No. 10, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA

*ON MOTION FOR JUDGMENT ON AMENDED COMPLAINT*

## REPLY OF THE UNITED STATES TO BRIEFS FILED BY THE DEFENDANTS AFTER ORAL ARGUMENT

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# INDEX



## CITATIONS

Cases:

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Pursuant to leave granted by the Court, the United States replies to briefs filed by the defendants after the oral argument. Since several of the same points are discussed in more than one of those briefs, we shall make a combined reply to all, rather than answering each separately.[1]

[1] In the Appendix (*infra*, p. 25) we have tabulated certain errors and omissions which we find in Texas' "Chart of Evidence as to Seaward Boundaries and Maritime Jurisdiction" designated as Appendix D to Post-Submission Reply Argument and Memorandum on Behalf of the State of Texas.

## I

### THE SUBMERGED LANDS ACT NECESSARILY REQUIRES CONSIDERATION OF THE NATIONAL MARITIME BOUNDARY

The defendants emphasize that the Submerged Lands Act grants only rights in the submerged lands and resources, without giving any rights in the overlying waters or general maritime jurisdiction; from this they conclude that discussion of the extent of national maritime jurisdiction is irrelevant to the decision of this case.[2] However, the necessity for considering the location of the national maritime boundary arises not from the nature of the interests granted but rather from the measure selected by Congress to determine their territorial extent.[3] Its relevancy was repeatedly recognized by the sponsors of the measure in the Senate. Thus, Senator Daniel said, "* * * there is no question but that the Holland bill simply gives to the States the lands * * * within their territorial waters * * *";[4] "So that there may be no mistake about it, the lands within the 3-mile and 3-league boundaries are within the Nation and within the States. They are within the United States the same as any of the dry land of the continent";[5] and "* * * we should not do anything that would challenge or lessen the seaward boundaries of the States, because

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[2] Texas' Post Submission Reply, 2–8; Supplemental Brief of the State of Louisiana, 2–8; Supplemental Brief of Mississippi, 4; Brief of Florida Filed Subsequent to Argument, 2–7, 18.

[3] See U.S. Brief, 148; U.S. Reply Brief, 19.

[4] Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 326; see U.S. Reply Brief, 24.

[5] 99 Cong. Rec. 4074.

they are also the boundaries of the Nation."[6] When opponents of the three-league claims argued that no state boundary could exceed the national three-mile limit,[7] no one ever replied that the national maritime boundary was irrelevant. On the contrary, the position taken by supporters of the three-league claims was that, with respect to their particular States, it could be shown that Congress had made an exception to the general rule that the national boundary is at the three-mile limit.[8] This was the precise issue which was represented to Congress as determinative of the States' rights under the Act, and it cannot be considered irrelevant to a determination of those rights now.[9]

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[6] 99 Cong. Rec. 4478. This statement was made in opposition to an amendment introduced by Senator Magnuson, which would have limited the definitions of "lands beneath navigable waters" and "boundaries" in Section 2 to a distance of three miles from the coast, and would have eliminated the last sentence of Section 4. 99 Cong. Rec. 4473.

[7] *E.g.*, Congressman Hays, 99 Cong. Rec. 2502; Senator Anderson, 99 Cong. Rec. 3041; Senator Hill, 99 Cong. Rec. 3265, 3273, 4325. Professor Sohn is mistaken in asserting that this point was never discussed. Texas' Post-Submission Reply, 50.

[8] *E.g.*, Senator Holland of Florida, 99 Cong. Rec. 2757; Senator Daniel of Texas, 99 Cong. Rec. 4172–4173.

[9] Professor Sohn's argument that the boundaries of the States may extend beyond the jurisdiction of the United States (Texas' Post-Submission Reply, 51–52) is contradicted by his own quotation from *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 540, "The jurisdiction of the United States extends over all the territory within the States * * *." (Texas' Post-Submission Reply, 50.)

He also argues that State boundaries may not be changed without State consent (Texas' Post-Submission Reply, 50–51); but assuming that to be true, it is immaterial here. The point is that State boundaries may not be established beyond the

## II

### THE NATIONAL MARITIME BOUNDARY HAS NEVER EXCEEDED THE THREE-MILE LIMIT

The defendants continue to assert that the United States has not restricted its maritime boundary to the three-mile limit.[10] We believe that our former discussion[11] fully establishes that from 1793 onward the United States has restricted its claims of general maritime jurisdiction and maritime boundary to a distance of three miles from the coast, and has taken the position that international law does not permit more extended claims. In addition to our former discussion, we cite here, for the convenience of the Court, the case of *The Anna,* 5 C. Rob. 373, 165 Eng. Rep. 809 (High Court of Admiralty, 1805), mentioned at the oral argument. In that case the court, acceding to representations made by the United States, held that a prize taken within three miles of an island in the mouth of the Mississippi was taken within the territorial waters of the United States; the court indicated that the three-mile rule was a well established one.[12]

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national boundary without congressional approval, and we believe that Congress has never approved establishment of a State boundary beyond the national three-mile limit.

[10] Texas' Post-Submission Reply, 4–7; Supplemental Brief of Louisiana, 9–16.

[11] U.S. Brief, 59–106; U.S. Reply Brief, 25–43; Supplemental Memorandum for the United States, 3–11.

[12] Another early case recognizing the exclusive jurisdiction of the United States to a distance of "a cannon shot, or marine league" from the coast was *The Ann,* 1 Fed. Cas. No. 397 (C.C.D. Mass., 1812), opinion by Justice Story.

The fact that some American officials may sometimes have considered the possibility of altering that rule [13] does not at all show that it was altered in fact.

Professor Sohn refers to the ordinance of the Continental Congress of December 4, 1781, which authorized capture of British goods bound for the United States within three leagues of the coast, and argues that it has as much tendency to show a three-league limit as the Neutrality Acts do to show a three-mile limit.[14] But the provision of the ordinance to which he refers was manifestly a war measure against enemy goods destined for this country, and asserted belligerent rather than territorial rights. However, the same ordinance did apparently recognize the distance of a cannon-shot from the shore as the limit of general territorial jurisdiction, for it fixed that as the distance within which captures by civilians should be considered lawful.[15] We have already discussed the four-league customs jurisdiction to which Professor Sohn refers.[16]

None of the other incidents cited by the defendants as departures from the three-mile rule was actually such. Piracy [17] may be suppressed by any nation, anywhere on the high seas. A mere survey of the sea within 20 leagues of the shore [18] certainly

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[13] Supplemental Brief of Louisiana, 11–12.

[14] Texas' Post-Submission Reply, 55.

[15] 21 Journals of the Continental Congress (1912) 1156.

[16] U.S. Brief, 109–110.

[17] Supplemental Brief of Louisiana, 11; Appendix D to Texas' Post-Submission Reply, under date Dec. 3, 1805. Texas is in error in characterizing suppression of piracy as "neutrality."

[18] Supplemental Brief of Louisiana, 12.

does not demonstrate a territorial claim to that distance; the United States has made navigational charts of navigable waters all over the world. The boundary 10 leagues from the coast, included in the Alaska cession,[19] was not a maritime boundary but on the contrary defined a strip of upland extending 10 leagues *inland* from the coast.[20] And despite Texas' assertions,[21] the character of this country's claim to the outer continental shelf as an extra-territorial one was clearly recognized in the debates on the Outer Continental Shelf Lands Act, and an amendment proposed by Senator Long which would have changed it to a territorial claim was defeated.[22] The boundary between the United States and Mexico, established by the Treaty of Guadalupe Hidalgo,[23] was merely a lateral division between the two countries, and its extension three leagues into the Gulf of Mexico did not enclose anything or imply a three-league marginal belt along the coast, any more than its termination at the shore of the Pacific implied an absence of a three-mile

[19] Supplemental Brief of Louisiana, 14.

[20] U.S. Brief, 68, fn. 18.

[21] Texas' Post-Submission Reply, 5–7. The "legislative intent" to which Texas refers (p. 7, fn. 6) related to the "lands beneath navigable waters" covered by the Submerged Lands Act, not to the outer continental shelf covered by the Outer Continental Shelf Lands Act. The fact that the former act relates only to lands within the territorial limits of the United States is of course the precise point that the Government has been making throughout this litigation.

[22] U.S. Brief, 116–118.

[23] Texas' Post-Submission Reply, 4.

belt in that ocean.[24] The Declaration of Panama[25] was a joint action by most of the nations of the western hemisphere, designed to exclude hostilities from an extended ocean area adjoining North and South America; it was not a claim of territorial jurisdiction by the participating nations, either jointly or severally.[26]

## III

### THE SUBMERGED LANDS ACT REFERS TO LEGAL STATE BOUNDARIES OF GENERAL JURISDICTION WHICH HAVE EXISTED EVER SINCE STATEHOOD OR SINCE APPROVAL BY CONGRESS

The defendants contend that the State boundaries referred to by the Submerged Lands Act are not necessarily the present, legal boundaries of general territorial jurisdiction of the States, but may be mere "historic" boundaries claimed in some way prior

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[24] Compare *Louisiana* v. *Mississippi*, 202 U.S. 1, 52, where this Court, drawing the lateral dividing line between those States, found it unnecessary to determine the width of their maritime belts. See U.S. Brief, 178–179.

The defendants are mistaken in their assertion (Joint Brief, 222) that the Treaty of Guadalupe Hidalgo recognized a limit of one marine league in the Pacific, by its provision that the western terminus of the boundary should be "one marine league due south of the southernmost point of the port of San Diego." Since the coast there runs due north and south, a point south of San Diego is on the coast, and it was in fact so characterized by the treaty. 9 Stat. 927. The line was run south of San Diego and north of Mission San Miguel to preserve the traditional division between Upper and Lower California. Nicholas P. Trist memorandum of January 7, 1848; 8 Manning, *Diplomatic Correspondence of the United States; Inter-American Affairs, 1831–1860* (1937) 1044–1049.

[25] Texas' Post-Submission Reply, 9, fn. 7.

[26] 1 State Department Bulletin, 331–333.

to statehood, or boundaries having only some undefined, limited domestic effectiveness.[27] However, in the debates on the Act those responsible for it repeatedly declared that it related only to present, legal boundaries. Thus, Senator Cordon said, "Texas will have title out to its legal, existing boundary line."[28] Senator Holland said, "But the language of the bill is perfectly clear in that it is the constitutional boundaries, and it is the historic boundaries, and it is a case of restoration and establishment to States of what lie within their boundaries of jurisdiction, of criminal law and of various other kinds of law, boundaries which fix the venues of cases which arise."[29] These and many similar assertions made it clear that the Act was designed to refer to the existing limits of legal, territorial jurisdiction of the States.[30]

The reference to present boundaries may seem inconsistent with the statutory designation of boundaries as they existed when the States became members of the Union, or as approved by Congress; but the apparent inconsistency disappears when it is understood that those qualifications were introduced to restrict, rather than to enlarge, the grant. Their purpose was to exclude reliance on recent extended boundary claims such as Louisiana Act 55 of 1938[31]

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[27] Texas' Post-Submission Reply, 2, 7, 10–28; Brief of Florida Filed Subsequent to Argument, 2–6.

[28] 99 Cong. Rec. 2621.

[29] Senate Interior Committee Hearings on S.J. Res. 13, 83d Cong., 1st Sess., 48.

[30] See also U.S. Brief, 36–46, 374–388; U.S. Reply Brief, 20–21.

[31] La. Acts (1938) p. 169; 49 La. Rev. Stats. (1950) 1–3.

claiming 27 miles, and Texas Act of May 23, 1947,[32] claiming to the edge of the continental shelf. This was recognized, for example, by Senator Daniel of Texas when he said of lands beyond the "historic" boundaries of the States, "* * * such lands were eliminated from the resolution specifically for the purpose of confining it to lands within historic boundaries."[33] Of Louisiana's 27-mile claim, he said, "The 27-mile claim was only asserted within recent times, and I believe that it is certainly clear, from the presentation made earlier today, that this measure covers nothing beyond the seaward boundary of Louisiana as it existed at the time Louisiana entered the Union."[34] While the statutory language might theoretically include former boundaries despite some subsequent diminution, that possibility was not considered by Congress for the practical reason that no State's maritime boundary has been reduced after its entry into the Union or after approval by Congress. This explains why the "historic" boundaries were always referred to as boundaries still continuing in existence, as for example by Senator Daniel when he said that the Act "simply follows the boundaries that have been in existence since the States entered the Union, or the boundaries that heretofore have been approved by the Congress."[35]

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[32] Tex. Gen. and Spec. Laws, 50th Legis., Reg. Sess., p. 451.

[33] 99 Cong. Rec. 2832.

[34] 99 Cong. Rec. 2754. Senator Daniel followed this with a quotation of a similar explanation previously made by Senator Long of Louisiana at 99 Cong. Rec. 2696.

[35] 99 Cong. Rec. 4477.

Nothing in the legislative history of the Act supports the suggestion that the State "boundaries" referred to might be special limits of some particular sort, of limited and only domestic validity. Whenever a question was raised as to what was meant by boundaries, it was answered in terms plainly indicating the universally valid and effective legal boundary of general jurisdiction, which every State necessarily has. Thus, Congressman Brooks of Louisiana said, "To the limit of the historic boundaries, of course, all State laws are applicable and will apply."[36] Senator Holland said, "There is no question that every State now has a boundary."[37] Senator Cordon, asked to define the boundaries referred to, said, "* * * they are the boundaries of the States."[38] Such statements would have been disingenuous, to say the least, if it had actually been intended to refer to some limit of qualified validity or applicability, different from the general territorial boundary.

That the Act refers only to boundaries legally effective, and not to mere claims, was specifically stated by Senator Cordon: "It applies to the boundaries, not to the claims."[39]

If there were any room for doubt (which we think there is not, in view of the terms and history of the Act) whether the Submerged Lands Act was intended to be limited to strict legal boundaries, that doubt should be resolved in favor of the United States, un-

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[36] 99 Cong. Rec. 2574.
[37] 99 Cong. Rec. 4096.
[38] 99 Cong. Rec. 2698; U.S. Brief, 393.
[39] 99 Cong. Rec. 2632.

der the rule that grants by the sovereign are strictly construed. That rule applies to federal grants to States as well as to individuals.[40]

## IV

### TEXAS DID NOT HAVE A BOUNDARY MORE THAN THREE MILES FROM THE COAST WHEN IT BECAME A MEMBER OF THE UNION, NOR HAS CONGRESS APPROVED SUCH A BOUNDARY

Our position regarding the claim of Texas, as developed in our former briefs,[41] is this: That long before 1836 this Government had taken the position that claims of maritime boundary more than three miles from the coast were invalid under international law and had refused to recognize such claims, and that a court of the United States should not recognize a territorial claim of a sort which the Government of the United States has refused to recognize;[42]

[40] *United States* v. *Michigan*, 190 U.S. 379, 401.

[41] U.S. Brief, 59–151, 187–251; U.S. Reply Brief, 25–43, 59–80; U.S. Supplemental Memorandum, 3–11.

[42] Florida's Reply to the Government's Reply Brief, 24–25, argues that the Court should decide this question of international law independently, as a court of international law. Two of the cases cited to support that contention are prize cases (*The Resolution*, 2 Dall. 1; *The Zamora* [1916] 2 A.C. 77); in such cases that is indeed the rule, because a prize court operates as an international court. *Penhallow* v. *Doane*, 3 Dall. 54, 88, 91; *Cushing* v. *Laird*, 107 U.S. 69, 76; *The Zamora* [1916] 2 A.C. 77, 91, 92. *The Scotia*, 14 Wall. 170, also cited by Florida, merely said that one nation cannot change the navigational rules to be observed by ships of other nations on the high seas. Those cases are plainly irrelevant here, where the Court sits as a domestic rather than an international court, and should observe the policy of this Government as to the territorial jurisdiction which it will recognize for other nations as well as for itself. See U.S. Brief, 127–147.

that in any event this Government, disclaiming territorial jurisdiction beyond three miles, did not annex a more extended maritime belt when it annexed Texas; and that no subsequent action by Congress approved a boundary for Texas beyond the three-mile limit. We believe that a State's boundaries "as they existed at the time such State became a member of the Union"[43] are its boundaries *upon statehood,* not its boundaries *until statehood,* in any case where the two differ.

Texas says[44] that we have cited no legislative history in connection with the annexation of Texas that shows an intention not to annex Texas in accordance with its statutory boundary description. The fact is that we have quoted many pages from the congressional debates, showing a universal recognition that the United States was not committing itself to the Texan boundary claim.[45]

Texas says that the Treaty of Guadalupe Hidalgo was negotiated under instructions by this Government to adhere to the Texan boundary statute of 1836.[46] However, the very passage of Nicholas P. Trist's memorandum which Texas cites[47] shows on its face, in a phrase omitted by Texas, that it referred only to the portion of the boundary extending up the Rio Grande *from its mouth:*

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[43] Submerged Lands Act, sec. 2(b), 43 U.S.C., Supp. V, 1301(b).

[44] Texas' Post-Submission Reply, 11.

[45] U.S. Brief, 209–226.

[46] Texas' Post-Submission Reply, 11, citing Texas Brief, 101–106.

[47] Texas Brief, 102.

> Or, as said object stands in said instructions, specifically stated & expressed, it was the object of prevailing upon Mexico to "agree that the line shall be established along the boundary defined by the act of Congress of Texas, approved December 19, 1836, towit: beginning at the mouth of the Rio Grande; thence up the principal stream of said river to its source; thence due north to the forty-second degree of north latitude." [48]

The instruction from which Trist was quoting, Secretary of State Buchanan's letter of November 10, 1845, to Trist's predecessor, John Slidell, was explicit in its recognition that not all of the Texan claim was maintainable. After asserting Texas' right to the area between the Nueces and the Rio Grande, it continued:

> The case is different in regard to New Mexico. Santa Fé, its capital, was settled by the Spaniards more than two centuries ago; and that province has been ever since in their possession and that of the republic of Mexico. The Texans never have conquered or taken possession of it, nor have its people ever been represented in any of their legislative assemblies or conventions.[49]

The instructions were to attempt to persuade Mexico to cede New Mexico to the United States in return for certain undertakings by this country; no part of it

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[48] Nicholas P. Trist Papers, Library of Congress, vol. 33, Misc., 62071. See Appendix D to Texas' Post-Submission Reply, under date 1847.

[49] S. Exec. Doc. No. 52, 30th Cong., 1st Sess., 77. (Cong. Doc. Ser. No. 509.) The passage quoted by Trist is on page 78.

was to be claimed as rightfully belonging to Texas. Indeed, the whole of Trist's memorandum which Texas cites seems to have been intended as a demonstration that he was justified under his instructions in entertaining a proposal to give up the area south of the Nueces. Manifestly, this Government did not take the position that it would assert the whole claim stated by the Texan boundary statute of 1836. The 1850 compromise, which Texas cites as a recognition of its territorial claims north and west of its present boundary,[50] was not such, but was a mere compromise of a dispute. The United States has always taken the position that it acquired that area from Mexico and not from Texas.[51]

Texas complains of our failure to cite legislative history to support our view that a State's boundary "at the time such State became a member of the Union" means its boundary as accepted by Congress upon statehood rather than its boundary prior to statehood.[52] We submit that our view is plainly supported by three statements by Senator Holland, the author of the measure:

> If under this resolution Florida and Texas receive property values out to the 3-league limit in the Gulf of Mexico, as I believe they should and will receive them, it will be because they can establish as a fact that *Congress approved* their 3-league outer boundaries as long

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[50] Texas' Post-Submission Reply, 29–35.
[51] U.S. Brief, 233–234.
[52] Texas' Post-Submission Reply, 12.

> ago as 1845 in the case of Texas and 1868 in the case of Florida.[53]
>
> This resolution * * * simply recognizes the Texas limits, provided Texas can, as I believe it can, show that its limits were 3 leagues out before it was admitted into the Union, and that fact was made known to Congress *and Congress approved it.*[54]
>
> Should a State desire to go more than 3 geographic miles out to sea, in order to qualify under the law, if the joint resolution be enacted, it would be necessary to show that *an earlier Congress took occasion to bind the Nation.* I say again, with much respect for my friend from Illinois, that he would be among the last to desire to take away or deprive any State of rights granted by a former Congress, if a State could now submit proof to the satisfaction of the same Supreme Court for which he has professed high respect.[55]

There could not be a more explicit declaration that Texas' claim depends upon a showing that Congress accepted its three-league boundary on annexation. And of course the idea that Texas might receive under the Act mineral rights extending out to a boundary which the *State* of Texas never possessed is utterly inconsistent with Senator Cordon's explanation that "Texas will have title out to its legal, existing boundary line." *Supra,* p. 8. When Senator Anderson and Senator Gore argued that upon annexation the boundary of Texas must necessarily have

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[53] 99 Cong. Rec. 2746 (emphasis added); U.S. Brief, 378.
[54] 99 Cong. Rec. 2755 (emphasis added); U.S. Brief, 394.
[55] 99 Cong. Rec. 2897 (emphasis added).

conformed to the three-mile boundary of the United States,[55a] Senator Daniel argued vigorously that Congress had in fact accepted Texas' three-league claim;[56] but neither he nor anyone else ever suggested that under the terms of the Submerged Lands Act it would be immaterial whether Congress had done so; yet that certainly would have been the logical response if it had been supposed that the Act depended on the boundary *before* statehood rather than the boundary *upon* statehood.

## V

### DESCRIPTIONS OF LOUISIANA, MISSISSIPPI, ALABAMA AND FLORIDA AS INCLUDING ALL ISLANDS WITHIN THREE OR SIX LEAGUES OF THE MAINLAND DID NOT INCLUDE WATERS AND SUBMERGED LANDS TO THOSE DISTANCES

While Louisiana, Mississippi and Florida all discuss this subject in their most recent briefs,[57] little need be added to what we have already said on this subject, namely, that to describe a State as including the islands within a certain distance of the coast or shore does not imply that it includes the water and submerged land to that distance.[58] We know of no instance where such a description has been construed as including all water and submerged land to the designated distance; the contrary construction has been adopted with respect to the "islands within twenty

[55a] 99 Cong. Rec. 3041.

[56] 99 Cong. Rec. 3044.

[57] Supplemental Brief of Louisiana, 22–30; Supplemental Brief of Mississippi, 1–4; Brief of Florida Filed Subsequent to Argument, 7–17; see also Appendix to Louisiana's Reply Brief and Motion to File with Supporting Statement, 1–2.

[58] U.S. Brief, 172–178; U.S. Reply Brief, 43–45.

leagues of any part of the shores of the United States," accorded to the United States by our treaty of independence from Great Britain,[59] and with respect to Alaska, where the treaty of cession gave us all the islands east of a described line through the Bering Sea.[60]

Louisiana refers to the case of *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78,[61] where this Court held that a statutory reservation of "the body of lands known as Annette Islands" as an Indian reservation included adjacent waters. Presumably Louisiana seeks to draw an analogy to its own enabling act. However, that case involved a mere appropriation to Indian use of inland waters of the Alexander Archipelago, admittedly property of the United States and subject to its use and control. It has no relevancy to establishing a claim as territorial waters to what, under usual principles of international law, would be high seas.

## VI

### CONGRESS DID NOT APPROVE THE THREE-LEAGUE BOUNDARY CLAIMED BY FLORIDA'S 1868 CONSTITUTION

Congress never approved in express terms either Florida's three-league boundary provision or the 1868 constitution which contained it. The contention is that Congress impliedly approved the constitution, and, by doing so, approved the boundary; but our position is that the contention is unsound. No doubt an

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[59] U.S. Brief, 173.

[60] U.S. Brief, 174–175.

[61] Appendix to Louisiana's Reply Brief and Motion to File with Supporting Statement, 1–2.

implied as well as an express approval would meet the requirement of the Submerged Lands Act; but the implication should be clear,[62] and the approval actual, intentional, and legally effective. We find no such situation here.

In requiring the southern States to submit constitutions "in conformity with the Constitution of the United States in all respects",[63] Congress was evidently fulfilling its obligation under Article IV,

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[62] The four decisions of this Court which Florida cites as examples of implied approval of interstate compacts (Florida Brief, 34–36) show the degree of certainty required to establish such an implication. *Green* v. *Biddle*, 8 Wheat. 1, and *Virginia* v. *West Virginia*, 11 Wall. 39, held that compacts between Virginia and certain of its counties, providing for their establishment as new States, were necessarily approved by Congress in admitting the new States, since Art. IV, Sec. 3 of the Constitution forbids Congress to create new States out of existing ones except pursuant to agreement of the latter. *Wharton* v. *Wise*, 153 U.S. 155, held that Congress necessarily approved a boundary agreement between Virginia and Maryland by approving an arbitration award made pursuant to it. *Virginia* v. *Tennessee*, 148 U.S. 503, held that a boundary agreement between those States was approved by a long line of acts of Congress adopting the agreed boundary as the boundary of federal judicial, revenue and election districts. In all these cases, the Court found a legal or logical inconsistency between the congressional action and non-approval of the agreement. But there is no inconsistency between what Congress did in 1868—admission of Senators and Congressmen—and disagreement with State boundary claims. Senators and Congressmen were, for example, admitted from Texas throughout the Government's disputes with that State over its northwestern boundary and Greer County, and from Georgia throughout the years that that State was disputing the Federal Government's right to Mississippi Territory.

[63] Act of March 2, 1867, sec. 5, 14 Stat. 429; U.S. Brief, 285–286.

Section 4 of the Constitution to guarantee to every State a republican form of government.[64] No broader scope should be attributed to its action, particularly when its ultimate pronouncement regarding the constitutions was only that they were "republican",[65] and the debates had not gone beyond that subject and the cognate subjects of due adoption, constitutionality and loyalty.[66] Even in the Act of March 2, 1867, which required the constitutions to be submitted to Congress for "approval," the natural meaning of the word in its context was a determination that the constitutions met the requirements imposed by the Act, which were that they be adopted in the manner provided, and that they conform to the Constitution of the United States and protect rights of suffrage. We believe that the Act of June 25, 1868, saying of the constitutions only that they were "republican", confirms that this was the congressional

[64] This is indicated by the report of the Joint Committee on Reconstruction, which recommended rejecting the constitutions theretofore submitted by the southern States on the grounds that they were not duly adopted and that they established governments that were neither republican nor loyal. H. Rept. No. 30, 39th Cong., 1st Sess. (Cong. Doc. Ser. No. 1273). The questions of due adoption and loyalty were regarded as aspects of the existence of a republican government. It was pursuant to this report that the Act of March 2, 1867, was passed.

[65] Act of June 25, 1868, 15 Stat. 73; U.S. Brief, 265–266, 331–333.

[66] U.S. Brief, 270–284. Florida points out (Brief of Florida Filed Subsequent to Argument, 22) that a requirement proposed by Congressman Stevens would not have sufficed to cure the unconstitutionality of the provision of the Georgia Constitution to which it was directed. Granting that that is true, it has no tendency to show that any general review of the constitutions was being undertaken.

understanding of the purpose of the prior act; but, if not that, then it showed an abandonment of any broader purpose. Its reference to the prior act merely recited how the constitutions came to be before Congress; it was not an adoption or incorporation of the 1867 act as part of the 1868 enactment.

Florida emphasizes that the Act of June 25, 1868, was passed without there having been any discussion or protest, in Congress or from the State Department, regarding the Florida boundary claim.[67] We agree that this was so, but draw from it a very different conclusion. It seems to us incredible that, in the midst of a period when the United States was most actively asserting to the world that three miles was the maximum maritime limit allowed by international law,[68] a boundary utterly at variance with that principle could have been approved by Congress without a single voice being raised in question or protest, either in Congress or the State Department. It seems to us a conclusive indication that no one supposed that the boundary was being approved by Congress or was before it for consideration.

The whole argument for congressional "approval" of the three-league boundary rests on the word "approval" in the 1867 acts, which preceded the constitutions. When that word is most naturally understood there as meaning only a determination that the particular requirements of those acts had been fully and fairly met, when there was no constitutional warrant for imposing a broader scrutiny, when no

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[67] Brief of Florida Filed Subsequent to Argument, 24–27.
[68] U.S. Brief, 70–73.

broader scrutiny was made in fact, and when no language of general approval appeared in the ultimate enactment, we submit that it is wholly incorrect to infer that comprehensive approval was actually given to everything in the constitutions. Certainly there is no compelling necessity for such an inference, such as the Court has heretofore relied on in finding an implied congressional approval of State action.

## VII

### THE GOVERNMENT'S POSITION DOES NOT DEFEAT THE INTENT OF CONGRESS IN PASSING THE SUBMERGED LANDS ACT

The defendants argue that the Government's position must be wrong because to sustain it will nullify the provisions of the Submerged Lands Act regarding areas beyond the three-mile limit.[69] The contention is unsound. Congress was fully informed that disputes existed over the location of maritime boundaries in the Gulf of Mexico; that Texas claimed to have come into the Union with a three-league boundary,[70] whereas opponents of the claim argued that it entered the Union subject to the three-mile rule followed by the United States;[71] that Louisiana claimed that its inclusion of islands within three leagues gave it also all waters and submerged lands within three leagues,[72] whereas others disputed that

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[69] Supplemental Brief of Louisiana, 2–8; Supplemental Brief of Mississippi, 5.

[70] *E.g.*, 99 Cong. Rec. 2620, 4171–4172 (Senator Daniel).

[71] *E.g.*, 99 Cong. Rec. 3270 (Senator Hill), 3617 (Senator Humphrey).

[72] *E.g.*, 99 Cong. Rec. 4116 (Senator Long).

interpretation;[73] and that Florida claimed that its three-league boundary claim was approved by the Act of June 25, 1868,[74] whereas others claimed that it was not.[75] A basic argument against all these claims was that the United States has always adhered to the three-mile rule;[76] the claimant States contended that it has not.[77] Congress concluded that as these disputes related to an existing state of affairs, rather than to adoption of new policy, they were most appropriately left to the Court to decide.[78] It cannot be said that a decision either way will thwart the congressional intention that the boundary questions be decided in strict accordance with all the applicable, existing law, wholly unaffected by anything contained in the Submerged Lands Act.[79] By giving the States an opportunity to sustain their claims if they can,

[73] *E.g.*, 99 Cong. Rec. 3265 (Senator Hill).

[74] *E.g.*, 99 Cong. Rec. 2621–2622 (Senator Holland).

[75] *E.g.*, 99 Cong. Rec. 2917 (Senator Douglas), 3042 (Senator Anderson).

[76] *E.g.*, 99 Cong. Rec. 3265 (Senator Hill), 3543 (Senators Humphrey and Morse).

[77] *E.g.*, 99 Cong. Rec. 2757 (Senator Holland), 4172–4173 (Senator Daniel). See Defendants' Joint Brief, 92–129; Texas' Post-Submission Reply, 8–9; Supplemental Brief of Louisiana, 10–16. The vigor with which this argument is pressed belies the defendants' contention that it will render the Submerged Lands Act frivolous to construe it as turning on this question, as to lands beyond the three-mile limit. The States urged to Congress that it was a serious question, and it was upon that urging that Congress left it to the Court to answer.

[78] See U.S. Brief, 51–58, 389–402.

[79] See U.S. Brief, 51–58, 389–402. It was with respect to this question of *boundaries* that Senator Holland said, "This resolution does not give anything to anyone * * *." 99 Cong. Rec. 2755; U.S. Brief, 394. Obviously it did give *title*, but only within existing boundaries.

Congress made those claims neither better nor worse than they were, but left them exactly as it found them. So far as boundary questions go, the Court should reach the same decision now that it would have reached if the Submerged Lands Act had not been passed and the boundary questions had arisen in some other way.

Professor Sohn's assertion that Congress intended the Submerged Lands Act as an outright grant of three leagues to Texas and Florida leaving a question for this Court only as to the other Gulf States,[80] is plainly contrary to the legislative history of the Act. Senator Holland, its author, repeatedly explained that Texas and Florida would have to prove the validity of their claims before they could receive more than three miles under the Act:

> * * * I am not claiming as a positive fact that either Texas or Florida would, at long last, after litigation, sustain their claims. * * * The joint resolution simply saves, without prejudice, the full right to our two States to rely upon action which we claim was legally taken by Congress at the time of the admission of Texas, in 1845, and in 1868, in the case of the restoration of Florida to her seats in the Congress, to claim the right to stand upon these provisions, for whatever they may be worth.[81] * * *

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[80] Texas' Post-Submission Reply, 49.

[81] 99 Cong. Rec. 4096; U.S. Brief, 401. For similar statements by Senator Holland specifically naming Texas and Florida as States that would have to prove their rights beyond the three-mile limit, see 99 Cong. Rec. 2746 (U.S. Brief, 393), 2755 (U.S. Brief, 394), 2933 (U.S. Brief, 397), 4096 (U.S. Brief, 402).

Similar statements were made by Senator Cordon, Senator Daniel, Senator Long, and others.[82]

## CONCLUSION

For the foregoing reasons, and those set forth in our previous briefs, the Court should enter a decree as prayed for in the Amended Complaint.

Respectfully submitted,

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NOVEMBER 1959

[82] See U.S. Brief, 52–58, 389–402.

# APPENDIX

## Errors and Omissions in Texas' Chart of Evidence

As Appendix D to its Post-Submission Reply Argument and Memorandum, Texas has submitted a "Chart of Evidence as to Seaward Boundaries and Maritime Jurisdiction, 1763–1868." Presumably it is offered as a complete and correct tabulation of the materials cited by both sides relating to those questions within that period, but we find it to be neither complete nor correct.[1] Many items relied on by both sides are listed as having been cited only by the Gulf States, and items relied on by the United States are omitted altogether, while others which we did not cite are

[1] The choice of 1763 as the initial date for the chart has resulted in the omission of earlier material regarding French claims in Louisiana. U.S. Brief, 154–169. In our view, foreign claims prior to American ownership are not material to this case; but if they are—as Texas seems to believe, judging from its inclusion of British claims to Florida—it would seem to us more useful for the chart to cover them all. The choice of 1868 as the terminal date for the chart has resulted in omission of subsequent material which we consider highly important to an understanding of the earlier history. However, our present criticism of the chart is directed not to its limited scope, but to its errors and omissions within its purported scope. Much of the omitted material bears only indirectly on the question of seaward boundary and maritime jurisdiction, but the same is true of much of the material listed by Texas. If material of that sort was to be listed in support of the States' case, it should also have been listed in support of the Government's. The failure to make comparable lists for the opposing sides renders the chart useless as a means of comparing the opposing contentions.

attributed to us. Following is a list of some 55 errors and omissions which we have noted. We do not discuss Texas' comments on the listed items, except where they are factually misleading, but it is of course to be understood that we disagree with many of them.[2]

*First page*

1. Texas omits the Treaty of February 10, 1763, between France, Spain and Great Britain, cited and relied on by the United States. U.S. Brief, 160–161.

2. The United States also cited and relied on the Proclamation of George III of October 7, 1763. U.S. Brief, 313, 315; U.S. Reply Brief, 35–36, 81, 86. The "area involved" expressly included the Atlantic coast and the Gulf of Florida; it was not limited to the Gulf of Mexico as Texas indicates.

3. The United States also cited and relied on the Treaty of Paris, September 3, 1783. U.S. Brief, 173.

*Second page*

4. The United States also cited and relied on Jefferson's letters of 1793 to France and Great Britain. U.S. Brief, 60, 144. Texas is wrong in saying that they were written by "President" Jefferson; he was then Secretary of State. Texas is also wrong in saying that the letters said a three-league boundary was *permissible;* they said only that it had "some authority in its favor."

*Third page*

5. Since Texas' single listing of the Neutrality Act of 1794 is made to serve for all its later re-enactments (see U.S. Brief, 62–63, fn. 14), it is erroneous to

[2] The United States is preparing a revised chart, to contain all that is on Texas' chart together with additional material which we believe should be included to make it complete and correct, with our own commentary. This will be submitted to the Court as soon as possible.

designate it as applicable only to the Atlantic coast. It was equally applicable to all other coasts when they were acquired, including the Gulf coast.

6. Since Texas lists (first page) the proclamation of George III of October 7, 1763, regarding Florida, it is wrong in omitting the Spanish cédula of June 14, 1797, cited and relied on by the United States, which established a two-mile limit for all Spanish possessions, including Florida, and so superseded the 1763 proclamation if (as we deny) that had established a broader limit. U.S. Reply Brief, 87–89.

7. Texas omits the Treaty of San Ildefonso, October 1, 1800, cited and relied on by the United States. U.S. Brief, 165, 169, 170.

8. Texas omits the Louisiana Purchase Treaty of April 30, 1803, cited and relied on by the United States. U.S. Brief, 165–166; U.S. Reply Brief, 36.

9. Texas omits the Organic Act for Orleans Territory, March 26, 1804, cited and relied on by the United States. U.S. Brief, 1, 17, 153, 171, 324.

10. Texas omits the boundary negotiations between the United States and Spain, 1805–1818, cited and relied on by the United States. U.S. Brief, 166–169.

*Fourth page*

11. Texas' comment that *The Anna,* 5 C. Rob. 373,[3] "throws no light" on the maritime boundary overlooks the fact that the court said the limit was three miles. 5 C. Rob. at 385c–385d.

12. President Jefferson's conversation of November 30, 1805, could not have related to the Gulf coast, as Texas asserts, since the Gulf Stream, which he was suggesting as a possible boundary, does not flow there. See *Columbia Lippincott Gazetteer* (1952) 737; Stommel, *The Gulf Stream* (1958) 23, 27; Leip, *The River in the Sea* (Piehler and Kirkness transl., 1958) 15.

[3] Mistakenly cited as 5 C. Rob. 676.

*Fifth page*

13. The portion of President Jefferson's message of December 3, 1805, which Texas cites related to piracy, not to neutrality as Texas asserts; consequently it was not limited to territorial waters of the United States. U.S. Reply Brief, 49. It did not relate to the Gulf coast as Texas asserts, and could not have done so since the Gulf Stream does not flow there.

14. Texas omits the United States' protest of Spanish claims of more than three miles around Cuba in the early years of Jefferson's administration, cited and relied on by the United States. U.S. Brief, 64; Supplemental Memorandum for the United States, 14–15.

15. The United States also cited and relied on the Louisiana Enabling Act. U.S. Brief, 1, 17, 153, 171, 172, 175, 176, 253, 324–325.

*Sixth page*

16. The United States also cited and relied on the Louisiana Admission Act. U.S. Brief, 2, 172.

17. The United States also cited and relied on the Mississippi Enabling Act. U.S. Brief, 2, 20, 176, 252, 326–327.

18. The United States also cited and relied on the Alabama Territory Organic Act. U.S. Brief, 2, 21, 260, 327–328.

*Seventh page*

19. The United States also cited and relied on the Mississippi Admission Act. U.S. Brief, 180, 252–253. Since that Act does not mention boundaries, we cannot agree with Texas' statement that its subject matter was "boundary."

*Eighth page*

20. The United States also cited and relied on the Treaty of February 22, 1819, with Spain. U.S. Brief, 185, 200, 203, 315, 316; U.S. Reply Brief, 36, 45, 48, 69, 70. The treaty also related to the Atlantic coast of Florida, and was not limited to the Gulf of Mexico as Texas asserts.

21. The United States also cited and relied on the Alabama Enabling Act. U.S. Brief, 2, 21, 176, 260, 328–329.

22. The United States also cited and relied on the Resolution Admitting Alabama. U.S. Brief, 260. Since the resolution contained no boundary description, we cannot agree with Texas' assertion that its subject matter was "boundary."

23. Secretary of State Adams' letter of February 22, 1822, listed by Texas as having been cited by the United States, was not cited or relied on by the United States. (We may also note that its subject matter included navigation, and was not limited to fishing and trade as Texas asserts.)

*Ninth page*

24. Secretary of State Adams' letter of March 30, 1822, listed by Texas as having been cited by the United States, was not cited or relied on by the United States. (We may also note that its subject matter included navigation, and was not limited to fishing and trade as Texas asserts.)

25. Texas' comment on Ambassador Middleton's memorandum of December 17, 1823, quotes only part of Vattel's statement to which the memorandum refers, and concludes from that part that Vattel stated one league only as a *minimum* distance. Portions of Vattel's statement omitted by Texas show that he was stating it as an *absolute* limit. U.S. Brief, 192–193; Supplemental Memorandum for the United States, 5.

26. Texas omits the Treaty with Russia, April 5/17, 1824, cited and relied on by the United States. Supplemental Memorandum for the United States, 5–6. In its comment on Secretary of State Adams' letter of March 30, 1822, to the Russian Minister, *supra,* Texas says that the treaty contained no reservation of any marginal sea right; but Texas omits to mention that (as was afterward held in the Fur Seal Arbitration) Russia conceded in the treaty negotiations that her jurisdiction should be restricted to the range of cannon shot from shore, and never thereafter asserted a greater jurisdiction in the Bering Sea. Supplemental Memorandum for the United States, 9.

*Tenth page*

27. Texas omits the boundary treaty of January 12, 1828, between the United States and Mexico, cited and relied on by the United States. U.S. Brief, 183–185; U.S. Reply Brief, 36.

*Eleventh page*

28. Texas omits Stephen F. Austin's instructions of November 18, 1836, to W. H. Wharton, cited and relied on by the United States. U.S. Reply Brief, 67–69.

29. Texas omits President Jackson's Message of December 22, 1836, and accompanying reports, cited and relied on by the United States. U.S. Brief, 201–202; U.S. Reply Brief, 74–75.

30. Texas is mistaken in asserting that "boundary" was the subject matter of the Senate Resolution of 1837 recommending recognition of the Republic of Texas. See U.S. Brief, 197–201.

31. The United States also cited and relied on the Boundary Convention of April 25, 1838. U.S. Brief, 182–183, 185, 186, 203; U.S. Reply Brief, 36, 69, 75. Texas' comment that the Texan boundary act was

known to the commissioners is not supported by any cited authority, so far as concerns the American commissioner. See U.S. Reply Brief, 70.

32. Texas omits the Journal of the Joint Boundary Commission, cited and relied on by the United States, which stated that the "point of beginning of the boundary between the United States and the republic of Texas" (not merely the beginning of the survey) was at a mound at the mouth of the Sabine River. U.S. Brief, 185–186, 203; U.S. Reply Brief, 75.

*Twelfth page*

33. Texas omits Anson Jones' instructions of March 26, 1844, to Henderson and Van Zandt, cited and relied on by the United States. U.S. Reply Brief, 71.

34. The United States also cited and relied on the unratified treaty of April 12, 1844, for the annexation of Texas. U.S. Brief, 203–204.

35. Texas omits the letter of April 12, 1844, from Van Zandt and Henderson to Anson Jones, cited and relied on by the United States. U.S. Reply Brief, 71.

36. Texas omits Lt. Emory's memoir, submitted to the Senate with the unratified treaty of April 12, 1844, and cited and relied on by the United States. U.S. Brief, 200.

37. Texas omits Secretary of State Calhoun's letter of April 19, 1844, cited and relied on by the United States. U.S. Brief, 204; U.S. Reply Brief, 71.

38. Texas omits Duff Green's letter of September 27, 1844, to Secretary of State Calhoun, cited and relied on by the United States. U.S. Reply Brief, 71.

*Thirteenth page*

39. The United States also cited and relied on the Joint Resolution of March 1, 1845, for the annexation of Texas. U.S. Brief, 208–234; U.S. Reply Brief, 79. We disagree with Texas' assertion that "bound-

ary" was the subject matter of the joint resolution; it specifically left boundary questions unsettled.

40. Texas omits the legislative history of the Joint Resolution for the Annexation of Texas, cited and relied on by the United States. U.S. Brief, 209–226; U.S. Reply Brief, 76–77.

41. Texas omits the Act of March 3, 1845, 5 Stat. 750, cited and relied on by the United States. U.S. Brief, 204–205.

42. Texas omits Texas' proposal to Mexico, March 29, 1845, cited and relied on by the United States. U.S. Brief, 226–227; U.S. Reply Brief, 71–72.

43. Texas omits Donelson's letter of April 12, 1845, to Secretary of State Buchanan, cited and relied on by the United States. U.S. Reply Brief, 72–74.

44. Texas omits Donelson's letter of July 11, 1845, to Secretary of State Buchanan, cited and relied on by the United States. U.S. Brief, 227–229.

*Fourteenth page*

45. The United States also cited and relied on the Joint Resolution admitting Texas into the Union. U.S. Brief, 2, 180, 195, 239, 330. We do not agree that "boundary" was the subject matter of that resolution as Texas asserts.

*Sixteenth page*

46. Texas omits the Mexican response of November 17, 1848, to the British protest regarding the Treaty of Guadalupe Hidalgo, cited and relied on by the United States. U.S. Brief, 66, 403.

*Seventeenth page*

47. The United States also cited and relied on the Texas Compromise Act of September 9, 1850, 9 Stat. 446. U.S. Brief, 233.

48. Texas omits Senator Pearce's explanation of the Texas Compromise Act of 1850, cited and relied on by the United States. U.S. Brief, 233.

49. Texas omits Secretary of State Seward's letter of August 4, 1862, to Secretary of the Navy Welles, cited and relied on by the United States. U.S. Brief, 68.

*Nineteenth page*

50. Texas omits Secretary of State Seward's letter of August 10, 1863, to Gabriel Tassara, cited and relied on by the United States. U.S. Brief, 189–191, 198.

51. Texas' comment characterizes Secretary of the Navy Welles' letter of March 5, 1864, as a "gratuitous observation," and omits the fact, cited and relied on by the United States, that on March 9, 1864, Secretary of State Seward transmitted it to Great Britain as part of the official reply of this Government to the British protest. U.S. Brief, 70–71.

52. Texas omits Mr. Dayton's letter of June 1864 to the French Foreign Minister, cited and relied on by the United States. U.S. Brief, 71.

*Twentieth page*

53. The United States also cited and relied on the 1867 Treaty with Russia for the cession of Alaska. U.S. Brief, 68, 144, 174; U.S. Reply Brief, 34.

54. Texas omits the Act of July 27, 1868, 15 Stat. 539, and its legislative history, cited and relied on by the United States. U.S. Reply Brief, 34.

55. Texas omits the Acts of July 24, 1866, March 2, 1867, March 23, 1867, July 19, 1867, June 22, 1868, and June 25, 1868, and their legislative history, cited and relied on by the United States. U.S. Brief, 262–312, 409–414; U.S. Reply Brief, 92–93.

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