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Supreme Court of the United States

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October Term, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PETITION FOR REHEARING

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No. 120, Original

In The

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October Term, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PETITION FOR REHEARING

Defendant State of New York respectfully moves this Court for an order granting rehearing of this original jurisdiction action, in which the Court on May 26, 1998 issued a decision sustaining in part and overruling in part the exceptions of the State of New Jersey to the Report of the Special Master, overruling in their entirety the exceptions of the State of New York to the same Report, and recommitting the case to the Special Master for preparation of a proposed decree. 66 U.S.L.W. 4389 (U.S. May 26, 1998). As grounds for this motion, New York states the following:

THE COURT'S DECISION LEAVES OPEN THE
QUESTION OF THE EXTENT OF ANY INJUNCTION
AGAINST THE ENFORCEMENT OF NEW YORK

LAW ON THE LANDFILLED PORTIONS OF ELLIS ISLAND, AND REQUIRES CLARIFICATION AS TO THE SCOPE AND MEANING OF THE GRANT TO NEW YORK, IN ARTICLE THIRD OF THE 1834 COMPACT BETWEEN THE STATES, OF "EXCLUSIVE JURISDICTION" OVER THE TERRITORY AT ISSUE.

The Court's decision granting New Jersey sovereignty over the filled portions of Ellis Island leaves unresolved important questions about the application to Ellis Island of Article Third of the 1834 Compact between the parties.¹ This Article provides in part that "[t]he state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York...and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof." Notwithstanding New Jersey's sovereignty over the western half of New York Harbor, Article Third provides a basis for New York's exercise of jurisdiction in this territory, and thus contemplates some circumstances in which New York law will apply in New Jersey sovereign territory. It remains to be determined what those circumstances are.

The Article Third grant of exclusive jurisdiction to New York necessarily means *something*. Indeed, the parties agree that, at a minimum, it entails the exercise of New York authority, and thus the enforcement of New York law, over navigation and commerce in New York Harbor. See NY Brief on Exceptions, pp. 16-17; NJ Reply Brief, p. 14; Transcript of Oral Argument pp. 11-12, 19-20. Because the task of the Special Master and the Court in the present case has been to determine which State has *sovereignty* over Ellis Island, the separate question of the scope

¹ The Compact between the parties appears as the Appendix to this Petition.

of New York's exclusive jurisdiction over the filled land has not been explored by the Special Master or the parties. The Court has now concluded that Article Second unambiguously leaves the matter of sovereignty over landfill added to Ellis Island to be resolved by the common law of avulsion. 66 U.S.L.W. at 4393 n 6. But the absence for the Court of any ambiguity in Article Second of the Compact with respect to sovereignty creates an ambiguity in Article Third: Does New York's "exclusive jurisdiction" under Article Third extend to landfill, and if so, what is the scope of the extraterritorial jurisdiction remaining to New York?

The Court's opinion does not answer these questions. Under the Compact, New York State has exclusive jurisdiction over the water and the underwater land over which New Jersey is sovereign—that is, the waters of the Bay and the subaqueous land in the western half of New York Harbor. There is no reason to believe that New York's Article Third exclusive jurisdiction is invariably extinguished when landfill is placed upon subaqueous land in New Jersey sovereign territory. In fact, the Compact indicates the opposite. When, in Article Third, the Compact shifts to New Jersey exclusive jurisdiction over filled lands in the western part of the Harbor, it does so expressly, awarding New Jersey "the exclusive jurisdiction of and over the ... improvements, made and to be made on the shore of the said state." This exception, expressly giving New Jersey exclusive jurisdiction over landfill placed only upon subaqueous land adjacent to the New Jersey shore, indicates that landfill placed elsewhere on subaqueous land in the western portion of the Harbor remains subject to New York's exclusive jurisdiction. The scope of this jurisdiction over landfill remains an open question, not yet addressed by this Court. *See Central R.R. Co. of New Jersey v. Mayor of Jersey City*, 209 U.S. 473, 479 (1908).

The question is not resolved by the Court's suggestion that, although Article Third undisputedly "preserve[s] New York's authority to regulate water-borne commerce in the Harbor," nonetheless "there is no reason to think that recognizing New Jersey as sovereign over the filled portions of the Island would affect New York's ability to regulate navigation and commerce in the harbor." 66 U.S.L.W. at 4394. There are circumstances in which New York's jurisdiction over navigation and commerce, however these terms are defined, entails an exercise of its authority over fast lands as well as waters.² At the very least, such jurisdiction is exercised when, for example, it is used to enforce state regulations respecting anchorage, docking, or commercial storage. *See id.* at 4393 n 4. It also may be exercised in enforcing such things as coastal zoning, environmental, and land use regulations.

Nor is the matter resolved by the assent of counsel for New York at oral argument to the proposition that if "New Jersey is sovereign over the fill, then New Jersey law applies to the fill." Transcript at 46; *see* 66 U.S.L.W. at 4393 n 4. The proposition is accurate as far as it goes: As this Court has noted, a sovereign's laws apply in its sovereign territory, and jurisdiction in the 1834 Compact is "something less" than sovereignty. *Central R.R. Co.*, 209 U.S. at 479. Now, with the question of sovereignty resolved, New Jersey can enforce its laws on the filled portions of Ellis Island. But the fact remains that New York has some type of jurisdiction over New Jersey sovereign territory, and thus

² There is precedent for the self-evident proposition that authority over navigation and commerce in New York Harbor entails some jurisdiction over fast land: When in 1901-1902 the federal Harbor Line Board declined to authorize a modification of harbor lines to accommodate the plans of an entrepreneur to create, with New Jersey's approval, an artificial hundred-acre island in New York Bay not far from Ellis Island, it did so in part because of the new island's probable interference with navigation (NJ Exhibits 331-334).

must retain authority to enforce some of its laws on that territory. And this in turn means that the scope of New York's "exclusive jurisdiction" must be defined in the course of delineating New Jersey's sovereign authority over the filled portions of Ellis Island.

Nor is this a matter that can await future presentation to the Court. The proposed Decree of the Special Master contains a provision that "the State of New York is enjoined from enforcing her laws...over the portions of Ellis Island that lie within the State of New Jersey's sovereign boundary." Report at 169. The Court at oral argument evinced concern with crafting an injunction encompassing New York's power to enforce its own laws on the landfilled portions of the Island. Transcript at 10-11, 46. Whatever the scope of New York's "exclusive jurisdiction" in Article Third, it plainly encompasses at least some extraterritorial exercise of authority by New York. Whatever the definition of New York's exclusive jurisdiction, it just as plainly may involve an exercise of that authority on the fast lands in the Harbor, including Ellis Island. The Court's rejection of New York's argument that it is sovereign over Ellis Island leaves uncertain and renders suddenly relevant the question of the scope of New York's extraterritorial jurisdiction under Article Third of the 1834 Compact. New York accordingly seeks rehearing in order to address this question, which can be resolved only by this Court.

CONCLUSION

For the foregoing reasons, the State of New York requests that this Court grant rehearing of its decision in this case.

Respectfully submitted,

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APPENDIX

COMPACT OF 1834

Act of June 28, 1834, 4 Stat. 708 (1834)

CHAP. CXXVI.—*An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.*

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q.C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said 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.

ARTICLE SECOND. The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to 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.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and middle of said waters: *Provided*, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B.F. EUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q.C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively,—therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, *Provided*, That nothing therein contained shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.

No. 120, Original

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Certification of Counsel

I hereby certify that the attached petition for rehearing of the State of New York in the above-captioned action is presented in good faith and not for delay.



BARBARA G. BILLET

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