 295 U. S. 1, 14, it was held long after these four states were admitted into the Union that title under navigable waters within the bounds of states passed to them.

It was not until the Tidelands cases were decided in 1947 that it was determined these "historic" boundaries, in the light of more recent determinations of the political branches of the Government, did not impute to the states property rights in the sea bed embraced in said boundaries. Even in those cases, the holding was limited to an adjudication that the United States only had paramount rights, superior to the states, from low water mark in submerged areas and irrespective of their boundaries.

However, Congress, in SLA having unlimited power of property disposition, adopted the criterion specified in said context which completely excluded interposition of a national boundary into the measure of the grants. Congress, with unlimited power in the field, may be likened to a *deus ex machina* which has by its own choice laid hold of the Gulf states' "historic" boundaries as they existed without diminuition of range in the time dimension of

their original documentation and designated them, and only them, in SLA as the measure of present day grants of natural resources to the Gulf states. As originally conceived and construed as of statehood, these boundaries were perimeter in nature, extending seaward at least three leagues in the Gulf.

3. FLORIDA'S CLAIM AS APPROVED BY CONGRESS PRIOR TO THE SUBMERGED LANDS ACT.

The term "boundaries" as used in the SLA of May 22, 1953 (67 Stat. 19-33) is by the said act itself declared to also embrace the seaward boundaries of a state "as heretofore approved by the Congress." Florida's state constitution of 1868, including Article "I" thereof, which defined its boundaries, received Congressional approval within the purview of the said SLA, as we shall hereinafter demonstrate and prove.

Florida claims such lands, not only under her boundaries "as they existed at the time such State became a member of the Union" in 1845 (see pages 7 to 15 hereof), but also as they were approved by the Congress in 1868, through the approval of Florida's 1868 Constitution under and pursuant to the Acts of March 2, 1867, March 22, 1867 and June 25, 1868 (14 Stat. 428; 15 Stat. 1 and 73). Florida's argument in this connection appears on pages 14-64 of her Brief in Opposition to the Motion for Judgment on the Amended Complaint and pages 27-36 of her Reply Brief to the Government's Reply Brief.

Construction of state boundaries "as heretofore approved by the Congress." — Congress, in the SLA, defined

certain words and phrases used therein to be followed when construing the said act. These definitions are binding upon us when construing the said act (see pages 15, 16 and 17, Florida's Reply Brief to the Government's Reply Brief). One of the definitions of the term "boundaries," as used in the said act is, such boundaries "as heretofore approved by the Congress," limited to not more than three marine leagues in the Gulf of Mexico. The purpose of the SLA being merely the transfer of property and property rights from the United States to the states, and federal rights and powers necessary for control of navigation, flood control and production of power being expressly excluded from such conveyance and transfer (subsection (d) of Section 3, and Section 6, SLA). The act is internal in purpose and scope and interferes in no way with the international use of the waters of either the Atlantic or Pacific Oceans or of the Gulf of Mexico. The administration and use of the submerged lands in the Gulf of Mexico by the states will not interfere with international use of the waters any more than would a like administration and use of such submerged lands by the United States. Congress, when it measured the extent of the submerged lands and waters covering the same and the natural resources therein, for the purposes of conveyance and transfer to the states, referred to state boundaries, not for international, but for internal purposes. The transfer of the property and property rights from the United States to the states, by the SLA was a domestic, not an international problem.

As shown above, prior to Florida's Constitution of 1865 her boundaries were defined by reference to East and West Florida (Act of March 30, 1822, 3 Stat. 654; Act of March 3, 1845, 5 Stat. 742; Florida Constitutions of 1838 and

1861). However, in drafting and adopting the Florida Constitution of 1865 a departure from previous practice was made and a boundary description was contained in said Constitution (Article XII), running in part down the middle of the St. Mary's River to the Atlantic Ocean, "thence southwardly to the Gulf of Florida and Gulf of Mexico, thence northwardly and westwardly including all islands within five leagues of the shore, to the beginning." There was a further deviation made in the boundary description in Florida's Constitution of 1868, which, in part, runs along the Atlantic coast, the Gulf Stream and the Florida Reefs "to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from land, to a point west of the mouth of the Perdido; thence to the place of beginning." The Florida Constitution of 1868, containing the above mentioned description, was laid before the Congress in 1868, in connection with her readmission to representation in the Congress following the Civil War (pages 1-11, and 16-26, Appendix to Florida's Main Brief). The primary question before this Court in this connection is whether or not this constitutional description received congressional approval within the purview of the SLA.

Disputed boundary between Florida and Georgia.—The agreed boundary between Florida and Georgia, beginning prior to the American Revolution, in part ran down the Chattahoochee River to its confluence with the Flint River "from thence straight *to the head of the St. Mary's River;* thence down the middle of said river to the Atlantic Ocean . . ." However, a dispute arose as to which of two streams was in truth and fact *the head of the St. Mary's River.* This boundary description dispute existed, between Spain

and Great Britain, prior to the American Revolution; after the cession of the Americas by Great Britain to the United States, between the United States and Spain; after the cession of the Floridas by Spain to the United States, between the United States and the State of Georgia; and after the admission of Florida as a state, between Florida and Georgia. The history of this disputed boundary appears from this Court's opinions in *Coffee v. Groover*, 123 U. S. 1, and *Florida v. Georgia*, 17 How. 478. This dispute between Florida and Georgia was interrupted by the Civil War. The disputed area contained upwards of 1,200,000 acres of land (*Florida v. Georgia*, supra, text 491). The dispute was finally settled by agreement and mutual legislation by both states in 1859, 1860, 1861 and 1866 (*Coffee v. Groover*, 123 U. S. 1, text 18-22). This Court in *Coffee v. Groover*, text 21, said that this boundary settlement was "recognized and confirmed by an act of Congress approved April 9, 1872." The magnitude of this boundary dispute was such that Congress was doubtless aware of it and desired to do nothing, in connection with the approval of state constitutions under the acts of March 2 and 22, 1867 (the Reconstruction acts), calculated to renew or extend the dispute. Further, it was a time of turmoil, and a majority of the members of Congress were unfriendly to the rebel states, which were not then represented in the Congress. In view of this, it is inconceivable that Congress did not carefully examine the boundaries appearing in the proposed constitutions when readmitting Florida, as well as Georgia and other rebel states to representation.

Florida Constitution of 1868 before Congress. — The Acts of March 2 and 22, 1867, required, as a condition to representation in Congress, that the rebel states, among other things, prepare, adopt and approve new state con-

stitutions, and submit the same to "Congress for examination and approval, and (when) Congress shall have approved the same" their representatives would be seated. Florida adopted, approved and had submitted to the Congress her Constitution of 1868, which was referred to the Committee on Reconstruction and ordered to be printed (Appendix, Florida's Main Brief, pages 16-27). The Congressional order for printing of the said Constitution was doubtless for the purpose of making copies available to all members of Congress for study and consideration. The Congressional Globe for 1868 shows clearly that the Florida 1868 Constitution received Congressional study and consideration. The Attorney General of the United States in 1869, as well as many military commanders in 1868 and 1869, held that Florida's 1868 Constitution had received Congressional approval (see Florida's Main Brief, pages 46-57, and Reply Brief to the Government's Reply Brief, pages 29-32). The Florida District Court (three judge court) and the Circuit Court of Appeals, Fifth Circuit, (Florida's Main Brief, pages 53-55), were of the opinion that Florida's boundaries, as contained in her 1868 Constitution, had received Congressional approval. These authorities show an approval of Florida's 1868 Constitution by the Congress. (See also, *Skiriotes v. State*, 144 Fla. 220, 197 So. 736.) Where the Constitution or statutes require legislative or congressional approval such approval may be an implied one, unless otherwise specifically required by such documents (see pages 34-36, Florida's Main Brief). There is no specific requirement in the SLA, or otherwise, that the approval of state boundaries by Congress should have been an express one. The record shows an approval by Congress of Florida's 1868 Constitution, including the state boundary description therein, within the purview and intent of the SLA.

The Government, on pages 272 and 273 of its Main Brief, accredits to Congressman Thaddeus Stevens certain statements and comments made in Congress alleged to show that Congress when examining reconstruction constitutions examined them only for the purpose of determining whether they were Republican in form or not; however, only a few short paragraphs away from the statement referred to by the Government, we find (Congressional Globe, May 13, 1868, page 2445) Stevens, addressing himself to an amendment proposed by him to the Georgia Constitution, being then examined by the Congress, saying:

> "I propose that amendment for this reason: The constitution of Georgia nullifies all debts due before a certain period, as well as those due to loyal men as to rebels. My amendment is that it shall nullify only those due to rebels and not those due to loyal men."

If the provision, prior to the proposed amendment, was not Republican in form as applied to all men, it certainly was not improved in this respect by limiting it to only those who were loyal to the United States during the war.

What the Congress was trying to do, in connection with its examination of the state constitutions, was expressed by Congressman Beck (Congressional Globe, May 13, 1868, page 2446), when he said:

> ". . . The gentleman from Pennsylvania (Mr. STEVENS) in the motion he made a few moments ago, to amend the constitution of the State of Georgia, has avowed boldly the true position of the majority in regard to the constitutions of the southern States. I say in all candor that his proposition to amend the constitution of the State of Georgia, because it does not suit this House, is presenting the issue fairly and

clearly. This House made that constitution; it ordered how it should be made, selected or rather appointed the man to frame it, and all others excluded from or admitted to the polls whom they pleased, and under the pretense of an election not only told the people of those States that no one but adherents of the dominant party should have any part or lot in the administration of the governments under them no matter how odious they might be to the people there.

"These constitutions do not represent the action of the people of any of those States, but they represent, in fact, the will and the orders of Congress. This House has just as much power—I do not say right, but power to alter, amend and make those State constitutions what they please, to say what they shall and what they shall not contain, who are elected and who are not elected, who shall and who shall not be admitted to seats on this floor and on the floor of the Senate, and who shall and who shall not occupy the State offices, as they have to do what they have done, and it would be more manly to avow it boldly at once.

"The papers now presented here as State constitutions are in fact but the action of Congress, and the amendment offered by the gentleman from Pennsylvania, (Mr. STEVENS,) or any other amendment, is just as legitimate, valid, and binding on the people of the South as the papers now presented are, and it would be no more the action of this House if adopted than are those papers now before us as constitutions of these Southern States are. By the adoption of such amendments now, the people of the country would understand clearly what is the undoubted fact, that Congress has framed constitutions and appointed officers to govern these states, and men to represent them here without their consent and against their will.

The sooner they understand and appreciate these facts the better, as the remedy will be the sooner applied."

An examination of the Congressional Globe of 1867 and 1868, relative to state constitutions' requirements for further representation in Congress, leaves little doubt but that Congress' examination of such constitutions was general, often going beyond questions of Republican form of government. Further, there is no record of protest by Congress or the Executive branch as to Florida's 1868 three league boundaries.

No objection to Florida's boundary by the Secretary of State.—The President of the United States transmitted a copy of the Florida Constitution of 1868 to Congress on May 27, 1868, which Constitution was ordered printed on May 29, 1868 (House Miscellaneous Document No. 297, 2nd Session, 40th Congress), which Constitution was laid before Congress, and by it referred to the Committee on Reconstruction where such Constitution was extensively considered by the Congress (pages 50-79, Appendix to Florida's Main Brief) between June 2, 1868 and July 2, 1868, when the delegation to Congress from Florida was permitted to take their seats in Congress). Arguments in this connection were long and heated. It appears from an examination of incoming and outgoing correspondence of the United States Department of State for this period the Secretary of State was present in the Department signing letters during most of this time, and that when not present like correspondence was signed by the Assistant Secretary of State or by the Chief Clerk. During this time the Secretary of State received correspondence from the Senate Committee on Foreign Relations, and from various mem-

bers of Congress; however, there is to be found no correspondence of protest or otherwise relative to the Florida Constitution of 1868. All as appears from that certain affidavit of J. Chrys Dougherty, in words and figures as follows:

"THE STATE OF TEXAS ()

COUNTY OF TRAVIS ()

"Before me, the undersigned authority, on this day personally appeared J. Chrys Dougherty, who being known to me and being by me duly sworn on his oath deposes and says:

"My name is J. Chrys Dougherty. I reside at No. 6 Green Lanes, Austin 3, Texas. I am one of the counsel in No. 10, Original, October Term 1959, styled United States of America v. The States of Louisiana, Texas, Mississippi, Alabama, and Florida, now pending in the Supreme Court of the United States.

"On October 16, 1959, in the National Archives, I examined all of the incoming and outgoing domestic correspondence of the United States Department of State for the period beginning April 1, 1868, and ending July 15, 1868, as reflected in Volumes 78 and 79, Domestic Letters (outgoing) and Volumes 1868 (Parts I and II, Miscellaneous Letters (incoming).

"I found that William H. Seward was apparently present daily in the Department signing outgoing letters from Monday, May 25 through Tuesday, June 9, 1868 (see 78 Domestic Letters 497-555), and again from Monday, June

22 through Wednesday, July 1, 1868 (see 79 Domestic Letters 1-43). In the interim, letters seem to have been signed by the Assistant Secretary of State or by the Chief Clerk.

"I found no letter or other document in either incoming or outgoing correspondence relating to the Florida Constitution submitted to the Congress by President Johnson in his Message of May 27, 1868 (House Misc. Doc. 397, 40th Cong., 2d Sess.) or to the three-league Gulfward boundary provision in Article I of that Constitution.

"I did find that the Secretary of State received correspondence from the Senate Committee on Foreign Relations, on June 11, 1868, and from various members of the Senate and House of Representatives during the month of June. (See Letter from William Higby, June 18; Letter from W. R. Robertson, June 20; Letter from S. M. Collum, June 22, and Letter from H. P. Banks, June 26, transmitting a resolution of the House Committee on Foreign Affairs; all in Miscellaneous Letters 1868, Part I.)

"I found that Mr. Seward wrote the following letter (79 Domestic Letters 8):

" 'Hon. H. McCulloch
Secretary of the Treasury

" 'Sir:

Informal representations have been addressed to this Department by the representatives of foreign governments here in regard to the discrimination proposed in the Revenue Bill before Congress in the tax on Insurance Agents. It is suggested that as the amount of revenue derived from this source must be small, the

attention of the proper committee be called to the subject.

I have the honor to be, Sir,
Your obedient servant
William H. Seward'

"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 *23rd* day of October, 1959, to certify which witness my hand and seal of office.

(SEAL) /s/ *Annette H. Westbrook*
Notary Public in and for
Travis County, Texas"

The original of which has been filed with the Clerk of this Court.

Change of state boundaries.—It is evident from *New Mexico v. Colorado*, 267 U. S. 30; *Oklahoma v. Texas*, 265 U. S. 493; *Arkansas v. Tennessee*, 246 U. S. 158; and *Louisiana v. Mississippi*, 202 U. S. 1, that a state's boundary may not be changed without its consent. Boundaries between two states may be changed by compact between such states only when approved by the Congress (*Florida v. Georgia*, 17 How. 478, text 494 and 495). This approval may be an implied one (see Florida's Main Brief, pages 34-36). Although it may be that neither the state, Congress, nor federal agency, acting alone, may change the boundaries of that state, such state, with the consent and approval of the federal government, may make such a change. It was competent for Florida, with the consent and approval of the Congress, to redefine and relocate her

seaward boundaries in the Gulf of Mexico, as was done by the adoption of Florida's 1868 Constitution and its approval by Congress, although such approval may have been an implied one.

The three league boundary in the Gulf of Mexico.— The three league boundary of Florida in the Gulf of Mexico, as fixed in her Constitution of 1868 with the approval of Congress, is the boundary adopted by the SLA, as one approved by Congress prior to the adoption of said act, whether or not the same was strictly an international boundary or not. It might be said to be a boundary like or similar to the three league boundary fixed by the Treaty of Guadalupe Hidalgo of February 2, 1848, by and between the United States and Mexico, which boundary was protested by England, to which protest the Secretary of State of the United States replied that the stipulated boundary affected only the rights of Mexico and the United States, and that "third parties can have no just cause of complaint." This reply further advised that "the government of the United States never intended by this stipulation to question the rights of Great Britain, or any other power, might possess under the law of the nations." Under subsection (d) of Section 3, and Section 6, of the SLA, there was reserved to the United States, and did not pass to the states thereunder, the ". . . navigational servitude and rights in and powers of regulation and control of said lands and navigable waters (conveyed and transferred to the states) for the constitutional purposes of commerce, navigation, national defense, and international affairs . . . " This provision seems to have been designed to preserve the use of the waters for international purposes and permit the use of such properties and property rights, by the states, subject to the superior right of international use of the waters.

Such use by the states would differ little, if any, from a like use by the United States for a like purpose. The state is substituted for the administration and use of such property and property rights in lieu of the United States. A three league boundary for state administration and use of such property and property rights does not interfere with international use and rights in the waters in question.

SUMMARY

First.—It was the purpose and intention of the SLA of 1953 to convey and transfer to the states the submerged lands and natural resources therein with the right in the states to administer such lands and resources for their own account; subject, however, to the international use of the waters for navigation and other usual international purposes. The boundaries mentioned in connection with this conveyance and transfer are boundaries for internal, and not international purposes, and do not interfere with boundaries for international purposes. The boundaries for such transfer of property and property rights are the state historical boundaries, not international boundaries.

Second.—Florida has two historic boundaries, both of which may be said to have been approved by the Congress: (1) the boundary under which she was admitted as a state by the Congress, and (2), the boundary approved by Congress in connection with Florida's 1868 Constitution. Although there appears no specific boundary description of the Floridas prior to the Proclamation of King George III of England on October 7, 1763, such proclamation adopted a boundary description that included "all islands within six leagues of the coast." The Treaty of Amity, Settlement and Limits, between Spain and the United

States, of 1819, described the Floridas as including "the adjacent islands dependent upon said provinces." The very nature of the setting of the Floridas and the numerous islands adjacent and dependent thereto, the depth of the waters of the Gulf of Mexico, the protection of legitimate navigation against piracy and illegal buccaneering, suggested a wider marginal sea in the Gulf of Mexico for the Floridas, as well as other Gulf Coast possessions and states.

Third.—Florida, in drafting her 1865 and 1868 Constitutions, was desirous of adopting more specific and certain boundaries. Under reconstruction laws the rebel states, including Florida, were required to draft, adopt and submit to Congress for its consideration and approval new state constitutions. Pursuant to these reconstruction laws, Florida drafted, adopted and submitted to Congress her 1868 Constitution containing a detailed boundary description, a portion of which, running from the St. Mary's River south "to the Gulf Stream and Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from land, to a point west of the mouth of the Perdido river . . . " This boundary received the approval of Congress, within the purview of the SLA, upon the congressional approval of the 1868 Constitution of Florida, as hereinabove shown.

Respectfully submitted,

SPESSARD L. HOLLAND
Washington, D. C.
Of Counsel

RICHARD W. ERVIN
Attorney General

J. ROBERT McCLURE
First Assistant Attorney General

FRED M. BURNS
Assistant Attorney General
Counsel for Defendant State of Florida

PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, certify that on the 27th day of October, 1959 I air mailed a reproduced copy of the final typewritten draft of the foregoing brief to the Solicitor General of the United States; that on the 30th day of October, 1959 copies of this brief were mailed to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C., and on the 30th day of October, 1959 copies were mailed to the Attorneys General of the States of Texas, Louisiana, Mississippi and Alabama.

RICHARD W. ERVIN
Attorney General of Florida

APPENDIX

EXHIBIT I

LAW SCHOOL OF HARVARD UNIVERSITY
CAMBRIDGE 38, MASS.

27 October 1959

Honorable Richard W. Ervin
Attorney General of Florida
State Capitol
Tallahassee, Florida

Dear Mr. Ervin:

Thank you for your nice letter of October 21, 1959. If you decide to put in a reference to Bartolus, you may wish to follow it up with a reference to Sir Thomas Craig whose statement of 1603 was reprinted in 1732, quite close to your crucial date. You might, for instance, say the following:

"Sir Thomas Craig (1538-1608), in his famous *Jus Feudale* (first published in 1603; third edition, Edinburgh, 1732) similarly treats jurisdiction over the sea, fishing and islands as co-extensive. After endorsing the 100-mile limit of Bartolus, he states (on page 141 of the 1732 edition):

> 'Et haec de mari, piscationibus maris, insulis in mari natis, & maris portubus: in quibus hoc fervandum, quod licet maria indubie sint publica, neque quis privatus servitutem eis possit imponere; tamen piscationes & insulas ad eos qui proximum continentem possident pertinere; sic & maris portus ad civitates & universitatem, ut quae ad usum navigantium maxime

sint commoda ibi aedificentur. Itaque piscationes maris proximi, & insulae, & portus, ut locari, sic in feudum dari possunt: aedificia vero quae in mari aedificantur, licet opus omnino non sit perfectum, ex quo pilae jactae sunt, occupantium, id est, eorum qui aedificant, fiunt.' "

With best wishes, I remain,

Sincerely yours,

/s/ Louis B. Sohn
Professor of Law

LBS/jcg