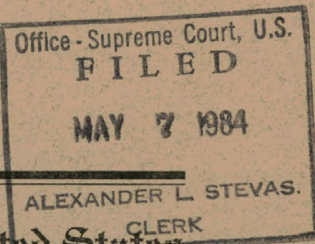


No. 35, Original



In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(RHODE ISLAND AND NEW YORK)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES
AND SUPPORTING BRIEF

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The United States excepts to the Report of the Special Master insofar as it recommends that Long Island be treated as a part of the mainland and, accordingly, that all waters north of that island be found to constitute a juridical bay closed by a line between Montauk Point on Long Island and Watch Hill Point on the Rhode Island coast. Instead, the United States urges the Court to fix the seaward limit of inland waters in this area (the baseline for measuring the three-mile grant to the States under the Submerged Lands Act) at the series of lines (from Orient Point on Long Island, to Plum Island, to Fishers Island, to Napatree Point, Rhode Island) that define the historic waters of Long Island Sound.

Respectfully submitted.

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ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT
OF ITS EXCEPTION

STATEMENT

This is one of at least two sequels to the Court's decision in *United States v. Maine*, 420 U.S. 515 (1975).¹ It was there held that the several States

¹ A similar proceeding involving the coastline of Massachusetts is presently pending before the same Special Master. That matter will be submitted to him on final briefs and oral argument next month. The "seaward boundaries" of the remaining nine States, parties to No. 35, Original, have not been fixed. Nor have any proceedings to that end been initiated. But this Court has expressly reserved to those States the right to begin like litigation (423 U.S. 1, 2 (1975)), and they are presumably waiting in the wings, ready to proceed if the outcome of this case encourages that course.

bordering on the Atlantic Ocean, like those abutting the Pacific, held interests in the seabed off their coasts only to the extent granted by the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, viz., to a distance of three geographical miles from their respective "coastlines." See 423 U.S. 1 (1975). The Court, however, did not fix the coastline of any of the affected States—which, at some places, is the seaward limit of inland waters, rather than the low-water line of the shore²—and jurisdiction was retained to entertain further proceedings for that purpose. *Id.* at 2. A dispute having arisen over the status of Block Island Sound as Rhode Island waters (see *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976), petition for cert. pending, No. 75-6990), the United States initiated these proceedings in December, 1976, and in due course the Court appointed a Special Master. 433 U.S. 917 (1977). Although Rhode Island was initially the only respondent, New York later participated as well. Report 2-3.

The only issue in these proceedings is the status of all or part of Block Island Sound as inland waters of Rhode Island and New York. That Sound comprises an area that stretches from Gardiners Island, Plum Island and Fishers Island on the west to a line be-

² The three-mile belt of submerged lands granted to the States by the Submerged Lands Act is measured from the "coast line," i.e., "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c). The same principle applies under the international Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 1608-1609, Arts. 3, 5, and 7 (4) (Report 5-6, 20-21), except that the coastline is there termed the "baseline," inland waters are referred to as "internal waters," and the 3-mile belt is called the "territorial sea."

tween Point Judith and Block Island on the east, and, at the south, a line between the eastern tip of Long Island and Block Island. See Report App. C; Chart 1, *infra*.³ The inland character of the waters to the west and north is undisputed. The United States has long claimed as historic inland waters the whole of Long Island Sound proper—closed at the east by lines from Orient Point on Long Island to Plum Island, to Fishers Island, and to Napatree Point, Rhode Island—and this assertion inures to the benefit of New York. Report 7. So, also, the United States treats Gardiners Bay as a juridical bay, closed by a line from Orient Point to Culloden Point that embraces Gardiners Island inside the bay. See Report App. C; Chart 1, *infra*. On the other hand, we deny that any part of Block Island Sound is inland. *Per contra*, Rhode Island and New York claim inland status for the whole of the Sound, whether as a “juridical bay” or as “historic waters.” Report 7-8; Chart 2, *infra*.

The Special Master has recommended a middle solution under which the western portion of Block Island Sound—to a line between Montauk Point on Long Island and Watch Hill on the Rhode Island mainland—would form part of a juridical bay that also encompasses the whole of Long Island Sound, but rejecting the inland water claim for the balance of Block Island Sound. See Chart 3, *infra*; Report 60-61. The Master first found that no historic inland water title for any part of Block Island Sound had been established. Report 8-19. Following the Court’s

³ As an aid to the Court, we have appended three charts to this brief to illustrate the positions of the parties and the Special Master’s recommended resolution. These simplified charts are traced from the eastern portion of Report App. B.

teaching, the Master then turned to applying the rules of the international Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, to determine if the Sound (or some portion of it) constituted a juridical bay, the closing line of which would be the "coastline" from which the three-mile submerged lands grant to the States is measured. Report 5-6, 20-21. It was quickly determined that no such bay satisfying the criteria of Article 7 of the Convention existed unless Long Island could be considered part of the mainland, but that if Long Island were so viewed, a juridical bay is present. Report 24-30, 47-49. Thus, in the Master's view (as in ours), the outcome turns entirely upon whether Long Island is or is not treated as an extension of the mainland mass—a peninsula—rather than a true island.

In addressing this critical question, the Special Master canvassed the precedents—primarily this Court's decision in the *Louisiana Boundary Case*, 394 U.S. 11 (1969), and the further proceedings in that case before a Special Master and the Court. Report 30-37. Turning to Long Island, the Master noted that the channel separating the formation from the mainland is a tidal strait, rather than a river, that it has a minimum depth of 35 feet, and that it is much utilized by commercial shipping carrying significant volumes of cargo. Report 39-43. But he concluded that the geographic facts were outweighed by evidence of geological, social and economic ties between the island and the mainland. Report 44-47. Specifically, the Master noticed the number of connecting bridges and tunnels (Report 45) and the "bay-like appearance" of the waters north of the

island, which, he observed, are "used as one would expect a bay to be used." Report 46.

Having concluded that Long Island should be deemed an extension of the mainland forming a juridical bay, the only remaining question was where to draw the closing line on the east. On this point, the Master rejected the States' proposal for a line that stretches from the tip of Long Island to Block Island and thence to Point Judith so as to enclose the whole of Block Island Sound (as well as Long Island Sound), and adopted the line conditionally proposed by the United States (on the assumption that Long Island is an extension of the mainland) from Montauk Point to Watch Hill.

We understand that Rhode Island and New York are filing Exceptions to other conclusions of the Report. But, for our part, we quarrel only with the Special Master's recommendation that Long Island be deemed a part of the mainland and the consequences that necessarily flow from that ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue presented by our Exception is whether Long Island ought to be deemed an extension of the mainland—treated as a peninsula rather than an island—for the purpose of fixing the "coastline" of the United States. The resolution of that question affects the boundary between federal and State submerged lands. If, as the Special Master concluded, the answer is "Yes," the consequence is that all of the water area between Long Island and the mainland coast to the north (including the whole of Long Island Sound and part of Block Island Sound) qualifies as a juridical bay, so that New York and Rhode Island own the bed and banks of these inland waters and,

additionally, are entitled to a 3-mile belt of submerged lands east of the line closing that bay (drawn between Montauk Point at the eastern tip of Long Island and Watch Hill Point on the Rhode Island coast). See Chart 3, *infra*. On the other hand, if, as we maintain, Long Island is considered an island, it cannot form a juridical bay, the States' inland waters are substantially less, and the baseline from which their submerged land grant should be measured is nearer shore. See Chart 1, *infra*.

But, more important than the acreage at stake in this case, are the principle involved and the precedent created. Besides the States of the Atlantic coast, presumably watching the outcome of this case (see note 1, *supra*), other affected States may well include Alaska, Hawaii, Washington and Oregon, as well as Mississippi and Alabama, where a similar question arises on the Report of the Special Master just filed with the Court (No. 9, Orig.). Nor are we only concerned about the domestic consequences. In light of the decision two decades ago to adopt the rules of the Convention on the Territorial Sea to resolve coastline questions under the Submerged Lands Act (*United States v. California*, 381 U.S. 139 (1965)), a ruling by this Court on the issue presented here constitutes an interpretation of that Convention with international implications.

A.

The Court has made clear that, in very special circumstances, formations that are technically islands or low-tide elevations should be assimilated as part of the mainland for the purposes of coastline delimitation. But, in practice, the Court has treated islands as mainland extensions only in the unique

situation of the Louisiana delta where the land is typically cut through by shallow waterways that create a jig-saw puzzle effect, or when an insular formation, separated from the mainland by a few feet of shallow water, merely extends the land a short distance in the same direction. And, equally important, the Court has rejected claims of island assimilation that, as a matter of geography, were much stronger than the case of Long Island. Unless some special factor justifies it, we cannot reconcile prior rulings with a holding that Long Island must be considered a part of the mainland rather than the island it appears to be. And, of course, the Equal Footing Doctrine prohibits disparate treatment of the States on this score.

B.

Current social and economic ties between Long Island and the mainland—much less a prehistoric land connection—cannot overcome the geographical separation of the island. As the Court itself has noted, the controlling international Convention—with only rare and inapplicable exceptions—seeks to lay down clear and uniform rules for coastline determination that a navigator can apply by reference to his charts. That straightforward approach is defeated if the insular status of an island is to be made to depend on geological history or such variables as how many bridges connect it to the mainland and how many commuters pass over them. This Court's decree confirming the island character of the Florida Keys is a close precedent that should be followed here.

C.

Finally, we address the Special Master's emphasis on the "bay-like" appearance and usage of the waters sheltered by Long Island as especially relevant to the question whether the Island should be deemed a part of the mainland. This, it seems to us, is reasoning backwards—always a suspect enterprise. The Court has long settled that the inland status of waters shoreward of fringing islands that would not otherwise be deemed part of the mainland is governed solely by Article 4 of the Convention permitting the drawing of straight baselines, not by straining the rules for bays, and that a national decision to eschew straight baselines is binding on the States. Here, there is even less reason to bend the usual standard since the United States, recognizing the enclosed character of Long Island Sound, has long since claimed it as historic inland water, and that assertion inures to the benefit of the coastal States. Stretching the limits of the claim by misapplication of island assimilation principles is wholly unwarranted.

ARGUMENT**LONG ISLAND IS NOT AN EXTENSION OF THE
MAINLAND AND DOES NOT FORM A JURIDICAL
BAY**

The notion seems to have gone abroad that every island near shore is at least eligible for consideration as legally a part of the mainland if so treating it will affect the baseline from which the territorial sea (and the three-mile belt of submerged lands granted to the States) is measured. In consequence, expert evidence is now commonly submitted and elaborate arguments are advanced in support of the candidacy

of islands as mainland extensions that, twenty years ago, would not remotely have been thought qualified for such treatment. And, increasingly, Special Masters are engaged in a weighing of a growing catalog of "factors," many of them legally irrelevant, and all too often are persuaded to grant the plea for "assimilating" an island to the mainland mass. The time is overdue, we submit, for this Court to end a debate which has strayed well beyond proper bounds by re-affirming in clear terms that a geographical island is an island in the eye of the law except only in very rare and truly unusual circumstances.

A. Geographic Tests

1. In the jurisprudence of this Court, the seminal case on the point is *Louisiana v. Mississippi*, 202 U.S. 1 (1906). Invoking an Act of Admission that encompasses "all the islands within six leagues of the shore," Mississippi claimed the whole of the Louisiana Marshes at the eastern end of the St. Bernard peninsula, asserting that this area consisted of "islands" within the prescribed distance of the Mississippi coast to the north. See 202 U.S. at 20 (map), 45-46. In rejecting that claim, the Court ruled that, although "portions of [the] sea marsh [in suit] * * * might technically be called islands, because they are land entirely surrounded by water," these "hummocks of land" should not be deemed "true islands" but, rather, "integral part[s]" of the mainland "coast." *Id.* at 46.

This realistic result, almost compelled by the unique geography of southern Louisiana, was re-affirmed with respect to like portions of the same State in the *Louisiana Boundary Case*, 394 U.S. 11 (1969). As the Court there noted, "much of the Louisiana coast does not fit the usual mold. It is marshy, in-

substantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." *Id.* at 63. To date, this special Louisiana situation—not remotely like the case of Long Island—is the only one in which the Court has actually approved treatment of a formation that is technically an island as an extension of the mainland. But the Court has written more generally on the point and, most significantly, has established practical guidance by rejecting a number of island-assimilation claims.

2. What the Court has *said*, all in the *Louisiana Boundary Case*, is clear enough so far as it goes. Thus, it is firmly settled that, while one or more islands in the mouth of a mainland indentation can help define a bay by shortening the water crossing portions of the closing line (the only parts that are counted in measuring the 24 mile maximum length and the diameter for applying the semi-circle test) (394 U.S. at 54-60), a fringe of islands may not form a bay in American territory—unless those islands realistically can be considered part of the mainland (*id.* at 62-63, 67).⁴ That is because the

⁴ The most relevant passages from the *Louisiana* opinion are the following (394 U.S. at 61-63, 67-68 (footnotes omitted)):

Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimi-

governing international Convention permits a coastal nation to claim the waters behind such an island fringe only by drawing straight baselines (*id.* at 67-71), but the United States has elected not to draw such lines and that decision is binding on the States (*id.* at 72-73). The critical question, then, is which islands should be considered extensions of the mainland, rather than true islands.

The Court has written that the "common-sense approach" followed in *Louisiana v. Mississippi* "extends to coastal formations where there are only a few islands, or even a single island, as well as to those where there are many" (394 U.S. at 64). On the other hand, the Court has disclaimed any suggestion that, "under the now controlling Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast" (*id.* at 65 n.84). The only comprehensive statement of a rule has been the following (*id.* at 66 (footnote omitted)):

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the

tation of bays. But much of the Louisiana coast does not fit the usual mold. * * *

* * * * *

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines.

mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. * * * [T]he task [is one] of determining * * *—in the light of these and any other relevant criteria and any evidence [a Special Master] finds it helpful to consider—whether the islands which [the coastal state] has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the “coast” within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

On its face, this may appear a somewhat open-ended invitation to island-assimilation claims, especially when preceded by the listing of an additional “consideration” in “the origin of the islands and their resultant connection with the shore” (394 U.S. at 65 n.84), and followed by a caveat to the effect that the enumeration of relevant factors “is intended to be illustrative rather than exhaustive” (*id.* at 66 n.86). As we have noted, the temptation to stretch such a seemingly pliable standard has not been missed. But what has been largely ignored is the Court’s actual practice in applying its test. Only when we notice the many island assimilation questions that have been resolved in the negative, can we appreciate that the Court has in fact followed a very rigorous standard—which, of course, should govern all coastal States alike.

3. The first significant ruling is that involving the chain of the Isles Dernieres, claimed to form Caillou Bay off the Louisiana coast. See Report App. E. Although the nearest of those islands was less than one-third of a mile from the mainland, Louisiana did not

originally contend that it was "so closely aligned with the mainland as to be deemed a part of it" and the Court expressly agreed that none of the islands would qualify. 394 U.S. at 67 n.88; see also *id.* at 66 n.87. Nor did the matter rest there. Before the Special Master, Louisiana changed its stance, arguing for treating the Isles Dernieres as a peninsula, and the Master indicated that he would allow the claim but for the Court's prior ruling. Report of the Special Master of July 31, 1974, at 50-51. The State pressed the matter on Exceptions (Brief for the State of Louisiana filed November, 1974, at 146-150, App. I 285-308), but the Court again rejected the plea. 420 U.S. 529, 530 (1975).⁵

The Court likewise treated as true islands similar island fringes shielding the entrances of Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay. See 394 U.S. at 50 n.65, 52, 53 n.71, 58-59 n.79, 66-67, 67 n.88.⁶ Yet, in most of these cases, the

⁵ The Special Master in the present case adverts to the precedent of Caillou Bay. Report 31-32 and n.22, 36. He draws a wholly different lesson, however: that true islands not part of a deltaic formation are eligible for assimilation as part of the mainland. *Id.* at 32 n.22, 36. Even accepting that point, we believe the most obvious message to be derived from the Court's *rejection* of the Isles Dernieres as mainland extensions is that islands off the coast, separated by a distinct, although narrow, navigation channel, are *not* to be treated as part of the land mass.

⁶ Obviously enough, the question how to draw a bay closing line when "islands" are situated at the mouth of the indentation does not arise if the formations are properly deemed part of the mainland. So, also, extensions of the mainland cannot be treated as water for semicircle measurement purposes. See Article 7(3) of the Territorial Sea Convention, reproduced at Report 20. It follows that the Court considered the islands in these fringes as true islands.

formation nearest shore was separated from the mainland by a very shallow and narrow water area—in the last three instances, “channels” less than 300 feet wide and one foot deep.

The same ruling later eventuated in respect of some eight other claims by Louisiana that islands or low-tide elevations should be deemed part of the mainland, which the Court initially referred to its Special Master. See 394 U.S. at 60, 66.⁷ Among these were

⁷ In most instances, Louisiana asserted its claim before the Court in 1968, then before the Special Master, and again by way of Exceptions in the Court at the 1974 Term. The islands or low tide elevations in question were: a mudlump off North Pass, to form the southern headland of Isle Au Breton Bay (1968 La. Br. 172-175); three mudlumps off North Pass, to form the southeast headland of Bucket Bend Bay (1974 Report 36-37; 1974 La. Br. App. I 254-260; 1975 U.S. Reply Br. 45); a mudlump off Pass a Loutre, to form the north headland of Blind Bay (1968 La. Br. 179-180; 1968 U.S. Br. 119-120; 1974 Report 38-40; 1974 La. Br. App. I 260-264; 1975 U.S. Reply Br. 44-45); three mudlumps off Southeast Pass, to form the southern headland of Blind Bay (1968 La. Br. 180; 1968 U.S. Br. 119-120; 1974 Report 38-40; 1974 La. Br. App. I 264-271; 1975 U.S. Reply Br. 44-45); the same mudlumps, to form the eastern headland of Garden Island Bay/Redfish Bay (1968 La. Br. 181; 1968 U.S. Br. 116-118; 1974 Report 40-42; 1974 La. Br. App. I 264-271; 1975 U.S. Reply Br. 43-44); East Timbalier Island, to form the eastern headland of Timbalier Bay/Terrebonne Bay/Lake Pelto Complex (1968 La. Br. 288; 1968 U.S. Br. 91-97; Report 48-49); Whiskey Island, to form the western headland of the same Complex (1968 La. Br. 288; 1968 U.S. Br. 91-97; Report 48-49); low tide elevations west of Point au Fer, to form the eastern headland of Atchafalaya Bay (1968 La. Br. 305; 1968 U.S. Br. 66-70; Report 52-53; 1974 La. Br. 140; *id.* App. I 308-310; 1975 U.S. Reply Br. 42-43); the Shell Keys, to form the western headland of Atchafalaya Bay and the eastern headland of “Outer

a number of instances in which the water gap between mainland and insular formation was only a few hundred feet wide and one to four feet deep.³ And, significantly, several of the islands claimed as part of the mainland were so-called “mudlumps,” islets formed of soil that had only recently become detached from the mainland mass. See note 7, *supra*, and Point B, *infra*.

4. The upshot of the *Louisiana Boundary Case* was that no claim of island assimilation was approved by the Court—except only the few very obvious cases accepted *sua sponte* by the United States. These were almost exclusively situations (like that of the Louisiana Marshes at issue in *Louisiana v. Mississippi*) in which the land was so riddled with shallow waterways that no “mainland” would be encountered for several dozen miles inland if every technical island were so treated. See 394 U.S. at 63. The only other instances were where the island formation was separated from the mainland by less than fifty feet of wading depth water and the consequence of assimilating the island was merely to extend an existing head-

Vermillion Bay” (1968 La. Br. 305; 1968 U.S. Br. 57-70; 1974 Report 52-53; 1974 La. Br. App. I 217, 310-311; 1975 U.S. Reply Br. 41-42.

³ *E.g.*, the nearest of the mudlumps off North Pass suggested by Louisiana as a headland for Bucket Bend Bay was less than 600 feet from the mainland and the intervening waters are no more than one foot deep (see 1974 La. Br. App. I 254-260); and the nearest mudlump claimed as the southern headland of Blind Bay was separated from the mainland by a shallow channel four feet deep at most and some 1600 feet wide (1974 La. Br. App. I 264-271).

land a relatively small distance seaward.⁹ Long Island does not remotely fit that mold.

Long Island, it must be stressed, is some 100 miles long, with a shoreline of more than 450 miles, all but a dozen miles of which are obviously "isolated" by very substantial waters from the mainland. See Report App. B. It is in no sense "nestled" in the land mass, like an interlocking piece in a jigsaw puzzle. Even at its western end, Long Island is separated by a tidal strait—mislabelled the East "River." Where the Island is closest to the mainland proper (at Throg's Neck), that channel is more than two-thirds of a mile wide; it has a minimum depth of 35 feet; and it supports a great volume of commercial navigation. See Report 39-43, 68. Moreover, to treat Long Island as part of the mainland would not merely extend it a little, but would grossly distort the coastline.

Unless some special factor takes Long Island out of the pattern, it is not possible to reconcile the result in Louisiana—most notably, the rejection of the Isles Dernieres as forming Caillou Bay—with a holding that Long Island is a part of the mainland and thus may create a bay. Indeed, in the *Louisiana Boundary Case* itself the Court expressly adverted to Long Island as a true "insular formation" that could not properly form a juridical bay. 394 U.S. at 72 n.95. Here, as elsewhere, the Equal Footing Doctrine forbids treating some states more generously than others. See *United States v. Texas*, 339 U.S. 707, 717-718 (1950); *United States v. Maine*, 420 U.S.

⁹ See, e.g., the islet at the tip of the northern headland of Redfish Bay, separated from the mainland by a water gap less than one foot deep and 30 feet wide, pictured at 1968 U.S. Br. 117.

515, 523, 527-528 (1975). See also, *Louisiana Boundary Case*, 394 U.S. at 33-35.

B. Socio-economic Ties

Apparently recognizing that Long Island would not qualify as an extension of the mainland if only geographical tests were applied, the States and the Special Master stressed a prehistoric geological connection and present social and economic ties between the island and the continental land mass. Report 44-47. That is, we submit, an impermissible approach, at odds with the method adopted by the Convention and approved by this Court.

The irrelevance of a "land bridge" connecting Long Island and the mainland some 25,000 years ago needs little comment. As we have noted (pages 12, 15, *supra*), notwithstanding the statement that the "origin" of islands is "one consideration," the Court in the *Louisiana Boundary Case* in fact rejected every claim advanced by the States that "mudlumps" quite recently emerged out of inland soil should be assimilated to the mainland. Obviously enough, a prehistoric connection is of even more doubtful relevance in determining whether an island ought to be treated as part of the land mass today. After all, it is probably a fact that at some distant time, before the glaciers melted, water did not "isolate" most of our present offshore islands—no doubt including the Florida Keys. See page 19, *infra*.

The argument is no better for taking into account current social and economic ties between an island and the mainland. Quite naturally, the question has arisen from time to time whether islands ought to be treated differently depending upon whether they were habitable, or actually populated, or otherwise associ-

ated with the mainland. But it is perfectly clear that those who drafted the Geneva Convention on the Territorial Sea quite deliberately put aside such distinctions. See D. Bowett, *The Legal Regime of Islands in International Law* 7-9 (1979). Clarity, simplicity, and uniformity were obviously served by disregarding variable and debatable data of this kind. Cf. *United States v. California*, 381 U.S. 139, 165, 167, 177 (1965); *Louisiana Boundary Case*, 394 U.S. at 34. And, perhaps most important, there was a special virtue in limiting the factors that define the coastline to those that appear on typical nautical charts. A foreign navigator ought to be able to gauge from the chart alone which formations are islands and which waters are inland—except only where there is a notorious claim to historic waters.¹⁰

This Court has been entirely consistent on this score—rebuffing both the United States and the affected State when either sought to introduce non-geographic ingredients to coastline delimitations. On the one hand, efforts to distinguish between land extensions that result directly or indirectly from artificial causes have been rejected. *United States v. California*, 381 U.S. at 177; *Louisiana Boundary Case*, 394 U.S. at 41 n.48. See, also, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982). As the Court put it most emphatically in the *Louisiana Boundary Case*, *supra*: “[W]e

¹⁰ Under Article 3 of the Territorial Sea Convention, “the normal baseline for measuring the breadth of the territorial sea is the low-water along the coast as marked on large-scale charts officially recognized by the coastal state.” Exceptions are provided for by Article 4 (straight baselines) and Article 7 (bays). Straight baselines are required to be marked on charts (Article 4(6)), but the closing lines of bays are not.

[cannot] accept the United States' argument that a 'mere spoil bank' should not be deemed part of the coast because it is not 'purposeful or useful' and is likely to be 'short-lived.' It suffices to say that the Convention contains no such criteria." 394 U.S. at 41 n.48.

Of course, the converse is equally true: a geographical feature does not gain additional or different status because it is of unusual social and economic importance, or because it is "demographically" tied to the mainland. Thus, an island does not cease to be an island because its "isolation" is tempered by a bridge that creates an easy and much travelled connection to the mainland. The case of the Florida Keys amply proves the point. Despite the connecting highway, the ultimate ruling there was that the Keys must be treated as true islands, separate from each other and separate from the mainland, with the consequence that the area claimed as "Florida Bay" could not qualify as a bay. See *United States v. Florida*, 420 U.S. 531, 533 (1975); 425 U.S. 791, 793 (1976).¹¹ There is no better ground for breaking the usual rules in the case of Long Island on account of its ties to the mainland.¹²

¹¹ See, also, *United States v. California*, 447 U.S. 1 (1980), in which the Court rejected the State's claim that its coastline was extended by a number of open-work piers and an artificial island connected to land by such a pier. In the latter case, the artificial island would have qualified if the bridge to the mainland had been viewed as equivalent to a landfill connection. See *Louisiana Boundary Case*, 394 U.S. at 41 n.48, discussing the spoil bank at Pass Tante Phine.

¹² The Special Master leaves the impression that in the *Louisiana* case the United States argued that the Florida Keys should be considered a part of the mainland. Report 39 n.29. To be sure, as this Court observed in the cited footnote, we then distinguished the case of the Florida Keys because of the

C. Bay-like Appearances

Unsurprisingly, the Special Master did not rest his finding that Long Island was juridically a part of the mainland on geographical tests or on socio-economic ties and bridge connections. Instead, he was critically influenced by the "bay-like appearance" and usage of the waters sheltered by Long Island and apparently believed a little straining was justified to vindicate the existence of such a juridical bay, possible only if Long Island were treated as an extension of the mainland. In the Master's own words, "[t]wo factors [were] of utmost importance [in reaching the] conclusion [that Long Island can be treated as part of the mainland]" (Report 46-47 (footnote omitted)) :

Long Island's geographic alignment with the coast is the first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay. Second, the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound. Ships bound

connecting highway. But, even in 1968, we were careful to add that "in pointing out this distinction we do not necessarily agree that even that circumstance justifies [Dr. Pearcy's] use of the keys [as forming the side of a bay]." 1968 U.S. Reply Br. 33. At all events, it is perfectly clear that when the issue of the Keys and Florida Bay reached the Court, the United States insisted that the Keys should be treated as true islands and not as part of the mainland.

for ports not in the enclosed area navigate outside of Long Island and Block Island as they pass up and down the United States coast. Long Island Sound is not a route of international passage; ships merely pass into and out of it as one would expect ships to pass into and out of a bay.

Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland.

This is a wholly impermissible approach. Whether an island—contrary to normal rules—should be assimilated to the mainland cannot turn on, or be influenced by, the effect accepting such a fiction will have on creating a juridical bay. Nothing in this Court's precedents remotely condones such a result-oriented technique of decision. Indeed, the Court's ruling with respect to the area claimed as "Caillou Bay" in the *Louisiana Boundary Case* impliedly rejects the method followed here. Nor does the Convention on the Territorial Sea permit this kind of stretching to fashion a bay. On the contrary, Article 4 of the Convention offers every coastal nation a straightforward way of claiming as inland waters sheltered by islands quite independently of juridical bay criteria. See *Louisiana Boundary Case*, 394 U.S. at 66-71. The fact that the United States has chosen not to adopt such a straight-baseline system is no reason for bending the rules governing bays by treating an island as a peninsula. *Id.* at 72-73.

In no event is it proper to deny the insular character of a true island simply to legitimize a "bay-like" water body. But, in this instance, the irony is that even this pretext is absent. Indeed, the United States has long claimed most of the waters behind Long Island—Long Island Sound strictly speaking—

as historic inland waters. This claim, of course, inures to the benefit of the coastal States. And it explains why the area in question is, as the Special Master found (Report 46), "used as one would expect [an inland] bay to be used." But, of course, the existence of an historic bay encompassing most of the waters in question is no justification for expanding that bay by fictitiously treating an island as an extension of the mainland.

Although history is irrelevant, one is tempted to wonder how, in August 1776, General Washington would have answered the question whether Long Island is a true island after he had crossed the East River and temporarily escaped from a superior British force, winning a respite that may have saved the Revolution. See 1 S. Morison & H. Commager, *The Growth of the American Republic* 206 (1962). We may perhaps let others present speak for him. Before the successful evacuation, John Adams worried about putting such a large part of the new nation's forces on Long Island, "from which retreat was virtually impossible." 1 P. Smith, *John Adams* 299 (1963). Washington's own subordinates described the plight of the Americans as being encircled "from water to water" by an overwhelming enemy with almost "perfect command of the island," and being confronted with the "most formidable obstacles" to evacuating "a body of troops, with all their necessary appendages, across a river a full mile wide, with a rapid current." *The Spirit of Seventy-Six* 444 (Brig. Gen. Scott), 445 (Col. Tallmadge) (H. Commager & R. Morris eds. 1967). When the operation nevertheless succeeded, a British commander was indignant,

picturing "twenty-two thousand men, stand[ing] on the banks of the East River, like Moses on Mount Pisgah, looking at their promised land, little more than half a mile distant, [where] [t]he rebel's standards waved insolently in the air." *Id.* at 448 (Comdr. Collier).¹³

No different reply would have been likely from those who, a century later, accomplished the notable feat of connecting Long Island to Manhattan by "spanning the fierce tides of the East River" with the Brooklyn Bridge, then "the longest suspension bridge on earth." See Morris, "A Century Old, the Wonderful Brooklyn Bridge," 163 *Nat'l Geographic* 565 (May 1983). The elapse of another hundred years and the building of several more bridges have not changed the common perception that Long Island is indeed an island. In this, at least, the law can safely accept what laymen have always known.

¹³ In his *Oxford History of the American People* 240 (1965), Admiral Morison has likened Washington's "skillful retirement" from Long Island to that of the British from Dunkerque in 1940, where another water channel "saved an army from annihilation and allowed the war to continue." Other accounts of the Battle of Long Island, illustrated by sketch maps, may be found in 1 R. Leckie, *The Wars of America* 142-146 (1968); and *Encyclopedia of American History* 108-109 (Morris ed. 1976).

CONCLUSION

The Report of the Special Master should be disapproved insofar as it recommends that Long Island be treated as a part of the mainland and, accordingly, that all the waters north of that island be found to constitute a juridical bay closed by a line between Montauk Point on Long Island and Watch Hill Point on the Rhode Island coast. Instead, the United States urges the Court to fix the seaward limit of inland waters in this area (the baseline for measuring the three-mile grant to the States under the Submerged Lands Act) at the series of lines (from Orient Point on Long Island, to Plum Island, to Fishers Island, to Napatree Point, Rhode Island) that define the historic waters of Long Island Sound. In all other respects, the recommendations of the Special Master should be approved.

Respectfully submitted.

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MAY 1984

