No. 120, Original

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1996

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

BRIEF FOR THE CITY OF NEW YORK, AS AMICUS CURIAE, IN SUPPORT OF THE STATE OF NEW YORK'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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INTEREST OF AMICUS CURIAE

As authorized by Rule 37.4, the City of New York (the "City") submits this brief in support of the defendant State of New York, urging that the Special Master's resolution of this case in favor of the State of New Jersey be rejected by this Court as contrary to law and without support in the record.

New York City's compelling interest in this litigation was recognized by the Special Master. Although denying the City's motion seeking formal intervenor status, he nevertheless invited it to participate as an "active amicus." See, Docket Item No. 70. The concerns prompting the City to participate in the defense of this case, to the extent permitted, are rooted in the historical record, which clearly reveals that, until the Special Master undertook to recommend its division, Ellis Island, as an entity, was always considered within the physical boundaries and under the local governmental jurisdiction of the City of New York.

The Special Master's decision effectively reverses a situation dating back to the March 12, 1664 grant to the Duke of York from his brother, King Charles II of England, of the territory which now comprises, inter alia, the states of New York and New Jersey. The Duke, in turn, almost immediately devised a tract, called "New Caesarea" or "New Jersey," to Lord Berkeley and Sir George Carteret (PE 280 at 12).[1] By 1676, Berkeley and Carteret had partitioned their holdings into West Jersey and East Jersey, respectively. Id. Two years later, Carteret devised East Jersey to certain trustees, who in turn parceled the holding to twelve proprietors. On November 23, 1683, confirming the rights of these East Jersey proprietors, Charles II described the eastern riparian limits of the territory, in pertinent part, in the same language as the original 1664 grant, i.e., as "extending eastward and

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[1] Parenthetical references prefaced by "PE" refer to numbered items on plaintiff's evidence list, followed by specific page references within those items; "DE" denotes items on defendant's evidence list; and "R" indicates a citation to the Special Master's Final Report.

northward all along the sea coast and Hudson's river," within specified northern and southern limits (id.) (emphasis added).

The province of New York, meanwhile, was not similarly limited to the eastern shore of the Hudson by the terms of any devise; it retained the river within its territorial boundaries because of the Hudson's inclusion, as an entity, within the original royal grant to the Duke (PE 280 at 11). Accordingly, as early as 1691, Chapter 17 of the Colonial Laws of New York for that year located the three Oyster Islands, one of which later became known as Ellis Island, in the City and County of New York. By the time a new Charter for the City was issued on January 15, 1730, by John Montgomerie, then governor of both New York and New Jersey, the City's limits were not only defined as including the Oyster Islands, but as extending to at least low-water mark on the opposite, or East Jersey shore (DE 824 at 137, 146-147). There is no evidence that during this pre-Revolutionary period the proprietors of East Jersey, or any other governmental authority within that territory, attempted to counter-assert jurisdiction over the Hudson River or Bay and any island, like Ellis Island, west of center.[2]

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[2] In 1721, the West Jersey proprietors, on the other hand, had sought to settle their boundary and assert rights to at least the midpoint of the Delaware by consulting with Crown counsel (PE 271 at 55) -- only to be told that (unlike the grant of the Hudson to the Duke of York) the royal grants on both sides of the Delaware ran only to the river. Hence, at that time, the Delaware River itself, and any islands in it, "remained in the crown" and were within the territorial boundaries of neither New Jersey nor Pennsylvania. Corfield v. Coryell, 6 Fed. Cases 546, 554 (4 Wash. C.C. 371) (1823); State v. Davis, 1 Dutcher 386, 387 (N.J. Sup. Ct., 1856).

After New York's emergence as a state at the conclusion of the Revolution, Ellis Island remained identified as part of the State and City of New York. In Chapter 63 of the Laws of 1788, setting up the counties of the State, New York County, which embraced New York City, still included Ellis Island. Three years later, legislation establishing wards within the City placed Ellis Island in the First Ward (L. 1791, ch. 18). By 1794, Ellis and Bedloe's Islands had been transferred by the City of New York to the State of New York, together with the soil between high-water and low-water mark surrounding Ellis Island (DE 740; 938 at 23). The grants were subject to a reverter whenever "the Premises shall no longer be used for the purposes of fortification." Id.

The 1794 cession, as well as a further cession by the State of New York to the federal government in 1800 and, finally, the State's conveyance of full title in 1808, had no effect on the status of Ellis Island as part of New York City. Even as legislation was passed in 1803, 1817, and 1825 to accommodate the need for new wards within the City, Ellis Island continued to be deemed part of the First Ward (L. 1803, ch. 29; L. 1817, ch. 285; L. 1825, ch. 195). Furthermore, Chapter 2, Title 1, sec. 2, par. 5 of the New York Revised Statutes (1829) described the County of New York as including Ellis Island, and Chapter 2, Title 5, sec. 1 described the City of New York as all of that part of the State within the bounds of the County of New York, placing Ellis Island in the City of New York.

Nor did ratification of the 1834 Compact change the situation: the description of Ellis Island in the 1829 statutes appears, unchanged, in the 1836, post-Compact version. See, Chapter 2, Title 1, § 5 and Title 5, § 1, N.Y. Rev.

Stat. (1836). Likewise, after New York State, in 1880, relinquished title and jurisdiction over the subaqueous lands surrounding Ellis Island to the United States (with the reservation that the cession of jurisdiction would continue only as long as the United States owned the Island and the adjacent subaqueous lands), Ellis Island continued to be legally part of the City of New York. See, e.g., New York Consolidation Act of 1882 (L. 1882, Ch. 410, § 1); the Greater New York [City] Charter (L. 1897, Ch. 378; L. 1901, Ch. 466, § 1). Again, that status continued despite New Jersey's 1904 transfer of subaqueous lands (without retention of any reversionary interest), even as the Island's size was increased by the filling operations undertaken by the federal government after 1890, and it remains in effect today. See, Administrative Code of the City of New York, § 2-202(1).[3]

SUMMARY OF ARGUMENT

As the State of New York has emphasized in its Exceptions to the Special Master's Report, Article Second's provision that Ellis Island, as an entity, would remain under the sovereign jurisdiction of New York effectively disposes of New Jersey's current claims to the landfilled areas based on Articles First and Third. The Report reaches the contrary conclusion, inter alia, because it ignores the contemporary meaning of the language chosen by the drafters, language which is based on concepts of sovereignty and jurisdiction current in the late 18th and

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[3] We note, in passing, that the only post-1834 attempt by a political subdivision of the State of New Jersey to claim Ellis Island for its own was the 1924 decision of a single Hudson County administrator to add both Ellis and Bedloe's Islands to the county's tax rolls as exempt property. See, State of New York's Exceptions at pp. 33, 38.

early 19th centuries. Instead of looking for guidance in construing the Compact to how the nature and legal viability of the claims which gave rise to the underlying dispute might have dictated their resolution, or to how the drafters were influenced by leading commentators, such as Vattel, whose theories are referenced in the 1807 and 1827 formal correspondence of the Commissioners, the Report begins with an abstract construct and then disregards any internal or external evidence that might not fit within this model.

When the proper analysis is undertaken, it becomes clear that the Compact incorporates Vattel's discussion of how, in sovereign states, rights of property may be separated from sovereign, or jurisdictional, powers. The rights of property which can be so separated are of the type which belong to an individual in the state, as distinct from the "high domain," which can never be separated. However, a state cannot possess the "high domain" -- or sovereign rights of property -- without also possessing the power of command, or jurisdiction. In Article Third, the drafters of the Compact gave exclusive rights of property with respect to the underwater lands west of the boundary to New Jersey, but granted to New York the crucial power of command, or "exclusive jurisdiction," over the same territory. In so doing, the drafters would have understood that they were establishing a situation in which New York held sovereign powers over the underwater lands up to the low-water mark on the Jersey shore. This is confirmed by the fact that the Compact grants New Jersey similar sovereign control, or "exclusive jurisdiction," over any improvements "to be made" on its shore, a grant which would have been unnecessary if, as the Report contends, that State already possessed sovereign power over the underwater lands west of the midpoint boundary.

Under the scheme set out in the Compact, New York also possesses sovereign rights with respect to the landfilled portions of Ellis Island, which were constructed on the very same underwater lands, and in the very same waters, over which the Compact gives that state "exclusive jurisdiction" or control. However, assuming, arguendo, that New York's power were less than sovereign in nature, i.e., assuming that it is properly characterized as the "police power" suggested by the Report, the Report still does not explain why that power should suddenly be negated by the fact that the underwater lands have been reclaimed. Moreover, even under a theory of New Jersey as sovereign, not much is left of the general sovereign power after subtracting the sweeping "police power" specifically granted to New York over the underwater lands, whether filled or in their original state.

Article First presents no obstacle to these conclusions. Far from establishing an "invariable" boundary, and hence allegedly investing New Jersey with absolute sovereign rights over the territory indicated, the Compact itself contains an "exception" clause indicating that variances will follow. The Report simply ignores this fact.

In short, interpreting the Compact in the context of the applicable principles of law as they were understood at the time of its drafting, and turning to contemporary commentators for guidance, as this Court has indicated is proper, Alabama v. Georgia, 64 U.S. (23 How.) 505, 513 (1859), compels the conclusion that the Special Master's resolution of this case in favor of New Jersey cannot stand.

ARGUMENT

PROPERLY INTERPRETED BOTH IN LIGHT OF THE CONTEMPORANEOUS LEGAL CLIMATE, AND IN LIGHT OF THE NATURE OF THE DEBATE BETWEEN THE TWO STATES REFLECTED IN THE 1807 AND 1827 CORRESPONDENCE OF THE COMMISSIONERS, THE LANGUAGE OF THE 1834 COMPACT COMPELS THE CONCLUSION THAT NEW YORK, RATHER THAN NEW JERSEY, ULTIMATELY POSSESSES SOVEREIGN POWERS OVER THOSE PORTIONS OF ELLIS ISLAND CREATED BY FILL IN THE POST-RATIFICATION YEARS.

(1)

As the City of New York reads the Special Master's Final Report (the "Report"), it upholds New Jersey's claims to sovereignty over Ellis Island on the ground that the territorial boundary set by Article First of the 1834 Compact, a boundary which is described in the Report as "unambiguous" (R31) and "unvarying" (R55), ipso facto endows New Jersey with an equally "unambiguous" and "unvarying" sovereignty over everything to the west of that line. Such an interpretation must, of course, completely ignore the qualifying phrase used by Article First with respect to the establishment of this "unambiguous" boundary: the boundary is stated to be the midpoint of the Hudson River and New York Bay, "except as hereinafter otherwise particularly mentioned." If, as the Report

maintains, sovereignty is both defined by and flows inexorably from boundary, those qualifying words can only mean that the Compact explicitly provides for situations in which, because other Articles effect a boundary change, sovereignty is similarly affected.

The Report implicitly admits that this is the case with respect to Article Second's proviso that New York "shall retain its present jurisdiction of and over" Ellis and Bedloe's Islands, as well as its "exclusive jurisdiction" over the other islands west of Article First's boundary "now under the jurisdiction of that state." This, the Report concedes, means that, under the Compact, sovereignty, i.e., what is termed in Article Second "exclusive jurisdiction," over lands geographically located within New Jersey's territorial limits was vested in New York (R60). Despite being characterized as "unvarying," the Article First boundary was thus obviously changed to that extent.

The "exclusive jurisdiction" which signifies sovereignty in Article Second reappears in Article Third, where it is granted to New York with respect to the waters and the land under water west of Article First's midpoint boundary, up to the low-water mark on the Jersey shore; and to New Jersey over the piers, wharves, and improvements annexed to its fast lands and projecting out into the same waters. In this context, however, the Report insists that the adjective "exclusive" somehow loses its primary meaning, becoming a qualifier denoting a power less than sovereign (R89). No reason is provided for this alleged change in meaning, other than the assertion that it must be so if the Article First boundary is indeed absolute and unvarying (R89). In fact, the Report recognizes that "[t]he plain and ordinary import of jurisdiction without

exception is the authority of a sovereign" (R60) (emphasis added); agrees that the "exclusive jurisdiction" referred to in the opening paragraph of Article Third "should be interpreted to convey a similar meaning in Article Second" (R60); concedes that what is referred to by the term in Article Second is sovereignty (R60); but states that "exclusive" is used as a qualifier (R89), and therefore, in Article Third, cannot indicate sovereignty (R60).

Given the primacy of the terms "boundary," "jurisdiction," "sovereignty," and "rights of property" in the Report's analysis of the Compact, the City of New York, in its role of amicus curiae, has chosen to concentrate its efforts in this brief on elucidating how the drafters of the Compact would have understood these concepts, as this can be determined from an analysis of the nature of the dispute the Compact was intended to resolve and the contemporaneous legal climate. This approach is dictated by almost two centuries of decisions by this Court indicating that where an agreement involves an interstate dispute regarding a river, the agreement "must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists [commentators] in reference to the settlement of controversies between nations and states as to their ownership and jurisdiction on the soil of rivers...." Alabama v. Georgia, 64 U.S. (23 How.) 505, 513 (1859). Cf., Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 722 (1838); Massachusetts v. New York, 271 U.S. 65, 87 (1926). In other words, although we agree with the State of New York's persuasive argument that the doctrine of laches, as well as principles of prescription and

acquiescence, demand rejection of the Special Master's conclusions, it is our position that these issues need not be reached if the Compact is properly interpreted as a matter of law.

(2)

In discussing the 1834 Compact in context, it is important to note that during the immediate post-Revolutionary period, many former colonies, now States, were attempting to settle border disputes by means of compacts or treaties. In 1783, New Jersey itself entered into just such an agreement with Pennsylvania concerning the Delaware. Because, as noted in footnote 2, supra, the Delaware river and bay, unlike the Hudson, had remained in the Crown, "ungranted to any of the colonies," these bodies of water "became vested in the adjoining states at the declaration of independence, so that the boundary of each extended to the middle." State v. Davis, supra, 386 Dutcher at 387. By the 1783 compact, the two states agreed, inter alia, to the exercise of "concurrent jurisdiction" over the water itself, but not over the lands under water on their respective sides of the boundary. Id. Since boundary was not an issue, retention by each state of exclusive jurisdiction over its underwater lands must here have been the operative indicia of sovereignty -- and this exclusive jurisdiction, of course, is what New York retained over the underwater lands specified in Article Third.

This point is underlined by reference to Vattel's The Law of Nations, a contemporary legal treatise cited by the Commissioners from New Jersey at various points during both the 1807 and the 1827 negotiations, see, e.g., PE 271 at 20, 44, and relied upon by this Court at least as early as 1820. See, e.g., Handley's Lessee v. Anthony, 18 U.S. (5

Wheat.) 374, 379-80 (1820). Vattel defines sovereignty as political authority, or the right of a nation to govern its own body. Law of Nations, Bk. I, c.1, §§ 2, 5 (J. Chitty, ed.)(7th Am. Ed., 1849). Sovereignty also encompasses "empire," or the right of "command" and regulation in all places of the country belonging to the nation. Id. at c.20, § 245. "Empire," in turn, is synonymous with the term "jurisdiction," and each nation "naturally possesses it over the whole or part of which it possesses the 'domain.'" Id. at c.22, § 278.

According to Vattel, "the empire and the domain or property, are not inseparable in their own nature, even in a sovereign state." Id. at 295 (emphasis in original). In language immediately following this statement which equates sovereignty with empire and jurisdiction, Vattel writes: "As a nation may possess the domain or property of a tract of land or sea, without having the sovereignty of it, so it may likewise happen that she shall possess the sovereignty of a place, of which the property, or the domain, with respect to use, belongs to some other nation." Id. at § 295 (emphasis added). Later in the treatise, he expands on this observation by pointing out that a state "cannot have full and absolute domain of a place where she has not the command" -- or, put differently, where the state does not possess the "empire" or jurisdiction. Id. at Book II, c.7 § 83. Thus, Vattel makes a distinction between "high domain," which is "nothing but the domain of the body of the nation," and which is "everywhere considered inseparable from sovereignty," and "useful domain," which can be severed. "Useful domain" is confined to "the rights that may belong to an individual in the state," and "nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction." Id. at § 83.

These concepts are directly reflected not just in the 1783 compact between New Jersey and Pennsylvania discussed above, but in other treaties of the same era -- notably, the Hartford Compact, considered by this Court in Massachusetts v. New York, 271 U.S. 65 (1926), in which it was held that New York ceded to Massachusetts private ownership of, but not sovereignty or jurisdiction over, the western half of territory claimed by both states; and in the 1782 Decree of Trenton, which, although it stated that "Connecticut had not the jurisdiction over the disputed territory," did not prevent that state from claiming "the right of soil" for another eighteen years. Rhode Island v. Massachusetts, 37 U.S. 657, 724 (1838). While the separability of sovereign power and property interests is certainly, we submit, reflected in the 1834 Compact, Vattel is perhaps even more useful in his explicit equation of sovereignty and jurisdiction -- an equation which appears not only in the extant records of the 1807 and 1827 negotiations, but in the language of the Compact itself.

(3)

As reflected in the official correspondence of the Commissioners appointed in 1807, New York took the position that the respective rights of each state "must in some measure serve as the grounds of any proposed compact" (PE 222 at 1, 4). According to New York, "coeval with the commencement of the colonial governments of the two states," it had actually and constantly exercised and possessed "jurisdiction" over the Hudson River and New York Bay as part of its rightful territory. Id. By the right of jurisdiction, New York specifically stated that it meant the sovereign right of government, as distinct from an estate or property interest

in territory (PE 222 at 19, 31). According to New York, New Jersey was entitled to "jurisdiction" only to the extent she was entitled to property, and the territorial grant from the Duke of York to Berkeley and Carteret was bounded by the western shores of the Hudson and New York Bay (PE 222 at 4).

It was New Jersey's basic position that, by virtue of the Revolution, it had become vested with authority to "exercise jurisdiction" over the Hudson "in such manner as belongs to a sovereign" (PE 222 at 3). Looking to the model of her Delaware River boundary, New Jersey argued that if New York was correct, New Jersey would also be deprived of all "jurisdiction" on her shores adjacent to that river, which was patently not the case (PE 222 at 38). Furthermore, according to New Jersey, when King Charles made his original grant to the Duke of York, it included the grant of the river, which thereby became the private property of a subject, permitting future grantees to hold to the center (PE 222 at 11). See, Bell v. Gough, 23 N.J.L. 624, 662 (1852). When the Duke in turn became king, the river reverted to the Crown, which, at the Revolution, impliedly yielded all "jurisdiction" over the river to the colonies (PE 222 at 20 et seq., propositions 6 & 7).

Alternatively, New Jersey argued (1) that the early confirmatory deeds to Berkeley and Carteret, which stated that they should have "free use" of all bays, inlets, shores, etc. within the granted territories, included the Hudson within that description (PE 222 at 16); (2) that the state had "uninterruptedly," as "far back as memory of man extends," itself exercised "jurisdiction" over its frontage on the river and bay, below low-water mark, for docks, wharves, piers, ferries, and fishing weirs (PE 222 at 16,

34); and, interestingly, (3) citing Vattel, New Jersey suggested that, given the separability of the "empire" of a country and its right of property in the soil, it did not necessarily follow that "jurisdiction" over New Jersey's shores and harbors belonged to New York, even if the property belonged to that state (PE 222 at 20).

As the negotiations deteriorated, New Jersey asked for an "accommodation line" (PE 222 at 40). New York responded that it preferred to retain the high-water mark on Jersey's shores (PE 222 at 40). New Jersey then suggested that a line be run down the middle of the river and bay, but leaving the Oyster islands within the "jurisdiction" of New York (PE 222 at 41). New York would not agree to the mid-line of the Hudson as the "line dividing the jurisdiction," but announced that it would consider an accommodation with respect to the "benefit and use" to accrue to New Jersey's citizens. Id. On October 7, 1807, the negotiations broke off with New Jersey's announcement that it was unwilling to "ask and receive" benefits from New York.

What is interesting and important about this exchange is (1) the paucity of use of the words "sovereign" or "sovereignty," terms which do not appear at all in the 1834 Compact, the word "jurisdiction" being used instead to discuss that concept; (2) the references to Vattel, who in fact frequently used "sovereignty" and "jurisdiction" synonymously and who also discussed the separability of jurisdiction and property in sovereign states; and (3) New Jersey's clear concern for control of the wharves, piers, and other developments on its own shores. See, State v. Babcock, 30 N.J.L. (1 Vroom) 29, 32-33 (1862) (control of these improvements identified as that state's motivating

concern in pressing its claims).

(4)

A number of important decisions affecting the legal viability of New Jersey's position were issued between 1807, when the first Commissioners were appointed, and 1827, when each state again designated representatives to attempt a resolution of the issues. In Handley's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820), this Court, citing Vattel, stated that, "[w]hen a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when ... one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river is its boundary." Id. at 379 (emphasis added). The Court also pointed out that a country bounded by a river extends to the low-water mark. Id. at 383. Cf. State v. Babcock, supra, 30 N.J.L. at 33.

The following year, one of New Jersey's own courts rejected the validity of the state's claim, through the proprietors, to rights over the river and bay, holding that, under the grant from the king to the Duke of York, the Hudson did not become a private river, with the subjects on each side holding to the middle. Arnold v. Mundy, 6 N.J.L. 1 (1821). This Court later adopted a similar position in Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). Cf. Bell v. Gough, supra, 23 N.J.L. at 662.

Finally, in 1823, a federal appellate court held that the claims of the proprietors of West Jersey to the Delaware

River and Bay were limited by the terms of the original grant from the Duke of York, which, on its face, extended only to the lands on the eastern side of the river. Corfield v. Coryell, 6 Fed. Cases 546, 553-554 (4 Wash. C.C. 371) (1823), citing Handley's Lessee, supra. Cf., State v. Davis, supra, 1 Dutcher at 387 (Elmer, J., describing and approving the decision). The Court also rejected the idea that language describing a grant of "all rivers" could enlarge the limits of the state, holding that these were confined to rivers within the boundaries of the original grant, not border rivers. Id. The Court further stated that, although the right of the Crown to the Delaware had been extinguished by the Revolution, New Jersey would hold to the middle only if there was no better title existing in some other state. Id.[4]

(5)

When the new set of Commissioners began communicating with each other in June 1827, both states were aware of the decisions in Arnold v. Mundy, Corfield, and Handley's Lessee (PE 280 at 13; PE 271 at 42, 57). Cf. State v. Babcock, supra, 30 N.J.L. at 33. New York acknowledged that Handley's Lessee would make New Jersey's border the low-water mark on the western shore of the Hudson (PE 280 at 14), but included in its First Set of Propositions only the proposal that New Jersey "shall enjoy and exercise exclusive jurisdiction on all the wharves and land now made, or which may hereafter be made ... to the actual line of low water" (PE 280 at 2), plus limited service of process. Id. New Jersey countered with a demand that

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[4] Such better title to a portion of the Delaware River was in fact later found in the State of Delaware. See, New Jersey v. Delaware, 291 U.S. 361 (1934).

the "waters of the Hudson River," within a geographically delimited area, "be the boundary between the two states and a common highway," with concurrent jurisdiction. It further proposed that Ellis Island and various other islands, "to low water mark of the same, be held to be and remain within the exclusive jurisdiction of the State of New York" (PE 280 at 3).

In the Second Set of Propositions, New York continued to state that New Jersey could have "exclusive jurisdiction" to low-water mark on her own shores, and that New Jersey's inhabitants could enjoy the right of the fisheries on the west side of the river "in common with the inhabitants of the State of New York;" provided for limited service of criminal and civil process; and stated that the right to exercise all "jurisdiction, power, and authority over the said waters, other than such as are herein secured to the state of New Jersey," would lie with New York (PE 280 at 3-4). New Jersey's response was to propose, inter alia, that the "waters" of the Hudson (no longer geographically deliminated) be the "boundary," with "exclusive jurisdiction" over them reserved to New York, except that New Jersey would have "exclusive jurisdiction" over the docks and wharves on its own shores (with no mention of a limitation to low-water mark) (PE 220 at 4). Ellis Island is not mentioned -- presumably because New York's "exclusive jurisdiction" over the waters would include any such lands.

When the Third Set of Propositions was tendered, New York's position had not changed much, except that, again without mentioning a boundary, it proposed exclusive jurisdiction of New Jersey not only in the "wharves and land now made, or which may be hereafter made," on its

own shores, but also "to low water mark along the whole of the said shore" (PE 220 at 5). It also proposed that New Jersey have the right to regulate the fisheries on her shore. Id. As pertinent here, New Jersey's proposal again suggested that the "waters" of the Hudson be the boundary; relinquished all claims to Staten Island and the other islands; and provided for concurrent jurisdiction in the service of process (PE 220 at 6).

The Fourth (and last) Set of Propositions differed only in minor details from the Third. After they had been exchanged, and apparently out of patience, New Jersey informed New York that, based on the "true construction of the original grants" and the rights acquired after the Revolution, it claimed: (1) a "right of territory and jurisdiction" to the middle of the Hudson; (2) Staten Island and the three Oyster Islands (including Ellis Island), as allegedly included within its territory by the same grants; and (3) the waters between Staten Island and the mainland (PE 220 at 8). According to New Jersey, New York was only willing to accord to New Jersey certain favors and privileges she already enjoyed (id.). New York admitted as much, and negotiations broke down with suggestions by New Jersey that the matter be referred to an impartial tribunal (id. at 9).

As in the case of the 1807 discussions, what is interesting here is the approach to the problem in terms of "jurisdiction" rather than "sovereignty." And what is particularly striking is that the term "exclusive jurisdiction" is used by both states in reference to New Jersey's rights over her wharves and other improvements to low-water mark -- or, after Handley's Lessee, to what would have been considered that state's sovereign boundary.

"Exclusive jurisdiction," therefore, is again used here as synonymous with sovereignty, and reappears, we submit, in the same guise in the 1834 Compact itself.

(6)

In turning to the Compact, we note that it must be construed not only against the conceptual backdrop of the contemporary legal and political debates which led to its genesis, but according to accepted principles of statutory interpretation. The Compact must, in other words, be interpreted as a whole, Gustafson v. Alloyed Co., Inc., ___U.S.___, 115 S. Ct. 1061, 1067 (1995), with any given term construed consistently throughout. Id. Indeed, this Court has recently emphasized that it is a "normal" rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." Id.

Before discussing the application of these principles, it may be wise to review again the Compact's main provisions. Article First states that the "boundary line" between the two states "shall be the middle of the said [Hudson] river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned." Contrary to the position taken in the Report, this language clearly fixes a part of the boundary as the middle of the river and of various other waters, but it leaves the other parts of the boundary to be defined as "otherwise particularly mentioned." That the boundary is not limited to the specific provisions of Article First, but is determined by that article and by whatever exceptions are "particularly mentioned," is plain from the language of Article First itself. Any other meaning would make the

article absurd. If the boundary were confined to the middle of the river, etc., the exception provision would be meaningless. It simply could not apply to anything in the rest of the agreement. Contrary to the principle that no provision in a statute should be treated as meaningless, see, e.g., Boise Cascade v. U.S.E.P.A., 942 F.2d 1427, 1432 (9th Cir. 1991), the Report's approach effects precisely this result.

The exception clause in Article First clearly relates to Article Second, which provides that New York shall "retain its present jurisdiction of and over Bedloe's and Ellis's Islands" and shall also retain exclusive jurisdiction over the other islands lying in the waters mentioned in Article First and "now under the jurisdiction of that state." The Report correctly concludes that this language refers to and confirms New York's sovereignty over the enumerated islands, although it still will not concede that Article Second constitutes the change in boundary recognized in Article First.[5]

Portions of Article Third also clearly come within the exception in Article First. This article provides that New York shall have and enjoy "exclusive jurisdiction" of and over the waters of the bay of New York and all the waters of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuytenduvel creek, and

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[5] New York's highest court held otherwise in People v. Central Railroad Co., 42 N.Y. 283 (1870), dism'd, 79 U.S. (12 Wall.) 455 (1872), where it pointed out that the exception in Article First "limits and restricts the boundary line," followed by the observation that the Commissioners established the boundary line between the two states "as fixed and defined in said first and second articles of said treaty." Id. at 294 (emphasis added).

"of and over the lands covered by said waters to the low water-mark on the westerly or New Jersey side thereof." This provision is made subject to specific rights of property and jurisdiction of New Jersey. The first gives New Jersey an exclusive right of property in "the land under water lying west of the middle of the bay of New York and west of the middle of that part of the Hudson river which lies between Manhattan Island and New Jersey." The second deals with wharves, docks and improvements made or to be made on the shore of New Jersey and to vessels aground on that shore or fastened to any such dock, placing them under the "exclusive jurisdiction" of New Jersey. The third gives New Jersey the exclusive right of regulating fisheries on the westerly side of the middle of the waters involved, provided that navigation not be obstructed or hindered.

Interestingly, these latter two rights are taken directly from the Third and Fourth Sets of Propositions submitted by New York in 1827, which New Jersey objected to on the ground that (1) they were made on the assumption that New York had full sovereign rights of territory and jurisdiction to the low-water mark on the Jersey shore; and (2) they did not grant New Jersey anything other than she already had -- i.e. "exclusive," and therefore "sovereign," jurisdiction down to low-water mark on those same shores (PE 220 at 8-9). The identical analysis is applicable here. If, as the Report maintains, New Jersey obtained "sovereignty" over everything to the west of the boundary line by virtue of Article First, there would be no need to provide her with "exclusive jurisdiction" over the improvements on her own shores extending out into waters over which she already possessed sovereign powers.

Accordingly, far from being a sovereign or jurisdictional boundary, the boundary of Article First obviously serves, inter alia, as the demarcation point for the limits of the property rights in the lands under water elsewhere granted to New Jersey. See, State v. Babcock, supra, 30 N.J.L. at 31-32 (Elmer, J., commenting that the midpoint of the Hudson is New Jersey's boundary only "for some purposes," one of these being to indicate the limits of her ownership of Article Third's underwater lands). Under the Compact, New Jersey gained rights of property it did not otherwise possess, as well as rights of sovereign, or "exclusive," jurisdiction over the improvements which, after many years of wharfing out, had changed the natural coastal boundary existing at the time of the Duke of York's grant, extending that boundary further into the Hudson River and New York Bay. New Jersey could not have gained full sovereign rights over the underwater lands indicated in Article Third because "exclusive jurisdiction" over the same property was granted to New York. As Vattel put it, and as the drafters of the Compact would have understood, a state cannot have the "high domain," or sovereign rights of property, where another state or nation possesses the jurisdiction or "command." What New Jersey received under the Compact was the "useful domain," the property rights possessed by an individual citizen. Only these rights, according to Vattel, are separable, and clearly, under the Compact, property rights in the underwater lands have been separated from the rights of jurisdiction.

(7)

The Report articulates a variety of reasons for rejecting the conclusion that the "exclusive jurisdiction" over the underwater lands vested in New York in Article Third is sovereign jurisdiction, which by definition would give New York ultimate control over the same underwater

lands held by New Jersey in a proprietary capacity. We address these, and certain other relevant issues, seriatim.

First, the Report rejects any such interpretation on the ground that if New York's sovereign jurisdiction, and hence its boundary, extended to the low-water mark on the Jersey shore (the limit of New York's exclusive jurisdiction stated in Article Third), the boundary would be subject to change, shifting as New Jersey reclaimed and filled in the lands along her shoreline. The Report finds such a result abhorrent, quoting this Court's observation in Georgia v. South Carolina, 497 U.S. 376, 396 (1990), that "a regime of continually shifting jurisdiction" does not "comport[ ] ... with the respect for settled expectations that generally attends the drawing of interstate boundaries" (R67). While the settled expectations in Georgia v. South Carolina, where the boundary was defined in relation to islands existing in 1787, would certainly have been disturbed by the appearance of new islands years later, the same is not true of the Compact: Article Third specifically envisions such shifts by providing that New Jersey possesses exclusive jurisdiction not only over the improvements on its borders existing in 1834, but over those "to be made."

Furthermore, the idea that jurisdictional boundaries may be affected by reclamation of subaqueous lands was not particularly shocking in the legal climate of 1834. As early as 1821, New York's highest court had ruled that, as between New York County and Kings County, the latter included all "made land" on the East River, even though this would change New York County's boundary, which, like New York's boundary here, extended to low-water mark on the opposite shore. Udall v. Trustees of Brooklyn, 19 Johns. 175, 178 (1821). The Court was even more

specific in a companion case, Stryker v. Mayor, 19 Johns. 178 (1821), pointing out that, under such circumstances, it was inevitable that "permanent erections, such as wharves and storehouses, may, from time to time, vary the line of jurisdiction." Id. at 180. Accord, Ross v. Mayor, 180 A. 866, 871 (N.J. Sup. Ct., 1935). More recently, the same principle has been applied to the sovereign boundaries between the United States and individual states on the coastal waters of this country. In United States v. California, 381 U.S. 139 (1965), this Court ruled that, when a state extends its land domain by reclaiming subaqueous lands on its seacoast, the fact that this would permit the state to unilaterally effect changes in the boundary between federal and state submerged lands was of no moment. Id. at 176-177.

In a second attempt to discount the idea that the "exclusive jurisdiction" which refers to sovereignty in Article Second somehow no longer carries that meaning in Article Third, the Report rejects any reliance on Vattel with the flat observation that the term "jurisdiction" can have several meanings, "not all of which imply sovereignty" (R58, note 20). We have no problem with this as a general statement regarding "jurisdiction," but it hardly does justice to the distinctions made by Vattel and the documented influence of his thinking on the drafters. Nor does it advance the argument when the issue is the meaning, not of "jurisdiction" in general, but of "exclusive jurisdiction." We have difficulty perceiving how the term "jurisdiction," when modified by the adjective "exclusive," can be considered anything but unqualified -- particularly since, when the Compact in fact wishes to indicate that it is referring to a limited exercise of power, as in Article Fourth's restriction of New York's power there to

quarantine laws, etc., it has no trouble doing so.

The problem, as we see it, is that the Report implicitly assumes that that possession of property or title is the controlling indicia of sovereignty. While it is often said that "ownership of land under navigable waters is an incident of sovereignty," Montana v. United States, 450 U.S. 554, 551, citing Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), possession of title in this context is considered an essential attribute of sovereignty only because it is "important to the sovereign's ability to control navigation, fishing and other commercial activity on rivers and lakes." Utah Division of State Lands v. United States, 482 U.S. 193 (1987). Accord, Montana v. U.S., supra, 450 U.S. at 552. See also, Idaho v. Coeur d'Alene Tribe of Idaho, __U.S.__, 1997 WL 338603 (U.S.) at 16 (concurring opinion); Bell v. Gough, 23 N.J.L. 624, 684 (1852) (right of the sovereign to underwater property, while commonly termed a title, "is more properly a power over it, to . . . protect such lands for the common welfare . . .").

Under the Compact, the dispositive control was granted to New York, a fact which argues persuasively for the conclusion that sovereignty was vested in that state and that what New Jersey received was Vattel's non-sovereign rights of property. In any event, the power to regulate the underwater lands surrounding Ellis Island, whether in their filled or natural state, and whether that power is denominated "sovereign" or not, is surely in New York under Article Third -- with no indication there, or elsewhere in the Compact, that the dominant control so vested could in any way be interfered with by New Jersey. Indeed, if New Jersey possessed sovereign powers, they would be sufficient to override what was intended to be the

permanent and exclusive jurisdiction of New York over the waters and underwater lands west of the boundary, including those surrounding Ellis Island. Compare, Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892) (while a state, as sovereign, may abdicate its police powers by delegation to another governmental body, these can always be revoked and the navigable waters made subject to direct control).

All these objections to the approach taken by the Report are, of course, objections to the reasoning in Central R.R. Co. v. Jersey City, 209 U.S. 473 (1908) (Holmes, J.), which the Report recognizes has no stare decisis effect but whose rationale it obviously finds persuasive. We agree with the result reached in Central Railroad, which is fully supportable under the exclusive ("sovereign") jurisdiction over improvements on its shores, "made and to be made," granted to New Jersey in Article Third. As indicated above, however, we obviously have problems with the sweeping announcement that "boundary means sovereignty, since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears," id. at 478-479, where that "different meaning" permeates the Compact; where other decisions of this Court establish that title is an incident of sovereignty only insofar as it supports the power of the state to exercise control, not vice versa; and where Central Railroad treats the phrase "except as hereinafter otherwise particularly mentioned" in Article First, which clearly provides for exceptions from the boundary and, hence, from the sovereignty allegedly established thereby, as though it did not exist. Application of Central Railroad's rationale to the issue of whether New Jersey possessed taxing authority over underwater lots connected to its own shores produced a sound result. Application of the same

reasoning to a much more complex situation, where the claim on the part of New Jersey is to artificially made lands annexed, not to its own shores, but to the sovereign territory of a sister state, has, we submit, produced a historically anomalous and radically unsound result.

The same can be said of the decision in People v. Central Railroad Co., supra, 42 NY 283 (1870), where the issue was whether New York could enforce its nuisance abatement laws with respect to a landfilled area extending into the Hudson from the Jersey shore. The decision against New York, which could have been reached solely, and properly, on the basis of Article Third, was instead grounded on the theory that whatever power New York possessed was subordinate to the sovereignty implicitly vested in New Jersey by virtue of Article First's boundary. To support its reasoning, in the face of a vigorous dissent, the majority was forced to admit that Article Third was, in its view, "unnecessary." Id. at 299. When it nevertheless addressed that provision, the majority then managed to misread it badly, stating that "under the concessions of jurisdiction over the waters of said river and bay," Article Third carefully provided that "no right should exist or be exercised [by New York] . . . over the bed of the river," id., despite the language explicitly vesting "exclusive jurisdiction" in New York over the underwater lands to low-water mark on the Jersey shore. No such elimination or rewriting of Article Third is necessary if, as we believe we have demonstrated, the drafters of the Compact envisioned that the low-water mark which indicated the limits of New York's exclusive jurisdiction would change as the improvements "to be made," and subject to New Jersey's own grant of exclusive jurisdiction, were in fact realized. Cf., Collins v. Promark Products, 763 F. Supp.

1204, 1206 (S.D.N.Y. 1991), aff'd, 956 F.2d 383 (2d Cir. 1992).

One final issue remains to be discussed. The State of New York's brief exhaustively demonstrates the error in the Special Master's refusal to make a factual finding that the practice of "wharfing out," i.e., reclaiming submerged lands, was taken for granted at the time of the Compact (R92, note 39). This error is compounded by the Report's further insistence that the Compact itself "does not address expansion by landfill" (R92). To the contrary, Article Third's grant to New Jersey of exclusive jurisdiction over the improvements "made or to be made" on its shores establishes that the drafters not only were aware of the possibility, but clearly contemplated that landfilling operations would be undertaken. New Jersey itself recognized this fact below and suggested that, because the Compact does not specifically mention the possibility of future improvements of this sort involving the underwater lands surrounding Ellis Island, New York's jurisdiction over the fast land could not be presumed to extend to any landfill (N.J. Pretrial Mem. at 6-7).

This proposition simply miscomprehends the structure of the Compact. At issue in Article Third was jurisdiction over improvements abutting sovereign land in New Jersey and extending into waters over which New York had exclusive jurisdiction. In light of the potential for conflict between the two states' claims of jurisdiction in this area, the Compact's drafters saw a need to articulate the scope of New Jersey's rights of improvement in detail. (Parallel provisions are contained in Article Fifth, which addresses improvements upon the shore of Staten Island). However, future improvements upon Ellis Island -- which

was New York's territory, and which was surrounded by waters over which New York alone had exclusive jurisdiction -- would create no comparable conflict of jurisdiction, and therefore required no comparable clarification.

CONCLUSION

FOR THE FOREGOING REASONS, THE RECOMMENDATION THAT NEW JERSEY BE DECLARED SOVEREIGN OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND SHOULD BE REJECTED, AND A DECREE SHOULD ISSUE DECLARING THAT ELLIS ISLAND, AS AN ENTITY, IS SUBJECT TO THE SOVEREIGN JURISDICTION OF THE STATE OF NEW YORK.

Respectfully submitted,

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