No. 35, Original

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(MASSACHUSETTS BOUNDARY CASE)

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION AND SUMMARY OF ARGUMENT

In light of our acquiescence in the Special Master's recommendation that Vineyard Sound be declared part of the inland waters of Massachusetts,[1] the only issue now before the Court is whether the waters of Nantucket Sound also qualify as inland (as the Com-

[1] Misunderstandings as to the basis and the meaning or prior "concessions" by the United States in this case (see Report 19, 20) counsel us to be explicit in stating what motivates our failure to except to the ruling that Vineyard Sound constitutes inland waters. We do not believe the Master's conclusion as to Vineyard Sound was correct; much less do we accept his reasoning. But, as it happens, all of the submerged lands of the Sound belong to the Commonwealth as underlying territorial waters, even under our view that these waters are not inland. The only practical effect of the Master's Vineyard Sound holding is to add a 1,000 acre wedge to Massachusetts submerged lands off the southwest entrance to the Sound. See Appendix, *infra*. Given such a minimal consequence, and the somewhat unique facts bearing on the historical claim to Vineyard Sound—in several respects contrasting with the evidence relating to Nantucket Sound—we have concluded that we ought not burden the Court with this issue. Cf. *United States* v. *Louisiana*, 446 U.S. 253, 261 n.1 (1980).

monwealth asserts) or, rather, constitute territorial sea and high seas (the Master's conclusion, which we support). See Appendix, *infra*. That single question, alas, has spawned a dozen sub-issues and no lack of words, some apparently self-contradictory and many of them wide of the mark as it seems to us.[2] Our endeavor will be to put the case back on track in as short a space as possible.

Had we the courage of our convictions, we would rest with a mere reference to pages 64 and 65 of the Report in which the Special Master unequivocably, and unanswerably, disposes of the Commonwealth's claim to Nantucket Sound by demonstrating that any earlier title to the area has long since lapsed. See pp. 10-17, *infra*. It will be noted that the Master's conclusion there is unhesitating and plainly does not depend on the standard of proof required of Massachusetts—the only matter to which its present brief is addressed.[3]

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[2] Although we disagree with some of the Special Master's reasoning, and even with one or more of what may be termed "conclusory" findings with respect to Nantucket Sound, we have filed no exception. That is because we entirely endorse the result—seeking neither more nor less than the decree recommended by the Master. Even a respondent or appellee in this Court is entitled to defend the judgment below on alternative grounds in such circumstances. See R. Stern & E. Gressman, *Supreme Court Practice* 478-487 (5th ed. 1978). *A fortiori*, a like procedural rule applies in cases on the Original Docket. These are, jurisdictionally, always in this Court and the filing of exceptions from a Special Master's Report is no more than a customary practice, not codified by statute or even by the Court's Rules. The Court has followed this course in the past, entertaining an alternative argument, advanced only by a reply brief, and adopting it to sustain a Special Master's ruling. *Utah* v. *United States*, 394 U.S. 89, 96 (1969).

[3] Massachusetts understandably invokes the Special Master's statement that it can "establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate to this proceeding." Report 51. But it seems

Although caution has led us to submit a fuller, sequential, presentation, we adhere to the view that the swiftest and surest solution to the case lies in the finding that any "ancient title" to Nantucket Sound was promptly renounced by both the United States and the Commonwealth itself.

A. We begin by stressing that the State's claim to Nantucket Sound as inland waters rests solely on the so-called doctrine of "ancient title." In the present context, this requires a showing that the Sound was lawfully acquired by the British Crown in colonial times and that the Commonwealth succeeded to that title and preserved it to this day. At the very least, we are warned to be cautious in accepting a claim so founded by the fact that there is no American precedent for it.

B. Assuming the validity of the theory, the evidence does not support a finding that Nantucket Sound became inland water of Massachusetts in the colonial period. Although it may satisfy the line-of-sight test, the Sound would not have been deemed eligible to be included in "county waters" because it is in no sense an indentation into the mainland, locked "between the jaws of the land." There is, moreover, no satisfactory evidence of "effective occupation" by governmental action.

C. At all events, any colonial title to Nantucket Sound has long since "lapsed," as the Special Master concluded. Indeed, every indication is that, immediately upon independence, the Commonwealth itself renounced the idea that the Sound was part of its internal waters. So, also, it seems clear such a claim would

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plain the quoted passage refers alone to the initial inquiry whether such a title was ever perfected in colonial times. On the critical issue whether any such title survived, the Master was in no doubt. Report 64-65. The Commonwealth simply ignores this unequivocal conclusion as to the "lapse" of any rights acquired during the colonial period. Report 65.

have been inconsistent with federal standards prevailing at the formation of the Union. In these circumstances, Massachusetts must be deemed to have relinquished any title it still held to the Sound.

D. Alternatively, we demonstrate that, if it did not do so at once, Massachusetts renounced or abandoned its claim to Nantucket Sound more than a century ago. At the latest, this occurred in 1859 when the State legislature formally adopted a six-mile rule to delimit Commonwealth internal waters. That regime having persisted without interruption until 1971, any "nonconforming" title to Nantucket Sound must be considered abandoned and cannot be "rescussitated" so late in the day.

E. Equally dispositive is the consistent repudiation of inland jurisdiction within Nantucket Sound by the United States. This is not a case in which the federal government participated in the ripening of historic title over a long span and then, belatedly and with questionable motives, disclaimed the inland water status of the disputed area. In the present circumstances, the Commonwealth's title to the Sound, even if briefly vested after statehood, may properly be deemed abrogated through longstanding adherence by the Nation to principles that deny inland status for the Sound.

F. Finally, we address the question so fully argued by Massachusetts: the quantum or standard of proof applicable to the State's historic claim in the face of a federal disclaimer. In our view, the result in this case does not remotely depend on the answer to that inquiry. Nevertheless, we submit that the Court and its Special Masters have consistently articulated the rule that the proof must be "clear beyond doubt" in a situation like that presented here. So much is due to the international stance deliberately taken by the United States, which ought not be contradicted except upon very strong evidence that it would be palpably unjust to deprive a

State of clear title matured by past events in which the federal government itself took a hand.

ARGUMENT

A. The Commonwealth's claim to Nantucket Sound is expressly (and necessarily) founded on an alleged colonial title

It is common ground that Nantucket Sound does not qualify as a "juridical" bay, *i.e.*, one that satisfies the presently governing criteria of Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1609, T.I.A.S. No. 5639. Report 9; see *Rhode Island & New York Boundary Case,* No. 35, Orig. (Feb. 19, 1985), slip op. 9-10; *Alabama & Mississippi Boundary Case,* No. 9, Orig. (Feb. 26, 1985), slip op. 6. So, also, there is no suggestion that the Sound is enclosed by a system of "straight baselines" sanctioned by the United States. Report 6; Mass. Exception 11; see *Alabama & Mississippi Boundary Case,* slip op. 6. And, whatever its earlier stance (see Report 10, 25), Massachusetts now expressly states that "it no longer claims historic title" to Nantucket Sound in the familiar sense of that term. Mass. Exception 4, 13 & n.7; see *Alabama & Mississippi Boundary Case,* slip op. 8-9.[4] For better or for worse, the Commonwealth today is perfectly content to rest the inland water status of Nantucket Sound solely on an alleged "ancient title" acquired by the British Crown and later passed on to the State. Mass. Exception 4, 13 & n.7, 23-24.

This is a unique stance. Presumably, Massachusetts recognizes that in the case of Nantucket Sound there is no evidence whatever to support a more traditional claim of "historic inland water" title, gradually maturing

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[4] Nor does Massachusetts in this Court assert that the "history and usage" of Nantucket Sound, as distinguished from the doctrine of "ancient title," supply an independent basis for its claim. See Report 51, 61.

over time through continued exercise of authority by federally sanctioned activities there and the acquiescence of foreign nations. Thus, despite a short-lived attempt to invoke the recent decision in the *Alabama & Mississippi Boundary Case* as relevant (see Report 69-69.4), the Commonwealth's argument in this Court is wholly unrelated to the one that prevailed there. Massachusetts here makes no pretense that, until a decade and a half ago, the State, as a member of the Union, or the United States, took any action with respect to Nantucket Sound that would yield a prescriptive title. Rather, the Commonwealth's entire submission is that a complete and perfect title to the Sound was lawfully acquired by the Crown during colonial times and bequeathed to the State—which could enjoy the inheritance without further ado. There is no precedent in this country for such a claim.[5]

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[5] On the contrary, both here and in England, it has been stated that nothing remains of maritime titles asserted in the 17th and 18th Century. Thus the Englishman Fulton has written that the old English claims survive

> only in the pages of historians, naval writers, and pamphleteers * * * * * [and] without apparently leaving a single juridicial or international right behind.

T. Fulton, *The Sovereignty of the Sea* 21, 538 (1911).

Elihu Root, in his argument for the United States in the North Atlantic Fisheries Arbitration stated that:

> These vague and unfounded claims [of the 18th and 17th, and earlier centuries] disappeared entirely, and there was nothing of them left . . . . The sea became, in general, as free internationally as it was under Roman law.

Quoted in Special Master's Report of Aug. 27, 1974, in No. 35, Orig., O.T. 1973, *United States* v. *Maine*, at 41 (brackets in original; citation omitted). As Judge Maris properly concluded, the coastal

B. No inland water title to the Sound was perfected in colonial times

It is not entirely clear how the Special Master and the Commonwealth overcome the stated requirement under the doctrine of ancient title that "effective occupation" of the area in question must date "from a time prior to the victory of the doctrine of freedom of the seas." Report 25-26; Mass. Exception 4. Although acknowledging the condition, neither the Master nor Massachusetts addresses the historic fact that, except for the relatively brief period of excessive Stuart pretensions, never fully accepted by the world community, freedom of the seas has been the prevailing international law regime since several centuries before the alleged appropriation of Nantucket Sound, especially where British views held sway. See Special Master's Report of Aug. 27, 1974, in No. 35, Orig., O.T. 1973, *United States*

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states may not rely on discredited pretentions of the Stuart reign to support modern coastline claims. Id. at 40-47, 60-65, 76-79.

The point is well summarized in Y. Blum, *Historic Titles in International Law* 250 (1965) (emphasis in original):

> a claim resting solely on extensive medieval pretentions, which may have been valid as long as a different legal regime prevailed over the high seas, will not be deemed as sufficient to uphold maritime historic claims and to validate them in accordance with the law in force at present. When the new international law of the sea took its final shape with the undisputed triumph of the *mare liberum* doctrine, each State was deemed to have been under the obligation, as it were, to *reacquire* its rights beyond those parts of the maritime territory which were conceded by the new regime to form the marginal belt of the coastal State.

It is clear that the English do not base any claim today on such outdated theories. See Special Master's Report of Oct. 14, 1952, in No. 6, Orig., O.T. 1952, *United States* v. *California,* at 18, approved, 381 U.S. 139 (1965); Special Master's Report of Aug. 27, 1974, in *United States* v. *Maine,* at 40-47; English position in the *Anglo-Norwegian Fisheries Case* (1 R. 161); Territorial Waters Orders-in-Council of 1964 U.S. Exh. 98).

v. *Maine,* at 25-29; J. Angell, *Tide Waters* 15-17 (1826).[6] We are nevertheless content to understand the Master and the Commonwealth as describing a title—whether or not properly labelled "ancient"—based on lawful occupation of a "vacant" area, not then appropriated by any nation or exempted from appropriation by international law as the common heritage of the world community. Accordingly, we ask two threshhold questions: (1) Could Nantucket Sound have been lawfully appropriated as inland during the colonial period and (2) assuming it might have, did Great Britain in fact assert sovereignty over the Sound?

1. The answer to the first question depends upon whether Nantucket Sound would have qualified as "county waters" under 17th and 18th Century English law which, in this respect, is assumed to have been consistent with international practice. See Report 27-34. We must respond in the negative. Even accepting the more generous line-of-sight test articulated by Sir Matthew Hale (see Report 45), it seems clear the waters of the Sound would not then have been viewed as *inter fauces terrae,* and therefore inland. See Report 43-50. The reason is not so much the width of the eastern entrance to Nantucket Sound (over nine miles), but the fact that the area, defined, except at the north, entirely by islands most of which no one pretends can be

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[6] The most often cited example of seabed ownership under ancient title is the case of the Ceylon pearl banks. *Annakumaru Pillae* v. *Muthupayal,* 27 Indian Law Rept. (Madras) 551 (1903). See, Y Blum, *supra,* at 331. The history of that fishery was traced to the sixth century B.C. P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 15 (1927).

assimillated as extensions of the mainland,[7] is in no sense a bay or estuary or gulf whose waters lie sheltered "between the jaws of the land," culminating in mainland headlands. Cf. *Louisiana Boundary Case,* 394 U.S. 11, 62-63 & n.82, 66-72 (1969); *United States* v. *California,* 381 U.S. 139, 170-172 (1965) (Santa Barbara Channel); *Rhode Island & New York Boundary Case,* slip op. 16-21 (Block Island Sound); *United Kingdom* v. *Albania,* 1949 I.C.J. 1, 4 (Corfu Channel).

The Special Master, we submit, was too quick to accept the idea that any area whose water crossings could be spanned by the human eye satisfied the Hale test for "county waters." So far as we are aware, no contemporary English authority condoned such an unbridled notion. Indeed, Hale himself specifies that, to qualify, the area must not only be closed by a line along which "a man may reasonably discerne between shore and shore," but also must be an "arm or branch of the sea, which lies within the *fauces terrae"* (or jaws of the land). Hale, *De Jure Maris et Brachiorum ejusdem* cap. iv (1667), *reprinted in* R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* App. vii (2d ed. 1875) (quoted in Report 45). And, unsurprisingly, all the examples alluded to, British or American, involve very obviously landlocked bodies of water, deeply penetrating into the mainland. That is the situation of the Bristol Channel, and of Delaware, Chesapeake and Buzzards Bays, mentioned

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[7] We have treated Monomoy Island, culminating at Monomoy Point, as an extension of the Cape Cod mainland. See Stipulation of Apr. 29-30, 1982, para. 2; Report 77-78. It is also arguable that the chain of the Elizabeth Islands, separating Buzzards Bay and Vineyard Sound, should be treated as a mainland extension. See App., *infra.* But no one has ever suggested such treatment for Nantucket, Martha's Vineyard, or the islands that lie between them.

in the Master's Report. See *id.* at 33-37, 45 & n.21, 59. No case treating as inland any area remotely like Nantucket Sound has been shown.

2. An equally serious obstacle to a claim premised on English Crown title is the failure to show any "effective occupation" of Nantucket Sound. As the Special Master repeatedly stressed, mere eligibility for such treatment under pre-Revolutionary English law is not enough to establish inland water title; and actual assertion of sovereignty must be shown. Report 38, 64-65. The evidence on this score is simply that the local inhabitants of the area in colonial times took full advantage of the natural resources offered by Nantucket Sound—as would any coastal people, whether the adjacent waters were "inland" or not. See Report 52-56.[8] In our view, the Master, although briefly distracted by these entirely private activities (see Report 56-58), was correct in ultimately concluding that Massachusetts had never attempted to establish jurisdiction over Nantucket Sound. Report 64-65. The upshot is that no "ancient title" to the Sound as inland water was ever perfected.

C. No colonial title to the Sound survived independence or the formation of the national Union

At all events, it is perfectly clear that any such title to the Sound, if it existed in colonial times, has not sur-

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[8] It ought not be necessary, at this late date, to demonstrate that the use of a maritime area by the coastal inhabitants for fishing and other purposes does not remotely constitute an effective assertion of sovereignty by State or Nation. See, *e.g.*, *Louisiana Boundary Case*, 394 U.S. at 75-76 & n.103; Special Master's Report of July 31, 1974, in No. 9, Orig., O.T. 1974, *Louisiana Boundary Case*, at 13-22, approved, 420 U.S. 529 (1975); *United States* v. *Alaska*, 422 U.S. 185, 190, 197-199, 203 (1975). See also Special Master's Report of Oct. 14, 1952, in *United States* v. *California*, at 39, approved, 381 U.S. 139, 173, 177 (1965).

vived. There is no avoiding the Special Master's unequivocal finding that until the 1970's neither Massachusetts as a State nor the United States ever asserted sovereignty over the center of Nantucket Sound and, indeed, that both Nation and Commonwealth effectively *disclaimed* any such jurisdiction for two centuries, with the consequence that "whatever rights [Massachusetts] may have had over Nantucket Sound during the colonial period lapsed until the Commonwealth's recent attempt to resuscitate them." Report 64-65.

There are several bases for the Master's conclusion that colonial rights with respect to Nantucket Sound, if any, "lapsed" by abandonment or renunciation. The first is that the supposed title never passed to Massachusetts as an independent commonwealth or as a member of the constitutional Union.

1. There is, of course, no inhibition on a *new* sovereign's renouncing a portion of the maritime territory enjoyed by the preceding sovereign. Thus, the United States effectively repudiated the sweeping claims once asserted in the ocean by Spain, Mexico, and Britain. *United States* v. *California,* 332 U.S. 19, 32 (1947). See also *United States* v. *Louisiana,* 363 U.S. 1, 30, 71 (1960); Special Master's Report of Oct. 14, 1952, in No. 6, Orig., O.T. 1954, *United States* v. *California,* at 37-38, approved, 381 U.S. 139, 172-175, 177 (1965). So here, assuming that Great Britain "acquired" Nantucket Sound by occupation during the colonial period, and assuming further that this title was transferred from the Crown to the colony by the Seventeenth Century charters invoked in this case (see Report 27, 38-43), nothing prevented the Commonwealth, upon Independence, from relinquishing the Sound to the community of nations.

Perhaps one ought not *presume* such a retrenchment.

But, in the premises, there are very strong indications that Massachusetts, from the beginning of its independent existence, disclaimed Nantucket Sound. That was apparently the view of Justice Story as early as 1829, applying the so-called "Coke test"—which concededly would not embrace Nantucket Sound as inland (see Report 49)—to define the limit of the Commonwealth's internal waters. *United States* v. *Grush,* 26 F. Cas. 48, 51-52 (C.C.D. Mass. 1829). The stance was, in any event, formally confirmed in the mid-Nineteenth Century by the judicial adoption of a standard that Nantucket Sound could not satisfy (*Commonwealth* v. *Peters* 53 Mass. (12 Met.) 387, 392 (1847), and, shortly thereafter, by the legislative enactment of a six-mile rule likewise excluding the Sound from State internal waters (Ch. 289, 1859 Mass. Acts 640; Mass. Exh. 53). See Report 58-59, 65.[9]

2. Although the Commonwealth's own clear failure to claim Nantucket Sound as inland waters until well after the present litigation was initiated in 1969 is dispositive, we note that any attempt by Massachusetts to maintain a non-prescriptive title to the Sound would fail anyway as contrary to the policy of the United States. It is now well settled that whatever rights a State may have enjoyed in the marginal sea and beyond as an independent nation were surrendered to the United States upon acceding to the Union. *United States* v. *Maine,* 420 U.S. 515, 522-523 (1975); *United*

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[9] As the Special Master notes (Report 59), the State legislature re-affirmed the 1859 six-mile rule in 1881 and directed the preparation of charts to depict its application. The resulting charts clearly omitted Nantucket Sound from State inland waters. Report 59, 65. That remained the situation until 1970. See note 13, *infra.*

States v. *Texas,* 339 U.S. 707, 717-718 (1950).[10] Plainly enough, that principle cannot be defeated simply because the area in question, although part of the marginal sea or the high seas under federal law, is labelled "inland water" by the affected State.

This, we submit, is the situation here. Indeed, it seems clear that, at least until the present century, the federal government did not assert inland water status for areas like Nantucket Sound which satisfied neither Lord Coke's county waters test nor the six-mile rule and did not enjoy the exceptionally deep inland penetration of Delaware, Chesapeake and Buzzards Bays and Long Island Sound. See, *e.g., Manchester* v. *Massachusetts,* 139 U.S. 240, 258 (1891); *Louisiana* v. *Mississippi,* 202 U.S. 1, 52 (1906); *Rhode Island & New York Boundary Case,* slip op. 14-15; Customs Act of July 31, 1789, ch. V, § 1, 1 Stat. 31; 1 Op. Att'y Gen. 32 (1793).[11] In sum, we fully endorse the Master's finding that the United States in fact never claimed Nantucket Sound as inland water. Report 62, 64-65.

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[10] Of course, by virtue of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, the United States retroceded some of these rights. But Massachusetts does not—and could not—advance any claim under that statute to the portions of Nantucket Sound more than three miles from land (the central core, in dispute here) since the Sound concededly does not qualify as a "bay" under the Convention on the Territorial Sea which this court has held applicable in delimiting "inland waters" under the Act. See *United States* v. *California,* 381 U.S. at 161-167.

[11] It is, of course, common ground that, from the first, the United States (unlike Britain) followed the more conservative Coke test for delimiting inland waters (Report 45-47), and that Nantucket Sound does not satisfy that standard (Report 49). So, also, it is clear that the eastern entrance to the Sound at all times exceeded six miles in width (Report 49-50 & nn.31 & 32, 65), which, for at least a century, the United States (longer than most nations) considered generally a maximum closing distance for bays. See Special Master's Report of Oct. 14, 1952, in *United States* v.*California,* at

D. Any colonial title to the Sound that survived statehood was later voluntarily renounced or abondoned by the Commonwealth

We have demonstrated that any colonial title to Nantucket Sound terminated with Independence or, at the latest, upon ratification of the federal Constitution. The result would be no different, however, if that title had been abandoned or repudiated at a somewhat later date.

1. The point hardly requires elaboration as it applies to the Commonwealth's voluntary relinquishment of any inherited colonial title. Just as it could renounce such a claim *immediately* upon achieving independence, Massachusetts might do so later. There is no rule of "now or never" in this matter. Subject only to limitations imposed by international law and to federal acquiescence (after 1789), the Commonwealth was free to alter its maritime boundaries. Thus, as this Court squarely held in *Manchester* v. *Massachusetts,* 139 U.S. at 263-264, the State was not required to adhere to the English "county waters" doctrine, but could adopt, as it did, a more precise six-mile rule in defining its internal waters.[12]

14-21, especially 17. As already noted, the special cases of Delaware and Chesapeake Bays and Long Island Sound were justified by unusual geography, not remotely resembling Nantucket Sound. Indeed, as we observe in a moment (pp. 18-20, *infra*), Nantucket Sound, being a strait connecting two segments of high seas and an area defined largely by islands, would not have qualified as inland water during the regime of the so-called ten-mile rule. See Letter from James E. Webb, Acting Secretary of State, to the U.S. Department of Justice, paras. (c), (e) and (f) (Nov. 3, 1951), *reprinted in* 1 A. Shalowitz, *Shore and Sea Boundaries* 354, 355 (1962).

[12] More recently, the Court has qualified the dictum of *Manchester* insofar as that decision seems to condone any extension of State boundaries to the limits permitted by international law, regardless of a federal objection. *United States* v. *California,* 381 U.S. at 168-169. See also *Louisiana Boundary Case,* 394 U.S. at 72-73; *United States* v. *Alaska,* 422 U.S. at 203; *Alabama &*

We accordingly have an effective renunciation of Nantucket Sound by legislative act in 1859—assuming the independent Commonwealth did not immediately disclaim the Sound. And that explicit disclaimer, continually re-affirmed in official charts, persisted for well over a century. No claim to the Sound as inland was advanced until the enactment of new statutes in 1971. See Chs. 742, 1035 and 1104, 1971 Mass. Acts 616, 985 and 1128; U.S. Exhs. 41, 42 and 76. And see U.S. Exh. 44 (Governor's Proclamation).[13] As the Master indicated (Report 65), after so long a lapse, title to Nantucket could not then be recaptured. Nor is it even suggested that a new prescriptive claim has matured in the few years since 1971, especially in light of the open and formal opposition of the federal government.

2. We have spoken of voluntary "renunciation" or "relinquishment," more or less explicit. On the present record, we might stop here. But it is perhaps well to add that, in the context of maritime boundaries, a loss of sovereignty and property rights can result from abandonment. Long acquiescence in a more restricted line is presumably sufficient in this case as it would be where

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Mississippi Boundary Case, slip op. 6. But the reasoning underlying the requirement of federal acquiescence for the expansion of State maritime boundaries has no application to a contraction of State waters: such action cannot embarass the United States in its foreign affairs.

[13] In 1968, the Law of the Sea Panel of the Governor's Conference on Massachusetts' Stake in the Ocean filed its report, recommending that the Commonwealth extend its marine boundaries to make them "coextensive with the United States for international purposes, as defined in the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone." U.S. Exh. 73, at 1. The report reflected, without apparent disagreement, the federal understanding that Nantucket Sound would not be included within such an extension. *Id.* at 2.

Some months later, the Massachusetts Attorney General, Elliot Richardson, announced that he had been working on legislation and was:

interstate boundaries are involved. See, *e.g., California* v. *Nevada,* 447 U.S. 125, 131-132 (1980), and cases there cited. *A fortiori,* an "aberrational" claim, at odds with contemporary norms, must be deemed lost if it remains unexercised for a long span.

It is true that "ancient title," so-called, is originally a lawful appropriation, not a usurpation conferring rights by adverse possession of an area appertaining to others, and that such a claim is complete by occupation and does not require time to ripen by prescription. But, of course, ancient title is relied upon only when the claim is inconsistent with modern legal standards; it is, in effect, a non-conforming use, entitled to be "grandfathered" only because it was established before the current "zoning" rules were enacted. Accordingly, an ancient title that offends prevailing international law criteria is susceptible to loss by non-use. Indeed, the United Nations study

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> ready to define our seacoast by statute, utilizing the latest techniques of international conventions and embracing roughly 150 additional square miles of Massachusetts Bay as ocean territory under the jurisdiction of the Commonwealth of Massachusetts.

U.S. Exh. 47, at 2. The State Attorney General's office consulted with the federal government, which had no objection to the proposed extension, on the understanding that the standards of the territorial Sea Convention would be followed, with the consequence that Nantucket Sound would not be closed. U.S. Exh. 48, at 2-3.

When, the following year, the State legislature again consulted with the federal government, it was made clear that Nantucket Sound could not be closed. U.S. Exh. 34. The Commission then proposed legislation which conformed to the federal position as it existed then and continues today. See U.S. Exh. 48. An accompanying map plainly shows the interior of Nantucket Sound to be high seas. *Id.* at 9. Finally, by Ch. 810, 1970 Mass. Acts 679, the State's boundaries were extended "seaward to the outer limits of the territorial sea of the United States of America." U.S. Exh. 40, at 2. In light of its history, this legislation presumably makes no claim inconsistent with the federal position denying inland water status to Nantucket Sound.

invoked by the Commonwealth expressly contemplates that an ancient title must be "fortified by long usage" if it is to endure. See Report 25; Mass. Exception 13 n.7 (omitting the adjective "long"). But, as the Master found, the history of Massachusetts with respect to Nantucket Sound reflects no attempt to exercise sovereign rights at least from the dawn of the Nineteenth Century to 1971. See Report 64-65.

E. Any colonial title to the Sound that survived statehood was effectively repudiated by the United States

As we have previously noted (p. 13, *supra*), every indication is that, from the very first, the United States disclaimed inland water title to areas like Nantucket Sound, consistently with our exceptionally conservative policy favoring the maximum freedom of the seas. See *United States* v. *California,* 332 U.S. at 32-33, 34. If that is right, Massachusetts must be taken to have relinquished any earlier title to the Sound upon joining the Union. See pp. 12-13, *supra.* The question we now address arises only in the unlikely event the Court were to conclude—contrary to its Special Master—that a colonial title to Nantucket Sound survived statehood with the acquiescence of the United States and was not then or later effectively renounced or abandoned by the commonwealth itself. On that hypothesis, what would be the result if, after 1789, the United States, rather than the State, repudiated any inland water claim for Nantucket Sound?

1. There is no doubt that the federal government has, in fact, disclaimed title to the Sound as inland. Nor does the repudiation of any such claim begin only in 1971, as the Commonwealth suggests (Mass. Exception 21, 23). The publication since 1971 of official charts excluding Nantucket Sound from inland water status (see Report 13-15) is merely the most recent reflection of a consistent stance dating back almost two centuries. As

the Special Master noted (Report 62, 62-63, 64-65), federal custom statutes enacted in 1789, 1790 and 1799, omitted Nantucket Sound (but not Vineyard Sound) and the significance of that fact was notified to the international community by Attorney General Randolph's 1793 opinion in respect of Delaware Bay. In addition, as we have already noticed (p. 13, *supra*), federal judicial decisions early followed a "county waters" test that excluded Nantucket Sound. Report 45, 47. It remains only to stress that the geographical status of the Sound as a strait, connecting two parts of the open sea (see Report 67), has deprived it of inland water status under undeviating federal policy, openly declared to the world for a century.[14]

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[14] The Special Master here seemed to assume that this position was reserved for straits with a significant amount of international traffic. Report 67. Although there is evidence in this record that Nantucket Sound was used for international shipping (Tr. 1019) that fact is not critical to the federal contention. Except for cul-de-sac situations, the consistent United States position has been to deny inland water status to water bodies formed by the mainland and offshore islands regardless of actual use by foreign vessels. See *United States* v. *California,* 381 U.S. at 171-172.

It may be noted that the International Court of Justice placed little or no emphasis on the volume of international traffic in the Corfu Channel Case, *United States* v. *Albania,* 1949 I.C.J. 1, 4. The majority stated (at 28):

> It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.

The Special Master's contrary view, although not identified as such, seems to track Judge Azevedo's dissenting opinion. *Id.* at 106. See Report 66.

At least since Secretary of State Bayard's statement in 1886 (see 1 J. Moore, *Digest of International Law* 718-721 (1906)), the United States has made clear its repudiation of any straight baseline system to enclose a channel that is not merely a dead-end (or "cul de sac") leading to inland waters—even where the offlying islands are less than ten miles from shore and from each other.[15] See Letter from James E. Webb, Acting Secretary of State, to U.S. Department of Justice, paras. (c), (e) and (f) (Nov. 3, 1951), *reprinted in* 1 A. Shalowitz, *Shore and Sea Boundaries* 354, 355-356 (1962). And the federal government has protested when foreign nations sought to treat straits as inland. See Special Master's Report of Oct. 14, 1952, in *United States* v. *California,* at 14-15, 25-26; P. Jessup, *The Law*

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[15] We cannot suppose the Court meant to disagree in recently describing "the publicly stated policy of the United States" since 1903 as one of "enclosing as inland waters those areas between the mainland and offlying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Alabama & Mississippi Boundary Case,* slip op. 13-14 (footnote omitted). Significantly, the Special Master here did not construe the "10-mile rule" as automatically enclosing Nantucket Sound (Report 69.3 n.1) and Massachusetts has not invoked that supposed "rule" in this Court. The correct reading of the quoted passage, we suggest, is that it envisages a cul-de-sac situation like Mississippi Sound (or Chandeleur and Breton Sounds) (see *Alabama & Mississippi Boundary Case,* slip op. 9, 17, 21), but not geographic straits like Nantucket Sound. Otherwise, it is impossible to explain the Court's rejection of inland water claims in Caillou Bay in Louisiana and Florida Bay in Florida. See *Louisiana Boundary Case,* 420 U.S. 529 (1975); *United States* v. *Florida,* 425 U.S. 791 (1976). At all events, moreover, the result in the case of Mississippi Sound did not rest on mere adherence to a ten-mile rule, but involved specific assertions of jurisdiction over the waters of the Sound by all three branches of the federal government (*Alabama & Mississippi Boundary Case,* slip op. 10-11, 14-15, 15-16 & n.11), implemented by concrete activities (slip op. 9, 11-12). As the Master found, there is nothing remotely comparable in respect of Nantucket Sound.

of Territorial Waters and Maritime Jurisdiction 66 (1927); 4 M. Whiteman, *Digest of International Law* 287 (1965). Obviously enough, this stance excluded Nantucket Sound as inland water. But, in any event, the status of the Sound was made explicit in 1959 when the Geographer of the State Department described the "territorial sea of Martha's Vineyard coalesc[ing] with that of the mainland as well as with that of Nantucket Island," a description wholly inapposite if the Sound was inland water. See Pearcy, *Measurement of the U.S. Territorial Sea,* 40 Dep't St. Bull. 963, 965-966 (1959) (quoted at 4 M. Whiteman, *supra,* at 281). There was thus an unambiguous disclaimer of the Sound long before the recently published charts.[16]

2. The only question, then, is whether such a federal disclaimer, however long and consistently maintained, must be denied effect if it postdates the State's admission to the Union, even if only by a few months, on the ground that this would work an impermissible "contraction of a State's recognized territory" in violation of the constitutional principle embodied in *Pollard* v. *Hagan,*

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[16] We are at a loss to understand the import of the Special Master's conclusion that a Coast Guard "inland water line" encompassing Nantucket Sound for less than two years—between July 15, 1977, and April 16, 1979 (see Report 16-17)—"vitiated the United States disclaimer." Report 19. Since the Coast Guard lines were published on the same large scale charts which carried the official territorial sea lines, expressly so labelled, it is doubtful that any foreign government was misled. But, in any event, the withdrawal of the Coast Guard lines, with an explicit acknowledgement of error because they did "not accord with the treaty" (44 Fed. Reg. 2245 (1979), U.S. Exh. 93), effectively re-instated the disclaimer of Nantucket Sound as inland water—a position that has been maintained in every re-issue of the relevant charts for the area. Indeed, with particular reference to Nantucket Sound, the Master ultimately concluded that the United States had never asserted inland water title. Report 64-65.

44 U.S. (3 How.) 212 (1845). See *United States* v. *California,* 381 U.S. at 168; *Louisiana Boundary Case,* 394 U.S. at 73-74, n.97, 77 & n.104; *Alabama & Mississippi Boundary Case,* slip op. 18-19. As we understand it, that is the Commonwealth's contention here. See Mass. Exception 7, 15. We disagree.

There is, in truth, no hard and fast constitutional rule that State title to tidelands and offshore submerged lands, once vested, is indefeasably "frozen." The gloss of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 372-378 (1977), on the *Pollard* doctrine, has no application to the beds and shores of waters that affect the national coastline. That was obviously the view of Congress when it wrote the Submerged Lands Act (see 43 U.S.C. 1301(a)(1) and (2)), and of this Court when it adopted the ambulatory principles of the Convention on the Territorial Sea to delimit State inland waters insofar as they affected the baseline of the territorial sea. *United States* v. *California,* 381 U.S. 139 (1965).[17] The point was expressly confirmed in *Hughes* v. *Washington,* 389 U.S. 290 (1967), upholding the State's loss of tidelands existing at statehood, and, most recently, in *California ex rel. State Lands Commission* v. *United States,* 457 U.S. 273 (1982), which reaffirmed *Hughes* (*id.* at 282-283, 284, 288) and again rejected a State claim that former tidelands were irrevocably vested in the State. *Id.* at 284 n.14. In sum, it is clear that changes in geography, whether natural or artificially caused, effectively can deprive a State of title to the beds and shores of tidal waters that qualified

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[17] Even before the second *California* decision in 1965, the Court had envisaged an ambulatory coastline, including (bay) low-water lines and closing lines that would accord with current geography, not the situation at statehood. See the Decrees entered by the Court in the pre-Submerged Lands Act cases. *United States* v. *California,* 332 U.S. 804, 805 (1947); *United States* v. *Louisiana,* 340 U.S. 899 (1950); *United States* v. *Texas,* 340 U.S. 900 (1950).

as inland on the date of the State's admission to the Union.[18]

Given that permanently or periodically submerged areas that once qualified as bays are not irrevocably vested in the State as a matter of constitutional law, it is not apparent why changes in law should not occasionally work a divestiture to the same extent as a change in geography. Indeed, the recent *California ex rel. State Lands Commission* case indicates that Congress can, by fashioning an accretion rule favorable to the United States, effectively deprive a State of some of its historic tidelands. See 457 U.S. at 283-284, 287. What is more, the Court has applied the Convention as domestic law in denying State claims to inland waters which the United States had conceded under its prior understanding of international law rules. That was true with respect to Caillou Bay in Louisiana (see *Louisiana Boundary Case,* 394 U.S. at 66-67 n.87, 73-74 n.97) and Florida Bay in Florida, anchored in the Keys (see *United States* v. *Florida,* 420 U.S. 531 (1975); 425 U.S. 791 (1976)).

To be sure, the State invokes the caveat in *United States* v. *California,* 381 U.S. at 168, to the effect that the "contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." But this was written in the context of a ruling that *approved* the wholesale adoption of new international rules as con-

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[18] This can occur in many ways: alluvion or accretion within the bay may reduce the water area so that it no longer meets the semi-circle test or loses its character as a "well-marked indentation"; erosion may wear away, or a violent storm may wash away, one or both headlands so that the water is no longer "land-locked" or the closing line exceeds 24 miles; a former headland may become an island, depriving the bay of one of its mainland "arms"; or islands screening the mouth may disappear and lengthen the water crossing to the point where the semi-circle test can no longer be met.

trolling State offshore rights and cannot reasonably be understood to require rejection of any application that, contrary to the usual result, disadvantages a State. Indeed, the point was clarified four years later in the *Louisiana Boundary Case,* 394 U.S. at 74 n.97, where the court said the Federal Government "arguably could not abandon [a consistent official international] stance solely to gain advantage in a lawsuit to the detriment of [a State]." Obviously, this description does not reach any changes in inland water delimitation rules directly resulting from United States adherence to the Convention on the Territorial Sea, which *the Court,* over our objection, imported as the law of these cases. See *United States* v. *California,* 381 U.S. at 164.

Our submission is not that the *Pollard* doctine has no application to tidal waters. But it must be remembered that the *Pollard* case does not tell us which are "inland waters" for constitutional purposes. More recently, the Court has instructed us to measure inland waters on the seacoast in accordance with the international Convention on the Territorial Sea. Yet, the whole rationale for adopting the comprehensive rules of the Convention as the "coastline" law of the Submerged Lands Act would be defeated if each application to a particular segment had to be tested against some supposed prior criteria and rejected if, in that context, the State fared less well. Cf. *California ex rel. State Lands Commission* v. *United States,* 457 U.S. at 286 n.14; *United States* v. *California,* 381 U.S. at 165, 166 n.33. Nor is it merely a matter of avoiding awkward burdens and pretexts for further controversy. This is a situation in which localized State concerns must yield to the broader national policies which inform the choice of a uniform international stance. Here, no less than in the case of coastal tidelands, we deal with "waters that lap both the lands of the State and the boundaries of the international

sea," whose status is "too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the land.'" *Hughes* v. *Washington,* 389 U.S. at 293, reaffirmed in *California ex rel. State Lands Commission* v. *United States,* 457 U.S. at 280, 283, 288. See also, *United States* v. *California,* 332 U.S. at 29, 34-36, 40.

These considerations may by insufficient where a belated and suspect federal disclaimer is invoked to divest a State of a title to inland waters that has already ripened by notorious adverse possession over a long period with the participation of federal authorities. See *Alabama & Mississippi Boundary Case,* slip op. 9-19. But no like case can be made for a title that was not earned by long usage, has never been endorsed by the United States, and, indeed, has been publicly repudiated by the Nation for most of two centuries, well before any dispute over valuable seabed resources was contemplated. Neither law nor equity can insulate the archaic Massachusetts claim to Nantucket Sound.

F. In light of the federal disclaimers, the Commonwealth must establish the original existence of colonial title to Nantucket Sound and its survival to the present day by evidence "clear beyond doubt"

We have already stressed our belief that decision of the only issue remaining in the case depends not at all on the standard of proof required of Massachusetts in establishing the inland water status of Nantucket Sound. This is because the Special Master correctly found that, on the critical question whether any colonial title to the Sound has been preserved, there was a total "absence of evidence showing an assertion of authority over Nantucket Sound during the nineteenth century," but, on the contrary, "positive evidence" (much of it "in-

troduced by Massachusetts") that the Commonwealth "failed to do so." Report 65. Thus, the Master's conclusion that any "ancient title" long since "lapsed" (*ibid.*) does not remotely turn on the quantum or standard of proof properly required of the claimant State. And, since the Commonwealth's case ultimately requires a showing that any ancient title has survived, it cannot matter which standard is applicable to the threshhold question whether such a colonial title was ever perfected. Out of an abundance of caution, we nevertheless briefly address the point to which the whole of Massachusetts' brief is devoted.

1. We fully accept that the question of proving a title "clear beyond doubt" arises only when the United States disclaims the area as inland water. See Mass. Exception 19. However, the 1965 *California* decision which established the standard makes clear that the rigorous burden of proof applies whenever the federal government officially denies the inland status of the disputed waters, even during the lawsuit. That was the situation there, as it was in the *Louisiana* litigation. See *Louisiana Boundary Case,* 394 U.S. at 73-74 & n.97; Special Master's Report of July 31, 1974, in Louisiana Boundary Case at 18-19, 21-22, approved, 420 U.S. at 529.[19] Such a belated disclaimer may not be "effective" or "dispositive" because a previously perfected historic title is "clear beyond doubt" (*e.g., Alabama & Mississippi Boundary Case,* slip op. 18-19), but it nevertheless brings into play the special standard of proof.

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[19] As applied to Caillou Bay, the United States in 1968 and thereafter was disclaiming inland water title to an area that it had expressly asserted to be inland throughout the 1950s (and perhaps earlier). Nevertheless, Louisiana's claim to the area, largely based on historic title, was rejected.

Thus, here, the wholly unambiguous disclaimer of Nantucket Sound on published official charts, beginning at the latest in 1979 after the withdrawal of the Coast Guard lines (see n.16, *supra*), was sufficient to require the Commonwealth to prove its title by evidence "clear beyond doubt." But, as it happens, we need not rely on anything so recent. There were, as we have noted, federal disclaimers of the inland status of the Sound as early as a customs statute of 1789. And that stance never varied. Plainly enough, this history, if not wholly dispositive (see pp. 11-24, *supra*), places the heaviest burden on the Commonwealth to demonstrate a title to Nantucket Sound.

2. Massachusetts apparently accepts that it has the burden of persuasion on the issue of ancient title even in the absence of any federal disclaimer (beyond our litigation stance). See Mass. Exception 9-13. In its view, however, no disclaimer can alter the standard to which it must prove its case. This, we submit, ignores both longstanding precedent and common sense.

Indeed, in the second *California* case, the Court very plainly indicated that a higher degree of proof was required to establish historic inland title when the United States disclaimed the area. 381 U.S. at 175. We read the opinion in the *Louisiana Boundary Case,* 394 U.S. at 76-77, to the same effect. It is obviously useless to look to international law on this point: nations do not normally both claim and disclaim title to the same area at the same time. This is a domestic problem, related to our particular federal system. On the other hand, it is relevant that international law requires an open and notorious claim before recognizing historic inland water title to areas that do not meet the "juridical" tests. Unless the historic evidence of title is very strong indeed, and the belated federal disclaimer can be dismissed as motivated by domestic concerns, it would be

extraordinary to give effect to an ambiguous set of mixed signals.[20]

There is, moreover, a foreign policy concern. It would cause a degree of embarassment for the United States if this Court, at the behest of a State of the Union, were to declare inland a body of water that the United States had repeatedly disclaimed over a long span. That situation is very like the one in which a State is asserting straight baselines which the Nation declines to draw. See *United States* v. *California,* 381 U.S. at 168. Accordingly, it is entirely appropriate for the Court to require very clear evidence of perfected title before it contradicts the public stance of the federal government. Presumably, such a result should be restricted to cases in which the United States long endorsed the inland water claim and has only very recently repudiated it for what may be reasons unrelated to foreign policy. See *Louisiana Boundary Case,* 394 U.S. at 73-74 n.97: *Alabama & Mississippi Boundary Case,* slip op. 19.

3. It remains only to define the heightened standard of proof by which an inland water claim must be decided

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[20] The point is well illustrated by the Court's treatment in *United States* v. *Alaska,* 422 U.S. at 203, of a State seizure of a Japanese vessel in the Shelikof Strait:

> [W]e are not satisfied that the exercise of authority was sufficiently unambiguous to serve as the basis of historic title to inland waters. The adequacy of a claim to historic title, even in a dispute between a State and the United States, is measured primarily as an international, rather than a purely domestic, claim. See *United States* v. *California,* 381 U.S., at 168; *Louisiana Boundary Case,* 394 U.S., at 77. Viewed from the standpoint of the Japanese Government, the import of the incident in the strait is far from clear. Alaska clearly claimed the waters in question as inland waters, but the United States neither supported nor disclaimed the State's position. Given the ambiguity of the Federal Government's position, we cannot agree that the assertion of sovereignty possessed the clarity essential to a claim of historic title over inland waters.

in the face of a federal disclaimer. On this point, we fully endorse the Special Master's discussion (Report 21-24). The Master concluded, as he and his predecessors had in like cases, that the Court in the *California* and *Louisiana* cases had fixed a standard of "clear beyond doubt." He added that the Court's adoption of subsequent Special Master Reports applying that standard has effectively ratified it. Report 24. We read the Court's most recent decision as endorsing the standard once again. *Alabama & Mississippi Boundary Case,* slip op. 18.

There is certainly no ground for concluding that the "clear beyond doubt" standard has proved unworkable. The Court deemed it satisfied as to Mississippi Sound in the *Alabama & Mississippi Boundary Case,* slip op. 19, as did the Master here in respect of Vineyard Sound. In these circumstances, we submit the Commonwealth's invitation to re-examine the matter should be declined. See Mass. Exception 9-19. Stare decisis ought to be accorded special force in this context. *United States* v. *Maine,* 420 U.S. at 527-528. Besides, equal treatment of sovereign States with respect to their offshore submerged lands rights is a constitutional imperative. *Id.* at 520-522; *United States* v. *Texas,* 339 U.S. at 719; *United States* v. *California,* 332 U.S. at 23.

CONCLUSION

The recommendations of the Special Master's Report should be approved by the Court and a decree entered accordingly.

Respectfully submitted.

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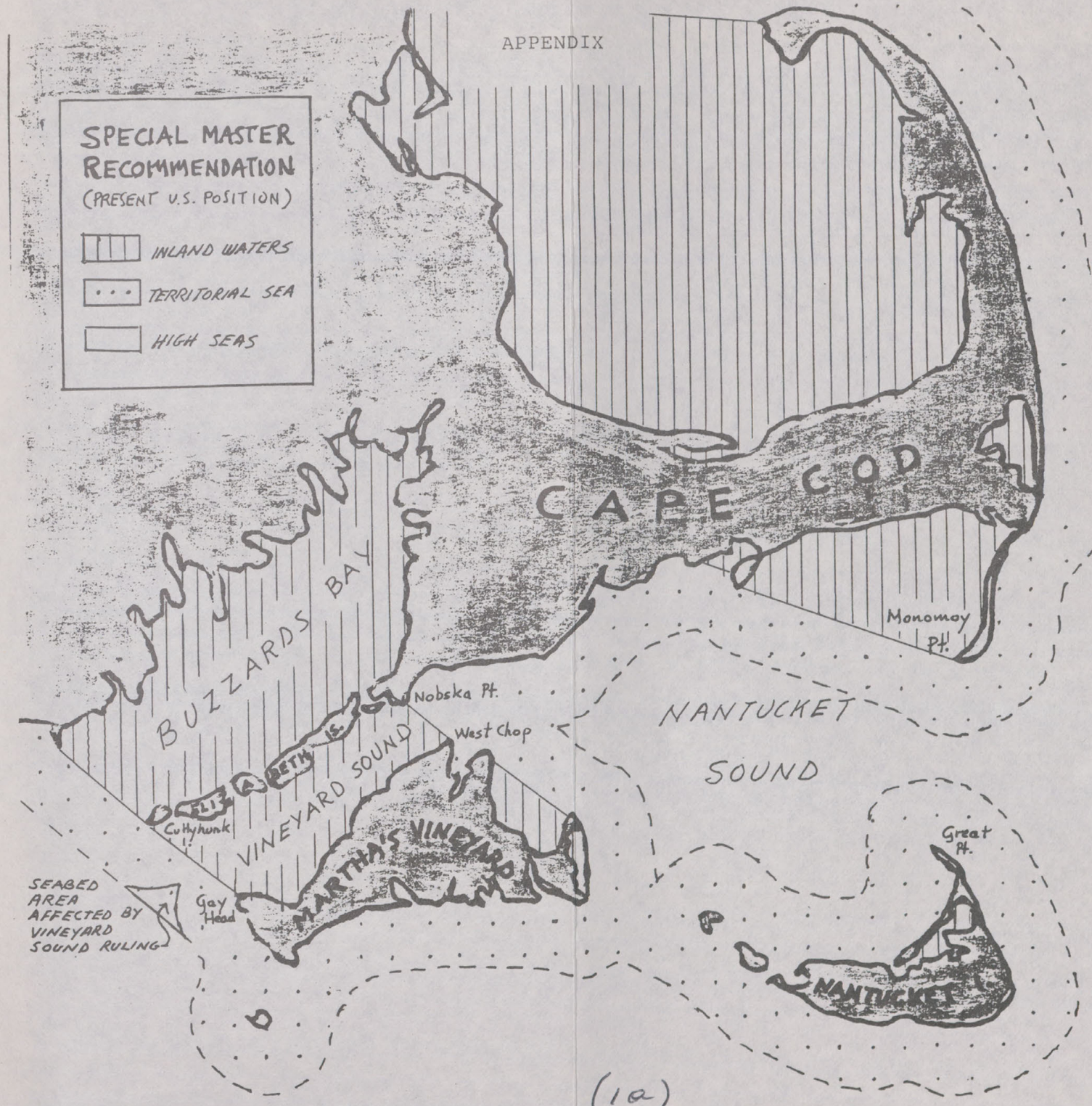
SPECIAL MASTER RECOMMENDATION
(PRESENT U.S. POSITION)
INLAND WATERS
TERRITORIAL SEA
HIGH SEAS
CAPE COD
Monomoy Pt.
BUZZARDS BAY
Nobska Pt.
West Chop
NANTUCKET SOUND
VINEYARD SOUND
Cuttyhunk
MARTHA'S VINEYARD
Great Pt.
NANTUCKET
SEABED AREA AFFECTED BY VINEYARD SOUND RULING
Gay Head