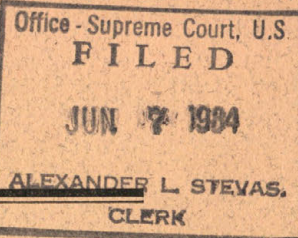


No. 35, Original



In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

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

ON REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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As we understand their submissions to the Court, the States of Rhode Island and New York have accepted the Special Master's finding (Report 19) that Block Island Sound does not qualify as an "historic bay." R.I. Br. 2; N.Y. Br. 11-12. Nor do the States now question the Master's conclusion (Report 28) that if Long Island is viewed as an island, no juridical bay exists in the disputed area. Accordingly, only two issues remain: (1) Should Long Island be treated as an extension of the mainland so as to form the side of a juridical bay? and (2) If so, what is the proper closing line of that bay? The

first question is the subject of our own Exception and has been fully argued in our opening brief. If we are right on that point, the case is at an end. The present brief addresses only the second question, in the event the Court disagrees with our primary submission that Long Island is an island in law as in fact.

On the assumption that Long Island is a part of the mainland mass, it is common ground that it forms a juridical bay—a bay we hereafter refer to as “Long Island bay,” which encompasses all of Long Island Sound and also some or all of Block Island Sound. It is likewise agreed that the southern headland of that bay is the eastern tip of Long Island, Montauk Point. What is disputed is how to draw the bay closing line from that point in a northerly direction to the Rhode Island mainland. Accepting *arguendo* that Long Island, juridically, is a peninsula, we endorse the Special Master’s resolution of the issue: a line from Montauk Point almost exactly due north to Watch Hill Point on the Rhode Island mainland. Report 49-60 & App. C. See also U.S. Br. 3a (chart 3). Although Rhode Island has listed 15 exceptions (R.I. Br. 2-4) and New York seven (N.Y. Br. 3-4), the States are essentially arguing that the closing line ought to proceed much more easterly from Montauk Point, to Block Island, and thence to Point Judith on the mainland. See Report App. C; U.S. Br. 2a (chart 2).

It is appropriate to deal with the question presented by the States’ Exceptions in two stages. First, ignoring Block Island, we ask where is the northern entrance point of the bay created by Long Island (treated as part of the mainland). After answering that inquiry, we turn to see whether the presence of Block Island alters the result.

A. The Normal Closing Line Of Long Island Bay

Since we are considering a juridical bay, it is clear that the question is governed by Article 7 of the international Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609 [hereinafter Convention], the text of which is reproduced in the Special Master's Report (at 20-21). That Article announces two kinds of criteria for a bay, the first visual, the second mathematical. We are not here concerned with the latter—the “semi-circle” test and the 24-mile rule—because it is agreed that they would be satisfied whichever of the proposed lines is chosen. But, of course, that is not enough. The Court has long since rejected the “argument that an indentation which satisfies the semi-circle test [and the 24-mile rule] *ipso facto* qualifies as a bay under the Convention.” *Louisiana Boundary Case*, 394 U.S. 11, 54 (1969). A bay must also meet what we term the “visual” tests: it must be a “well-marked indentation,” which is “more than a mere curvature of the coast,” and it must “contain landlocked waters.” *Ibid.*; see Convention, Art. 7(2). Nor do these requirements lose their relevance once it is determined that a true bay exists. As the Special Master recognized (Report 49-52), the visual tests also tell us where the bay begins and ends.

Thus, in this case, assuming there is a juridical bay between Long Island and the mainland to the north, we must still decide what are “the natural entrance points” of that bay, a line connecting which will define the limit of “internal” or “inland” waters. Convention, Art. 7(4). And, to make that determination, we will be applying a visual standard: at what points do the waters landward of a line drawn between them appear “landlocked” and within a “well-

marked indentation" and the more seaward waters seem outside the indentation and no longer land-locked? Given that the southern entrance point of the bay cannot be located more favorably than the tip of Montauk Point, the issue is where to place the "matching" entrance point on the northern mainland.

As it seems to us, a look at a chart of the area (*e.g.*, Report App. C) immediately answers the question in favor of the Special Master's choice, Watch Hill Point, and not Point Judith some eighteen miles to the east—or some point in between. That selection was endorsed (on the hypothesis that Long Island is an extension of the mainland) by the federal Baseline Committee (Hodgson Deposition, U.S. Exh. 63 at 7, 50; U.S. Exhs. 18-19) and by experts (Bowett Trial Transcript 41-43; Smith Trial Transcript 96). Watch Hill Point is, moreover, the nearest point on the opposite shore to Montauk Point and therefore satisfies the most appropriate of the objective criteria devised to aid in these determinations. See Hodgson Deposition 6-7; Report 50-51 n.39. But, at the end of the day, we cannot improve on the Special Master's statement in support of this solution (Report 59-60):

Montauk Point is one prominent point marking the separation between the waters within the indentation and the waters outside the indentation, and is the clear natural entrance point on the south side of the indentation. Watch Hill Point is the first prominent point on the Rhode Island coast, it is almost due north of Montauk Point, and it also marks the separation between the waters within the indentation and the waters outside the indentation, thus, Watch Hill Point is the logical natural entrance point on the north side of the indentation.

The parties agree that the waters on Long Island Sound are landlocked and it is clear that the waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while the waters east of this line are not landlocked. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea. Upon reviewing charts of the area, there is no perception that these waters are part of the land rather than open sea. Conversely, the waters west of Montauk Point and Watch Hill Point satisfy all the criteria for being landlocked. Long Island Sound and Block Island Sound west of Montauk Point and Watch Hill Point are surrounded by land on all but one side and are usefully sheltered and isolated from the sea. The waters west of a line connecting Montauk Point and Watch Hill Point are landlocked.

B. The Effect Of Block Island On The Bay Closing Line

The States pitch their case on the existence of Block Island. But it is plain, we submit, that the island is far too "isolated" to affect the definition of Long Island bay (assuming such a juridical bay, arguendo).

It is, of course, too late in the day to argue that an island "which cannot realistically be considered part of the mainland" may form a bay. *Louisiana Boundary Case*, 394 U.S. at 67. And, sensibly, the States make no such claim for Block Island, more than seven miles from the nearest mainland. See Report 67. But it is no more arguable that the closing line of Long Island bay ought to be deflected seaward because Block Island is so situated as to give the

indentation "more than one mouth." See Convention, Art. 7(3). Assuming a bay's seaward boundary should be bent outward (beyond the direct mainland-to-mainland closing line) where one or more islands obstructs the mouth of the indentation and "covers a large percentage of the distance between the mainland entrance points" (*Louisiana Boundary Case*, 394 U.S. at 58),¹ this is not remotely such a case. Here the island accounts for less than a quarter of the proposed closing line and lies more than ten miles seaward of the normal closure of the bay. See Report 60, 67 & App. C.

The States' somewhat original attempts to avoid the obvious result cannot avail. For instance, New York argues that all the waters of Block Island Sound should be considered part of a bay because they are put to the same purpose as "internal" waters, to wit, fishing and recreation, with little interruption by international traffic. N.Y. Br. 12. But, at best,

¹ This Court has not resolved the question, merely reciting Shalowitz' suggestion. See *Louisiana Boundary Case*, 394 U.S. at 57 n.78. Even Shalowitz noted, however, that using such an island "would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule." While he was of the view that a case by case application was best, he recognized that deflecting the closing line "only if some part of the island is on a direct headland-to-headland line", while more restrictive, "would also be in the interest of least encroachment on freedom of the seas." 1 Shalowitz, *Shore and Sea Boundaries* 225 n.38 (1962). To assure consistency, avoid ad hoc results, as well as protect the national interest in freedom of the seas identified by Shalowitz, the United States utilizes islands to form multiple mouths of a bay only when intersected by a mainland-to-mainland closing line. Smith Transcript 2-3, 2-4.

these facts are marginally relevant to an historic claim, now abandoned, or to a decision (reserved to the federal government) whether to invoke the straight-baseline option offered by Article 4 of the Convention. See *Louisiana Boundary Case*, 394 U.S. at 67-73. They have no place in determining the limits of a juridical bay under Article 7 of the Convention. Nor, indeed, is the absence of international traffic a unique characteristic of inland waters. As a consequence of the relative geographical isolation of the United States, many areas of territorial sea, even high seas, off the coast see no international shipping.

Rhode Island can fare no better in relying on non-geographical criteria, including vessel transit and the oceanographic traits of Block Island Sound. R.I. Br. 7-8. None of these factors are part of the Article 7 standards for delimitation of a bay, and they were properly rejected by the Special Master. Besides, if one were to stray from the geographical tests announced by the Convention, it would be difficult to ignore the views of the residents of Block Island, who are so far from considering themselves within the "landlocked" waters of Rhode Island that they are reportedly threatening total "secession." See *N.Y. Times*, May 30, 1984, at 1, col. 2.

In sum, the alternative closing lines presented by the States are not sustainable. If Long Island must be deemed an extension of the mainland creating a juridical bay, the natural entrance points of that indentation are found at Montauk Point and Watch Hill Point, as the Special Master found. That is what the map tells us at first glance and no number of words can alter this geographic reality.

For the reasons stated in our opening brief, the Exception of the United States to the Special Master's Report should be sustained. In the event the Court rejects that primary submission, the several Exceptions of Rhode Island and New York should be overruled and the Special Master's recommendations approved.

Respectfully submitted.

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