No. 120, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK AND BRIEF OF *AMICI CURIAE*

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MOTION OF NEW-YORK HISTORICAL SOCIETY, SOCIETY FOR NEW YORK CITY HISTORY, ARTHUR M. SCHLESINGER, JR., RICHARD C. WADE, AND KENNETH T. JACKSON FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the New-York Historical Society, the Society for New York City History, Professor Arthur M. Schlesinger, Jr., Professor Richard C. Wade, and Professor Kenneth T. Jackson (collectively, "Proposed Historian Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31, 1997 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

The Report purports to base its conclusions "upon what the evidence shows the parties actually intended at the time they signed the Compact." (R. at 48.) However, the Report goes on to hold against New York without considering any evidence concerning the actual negotiations that immediately preceded execution of the Compact of 1834 (the "Compact") or the participants in those negotiations. This Court, which retains ultimate responsibility for both the facts and the law in this original case, should not make the same mistake.

Proposed Historian Amici have an interest in assuring that the Court does not do so. Amici are historians of established reputation and organizations dedicated to study of the history of New York City and State. Having reviewed the Report, Amici believe that its conclusions are incorrect. The Report's recommendations are undermined by an invalid set of premises and an equally insupportable set of factual findings. In addition, it is plagued by numerous failures to pursue valid and otherwise obvious avenues of inquiry. In the accompanying brief, Proposed Historian Amici undertake to furnish the Court with what the Report fails to provide—a detailed summary of relevant events in the years 1832 through 1834 and brief accounts of the most significant participants in those events.

Proposed Historian Amici are uniquely qualified to provide the Court with such information:

NEW-YORK HISTORICAL SOCIETY

The New-York Historical Society, the second oldest historical society in the United States, was founded in 1804. Among its founders and early members were DeWitt Clinton, Governor of New York, Egbert Benson, the first Chief Judge of the United States Court of Appeals for the Second Circuit, and Peter Augustus Jay, one of New York's Commissioners in the 1833 negotiations with New Jersey. The Society's library contains an unparalleled collection of 17th, 18th, and 19th Century

documents, letters, and newspapers, including a significant quantity of materials relating to the New York-New Jersey boundary dispute. The Society's collections have been a starting place for countless articles and books concerning New York City history, and the Society itself has overseen hundreds of publications relating to the history, art, and culture of the New York area.

SOCIETY FOR NEW YORK CITY HISTORY

The Society for New York City History was founded in 1983 as a forum for the discussion of current research into New York City history and to bring that history to a wide and culturally diverse audience. Most of its members have published books or articles on New York City-related topics. Virtually all of its members create and lead historical tours, teach academic courses, serve as witnesses at Landmark Commission hearing, and curate historical exhibitions at area museums and libraries.

ARTHUR M. SCHLESINGER JR.

Arthur M. Schlesinger, Jr. is the Albert Schweitzer Professor of Humanities at The City University of New York. Schlesinger, the recipient of two Pulitzer Prizes and more than 25 honorary degrees, taught at Harvard University from 1947 to 1962 and was a Special Assistant to Presidents Kennedy and Johnson from 1961 to 1964. The many books he has authored include *The Age of Jackson* (1945), *A Thousand Days* (1965), *The Imperial Presidency* (1973), *The Cycles of American History* (1986), and *The Disuniting of America* (1991).

KENNETH T. JACKSON

Kenneth T. Jackson is the Jacques Barzun Professor of History and Social Sciences and chairman of the History Department at Columbia University. He has taught New York City history for a quarter-century, is the general editor of the *Columbia History of Urban Life* (1980-), and

is the author or editor of numerous books and articles, including the prize-winning *Crabgrass Frontier: The Suburbanization of the United States* (1985), *Silent Cities: The Evolution of the American Cemetery* (1989), and *The Encyclopedia of New York City* (1995).

RICHARD C. WADE

Richard C. Wade, Professor Emeritus of Urban History at the Graduate School of the City University of New York, is a pioneering figure in the study of urban history in the United States. He received a Ph.D. from Harvard University in 1954 and, prior to joining the CUNY faculty, taught at the University of Rochester, Washington University, and the University of Chicago. He is the author of numerous books and articles, including *The Urban Frontier: The Rise of Western Cities, 1790-1830* (1959) and *Slavery in the Cities: The South 1820-1860* (1964).

In preparing the accompanying Brief, Proposed Historian Amici have examined primary and secondary sources that appear to have been overlooked in the Report. Research was conducted at more than a dozen libraries and historical collections. Leading the list of repositories containing primary materials were (1) New-York Historical Society, (2) New Jersey Historical Society, (3) Rare Book and Manuscript Library, Columbia University, (4) Department of Rare Books and Manuscripts, Princeton University Library, and (5) Special Collections and University Archives, Rutgers University. In addition, potentially relevant original materials were located but not reviewed (due to time constraints) at more than 15 other repositories.

The account of the events surrounding negotiation of the Compact gleaned from these sources provides, Proposed Amici respectfully submit, a compelling basis for this Court

to reach conclusions that are substantially different from those reached in the Report. If the Court disagrees, however, and cannot find for New York on any other basis, it should alternatively determine that it needs still further information. In either connection, Proposed Historian Amici are in a unique position to do precisely what Supreme Court Rule 37.1 contemplates, *i.e.*, to "bring to the attention of the Court relevant matter not already brought to its attention by the parties," and consequently to "be of considerable help to the Court." Toward this end, the accompanying Brief suggests conclusions that should have been, but were not, reached in the Report; alternatively, it points out to the Court numerous avenues of inquiry that have not yet been and should still be explored.

WHEREFORE, Proposed Historian Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae.*

Dated: New York, New York
July 30, 1997

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STATE OF NEW JERSEY,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK

The New-York Historical Society, the Society for New York City History, Professor Arthur M. Schlesinger, Jr., Professor Richard C. Wade, and Professor Kenneth T. Jackson (collectively, the "Historian Amici") submit this brief, as *amici curiae*, in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R.").

INTEREST OF *AMICI CURIAE*[1]

The Report purports to base its conclusions "upon what the evidence shows the parties actually intended at the time they signed the Compact." (R. 48.) However, the Report goes on to hold against New York without considering any evidence concerning the actual negotiations that immediately

[1] Pursuant to Rule 37.6 of this Court, the Historian Amici state that this Brief was not authored in whole or in part by counsel for a party, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

preceded execution of the Compact of 1834 (the "Compact") or the participants in those negotiations. This Court, which retains ultimate responsibility for both the facts and the law in this original case, should not make the same mistake.

The Historian Amici have an interest in assuring that the Court does not do so. Amici are historians of established reputation and organizations dedicated to the study of the history of New York City and State. Having reviewed the Report, Amici believe that its conclusions are incorrect. The Report's recommendations are undermined by an invalid set of premises and an equally insupportable set of factual findings. In addition, it is plagued by numerous failures to pursue valid and otherwise obvious avenues of inquiry. For the same failings, a scholarly book or article would be subject to criticism in the academic press. The Report should not be treated differently, especially when its recommendations, if adopted, would have far more concrete and long-lasting effects on the history, geography, and economics of the New York City region.

The Historian Amici are uniquely qualified to bring the Report's shortcomings to the Court's attention. The Amici's members have published books and articles concerning New York City history and routinely engage in the type of historical research concerning New York issues and events that should have gone into the Report. Their critique of the Report's premises, methodology and conclusions should consequently prove of substantial value to the Court.

SUMMARY OF ARGUMENT

While the Special Master's Report several times acknowledges that the "nature and history of the controversy" must be considered in resolving boundary disputes (R. 33), the Report furnishes remarkably little information about the immediate circumstances under which the Compact was negotiated and agreed to by New York and New Jersey. The Report does digress for four pages about a "steamboat

controversy" that had no direct bearing on the Compact, and does provide summaries of prior negotiations in 1807 and 1827, as well of the Supreme Court suit filed by New Jersey in 1829. (R. 35-41, 68-74.) However, no information is proffered concerning the actual negotiations that resulted in an agreement between the States in September 1833 or the participants in those negotiations.

If, as the State of New York has ably argued, the Court determines to resolve this case solely on the basis of the plain meaning of Article II of the Compact, no additional information concerning these matters would be required. If, however, the Court concludes otherwise and turns its attention to Article III of the Compact—and the equation of "property" and "sovereignty" rights the Report contends is supported by that Article's negotiating history—the absence of such information must preclude the Court from accepting the Report's current conclusions. In an original case of this type, the Court's mandate is to ensure that no long-lasting conclusions of necessarily broad impact are reached before all avenues of inquiry have been exhausted.[2] Such has not been the case here.

To demonstrate this point, this Brief undertakes to furnish the Court with what the Report fails to offer—a detailed summary of relevant events in the years 1832 through 1834 and brief accounts of the most significant participants in those events. This summary, the Historian Amici respectfully submit, provides the Court with a compelling

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[2] In original cases, this Court retains "ultimate responsibility" for both findings of fact and conclusions of law, and it fulfills this obligation with an eye to the long-lasting historical, geographical, and financial ramifications of its decisions. *See United States v. Maine*, 475 U.S. 89, 97 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974); *United States v. Texas*, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950).

basis for reaching conclusions that are substantially different from those reached in the Report. More specifically, the account set forth herein demonstrates that, contrary to the Report's findings, (1) four of the six Commissioners came to the bargaining table in 1833 with well-developed ideas about the relationship between "property," "jurisdiction," and "sovereignty," and intended, in the Compact, to grant to New Jersey no more than "property" rights in the underwater lands surrounding Ellis Island; and (2) New Jersey was willing to settle for merely an "exclusive right of property" in the western half of the Hudson because (a) a previously unexamined March 1832 decision by this Court to postpone action on New Jersey's Bill stirred fears that the Court might never accept jurisdiction of New Jersey's claims; and (b) pro-Jackson state leadership in both New Jersey and New York was exerting increasing pressure to "amicably" resolve a case that might have proven problematic for Andrew Jackson's administration if it had been pressed to conclusion.

If the Court is unwilling to accept these conclusions, it should, in the alternative, determine that it needs still further information. Notwithstanding the fact that the Special Master saw fit to file the Report without considering much of the information contained herein or directing the States to explore further the potential sources for additional information proffered by the Amici, such information needs to be before this Court in order for it to reach an informed resolution of this dispute. Accordingly—to the extent that it cannot find for New York on any other basis—the Court should reject the Report and take whatever measures it deems necessary to ensure that the record is complete before it finally adjudicates the respective rights of New York and New Jersey under the Compact.

POINT I

THE COMMISSIONERS AND THE STATE OFFICIALS TO WHOM THEY REPORTED GRANTED TO NEW JERSEY MERE "PROPERTY" RIGHTS IN THE WESTERN HALF OF THE HUDSON

It is impossible to understand fully the terms of the Compact without familiarity with the six New York and New Jersey Commissioners who participated in its drafting and the state officials to whom the Commissioners reported. The Commissioners each brought to the bargaining table prior experiences, ideas and instructions from their respective state capitals that necessarily affected the agreement they negotiated. The Report mentions the Commissioners in a single footnote, with no suggestion that more attention is required. (R. 42 n.26.) However, more information about the Commissioners and state officials to whom they reported, as well as the actual course of the negotiations, is available and unquestionably merits the attention of this Court.

A. THE NEW YORK DELEGATION

In March of 1833, New York Governor William L. Marcy appointed Benjamin F. Butler, Peter Augustus Jay, and Henry Seymour as Commissioners for New York. (NJ Ex. 307.) None of the three appear to have had any long-term prior involvement with the boundary controversy, but at least two of the three, Butler and Jay, came to the table with strong ideas about the terms of its resolution.

1. BENJAMIM F. BUTLER

The lead negotiator for New York in 1833 was Benjamin F. Butler, then a prominent New York attorney and soon-to-be Attorney General of United States. *See* William D. Driscoll, *Benjamin F. Butler, Lawyer and Regency Politician* (1987); *see also* Arthur A. Ekrich, Jr., *Benjamin F. Butler of New York, A Personal Portrait*, 58 N.Y. HISTORY 47 (1977). Butler acted on the instructions of Governor Marcy, who had

become New York Governor in January 1833. Both Butler and Marcy were high-ranking members of the Albany Regency, the statewide political machine built by Martin Van Buren prior to his departure for Washington in 1829 to serve first in the cabinet of and then as Vice President to Andrew Jackson.[3]

Butler was appointed the District Attorney of Albany County in 1821 and remained in that position until 1825. In 1825, while still District Attorney, Butler was appointed one of the "revisers" of the New York statutes, and would spend the next four years playing a leading role in the first "codification" of New York law. After a brief stint in the New York State Assembly, Butler returned to private practice in Albany and New York City in 1828, where he prospered. Butler became involved in the New York-New Jersey boundary controversy in 1832, first by assisting Greene C. Bronson, New York's Attorney General, at Supreme Court argument in March 1832, and then by his participation later that year in a series of communications with New Jersey officials that would lead to his appointment as a Commissioner in 1833.[4]

Butler, who appears to have been the driving force behind the 1833 negotiations on the New York side, brought two

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[3] Butler's close association with Van Buren and the Albany Regency was no accident. Butler was born in Kinderhook Landing, New York in 1795, and went to work at age 16 in Van Buren's Hudson, New York law office at a time when Van Buren was already a rising star in New York politics. Butler's association with Van Buren would shape the rest of his professional career.

[4] In November 1833—only weeks after the Compact had been transmitted to Governor Marcy—Butler was appointed U.S. Attorney General, and moved to Washington to serve in the cabinets of Andrew Jackson and Van Buren until 1838. Shortly thereafter he was appointed United States Attorney for the Southern District of New York, a position he filled from 1838 to 1841 and again from 1845 to 1848.

assets to the bargaining table. First was his connection to Van Buren, and thus the Regency machine in Albany and political power in Washington. As the "most influential" man (apart from Van Buren) in the New York Democratic party, Butler consequently had the authority to shape a compromise and the political access to bring other concerns to bear on the negotiations. Letter from John Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).[5]

Second, as a result of his involvement in the 1825-29 revision of New York statutory law, Butler brought to the table a vast knowledge of New York law, including most particularly the litigious history of New York's boundaries. *See* William A. Butler, *The Revision of the Statutes of the State of New York and the Revisers* 23-24 (1889); *see also* Benjamin F. Butler, *Outline of the Constitutional History of New York* 27-32 (1847). Indeed, the first two sections of the codification authored by Butler were entitled "Of the Boundaries of the State" and "Of the Sovereignty and Jurisdiction of the State." N.Y. REV. STAT., Ch. 1, Tit. I & II (1829).

The second of these sections ("Of the Sovereignty and Jurisdiction of the State") tells us much about the understanding of "boundary," "sovereignty," and "jurisdiction" that Butler brought to the 1833 negotiations:

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[5] This Brief cites to a number of letters and documents in publicly accessible state or university collections that were not introduced into evidence at trial, but which are the type of historical documents of which this Court has taken judicial notice in other original jurisdiction cases. *See, e.g., United States v. Louisiana*, 363 U.S. 1, 12-13 (1960). These documents should be considered for the propositions they support, but, if the Court is not so inclined, it can, at the very least, look to such documents as evidence that avenues of inquiry exist that have not yet been pursued.

> The sovereignty and jurisdiction of this state extend to all the places within the boundaries thereof, as declared in the preceding Title; but the extent of such jurisdiction over places that have been or may be ceded to the United States, shall be qualified by the terms of such cessions.

N.Y. REV. STAT., Ch. 1, Tit. II. The structure and language of this section supports two conclusions. First, it shows that Butler, and his contemporaries, equated "sovereignty" with "jurisdiction." Thus, New York's "sovereignty and jurisdiction" (read as one word, for all practical purposes) extends to the state's boundaries except where "such jurisdiction" (referring back to "sovereignty and jurisdiction") had been ceded to the United States. Second, it was Butler's understanding that "sovereignty and jurisdiction" normally extended to "all the places within the boundaries" of the state, but this did not mean that "boundary" could be equated with "sovereignty." To the contrary, the statute, as revised by Butler, expressly permits "sovereignty and jurisdiction" to be "qualified" by the "jurisdictional" terms of various "cessions" to the Federal Government. *See* N.Y. REV. STAT., Ch. 1, Tit. III (detailing terms of cessions by New York to United States prior to 1829).[6]

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[6] The previously executed cessions from New York to the United States that Butler viewed as qualifying New York's "sovereignty and jurisdiction" ran the gamut from ceding full control to granting only very limited rights to the Federal Government. Thus, certain cessions, like those pertaining to Ellis and Bedlow's Island, granted "exclusive jurisdiction" (subject only to execution of civil or criminal process) to the United States, others retained "police power" jurisdiction for New York, and still others granted the Federal Government rights contingent upon continued ownership and development as originally prescribed. *See* N.Y. REV. STAT., Ch. 1, Tit. III §§ 3, 7-8, 19.

Understood in this way, the "boundary" statute that Butler labored over seven years before the 1833 negotiations provides a template for understanding the bargain arrived at between New York and New Jersey. Just as in the Revised Statutes, Article I of the Compact draws a "boundary" between New York and New Jersey, which applies "except as hereinafter provided." Compact, Art. III. Subsequent Articles, including Articles II and III, then "qualify" the "boundary" thus drawn by ceding an "exclusive right of jurisdiction" (and thus sovereignty) over different areas and objects to one or the other of the states.

The likelihood that these provisions of the New York statute were used as a model for the Compact is supported by contemporaneous evidence. On July 23, 1833—just three weeks before the first meeting between the New York and New Jersey Commissioners—Butler wrote to fellow Commissioner Peter Augustus Jay that "whilst at Utica a letter was forwarded to me from Mr. Elmer, requesting information concerning the Revised Statutes of this State." Letter from Butler to Jay dated July 23, 1833 (Jay Family Papers, N. Y. Hist. Soc.). Given the timing of this letter, it can be validly inferred that the sections of the New York statute in which Elmer, one of the New Jersey Commissioners, would have been most interested were those concerning New York's boundaries, and therefore that Butler's supplying of the requested information planted the seeds of the compromise that would be reached in September 1833.

2. PETER AUGUSTUS JAY

Butler's second-in-command at the 1833 negotiations was Peter Augustus Jay. Jay was the son of John Jay, a former New York governor and the nation's first Chief Justice. *See* John Jay, *Memorials of Peter A. Jay: Compiled for his Descendants* (1929). Jay was born in 1776, graduated from Columbia College in 1794, and spent most of his life as a

prominent lawyer and municipal official in New York City. Jay was elected to the New York State Assembly in 1816, was appointed Recorder (*i.e.*, criminal court judge) for New York City in 1821, and the same year served as a delegate to the convention that framed New York's new constitution. Returning to private practice in 1822, Jay often represented the Corporation of the City of New York (the "Corporation") as retained counsel in ensuing years.

As a result of his background, Jay came to the bargaining table in 1833 as a guardian of the interests of the City of New York. Indeed, in a letter Butler wrote to Jay shortly after their appointment as Commissioners in March 1833, Butler made it clear that this would be Jay's bailiwick at the coming negotiations:

> In arranging these details, we shall very greatly rely on your superior knowledge of what is due to the commerce, health, police and improvements of your city, all which are to be carefully considered in the propositions we may submit or receive.

Letter from Butler to Jay *quoted in* Jay, *supra,* at 169; *see also id.* at 167-68 (Letter from Marcy to Jay dated Mar. 5, 1832; Letter from Jay to Marcy dated Mar. 9, 1833).

Jay's "superior knowledge" of the needs of New York City derived from his experience as a city judge and frequent representation of the Corporation in the 1820s. The Corporation that Jay served was, as Hendrik Hartog and others have shown, a political entity in transition, with a growing awareness of the distinction between its "property" and its "power." *See* Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); *see also* Elizabeth Blackmar, *Manhattan for Rent, 1785-1850* (1989). A royally chartered municipal corporation, the City had traditionally derived its regulatory "power" from the "property" that it had been granted in its Charters. By the 1820s, however, the City

had come to see its "jurisdiction" as deriving from its status as an agency of the state and its "property" as a collection of assets held in a non-sovereign capacity.

The growing awareness of this distinction between the Corporation's "property" and "jurisdiction" was at the center of a trio of cases, the so-called "cemetery cases," in which Jay represented the Corporation in the mid-1820s. *See Mayor of New York v. Slack*, 3 Wheel. Cr. Cas. 237 (N.Y. C.P. 1824); *Corporation of the Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826); *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827). The Corporation Common Council had passed an ordinance (owing to typhoid fears) banning burials in church cemeteries, and the churches claimed that property rights that had been granted to them by the Corporation a century before had been infringed. The courts, at Jay's urging and in an early recognition of the "police power" doctrine, distinguished between the Corporation's "proprietary" and "regulatory" identities, and held that, under the proper circumstances, the latter must trump the former. *See Slack*, 3 Wheel. Cr. Cas. at 247 ("a distinction is to be made between [the Corporation's] capacity for holding and transferring property, and its capacity to legislate for the good" of the City).

Thus, Jay came to the table keenly aware of the difference between the "jurisdictional" and "property" rights that New York might choose to keep or trade away in the negotiations. As a result, it can be reasonably concluded that Jay understood the "exclusive right of property" that Article III granted to New Jersey to be no more or less than the "property" that the Corporation of the City of New York held

in a non-sovereign capacity and from which it derived none of its governmental "power."[7]

B. THE NEW JERSEY DELEGATION

On February 26, 1833, New Jersey Governor Samuel L. Southard appointed Lucius Q.C. Elmer, Theodore Frelinghuysen, and James Parker as New Jersey's Commissioners. (Commission dated Feb. 26, 1833, Cumberland County Hist. Soc.)[8] All three had prior experience with the boundary controversy, Parker as a Commissioner in 1807 and 1827, and Elmer and Frelinghuysen as Commissioners in 1827. Of the three, however, Elmer and Parker have told us the most about the Compact and the negotiations that led to its execution.

1. LUCIUS Q.C. ELMER

Lucius Quintius Cincinnatus Elmer was born in 1793 in Bridgeton, New Jersey. *See* William E. Potter, *A Sketch of the Life of Lucius Quintius Cincinnatus Elmer, LL.D.* (1884).

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[7] The final member of the New York contingent in 1833 was Henry Seymour. Seymour, who was born in 1780 and died in 1837, was a political lieutenant of Martin Van Buren from Utica, New York. *See* A.J. Wall, *A Sketch of the Life of Horatio Seymour, 1810-1886* (1929). He served as an Erie Canal Commissioner and counted among his friends Greene C. Bronson and Samuel Beardsley, two names that would figure prominently in New Jersey's 1829 suit in this Court. As a non-lawyer and Regency functionary from upstate New York, Seymour's largely undocumented role in the negotiations is likely to have been minor.

[8] Southard had only been elected New Jersey's Governor in October 1832, but he had had extensive experience with the boundary dispute. Southard first became involved with the dispute when, after serving in the U.S. Senate (1821-23) and the cabinets of Presidents Monroe and Adams (1823-29), he succeeded Frelinghuysen as New Jersey Attorney General in 1829. *See* Michael J. Birkner, *Samuel L. Southard: Jeffersonian Whig* (1983). It fell to Southard, with the assistance of William Wirt, to litigate New Jersey's case in this Court for the next three years.

He was elected to the New Jersey Assembly in 1820 and served for four sessions. In 1824, President Monroe appointed Elmer United States Attorney for the District of New Jersey, an office he filled until 1829, when, as an Adams Democrat, he was replaced by Jackson supporter Garret D. Wall. Returning to private practice, Elmer spent much of the 1830s compiling his *Digest of the Laws of New Jersey* (first published in 1838), was appointed New Jersey Attorney General in 1850, and served on the New Jersey Supreme Court from 1852 to 1869.

Given his knowledge of New Jersey's boundaries and land law, Elmer most probably served as Butler's counterpart on the New Jersey side of the table. As noted above, it was Elmer who wrote to Butler to inquire about the New York boundary statute, and it was also Elmer who at about this same time was compiling his *Digest of the Laws of New Jersey.* The *Digest* contains a chapter entitled "Territory and Jurisdiction," which is analogous to the New York Revised Statutes sections discussed *supra* and which compiles all the boundary agreements with neighboring states, including New York, Delaware and Pennsylvania, into which New Jersey had entered prior to 1838.

This compilation sheds light on the ideas Elmer brought to the negotiations in two ways. First, the word "sovereignty" appears nowhere in these prior boundary agreements, and instead, "jurisdiction" is used in its place and as its practical equivalent. *See* Lucius Q.C. Elmer, *Digest of the Laws of New Jersey* 562-69 (1838). Second, the only place (other than in the Compact) that the word "property" occurs is in the 1772 Agreement settling the northern boundary line between New Jersey and New York, and there it plainly refers to lands held by non-sovereign grantees. *Id.* at 563. With these precedents in mind, we may assume that Elmer attributed similar meanings to these terms as used in the Compact.

Elmer's later comments on the "plain meaning" of the Compact in *State v. Babcock*, 30 N.J.L. 29 (1862), are even more revealing of the concepts of "property" and "jurisdiction" he brought to the negotiations in 1833:

> Although, for some purposes, New Jersey is bounded by the middle of the Hudson River, and the state owns the land under water to that extent, exclusive jurisdiction, not only over the water, but over the land to the low water line on the Jersey shore, is, in plain and unmistakable language, granted, or rather acknowledged to belong to, the state of New York.

Babcock, 30 N.J.L. at 31; *see also* Lucius Q.C. Elmer, *The Constitution and Government of the Province and State of New Jersey* (1872). This account, which was furnished in the course of applying the terms of the Compact to the facts of a case before him, is entitled to full deference, and demonstrates that, in Elmer's view, New Jersey received no more than a "property" right in the underwater lands surrounding Ellis Island.

2. JAMES PARKER

The second, and by far the most experienced, of the New Jersey Commissioners was James Parker. Parker served as a New Jersey Commissioner in all three negotiations with New York—1807, 1827 and 1833. Such extensive involvement was not unexpected in light of Parker's lineage. *See* Richard S. Field, *Address on the Life and Character of the Hon. James Parker* (1869). Parker, who was born in 1776 and died in 1868, was raised in Perth Amboy, New Jersey, where five generations of Parkers had lived and where Parker's father, a member of the Provincial Council and of the Board of Proprietors of the colony, dedicated himself, as would his son after him, to the management of the family properties.

Parker, who was not an attorney, was first elected to the New Jersey Assembly in 1806, and served in that body, with

periodic gaps, through 1818. Parker also served as the Mayor of Perth Amboy in 1815 and again in 1850. Although a Federalist, Parker supported Jackson in 1828 and was rewarded with an appointment as the Collector of the Port of Perth Amboy, which at the time had considerable foreign trade. In 1832, while serving in this office—and only months before his appointment as a Commissioner—Parker was elected to the U.S. House of Representatives, in which he would serve until 1836.

It is difficult to untangle Parker's role at the negotiations from his membership on the Board of Proprietors of East Jersey and lifelong residence at Perth Amboy. Indeed, his biographer indicates that he was originally selected as a Commissioner because of "[h]is familiar acquaintance with the records of the Council of Proprietors of East Jersey—having filled the office of Register to the Board for many years—and his knowledge of the various points connected with proprietary grants and titles." Field, *supra*, at 123. The same biographer suggests that it was Parker, as a new member of the New Jersey Assembly in 1806, who instigated the first round of negotiations with New York in order to address New York claims to underwater lands at Powles Hook (now Jersey City) that had been granted to the Associates of Jersey Company by the Board of Proprietors in 1802. *Id.* at 120-21.

Thus, it would be fair to say that Parker's chief interest at the negotiation may well have been the acquisition of "property," for New Jersey and, owing to uncertainty in the law, potentially for the Proprietors. As set forth more fully in the Brief of the New York Landmarks Amici, until and even after this Court's decision in *Martin v. Waddell,* 41 U.S. 367 (1842), title to lands under navigable waters, as between the State and colonial grantees, remained in doubt. Indeed, the Board of Proprietors would lay claim to such underwater lands, including lands under the Hudson River, into at least

the 1980s. *See America's Gateway Embroiled in Border Dispute,* U.P.I., Aug. 20, 1984. Thus, Parker, businessman and propertyholder that he was, could have taken solace in an "exclusive right of property" on the western side of the Hudson, regardless of whether that right accrued to New Jersey as a sovereign or the Board of Proprietors as a non-sovereign propertyholder.[9]

Parker's second area of concern was the promotion of Perth Amboy. As a lifelong resident, former Mayor, and Collector of the Port of Perth Amboy, Parker had a strong interest in securing the rights necessary to allow Perth Amboy to prosper as a seaport. Thus, as Justice Elmer explained in *Babcock*, "[a]s it was thought possible that the time might come when Perth Amboy should be an important city, like exclusive jurisdiction over the adjacent waters to low water mark on Staten Island was secured to this state." *Babcock*, 30 N.J.L. at 34. These rights were granted in Article V, and it is likely that Parker focused his energies on that Article more than on Article III. But with both an "exclusive right of property" in the Hudson River and "exclusive jurisdiction" over Raritan Bay and most of the Arthur Kill, we can be certain that Parker left the Compact negotiations in September 1833 satisfied with the outcome.[10]

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[9] That Parker might not have been the only New Jersey Commissioner or state official primarily interested in "property" rights is hinted at in a June 1832 letter from 1827 New Jersey Commissioner John Rutherford to New Jersey Governor Peter D. Vroom, in which Rutherford appears to express relief upon learning that New York had no interest in the "Oyster grounds" of New York Bay, and was instead only "anxious for some regulations relative to quarantine and jurisdiction near the city of New York." Letter from Rutherford to Vroom dated June 10, 1832 (Southard Papers, Princeton University).

[10] The last of the New Jersey Commissioners was Theodore Frelinghuysen. Frelinghuysen, who was born in 1787 and died in 1856, was New Jersey Attorney General from 1817 to 1829 and an anti-

In light of all the foregoing, it can be readily and validly inferred that each of the Commissioners, and especially Butler, Jay, Elmer and Parker, came to the negotiating table in 1833 with well-developed ideas about the relationship among "property," "jurisdiction," and "sovereignty." By granting New Jersey a mere "exclusive right of property" in the western half of the Hudson River in the vicinity of Ellis Island, while allowing New York to retain an "exclusive right of jurisdiction" over the same area, the Commissioners left "sovereignty" over this area in New York's hands.

POINT II

NEW JERSEY WAS WILLING TO SETTLE FOR MERE "PROPERTY RIGHTS" OWING TO FEARS ABOUT THE OUTCOME OF ITS SUIT IN THIS COURT AND POLITICAL PRESSURE FROM JACKSON SUPPORTERS

The Report accepts uncritically New Jersey's account of the progress of its 1829 suit against New York as ending with this Court's January 1832 decision to deem New York's demurrer an appearance and set the case down for argument. The inference apparently accepted by the Special Master along with this account of the suit is that this Court's decision to permit argument as to its jurisdiction over New Jersey's claims prodded a fearful New York back to the bargaining

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Jacksonian member of the U.S. Senate from 1829 to 1835. *See* Talbot W. Chambers, *Memoir of the Life of the Late Theo. Frelinghuysen* (1863); *see also* Michael J. Birkner, *Samuel L. Southard: Jeffersonian Whig* (1983). As the New Jersey Attorney General who commenced the original suit against New York in this Court, Frelinghuysen most probably brought an advocate's zeal to the negotiations, but even that fervor appears to have cooled by 1833. *See* Letter from Frelinghuysen to Southard dated Jan. 11, 1833 (Southard Papers, Princeton University) (commenting on settlement overtures and observing, "I hope it may be settled.").

table with every incentive to settle at any cost. This, however, is not a full account of the relevant facts. To the contrary, there were further developments (unexamined in the Report) later in 1832 both in New Jersey's suit and on the national political scene, which, far from supporting the inference that the Special Master has drawn, lead to exactly the opposite conclusion: that it was New Jersey, and not New York, that had grown apprehensive about the suit's outcome and was thus seeking out ways to resolve it "amicably."

A. THE MARCH 1832 ARGUMENT

In January 1832, Greene C. Bronson, New York's Attorney General, sent Samuel Beardsley, his law partner and a member of the House of Representatives to file a "demurrer" with this Court. *New Jersey v. New York*, 31 U.S. (6 Pet.) 323 (1832); *see* Letters from Frelinghuysen to Southard dated Jan. 10 and 15, 1832 (Southard Papers, Princeton University). Theodore Frelinghuysen and William Wirt[11] appeared on behalf of New Jersey, and, when no one entered an official appearance on behalf of New York, they argued that the demurrer did not constitute the "appearance" ordered by the Court at 1831 term and asked the Court to proceed "ex parte." *Id.* at 326. In a tersely-worded opinion, Chief Justice Marshall disagreed, holding that the "demurrer" did constitute an appearance, and directed that the "demurrer be set down for argument on the first Monday of March of this term." *Id.* at 327.

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[11] William Wirt, upon whom Southard called when he inherited the New Jersey-New York case from Theodore Frelinghuysen, served as U.S. Attorney General from 1817 to 1829. *See* Marvin R. Cain, *William Wirt Against Andrew Jackson: Reflections on an Era*, 47 MID-AMERICA 113 (1965). Wirt was among the preeminent advocates of the day and participated in many arguments before this Court, including in *Gibbons v. Ogden*, *McCullogh v. Maryland*, and the *Dartmouth College* case.

All parties appeared before the Court again in March 1832. Bronson appeared on behalf of New York and was assisted by future New York Commissioner Benjamin F. Butler. *See* William D. Driscoll, *Benjamin F. Butler, Lawyer and Regency Politician* 224-27 (1987); Michael J. Birkner, *The New York-New Jersey Boundary Controversy, John Marshall and the Nullification Crisis*, 12 J. EARLY REPUBLIC 195 (1992) (hereinafter "Nullification Crisis"). Wirt and Southard appeared for New Jersey. What was expected to be a several-day argument of the demurrer commenced on March 14, 1832, with Bronson contending that the Court lacked jurisdiction over disputes between the States. Before Bronson could conclude even this first point of his argument, however, the Court announced that it could proceed no further. As Butler reported in a letter to his wife:

> This morning we went to court to proceed with the cause, but the Chief Justice announced that the Court saw that the cause could not be decided this term if the argument was completed, and that they had therefore come to the conclusion that the argument should be postponed until next winter. By the consent of all the counsel, the first Monday of February 1833 was assigned for the hearing. . . . Bronson's argument, as far as he proceeded, was extremely able—it evidently worried our opponents prodigiously, and it gave the court a new notion of the case, which in truth, as I suppose, led to the postponement of the cause.

Letter from Butler to Harriet Butler dated Mar. 14, 1832 (Butler Papers, New York State Library). The Court recessed three days later, and the representatives of the two States went home with nine months to ponder their options.

B. REASONS FOR SUPREME COURT DELAY

Chief Justice Marshall's decision to postpone resolution of the New York-New Jersey dispute remains puzzling. New

Jersey never tired of reminding the Court, as Frelinghuysen did again at the January argument, that the suit had been pending for over three years without significant results, so the Court had no ready excuse for delay. *New Jersey v. New York*, 31 U.S. (6 Pet.) 323, 325 (1832). Moreover, notwithstanding Butler's opinion of the merits of Bronson's argument, the Court had already indicated that it had precedent for exercising jurisdiction over New Jersey's claims, so a sudden change of heart seems unlikely. *See New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 288-90 (1831); *see* Letters from Wirt to Southard dated Jan. 17 and 21, 1832 (Southard Papers, Princeton University). The most probable answer lies in Marshall's own reluctance to expose the authority of the Court to more than one significant challenge at a time.

Less than two weeks before argument of the New York demurrer, the Court had handed down its decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, Marshall had invalidated a Georgia statute prohibiting white settlers from entering Cherokee territory without a state license as contrary to treaties between the Cherokees and the federal government. Georgia, taking a radical states' rights position, argued that the Supreme Court had no jurisdiction to thus interfere in internal state affairs. The plaintiffs, missionaries who had been imprisoned for violating the statute, were represented by William Wirt and argued, as did New Jersey in its suit, for a broad construction of the Court's jurisdiction. Marshall adopted the plaintiffs' position, and, in response, Georgia, tacitly supported by President Jackson, threatened to disobey any process that might eventually issue to enforce the Supreme Court's decision. *See* Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* 26-32 (1987); Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. SOUTH. HIST. 519 (1973). Already confronting in the

Georgia suit a significant challenge to the Court's authority, Marshall was reluctant to permit another by upholding jurisdiction as to New Jersey's claims. Hence, the determination to postpone decision until the following year.

Such an explanation of Marshall's decision is consistent with contemporary accounts of the March 1832 argument. As an anonymous correspondent to the *New York Courier* observed:

> The New York case has been peculiar. It has brought the Supreme Court into a temper of reflection on the subject of State-Rights, more than any case ever before them. It is the first time in the history of our general legislation that a sovereign State ever consented to employ counsel to contest the jurisdiction of the Court.

New York Courier, Mar. 27, 1832 (quoted in Driscoll, *supra*, at 225). It is also consistent with concerns expressed by Chief Justice Marshall at about this time regarding the waning prestige of the Court. Indeed, in what is likely a thinly-veiled reference to his quandary in March 1832, Marshall wrote to Justice Joseph Story in September 1832:

> I yield slowly and reluctantly to the conviction that our Constitution cannot last. I had supposed that North of the Potomack a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful. The case of the South seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves. The Union has been prolonged thus far by miracles. I fear they cannot continue.

Letter from Marshall to Story dated Sept. 22, 1832 (quoted in 1 Charles Warren, *The Supreme Court in United States History* 769 (1926)); *see also* G. Edward White, *The Marshall Court and Cultural Change—1815-1835* (1991). Faced with a challenge to the Court's authority from "North

of the Potomack" at the same time as the Southern states were resisting federal authority on several fronts, Marshall apparently decided that the better part of valor was to delay. By January 1833, Marshall may have hoped, the Georgia crisis would have run its course and he would be free to "preserve the Union" in whatever way the facts of the New York-New Jersey suit required. It was a feeble hope, but it changed the course of the negotiations between New York and New Jersey.

C. NEW JERSEY REACTION TO POSTPONEMENT

New Jersey's reaction to Marshall's decision was swift and thoroughgoing. Up until the March 1832 argument before this Court, New Jersey had expressed no doubts about its likelihood of success before a neutral arbiter such as this Court. After March 1832, this optimism evaporated, and New Jersey officials and advocates began to seriously consider ways to reach an "amicable" resolution.

The chief impetus for this change of attitude was New Jersey's fear of continued delay, and the changes it might effect in the Court. As William Wirt wrote to Samuel Southard in January 1833, commenting on New York's settlement overtures:

> I wish Governor Marcy's olive branch may not turn out to be a fire brand at a fox's tail. He is cunning enough to know, with positive certainty, that New Jersey has no hope for success but before the present judges of the Supreme Court—that every probability is in favor of a States-rights Chief Justice ere long—and that change, if made by President Jackson, must inevitably lead to the dismissal of our bill by the denial of the jurisdiction of the Court.

Letter from Wirt to Southard dated Jan. 11, 1833 (Southard Papers, Princeton University). Wirt's concern with delay, which he voiced again and again in the course of the case,

was well-justified.[12] Justice Marshall was 77 years old, in uncertain health, and had talked periodically of retiring. *See* Leonard Baker, *John Marshall: A Life in Law* 742, 746-50, 764 (1974). Marshall's nationalist colleague, Justice William Johnson, was visibly failing, and another Justice, Henry Baldwin, was rumored to be mentally unstable. White, *supra*, at 194, 299, 343. If a vacancy should occur on the Court, Jackson supporters had promised to fill it with a states' rights justice or other "anti-Court partisan," who would help change the direction of the Court. *Nullification Crisis*, *supra*, at 209; *see also* Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 94-102 (1985). If this should happen, Wirt warned, New Jersey could not hope for a resolution of its dispute with New York in the Court, and "would then have to take arms against the giant state—and, if it came to that issue, may they prove to be the Heaven-directed arms of David." Letter from Wirt to Southard dated Jan. 11, 1833 (Southard Papers, Princeton University).

Wirt's sentiments had been echoed as early as the preceding June in an exchange of letters among Jacksonian Governor Peter D. Vroom,[13] 1828 New Jersey Commissioner

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[12] Wirt had been pressing for a speedy resolution ever since New York filed its demurrer in January 1832. Claiming that he had "been against all delay from the word 'go,'" Wirt advised against consenting to postpone argument of demurrer until the following term because "delay is full of danger," since the "question [of jurisdiction] hangs on the lives of two men, of whom the youngest [*i.e.*, Marshall] is 'almost' an octogenarian." Letter from Wirt to Southard dated Feb. 8, 1832 (Southard Papers, Princeton University); *see also* Letters from Wirt to Southard dated Jan. 17 and 21, 1832 (Southard Papers, Princeton University).

[13] Peter D. Vroom, a Jackson supporter, served as New Jersey Governor from 1829 to 1832 and again from 1833 to 1837. *See* "Peter D. Vroom," in James G. Wilson & John Fiske, *Appleton's Cyclopedia of American Biography* (1888).

John Rutherford, and Samuel L. Southard, while he was still New Jersey's Attorney General. Rutherford had written to Vroom to communicate to the Governor a settlement overture made to Rutherford by Benjamin F. Butler in a chance meeting on a Hudson River steamboat. Letter from Rutherford to Vroom dated June 10, 1832 (Southard Papers, Princeton University). Vroom promptly responded that he was "exceedingly anxious" for the suit to be resolved on "equitable principles," and saw this as the moment to pursue such a settlement. Letter from Vroom to Rutherford dated June 25, 1832 (Southard Papers, Princeton University). Vroom then passed along Rutherford's letter to Southard, his Attorney General, with the strong suggestion that a "proper opportunity is now presented for doing something to accommodate the unpleasant controversy with N.Y." Letter from Vroom to Southard dated June 25, 1832 (Southard Papers, Princeton University). Southard, ever the champion of New Jersey's cause, resisted making an approach, but, apparently shaken by the Court's inaction in March, remained open-minded, stating that "N.Y. knows perfectly well that we are anxious . . . to meet her in the way of compromise." Letter from Southard to Vroom dated June 28, 1832 (Southard Papers, Princeton University).

D. THE NULLIFICATION CRISIS

New Jersey's resolve to settle rather than fight was further strengthened in late 1832 by other developments on the national political scene. Andrew Jackson had been elected to the Presidency on a states' rights platform that favored individual state autonomy and reduction of the power of centralized government. However, as President, Jackson still had to preside effectively over the Union, so when South Carolina enacted legislation in late 1832 invalidating or "nullifying" an 1828 Federal tariff law, the Jackson administration found itself confronting what has since become known as the "nullification crisis." *See* Richard E.

Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (1987); Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. SOUTH. HIST. 519 (1973).

Ultimately, Jackson issued a proclamation in December 1832 denouncing "nullification" and threatening military action if South Carolina did not retreat from its extreme position. *See* William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836,* at 265-95 (1966); Merrill D. Peterson, *Olive Branch and Sword: The Compromise of 1833,* at 46 (1982). However, Jackson could not have taken such radical measures without first ensuring that Georgia would not join South Carolina in the threatened secession, and Georgia in turn could not be won over, with any credibility, at the same time as New Jersey and a Jackson stronghold like New York were engaged in a similarly divisive debate concerning states' rights in this Court.

The message went out that it was in the Jackson administration's best interests for both the Georgia crisis and the New York-New Jersey boundary dispute to be resolved as expeditiously as possible. *See Nullification Crisis* at 195-96. The message was heard in New Jersey where Jackson supporters, led by Senator Mahlon Dickerson and former Governor Peter D. Vroom, continued to urge rapprochement with New York. *See* Michael J. Birkner, *Samuel L. Southard: Jeffersonian Whig* 121 & n.34 (1983). Indeed, in December 1832, Dickerson, together with future New Jersey Commissioner Theodore Frelinghuysen, "made a strong application" to New York's Governor-elect William L. Marcy concerning the recommencement of negotiations. Letter from Butler to Southard dated Jan. 3, 1833 (Southard Papers, Princeton University).

The message was also heard in New York where Benjamin F. Butler labored, on Van Buren's behalf, to

address both the Georgia crisis and the boundary dispute. *See* Driscoll, *supra*, at 230-57. Thus, it was Butler who worked behind the scenes to convince the ecclesiastical authorities who supported the missionary plaintiffs in the *Worcester* suit to withdraw their claims and thus defuse the situation, which efforts proved successful in early 1833. *See* Driscoll, *supra*, at 230- 44. It was also Butler who in January 1833 wrote an "unofficial" letter to Governor Southard suggesting that New York would be amenable to the "strong application" made by Dickerson and Frelinghuysen in December 1832. Letter from Butler to Southard dated Jan. 3, 1833 (Southard Papers, Princeton University).

At this juncture, even Southard, a Jackson opponent whose faith in New Jersey's cause had not been totally undermined by the Court's failure to act in March 1832, evidenced a willingness to assist the Jackson administration in quelling the discord threatened by South Carolina's actions. In a series of messages to the New Jersey legislature in December 1832 and January 1833, Southard spoke out strongly in support of Jackson's militant stand against South Carolina's position. Birkner, *supra*, at 139-40; *Nullification Crisis* at 210 & n.34. In the same spirit, when New York did formally suggest that negotiations be reopened in January 1833, Southard—who likely understood that New Jersey's chances of success in this Court had not been improved by the growing regional discord—was ready to accede to this suggestion and agreed to appoint Commissioners. Frelinghuysen could still write to Southard that he had "fully satisfied [his] own mind that we are right," but with Wirt (the preeminent Supreme Court litigator of the day) leading the list of Jacksonians and anti-Jacksonians contending that New Jersey's most practical alternative was an out-of-court settlement, Southard saw New Jersey's best option as renewed negotiations. Letter from Frelinghuysen to Southard dated Jan. 11, 1833 (Southard Papers, Princeton University).

It was thus with uncertainty about New Jersey's prospects of ultimate success in this Court, pressure from other state officials, and appreciation of the potential impact of continuation of the suit on national unity that Southard agreed to appoint Commissioners on behalf of New Jersey in January 1833. It was with similar concerns in mind that we may assume the New Jersey Commissioners set about their task in the late summer of 1833.[14] And it is, finally, in light of these considerations that we must evaluate the compromise achieved in the agreement arrived at between the States in September 1833.

The terms of this compromise, which the New York Commissioners deemed "conducive to the harmony and welfare" of both states, are set forth in an October 20, 1833 letter that Butler, Jay and Seymour sent to Governor Marcy, together with an executed copy of the Compact:

> [I]t will be seen that the middle of the waters which divide this State from New Jersey has been agreed upon as the *line of property*, with such variations as to include within this State the islands belongings to it; and that this is also to be the *line of jurisdiction, except where circumstances render a departure from it proper.* This was peculiarly the case with respect to the waters adjacent to the City of New York, and we trust that the jurisdiction necessary for the health, improvements, and

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[14] The actual negotiations between the Commissioners for the two States took place over a period of approximately one month between August 14 and September 16, 1833, *see* "Memorandum of my Attendance As Commissioner to Settle the Line between New York and New Jersey," by James Parker, dated Oct. 5, 1833 (Parker Papers, Rutgers University) ("Parker Mem."), with an agreement being reached and signed on September 16, 1833, which Benjamin F. Butler described to his wife as a "good & right settlement." *Id.;* Letter from Benjamin F. Butler to Harriet Butler dated Sept. 18, 1833 (Butler Papers, Princeton University).

> police of that City has been amply secured and that the agreement herewith delivered to you will be satisfactory to the Legislature and to our fellow citizens generally.

(NJ Ex. 312 (emphasis added).) In the absence of any comparable summary from the New Jersey side,[15] the New York Commissioners' letter to Governor Marcy, when read together with Justice Elmer's statements in *Babcock* concerning New York's retention of "exclusive jurisdiction," 30 N.J.L. at 31, demonstrates unequivocally that what circumstances had compelled New Jersey to accept were mere "property" rights in underwater lands between its shores and the middle of the Hudson River over which New York continued to exercise "exclusive jurisdiction."

POINT III

ALTERNATIVELY, THE COURT SHOULD DETERMINE THAT IT NEEDS STILL FURTHER INFORMATION

The foregoing account of the participants in and events surrounding negotiation of the Compact provides a compelling basis for this Court to reach conclusions that are substantially different from those reached in the Report. If the Court disagrees, however, and cannot find for New York on any other basis, it should alternatively determine that it needs still further information. The limited efforts of the Amici in the short time between filing of the Report and this

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[15] The New Jersey Commissioners reconvened in Trenton on October 4, 1833, to "make and sign [a] report to the Governor," Parker Mem. at 2, but this "report" has not yet come to light, most probably because it was transmitted by the New Jersey Commissioners to Elias P. Seeley, the little-known anti-Jacksonian legislative council member from Cumberland County who succeeded Southard as Governor in February 1833 and whose papers are scattered in several local historical society collections. *See* "Elias P. Seeley," in Paul A. Stellhorn & Michael J. Birkner, *The Governors of New Jersey—1664-1974* (1982).

Brief have opened up various, previously-unexplored avenues of inquiry. New light has been shed on the motives and mindsets of the Compact's drafters. The significance of the Compact has been placed in the context of its age. As historians, however, we would be hard-pressed to say that all that should be done has been done.[16]

Notwithstanding the fact that the Special Master saw fit to file the Report without considering much of the information contained herein or directing the States to explore further the potential sources for additional information proffered by the Amici, such information needs to be before this Court in order for it to reach an informed resolution of this dispute. Accordingly—to the extent that it cannot find for New York on any other basis—the Court should reject the Report and take whatever measures it deems necessary to ensure that the record is complete before it finally adjudicates the respective rights of New York and New Jersey under the Compact.[17]

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[16] By way of example, more than 2500 letters and other materials authored by or relating to Benjamin F. Butler exist in more than 75 collections around the country. *See* Ronald L. Brown, *The Law School Papers of Benjamin F. Butler* xiii (1987). The Historian Amici have examined as much of this material as time would permit between April 1, 1997, and the filing of this Brief. However, much remains to be reviewed. Smaller but still not insignificant quantities of material exist relating to Peter Augustus Jay, Henry Seymour, Lucius Q.C. Elmer, Theodore Frelinghuysen and James Parker. The materials relating to more peripheral but not less significant players, such as Samuel L. Southard, Peter D. Vroom, Martin Van Buren, and Andrew Jackson, are even more abundant.

[17] Where important issues have been left unaddressed or misconstrued by a Special Master, this Court has not hesitated to resolve the issues on its own, *see Colorado v. New Mexico*, 467 U.S. 310, 324 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759-60 (1981), or to remand the case to the Special Master with specific instructions concerning additional factfinding. *See Delaware v. New York*, 507 U.S. 490, 510

CONCLUSION

For all the foregoing reasons, the Court should (i) decide this case solely on the basis of Article II and the other arguments advanced by the State of New York, (ii) endorse the conclusions suggested by the Historian Amici herein, or (iii) reject the Report and take whatever measures it deems necessary to ensure that the record is complete before it finally adjudicates the respective rights of New York and New Jersey under the Compact.

Dated: New York, New York
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