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Supreme Court of the United States

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WASHINGTON, D. C. 20543

UNITED STATES,

Plaintiff

v.

STATE OF LOUISIANA ET AL

No. 9 Orig

Washington, D. C.
February 24, 1975

Pages 1 thru 77

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
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Plaintiff :
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v. : No. 9 Orig.
:
STATE OF LOUISIANA ET AL :
:
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Washington, D. C.

Monday, February 24, 1975

The above-entitled matter came on for argument at
10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

OLIVER P. STOCKWELL, ESQ., Special Assistant Attorney
General of Louisiana, Department of Justice, Lake Charles,
Louisiana For Defendants

FREDERICK W. ELLIS, ESQ., Special Assistant Attorney
General of Louisiana, Department of Justice, Baton Rouge,
Louisiana For Defendants

LOUIS F. CLAIBORNE, ESQ., Special Assistant to the
Solicitor General, Department of Justice, Washington, D.C.
For Plaintiff

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 9 Original, United States against the State of Louisiana.

Mr. Stockwell.

ORAL ARGUMENT OF OLIVER P. STOCKWELL, ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. STOCKWELL: Mr. Chief Justice and may it please the Court:

This case is now before the Court to determine the coastline from which to measure the three geographical miles that was confirmed to Louisiana in the Submerged Lands Act.

In 1969, this Court reaffirmed its prior position in the California case that the Convention on the Territorial Sea would control in determining this coastline and at that time, there was appointed a Special Master, the Honorable Walter P. Armstrong, and referred to him certain issues to be determined preliminarily by Mr. Armstrong and report back to the Court.

The report has now been filed with this Court and exceptions have been taken, both by Louisiana and by the United States.

The first exception of Louisiana deals with the fact that the Special Master failed to find any historical inland bays along Louisiana's coast.

The Master first rendered a preliminary report in which he found that there were no historical inland bays and to that report we filed a motion to ask him to find special findings of fact for the benefit of this Court, since he had said that the evidence on Louisiana's historical bay claims was undisputed.

In the Appendix one to our brief is a motion that we filed with the Special Master.

Now, that resulted in the Special Master making 16 special findings of fact which are attached to his report as Exhibit B.

Now, these findings of fact were made after the Special Master had already determined that Louisiana had low inland bays along its coast.

As we read the Special Master's report, he is saying that these bays along Louisiana's coast would qualify as territory bays and not as inland bays.

Now, we feel that the Master --

QUESTION: That they qualify as --?

MR. STOCKWELL: Territorial bays, historic territorial bays and not inland bays.

Now, we feel that the Master made this determination on the argument of the Government that only the exclusion of innocent passage of foreign vessels was relevant evidence to establish historically inland waters, even in a bay and we --

and now in this case, before this Court, the United States is not defending that statement of law that they argued to the Master.

They are saying that while that is an important factor, that there are other relevant evidences that would show that these waters could be territorial inland waters and we say that these facts, it was found by the Master, which included briefly that since 1870 Louisiana had been passing laws regulating oyster fishing along its coast.

In 1886, Louisiana passed legislation reaffirming its title in all these bays which was shown on all the published maps and these titles were reaffirmed in subsequent legislation.

Louisiana, the Master found that since the 1900's, Louisiana had been leasing part of these bays for oyster fishing and in the early 1900's, Louisiana had been enforcing its game and fishing laws in these bays and using as a line to demark these bays, the outermost mud lump or other feature marking the seaward entrance into these bays and three miles seaward from that line.

And they were treating these bays as inland waters. They were patrolled by armed vessels with armed [inaudible]

They required anybody fishing in these bays to buy licenses from Louisiana and the evidence shows that Mexicans, Spanish and various other foreign nationals

purchased licenses to fish in these bays and they also -- the Special Master found that Louisiana had closed seasons and that these foreign nationals recognized Louisiana's closed seasons.

In 1946, the Master found that Louisiana arrested Mexicans in these bays and the arrest was made more than three miles from any territorial -- three-mile territorial sea within these bays.

Louisiana started leasing these bays for oil and gas in 1928.

Louisiana passed pollution laws in the 1930's and has enforced these laws.

And Louisiana has exercised and claimed jurisdiction over these bays from the time it was admitted in the state in 1812 to the present time.

Now -- and also the United States has taken an interest in these bays. Around the delta there was the Tern Island Game Reservation Treaty by President Theodore Roosevelt in 1907 and that was before you had any migratory game laws.

Now, we say that this evidence clearly indicates that Louisiana was asserting to the world by these legislative acts and the other acts that it was claiming these bays as inland waters.

The Master found that Louisiana's title to these bays

had never been questioned by the United States until 1948 and in this Court -- in its brief -- the United States now admits that it hasn't questioned Louisiana's title to Caillou Bay as inland waters until 1968 and if this Court accepts the Master's headlands for line A in East Bay, then the waters in East Bay would have been a juridical bay till 1956.

Now, we say that the fact that the Government now is not defending this position that you had to have direct evidence of preventing innocent passage into these bays, that a legal principle that they now say is what we have argued all along, that you could show these acts against foreigners to show that this water was an inland bay.

Now, also, we are arguing to this Court and we feel that the jurisprudence supports it, that where you have an indentation like a bay and you exercise jurisdiction and dominion over that bay and establish it as a historic bay, that it automatically becomes an inland bay.

Now, under Articles of the Geneva Convention where they deal with historic bays and say that it is an exception to the rules it is provided that any waters landward of the closing line is inland waters.

Now, Dr. Blum in his book, which we cite in our brief, discusses this very issue and says that there is no distinction between the waters behind the closing line in a

juridical bay than there is in an historic bay.

Now, we feel like that one other issue that the United States discussed in hearings before the Special Master was that you had to have acquiescence of foreigners to these acts -- or foreign governments to these acts.

Now, in this Court, they don't defend that legal principle. They say that you don't have to have acquiescence.

In another issue in the -- before the Master was the burden of proof. They introduced evidence showing that the United States purportedly disclaimed any historic bays along Louisiana's coast.

All of those Acts were after 1948 when Louisiana's title had already ripened, as we say, by these past acts and anything that was done after that, as this Court has said, could not dispossess Louisiana of this title because it would be an impermissible contraction of territory.

So this evidence was introduced before the Master to urge that we had to prove our title to these waters which we had treated as inland waters from the initial statehood beyond a doubt which is almost the same evidence you'd need to have in a criminal case.

Now, in this Court, they don't defend that principle. They say that now you don't have to have that burden of proof.

Now, we feel like that -- that in the United States

also argued before the Special Master, that there were no waters along the Louisiana coast that were at one time inland waters that would not now satisfy the juridical test.

Now, of course, that is not true now, because they admit that East Bay at one time was a juridical bay to its outermost headlands in 1918, which would be to Line A and also admit that Caillou Bay was inland waters.

Now, they were making that argument to the Court, to the Master, to keep him from having to decide whether Louisiana -- what title had already been invested by past events, whether or not the Government could dispossess Louisiana of that title.

And we say that where these bays had been inland bays and recognized as inland bays by the United States until after the Submerged Lands Act, they remained inland bays.

Now, they argue, too, that the fact that these bays were once inland bays -- or the waters were inland waters -- that shouldn't be -- is [of] no importance in determining the historical character of these bays, even though Louisiana showed that it exercised enough jurisdiction of dominion prior to these bays ceasing to be juridical bays if they have -- already don't meet the test and has continued to exercise that authority.

They say that immediately -- that a bay would

immediately lose its juridical characteristics.

Say you had a slight change in the headlines, a slight change in the water area, that the United States would lose thousands of acres of land and you could not acquire that as a juridical -- as an historical bay to exercise jurisdiction and dominion for a period normally to acquire historical title whether you had any prior inland waters or not.

Now, we say that that is certainly not -- has no basis for that. They have shown no area in the world where you have had bays that have been treated as inland bays that are now open sea and they also -- Mr. Miller, who represented the United States at the Hague Conference in 1930 urged that where waters were once under the dominion of a state as inland waters and you remained -- and you kept jurisdiction of them, that they remained inland waters and this was in keeping with the arbitration case between Norway and Sweden in the Grisby-donna case where they say that a state of facts of law existed in international law that disturbed very little and we say that it doesn't affect ambulatory questions of the coastline.

The ambulatory feature of the coastline is primarily related to that part of the coastline that is in direct contact with the sea. Now, this is changed by erosion and accretion but where you have large bodies of water such as

bays and straits, that this -- that that principle doesn't necessarily apply.

Now, we had Dr. Bouchez come over from the Netherlands and testify in this case and that was his opinion.

The United States argues that if they would adopt the evidence that we have introduced in an international court, that the international court would not say these were inland waters.

We had Dr. Bouchez come over here and he listened to all the evidence and we propounded to him a hypothetical question similar to the evidence in Exhibit B that the Master found and asked him what an international court would determine the waters over which these acts had been taken and he said they would be internal waters under the regime of historic bays.

Now, we feel that his opinion should have consideration by this Court. He is a recognized authority of which this Court has recognized him as an authority.

The same -- so we feel that Louisiana has proven that these bays are historically inland waters and that therefore the closing line of the bays should be, as Louisiana has indicated; there is no dispute, as we understand, between the Government and us as to the closing lines if this Court would hold that the bays of the Delta -- now, the only bays that are involved -- Mr. Justice White, do you

have that map -- is around the Delta and at Caillou Bay.

Now, these are the bays that we say are historical bays.

Now, at this time, unless you have some questions, I'd like to ask Mr. Ellis to talk on the juridical question.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ellis.

ORAL ARGUMENT OF FREDERICK W. ELLIS, ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. ELLIS: Mr. Chief Justice and may it please the Court:

In addressing the juridical problems of whether particular bays along the Louisiana coast qualify as bays and whether the limits are located as contended for by Louisiana or as contended by the United States, the principal legal authority involved is Article VII of the Geneva Convention on the Territorial Sea which this Court, in its 1969 Louisiana boundary decision, held must be applied to the Louisiana coast.

QUESTION: Mr. Ellis, before you proceed, may I ask, am I correct in my understanding that the map that has been put before us this morning is identical to the map that was the Appendix to the Court's opinion in the case to which you just referred in 1969?

MR. ELLIS: I understand this is correct, your

Honor. This was put before you by the United States and we are satisfied it is correct, sir.

QUESTION: That it is the same.

MR. ELLIS: Yes, and they offer some explanatory details.

QUESTION: They have made some marks in red here, I noticed.

MR. ELLIS: Yes, sir, they have marked, for example -- there is one little detail, the Coast Guard line that shows an extensive water area.

QUESTION: Right.

MR. ELLIS: Runs outward to sea considerably. That is no longer in controversy. Originally there was 20 million acres in controversy in the case. It has now been reduced to approximately 258,000 acres.

QUESTION: I understand that.

MR. ELLIS: The areas in controversy are the Mississippi Delta areas numbers 1, 4, 5 and 6 and Caillou Bay, number 7 which are affected by the historic claims and the remaining areas numbered on the map are affected by juridical claims.

Additionally, much of the area affected by historical claims is affected by juridical claims.

For example, East Bay, number 1 on the map, is the subject of both historical and juridical claims.

QUESTION: Right.

MR. ELLIS: Now, turning to --

[QUESTION: Inaudible.]

MR. ELLIS: This shows the historic bay closure at the artificial entrance point and this shows Line A employing the outermost extension of the natural land form at the base of the jetties on the headland, the pronounced headland at Southwest Pass.

QUESTION: Right.

MR. ELLIS: Incidentally, this Court, in its 1966 decree in the California case, in passing upon headland questions, noted that where there is a pronounced headland, the natural entrance point would be selected by using the outermost extension of the pronounced headland.

We have fundamentally three kinds of problems in the Bay areas in controversy.

Related to the elements of the bay definition which your Honors can find in Appendix A to the United States brief, the original brief, Article VII requires that bay be a well-marked indentation with such penetration in proportion to width of miles as to contain landlocked waters and constitute more than a mere curvature of the coast.

Additionally, it requires a semicircle test. We maintain that there are basically three elements involved.

One, the well-marked element which relates to the

identifiable headland requirement this Court required in 1969.

Secondly, the landlocked element governed by depth of penetration in relation to width of miles which is the N and M landlocked of mere curvature.

At Ascension Bay, the first of the geographic areas in controversy, the controversy turns principally around the landlocked issue.

QUESTION: What number is that?

MR. ELLIS: This is number two, your Honor.

Your Honors may find this bay also in a map which was prepared to implement your ruling that islands should be counted as water area. Figure R-A in Louisiana's reply brief found at page 58 which map has superimposed upon it, in black lines, a sketch showing the outline of Monterrey Bay.

Monterrey Bay is a bay along the California coast which this Court decided in 1965 was well-marked, was landlocked, did have identifiable headlands.

Now, the Court decided in 1969 that islands within an indentation should be counted as part of the area of the indentation even excepting Government arguments that to be counted, one area had to be part of the area of the indentation.

The Court referred to the Master then, two issues,

the well-marked question and the landlocked question.

During the testimony in this case, Dr. Hodgson, the geographer of the Department of State, testified that Ascension Bay was well-marked, his disagreement with the bay being accepted as enclosing inlocked waters was based solely upon the landlocked issue.

However, as we demonstrated to the Special Master, by comparison to the Monterrey Bay map, a mathematical data by measurement experts, geomorphological experts.

As we demonstrated by comparison to Moray Firth, by comparison to Egmont Bay, by comparison to bays that Dr. Hodgson himself had recognized along the coast of Alaska, this bay was, by any comparison, subjectively or objectively landlocked.

For example, it had a depth of penetration 50 percent greater than the depth of penetration ratio of Monterrey Bay.

It is rather interesting to note in this Louisiana environ that bays are formed by the natural bank or natural levee systems of the Mississippi River or its distributaries or its former courses.

At this locale, it is the former course of the Mississippi by Isle La Fouché on the left or the west side of the drawing, the Mississippi on the right with Southwest Pass which forms the pronounced headlines which well mark the

indentation.

Turning to East Bay, similar land forms --

QUESTION: Is this one?

MR. ELLIS: This is East Bay, your Honor.

QUESTION: Right, that's number one.

QUESTION: That's one.

MR. ELLIS: That is number one, your Honor, on the Government location map. It is immediately to the east of Ascension Bay.

We have, again, these pronounced headland forms. Dr. Hodgson, incidentally, in his testimony here recognized that these -- and he is the geographer for the Department of State -- that these landforms were, indeed headlands, that they were, indeed, identifiable headlands.

His only quarrel with the headlands were that they did not relate to this bay but related to pocket bays.

We demonstrated, however, by an objective test that he said should control over his own opinion, that it satisfied this objective test and consequently we also satisfied the Master on that point as well as using a number of other technical tests which satisfied him fully at all of the alternative line claims of Louisiana.

The Master found that each of the alternative juridical claims within this bay was well-marked, was landlocked, had clearly identifiable headlands.

He required actually a stiffer burden of proof than this Court asked for when it required that there be identifiable headlands and found they were all clearly identifiable by use of the technical test, photographs, overflights and a mass of map data and information.

There is no time to cover the various alternative contentions which were thoroughly considered by the Master in this area. The principal problem here turns on area measurement, area measurement under the semicircle test.

It is Louisiana's contention that the letter and spirit of Article VII should be followed in requiring the area for the semicircle test be measured by following the low water line and additionally, that islands within the indentation be counted as part of the area.

This is consistent with the ruling of an eminent British trial jurist who considered the same problem in the Thames Estuary which, like this area, contains tidal streams, tidal rivers and he held that the history of the Convention, the letter of it, required that every stream, every river be counted and he counted all of them and he found that the line in controversy there satisfied the semicircle test by so doing this.

We submit that the precedent of the British decision in this Thames Estuary case is very well-reasoned and should be followed by this Court also.

The only substantial question then is whether he was correct when he decided that tributary waters should be excluded. The Government would draw a distinction and say, well, some tributary waters should be excluded and others should not. This is a change in their former position.

They would say, well, perhaps rivers or streams should not be included in area measurements.

Let us note right now that we did not, in any of the measurements submitted by experts -- the mathematics of which, incidentally, were not challenged at all -- we do not claim any part of the Mississippi River passes -- these passes -- as part of the area measured.

The system our technical expert recommended was to use the tributary waters to the point where they ceased to be tributary to this bay. The passes were tributary to the Gulf of Mexico and thus ad absurdum arguments to the effect that one could by this system go to Canada simply have no application under the recommendation of our technical expert, Dr. James P. Morgan.

QUESTION: When you say "pass," that refers to the water rather than the land, doesn't it?

MR. ELLIS: Yes, sir, now, generally speaking, "pass" means "Southwest pass," for example, would be the water but this term is sometimes also applied to the natural bank or natural levee system that -- that bounds the land.

So that I am not referring to Southwest pass waterbound in the East Bay. I am referring to/Southwest Pass natural levee bounding or well-marking East Bay.

QUESTION: All right.

MR. ELLIS: Incidentally, this problem should be distinguished in this area of counting islands from problems of headland selection in connection with islands.

You will hear the Government contend that islands within an indentation should not be counted because they should be treated as part of the mainland. We would direct this Court's attention to the fact that when it decided that islands may be realistically be treated as part of the mainland, that this was done after considering that the Convention language did not deal with the problem but in this instance, the Convention language is explicit and it is not merely a matter of technical language, it is a matter of the spirit and of the reason for the rule for there is explicit legislative history, for example, we have an Appendix, Appendix one where we deal with the International Law Commission history among many, many other items in that technical appendix where we point out that Mr. Francois, the rapporteur, mentioned -- of the International Law Commission whose work led to the Geneva Convention -- mentioned that the rule required islands to be counted as part of the area of the indentation, did so because of the fact that the islands tended to link the area

with the land law.

This is a reason for counting and being liberal in the question of area measurement, not a reason for being restrictive in the method of area measurement.

Similarly, islands at the mouth of bays, they have found that this tends to link the water with the land law and the more one links the water with the land, the more reason there is to treat it as in the water and this is just antithetical to the Government notion that one would assimilate islands to the mainland for purposes of water measurement under the semicircle test.

Turning to the other major category of problems, island headland problems -- oh, but before discussion of those, let me point out one other problem. We have -- we have in the sketches presented to this Court which the Government would have the Court rely upon instead of the massive large-scale maps and other technical evidence presented to the Master.

Numerous errors and deficiencies which we feel we must bring to the attention of the Court lest the Government position go unanswered that one can form an opinion on the basis of there mere sketches.

For example, at South Pass, the Government sketches leave off the islands that form the tip of Line A.

QUESTION: What is the status of the Government

sketches so far as the record is concerned? Were they admitted in evidence or are they concededly just illustrative?

MR. ELLIS: They were not admitted in evidence. As I appreciate it, they are merely illustrative.

Similarly, in the illustration, however, there are departures from the evidence because we had, in the Joseph Bayou area, this landbound area here, considerable evidence of the land deteriorating until it reached a condition like this map which is submitted as illustration only but is a public map of the United States Geological Survey recently published.

This area here has disintegrated and we show ample photographs, for example, at page 82 of our opening brief following, to show this state of deterioration --

QUESTION: Is that the Joseph Bayou area?

MR. ELLIS: Yes, these are shown at -- close-up photographs at page 82 and 83 and this map made with the hydrography for the low-water datum -- and the hydrography includes the low-water line shows that this area is substantially identical to the streams and island situation within West Bay which I am pointing to now, which this Court held did not separate Riverside Bay, Zinsen Bay and Bob Taylor's Pond.

Incidentally -- excuse me, sir?

QUESTION: No, you go ahead.

MR. ELLIS: All of these areas were counted as part of the Outer Bay-Ascension Bay, which is out here -- would be approximately out here -- and the Court held that these were islands within a bay and that they and the areas covered, which, incidentally, include streams, do not prevent the use of those areas as part of the area of the bay.

We feel the Master fell into error of a legal sort in connection with island-handling problems for we think he misinterpreted the Court's opinion where it set out factors for determining whether islands are realistically part of the mainland as requiring cumulative rigid tests or requirements.

For example, this is an area in the Mississippi Delta where we have in the headland situations substantial fluvial conditions.

For example, at Southeast Pass, which is the subject matter of illustrations in the Appendix numbered one to our opening brief, one can find -- I direct the Court's attention to figure 33 found at page 266 -- mudlumps claimed by Louisiana -- these are unique local names for these highly-elevated islands, mudlumps.

They are found at a very short distance, approximately two miles from the mouth of Ballize Bayou where the arrest of a vessel, a privateering seizure, occurred in 1806.

This was the subject of the British Admiralty

Court decision, The Anna, in which an American Ambassador appeared in the British Court and made, I submit, an historic water -- an historic bay claim here because these -- really, this Court found itself were islands that were an extension of the mainland in The Anna and these are almost at precisely the same locale.

We had a geologist testify they had precisely the same characteristics as The Anna facts and, indeed, there is some reason to suspect that they may even be the very same islands that were involved in The Anna.

The distances involved were relatively minor but very significantly, as this exhibit shows, there was less than a foot of water separating these islands from the mainland. This is typical of all of these floating islands along the Louisiana coast, the very exceedingly shallow waters.

As far as innocent passage is concerned, for example in this area, one couldn't get one of our local pirogues through this area, or one would need an airboat to get through this area, the only kind of navigation that can be done but yet, the depth and utility of the intervening waters which this Court said was a factor to be considered, while considered, was not given appropriate weight, we submit, by the Special Master.

These are situated on extensions of the natural levee. If ever there was a geological natural levee extension

of the mainland form, this is it.

An eminent geologist testified to these islands being continuations of the physical mainland geologically in this connection being formed just as the Anna mudlumps were by sediments, as the Court in that case styled them and by the weight of sediment upthrusting them.

The distances involved are minor, if one examines figure 35 at page 270 of our Appendix, compared to the assimilation of islands that was done in the case of the Spanish Banks by Judge Maris in the Florida matter pending now before this Court.

Turning to -- oh, before leaving this Mississippi Delta area, I wanted to bring the Court's attention to this illustration from material in the record that shows that the headland -- this is the example of the kind of detail we went through. There is much more for all of these others, too; that where we show that the -- this was the outermost extension of the natural form -- the natural landform in 1901, the headland used for Line A on the west and that over time we traced it -- for here, example, the jetty that was left off the Government sketch is shown on this reproduction of the chart of that period and line A strikes that jetty at its base, showing that it is the terminus of the natural lane which we selected as the natural entrance point.

Now, this shows this on a more modern map.

In the Caillou Bay region, area number 7, again we have an example of fluvial islands, islands which were the subject of geomorphological testimony to the effect that they are the remnants of a former Delta of the Mississippi River.

They had formerly been solidly connected to the mainland. Technical illustrations are present in our brief.

For example, figure 42 can be found in Appendix one, this is the large technical volume of requested findings at page 292 and you can see the maps in 1853, 1887 et cetera

In the last century this island was solidly connected to the mainland and it was really a peninsula.

The Master, incidentally, ruled with us here that he, on the basis of even a strict test he took to applying the Court's standards, that he found that this island situation posed a situation where the island should be treated realistically as part of the mainland.

He felt deterred by this Court's footnote comment that we had not urged this ourselves and that the Court did not think so but of course the Court at that time did not have a full record for it, did not have the evidence. This is the very reason this Court appointed a Master, was to discover such information as the fact that these were fluvial islands as testified to by the Government geologist, even, where he found mainland marsh deposits on these islands. The --

QUESTION: Is Caillou Lake completely landlocked?

MR. ELLIS: Caillou Bay?

QUESTION: Lake. There is a lake in there, isn't there?

MR. ELLIS: Caillou Lake is in the interior part and I believe it is landlocked completely except for an entrance to it, sir. This is the 1853 map, perhaps you are referring to, in figure --

QUESTION: No, I am looking at the temporary map. I also have the old map.

MR. ELLIS: Yes.

QUESTION: The 1853.

MR. ELLIS: There are two distinct water bodies, Caillou Lake and Caillou Bay.

QUESTION: I understand that.

MR. ELLIS: And Caillou Lake is virtually completely landlocked --

QUESTION: Umm hmn.

MR. ELLIS: -- as you have observed, your Honor. Caillou Bay was open at its mouth.

These depths in this bay, incidentally, which forms a -- as the Government points to in claims, this is a situation rather like Santa Barbara Channel, I believe you'll hear; depths off Santa Barbara Channel or in the channel are in excess of 100 fathoms, range up to 1,200 feet and more, 600 to 1,200 feet.

Depths here on either side of the hole that the Government points to as a deep channel but it is merely a hole -- one sounding is 23 feet between these, on the whole, less than five foot. A vessel drawing more than five foot of water could not navigate through here.

In this area, for example, this largest of the island openings -- C, your Honors, in location C here the water depth is less than a foot. There is a picture in the record of myself and my daughter out there taken by ^a technical witness hung up with a 20-foot Mercury outboard motor cannot navigate, a small bateau cannot navigate through these openings.

Turning to the size considerations which the Master deemed important, he found it a fact here that we had islands that on the whole -- and your Honors can see this -- are larger, are greater in distance than the water gap openings and data is not needed, it is quite evident graphically.

We failed to footnote comments which was perhaps occasioned by the graphics of the Government brief which showed an extremely small-scale sketch.

We have tried to point out in our brief that small-scale sketches can be misleading accidentally and that it is necessary to consider the Convention requires the large-scale charts.

We, incidentally, have a great many other arguments

that selectivity of time needs have required us not to elaborate upon but of course we do not waive them, such as the chart matters where we have maintained that Cowhorn Island for line C which the Master found existed until 1969, that this should control.

We persist in these arguments and merely mention this so it will not be misunderstood that we are waiving any of these claims.

Incidentally, a number of the headland claims are supported independently by the application of ordinary headland rules as well as island assimilation rules. It will be recalled this Court mentioned in passing that rules for headlands apply to islands and we have a number of headland rules that are applicable.

For example, in the islands at Southeast Pass we looked at, which are substantially similar to other islands in the Mississippi Delta that are claimed as bay headlands, we haven't argued all of these locations in the interests of time, they form the apex of the Salians, which are the natural banks of the rivers here.

Some of these other islands are a good deal closer than the Southeast Pass mudlumps to which I direct your attention particularly as at Bucket Bend Bay where they are very, very close. Others are more distant as at Pass Salute, but all of them have this unique fluvial character present in

this Mississippi River Delta of very, very shallow water.

The deepest water found between the islands in the Mississippi Delta is water of four feet, and this is at Pass Salute.

Generally the water between the islands is less than one foot, mere inches, a child, a five-year-old child could walk out to these islands. That is how shallow the water is and, incidentally, out at the exterior headland islands that we are claiming, the land out there is very substantial and firm because you receive sands there but in the interior portion, in the Joseph Bayou area, the land in here is very, very insubstantial, very marshy due to the differences in the geologic conditions associated with this.

[?]
This area has become nothing but mere smallbank remnants which we maintain ought to be treated technically as what they are, islands.

In the Caillou Bay area it is interesting to note that the principal watergap there involved, Caillou Boca, Dr. Hodgson admitted in his testimony was inland in character as, indeed, I believe the Government recognizes that Caillou Boca is inland waters which is --

QUESTION: Is this number 7 on the Government map?

MR. ELLIS: Yes, sir, this is number 7 on the Government map and it is the opening marked A here.

You see, it forms the boundary for Lake Peltoe which

has been recognized by the Government and by this Court here, too and actually, Caillou Bay, the Isle Derniere, the same island, it was all one island at one time, fronts Lake Peltoe, also a recognized body of inland water adjoining it.

In closing, let me mention that the errors we point to in the Special Master's report are almost exclusively errors of law, a question of the correct method for applying the semicircle test, a question of did he require the correct standard of proof when he required that headlands be clearly identifiable -- clearly identifiable, not merely identifiable but clearly identifiable.

Did he require -- apply the correct rule when he converted -- we submit this Court's mere fact of mere considerations to use the words of this Court -- into cumulative, rigid requirements if you miss one of them, even if you have these tremendous fluvial characteristics we have here which this Court felt important enough to talk about for two pages in its opinion.

Even in the face of this, if one fact defies, a distance is not present, as he did in the case of some of these mudlump islands, he denies their use as headlands.

We submit that this was a misinterpretation legally of the Court's.

On the contrary, the Government's position, where the Government would ask to reverse the Special Master's

report as on headland matters, landlocked, well-marked matters at Ascension Bay and at East Bay where the Master ruled for us, the Government asked this Court to substitute its judgment on essentially factual questions, not pointing, effectively, we think, to any error of law upon which his reasoning was grounded.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ellis.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. CLAIBORNE: Mr. Chief Justice and may it please the Court:

I'll attempt to deal first with Louisiana's historic claim.

I approach it in this and I suggest it is proper for the Court to approach it with a bias against finding historic inland waters.

I say that because it seems to me there is a presumption against such historic waters that do not conform to the rules of international law or the rules of convention.

To find an historic bay where there is no juridical bay obviously encroaches on the first principle of maritime law, which is freedom of navigation, freedom of the seas.

Secondly, it delegates from the rules of the

International Convention which tell us how to define a bay, if every time an area which looked like a bay does not satisfy the technical criteria established by the International Convention it could be claimed as historic waters, the convention would become a dead letter. It would serve no purpose.

One must be hesitant. One must be reluctant to find a bay where the rules of the Convention say there is none.

Thirdly, to find historic waters on the American coast contradicts the consistent and very longstanding tradition of American foreign policy which is to view restrictively, narrowly claims into the ocean. That has been the position of the United States in its foreign relations ever since the days of Thomas Jefferson.

And, finally, in these particular areas, East Bay and the rest, it is of course relevant that the United States has taken the position that these are not historic waters.

And it has taken that position not for the purpose of this litigation solely, but quite consistently in its international stand with a view to foreign relations.

There can be no claim in this case that the Government has taken one position where oil is involved and a different position where international relations are involved.

At all stages of this case, the Justice Department and the State Department have been in consultation and have found a uniform position and, indeed, the position --

QUESTION: But it is also quite an unusual one.

MR. CLAIBORNE: Indeed, Mr. Justice Rehnquist.

And I may say -- or perhaps I shouldn't -- that we have sometimes been in the position of having to bow to the geographer of the State Department.

QUESTION: Is this a -- your basic theme, here at the onset, that there is and should be a presumption against finding historic bays? Do you find any support for that in any of the opinions of this Court?

You gave us the four reasons of the support you think your assertion of that bias or preemption --

MR. CLAIBORNE: I think --

QUESTION: -- but is there any support for that in either the Louisiana Boundaries case or in the United States against California or anywhere else that you know of?

MR. CLAIBORNE: Only to this extent, Mr. Justice Stewart, that in both of those cases the Court took note of the federal disclaimer and gave it weight.

In the California case it was said that such a disclaimer would be conclusive in the absence of overwhelming proof that such a claim had right.

Now, let me say straightaway that notwithstanding all

I have said about a presumption against historic waters, we recognize -- as we must in light of the Court's opinion in this very case in 1969 -- that if historic title had ripened to any of these areas before a federal disclaimer was made -- and we take that to mean before 1948 when the first of these suits was filed, then it would be curtailed, but one must be hesitant to make such a finding, not only because of the encroachment on American foreign policy, the awkward situation that would result in having this Court say, "This is a bay," the State Department saying, "It isn't inland water," but the international considerations which view historic waters as an exception -- and my opponents were free to say that this was an exception to the normal rules of Article VII and I think they must be right in this respect.

QUESTION: But that still, all of that, still doesn't add up to their being a bias against them or a presumption against them, does it?

MR. CLAIBORNE: I certainly wouldn't say there ought to be a bias against Louisiana, Mr. Justice Stewart --

QUESTION: Well, just historic bays. That was your --

MR. CLAIBORNE: Well, I suppose the normal rules of construction would say that when the claim is -- attaches itself to an exception to the rule, that exception ought to be construed narrowly.

Now, perhaps that is a different way of saying that there is a presumption against finding such an exception.

QUESTION: There are a good many recognized historic bays, aren't there, along the coastlines of the United States?

MR. CLAIBORNE: No, Mr. Justice Stewart, the United States -- and I should say this -- consistently with its position of restricting the coastline as much as possible, of limiting the encroachments on the open sea, recognizes on the American coast no historic bay whatever with the single exception of Long Island Sound and that is in the record through letters from the legal advisor of the State Department and, indeed, from the Secretary of State to the Attorney General.

That is the traditional policy of the United States. Other countries take different views but here we are talking about the American coasts.

QUESTION: Tested by the rules of an International Convention.

MR. CLAIBORNE: Tested by the rules of the International Convention which merely recognizes in Article VII that there are such things as historic bays without attempting to define them, presumably because of lack of agreement in the national community on the subject.

Now, bearing in mind what must be recognized as a

heavy burden -- if only because of the federal disclaimer -- and here the Court has been clear that the disclaimer puts the burden on the state claiming the historic waters, has Louisiana proved any historic title to East Bay or any of the other areas.

Now, this Court has already said there are three elements which require proof as to each of which the state has the burden.

The first is that there has been an exercise of authority over the area which indicates a claim to that area as inland water, not as territorial water but as inland water.

My opponent said that the Master had found that East Bay was a historic territorial bay and that is simply not the fact. On the contrary, the Master explicitly found that issue the other way.

He discussed whether Louisiana's evidence was consistent with the use of the waters as territorial waters, there being, of course, the three-mile territorial belt.

He also adverted to the possibility that one could obtain territorial water title to an extended belt but his conclusion -- and that conclusion is quite explicit -- is that the issue which has been presented by Louisiana, is there a territorial -- are there territorial waters in East Bay? He says the answer is no.

Now, that is made perfectly clear when one looks at the report on page 56. The paragraph six says "From South Pass to Southwest Pass, East Bay."

Subparagraph E -- I've got the wrong one.

Page 56. I'm sorry, I was -- "Does this area include"--- now this is paragraph E on page 56, "Does this area include any historic territorial waters under principles of international law, particularly at Isle au Breton Bay, East Bay or West Bay and, if so, what is the effect?"

He answered that question and that is issue 1(e) on page 22 of his report where he said, "The Special Master is constrained to make a similar finding in the instant cases and therefore 1(e) and so forth must be answered in the negative."

Now, we come to the second element which is the continuity of the exercise of authority over the waters indicating that they are inland character which, quoting from a U.N. publication, Juridical Regime, which this Court invoked in its last opinion, "Must be so long continued as to have developed into a usage."

And, finally, and very important is the acquiescence of foreign nations.

I heard it said a moment ago that the United States had taken the view that acquiescence was not necessary.

What we have said is this: Acquiescence is

necessary but it may be explicitly expressed or it may be tacit. Obviously, if the evidence were that foreign governments had, over a long period of time, been notified of a claim to inland water and had taken no action, made no protests, and had obeyed the restrictions imposed, we would concede, even though there had been nothing expressed, that this amounted to acquiescence. It would be tantamount to --

QUESTION: What authority do you have that acquiescence in some form is essential?

MR. CLAIBORNE: The authorities cited by this Court in its last opinion indicate that either express acquiescence or absence of protest is important.

When absence of protest is discussed, it is in a context of having notice and we simply refer to that situation of not protesting when you have had long notice as amounting to a type of acquiescence.

It seems to us to be a debate about words and not a real debate, whether one says --

QUESTION: So you wouldn't --if it is just a debate about words, you wouldn't insist that acquiescence is unnecessary.

MR. CLAIBORNE: Except that I would insist, Mr. Justice White, that absence of protest alone is not sufficient. One must show that the foreign government had repeated and over a long period notice of the claim.

QUESTION: Well, if the foreign government hasn't invaded Louisiana, that would be an official acquiescence then, wouldn't it?

MR. CLAIBORNE: It would be enough if a foreign government had been notified, over a long period, that Louisiana was claiming East Bay as inland waters and had failed to protest such situation -- provided, further, that they had some interest in doing so.

Well, one can't draw a conclusion if there is no reason to go into East Bay.

Now, what is the evidence that Louisiana has presented come to?

I think it is fair to boil it down to really two claims. The first is that over some period it has exercised fishing regulation within East Bay and perhaps some adjacent areas, including in that oystering and shrimping.

And, secondly, it invokes its mineral exploration and leasing in East Bay and in Caillou Bay.

Now, when we get down to looking at that evidence, what do we find?

With respect to fishing first, any fishing or fishing regulation or exclusion of foreign vessels within the three-mile territorial sea proves absolutely nothing relevant to this case because as a matter of international law it has always been the prerogative of the coastal state to exclude

foreign fishermen within that territorial sea or to regulate foreign vessels or to recall them to take out licenses and pay a fee.

Indeed, even as a matter of domestic law it has always been the prerogative of the states, within constitutional limitations only, which is to say the Commerce Clause and the Privilege and Immunity Clause, to regulate fishing within that marginal belt of three miles and even the California case which said the states don't own the belt, did not take away from them the right to regulate fishing, provided it was done in a nondiscriminatory way vis-a-vis other U. S. citizens.

And, indeed, the Court so held in Toomer and Witsell

Of course, since 1953, the Submerged Lands Act has clearly confirmed the rights of the states to regulate fishing within the three-mile belt. So nothing can be made of the activities within the three miles.

Beyond three miles it is, of course, settled by early decision of this Court, Skiriotes versus Florida, that regulation with respect to its own citizens indicates no claim.

Now, what about regulation of foreign fishing or exclusion of foreign fishing beyond the three miles?

Even that may amount to no more than the claim of a wider territorial sea than three miles and, indeed, during

all of this period, Louisiana was claiming a much wider territorial sea. It was 27 miles between 1938 and 1954 and it was nine miles between 1954 and 1960 when this Court's decision came down.

And as a matter of international law, one is free, under the Convention, to claim as much as 12 miles, which would eat up all of the area of East Bay, if one took 12 miles from each side. The basic opening is approximately 18 miles, the widest opening.

Now, alternatively, regulation of foreign shipping or foreign shrimping or fishing or exclusion of their boats beyond three miles may amount to no more than the claim of a contiguous fishery zone, beyond the territorial sea, very far from a claim of inland water.

That is precisely what the United States did in 1966 by Act of Congress. It claimed a nine-mile zone within which it can exclude foreign fishing or regulate it or both and other nations throughout the world have done the same.

Indeed, in the 1960 opinion of this Court in this case, the Court noted that for fishing, among other purposes, nations had, for hundreds of years, created belts of jurisdiction off their coasts and the Court referred in that case to a tabulation which had been made during the Senate hearings in 1951 in reference to the Submerged Lands Act legislation.

I had lodged with the Clerk for the information of

the Court, should the details be of interest, three tabulations of claims made in the world community of fishing zones that exceed the territorial sea.

One is from the Senate hearings to which the Court itself referred in the 1960 opinion. One is from the 1960 edition of Shalowitz, which has been referred to by the Court and by the parties. And the last is the most recent State Department publication published in 1974 which, incidentally, shows that no less than 36 nations have fishery zones, either excluding foreign fishing or conservation areas which go well beyond their territorial seas and which are obviously not intended to imply any claim to inland waters, indeed, not even to territorial waters.

I conclude, therefore, that the fisheries regulation would indicate no claim to inland water here and that is on the assumption that there is some real evidence about it.

The truth of the matter is that we have a series of acts of the legislature entirely inconsistent and contradictory, some placing a three-mile belt within East Bay and everywhere else, some an 18-foot line or three fathom line which is always within, landward of the three-mile belt, in East Bay, at least and some of them apparently claiming East Bay on a -- what is called a point-to-point basis between the two levees.

The evidence as to the way in which these statutes

were actually implemented is also most ambiguous.

First we know that no oyster lease was ever granted more than three miles from shore. As to fishing and shrimping, there is evidence that for broken periods there was a patrol that ran from one end of the Southwest jetties to the end of the South Pass jetties but it is perfectly clear that that was not a consistent practice.

What it meant, even when it was used, is not clear.

At times, the 18-foot line or the three-mile line were used instead.

So we have, far from a long continued, consistent usage developed on the issue of enforcement, even assuming that such a policy would prove a claim to inland waters.

As to the exclusion of foreign fishermen, when you look at the depositions on which those allegations are based, you discover that most of them, in fact, lived locally, for all we know, were citizens. In any event, they seemed to have been permanent residents of Louisiana and the notion that their acquiescence in these fishing license regulations got back to China or Japan or Spain or the Phillippines is most unreal.

Anyway, they agreed to buy the \$5 fishing license or shrimping license and it turns out, when one looks at the record, the place they seem to have wanted to fish most was Cow Horn Reef, which is very close to shore and whether they bought it three miles out or six miles out, mattered little

to them. The interesting ground for shrimping was Cow Horn Reef.

QUESTION: Are these soundings on this map -- they are in fathoms?

MR. CLAIBORNE: I think they are in --

QUESTION: Is that mean low water? That is what they generally are.

MR. CLAIBORNE: I believe they are in feet, Mr. Justice Stewart, if that is a composite based on --

QUESTION: That would be very unusual on a chart.

MR. CLAIBORNE: The series 1200 charts, of which there are many in the record, are in feet, not in fathoms and the 18-fathom line --

QUESTION: This one is in fathoms.

MR. CLAIBORNE: This one does. Well, I stand corrected but the 1200 charts which we have do show them in feet.

QUESTION: Generally -- generally on a chart they are in fathoms at mean low water.

QUESTION: Which is what this is.

QUESTION: Is it?

QUESTION: It says so.

QUESTION: Well, that's it, then.

MR. CLAIBORNE: This is the 1200 series chart and it says, "Soundings in feet at mean low water." In feet.

And the 18-fathom line -- the 18-foot line is shown very clearly and as I represent to the Court, always well within our three miles from the shore of East Bay. I don't -- I am not clear where it might be elsewhere.

Now, perhaps I ought to turn to the claim based on mineral exploration. That can be dealt with quite shortly.

I have heard nothing about it this morning but Louisiana's brief makes much of a lease granted in 1928 which can be construed as covering all of East Bay and all of West Bay and a great deal more.

It is clear in the record that the only map accompanying or relevant to this lease, which is, in fact, a release dated in 1937, shows that the oil company to whom the lease had by that time been assigned found unusable -- and therefore released -- any portion beyond a certain boundary and that boundary happens to be pretty much the three-mile limit, well inside of it at places, generally following it.

It is therefore perfectly clear that there never was any exploration much less any production from any lease granted by the state in East Bay before 1947 and, indeed, when the case was last here, Louisiana dated its claim based on exploration from 1947. Only in this proceeding has that been changed.

By 1947, of course, President Truman had claimed for the country the entire Continental Shelf and other nations

seeing operations more than three miles from shore, would not have cared or known whether this was done under the Presidential Proclamation or because Louisiana treated the waters as inland.

It is also relevant that, as soon as their drilling began in 1947, the United States filed suit against Louisiana and has consistently challenged those operations. Indeed, the Chaplin Line in East Bay, which was meant to carry out this Court's decree in 1950, follows the three-mile -- follows the contour of the coast and in 1956 this Court was required to issue an injunction against Louisiana to prevent the drilling in the East Bay.

It would be a very strange irony if, by acting -- if, by prolonging this lawsuit for so long, Louisiana were to be able to establish an historic claim to inland water in East Bay invoking the very activities which have always been in dispute since 1948.

Now, on the historic claim, I think I need say no more. It is clear that there are no unequivocal actions which indicate a claim to these waters as inland rather than as territorial or as contiguous.

There is no consistent pattern which could reasonably be called a usage and there is no indication whatever that any foreign nation was ever notified or ever had come to its notice any of these claims that Louisiana now asserts.

In those circumstances, the absence of protest is meaningless.

We, therefore, think the Master quite correctly rejected the Louisiana historic claim.

I turn now to the juridical claims advanced by the state and first to East Bay.

Now, we take what is characterized as a simplistic approach here and suggest that you look at this area without any lines on it and reach an impression -- and that is all these matters come to -- whether this qualifies as a well-marked indentation enclosing the landlocked waters.

I think one has to note first the general shape of that triangle. The bottom of it is so wide, so open to the sea that it is very difficult --

QUESTION: The Master ruled against Louisiana on East Bay as a juridical claim.

MR. CLAIBORNE: The Master ruled in part against Louisiana on the juridical claim but found, for one period, one line, well within the bay and for another period, a second line further within the bay and it is qualifying as a juridical claim.

QUESTION: So your argument is going to all of those findings?

MR. CLAIBORNE: Indeed. My argument goes to both what the Master found and what Louisiana suggests he should

have found.

QUESTION: Well, I --

MR. CLAIBORNE: We do attack the Master's finding of part of East Bay as qualifying as a juridical bay, Mr. Justice Rehnquist.

QUESTION: And do you say that we could upset the Master's findings just by looking at that map and kind of getting a sense of whether it is a bay or not?

MR. CLAIBORNE: Well, I don't think quite that simply but that is the beginning.

The Master's conclusion is not based on any technical expertise. There is no way technically that one can decide such a matter and when one looks at how the Master articulated his conclusions, it is simply one that I think that line encloses landlocked waters.

Now, I will say that I think the Master started from the wrong premise and if one starts from the right premise, I don't think one reaches his results.

QUESTION: Well, it is, if not technical, at least it is objective and measurable, isn't it? It is a semi-circle test and it is 24 miles from the mouth and so on.

MR. CLAIBORNE: Yes, Mr. Justice Stewart. I am assuming that those technical requirements have been satisfied as, indeed, the Master quite properly found that the 24-mile rule had been satisfied and with respect to line C

and D which he thought proper ---

QUESTION: Yes.

MR. CLAIBORNE: -- the semicircle test was satisfied.

QUESTION: All right.

MR. CLAIBORNE: But you never get there until you first look at an unmarked map.

QUESTION: And find the -- mark the indentation.

MR. CLAIBORNE: Well, I would say that, Justice Stewart, you do it this way. You look at the map.

QUESTION: Yes.

MR. CLAIBORNE: You say to yourself, now, does that look like a bay or arguably a bay? It may be, in the case of the East Bay, the answer is yes.

You then ask yourself, where are the natural entrance points to that bay and this Court itself, I think, in the last opinion, concluded the natural entrance points are the tips of the two jetties. That seems to be the boundary of the bay.

Louisiana makes an argument about, that is not natural because it is an artificial jetty but I take that argument to have been foreclosed by the previous opinion.

It happens that, once you test that full bay under the semicircle rule, it doesn't satisfy. This Court so found in 1969.

Now, the Court -- Louisiana said last time, we recognize that, but we can draw a line -- a very artificial line -- inside which will satisfy the test.

This Court responded, ah, you can't go about it that way. You have got to find that there is a geographic bay, not one that mathematically satisfies the test.

We followed that approach.

The Court said, there may be a bay, a narrower, a smaller bay within East Bay. We are not saying there is. We are not saying there is not.

The Master, I think, misunderstood, or at least he seemed to take the view that he must assume that there was a bay somewhere in there. After all, it is called "East Bay." There must be a bay. My job is to locate it.

I think he also assumed that any line which satisfied the semicircle test was, at least presumptively, good enough to meet the juridical test of the Convention.

Now, it seems to us that that is going about it backwards. He should have first said to himself, now, if the whole thing doesn't qualify, is there, in fact, anything else that is a separately-defined bay within East Bay?

And when you look at the two shores, which are essentially straight, there is nothing that jumps at you as the natural entrance point of a smaller bay and that is not surprising because when you are dealing with a triangle of

those dimensions, more relevantly, with an angle at the top which exceeds 65 degrees, it is mathematically impossible to construct an interior bay which satisfies the semicircle test, if it were a perfect triangle.

Now, first, East Bay is not a perfect triangle.

QUESTION: Mr. Claiborne, may I ask, looking at that map, what is the significance of that line below numeral 73?

MR. CLAIBORNE: That is just meant to indicate that the 73 relates to the measurement of the angle, Mr. Justice White.

QUESTION: That is the degrees of angle, isn't it?

MR. CLAIBORNE: That is the degrees of angle.

QUESTION: Well, now, where --

MR. CLAIBORNE: The formula is that if the apex of the triangle exceeds 65 degrees, no way can you draw a line that uses that same angle as a form that satisfies the semicircle test?

QUESTION: Where within what is marked as East Bay did the Master say there existed a bay?

MR. CLAIBORNE: Well, we have an exhibit that --

QUESTION: I know.

MR. CLAIBORNE: -- that would indicate it, Mr. Justice Brennan. It's well within -- but I wanted the Court to look at the map unmarked to think to itself, where would we put that line?

Now, the Master said that -- he didn't go about it that way. Louisiana suggested to him, among many, these two lines. The United States said, we concede that those lines meet the technical semicircle test but we dispute that you'd have ever found them if they hadn't been suggested to you. And I think that is the way it ought to be thought about.

QUESTION: Yes. Well, which one did he find?

MR. CLAIBORNE: For a period until 1969 -- I think it is December, 1969 -- he found the outer line, which is to say line C.

QUESTION: Yes.

MR. CLAIBORNE: He found that thereafter the anchor for line C on the east which is labeled Cow Horn Island had ceased to exist and therefore he had to find another anchor and the next one was the one to the north which supports line D.

We say Cow Horn Island didn't exist for any of this relevant period and therefore line C must fall on that ground alone. I will not burden the Court with the reasons why we think the evidence does not support Cow Horn Island for the period 1950 to the present and we'll rely on the brief for that proposition.

QUESTION: But now your point is that those are not headlands or what?

MR. CLAIBORNE: That those are not natural entrance points to the bay. The only natural entrance points of any body of water within that general area of East Bay or, indeed, the tips of the jetty or with respect to the smaller pocket bays which we have numbered one through five are which we fully concede are the proper bays but which it happens don't affect the three-mile grant.

QUESTION: But those bays are within East Bay.

MR. CLAIBORNE: Those bays are within East Bay.

QUESTION: And so there may be a bay within a bay.

MR. CLAIBORNE: Indeed. Indeed, we --

QUESTION: Even though the bay in which the one bay occurs isn't a juridical bay.

MR. CLAIBORNE: Indeed, Mr. Justice White. Our point is this, that these -- this coast is essentially straight and that to pick out points on it is artificial.

QUESTION: Would you concede that somewhere up in the -- would you concede beyond that line of A?

MR. CLAIBORNE: Indeed. It so happens it doesn't affect anything.

QUESTION: It doesn't.

MR. CLAIBORNE: But it was so testified by the geographer of the State Department who drew a line somewhere about here.

QUESTION: Yes.

MR. CLAIBORNE: And first we concede that this is a bay. We concede that there is a bay in here.

QUESTION: Yes.

MR. CLAIBORNE: We concede that this is a bay.

QUESTIONS: With all these concessions you are suggesting, these have nothing to do with this over here, these islands.

MR. CLAIBORNE: It so happens that they do not.

QUESTION: What do you mean precisely when you say the natural entrance point to a bay? Are you talking about somebody hiking around the shore?

MR. CLAIBORNE: I think one must look at it from the point of view of a mariner, Mr. Justice Rehnquist, who is entering and he says to himself, I am now within inland waters. I have left the open sea.

QUESTION: But you don't enter, certainly, at the point closest to shore as if you are entering the bay?

MR. CLAIBORNE: Well, it is perfectly true, if one might more logically enter at the center.

QUESTION: Well, you would hope so, wouldn't you?

MR. CLAIBORNE: But in this case, when you can see both shores, the distance not being great in the case of line D. But in this case, --

QUESTION: But when it comes to waters, it is something quite different. That is when the inland rules of

the road take over and so on and that has nothing to do with bays.

MR. CLAIBORNE: Well, the internal waters, the inland waters --

QUESTION: A mariner, a navigator of a ship has to know when he is in inland waters and that is actually the Coast Guard line.

MR. CLAIBORNE: Well, but using --

QUESTION: And that has nothing to do with whether or not you are in a bay.

MR. CLAIBORNE: Using inland, Mr. Justice Stewart, in the sense in which the Submerged Lands Act uses inland or internal waters in the sense in which the Convention uses internal waters --

QUESTION: But inland waters is a term of art having to do with the rules of the road for mariners. It has nothing to do with whether or not you are in a bay, whether you are in a bay or not.

MR. CLAIBORNE: But Mr. Justice Stewart, this Court has used the term inland waters as the grant states -- this Court has said -- begins the seaward limit of inland waters and it is that use as inland waters that I am talking about and for that purpose, the waters within the juridical bay are inland waters and the waters outside that closing line, even though within the inland rules of the road, are not inland

waters for the purpose of this case.

QUESTION: Yes. But the many inland waters, you are in inland waters many, many times when you are not in a bay and nobody thinks you are in a bay. You are still in inland waters.

MR. CLAIBORNE: Yes. But in answer to Mr. Justice Rehnquist, I would say that one has to be able to determine, whether it is from a plane or from a ship or from the shore, that one has ceased to be in waters that appertain to the open sea and have reached waters which are landlocked which are internal which are defined by headlands, preferably pinch headlands and which therefore are --

QUESTION: Isn't it the purpose of a convention to enable you to make that sort of a definition?

MR. CLAIBORNE: Exactly. The convention helps us in that it tells us that such a closing line must be between natural entrance points. It tells us that the indentation must be well-marked. It tells us that the line must be such as to enclose land-locked waters.

Beyond that, the convention does not help us. We must use our own judgment in interpreting those terms and applying them to any concrete situation. But I say to this Court that the members of this Court are just as able to do that and it is done on a flat map -- has nothing to do with any special information that might not be available.

One just looks at the map and makes a -- an --

[?]

QUESTION: Well, are we offering coletractors to conference on Friday and try to figure this thing out for ourselves? I would think in order to assess a Special Master's finding on this, you would have to make some attack other than -- we do it a little differently.

MR. CLAIBORNE: But I did try to say, Mr. Justice Rehnquist, that I think he began from the wrong starting point, followed the wrong path and therefore reached the wrong result and I think his wrong starting point was to assume that his job was to find a bay somewhere within East Bay and, secondly, to rpesume that when the technical semi-circle test was satisfied, one indulged a kind of expectation that so were the other tests.

QUESTION: Well, if you --

MR. CLAIBORNE: Whereas this Court has very clearly said you begin the other way in light of the convention.

QUESTION: But he did hunt for headlands, apparently.

MR. CLAIBORNE: He considered headlands suggested to him is more fair, Mr. Justice Stewart.

QUESTION: Well, that may be so but he didn't just say, at any point along a smooth coastline I can mark the beginning of a bay just because that is where the bay satisfies the semicircle test.

MR. CLAIBORNE: Well, I certainly don't wish to

overstate the Master's decision. Of course he recognizes this Court has said you can't draw an arbitrary line anywhere which merely satisfy --

QUESTION: Actually, you are looking to Article VII of the convention, aren't you, where this definition is?

MR. CLAIBORNE: Indeed. Indeed.

QUESTION: Yes.

MR. CLAIBORNE: And Article VII begins by telling you what is a bay and then as a second check, it imposes the semicircle test in case you have gotten a bad impression.

But you must first find a bay before you use the protractor. You never get to the protractor until you have found what looks like a bay and what is not merely an artificial construction.

I would say that what has happened in this case is that Louisiana last time quite candidly said, we are drawing an arbitrary line that meets the semicircle test which, incidentally, I'd like to show you, to show you where it was. And this time they said, oh, well, we'll have to get little pin pricks on either side to support that artificial, equally artificial line.

QUESTION: And the Special Master rejected Louisiana's arbitrary --

QUESTION: Right.

MR. CLAIBORNE: Indeed. Now, it is interesting to

note where that line is.

QUESTION: They purported to follow your rules. You may disagree with them.

MR. CLAIBORNE: Well, I -- I don't know about -- well, I suppose the Master purported to follow my rules but he did not articulate it that way.

He said, let's look at line D and then said, oh, well, it has got enough of a headland on the left and enough of a headland on the right. He didn't ever say to himself, now, is there really any bay within this bay? Suppose I weren't helped by the parties, where would I find it?

QUESTION: [It looks like a bay to me, all right.]

MR. CLAIBORNE: I point out that the 1968 line is remarkably inland and that was the best line Louisiana could find in 1968 that would satisfy the semicircle test. Only now have they developed a new rule for semicircle measurement and talked about the deterioration of Joseph Bayou. Now, issues that were perfectly available to them in 1968.

I think one must view that approach with some guarded suspicion.

The other lines shown on this last overlay are Louisiana's various suggestions, the most --

QUESTION: Wait a moment, what is the nautical-miles distance on the line he finally found? That is D, isn't it?

MR. CLAIBORNE: D.

QUESTION: Yes.

MR. CLAIBORNE: I --

QUESTION: Looking from here it seems it would be about five --

MR. CLAIBORNE: It would appear to be approximately four and a half nautical miles.

Now, I cannot, in the little time remaining, go through our various objections to each of these lines.

I'll say one word about this new method of going up rivers to include waters so as to satisfy the semicircle test with lines further seaward than either C or D.

The United States concedes that C and D meet the semicircle test properly applied. Louisiana would have you overturn the Master in this respect and find B or A by using upriver waters first, invoking an English decision by a single judge who is not affirmed in that respect by the English court of appeals.

I'll say no more about that.

And secondly, by taking notice of what they claim to be deterioration at Joseph Bayou, a matter as to which they were not free to do because they had not reserved the right to do so in 1969 when they stipulated the correctness of the '54 maps which is before this Court, indeed, was before this Court in 1958 -- and which, in any event, is insufficient to treat all that land area as water.

Louisiana waxes hot and cold about what are islands and what is mainland. When it serves their purpose, areas very far detached from land -- like all these mudlumps -- are treated as assimilable to the mainland.

When there are little ribbons of water separating large chunks of land, they somehow become true islands and therefore to be treated as water for semicircle test purposes.

I think it will be transparent to the Court that that inconsistency cannot prevail.

QUESTION: Mr. Claiborne, has there been much oil exploration seaward of line C or D?

MR. CLAIBORNE: There has indeed. There has been. But you must remember, Mr. Justice Brennan, that that is the beginning point for the three-mile belt and therefore what we are talking about is not line C as such but a projection three miles seaward from line C. That would be the award to Louisiana if line C were upheld or if line D were upheld.

QUESTION: C would be the equivalent of the low water mark basically and you would work it out from there.

MR. CLAIBORNE: Indeed. Exactly.

QUESTION: Well, this bay now -- we are now trying to determine the coastline and Louisiana owns three nautical miles out from the coastline.

MR. CLAIBORNE: That is right and the coastline is defined either as the low-water line along an open coast or

as the seaward limit of inland waters in a bay --

QUESTION: Yes, it is really only the latter that causes all these problems.

MR. CLAIBORNE: And it is only the latter --

QUESTION: The latter part of the definition.

MR. CLAIBORNE: Now, there are issues. Our second exception deals with the existence or non-existence of an extension of lowtide area off Pass Isle Bois which is more a question of where the low water line is.

I do not argue that here because it is a minor issue and tends more on the facts.

I had best get to Ascension Bay if I expect to say anything about it at all. Here again, we take the same approach.

That is, we suggest to the Court that the proper approach is one of looking at the general area and saying to oneself, now, is this a bay at all?

Here there is no question about which part of it is a bay. The question is whether any part of it is a bay.

It seems to us that we have here a half-moon in which a 42-mile opening to the sea with no possible indications of where the open sea begins and where inland waters or internal waters or the bay itself begins.

QUESTION: Two.

MR. CLAIBORNE: Indeed, number two. And the

Government's chart, Louisiana dislikes the use of small-scale charts, gives you a reasonable impression of Ascension Bay as compared to the entire coastline and whether one ought to view it as more realistically part of the sea or as a separate landlocked area we say that it is simply not landlocked.

Now, again the Master, I think, was influenced by this Court's findings that Ascension Bay met the semicircle test and he thought that was a goad in the direction of saying therefore it is probably a juridical bay.

There is very little indication how he reached his conclusion because he did it all in three sentences. He said that the bay had well-marked natural entrance points but was very reluctant to identify them.

He said that it was almost perfectly semicircular in shape, the classic shape for a bay. He said that it had a startling resemblance to Monterey Bay, which this Court had found to be a bay in the California case and we think each of those statements is false.

Where the well-marked entrance point on the west is baffles me. It has baffled Louisiana, who shifted it about to several places, and it has baffled the Master, who has chosen one and said there may be many more and had to be pressed into choosing the first because it was much easier to leave it vague.

It seems to us one can't do that. If this is a

well-marked natural entrance point, a necessary predicate for a bay, it ought to be identifiable.

We see none.

The two possibilities seem to be, one at Bell Pass Jetties. Louisiana doesn't use the jetties because they are not natural. They are artificially made.

And the only other one that occurs to us is as
[?]
coming out of here, both ending on the tip of Susqu Jetty which does indeed look like a well-marked natural entrance point. It is the problem on the west that we speak of.

Now, it --

QUESTION: [Inaudible] the Master's line?

MR. CLAIBORNE: Mr. Chief Justice, the Master suggested that one line was the red one. He suggested there may be others, not telling us which they might be. We presume that his decision is based on the red line though he was -- let me hasten to say the reason why this could be left in the air is because, the bay being overlarge, the rules of the convention require that a 24-mile arbitrary fall-back be drawn and it so happens that that fall-back line -- and the parties are agreed about where it would be -- starts here and goes somewhere in this direction so it doesn't matter whether you stop there or there.

QUESTION: Let's assume the Master -- assuming the Master was correct in calling this an oversize bay, then

the parties are in agreement as to where the 24-mile ---

MR. CLAIBORNE: Entirely right, Mr. Justice White.

QUESTION: I see. I see.

QUESTION: Well, let's see, if the Master sustained, what remains to be done to locate the actual lines, anything?

MR. CLAIBORNE: Nothing remains to be done if the Master is sustained.

QUESTION: If the line has existed or -- you say there is no bay at all.

MR. CLAIBORNE: We say there is no bay and we say that because the point on the west which has been chosen, if the belt has jetties, doesn't begin to define that inward curve that one would expect to find for a bay.

On the contrary, it comes out. It is convex and not concave. It is just an arbitrary starting point. Now, it can't be seen as anything else, or so we submit.

Now, the other point, on the face of it, seems to have a little more to recommend it but it is really nothing more than the headland for Caminada Bay. It doesn't advert the mariner or anyone else. This is a huge bay to the east.

It tells you, we are about to go into a bay, Caminada Bay, the other entrance of which is the island to the east --- actually, not the island because this whole complex is one -- Barataria Bay-Caminada Bay -- so this is quite obviously a bay but when you get to here, to realize

that there is a huge bay to your right is not realistic.

Now, the Master also said it was almost a perfect semicircle. It is that close but substantially incorrect.

If one draws a semicircle on either of these lines, one notices how much land has to be eaten into before the semicircle of water is satisfied.

The only reason the bay satisfies the semicircle test is because this Court held in 1969 that these waters can be thrown in but in terms of perfect semicircles, there is all of this of land. There is all of this of land, showing that the depth is not even that of the semicircle.

Now, the statement that a semicircle is the classic form of a bay is a gross exaggeration. It is the minimum for a bay. The classic form of a bay is more like a sea shape, with a pincher, with something that tells you that you are now entering internal waters, something which does lock the waters inside the closing line.

There is nothing here which makes the waters on one side of the line more landlocked than the waters on the other side.

QUESTION: You mean, in order to meet the initial test of a well-marked indentation, it has to have that sort of configuration?

MR. CLAIBORNE: Mr. Justice Stewart, I would say to meet the combined test of having a well-marked indentation

that encloses landlocked waters.

When one puts those two phrases together, I think one expects to find the classical form, at least, would be a pincher. A semicircle will satisfy the test but this is not a semicircle because it doesn't even come in on the west as a semicircle would.

Now, when one compares Monterey Bay, which is a pincher, one sees what a classical bay does indeed look like. There is no question where the natural entrance points to Monterey Bay are. They are two headlands facing each other and the waters behind are lying connecting them, quite clearly are landlocked waters. One knows that one is within a bay and has left the open sea.

What is more, Monterey Bay is only 19 miles wide. This bay is 42 miles wide.

We suggest that when a bay is overlarge, there is all the more reason to require stronger indications that one has left the open sea. One can't see across this opening. Therefore, there ought to be stronger pinchers that cut off the ocean from the waters inside is one is going to reach the conclusion that these are truly inland bay waters.

I have time for one word with respect to Caillou Bay. The short answer there is that this Court has already resolved that issue in 1969.

There are enough issues in this case without this

Court's being tempted to accept the invitation to reconsider that ruling.

What the Court said in 1969 was that neither did Louisiana claim nor was it a fact that the Isles Dernieres were assimilable to the mainland but that they were, on the contrary, islands.

The Court's other holdings, which were that islands can never form the entrance to a bay and that you don't push out a line for the purpose of including islands unless it is a bay to begin with, and here there is very truly no bay if you don't anchor it on the islands.

This area would never qualify as a bay unless one used this as a closing anchor.

Now, here we have Caillou Boca, about a third of a mile, about 14 to 15-foot depth and a marked channel, a clear separation from the mainland. There is no serious debate that this is an extension of the mainland.

What's more, as I say, the Court has already resolved the issue. Louisiana says, ah, but the United States until 1968 conceded that these were inland waters which is true. The Court in 1969 said that the Government is not bound by that concession because Louisiana has suffered no prejudice from it. On the contrary, it has just received revenues through oil exploration to which it may not have been entitled.

Louisiana says, we were prejudiced because this area wasn't surveyed as carefully as it might have been if that had been at issue. But the years that have passed since 1968 and the present have offered ample opportunity to the state to make any -- to present any further evidence if there were useful evidence to present.

They did not even reserve the right to do so when they stipulated the maps.

In any event, they have done so and the new evidence doesn't change the picture. It doesn't narrow the gap between the islands and the mainland, the relevant gap being Caillou Boca.

In all the circumstances it seems to us that the Master's gratuitous invitation to the Court -- naturally supported by Louisiana -- to reconsider its ruling with respect to Caillou Bay ought to be declined.

Now, I have sought to say to the Court that this is not a technical matter and that the Court ought to view it freely without being burdened with the suggestion that the record is overwhelming and that special expertise is required.

I suggest the Master's report be confirmed in all respects except in his finding at East Bay, his finding at Ascension Bay and his finding with respect to Pass du Bois.

QUESTION: Mr. Claiborne, I am interested in your comments. Do I understand you to say that only Long Island

Sound has been -- is an historic bay on the United States coasts?

MR. CLAIBORNE: That is the fact, Mr. Justice Blackmun. It appears in two ways. First, that is the representation of both the legal advisor and the Secretary of State in documents on file in this case.

Secondly, it appears if one looks at the charts which have been circulated, which have been published and, at the request of some foreign governments, circulated to them, delineating the entire three-mile coast of the United States and there it would appear that Long Island Sound is the only case where one claims a bay that does not meet the juridical test.

QUESTION: This is why, then, Connecticut is not a party to the next case.

MR. CLAIBORNE: I think that is the answer, Mr. Justice --

QUESTION: And of course, you have a district court decision against you on Cook Inlet, don't you?

MR. CLAIBORNE: We do, but of course the Court has granted certiorari in that case and we do not acquiesce in the ruling of either the district court or the Court of Appeals in the Alaska case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne.

Mr. Stockwell, you have a few minutes left.

REBUTTAL ARGUMENT OF OLIVER P. STOCKWELL, ESQ.

MR. STOCKWELL: Well, in connection with the question of Justice Blackmun, I think the United States recognized Chesapeake Bay and Delaware Bay as historical bays, in addition to Long Island Sound.

As a matter of fact --

QUESTION: They meet the juridical bay requirements, though.

MR. STOCKWELL: I think they do now, yes, sir, but I think before that they were recognized before they had the 24-mile closing line. They were recognized as historical bays.

As far as Long Island Sound is concerned, the United States, through the State Department, furnished information to Mr. Griswold to answer interrogatories in the Alaskan case and said there was some question about whether Long Island Sound was a historic place and later Mr. Meeker wrote Mr. Griswold to correct those answers and said he had found out that there had been ^{an} agreement between New York and one of its adjacent states fixing a boundary in the bay which was approved by the United States and therefore they considered it a historical bay and they said there was no question of any dispute about it.

Now, that was the only thing that was said about it. They didn't say anything about jurisdiction and physical

dominion or not. It automatically became a historical bay. So we feel that with the long history of action that Louisiana has taken along these bays, along its coast, and that there has been no --- even though the United States said the evidence is not all that clear, but the Master found that they had enforced these laws.

Now, when they talk about the fishing, there is a recent case filed with this Court just before the Original in which the United States filed a suit against Texas and Florida to enjoin Texas and Florida from enforcing its fishing laws more than three miles from the coastline.

This suit is pending now. In other words, the United States recognized in that court, in that case, that they permitted foreign nationals to fish three miles beyond its coastline and that the states had no right to prohibit the foreigners from doing that.

Now, of course, we recognize in '66 Congress passed an act creating the 12-mile fishing zone. We recognize they had a convention on the sea and natural resources at the same time they had the convention on the territory of the sea and continuous zoning.

But we are talking about in 1948 when Louisiana says its title was vested by these historical acts.

There was no permission to fish beyond the three-mile territorial sea and it was Louisiana enforced those

rules within its bay that they were asserting jurisdiction against foreign nationals beyond the territorial sea and certainly would be asked to establish historical waters.

Now, Mr. Claiborne didn't discuss the fact that these bays were recognized at one time as inland bays.

Now, as a matter of fact, the Special Master in East Bay, he found that the line A that you saw on Mr. Claiborne's map and the line B met all of the requirements of Article 7 of the Convention but he said that it did not meet the semicircle test when you used his rigid water measure.

But the Master realized he was wrong so he found those lines and said to the Court that you might take a more liberal view of water measurement and if you do, these lines meet objectively those tests and we say that under the convention and the prior ruling of this Court in the Thames Estuary case, that the Court should take and include the waters of these streams that are tributary to the bay.

Now, this exhibit that the Government put which was a diagram which was a diagram -- and certainly they are entitled to put the diagrams up there -- it doesn't show all of the waters entering East Bay from South Pass. It doesn't show the waters entering the Bay from Southwest Pass or none of the Johnson Bay area [Joseph Bayou area?]

QUESTION: Mr. Stockwell --

MR. STOCKWELL: Of course, all that makes a

difference when you look at that bay to see if you can find headlands or you can consider water area.

Now, the map that indirectly -- and these are the maps that the Court attached to its opinion -- shows a more realistic view of East Bay.

Now, Mr. Armstrong gave considerable attention to this case. He gave us all plenty of time and he worked and listened to all of the evidence and on all of these points, these headlands points, there was distinctive evidence on it. There was -- it located them. There was expert testimony and we say that what the Government is attempting to do -- and Louisiana is not attempting to do -- we are not trying to upset its findings of fact -- we say legally and he realized that was a legal question is whether or not he used the proper area measurement and if you disagreed with him, he had fixed these lines.

Now, he designated Caillou Bay. He said that he realized that in the ruling of this Court in prior briefs there was some question of whether it was admitted that these islands were not assimilated to the mainland.

But he said that if -- from the evidence in this case that was produced before him that he would say that Caillou Bay was a juridical bay, that it met all of the tests. These are the rigid tests that he set down with reference to the assimilation of these islands to the

headlands.

Now, there is a difference between assimilating islands for headland purposes and islands in a bay to be considered water area.

The fact that islands are in a bay might be assimilated to the mainland doesn't make them nevertheless an island for the purpose of water measurements because in a bay it is considered that that whole area is territory.

In other words, there is no difference between the land and the water.

Now, the assimilation of islands for headlands, there is a question there of whether this island is assimilated to the land. Now, whether an island is an actual island in the bay or whether you would say that island is assimilated to the mainland and you couldn't use it for water, that is not the test.

That test only applies when you use an island as a headland for the bay.

Now, that is what Mr. Claiborne was arguing.

Now, we say, your Honors, that we feel that Louisiana has adequately proved all of its -- all of these waters as being historical waters and I want to make it clear, we are not asking this Court to treat Louisiana specially. All we want is what the facts of this case and the law would give us.

We realize that this is an important case and the decision that this Court makes on these issues of historic bays and on other issues dealing with the convention are going to be precedents in these other cases and in international law and we say that the Court -- we urge the Court to look at the case carefully and resist the effort of the United States in trying to restrict the territory of the United States.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stockwell.

The case is submitted.

[Whereupon, at 12:00 o'clock noon, the case was submitted and a recess was taken for luncheon.]