In the

Supreme Court of the United States

STATE OF NEW HAMPSHIRE, Plaintiff,	
v.	No. 64 Orig.
STATE OF MAINE, Defendant.	

Washington, D. C.
April 19, 1976

Pages 1 thru 44

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Monday, April 19, 1976

The above-entitled matter came on for argument at 10:04 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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

EDWARD F. BRADLEY, JR., ESQ., Assistant Attorney General, State House, Augusta, Maine 04333, for the defendant.

RICHARD F. UPTON, ESQ., Special Counsel, 10 Centre Street, Concord, New Hampshire 03301, for the 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. 64 Original, State of New Hampshire against the State of Maine.

Mr. Bradley, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD F. BRADLEY, JR.,

ON BEHALF OF DEFENDANT

MR. BRADLEY: Mr. Chief Justice, and may it please the Court: This is a dispute between the States of Maine and New Hampshire over the location of their lateral marine boundary in the Piscataqua River and Gosport Harbor and the intervening marine area.

The legal issue in this case is the proper interpretation of the 1740 boundary decree of the King of England which describes the boundary in these areas. Maine's original interpretation of the decree was an extended thalweg line in Piscataqua Harbor and Gosport Harbor intersecting in the intervening marine areas.

New Hampshire's original line is a "lights on range" line connecting Fort Point to Whaleback Light. It was Maine's enforcement of its lobster regulations in the intervening marine area between these two lines which led to regulatory conflict and an attempt to resolve the boundary through boundary commissions. This attempt failed. Subsequent enforcement action led to conflict between enforcement officers of both

States and an executive moratorium on enforcement to permit New Hampshire to file a complaint in this case.

New Hampshire filed that complaint on June 6, 1973, and a Master, Justice Thomas Clark, was appointed on November 5, 1973. Soon after his appointment Justice Clark met with counsel for Maine and New Hampshire to urge the States to settle this dispute and to avoid long and disruptive litigation with great expense to the people of both States.

Counsel accepted this recommendation and met to review principles of law which would determine the location of the boundary and the proper interpretation of the description in the 1740 decree. They were able to reach agreement on this and they filed a joint motion for consent decree on September 23, 1975. On February 27, 1975, the stipulated record in support of that joint motion for consent was submitted to the Special Master and the case was finally submitted without oral argument on March 17, 1975.

After reviewing the stipulated record and the consent decree submitted by the States, the Special Master decided that he had to reject the consent decree because he believed that the court was without jurisdiction to enter and also because he felt the geographic middle rather than thalweg was the proper interpretation of the word "middle" in the boundary description.

The State of Maine has taken exceptions to both these determinations. But before discussing our exceptions, I would

like to describe to the Court the substantial prejudice which the Special Master's rejection of the consent decree, adoption of the geographic middle line, and also his failure to hear full argumentation on the issues below has caused to the interests of the State of Maine.

First, of course, we have lost to the State of New Hampshire by the Master's description of the new line 636 acres of land in the intervening marine area, land which is in dispute between New Hampshire and Maine fishermen and presents a great emotional issue in both States.

QUESTION: What's that? About one square mile?

MR. BRADLEY: Your Honor, the way I visualize it is that it's about two and a half times the area between the Capitol and the Lincoln Memorial.

QUESTION: There are about 640 acres in a square mile.

MR. BRADLEY: OK if that's what it is. That's my visual reference.

But we don't feel that that 636 acres --

QUESTION: This area is off the coastline?

MR. BRADLEY: Yes, sir.

QUESTION: Or do you include in that anything in the harbor?

MR. BRADLEY: No, we have made no calculation of the area that we may have lost in the harbor.

As much objection as we have to the lost 636 acres,

we feel that we have been much more greatly prejudiced by the Master's adoption of an equidistant boundary in the Piscataqua River. The Master, at page 43 of his report, indicated that it wouldn't be necessary for purposes of this dispute to delimit that boundary, but because we are going to have to live with it, we have asked State Department Office of the Geographer to do a rough approximation of what an equidistant line would look like. And they have done it on a map that refers also to the thalweg, which we distributed just prior to the argument.

As you can see, it's an extremely irregular line which would be very, very difficult to mark on the water and would give rise to great opportunities for the kinds of jurisdictional and regulatory conflict which gave rise to the disputs in this case.

QUESTION: You have submitted this map?

MR. BRADLEY: Your Honor, it's really demonstrative. It's not evidence. It wouldn't be the line that you would adopt in a decree or anything like that.

QUESTION: You wouldn't suggest the thalweg is going to be a straight line like that, do you?

MR. BRADLEY: Your Honor, it was in the consent decree. It was marked by a range line --

QUESTION: You wouldn't really suggest that's the way it is, would you?

MR. BRADLEY: It's pretty near that, your Honor.

QUESTION: A straight line? A thalweg? The deepest channel in a river, a line like that?

MR.BRADLEY: In this river, the channel --

QUESTION: That's incredible.

MR. BRADLEY: It may be incredible, sir, but --

QUESTION: The line you agreed upon, is that it?

MR. BRADLEY: Yes, sir. And it was based upon the --

QUESTION: It's not a thalweg, though. That's where you agree it is.

MR. BRADLEY: Your Honor, it's the main ship channel. It's the channel that ships actually --

QUESTION: Maybe it's misnamed thalweg, but in any event on this map the straight line is the line upon which the agreement was reached.

MR. BRADLEY: Yes, sir.

QUESTION: May I ask a question while I have you interrupted?

MR. BRADLEY: Yes, your Honor.

QUESTION: Is there any question in the case? I notice New Hampshire isn't quite as happy with that agreement now as perhaps it was at the time it was made. But the New Hampshire legislature never did agree with that agreement, did it?

MR. BRADLEY: No, your Honor.

QUESTION: Is there any question of the validity of

the executive -- of New Hampshire -- maybe I should ask your adversary whether it's a question of state law.

May there be an agreement of this kind without approval of the legislature of New Hampshire?

MR. BRADLEY: Your Honor, the position of the State of Maine is that this is not an agreement; it's merely a suggested judicial resolution which the Special Master has the power to enter as a proper exercise of the original jurisdiction.

QUESTION: I know, but it depends, does it not, upon the consents of both the States?

MR. BRADLEY: Your Honor, it's not a consent to which both States were bound, as we have seen by the actions and behavior of the State of New Hampshire in this case today, and neither State has felt bound to enforce it on their citizens or the citizens of other States. It had no binding effect until it was adopted by the court and entered.

This is really our response to one of the suggestions the Special Master has made.

QUESTION: Do we have before us the case of an alliance, whatever you call it, consent, or what, jointly submitted by the two States? Do we have that still?

MR. BRADLEY: It is a line which the New Hampshire legislature does not agree with and never agreed with it. Neither State could agree with it through the political process. The counsel for both States, through the Attorney

Generals' offices, made a determination that this was the appropriate interpretation through legal principles of the decree and suggested it to the Special Master. They have not indicated that they don't agree with it. They have just found the answers -- the Master's reasons for rejecting it unanswerable. I don't take it that that means they rejected it. They are just finding that if he is correct, that they would assert a different line in this case. That is, if he is correct about rejecting thalweg and the lack of jurisdiction of the court, that they would have applied the principles differently to obtain a different line. But it made no statement about whether they reject --

QUESTION: Is the ship channel you referred to an artificial channel that has been dredged out?

MR. BRADLEY: I really don't know the answer, your Honor. I believe that it's --

QUESTION: Is it marked by buoys?

MR. BRADLEY: It's marked by buoy in Gosport Harbor. It's marked by the range lines in Piscataqua River which are lights connecting so that mariners can determine whether they are on the main channel as they come into the river.

QUESTION: Is there any authority from this Court as to whether a proposed consent decree needs the ratification of the legislative branches of the two States?

MR. BRADLEY: Yes, your Honor, I believe that there

is. I feel that the case of Virginia v. Tennessee determined that not all compacts and agreements require legislative approval and that only when the parties have done everything they can to bind themselves to an agreement that legislative approval is required.

QUESTION: Now, that's congressional approval. Is that legislative -- I was thinking in terms of what sort of authorization do counsel representing two States in an original action in this Court need in order to consent?

MR. BRADLEY: I think New Hampshire's answer to that in its motion to support the jurisdiction of a Special Master to enter the consent decree which was filed with the Special Master, and I honestly don't have it in my mind, the principles, but they have answered that with respect to their authority and determined at that time that their Attorney General did have authority to enter it.

QUESTION: What if both of the States, if the two States entered into the agreement which you have entered into and then moved to dismiss the original action by stipulation of both parties, then there would be no original action left, would there?

MR. BRADLEY: That's right, your Honor.

QUESTION: Would the terms of that agreement, then, entered into between the two States, present problems of enforceability if citizens of one State or the other elected

not to comply with it?

MR. BRADLEY: Yes, your Honor. I believe --

QUESTION: That's why you want this Court's action, I take it.

MR. BRADLEY: Yes, your Honor. There is no question that if agreement was reached outside the context of your exercise of regional jurisdiction, that we would have to find congressional approval under Article I, Section 10, the compact clause.

The point that I started to make with Mr. Justice Rehnquist was that the only time that is required once the original jurisdiction has been exercised, is never required once the original jurisdiction has been exercised, because nothing the parties do in the context of the exercise binds them until the Court has exercised its judicial power.

In the case that I cited, Virginia v. Tennessee, 148 U.S. 503, the States of Virginia and Tennessee entered into preliminary boundary agreement prior to entering into binding boundary agreement, and the Court naturally held that all compacts and agreements don't require congressional approval and it's only when the States do something that actually binds themselves independent of the judiciary, I believe, or outside the context of original jurisdiction, that the approval of Congress is required. And that is consistent with the reasons that congressional approval is required in the first place,

which was to protect the United States' interest against compacts and agreements by the States which would affect Federal interests. It has been held a long time in this Court that the exercise of judicial power is a satisfactory substitute for congressional approval when original jurisdiction is exercised. And we believe that the Court has jurisdiction to enter the decree in this case.

QUESTION: What action, if any, has either of the legislatures taken on this?

MR. BRADLEY: The State of Maine legislature has taken no action. The State of New Hampshire, both Houses, as I understand, have passed concurrent resolutions rejecting the decree, but has not passed any law which is binding on them. And that's the matter of their State law which I --

QUESTION: But your legislature has done nothing.

MR. BRADLEY: Our legislature has done nothing.

QUESTION: Mr. Bradley, if the Special Master had accepted the consent decree, would the location of the line have been self-evident? Would the decree itself have identified the precise location of the --

MR. BRADLEY: Yes, your Honor, the decree does, which is the location of the thalweg and the determination of the thalweg and the straight line portion of the boundary by latitudes and longitudes.

QUESTION: And the Attorney General of New Hampshire

then agreed at one time to the location of the line.

MR. BRADLEY: Yes, your Honor, in filing that motion for joint judgment, he indicated that he not only agreed with it, but it was the appropriate application of law and fact and it was in the best interest of the State of New Hampshire at that time.

QUESTION: General, could you tell me what legal principle will support this straight line in the harbor?

MR. BRADLEY: The principle which supports it is the principle of main channel or thalweg.

QUESTION: You don't really suggest that on the ground that's where you would find the thalweg. You haven't even attempted to say where the thalweg is, have you? You have just agreed that's where it is.

MR. BRADLEY: Your Honor, we have agreed to it, but we have agreed to it by reference to charts which indicate the depths of the water and the, what we -- I understand --

QUESTION: And it turns out to be a straight line like that?

MR. BRADLEY: It turns out to be a relatively straight --

QUESTION: That's the course that mariners sail, I expect.

MR. BRADLEY: Yes, your Honor, it's definitely the course that mariners sail.

QUESTION: That would be it.

MR. BRADLEY: I have to admit that I honestly don't know that it is exactly the deepest part --

QUESTION: Thalweg doesn't mean where mariners sail, does it? Thalweg means the deepest part of the channel.

MR. BRADLEY: The main part of the channel.

QUESTION: Mariners sail what's safe to sail and if a straight line is more convenient, they sail a straight line.

MR. BRADLEY: The indication that this is the safest place to sail and therefore the deepest is the largest vessels that come into the area stay right on that range line all the time they are coming in. They don't deviate from it. As a matter of fact, in talking to pilots we have had indications that there is very little --

QUESTION: They don't need to deviate from it. It's deep enough for the deepest ships -- for the largest ships.

MR. BRADLEY: In that place.

QUESTION: On that line.

MR. BRADLEY: Yes, your Honor.

QUESTION: Suppose we were to conclude that the two parties were mistaken in their agreement that this was indeed the thalweg.

MR. BRADLEY: Yes, your Honor.

QUESTION: The fact that you consented to it wouldn't

preclude us from saying --

MR. BRADLEY: No, your Honor. If you decided --

QUESTION: That this was not the thalweg.

MR. BRADLEY: --that thalweg was the proper principle --

QUESTION: And the consent agreement should be rejected if what's to determine the resolution of the boundary dispute is the drawing of the thalweg.

MR. BRADLEY: I would agree that the consent decree should be -- that the Court would have the power and should maybe reject the consent decree, but they shouldn't accept the Master's line. What they should do is send us back for a full determination of the concept of thalweg and where it actually lies on the ground. This is one of the greatest prejudices to our interest, we feel, that we have had because of the Master's decision without oral argument --

QUESTION: You are going to get to arguing that he adopted the wrong principle?

MR. BRADLEY: Yes, I am.

QUESTION: I mean, wholly aside from the consent decree.

MR. BRADLEY: Yes, your Honor.

QUESTION: From the consent of settlement.

MR. BRADLEY: Right. I am arguing the consent decree so hard because the Master has indicated that if you have jurisdiction to enter it, that you should enter it and he hasn't

felt it necessary to recommend rejection of the thalweg line without --

QUESTION: On what basis would we have jurisdiction to enter it?

MR. BRADLEY: I think you have exercised your original jurisdiction.

QUESTION: I know, but would we not have to agree that this indeed is in law the thalweg?

MR. BRADLEY: You would have jurisdiction, I believe, whether you agreed or not. You could still reject it as an inappropriate application of law to fact without respect to your jurisdiction. You could reject it certainly for other reasons than the lack of jurisdiction.

QUESTION: Suppose that you concluded that the 1740 -- or something in history indicated that the thalweg was not the proper basis. You think that the two States by agreement could adopt the thalweg?

MR. BRADLEY: No, your Honor, not in this --

QUESTION: Is that another reason that you might have to reject the consent decree?

MR. BRADLEY: Yes, it might be a reason for rejecting it. The point that we are making in this case is that every indication in the boundary proceedings was that thalweg was meant when the term "middle" was used. The Special Master has referred to some of the evidence we refer to in our brief with

regard to the use of the channel in the Merrimack River and also with regard to deeds relied on by Massachusetts which referred to the channel of Piscataqua.

There are two indications, though, that were not cited in the brief or referred to by the Special Master which we think are a strong indication that channel was meant when the term "middle" was used. The first of these is the Charter of King Charles II to Rhode Island in 1664 which was issued just before the Charter issued to New Hampshire in 1679. That Charter is described in Rhode Island v. Massachusetts at 37 U.S. 464, and in that Charter, King Charles, the person who issued it -- one of the boundary determinations that was in the line title that the Boundary Commissioners were determining indicated that the definition of "middle" was channel. Thus when he was describing the location of the boundary between Connecticut and Rhode Island to the south, he indicated that it went to the middle or to the channel of a river there commonly called and known there by the name of Pawcatuck. We think this is a contemporaneous indication that thalweg was in vogue and being used at the time the decree was entered.

The Master has seized upon the use of the word "the half" in New Hampshire's petition for appeal as apparently the strongest basis for adopting geographic middle. And we found a passage in Belknap, History of New Hampshire, which indicates

how insignificant the use of "the half" is in a description of that boundary. Thus, it is clear that the State of New Hampshire in authorizing the appeal didn't use the word "the half." The only time it was used is by the Solicitor for the State of New Hampshire who was someone who had been hired and was in England and filing papers before the King's counsel in the petition for appeal. And the passage in Belknap which is very, very short I would just like to read because it describes the relationship between the Solicitor in England and New Hampshire's actual intention. And he says: "They oblige us to make bricks without straw. Above all, why did they not send a copy of their own appeal? For want of it, I have been forced to guess what that appeal was from loose passages in Mr. Ade's letters." So the Solicitor who used the word "the half" had to guess at what New Hampshire was doing back in the colonies. He didn't have any direct information from New Hampshire when he used the word "half." We believe this undercuts the Master's strong lines on the use of the word "half" to determine geographic middle.

QUESTION: Mr. Bradley, will you let us have the page citation? We might have trouble finding that.

MR. BRADLEY: Certainly. That's page 251, Belknap's History of New Hampshire.

Finally, I would like to also note on the use of the word "the half" in the petition for appeal was the second time

that New Hampshire had used that word. The first time they used it, they used it with regard to navigational criteria and not criteria based on geometric concepts such as geographic middle. Thus, in the boundary proceedings they indicated that the half of the Isles of Shoals was divided by the harbor or road which lay between. Now, this is a clear reference to navigational use of the area and it's consistent with the use of thalweg or channel in the other portion of the northern boundary and not with the Master's adoption of a geometric concept to determine the meaning of the word "middle."

I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Upton.

ORAL ARGUMENT OF RICHARD F. UPTON

ON BEHALF OF PLAINTIFF

MR. UPTON: Mr. Chief Justice, and may it please the Court: In arguing for New Hampshire, I would like first to touch on a sole exception to the Master's report and then answer the arguments just made by Mr. Bradley regarding the consent decree.

Now, the question of law presented by New Hampshire's sole exception is this: Was the Master correct in ruling that it was proper for him to use low-tide elevations, that is, rocks protruding only at low tide, in the Piscataqua River as points of reference from which to calculate the geographic

middle of the river. And we argue that this ruling was incorrect, the use of low-tide elevations.

QUESTION: You affirmatively support the rest of the Master's decree?

MR. UPTON: Yes, your Honor.

QUESTION: Including his decision that the geographic middle is the right division in the river?

MR. UPTON: Your Honor, that is our position.

QUESTION: Although it wasn't.

MR. UPTON: But the geographic middle, we believe he is correct in this rule. They think he has located it improperly.

QUESTION: I understand that, but as a principle, you think the geographic middle is the right principle.

MR. UPTON: We do. In my reply brief I have argued the point as strongly as I know how with citations to the proceedings of the Boundary Commissioners in the appendix.

So we have only one complaint with the Master's --

QUESTION: Is it your position -- what is your position? Do you think that determination would preclude or did preclude the two States from an agreement?

MR. UPTON: Your Honor, the agreement was based on an entirely different concept of law. Counsel were dealing then in terms of thalweg and trying to agree --

QUESTION: Having decided that the geographic middle

is the correct legal principle historically in this situation, you think that the States were then disentitled to agree otherwise?

MR. UPTON: I think that now we have the Master's findings on that; we never tried to agree on this point in our agreement. We never covered this in our negotiations.

QUESTION: I say that, since the basis for the agreement falls out, the agreement falls out.

MR. UPTON: Yes, your Honor.

QUESTION: Whether or not your legislature approval is required.

MR. UPTON: That's our position.

So we argue that he was incorrect in calculating and locating the geographic middle of the river in using these low-tide elevations, and in particular a submerged rock off Whaleback Reef. This is the one thing which distorts the situation so much because Whaleback Reef is a tiny rock, one-third of the way out into the river. It doesn't qualify as an island. It can't be assimilated to the coast as an island under any of the tests this Court has adopted in United States v. Louisiana, 394 U.S. recently. It's a distortion of geography to say that's part of the bank of the river at low tide.

QUESTION: I am looking at the chart which is appended to your exceptions and brief filed December 23. Where is Whaleback Reef found?

MR. UPTON: No. 3 in black ink is Whaleback Reef, the figure 3, just to the left of the line marked "Closing line of harbor."

QUESTION: I don't see that -- the line doesn't go from there, though.

MR. UPTON: No, but we were informed in the footnote on pages 42 and 43 in the Master's report, the bottom of page 42: The way the median line is calculated is to run arcs to the compass to nearest points. He said, "The significant points in the Piscataqua Harbor are those low-tide elevations and low water lines on either side of the harbor that are nearest each other," and he mentions Whaleback Reef, there. He gives that as a point of reference in calculating the median line. We say that was error.

QUESTION: He doesn't use that itself as a headland point.

MR. UPTON: No, your Honor. He uses it as a point of reference in calculating the median line of the river.

QUESTION: I see. And this chart shows, as I understand it, the difference in the boundary line that would result if you are correct in this exception.

MR. UPTON: If I am correct, yes, your Honor.

As the Court can see --

QUESTION: What is the difference between points A and B there?

MR. UPTON. 350 yards. It makes a difference because it deflects the straight line boundary all the way from there up to the Isles of Shoals, a distance of six miles. The deflection of that line at that point, 350 yards, makes a difference of 300 acres to New Hampshire over the whole area.

QUESTION: Would the lines be parallel?

MR. UPTON: They are not; they converge, your Honor, at one point at the Isles of Shoals. It's a long V-shaped gore.

QUESTION: I see.

QUESTION: Mr. Upton, since you are interrupted, I am kind of new at this kind of litigation. What is the standard of review that we should apply in deciding how gross the error of the Master must be before we take another look at it?

MR. UPTON: As I view it, the Master's report is entitled to a strong presumption of correctness.

QUESTION: So it's not enough for you merely to persuade us that he might have done a better job.

MR. UPTON: If he committed an error of law, of course, questions of law may always be corrected in this Court.

QUESTION: I didn't understand you to contend that it would never in any situation be appropriate to use these low-water projections, whatever they are called. You are just

saying in this particular case they are inappropriate.

MR. UPTON: I say, your Honor, that it's contrary to any of the precedents in international law that I have been able to find. It's contrary to the the precedents in international law that I have been able to find, it's contrary to the holdings of all the writers in this field that we have cited on pages 7 to 9 in our brief, and it's contrary to the holdings of this Court in United States v. Louisiana.

QUESTION: Were those holdings on particular fact situations, or do you read those as saying as a matter of law it's never appropriate to use the standard?

MR. UPTON: Your Honor, one of the tests they use is that proposed by Mr. Boggs, the former Geographer of the State Department,to draw parallel lines from the end of each offshore formation to the shore. And if the amount of water area between the island or offshore formation and the shore is greater than the offshore formation, then it can't be assimilated to the shore and used as a point of reference.

In this situation, this is obviously too small and too far removed from the shore to qualify under that test. And I understand that approach is almost a question of law.

Now, both parties have in their briefs gone farther than to argue merely the point of whether a measurement should be made from these offshore formations, whether they are properly a part of the bank of the river from which one should

measure, and we have gone into the analogy of various articles of the Geneva Convention of the Territorial Sea . Now, we may have complicated matters by doing this, but we feel obliged to go into it because the Master did. And he used it to justify what he had done here.

I think it all stems from Article XII of the Geneva Convention of 1958, which states that the territorial sea outside of internal waters should be divided between States whose coastlines are adjacent by the median line principle, measured from the nearest points on each State's baseline.

Now, the Master has apparently applied this analogy to internal waters, because we are here in internal waters inside the closing line of the harbor, whether one looks at it by Maine's standpoint or by New Hampshire's standpoint. But I urge to the Court that if we are to apply this analogy of international law to internal waters, it ought to be done with extreme care, and with an eye to the real purposes of the convention. To do it, we have to consider Maine and New Hampshire as foreign States having opposing coastlines on each side of the river. But this is a very narrow river. It's a little over a mile and a half wide at the mouth, and it narrows down as we go further inland. Now, how would coastal baselines be drawn on each side of the river from which to measure the median line or boundary? And we say that if this analogy is to be followed at all, Article III should

be used, that is, the normal baseline follows the low-water line on the mainland, that islands should only be considered part of the shore if they qualify in the tests of United States v. Louisiana, that is, if their size and closeness makes them really an integral part of the mainland, and that the use of low-tide elevations, that is, rocks exposed only at low tide as part of the base line, is optional under international law and to use these as measuring points in such close waters is apt to create distortion and unequal division of the waters of the river. And that's just what it would do if this happens. I think it is demonstrated.

At the very least, a low-tide elevation should not have more influence than an island, but if the Master is correct, he would be giving it that effect, and we say that that was his principal error. Otherwise, we have no objection to his report.

Now, Maine has referred to Article IV of the Convention which is an optional method of drawing long, straight baselines. It's optional, not mandatory. And it was fathered by the decision of the international court of justice in the Anglo-Norwegian fisheries case in 1951. It's optional. It applies to the peculiar coastline that was found off Norway with many deeply indented fjords. It's not appropriate to apply by analogy to closely bounded internal waters, and the decision was never accepted by the United States Government.

In fact, although it was advocated by California, it was not followed in United States v. California, and to use this method and to use Whaleback Reef would cause much more than a 15 percent departure from the general direction of the main shore, which was the maximum thought permissible in the Anglo-Norwegian case.

Now, turning to the point that occupied the Court's attention when Maine was arguing the rejection of the motion for entry of judgment by consent, was the Master correct in rejecting it? And is New Hampshire's present position in support of the Master correct?

We believe the Master gave sound reasons, sound and adequate reasons, for recommending rejection of the consent decree, and we have not taken any exception to this ruling. The motion for entry of judgment by consent -- and I took part in it -- was an effort by the two States to get a compromise settlement -- frankly, a compromise settlement -- approved. It had to become a judgment of this Court or it would do us no good because our State had already unilaterally adopted a boundary line inconsistent with anything Maine would agree to and our legislature had provided this shall be the line governing all public offices of New Hampshire unless and until modified by a compact or by judgment of the United States Supreme Court.

QUESTION: Was that just a resolution by your

legislature, or was it approved by the Governor?

MR. UPTON: That, your Honor, was a law which passed and was approved by the Governor, the one I just quoted, and that was passed before we entered into this compromise agreement. It was signed by the Governor. It is quoted in the appendix to our brief.

QUESTION: That line went some 200 miles out to sea, didn't it?

MR. UPTON: That was the next section of that chapter, your Honor.

QUESTION: Well, then, when you entered into the compromise agreement, I take it that those who were acting on behalf of the State of New Hampshire felt it was consistent with that first act of the New Hampshire legislature?

MR. UPTON: We felt that it could only be made consistent, your Honor, if this Court approved it and adopted it and made it a judgment of this Court. In that case it came within the exception of the statute.

QUESTION: And, of course, you don't know whether this Court will approve it or adopt it until you have submitted it to the Master and he in turn has submitted it to the Court and this Court has decided one way or the other, I suppose.

MR. UPTON: That is correct, your Honor. The matter rests in the hands of this Court at this moment, because you do have the power, I believe, if you find that is the law,

to enter the consent decree.

QUESTION: Well, in a sense, it is like a stipulation where you settle a personal injury claim or something; two lawyers get together and agree and they have to submit it to the court, so the matter remains open until the judge actually approves the stipulation.

MR. UPTON: That's true. Although in the case of a personal injury case, your Honor, the parties have the power to make such a settlement without the intervention of the court. They could just --

QUESTION: The injured party ..

MR. UPTON: In that case I have to confess it requires the approval of the court.

QUESTION: That is the sort of thing I think my brother Rehnquist suggests. There is a public interest. Of course, we have had this problem.

MR. UPTON: This problem always exists, and I suppose it exists in a criminal case where a man pleads guilty and counsel attempted to work out an arrangement as to what the recommendations will be for sentence. It's placed before the court, and the court may or may not accept it and may impose a harsher penalty or a lesser penalty. But the matter is in the hands of the court.

QUESTION: Isn't there some contract law theory that would say neither party has the right to repudiate it during the

reasonable time that it has taken to go through the steps necessary for judicial approval?

MR. UPTON: Your Honor, I take this to be the position regarding contracts, that if this is not to become a judgment of this Court, then it must be a compact which requires the consent of the United States Congress in order to be binding on the States, because this Court has several times held that the resolution of boundary disputes between States falls within the compact clause if the case is not settled by a judgment of this Court. That would be my answer.

Now, this was frankly a compromise on which we needed the Court's approval, but at the time we did this we were unaware of what your Honors were going to hold in New York v. Vermont or Vermont v. New York, and that decision came down in the summer of the time these negotiations were going on. Now, we compromised in these ways: The thalweg versus the geographical middle. New Hampshire accepted the thalweg and then we further compromised on the thalweg by deciding we would agree it is a straight line when in fact, of course, it can't be physically. But for convenience, for the convenience of law enforcement, we agreed that it was the thalweg and that that was it.

Secondly, the mouth of the harbor, for determining the point where the thalweg ended, we agreed was the line going from Odiornes Point to a submerged rock called Kitts Rock

which has a whistling buoy on it. Now, this, again, was an arbitrary compromise for administrative convenience, but it has no relation to law, the law that applies to tell where a harbor's mouth is.

And, finally, we agreed that the line across the open sea would be a straight line rather than a curved line as sought by Maine based on the United States Geological Survey maps, and here the Master has found that we adopted correct law. The straight line is proper under the special circumstances exception of the Geneva Convention.

Now, when the terms of this settlement were proposed to the Master, he told us he now doubted that he had the power to accept it, although he had earlier urged us to try to settle.

QUESTION: That is because of the intervening decision of Vermont v. New York.

MR. UPTON: Yes, your Honor. And we held a hearing on that. It appeared likely that he might rule to accept it; he might accept it with modifications; he might reject it and call for an evidentiary hearing in full; or he might proceed to decide the case either for New Hampshire or for Maine on the record we made for him, because when we knew about Vermont v. New York we tried to repair the situation by presenting the Master with a stipulation for an evidentiary record which is reported in full on pages 2 and 3 of the

record, so he would have something by which to judge the lawfulness and reasonableness of the stipulation.

Now, he recommended rejection. He thought we were presenting him with a fait accompli which he would merely rubber stamp and which did not call for the exercise of the judicial power, that is, applying established principles of law to facts which either have been stipulated to or settled by the evidence. He felt that this wasn't that kind of a thing. He had been presented with something that wasn't judicial in nature and not a proper basis for a judgment.

He then found that the record we had stipulated to before him as a basis for deciding the case was sufficient for him to make a decision on the merits without further hearing, and he then proceeded to decide, as my brother Bradley has outlined in his opening statement.

Now, we believe that the Master was correct in adopting geographic middle as opposed to thalweg. We compromised that position in the beginning in order to obtain what we thought was doubtful, that is, a straight line across the open sea which we felt was very important to us.

QUESTION: Mr. Upton, looking at the consent decree lines, so-called, which appears in the appendix to the response of the State of Maine to New Hampshire's exceptions, what accounts for that line CEF? If you have that little tan brief. What accounts for the segment of the line CE? Why wasn't it

drawn from C, which is the thalweg middle? What was the F?

MR. UPTON: E, your Honor, was the point we agreed on in the consent decree as being the mouth of the harbor and the end of the thalweg.

QUESTION: Then what is C doing there?

MR. UPTON: C is the line -- I believe my brother means that C is the line drawn by the Master, C to D.

QUESTION: Yes, but if you look at the key to the appendix in the upper left-hand corner, the consent decree line is denominated as CEF.

MR. UPTON: That's right, your Honor. The reason we --

QUESTION: Not just CF.

MR. UPTON: CD is the line found by the Master. CEF is the consent decree, and we extended the thalweg out to E, which is a point we agreed in our stipulation to be the mouth of the harbor. So then we took off across the sea.

QUESTION: I see. So that E is the thalweg as far as it goes out into open sea.

MR. UPTON: Yes, sir. And we stipulated that would be the mouth of the harbor by arbitrarily drawing a line from Odiorne Point across to Kitts Rock whistling buoy at that location.

QUESTION: All right. Thank you.

QUESTION: For purposes of enforcement, Mr. Upton, how would these areas be identified under the consent decree?

MR. UPTON: As we go off to sea -- and this is where the biggest trouble of enforcement is, your Honor -- we would ask Maine to participate with us in putting range lights on Newcastle Island, one behind the others, lined up with this line, and we have asked the Court -- and Justice Clark has recommended to the Court -- that a commissioner be appointed to mark the line when the report becomes final. This has been done in most of the boundary cases. It was done in Vermont v. New Hampshire; after the Court had adopted the law and decided how it applied, a commissioner was appointed to mark points on land where the agreement states. And we think this would be appropriate here.

QUESTION: His function would have some finite limits in the sense that when he finished marking, that would be the end of his job.

MR. UPTON: Yes, your Honor.

QUESTION: It didn't require any ongoing judicial supervision.

MR. UPTON: He would have hardly any discretion as I see it. I agree with your Honor's suggestion.

QUESTION: But from the point of view of the lobster fishermen, there would be range lights that they could --

MR. UPTON: They would have much the same effect as the lights on range that the lobstermen fought so hard to have, that is, two lighthouses, one behind the other.

QUESTION: Those are existing lighthouses, they go way back.

MR. UPTON: They go way back in history.

QUESTION: And the claim is that as a matter of practice, that's been the practically recognized boundary over the years.

MR. UPTON: That's what the claim is.

So we entered into the compromise realizing that it would have to be approved. We had Vermont v. New York; we had the stipulated record, and we had the Master moving that it be rejected, and we had detailed findings by him that it was the geographic middle rather than the thalweg. And we support that ruling because in reviewing the record of the Boundary Commission, we find that when they referred to the Merrimack River on the south, they always used the words "middle of the channel," whereas when they referred to the Piscataqua River on the north, they used "middle of the river." And New Hampshire's Commissioners talked about losing half the river to Maine, then Massachusetts, and the Massachusetts Commissioners said the line has always been in the middle of the river because those islands nearest to each State have always been taxed by each State, and we say that language speaks in terms of geographic middle just as in the case of Texas v. Louisiana where your Honors felt that the intent of Congress was directed to the middle of the river, geographic

middle rather than the thalweg. And we feel this case is equally strong.

Thalweg was not in vogue as a tool of interpretation in 1740. Also, we were then under British colonial rule where there was freedom of navigation to all British subjects, including colonists. There was no obstruction to freedom of navigation, which is one of the things that makes thalweg applicable.

I have not touched on the "lights on range" argument of the amicus curiae because there is no exception before the Court raising that question. But if the Court is interested in considering it, there is an apt quotation in United States v. Louisiana, 394 U.S. at page 76. "The unauthorized acts of private citizens could generally not support a claim of historic title."

So in conclusion we submit that the Master's report should be confirmed with the exception that the Court should hold it was error to use these low-tide elevations.

QUESTION: What precisely, if we were to agree with you, would that mean in respect to relocating the geographic middle?

MR. UPTON: I believe that on that issue the case should be referred back for findings.

QUESTION: How do you think it would affect it? How about, for example, the center point of the mouth of the

harbor, where would it move to? How far would it move, do you know?

MR. UPTON: It makes a difference of 350 yards, your Honor, whichever view is adopted --

QUESTION: It's in the appendix to your exceptions at brief.

MR. UPTON: Right.

QUESTION: How much acreage --

MR. UPTON: We would gain or lose about 300 acres, depending on the result.

QUESTION: That's that long "V" you were telling me about.

MR. UPTON: Yes, your Honor.

QUESTION: Mr. Upton, just one more question before you sit down.

As I understand your brief, you in part argue that the Master did not adequately consider the low-tide elevation point, Do you make argument before us that you did not make before him? Did he have the same chance to appraise this issue you are asking us today?

MR. UPTON: He brought this up for the first time, your Honor, in his report. This was not argued by the parties; it was suggested by him that he might consider it.

QUESTION: Do you take exception to the procedure he followed?

MR. UPTON: No, I don't object. I object to his ruling.

QUESTION: Your brother takes exception.

MR. UPTON: They did.

QUESTION: You don't take exception.

MR. UPTON: I don't object to it because I think we are protected, and I think the Court can refer it back for hearing on this one point if it so decides.

MR. CHIEF JUSTICE BURGER: Mr. Bradley, you have about 9 minutes left, if you need it.

REBUTTAL ARGUMENT OF EDWARD F. BRADLEY, JR.

ON BEHALF OF DEFENDANT

MR. BRADLEY: Mr. Chief Justice, I would like to refer briefly to the questions that were raised with respect to whether a factual determination is required in determining whether these low-tide elevations the Special Master used qualified for the tests under the Geneva Convention.

The arguments that my brother Upton has made that this is not an island, a low-tide elevation within the meaning of island, part of the mainland. These kinds of questions have given rise to substantial evidentiary hearings in cases in Louisiana, an opportunity which the State of Maine nor the State of New Hampshire has had because of the way this came up to this Court.

This is a problem in another regard. The Special

Master, we believe, has seriously prejudiced a right of the State of Maine that exists outside the issues in this dispute. Thus the Master found it was essential to determine where the location of inland waters was, because he felt this Court in U.S. v. Maine had determined that there was no ownership in the intervening area between Gosport Harbor and Piscataqua. But we believe that this is inconsistent with the reservation of jurisdiction which this Court has exercised at 421 U.S. 958 in granting the motion of the United States Government to reserve its jurisdiction to determine questions just in this nature. The State of Maine has an historic inland water claim and other coastline claims which would give it sovereignty over the area between Piscataqua Harbor and Gosport Harbor, and we believe that we should have the opportunity to be permitted to apply the criteria that the Court has announced in dealing with similar claims in the States of Alaska, Florida, and Louisiana in just last term.

The Master's determination has precluded us from doing that, and we didn't even know he was doing it until the report came out. We didn't,in choosing thalweg, in choosing straight line portion of the boundary, think that we needed to determine the extent of inland waters, which is why the questions which the Master has focused so strongly on with respect to the location of inland water and geographic middle are almost irrelevant to the determinations that went into the

consent decree.

All we needed to do was to decide thalweg was appropriate in the river and in the harbor, and then determine whether the line ended. That didn't need any great application of legal principle, because it was a factual question. The channel gradually disappeared as it hit the open ocean. We didn't need to determine mouth of the river. And I submit we didn't. All we did was determine a reasonable place for the thalweg to end without having any requirement for determining inland waters.

We believe we have been prejudiced by the determination of the Master, and that if you are going to use a concept of inland waters, that we ought to have our opportunity in this Court. These boundaries are very serious things to the States. We are going to have to live with them for a long time. We believe we deserve the opportunity to have a full determination of our facts in evidence before the Court summarily accepts the report of the Special Master.

QUESTION: Let me see what that comes down to. If we were to agree on geographic middle --

MR. BRADLEY: Yes, your Honor.

QUESTION: -- you suggest that on this record that would be inappropriate without Maine having a further opportunity to have a determination of inland waters?

MR. BRADLEY: Your Honor, we have never had the

opportunity --

QUESTION: I know, but is that what you are arguing?

MR. BRADLEY: I am arguing that we should have opportunity for hearing on geographic middle,on inland waters, and also the rejection of thalweg.

QUESTION: What relevance does the determination of inland waters have on the determination of geographic middle?

MR. BRADLEY: The Master felt that he had determined the location of the geographic middle by a closing line across inland waters to determine the end point of the straight line terminus and the boundary --

QUESTION: What I am getting at, whereas you say you might be able to persuade him to the contrary as to the closing line which then would have an effect on the location of the geographic middle?

MR. BRADLEY: No, I am only saying that if you choose the principles that we adopted in our judgment for consent decree, it's unnecessary to determine the extent of inland waters. That can be left an open question for determination --

QUESTION: What if we disagree with you on that?

MR. BRADLEY: If you disagree with us?

QUESTION: On the principles on which you based the consent decree.

MR. BRADLEY: Then, if you do, your Honor, I believe that you should send it back to the Special Master for a

determination so we could have a full opportunity to develop them. We haven't had that opportunity to this point.

QUESTION: What is it you want to develop?

MR. BRADLEY: I suggest that we --

QUESTION: If we disagree with the principles on which the consent agreement --

MR. BRADLEY: I am suggesting, your Honor, that you don't have a proper development of the case at this point to determine whether you can disagree with us. I have suggested two things today that weren't even mentioned before the Special Master. You know, the question of whether a contemporaneous Charter in Rhode Island has any effect on the usage of thalweg. I suggested that the Master seriously overestimated the concept of "the half" when it was used in a petition for appeal.

I believe there are hundreds of other items --

QUESTION: Did you stipulate a record before the Special Master or didn't you?

MR. BRADLEY: Yes, we did, with respect to the --

QUESTION: And I suppose the purpose for stipulating it was to help him in determining whether he could accept or reject the consent decree.

MR. BRADLEY: Just the concept of thalweg, your Honor. It had nothing to do with the concept that he ultimately adopted. And we believe that if he is going to both not only

reject our consent decree, but adopt an entirely new principle, that we ought to have an opportunity to present our case with respect to whether that's appropriate or not.

QUESTION: You say that the only trial you had was basically a truncated one devoted to the authorization for the consent decree rather than a fight on the merits.

MR. BRADLEY: Yes, your Honor, we had no fight on the merits and no opportunity. And it's going to be hard enough to enforce the line that the Master has adopted. It is going to be extremely hard if the people of Maine feel they have not had the proper opportunity to present their position to the Court.

QUESTION: You don't think there is enough in the record for the Master to have not only rejected the consent decree and to have said, "I will not accept the thalweg as the principle for division," but to go on and say the proper principle is the middle of the river.

MR. BRADLEY: Yes, your Honor.

QUESTION: Do you mean you want to put on evidence or just want to argue?

MR. BRADLEY: No, sir, I want to go back through the documents, I want to go back through the usage. I want to have --

QUESTION: My brother Brennan tried to get from you what you wanted to present as of now.

MR. BRADLEY: As of right now, I don't have a full --

we haven't developed the case as entirely as it should have been to this point. We are really at a stage now where we are no more than at a preliminary trial stage, because of the way the case developed below you. You don't have a full development of any of the facts or issues in this case.

QUESTION: Mr. Bradley, let me understand. You are arguing that if you had a full opportunity, you might be able to persuade him that he should not adopt the geographic middle principle. Are you also arguing that if he does adopt the geographic middle principle, it might be placed elsewhere?

MR. BRADLEY: No, your Honor, I believe that if he does adopt the geographic middle, that the only --

QUESTION: He has got the right line.

MR. BRADLEY: That he has the right line.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, gentlemen. Thank you. The case is submitted.

(Whereupon, at 10:59 a.m., oral argument in the above-entitled matter was concluded.)