

The Burger Court Opinion Writing Database

Florida Department of State v. Treasure Salvors, Inc.

458 U.S. 670 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

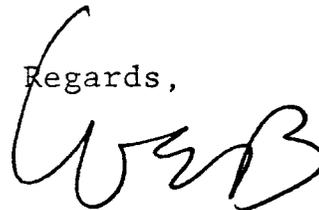
May 26, 1982

Re: No. 80-1348 - Florida Dept. of State v.
Treasure Salvors

Dear John:

I am prepared to join an opinion along the lines
of the analysis in your second draft memo dated
March 30.

Regards,

A handwritten signature in dark ink, appearing to be 'JWS', written in a cursive style.

Justice Stevens

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1982

Re: 80-1348 - Florida Department of State v. Treasure Salvors

Dear John:

I join.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 25, 1982.

No. 80-1348 -- State of Florida v. Treasure Salvors.

Dear John,

I think that your memorandum on this case does a splendid job with the Eleventh Amendment issue. I have only two reservations:

(1) Page 12, footnote 17. As you know, I have long taken a different view on the Hans issue. Employees v. Missouri Public Health Dept., 411 U.S. 279, 309-322 (1973) (dissenting opinion); Edelman v. Jordan, 415 U.S. 651, 687 (1974) (dissenting opinion). I therefore cannot agree with your footnote 17, and will write separately on that point in any event.

(2) Page 27. I am not sure that your partial reversal of the Court of Appeals, in Part IV, is really necessary. As I read the proceedings below, the State had a full opportunity to present its arguments respecting ownership of the artifacts at issue in this case when the action was in the District Court, and that court held a full evidentiary hearing on the merits of these arguments. See 459 F. Supp. 507, 521 (SD Fla. 1978); App. to Pet. for Cert. 6, 21-22 (CA5 1980). The State's arguments were rejected in the District Court, and that rejection was affirmed by the Court of Appeals. You seem to agree that the arguments available to the State on the merits are not substantial. Memorandum at 25. Why, then, do we need to reverse the determination by the courts below of the State's ownership, as you recommend

in Part IV? I do understand that you do not want to re-
mand for a determination of the State's ownership, and
rather are advocating a simple reversal. But the courts
below have already determined the merits of the State's
claim: Even if they were incorrect to make that deter-
mination at the time that they did, why should that fact
invalidate that determination? Why should the State now
get a second bite at the apple? I conclude that the
proper disposition of this action is a simple affirmance
-- on different grounds on the jurisdictional issue, and
then accepting the Court of Appeals' analysis on the mer-
its.

Sincerely,

Bill
W.J.B., Jr.

Justice Stevens.
Copies to the Conference.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: JUN 21 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., *ETC.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BRENNAN, concurring in the judgment in part and
dissenting in part.

I agree with the Court that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 27. My rationale for this conclusion differs from the Court's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U. S. Const., Amdt. 11 (emphasis added). The Court asserts that this constitutional provision "long has been held to govern . . . actions brought against a State by *its own* citizens." *Ante*, at 11, n. 17 (emphasis added), citing *Hans v. Louisiana*, 134 U. S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a State when brought by its own citizens. See *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 309-322 (1973) (dissenting opinion); *Edelman v. Jordan*, 415 U. S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable in the

"Court" changed to
"plurality" throughout.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 23 June 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BRENNAN, concurring in the judgment in part and
dissenting in part.

I agree with the plurality that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 27. My rationale for this conclusion differs from the plurality's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U. S. Const., Amdt. 11 (emphasis added). The plurality asserts that this constitutional provision "long has been held to govern . . . actions brought against a State by *its own* citizens." *Ante*, at 11, n. 17 (emphasis added), citing *Hans v. Louisiana*, 134 U. S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a State when brought by its own citizens. See *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 309-322 (1973) (dissenting opinion); *Edelman v. Jordan*, 415 U. S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable

To: The Chief Justice
Justice White
✓ Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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Recirculated: JUN 24 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BRENNAN, concurring in the judgment in part and
dissenting in part.

I agree with the plurality that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 27. My rationale for this conclusion differs from the plurality's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U. S. Const., Amdt. 11 (emphasis added). The plurality asserts that this constitutional provision "long has been held to govern . . . actions brought against a State by *its own* citizens." *Ante*, at 11, n. 17 (emphasis added), citing *Hans v. Louisiana*, 134 U. S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a State when brought by its own citizens. See *Employees v. Missouri Public Health Dept.*, 411 U. S. 279, 309-322 (1973) (dissenting opinion); *Edelman v. Jordan*, 415 U. S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable in the present case.¹ To this extent, I am in agreement with the plurality's disposition.

¹ For this reason, I cannot agree with footnote 17 of the plurality's opinion. To the extent, however, that the plurality concludes that the judg-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 25, 1982

RE: No. 80-1348 Florida Dept of State v. Salvores

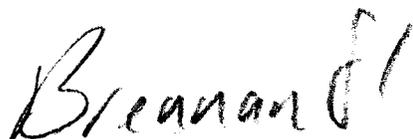
Dear John:

I'll be delighted to make the change adding your suggested words immediately after my name in Henry Lind's syllabus.

Sincerely,



Justice Stevens



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 25, 1982.

No. 80-1348 -- Florida Department of State v. Treasure
Salvors -- Addition to Justice Brennan's Opinion.

Dear John,

I plan to add the following at the end of footnote 1
of my opinion in this case:

"To the extent, however, that the plurality con-
cludes that the judgment of the Court of Appeals
should be affirmed because the State of Florida
does not have even a colorable claim to the arti-
facts, I agree with its opinion."

I hope that this change is satisfactory to you.

Sincerely,

Bill
W. J. B., Jr.

Justice Stevens.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 30, 1982

Re: 80-1348 - Florida Department of
State v. Treasure Salvors

Dear John:

I voted the other way in this case and am still inclined in that direction. In due course, I shall circulate a counter-memorandum or a dissent in the event you have a majority for your view.

Sincerely yours,



Justice Stevens

Copies to the Conference

cpm

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 26 MAY 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPT. OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[May —, 1982]

Memorandum of JUSTICE WHITE.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the state agrees to waive its Eleventh Amendment immunity. Because it is the state itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the complaint and recognized by both the district and appellate court, is to determine the state's title to such property, this is not a case subject to the doctrine of *Ex Parte Young*, 209 U. S. 123. Although I agree with much of JUSTICE STEVEN'S summation of our Eleventh Amendment jurisprudence, I cannot agree with his interpretation of the most relevant precedents, the two *In re New York* cases, or with his characterization of this litigation. I view it as a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the state provided a colorable basis upon which the agents could hold the property.

There remains the grounds asserted by the courts below for finding that the Eleventh Amendment did not bar the suit. I agree with JUSTICE STEVENS that the Court of Appeals' rationale is indefensible: a federal court is no more enti-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 27, 1982

Re: 80-1348 - Florida v. Treasure Salvors

Dear John,

Your letter of yesterday addresses itself to part II of my Memorandum and has little to do with part I, the thesis of which is that the in rem suit and the arrest of the artifacts in possession of the state constituted an action against a state barred by the Eleventh Amendment, as well as by maritime precedent. Even if I agreed with you on the legal significance of the contracts, which I do not, the federal court could not proceed in this case consistently with the Eleventh Amendment.

Apparently, you would hold that the Amendment would not bar the attachment or seizure of property claimed by the state and resting in the hands of state officials, as long as a court examined the state's title to the property or its right to possession and found that the state had no colorable right. That may be fair, but it is not good Eleventh Amendment law; and if the suit were in admiralty, it would be contrary to admiralty precedent. It would also be very similar to what the Court of Appeals did in this case, namely, to adjudicate the state's title as a predicate to finding that the Eleventh Amendment was no bar.

Sincerely yours,



Justice Stevens

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cpm

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPT. OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE WHITE, dissenting.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the state agrees to waive its Eleventh Amendment immunity. Because it is the state itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the complaint and recognized by both the district and appellate court, is to determine the state's title to such property, this is not a case subject to the doctrine of *Ex Parte Young*, 209 U. S. 123. In short, this is a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the state provided a colorable basis upon which the agents could hold the property.

The Court of Appeals, like the District Court, thought that the jurisdictional issue raised by the State merged with a determination on the merits of the validity of the State's claim to the property. The Appellate Court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the state. By holding that "the court did not have power . . . to adjudicate

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To: The Chief Justice
Justice Brennan
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Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

- pp. 1-3, 15-16 & stylistic;
- plurality replaces Court
throughout

From: Justice White

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPT. OF STATE, PETITIONER *v.*
TREASURE SALVORS, INC., *ETC.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE WHITE, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in the judgment in part and dissenting in part.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the State agrees to waive its Eleventh Amendment immunity. Because it is the State itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the complaint and recognized by both the district and appellate court, is to determine the State's title to such property, this is not a case subject to the doctrine of *Ex Parte Young*, 209 U. S. 123. In short, this is a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the State provided a colorable basis upon which the agents could hold the property.

The Court of Appeals, like the District Court, thought that the jurisdictional issue raised by the State merged with a determination on the merits of the validity of the State's claim to the property. The Appellate Court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

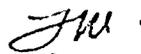
May 12, 1982

Re: No. 80-1348 - Florida Dept. of State v. Salvors

Dear John:

Please join me.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 5, 1982

Re: No. 80-1348 - Florida Dept. of State v. Treasure Salvors

Dear John:

I, for one, very much appreciate the time and effort you have devoted in preparing your memorandum for this fascinating and sensitive case. It seems to me that your analysis is a proper one and answers what, for me, is outrageous conduct on the part of the petitioners. Unless the opposing writing proves to be persuasive, I am prepared to join you when your memorandum is converted into an opinion. At least for now, that is my posture.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

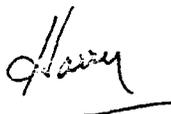
May 31, 1982

Re: No. 80-1348 - Florida Department of State
v. Treasure Salvors

Dear John:

I now join your memorandum and shall join an opinion based upon it.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1982

Re: No. 80-1348 - Florida Department of State
v. Treasure Salvors, Inc.

Dear John:

Please join me in your proposed opinion for the Court.

Sincerely,



Justice Stevens

cc: The Conference

March 29, 1982

80-1348 Florida Department of State v. Treasurer Salvors

Dear Byron:

At Conference, you and I were substantially together in this case.

We thought that Judge Rubin's dissent was about right; that CA5 decided the merits before it reached the Eleventh Amendment; and, if this procedure is proper, the Eleventh Amendment may be circumvented. Our bottom line, as I recall (somewhat vaguely), was that we should reverse on the Eleventh Amendment issue, leaving open the other issues.

On the basis of a first reading of John's memo, and to the extent I understand it, I have reservations about his views. These have not been dispelled by the pages of correspondence between John, Sandra and Bill Brennan.

I either joined your dissent from denial of cert last spring, or was persuaded by it to vote to grant. If you write, I'll probably join you. Otherwise, I may simply dissent and say I agree generally with Judge Rubin.

Sincerely,

Justice White

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 30, 1982

80-1348 Florida Department of State v.
Treasurer Salvors, Inc.

Dear John:

Although I found your memorandum most interesting, I had rather different views at Conference. Accordingly, I will await other writing.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1982

80-1348 Florida Dept. of State v. Treasure Salvors

Dear Byron:

Please add my name to your memorandum in this case.

Sincerely,



Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1982

80-1348 Florida Dept. of State v. Treasure Salvors

Dear Byron:

I renew my join of your dissent. In due time,
please add my name.

Sincerely,



Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

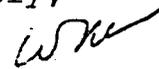
June 3, 1982

Re: No. 80-1348 Florida Dept. of State v. Treasure
Salvors, Inc.

Dear Byron:

I agree with your memorandum.

Sincerely,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1982

Re: No. 80-1348 Florida Dept. of State v. Treasure Salvors

Dear Byron:

I renew my join of your dissent.

Sincerely,

White/cons

Justice White

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER, *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March —, 1982]

Memorandum of JUSTICE STEVENS.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a seventeenth century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The State responded to the court's warrant of arrest and claimed that the property belonged to the State and was immune from process under the Eleventh Amendment.

In considering the State's argument, the Court of Appeals held that the Eleventh Amendment barred execution of federal process only if the State in fact was the rightful owner of the property. The jurisdictional issue raised by the State thus merged with a determination on the merits of the validity of the State's claim to the property. The court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1982

Re: 80-1348 - Florida v. Treasure Salvors

Dear Bill:

In order to accept your suggestion that we simply affirm the Court of Appeals, I believe it would be necessary to decide that the State voluntarily submitted the ownership issue to the District Court for adjudication. That is arguably a fair interpretation of what happened in the District Court, but it was my understanding that a majority of the Court was not prepared to adopt that position. If the State, and its agents, appeared involuntarily in response to the process served by the federal marshal, I believe the reasoning in the memorandum leads to the conclusion that the adjudication could only be binding on the agents and could not finally adjudicate the State's rights.

As is always true with respect to a memorandum more or less tentatively proposing a disposition, I am surely open to consideration of other dispositions that the Court may consider appropriate.

Respectfully,



Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1982

Re: 80-1348 - Florida v. Treasure Salvors

Dear Sandra:

Thank you for your letter commenting on my memorandum suggesting a possible disposition of this case.

When I started to work on this case I was under the impression that Florida was claiming that the contracts with Treasure Salvors were the source of its right to the artifacts. It was only after I had read the contracts and then re-read Florida's brief that I realized that such is not the case at all. There are only a few references to the contracts in Florida's entire 109-page brief, and it is noteworthy that in none of those references does Florida advance an argument that the contracts created even a colorable right to ownership of the property.

The only mentions of the contracts in Florida's brief are these:

a. At pages 5 and 6, the brief summarizes the State's obligations under the contracts (which, you will recall, are written on the premise that the State was already the owner of the property), and then states: "In return, the State was to retain twenty-five percent (25%) of the representative artifacts, JA 33, for the purposes of continuing study, examination and display." (Emphasis added.)

b. At pages 15-16, at the beginning of its principal argument concerning the Eleventh Amendment, the brief states: "Under the terms of these contracts, the State received twenty-five percent of the artifacts recovered. The State's interest in these artifacts is a direct result of the State's concern for its rich cultural heritage.... "

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c. At page 32, the brief states: "At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession.... "

d. At page 43, the brief states: "The State of Florida has not claimed a mortgage or other lien on the artifacts, as claimed by the trial court, but has asserted ownership of them." (Emphasis in the original.) Again, the absence of any suggestion that the contracts are the source of this claim of ownership is noteworthy.

e. At page 60, the brief states: "The issue on the merits was whether the State had property rights to artifacts in its Archives--that is, whether the contract to which the State was a party was valid." Even though the State does not argue here that the contracts conferred a right of ownership, this statement is somewhat misleading. As you know, in my memorandum I simply assumed that the contracts were perfectly valid and note that it is entirely unrelated to the question whether, as the contracts recited, the State has property rights in the artifacts. If it has such property rights, my proposed disposition will allow those rights to be asserted either in this case or in a separate proceeding that the State might initiate.

f. At page 77, the brief refers to the "contracts in dispute" but again makes no argument that those contracts granted Florida a right of ownership. On the contrary, in that section of the brief, Florida argues that this Court's determination of the State's boundary was made for a limited purpose that does not control anything other than an interpretation of the Submerged Lands Act.

g. At pages 104 through 108, the State argues that if any mistake occurred, it was a mistake of law that would not invalidate the contracts. Again, however, I think we may assume that this argument is entirely correct and that the contracts remain valid.

Rather than arguing that the contracts granted the State a right of ownership, the State actually advances two quite different arguments as a basis for its claim of ownership. First, it argues that it has a duty to preserve and protect historic resources similar to that exercised by the City of New York in the Penn Central case, and that under the State's police power it may preserve and regulate the use of valuable resources necessary for the public welfare. See pages 65-74. Alternatively, the State argues that a correct understanding of the State boundaries would support the view that the artifacts were in fact found within its own territorial jurisdiction. This is the novel argument that is spelled out at pages 74-108.

I did not address the first argument in the terms used by the State, but the memorandum rejects the argument that the State of Florida has authorized its officers to take or hold all historical artifacts at will, without providing compensation, simply for the common good. Since I think it is perfectly clear that the second argument is foreclosed by our decision in United States v. Florida, 420 U.S. 531, it seemed appropriate to reject it in a footnote.

Having said all this, I must acknowledge that I think you are quite correct in suggesting that before the state boundaries were definitively determined, the state agents were indeed acting under a colorable claim that the wreck was found on Florida's submerged lands and that they were not acting ultra vires when they entered into the contracts. But since the contracts on their face do not create even a colorable right of ownership, and since I can find no other legitimate basis for the state agents' actions in withholding possession of the property, it does seem to me that they are presently acting beyond their authority within the meaning of our cases.

In his letter, Bill Brennan suggests that we should affirm the lower court's determination that the ownership issue has been resolved. I was reluctant to reach that conclusion, however, because it seemed to me that even though the State did tender that issue for determination, it really did so involuntarily in response to the process that had been served upon the state officials and as a means of resisting enforcement of that process. I think one could come to the conclusion that Bill Brennan suggests, but in my

memorandum I have simply taken the position that the state agents must surrender possession of the artifacts, without prejudice to the State's right to obtain a formal adjudication on the ownership question.

I have reexamined the memorandum with these thoughts in mind, and believe that a few changes are in order. As I have said, I do not believe that the State has advanced a reasoned argument that it is entitled to ownership of the property as a result of the contracts. Perhaps more importantly, however, to the extent that the State may be said to have asserted a claim to the artifacts pursuant to the contracts, that claim may be rejected on its face; an examination of the contracts themselves demonstrates that they do not provide any basis on which the State may claim ownership of the property. Absent at least a colorable contract claim, or some other authority that I have not discovered in this case, the federal court was not barred by the Eleventh Amendment from ordering the state officials to surrender possession of the artifacts. I shall circulate a second draft of my memorandum shortly that will emphasize these points.

Once again, I thank you for your comments.

Respectfully,



Justice O'Connor

Copies to the Conference

P. 12, 13 - 30

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER, *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March —, 1982]

Memorandum of JUSTICE STEVENS.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a seventeenth century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The State responded to the court's warrant of arrest and claimed that the property belonged to the State and was immune from process under the Eleventh Amendment.

In considering the State's argument, the Court of Appeals held that the Eleventh Amendment barred execution of federal process only if the State in fact was the rightful owner of the property. The jurisdictional issue raised by the State thus merged with a determination on the merits of the validity of the State's claim to the property. The court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses."

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 26, 1982

Re: 80-1348 - Florida v. Treasure Salvors

Dear Byron:

Your memorandum is helpful in narrowing the issue that divides us. I think you agree that the Eleventh Amendment is not a bar unless the State has a colorable claim to the artifacts. You seem also to recognize that Florida has no such claim unless it is supported by the contract. Finally, you do not dispute my reading of the plain language of the contract which grants nothing to Florida. You argue, however, that since the parties entered into the contract based on the mistaken belief that the Atocha lay within Florida's boundaries, we should not expect the contract "to read as if the mistake had not occurred." Memo. at page 11.

But surely if there had been no mistake, the language of the contract would not have been more favorable to Florida than it actually is, for if the parties had known the true facts Florida would have had absolutely nothing of value to offer to Treasure Salvors. The central thesis of your memorandum, as I understand it, is that a contract that literally gives Florida no basis for claiming an interest in the artifacts should be reformed to create a colorable claim even though the only conceivable basis for such a claim is a prior misunderstanding that has since been corrected.

Because we have already written so much in these cases, and because I think my memorandum already responds to the points you have made, I will not burden our colleagues with an additional response.

Respectfully,



Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

JUN 8 '82

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER, *v.*
TREASURE SALVORS, INC., *ETC.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a seventeenth century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The question presented is whether the Eleventh Amendment immunized the property from the federal court's process.

I

Battered by a tropical hurricane, the *Nuestra Senora de Atocha*, a Spanish galleon carrying a cargo of New World treasure to King Phillip IV of Spain, sank in 1622 forty nautical miles west of what is today Key West, Florida. After years of searching the ocean floor and studying Spanish archives in Seville, respondent Treasure Salvors¹ located the wreck site in the spring of 1971 near shoals known as the "Quicksands," nine and one-half nautical miles west of the

¹The two respondents in this action, Treasure Salvors, Inc. and Armada Research Corp., were organized by the same parties. Throughout these proceedings they have been treated as a single entity referred to as "Treasure Salvors."

12, 20-22, 24, 27-28
Footnotes renumbered

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: JUN 21 1982

~~1st~~
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER, *v.*
TREASURE SALVORS, INC., *ETC.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a seventeenth century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The question presented is whether the Eleventh Amendment immunized the property from the federal court's process.

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¹The two respondents in this action, Treasure Salvors, Inc. and Armada Research Corp., were organized by the same parties. Throughout these proceedings they have been treated as a single entity referred to as "Treasure Salvors."

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 24, 1982

Personal

Re: 80-1348 - Florida v. Treasure Salvors

Dear Bill:

Is there any possibility that you might consider adding a sentence reading substantially like the following at the end of your present footnote 1 on page 2 of your separate writing?

"To the extent, however, that the plurality concludes that the judgment of the Court of Appeals should be affirmed because the State of Florida does not have even a colorable claim to the artifacts, I agree with its opinion."

The reason I raise the question is that if this would be consistent with your views, it would give us five votes on the portion of the opinion with which I believe you are largely in agreement. This would mean that if a comparable issue should arise in a case in which the Hans rationale was not applicable, then it could be argued that five members of the Court rejected Byron's analysis.

Respectfully,



Justice Brennan



7.1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 22 _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1348

FLORIDA DEPARTMENT OF STATE, PETITIONER, *v.*
TREASURE SALVORS, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join..

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a seventeenth century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The question presented is whether the Eleventh Amendment immunized the property from the federal court's process.

I

Battered by a tropical hurricane, the *Nuestra Senora de Atocha*, a Spanish galleon carrying a cargo of New World treasure to King Phillip IV of Spain, sank in 1622 forty nautical miles west of what is today Key West, Florida. After years of searching the ocean floor and studying Spanish archives in Seville, respondent Treasure Salvors¹ located the

¹The two respondents in this action, Treasure Salvors, Inc. and Armada Research Corp., were organized by the same parties. Throughout these proceedings they have been treated as a single entity referred to as "Treasure Salvors."

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 25, 1982

Re: 80-1348 - Florida Dept. of State
v. Treasure Salvores

Dear Bill:

Many thanks for making the change in the footnote. I really think that it is most helpful.

With respect to the syllabus, Henry Lind has made a proposal reading as follows:

"JUSTICE BRENNAN concluded that the Eleventh Amendment is inapplicable in this case because both respondents are Florida corporations and thus the suit was not 'commenced or prosecuted against one of the United States by citizens of another State,' as the Eleventh Amendment provides. Pp. 1-2."

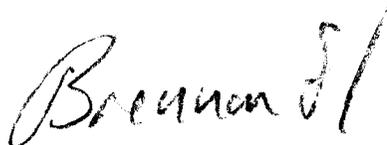
I wonder if it would be acceptable to you to insert the following clause immediately after your name: "while agreeing with the opinion that the State of Florida has not established even a colorable claim to the artifacts, concluded ..."

I gather Henry usually does not attach too much significance to footnotes but, in this case it seems to me it might be worth the effort.

Respectfully,



Justice Brennan



✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 25, 1982

No. 80-1348 Florida Dept. of State v. Treasure Salvors

Dear John,

I agree with your basic approach to deciding this case, but I wonder if, in implementing your analysis, you have not dealt too summarily with the State's claims arising out of the contract between the parties. Can we conclude, in all candor, that the contracts are a false issue in the case, without expressly considering the law of mistake?

Arguably, when Florida's agents entered into the contracts with Treasure Salvors prior to the 1975 decision in United States v. Florida, they were not acting ultra vires, because the State was then asserting a colorable claim that the wreck had been found on Florida's "state-owned sovereignty submerged lands." In fact, it appears that both Florida and Treasure Salvors were proceeding on the mistaken belief that the remains of the Atocha were within Florida's territory, and that by the time of the 1975 ruling the contracts had been partially performed by both parties. As a result, Florida could have a colorable claim to the property at issue under relevant contract law, and, after 1975, Florida's agents could have been acting within their state-granted authority in continuing to hold the property pursuant to Florida's contract claims.

On page 23 of your memorandum, you state that Florida is not asserting such a contract right. As I read Florida's brief, however, the State does claim 25% of the proceeds of the salvage operation under the contracts. In particular, Florida argues that the mutual mistake regarding Florida's boundaries was a mistake of law, not of fact, so that neither reformation nor rescission of the contracts is now appropriate. Brief of Petitioner 106-107. I am thus led to think that Florida's agents may have been acting within their authority under state law in holding the disputed property both before and after 1975.

In the end, you may be right that Florida has not even a colorable claim growing out of its contractual relations with Treasure Salvors. But I question whether Florida is not entitled to a somewhat fuller analysis of its contract rights before we reach that conclusion.

Sincerely,



Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 31, 1982

80-1348 Florida Department of State v.
Treasure Salvors

Dear John,

Your second draft of a memorandum in this case is persuasive. I may join your opinion when it is circulated, although I expressed a contrary view at Conference. For the time being, however, I await further writing.

Sincerely,



Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 21, 1982

No. 80-1348 Florida Dept. of State v.
Treasure Salvors

Dear Byron,

Please join me in your dissent.

Sincerely,



Justice White

Copies to the Conference