In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 35,
ORIGINAL

UNITED STATES OF AMERICA,
PLAINTIFF

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA.

REBUTTAL BRIEF BY THE DEFENDANT COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Introduction

The Defendant Commonwealth of Massachusetts reaffirms its legal arguments in its brief, and its reliance upon the authorities cited. We submit that the Brief by the

United States in Opposition only warrants rebuttal on several specific points.

Argument

I. Massachusetts Denies That It Has Approved of the Continental Shelf Explorations Under Discussion.

The Plaintiff United States of America alleges on pages 2 and 3 of its Brief that, at a meeting in Philadelphia, an understanding was reached between the Defendant States and the plaintiff that the latter could "continue with geological and geophysical exploration and informal information gathering activities which would include seismic tests and shallow core sampling"; the plaintiff further alleges that this "understanding" was "confirmed by an exchange of correspondence with the defendant States subsequent to the meetings," and that the plaintiff, "with the apparent approval of the States," continues to abide by this "commitment."

Massachusetts is obliged to deny that it either has orally or in writing approved or assented to the explorations which are the subject of the motion. We cannot speak for our Sister States, but we can and we do deny that the correspondence between the Massachusetts Attorney General's Office and the plaintiff "confirmed" such an alleged understanding. While we are indeed reluctant to burden the Court with further documentation in this interlocutory matter, we feel obliged, in the face of plaintiff's allegations, to annex hereto, in chronological order, the relevant correspondence in its entirety, so that the Court may draw its own conclusions.

The final communication between the plaintiff and the Attorney General of Massachusetts on this subject is the telegram of March 8, 1972. The Under Secretary of the Interior stated therein: "The Department has no plans to

conduct exploratory work on the Atlantic Continental Shelf." He goes on to say that "Our only plans are for a continuation of bottom sampling and shallow coring as part of our program of continuous information gathering." The semantic structure of this telegram is worth noting: The activity which Massachusetts seeks to enjoin is classified as "explorations" under Section 11 of the Outer Continental Shelf Lands Act, 67 Stat 469, 43 U.S.C. 1340. Befitting the present age of euphemisms, the Interior Department does not designate these "explorations" as "explorations" but, rather, as "information gathering;" the question then arises what "Exploratory Work on the Atlantic Continental Shelf" could possibly mean. We submit it is reasonable to assume that it encompasses the very activity which Massachusetts seeks to enjoin.

Furthermore, we submit that the wording of this telegram lends itself with facility to the interpretation that what the Interior Department planned was an examination of the characteristics of the continental shelf somehow sharply differentiated from the crux of that verbal exchange, namely, explorations for offshore oil and gas deposits. We would note, also, that there is no mention whatsoever of seismic survey or exploration.

This, then, is the correspondence which the plaintiff has alleged confirms an understanding with Massachusetts that the plaintiff may conduct the very explorations which we seek to enjoin!

II. Massachusetts Has Alleged Imminent And Irreparable Harm Different From That Discussed In Plaintiff's Brief.

Massachusetts, in its brief, alleged imminent and irreparable harm to its right, if it prevails, to authorize

and market *exploration* privileges. This, we have argued, is a property interest quite distinct from the right to market *exploitation* privileges. It is a distinction which is not observed in the Plaintiff's Brief, Part I, which speaks only of the "resource rights in the continental shelf." (Plaintiff's Brief, p. 5.) Massachusetts, further, has not alleged that the actions sought to be enjoined "would prevent the State legislature from proscribing seabed and subsoil exploitation rights. . . ." (Plaintiff's Brief, p. 5). Rather, we have argued that their actions would prevent our legislature from proscribing *exploration* activities, if, in its judgment, exploration could create an undesirable momentum towards exploitation.

III. The Plaintiff Has Failed To Show That It Will Suffer Material Damage In The Event It Is Enjoined.

Massachusetts has not, as the plaintiff' contends, (Plaintiff's Brief, p. 8) overlooked "the fact that both the President and Congress have recognized the imminent threat of an 'energy crisis' in the United States." What the plaintiff has not demonstrated is that the scope of the injunction and its duration would pose any material obstruction to the formulation of national policy dealing with this "energy crisis." The plaintiff has not shown that during the remaining pendency of this action, a comprehensive and explicit national policy statement will issue, and that an injunction would thereby impair the informational impact underlying such a policy formulation. The plaintiff's argument is also flawed by the implicit assumption that the Federal Government will ultimately prevail, for, if it did not, Presidential and Congressional decisions *pendente lite,* as to the development of offshore energy sources, would be nullified if the successful defendant

States oppose such development. If the dominium over these offshore resources, therefore, is *arguendo,* a crucial factor in the formulation of national energy policy, then we submit the formulation of this energy sources policy might judiciously be postponed until this Court has rendered a final decision.

Furthermore, even if, *arguendo,* the plaintiff ultimately prevails, the contingency that "leasing may proceed expeditiously" (Plaintiff's Brief, p. 9) is most unlikely. The plaintiff would still have to comply with the formal procedures specified in the National Environmental Policy Act of 1969, (42 U.S.C. 4321 *et seq.*) procedures which, it should be noted, the plaintiff has pledged not to initiate prior to the final outcome of this action. Due to the complexity and gravity of the problems involved, it is not unreasonable to assume that compliance with the aforesaid Act would involve a period of time, *subsequent* to the outcome of this action, which would be comparable to the duration of a preliminary injunction. Since exploitation leasing could not be initiated pending compliance with the National Environmental Policy Act subsequent to the outcome of this law suit, we submit that the plaintiff, if it ultimately prevails, will be afforded precisely that opportunity to undo any temporary effect of an injunction by means of intensified seismic survey.

IV. The Plaintiff Has Not Cited Convincing Authority For Its Contention That Massachusetts Has The Burden Of Showing A Reasonable Probability Of Ultimate Success In This Case.

In support of its contention that Massachusetts must demonstrate a reasonable probability of ultimate success, the plaintiff has cited only *American Metropolitan Enter-*

prises of New York, Inc. v. *Warner Bros. Records, Inc.*, 389 F.2d 903 (2nd Cir. 1968) (Plaintiff's Brief, p. 6).

That case, however, did not so hold. The plaintiff's proposition derives from dictum quoted in the case; the court, in affirming the denial of a preliminary injunction, seemed to base its holding on the plaintiff's failure to demonstrate irreparable injury and the absence of an adequate remedy at law.

V. The Plaintiff's Formulation Of The Status Quo Bears No Relevance To The Existing Factual Situation Under Discussion.

The plaintiff alleges on page nine of its brief that ". . . exploration of the Atlantic seabed has been in progress since 1960. . . ." That may well be. However, "Atlantic seabed" is such a broad concept that we fail to see how its mention here affects the issues. At issue in the case at bar is merely the Atlantic *Continental Shelf,* not the Atlantic *seabed* (which includes the deep ocean); what is at issue in this motion is only that *segment* of the *Continental Shelf* to which Massachusetts makes claim. Furthermore, it is unclear whether the "exploration" referred to by plaintiff includes the type of activity which Massachusetts presently seeks to enjoin.

We point this out to show that even if the Court were to adopt the plaintiff's basic concept of status quo (alleged prior activity) there has been a dearth of factual presentation of prior activity that would relate to the subject matter of this motion. However, the conceptual nature of the status quo advocated by Massachusetts is the *present aggregate of exploration data.* We contend that the very argument of the plaintiff suggests that the latter is the correct delineation. For, if as the plaintiff contends, an intensive exploration program dur-

ing the remaining pendency of this action is essential even to formulate policy as to these offshore resources, it is apparent that the actions which Massachusetts seeks to enjoin, will, notwithstanding any vaguely alleged prior conduct, result in a change in the aggregate of exploration data so fundamental as to differ; not in degree, but in kind, from the status quo.

Conclusion

For the reasons above stated, the Defendant Commonwealth of Massachusetts respectfully submits that it is entitled to a preliminary injunction.

COMMONWEALTH OF MASSACHUSETTS

Respectfully submitted,

ROBERT H. QUINN
Attorney General
HENRY HERRMANN
Special Assistant
Attorney General
THOMAS J. CROWLEY
Assistant Attorney General

CERTIFICATION

I, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, do hereby certify that the statements contained in the attached Rebuttal Brief by the Defendant Commonwealth of Massachusetts in support of its Motion for Preliminary Injunction are true to the best of my knowledge and belief, and, further, that the copies annexed in the Appendix thereto are true copies of the correspondence in my files.

(s) Robert H. Quinn
Attorney General
Commonwealth of Massachusetts

APPENDIX

[SEAL]
ROBERT H. QUINN
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE, BOSTON

December 13, 1971

The Honorable Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530
The Honorable Mitchell Melich
Solicitor
United States Department of the Interior
Washington, D. C. 20240
Gentlemen:

This will confirm certain understandings reached at a meeting in Philadelphia on December 7, 1971, between representatives of the Departments of Interior and Justice, namely, Francis A. Cotter, Senior Attorney, Office of the Solicitor, Department of the Interior; Samuel Huntington, Assistant to the Solicitor General, Department of Justice; Jonathan Charney, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; Bruce Rashkrow, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; and Lawrence Shearer, Attorney, Marine Resources Section, Land and Natural Resources Division, Department of Justice; and representatives of the following parties defendants in *United States* v. *Maine, et al.*, namely, Andrew P. Miller, Attorney General of Virginia; Gerald L. Baliles, Assistant Attorney General of Virginia; Elias Abelson, Assistant Attorney General of New

Jersey; Vernon Stuart, Assistant Attorney General of New York; Kevin P. Curry, Assistant Attorney General of Massachusetts; David H. Souter, Assistant Attorney General of New Hampshire; W. Slater Allen, Jr., Assistant Attorney General of Rhode Island; and E. Stephen Murray, Assistant Attorney General of Maine.

The meeting was requested by the parties defendants to seek clarification of the position of the United States in regard to proposed leasing of the Outer Continental Shelf (OCS) lying off the Atlantic Coast. More Specifically, the parties defendants voiced concern about extensive reports in the news media that the United States was contemplating moving toward the issuance of leasing for offshore oil exploration for OCS areas and, further, that public hearings in connection therewith would be held in the near future. Moreover, the United States communicated with the governors of the Atlantic Seaboard States, which communication included a telegram dated November 4, 1971, establishing the intent of the Department of the Interior to hold a joint meeting with the governors ". . . for the purpose of exchanging information leading to an appropriate course of action for the future."

At the December 7th meeting, in order to assist the defendants states in their consideration of an appropriate course of action, answers to specific questions were sought. The areas of inquiry included the following:

(1) What action, if any, does the United States propose to take *pendente lite* relative to the development of the mineral resources of the Atlantic Seaboard OCS?

(2) What arrangements does the United States propose for communication between the United States and the Atlantic Seaboard Attorneys General when the United States proposes to discuss with the defendants states and their officials matters

related to the seabed and subsoil resources of the OCS?

The United States assured the States' representatives that, absent agreement or arrangement to the contrary, it would take no action toward leasing procedures with respect to the Atlantic OCS prior to the determination by the United States Supreme Court of the respective rights of all the parties. This assurance included undertakings not to call for, or to act upon, nominations of possible leasehold areas; not to call for, or to issue, drafts of environmental impact statements related to proposed leasehold areas; not to hold any hearings with respect to proposed leasehold areas; and, generally, not to take any action which, in the course of proceedings normally followed by the United States in moving toward leasing, is taken subsequently to the call for nominations.

It was further represented by the United States that no agreement or arrangement with any defendant state would be negotiated without the presence and participation of its attorney general or his representative. The United States also expressed willingness, upon the request of the governor of any of the defendant states, to provide the attorney general of said defendant state copies of all future communications with any state official on any matter related to the natural resources of the OCS.

Your cooperation in this matter is appreciated.

Sincerely yours,

(s) Robert H. Quinn
Attorney General
Chairman,
Atlantic Coast Conference
of Attorneys General

CC: The Honorable
Governor of Massachusetts
Francis W. Sargent

RHQ:KPC:oe

[SEAL]
U. S. DEPARTMENT
OF THE INTERIOR

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Dec. 30, 1971

Honorable Robert H. Quinn
Attorney General
Commonwealth of Massachusetts
State House
Boston, Massachusetts

Dear Mr. Quinn:

Thank you for your letter of December 13, 1971, summarizing the conclusions reached at the meeting in Philadelphia between representatives of the United States and most of the States involved in the case of *United States* v. *State of Maine, et al.,* S. Ct. No. 9, Original [sic]. Your summary is accurate subject to the following clarifications.

You have stated that we have agreed not to take any action towards "leasing procedures" nor "hold any hearings with respect to proposed leasehold areas" unless agreements or arrangements were entered into with the adjacent State. The definition of "leasing procedures" is crucial. We believe that it was made clear at the meeting that the "leasing procedures" referred to were "formal pre-leasing procedures", that is, those involving the published call for nominations and subsequent procedures leading to the issuance of Outer Continental Shelf (OCS) leases as provided for in the applicable regulations. Thus, the United States reserves the right to continue information-gathering activities and hold informal hearings for the purposes of obtaining information relevant to possible mineral development of the OCS off the East Coast.

In the last paragraph of your letter, you mentioned that upon the request of a Governor of a particular State the United States undertook to send copies of all "future communications" with that State relating to "the natural resources of the Outer Continental Shelf" to the Attorney General of that State. We believe that our commitment was somewhat more limited. We proposed that upon the request of the Governor of an individual State we would send to the Attorney General of that State copies of all correspondence between the Federal government and the State's officials on matters of policy relating to the development of the natural resources of the OCS adjacent to that State. Thus, we excluded from this the routine technical communications between the State and the Federal government that have no close relationship to the matters that we have been discussing with you.

It was pointed out by the Federal government's representatives at the Philadelphia meeting that the assurances given at that time were in fact but an amplification of previously announced Federal policy on these matters. This point was stressed in view of the erroneous impressions in some quarters that the United States intended to move unilaterally towards leasing of the OCS off the East Coast.

If we can be of further assistance in clarifying these understandings we shall be glad to do so.

Sincerely yours,

(s) RAYMOND COULTER
Acting Solicitor

[SEAL]
DEPARTMENT
OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

January 3, 1972

Honorable Robert H. Quinn
Attorney General of Massachusetts
State House
Boston, Massachusetts 02133

Dear Mr. Quinn:

Thank you for your letter of December 13, 1971, summarizing the conclusions reached at the December 7 meeting in Philadelphia between representatives of the United States and most of the States involved in the case of *United States* v. *State of Maine, et al.*, S.Ct., No. 9, Original [sic].

Subject to the clarifications contained in a letter being sent to you by Raymond C. Coulter, Acting Solicitor of the United States Department of the Interior, * we concur in your summary.

Very truly yours,
(s) ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General

* A copy of Mr. Coulter's letter is attached.

TELEGRAM TO:
HON. ROGERS C. B. MORTON, SECRETARY
UNITED STATES DEPARTMENT
OF THE INTERIOR
WASHINGTON, D.C. 20240
(COPY TO HON. ERWIN H. GRISWOLD,
SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530)
I AM ADVISED IN NEWS MEDIA THAT SOME SORT OF AGREEMENT MAY HAVE BEEN ENTERED UPON BETWEEN YOU AS SECRETARY OF INTERIOR AND GOVERNOR FRANCIS W. SARGENT OF MASSACHUSETTS CONCERNING EXPLORATORY WORK ON THE FLOOR OF THE OUTER CONTINENTAL SHELF. BE ADVISED BY THIS TELEGRAM THAT, PENDING FURTHER NOTIFICATION YOU SHOULD TAKE NO ACTION IN RELIANCE UPON ANY SUCH AGREEMENT. LETTER WILL FOLLOW.

ROBERT H. QUINN
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS

WUY134 CTA10S SSL214 CT WA244 EE
INTER FR US GOVT PDB
FAX W WASHINGTON DC 81 03-8 936A EST
ROBERT H QUINN ATTORNEY GENERAL
COMMONWEALTH OF MASS BSN
IN REPLY TO YOUR TELEGRAM OF FEBRUARY 24, 1972, TO SECRETARY MORTON, PLEASE BE ADVISED THAT YOU HAVE RECEIVED ERRNOEOUS INFORMATION. THERE HAS BEEN NO AGREEMENT BETWEEN THIS DEPARTMENT AND GOVERNOR FRANCIS SARGENT CONCERNING EXPLORATORY WORK ON THE FLOOR OF THE OUTER CONTINENTAL SHELF. THE DEPARTMENT HAS NO PLANS TO CONDUCT EXPLORATORY WORK ON THE ATLANTIC CONTINENTAL SHELF.
OUR ONLY PLANS ARE FOR A CONTINUIATION OF BOTTOM SAMPLING AND SHALLOW CORING AS A PART OF OUR PROGRAM OF CONTINUOUS INFORMATION GATHERING.
W T PECORA UNDER SECRETARY.