No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA

(Mississippi Boundary Case)

ON MOTION FOR RELIEF FROM DECREE

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DONALD A. CARR
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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We oppose Mississippi's recent Motion and urge its summary denial.

1. The first thing to be said about the present Motion is that it is inexcusably late. When the State filed its Motion for Supplemental Decree in October 1979, seeking a declaration that Mississippi Sound is "inland" waters, it expressly recited that the United States had conceded that claim in a brief submitted to this Court in 1957, and that, more recently, the concession had been repudiated. 1979 Motion at 3-4, 11-13, 23-40. No intervening event is pleaded to explain Mississippi's failure to act more promptly in suggesting the relief now sought.

On the contrary, during the two and a half years since the State reactivated these proceedings, the parties have defined the issues, engaged in extensive discovery and prepared for trial. The trial is now fixed before the Court's Special Master on June 14, two weeks hence. It seems particularly inappropriate, at this late date, to seek relief from a Decree entered in 1960.

2. At all events, the present Motion is wholly without merit. Mississippi does not suggest that the 1960 Decree foreclosed its claim to Mississippi Sound as "inland" water. Nor do we. As the State correctly recited in its 1979 Motion (at 16), this Court's 1960 decision did not purport to locate the State's coastline from which the 3-mile grant effected by the Submerged Lands Act should be measured—whether the mainland shore or a line connecting the barrier islands. See *United States* v. *Louisiana*, 363 U.S. 1, 82 n.135; 364 U.S. 502, 502-503. That question, still open, is the issue to be resolved in the pending proceedings.

What Mississippi now appears to be urging is that it ought to be free to advance an alternative argument which *is* foreclosed by the 1960 ruling: that the State is not restricted to a three-mile belt of submerged lands measured from the "coastline" because it was admitted to the Union with boundaries that encompassed all of Mississippi Sound. See Motion for Relief at 7. As the State explains (*ibid.*), this contention becomes relevant if, as the United States maintains, the Sound does not qualify as "inland" water—because, in some places, the Sound is more than six miles wide and the three-mile marginal sea belts extended from the mainland and from the islands do not meet or overlap and leave "enclaves" of high seas. Fearing that result, the State now

wishes to reargue the issue whether Mississippi's seaward boundary, like those of Texas and Florida, was "approved by the Congress" as extending more than three miles from its "coastline." See 43 U.S.C. 1301(b). There is no disagreement that this claim was expressly decided in the negative by this Court in 1960. *United States* v. *Louisiana, supra,* 363 U.S. at 79-82; 364 U.S. at 502-503. Hence, Mississippi's plea to reopen the Decree then entered.

3. The pretext for this belated plea to reconsider a matter fully litigated more than two decades ago is the allegation that the United States then deflected the Court's consideration by its concession that Mississippi Sound was "inland" water. The short answer to this suggestion is that the Court plainly did not premise its ruling on any federal concession. On the contrary, the Court expressly avoided approval of a like concession in respect of Louisiana (363 U.S. at 66-67 n.108) and referred to that discussion when disclaiming any ruling on the location of Mississippi's coastline. 363 U.S. at 82 n.135. And the point was emphatically reaffirmed a decade later when Louisiana sought to invoke estoppel against the United States. See *Louisiana Boundary Case,* 394 U.S. 11, 73 n.97 (1969).

Nor could the federal concession, even if accepted, support the Court's 1960 ruling. Mississippi, like the other Gulf States, was then claiming an admission boundary extending a stated number of "leagues" into the sea (in Mississippi's case, six leagues or 18 miles), *not* a boundary defined by the barrier islands. Indeed, Mississippi was at pains to reject any notion that its Gulf boundary was tied to these islands, which, it was said, were known to be impermanent and constantly shifting. See *Supplemental*

Brief of the State of Mississippi, at 3-4, 6-7 (No. 10, Orig., 1959 Term). To be sure, since all the islands are less than six leagues from shore, this claim included all of Mississippi Sound.[1] But, reasonably enough, Mississippi, like the other Gulf States, was invoking the "six league" language of its Enabling Act and Constitution as the predicate for its expansive claim; and, on the face of the documents, there was no other "historic" line to be asserted. This was, of course, firmly rejected by the Court—except in the case of Texas and Florida.

If, contrary to what appears, there is an arguable basis for contending that Congress approved Mississippi's seaward boundary as defined by the barrier islands or by the "open" Gulf, understood as beginning only south of the islands, it is difficult to appreciate why the State did not advance it, at least alternatively, in the 1960 proceedings. The stance then taken by the United States should have encouraged Mississippi to seek confirmation of so much. No prudent lawyer relies on the continuing force of a trial concession by his opponent when he can seize the moment and obtain a binding court judgment permanently quieting his client's title. It is, after all, familiar experience that even the United States sometimes changes its position. We must conclude that, at the time, Mississippi made the only argument for

[1] In the 1960 proceedings, Mississippi claimed a belt of submerged lands to a distance of six leagues from the mainland shore, except insofar as the Submerged Lands Act restricted the grant to three leagues from the "coastline." Since the United States was then suggesting that Mississippi's "coastline" was a line drawn on the south of the barrier islands, the State measured its three-league grant from those islands, except where this exceeded six leagues from the mainland. *Mississippi Supplemental Brief* at 8.

a congressionally approved boundary beyond three miles that seemed plausible.

4. It is, of course, regrettable that the United States has found it necessary to change its position with respect to the "inland" water status of Mississippi Sound. But, in the absence of a binding agreement or judgment incorporating the Government's earlier stance, Mississippi cannot now hold us to that long repudiated concession—any more than the United States can hold Mississippi to its once held position, that Mississippi Sound is a part of the "high seas." See *Louisiana* v. *Mississippi*, 202 U.S. 1, 29, 51-52 (1906). So much is clearly settled by this Court's ruling in the first of these cases, *United States* v. *California*, 332 U.S. 19, 39-40 (1947), and was reaffirmed in a comparable situation in the Louisiana offshore litigation. See *Louisiana Boundary Case*, *supra*, 394 U.S. at 73 n.97.

This is not a situation in which "the consistent official international stance of the Government" was abandoned "solely to gain advantage in a lawsuit to the detriment" of the State, nor an attempt to "prevent recognition of a historic title which [had] ripened because of *past* events." See *Louisiana Boundary Case*, *supra*, 394 U.S. at 73-74 n.97, 77 n.104. The concession made in 1957 was premised on what, even then, may have been an erroneous view of the effect of a "portico" or "fringe" of islands on the character of the landward waters. At all events, it was a position which became untenable once the Court adopted the rules of the international Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607, as the relevant guide to construing the Submerged Lands Act, not only on the Pacific coast (*United States* v. *California*, 381 U.S. 139 (1965),

but for the Gulf of Mexico as well (*Louisiana Boundary Case, supra*, 394 U.S. at 16, 32-35). Accordingly, for all purposes, international and domestic, the relevant agencies of the United States ceased to treat Mississippi Sound as an "inland" body of water. In these circumstances, we obviously cannot be accused of improper motives. Indeed, the Executive Branch could not, if it chose, abandon what it believes to be "property belonging to the United States" without usurping Congress' exclusive prerogative under the Property Clause of the Constitution (Article IV, Section 3, Clause 2).

Nor is it shown that Mississippi meaningfully relied on our concession. We are not told of any State activity or investment within the now disputed areas of Mississippi Sound. In its 1979 Motion (at 20) Mississippi represented that it had, in 1959 and 1964, granted oil and gas leases embracing these areas—which, presumably, have long since lapsed. But this is far from *detrimental* reliance. At the worst, the State will ultimately be required to account, without interest and in depreciated dollars, for revenues it has in the meanwhile enjoyed. Cf. *United States* v. *Louisiana*, 446 U.S. 253, 272 n.4 (1980). The upshot is that Mississippi has merely reaped a benefit because the United States did not earlier challenge the State's dominion over the submerged lands in controversy.

5. We should stress that denial of the present Motion will not embarrass the State's pending case before the Special Master. We have made no objection to the tender of evidence supporting Mississippi's claim that the Sound is "historic" inland waters. The State is entirely free to demonstrate, if it can, that the United States, over a long period, so viewed the Sound and gained international ac-

quiescence for that stance. See *United States* v. *Alaska*, 422 U.S. 184, 189, 203 (1975). To that end, Mississippi may, of course, submit evidence that Congress treated the Sound as "inland" in 1817, when the State was admitted to the Union. Nor do we seek to prevent the State from arguing from our earlier "concessions" that the United States recognized the "inland" character of the Sound.

Our only submission is that Mississippi can no longer invoke Section 2(b) of the Submerged Lands Act, 43 U.S.C. 1301(b), to claim a seaward boundary more than three miles from its "coastline." Thus, if Mississippi Sound is not "inland" water, the State is now debarred from obtaining a declaration of title to those enclaves more than three miles from the mainland or any island. It seems to us right to insist that what was finally adjudicated in 1960 ought to be held foreclosed in the case of Mississippi, just as it has been in the case of Louisiana and the States of the Atlantic coast. See *United States* v. *Maine*, 420 U.S. 515 (1975). This Court, we need hardly say, is sufficiently burdened in these offshore boundary cases without entertaining reargument of decisions rendered two decades ago.

6. It remains only to suggest the appropriate procedure for dealing with the present Motion. Not infrequently, the Court has simply referred motions in original cases to its Special Master without further instructions. *E.g.*, *Arizona* v. *California*, 439 U.S. 419, 440 U.S. 942 (1979); *Maryland* v. *Louisiana*, 445 U.S. 913, 447 U.S. 902 (1980). In this instance, however, we urge against that course. Only the Court can decide whether it will reopen its Decree entered December 12, 1960. The Special Master ought not be left in doubt whether Mississippi's pending claim can be enlarged to encompass more

than the contention that Mississippi Sound is "inland" waters. Nor can the Master usefully advise the Court whether what is in effect an untimely petition for rehearing should be entertained. The Court itself, we submit, must decide the motion.

In our view, the present motion properly may be dealt with summarily, without further briefing or oral argument. We have responded with unusual dispatch because the trial before the Special Master is imminent and it is desirable that the Master have the benefit of the Court's ruling before it rises for the Summer. Accordingly, we pray for prompt consideration and disposition of Mississippi's Motion for Relief.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DONALD A. CARR
Attorney

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