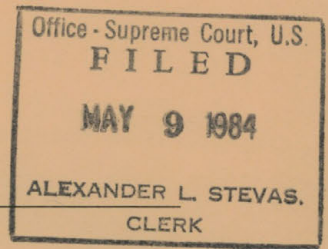


No. 35, Original.



**In the
Supreme Court of the United States.**

OCTOBER TERM, 1983.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

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

Exceptions and Brief of the State of Rhode Island.

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Introduction.

This brief is submitted on behalf of the State of Rhode Island. As the introduction to the January 13, 1984, Report of the Special Master details, the issue before the Court is the location of the legal coastline of the United States, the State of Rhode Island and the State of New York at the eastern end of Long Island Sound and Block Island Sound. The Court's resolution of this issue turns on whether or not Long Island Sound and Block Island Sound form a bay under the terms of the Convention on the Territorial Sea and the Contiguous Zone, and if a bay is formed, the proper closing lines of that bay.

As Rhode Island's exceptions to the Master's Report demonstrate, the area of disagreement with the Report is narrow, but critical. Rhode Island agrees that an historic claim to the waters of Block Island Sound was not established. Further, the Master's conclusions that Long Island can be treated as part of the mainland under Article 7 of the Convention and that Long Island Sound and Block Island Sound form a well-marked indentation satisfying the semi-circle test of Article 7 are in accord with Rhode Island's view of this proceeding. It is to the way in which the Master proposes to close the bay that Rhode Island takes exception.

This brief is directed only to Rhode Island's view of the correct method to close the juridical bay formed by Long Island and Block Island Sounds.

Exceptions.

The State of Rhode Island excepts to the following findings and conclusions in the Master's Report:

1. Watch Hill Point is the first prominent point when heading west along the otherwise featureless Rhode Island coast (Report, p. 53).
2. The Special Master attaches no weight to the test White developed for determining when a body of water is landlocked, or White's conclusions (Report, p. 56, n.42).
3. The closing line for the bay is a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island (Report, pp. 59, 60, 61).
4. Watch Hill Point is the first prominent point on the Rhode Island coast and it also marks the separation between the waters within the indentation and the waters outside the indentation (Report, p. 59).

5. Watch Hill Point is the logical natural entrance point on the north side of the indentation (Report, p. 59).

6. The waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while waters east of this line are not landlocked (Report, p. 59).

7. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea (Report, p. 59).

8. There is no perception that these waters are part of the land rather than open sea (Report, p. 59).

9. The Point Judith harborworks and Point Judith are not appropriate headlands of a bay because they do not mark the entrance to the indentation but are located outside the indentation (Report, p. 59, n.45).

10. A closing line drawn to Point Judith or the Point Judith harborworks would enclose waters that are not landlocked (Report, p. 59, n.45).

11. Block Island cannot be included in the closing line (Report, p. 60).

12. If the closing line included Block Island, there would be waters inside the closing line which are not landlocked (Report, p. 60).

13. The natural entrance or mouth to the indentation is along the Montauk Point to Watch Hill Point line, and Block Island does not form the mouth to the bay or cause the bay to have multiple mouths.

14. Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island.

15. The legal coastline (or baseline) in the disputed area is the ordinary low water line from Point Judith along the mainland to Watch Hill Point, then a straight closing line south to Montauk Point on Long Island. The legal coastline of Block

Island is the ordinary low water line around Block Island. The territorial waters of the United States are measured from this baseline (Report, p. 61).

Standard for Decision.

As an original jurisdiction proceeding under Article III, this Court is the sole tribunal to which the United States, Rhode Island and New York may come for resolution of the issues presented. The Special Master, as is the practice, has filed his report containing findings, conclusions and recommendations with the Court. The question remains as to what weight, if any, the Master's Report should be accorded by the Court.

Rhode Island submits that the ultimate decision on the *facts* as well as the law must rest with the Court. The "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure has no place in an original proceeding for reasons beyond the fact that the Federal Rules of Civil Procedure only apply to district courts. Rule 1. Original actions are delicate matters which the Constitution sought to resolve at the highest level. Such a resolution gives finality and acceptability to the result. Further, where the Master's Report is based upon a review of the documents, including charts, and the testimony of expert witnesses or uncontradicted lay witnesses, the Court may find facts on a cold record without the difficult problem of weighing credibility.

Indeed, in *Mississippi v. Arkansas*, 415 U.S. 289 (1974), the Court, in reviewing the Master's Report in a boundary dispute proceeding, approved the Report only after noting its "complete agreement and accord" with the Master's evaluation of the evidence. *Id.* at 291. Further, the Court noted that its decision was "upon our own consideration and our independent

review of the entire record.” *Id.* at 296. The dissent outlined a similar standard as well as the history of the standard for decision in original cases. *Id.* at 296-97, 296 n.1 (Douglas, J., dissenting).

In *Mississippi v. Arkansas*, *supra*, had a majority of the Court merely disagreed with the Master’s evaluation of the maps and other documents or the Master’s appraisal or understanding of the expert testimony, reversal would have been the only appropriate remedy. Thus, while the findings of the Special Master are of course entitled to respect they have not heretofore been entitled to deference. *Id.* at 297.

The instant Report provides further cause for the Court to examine the record and independently evaluate the evidence. In that portion of the Report which discusses the appropriate bay closing line, the Master makes conclusory statements without identifying the relevant underlying facts supporting the conclusion. For example, the Master summarily rejects Rhode Island’s objective test to determine whether or not a body of water is landlocked (Report, p. 56, n.42). Additionally, the Master summarily rejects Point Judith as an appropriate headland (Report, p. 59, n.45). Such findings would be clearly useless were these appellate proceedings. *E.g.*, *Dalehite v. United States*, 346 U.S. 15 (1953). Indeed, the statement of underlying reasons by a decisionmaker is among the essentials of due process and fair treatment. *Kent v. United States*, 383 U.S. 541 (1966). In this original proceeding, the unsupported conclusions in the Report should give the Court cause to determine how the juridical bay formed by Block Island Sound and Long Island Sound should be closed under the applicable law and the evidentiary record.

Argument.

I. UNDER THE MOST CONSERVATIVE READING OF ARTICLE 7, THE MONTAUK POINT TO WATCH HILL POINT CLOSING LINE IS INCORRECT.

The complete text of Article 7 of the Convention is set forth in Appendix A. That Article together with its history and the Court's decision in *United States v. Louisiana*, 394 U.S. 11 (1969) provide the framework by which bay closing lines may be divined.¹

The closing line of a bay is drawn between the "natural entrance points" of the indentation. The parties agree that Montauk Point is one of the natural entrance points to the bay formed by Long Island Sound and Block Island Sound. Leaving aside the issue of whether a closing line may be drawn to Block Island, Watch Hill Point cannot be selected as the other natural entrance point.

The term "natural entrance point" is left undefined by the Convention. The Master's Report accurately sets out the manner in which commentators and geographers have sought to define the term, both subjectively and objectively (Report, p. 50, n.39).

¹ Under the terms of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, the United States relinquished to the coastal States all of its rights in submerged lands extending three nautical miles seaward from the State's coastline. The Act was passed in response to the Court's decisions in *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707 (1950); and *United States v. Louisiana*, 339 U.S. 699 (1950) holding that the States did not own the submerged lands off their coasts. The term "coastline" was defined as "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 Court's 1965 decision in *United States v. California*, 381 U.S. 139 (1965), held that Congress had left the task of defining "inland waters" to the Court. The Court adopted the provisions of the Convention.

By using the forty-five degree test together with the Article 7(5) notion that, given several entrance points which meet the subjective or objective tests, a closing line should be drawn to enclose the maximum area of water,² a point in the vicinity of Quonochontaug Pond, Rhode Island, *east* of Watch Hill Point, would be the appropriate headland. That point satisfies the forty-five degree test, and the line is less than twenty-four miles in length. (Testimony of White on cross-examination by the United States, November 13, 1981, pp. C 51-52; R.I. Ex. 1 (c)). Indeed, Watch Hill Point and Napatree Point also satisfy the same criteria. Their infirmity lies in their location — to the west of Quonochontaug. Napatree Point marks the beginning of the scalloped Rhode Island coastline which proceeds east to its most prominent promontory, Point Judith. At best, the selection of Watch Hill Point as an entrance point by the Master was a compromise.

II. LONG ISLAND SOUND AND BLOCK ISLAND SOUND ARE PROPERLY CLOSED BY A LINE BETWEEN MONTAUK POINT AND LEWIS POINT ON BLOCK ISLAND AND A LINE BETWEEN SANDY POINT ON BLOCK ISLAND AND POINT JUDITH.

Block Island lies at the opening of the long and deep indentation formed by Long Island Sound and Block Island Sound. Block Island lies seaward of a line between Montauk Point and Point Judith yet it influences Block Island Sound in a number of significant ways. First, coastal traffic coming from Montauk Point en route to Narragansett Bay or Buzzards Bay and the Cape Cod Canal routinely pass *outside* of Block Island.

² Commentators have suggested that the policy of Article 7(3) supports a policy of enclosing the maximum area of inland waters in closing bays. Shalowitz, *Shore and Sea Boundaries*, 218-225 (1962); Percy, *Measurement of U.S. Territorial Sea*, 40 Dept. State Bull. 963, 966 fig. 4 (1959); cited with apparent approval, 394 U.S. at 57 n.78.

The reverse is also true. (Testimony of Neary, November 13, 1981, pp. C 88-92). Second, commercial vessels rarely pass between Montauk Point and Block Island. The breaking swell, rocks and other obstructions render the area hazardous. (Neary, November 13, 1981, pp. C 92-95). Third, Block Island, alone, and together with Montauk Point and Point Judith provides shelter in rough weather and cuts down on the swell. (Neary, testimony of November 13, 1981, pp. C 108-109, 118-122); *Warner v. Replinger*, 397 F.Supp. 350 (D.R.I. 1975). Fourth, the salinity of the water in Block Island Sound is less than that of sea water and is influenced by runoff on the mainland. (Swanson, November 11, 1981, pp. 3-107-108, 3-116-118). Fifth, Block Island has an effect upon the velocity and timing of the currents of Block Island Sound. (Swanson, November 11, 1981, pp. 3-127-129). In concert, these factors link Block Island to the indentation rather than to the open sea, and cause the indentation to have more than one mouth.

If a bay closing line is to be drawn to Block Island, the waters landward of that line must be landlocked by virtue of Article 7. That term is left undefined by the Convention, and commentators prior to this litigation had developed only subjective definitions.³ Indeed, two commentators have noted an apparent conflict within Article 7. They state:

In nature, bays may have all types of shapes, except those which are truly geometric (nature is said to abhor straight lines). For the sake of discussion, however, the shapes may be compared to semi-circles, triangles, squares, rectangles, etc. Most bays fall into the first two categories. In the case of semi-circles, it has been noted that this shape represents an absolute minimum condition.

³ The Master's Report accurately reflects the comments of various treatises. (Report, p. 51-52, n.40).

In fact, we do not believe that a true semi-circular bay would contain land-locked waters.

Hodgson and Alexander, Towards An Objective Analysis of Special Circumstances, Occasional Paper No. 13, University of Rhode Island (1972), p. 8 (U.S. Exhibit No. 40) (emphasis added).

This Court has previously considered the problem presented by the Article 7(3) reference to multiple mouths "because of the presence of islands."

In the context of an island intersected by a mainland-to-mainland closing line the Court wrote:

Just as the 'presence of islands at the mouth of an indentation tends to link it more closely to the mainland,' so also do the islands tend to separate the waters within from those without the entrances to the bay. Even waters which would be considered within the bay and therefore 'land-locked' in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands. It would be anomalous indeed to say that waters are part of a bay even though they lie outside its natural entrance points.

United States v. Louisiana, 394 U.S. at 58.

The court also considered, without deciding, the relevant factors to be considered when an island lies wholly *landward* of a closing line.

By inference, the quotation above supports drawing a closing line to Block Island from Montauk Point and Point Judith. For a seaward island tends to link waters otherwise outside a bay to the waters within an indentation. Aaron Shalowitz, Shore

and Sea Boundaries, p. 225, n.38 (1962), cited in *Louisiana* at 57, n.78, posited drawing closing lines to seaward islands, subject to the rule of reason.

This Court has previously recognized that “there could be islands which would not, whether because of their size, shape, or relationship to the mainland, be said to create more than one mouth to the bay.” 394 U.S. at 58. That hypothesis, of course, is forever linked to whether the area behind closing lines drawn to the island(s) is landlocked. Mr. White, an expert witness presented by Rhode Island, developed an objective test to determine this point which takes into *precise* account the concerns expressed by the Court above. The test is fully explained in the transcript and is fully illustrated in the exhibits both in the abstract and with relation to Block Island, in its actual and a notional position. (White, November 11, 1981, pp. 164-166, B-1 to B-18, C-54-59. R.I. Exhibits 21, 22 1(c), 1(d), 1(e) and 1(f).) The Master’s Report adequately explains the test, yet as with any novel approach to a problem, an explanation often serves only to confuse (Report, p. 56, n.42). The geometry is simple once the principle is understood.⁴

Given the summary dismissal of Mr. White’s proposition by the Master, Rhode Island is not sure that the Master understood the proposition. The test is certainly every bit as reliable as the various objective tests used to determine natural entrance points. The waters of Block Island Sound closed by a line from Montauk Point to Lewis Point and a line from Sandy Point to Point Judith are landlocked under the White test. Their sum length is less than 24 miles.

In the absence of Block Island, Rhode Island would be without authority to draw a direct closing line from Montauk

⁴ A full understanding of the test, should it be unclear, is perhaps best left to oral argument or a further brief prompted by questions from the Court.

Point to Point Judith.⁵ Article 7(3), however, is not limited in its application to indentations which would not be bays but for the presence of an island. Once the Block Island Sound — Long Island Sound configuration is determined to constitute an indentation, and all waters behind plausible closing lines⁶ to Block Island are held landlocked either by the particular circumstances of Block Island or the White test, the selection of closing lines across those mouths are required by Article 7 just as surely as this Court held closing lines to headlands on an intersected island “not optional” in *Louisiana*. 394 U.S. at 57, n.77.

Conclusion.

The juridical bay formed by Long Island Sound and Block Island Sound is properly closed by lines drawn from Montauk Point on Long Island to Lewis Point, Block Island and Sandy

⁵ Under the Convention a line could properly be drawn to the Point Judith harborworks. Convention, Article 8.

⁶ Point Judith is certainly a plausible natural entrance point. It is one entrance point to Narragansett Bay. It is the most prominent promontory along the south coast of Rhode Island in terms of visibility, length, departure from the general direction of the coast and usefulness to the coastal navigator. Further, the line from Sandy Point to Point Judith meets the forty-five degree test.

Point, Block Island to Point Judith, Rhode Island. The territorial waters of the United States are measured from this baseline.

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Appendix A.**Juridical Bay Discussion.***Article 7.*

1. This article relates only to bays the coasts of which belong to a single state.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

