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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 35 Orig.

TITLE UNITED STATES, Plaintiff, v. MAINE, et al.

PLACE Washington, D. C.

DATE Monday, November 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Plaintiff, :
v. : No. 35 Orig.
MAINE, ET AL. :
- - - - -x

Washington, D.C.
Monday, November 26, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:00 o'clock a.m.

APPEARANCES:
LOUIS F. CLAIBORNE, ESQ., Deputy Solicitor General,
Department of Justice, Washington; on behalf of
the plaintiff.
JOHN G. PROUDFIT, ESQ., Assistant Attorney General
of New York, New York, New York; on behalf of
New York.
J. PETER DOHERTY, ESQ., Special Assistant Attorney
General of Rhode Island, Sharon Springs, New York;
on behalf of Rhode Island.

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1 question is that the result affects the extent of the
2 submerged lands belonging to Rhode Island and New York
3 as distinguished from the submerged lands of the United
4 States.

5 That arises because under a venerable doctrine
6 the states, each of them on the coast, own the beds and
7 banks of all inland navigable waters within their
8 boundaries, and by virtue of the Submerged Lands Act of
9 1953, they likewise own an additional three-mile belt
10 measured from the outer limit of those inland waters.

11 QUESTION: Does the case also relate to who
12 has jurisdiction over the water or who may regulate
13 traffic on the water, or fishing?

14 MR. CLAIBORNE: It does not, Justice White.
15 This case is entirely under the Submerged Lands Act, and
16 that Act simply governs the seabed and the resources
17 thereof, the right to extract minerals and the right to
18 take resources, but not fishing, within that zone.

19 QUESTION: But they are not -- but if Long
20 Island Sound is inland water, it is not international
21 waters then, either.

22 MR. CLAIBORNE: It would -- As I said, most of
23 Long Island Sound is at all events by common ground
24 inland waterway. That is so in the view of the United
25 States because it is historically --

1 QUESTION: Yes.

2 MR. CLAIBORNE: That is so in the view of the
3 two states opposite because --

4 QUESTION: Well, to the extent it isn't,
5 though, does it affect who has jurisdiction over the
6 navigable waters?

7 MR. CLAIBORNE: Whether it is inland or
8 whether it is territorial sea of the state it would seem
9 to me has little effect on its jurisdictional powers in
10 that area.

11 QUESTION: What if it is open sea, though?

12 MR. CLAIBORNE: If it is open sea, then the
13 state would have no claim to govern other than its own
14 citizens within that zone.

15 QUESTION: Well, there is some of that
16 involved here, I take it.

17 MR. CLAIBORNE: And there is in Block Island
18 Sound some of that involved, and indeed this dispute
19 originally arose because of Rhode Island's claim to
20 control pilots bringing both domestic and --

21 QUESTION: Right. So that is involved to that
22 extent.

23 MR. CLAIBORNE: It is involved to that extent,
24 though it isn't strictly speaking the bone of contention
25 here.

1 QUESTION: Mr. Claiborne, on that line of
2 questioning, your brief states that there are
3 international implications, but I don't think they were
4 identified in the brief. What are they, really?

5 MR. CLAIBORNE: Justice Powell, to the extent
6 that there are -- that this Court can declare, for
7 instance, that all of Block Island Sound is territorial
8 water and not high seas, the sea lanes between Block
9 Island and the Rhode Island mainland on the east and
10 between Block Island and Long Island on the west would
11 be open to -- would not be open sea, and would not be
12 freely navigated by the world community, but only
13 subject to right of innocent passage and otherwise by
14 permission of the coastal states.

15 And to that extent, to the extent that this
16 Court's decision is viewed because it is an
17 interpretation of international law, the international
18 convention, it would have international radiations.

19 QUESTION: Well, certainly the -- go ahead.

20 QUESTION: Would the position of the United
21 States bring international waters closer to the mainland
22 of the United States? It would to some extent in view
23 of your position with respect to Block Island Sound,
24 wouldn't it?

25 MR. CLAIBORNE: That is so, and that is

1 generally so. It is generally the position of the
2 United States to -- freedom of the high seas.

3 QUESTION: May I just follow up? What effect
4 would it have on fishing rights, on electronic
5 surveillance by other countries, and on mineral rights
6 internationally?

7 MR. CIAIECRNE: With respect to the latter
8 two, Justice Powell, I think I am correct in saying that
9 it would have no effect on the fishing rights or on the
10 right to exploit the subsoil of the sea, because in both
11 those respects the United States has declared for itself
12 ownership of a zone which goes either 200 miles out or
13 to the edge of the continental shelf, and therefore
14 these areas now in dispute would in no event be open to
15 international exploitation or to international fishery
16 except by permission or by treaty.

17 With respect to surveillance, I suppose that
18 that would be affected in that so long as these are high
19 seas, any vessel can come in those waters provided it is
20 not for fishing and provided it is not for the purposes
21 of exploiting the seabed.

22 QUESTION: To what extent does that work both
23 ways? In other words, I suppose you are concerned --
24 the government is concerned about a precedent that would
25 involve similar situations in other parts of the world.

1 MR. CLAIBORNE: Justice Stevens, you have hit
2 upon the reason why it has traditionally been the policy
3 of the United States as a matter of international
4 relations to confine the high seas close to shore,
5 relatively close to shore, because of the interest of
6 the United States in avoiding or wanting to avoid
7 setting a precedent which other nations can immitate and
8 thereby close off the areas near their buoys to
9 international navigation and as well to our surveillance
10 of their activities. It is as Your Honor --

11 QUESTION: The government surely isn't
12 concerned about any navigation problems as between it
13 and the states, is it, because certainly the federal
14 government can regulate to its heart's content in that
15 area.

16 MR. CLAIBORNE: I think that is -- Justice
17 Rehnquist.

18 As I have indicated in answer to a question
19 from Justice White, it is common ground in this case
20 that if Long Island is not an extension of the mainland,
21 then the inland waters behind Long Island are restricted
22 to what are known as -- what is known as Long Island
23 Sound proper.

24 If I can refer the Court to our exceptions, at
25 the back there are three charts. The first one would

1 indicate sufficiently what I mean by Long Island Sound
2 proper.

3 On Chart 1, the Court will notice that Long
4 Island Sound, the eastern portion of it is indicated,
5 and that it is closed off by a line from Orient Point on
6 the north of the east end of Long Island to Fishers
7 Island and Napatree Point.

8 The area west of that is Long Island Sound
9 proper, and it is common ground that that area is inland
10 water not because it satisfies the test as an -- but
11 because it has and always has been historic inland
12 waters of the United States, and that claim by the
13 United States inures to the benefit of the neighboring
14 states, for the most part New York in this case.

15 What is in dispute is the area indicated in
16 Block Island Sound to the east. If Long Island is not
17 an extension of the mainland, no part of Block Island
18 Sound qualifies as part of the bay or as otherwise
19 inland water. There is no claim in this case at this
20 stage that those waters are historic inland waters.

21 QUESTION: Mr. Claiborne, what is it about
22 Block Island Sound that the United States does not make
23 it an historic bay, whereas Long Island Sound is in your
24 view?

25 MR. CLAIBORNE: Justice O'Connor, it appears

1 that at the time when the claim to Block Island Sound
2 matured as a historic claim, the general rule, although
3 it was not properly speaking a rule, but the tendency
4 was to treat waters which were closable by a line
5 something approaching ten miles only would fit that
6 description, and that line at the north between Orient
7 Point and Fisher Island and Napatree Point is a total of
8 less than ten miles, while a line from Montauk Point to
9 Washkill or much less a line which would include Block
10 Island would exceed ten miles, and indeed in one case
11 come to 24, or nearly, 24 miles.

12 Accordingly, those waters were not
13 historically viewed as sufficiently enclosed to justify
14 a claim of historic inland water, and as a matter of
15 fact, the evidence of 70 piers does not justify such a
16 claim on Block Island Sound, and the two states in whose
17 interest it would have been to extend the historic claim
18 that far having not sought to do so, presumably for good
19 reason.

20 Now, just to identify the position of the
21 parties further, as the Court sees on this Chart 1 is
22 the position of the United States, that is, Long Island
23 not being an extension of the mainland, there is no
24 juridical bay.

25 There is only the historic inland waters of

1 Long Island Sound and some subsidiary bay such as
2 Gardners Bay which qualify under the convention, and
3 accordingly the line which borders, which is the
4 boundary of inland waters includes no part of Block
5 Island Sound.

6 The only portion of Block Island Sound which
7 we have between the two states are those portions which
8 constitute the three-mile belt which by virtue of the
9 Submerged Lands Act was granted to them in 1953.

10 The special master in this case, having
11 concluded to reach a middle solution, as is perhaps all
12 too often the case, drew a line which -- first he
13 concluded that Long Island was an extension of the
14 mainland, and then he closed the bay formed by that
15 island.

16 This is illustrated in the third of our
17 charts. He drew a line between Montauk Point almost
18 directly north to Washkill Point, and that line enclosed
19 some portion of Block Island Sound.

20 We agree with the master that if Long Island
21 is an extension of the mainland, which we -- that is the
22 correct closing point.

23 Finally, the position of the two states is
24 illustrated in Chart 2. They would first maintain that
25 Long Island is indeed an extension of the mainland, but

1 they would then close the bay which they say is formed
2 thereby by drawing a line not north but east to Block
3 Island, and then a northerly line from Block Island to
4 Point Judith.

5 QUESTION: Mr. Claiborne, what is the standard
6 of review that this Court traditionally uses in
7 reviewing the findings of fact of a special master?

8 MR. CLAIBORNE: If Your Honor please, the most
9 recent statement by the Court itself with respect to
10 that matter arises in Colorado versus New Mexico, Number
11 80 Original, decided June 4th of this year. In that
12 case, the Court indicated that the master's findings
13 "reserved respect and a tacit -- I am reading from Page
14 6 of the slip opinion -- and a tacit presumption of
15 correctness," but the ultimate responsibility for
16 deciding what are correct findings of fact remains with
17 us.

18 The Court then cites one of its previous
19 decisions in Mississippi versus Arkansas at 415 of the
20 United States Reports, and concludes, "Upon our
21 independent review of the record, we find that Colorado
22 has failed to meet its burden."

23 I read those words of the Court as indicating
24 that this Court has concluded that it ought not review a
25 master's findings as though they were the findings of a

1 district judge sitting as a District Court, but except
2 for matters of credibility where his appraisal of the
3 witnesses must obviously be given more weight than what
4 can be determined on the cold record, this Court has an
5 obligation to review the evidence to the extent that it
6 is challenged.

7 Here, we say that the Court need go no further
8 than the master's report, because we accept every
9 finding in that report, and so far as I am aware, there
10 is no challenge to any finding of fact in that report by
11 counsel opposite.

12 Accordingly, there is very little occasion in
13 this particular case for the Court to do more than look
14 at the evidence as summarized by the master.

15 Now, the question whether Long Island is an
16 extension of the mainland, which is the dispositive
17 question in this case, is one that has tended only
18 recently to arise and to arise -- It is a troubling
19 development that every island somewhere near the shore
20 is now thought of -- for being treated as not an island
21 but a peninsula.

22 If that tendency were to continue unabated,
23 the number of challenges, hence the original docket of
24 this Court would be severely burdened. Now, our brief
25 traces the history of this notion that an island can

1 sometimes be viewed not as an island jurisdictionally
2 but as an extension of the mainland mass.

3 It was intended as a very narrow exception to
4 the rule of geography. It was originally applied only
5 in the Louisiana delta and the Mississippi delta in
6 Louisiana, where the land mass is so criss-crossed by
7 canals, it looks like a jigsaw puzzle, somewhat
8 separated, and the Court concluded, almost unavoidably,
9 that if one were to take each of the waterways and treat
10 it as separating the mass into islands, Louisiana would
11 wash into the sea.

12 Accordingly, in that special circumstance, it
13 was deemed appropriate, and this was in a case called
14 Louisiana versus Mississippi in 1905, in which this
15 Court said, "To be sure, these are technical islands,"
16 speaking of the St. Bernard peninsula, "but we must view
17 it as part of the land mass."

18 The only other way in which the Court has
19 thought it proper to treat islands as part of the land,
20 part of the land mass, is when usually a small mud lump
21 or other alluvial formation was appended to the mainland
22 in the sense that it looked like it had dropped off,
23 like a teardrop, and there was a narrow channel
24 separating it from the mainland.

25 QUESTION: Mr. Claiborne, may I ask you this

1 question? Does trans-Atlantic shipping use Long Island
2 Sound?

3 MR. CLAIBORNE: The indications in the record,
4 Justice Powell, are that little trans-Atlantic shipping,
5 mostly coastal shipping, but a very heavy volume of
6 coastal shipping.

7 QUESTION: I know coastal shipping does.

8 MR. CLAIBORNE: And very much navigated. The
9 total volume I have forgotten, but the volume is quite
10 substantial, and the channel is some 35 feet deep.

11 QUESTION: Thirty-five feet? That could
12 accommodate trans-Atlantic shipping.

13 MR. CLAIBORNE: It could indeed. It so
14 happens that the Port of New York is mostly to the west
15 rather than on the East River, and therefore the traffic
16 doesn't go through the East River, and there is no
17 substantial international port within Long Island
18 Sound.

19 QUESTION: Mr. Claiborne, may I ask, in your
20 discussion of the islands that you were involved in,
21 what is the government's position with respect to
22 Manhattan Island?

23 MR. CLAIBORNE: Justice Stevens, we don't have
24 to resolve that question here, because as it happens,
25 whichever way one treats Manhattan, the result is the

1 same.

2 The record in this case does indicate that the
3 geographer of the state -- when asked that question in
4 depositions -- he died before the trial and therefore his
5 deposition was introduced in evidence -- his answer was
6 that Manhattan and indeed Staten Island as well were
7 treated by the committee, the baseline committee which
8 drew the coastline of the United States, as water, as
9 islands and therefore as water because under the rule of
10 Article 7 an island wholly within an indentation is
11 treated as water, but that is only true with respect to
12 an island, and not with respect to some portion of the
13 land mass.

14 It is obviously a closer question whether
15 Staten Island and Manhattan Island are islands for all
16 purposes. The case of Long Island is much clearer,
17 because there the separation is some seven-tenths of a
18 mile. We have a channel which is a -- channel, not a
19 river, and we have a channel 35 feet deep, and we have
20 it very actively navigated.

21 When one compares it to an instance which the
22 Court rejected in the Louisiana context, the Eau de Nea
23 and what was claimed to be Calieu Bay, there we have a
24 channel that was only a third, not even a third of a
25 mile wide, only some 14 feet deep, and carrying a far

1 lesser volume of seagoing traffic.

2 QUESTION: Mr. Claiborne, what about coastal
3 shipping coming from Boston to the Port of New York. I
4 suppose it would actually be a little bit shorter if it
5 went through Long Island Sound. Does the record show
6 anything about whether coastal shipping coming from east
7 of Block Island goes through the sound on its way to New
8 York or whether it goes south of Long Island?

9 MR. CLAIBORNE: I think, Justice Rehnquist,
10 the record indicates that it does not go through the
11 sound, that most of that traffic goes -- now, why that
12 should be so, because I think Your Honor is correct that
13 the distance is marginally shorter --

14 QUESTION: Well, other than perhaps it was
15 just thought not to be a very suitable place to
16 navigate.

17 MR. CLAIBORNE: And there may be some sense of
18 congestion even in the --

19 QUESTION: Mr. Claiborne, you just a moment
20 ago said that passageway of seven-tenths of a mile was
21 heavily navigated. By what?

22 MR. CLAIBORNE: By commercial vessels.

23 QUESTION: From where? Not coastal vessels,
24 or --

25 MR. CLAIBORNE: They are coastal vessels, but

1 I am only suggesting that they may not be coming from
2 Boston. They may be bringing goods to and from ports
3 within the sound itself.

4 QUESTION: Sure, and so it is heavily
5 navigated by coastal vessels.

6 MR. CLAIBORNE: It is heavily navigated by
7 commercial coastal vessels, no question about it.

8 QUESTION: Which have a destination at a port
9 somewhere on the sound.

10 MR. CLAIBORNE: Yes, and the master's report
11 is quite clear as to the exact volume of that traffic.

12 QUESTION: But the passageway is navigated by
13 vessels going from New York Harbor to destinations on
14 the sound, or from sound origins into New York?

15 MR. CLAIBORNE: I think in both directions.

16 QUESTION: Yes.

17 MR. CLAIBORNE: Let me say that the master
18 seemed to have recognized that he was straining the
19 rules in treating Long Island, or would be, in treating
20 Long Island --

21 QUESTION: Mr. Claiborne, how many harbors do
22 you have in the sound?

23 MR. CLAIBORNE: Your Honor, I should know
24 that, but don't. I take it there are Connecticut
25 harbors there as well as some in Rhode Island.

1 QUESTION: And Long Island.

2 MR. CLAIBORNE: And Long Island itself.

3 QUESTION: There is a harbor on Long Island?

4 MR. CLAIBORNE: I frankly don't know, as I
5 should know, what harbors there are there, but the
6 volume of traffic indicates that there must be some
7 place to disembark the cargo and to bring it on board.

8 As I said, the master seemed to have
9 recognized the difficulty, especially in light of this
10 Court's actual rulings and the language in the Louisiana
11 case in treating Long Island which very severely
12 deflects the coast if it is treated as an extension of
13 the mainland, as an extension -- an island.

14 So what he did was to say to himself, what,
15 when I look at what Long Island does, it is clear to me
16 that what is behind Long Island looks like a bay, and
17 therefore, since it seems to form a bay, and the only
18 way it can be so legally, I will treat it as an
19 extension of the mainland, totally backward reasoning,
20 result-oriented reasoning.

21 He said this area, Long Island Sound, is used
22 as a bay. It looks like a bay. Therefore it must be a
23 bay, yet it cannot be a bay unless Long Island is an
24 extension of the mainland, therefore I will treat Long
25 Island as an extension of the mainland even though it

1 may not qualify otherwise.

2 Now, that is our bone of contention with the
3 master's report, and if that sort of principle, that
4 sort of loose principle were to be encouraged, we would
5 have many more such cases. There are many other states
6 waiting in the wings to see whether this novel effort
7 prevails.

8 I will save what time I have.

9 CHIEF JUSTICE BURGER: Mr. Proudfit.

10 ORAL ARGUMENT OF JOHN G. PROUDFIT, ESQ.,

11 ON BEHALF OF NEW YORK

12 MR. PROUDFIT: Mr. Chief Justice, and may it
13 please the Court, I will respond to the government's
14 arguments with respect to whether or not there is a bay
15 as found by the master, and Mr. Doherty will address the
16 proper closing lines for that.

17 The master found a juridical bay as he
18 inevitably had to do on the basis of the facts and the
19 law. There were four basic reasons why he found the
20 juridical bay. First of all, the area is geographically
21 a bay. Secondly, it meets all the requirements of
22 Article 7 of the Convention on the Territorial Sea and
23 Contiguous Zone.

24 Thirdly, it satisfies the use and purpose
25 concept in international law, that concept which permits

1 a bay to be closed. And fourthly, Long Island meets the
2 requirements as set forth by this Court in the Louisiana
3 boundary case of being realistically considered as part
4 of the mainland.

5 QUESTION: Of course, if you are wrong on the
6 last, your first three reasons evaporate, I take it.

7 MR. PROUDFIT: Your Honor, that is correct.
8 As far as this Court goes, that is absolutely correct.

9 First of all, geography. The government would
10 have you focus on the fact that Long Island is an
11 island. It is surrounded by water. The states have
12 never disputed that. But the reality is that that
13 island forms a bay, forms a very large bay, encloses
14 those waters. It is a unique island. It is a unique
15 bay.

16 The government referred to the charts in the
17 back of their brief. You will notice that those charts
18 only show you the Block Island Sound area. Now, I
19 submit that from their point of view, that is what they
20 would like to have you see.

21 From our point of view, and from reality, we
22 would like you first of all geographically to look at
23 Long Island in toto and Long Island Sound. In the back
24 of the master's report, at Appendix B, there is a chart
25 which shows you that area.

1 I suggest it is difficult to follow, so we
2 have provided you with an additional map, a satellite
3 map that you have before you, and that map, if you care
4 to pursue it at some point, will give you a better idea
5 because of the contrast in the color --

6 QUESTION: Is this the one, Mr. Proudfit?

7 MR. PROUDFIT: That's correct, Your Honor.

8 What I would suggest the first thing that you
9 see geographically that Long Island fits into the
10 mainland and in fact geographically is closer to the
11 mainland than the government would suggest. It is
12 separated from the mainland by a body of water referred
13 to as the East River.

14 And because it is separated by that body of
15 water, the government says it is -- may not be
16 considered as closely related to the mainland. Now,
17 this Port of Louisiana case suggested factors which
18 should be considered in determining whether an island is
19 realistically part of the mainland.

20 The first of these factors is size. Long
21 Island is a very large island. It is over 100 miles
22 long. It has 450 miles of shoreline. It contains four
23 counties of the State of New York. It contains two
24 boroughs of the State of New York. Over half the city
25 population is on that island.

1 QUESTION: When you say four counties, are you
2 including among those the two boroughs?

3 MR. PROUDFIT: That's correct.

4 QUESTION: So it is two boroughs and Nassau
5 and Suffolk County?

6 MR. PROUDFIT: Yes, that is correct.

7 Now, the only -- I think the relevant thing
8 about size in relationship to the water that is
9 enclosed, it is in relationship to the projection from
10 the mainland, and I might also say that size is another
11 consideration when the government talks about islands
12 and mud lumps in the Mississippi -- in the delta area
13 and in the Gulf.

14 I would say to you that in my opinion, there
15 is absolutely no comparison. The master looked at
16 charts of that area. He looked at charts of islands in
17 Alaska, and there was no comparison.

18 The next factor which this Court said should
19 be considered is distance from the mainland. Now, the
20 East River separates Long Island from the mainland --

21 QUESTION: What are you talking about when you
22 refer to the mainland?

23 MR. PROUDFIT: Your Honor --

24 QUESTION: Manhattan?

25 MR. PROUDFIT: I am talking about Manhattan,

1 and I am also talking about the Bronx. The Bronx, I
2 don't think there would be any dispute about that being
3 the mainland.

4 QUESTION: Well, when the government says that
5 the East River is seven-tenths of a mile wide, where is
6 it measuring the East River?

7 MR. PROUDFIT: That, Your Honor, is measured
8 from Frog's Neck to Willet's Point, and that is not the
9 narrowest point. If you went straight across --

10 QUESTION: Frog's Neck to -- that is just the
11 north end of Flushing?

12 MR. PROUDFIT: That's correct. Your Honor --

13 QUESTION: I've got it. That is the
14 two-thirds of a mile.

15 MR. PROUDFIT: Yes.

16 QUESTION: Seven-tenths of a mile. How wide
17 is it down at Manhattan?

18 MR. PROUDFIT: Well, it gets down to about
19 three-tenths of a mile.

20 QUESTION: On either side of -- what's the
21 island there in --

22 MR. PROUDFIT: That would be --

23 QUESTION: Rikers Island?

24 MR. PROUDFIT: It slips my --

25 QUESTION: On your map the very narrowest

1 point is the water on either side of an island.

2 MR. PROUDFIT: Well, it gets -- I think that
3 is referred to as Roosevelt Island.

4 QUESTION: And how wide is the water passage
5 there?

6 MR. PROUDFIT: Well, it would be less than
7 three-tenths of a mile, Your Honor, but I think it gets
8 even narrower farther down.

9 QUESTION: Under the convention, do you have
10 to treat islands like that as water, however?

11 MR. PROUDFIT: Your Honor --

12 QUESTION: I mean, you are not just -- isn't
13 that what the Convention instructs us to do?

14 MR. PROUDFIT: Justice O'Connor, it says to
15 you, treat islands as water in the terms of the
16 measurement of water area for complying with the
17 semicircle test. Mr. Claiborne suggested that the
18 geographer of the United States, Dr. Hodgson, treated
19 that as water.

20 In fact, Exhibit 78 to the deposition -- I am
21 sorry. It is Exhibit 73. U.S. 73 is the deposition of
22 Dr. Hodgson. On Page 78 he says that Manhattan would be
23 considered a part of the mainland, and obviously you can
24 see the connection there, the river between the two --

25 QUESTION: But not Roosevelt Island?

1 MR. PROUDFIT: Not Roosevelt Island. No, Your
2 Honor.

3 QUESTION: If Long Island is a part of the
4 mainland, is Roosevelt Island?

5 MR. PROUDFIT: Your Honor, Roosevelt Island is
6 an island. We don't consider that --

7 QUESTION: No matter what you do about Long
8 Island, it is an island?

9 MR. PROUDFIT: There is not a bridge running
10 over there.

11 QUESTION: It doesn't make any difference
12 anyway?

13 MR. PROUDFIT: It doesn't make any difference
14 at all, Your Honor.

15 QUESTION: Yes.

16 MR. PROUDFIT: The next factor is the depth
17 and utility of the intervening waters.

18 QUESTION: Are you sure there is no bridge to
19 Roosevelt Island?

20 MR. PROUDFIT: Your Honor, you caught me out.
21 The Queensboro Bridge goes across Roosevelt Island. You
22 are exactly right.

23 QUESTION: I was just getting ready to blow my
24 brains out.

25 (General laughter.)

1 MR. PROUDFIT: You are exactly right, and in
2 fact there is a tram car that runs from Manhattan, but
3 you are exactly right. I didn't think of that, but you
4 are exactly right.

5 The depth and utility of the intervening
6 waters, the waters of the East River are internal
7 waters. Now, basically the East River is a strait
8 running between two bays. It runs between New York
9 Harbor and it runs between the waters of Long Island
10 Sound. That opening into the East River at the end of
11 Long Island Sound is dwarfed by the size of the water
12 body. It is dwarfed by the size of the island.

13 The depth, as Mr. Claiborne suggested to you,
14 is 34 feet, and that depth has been increased by a major
15 project of the Corps of Engineers back in the 1980's.
16 Shape is another factor. It is a long projection from
17 the mainland enclosing a large body of water.

18 QUESTION: Is that East River body of water
19 substantially greater than that of other channels which
20 this Court has previously ignored for purposes of
21 determining a headland?

22 MR. PROUDFIT: Your Honor, I think it probably
23 is. It certainly is deeper, but I would suggest to Your
24 Honor that that --

25 QUESTION: Greater navigability and deeper

1 than any that we have previously --

2 MR. PROUDFIT: That is correct, Your Honor,
3 and I would suggest that that is relative here to the
4 size of the island and to the size of the water bodies.
5 There are also here, of course, physical connections to
6 the mainland. There are the --

7 QUESTION: Do you really think that we should
8 follow a principle that says because you build a bridge
9 you ought to be able to annex an island? Doesn't that
10 have international ramifications that we might not like
11 as a nation?

12 MR. PROUDFIT: Your Honor, I --

13 QUESTION: Under -- in interpreting the Geneva
14 Convention?

15 MR. PROUDFIT: Justice O'Connor, I would
16 suggest that that is one factor that this Court
17 considered. These are major physical connections.

18 QUESTION: Well, isn't that kind of a risky
19 factor on which to determine this question?

20 MR. PROUDFIT: Your Honor, that is one
21 additional factor that I would suggest, and I certainly
22 wouldn't hinge the relationship on that as the only
23 factor.

24 QUESTION: You think you can win even without
25 that factor.

1 MR. PROUDFIT: That's correct, Your Honor. I
2 say that we can win because of the close relationship
3 between Long Island and the mainland that is
4 geographically there, that is there by common sense, and
5 is there because of the other factors which this Court
6 -- which I have enumerated, and because the East River
7 in separating Long Island from the mainland is --
8 according to the government, the only reason that Long
9 Island Sound can't be a bay is because that is not a
10 river.

11 None of those factors would change if in fact
12 that was a river, so that is their distinction, and what
13 I say is, it is not a river, but it is an estuary, it is
14 a very complex estuary, which their own witness, Dr.
15 Swanson, testified to, and the Hudson River is an
16 estuary.

17 The Convention would consider obviously
18 estuaries in terms of bays, because we are talking about
19 areas that are on the ocean, but let me just --

20 QUESTION: Could I -- don't you think the fact
21 that the government agrees, the special master found and
22 the government agrees that this is a historic bay,
23 doesn't that support your argument that Long Island is
24 part of the mainland?

25 MR. PROUDFIT: Your Honor, if you consider

1 those are internal waters, this is why I would say they
2 have -- on occasion people have said that they recognize
3 it as a historic bay. They only recognize it as
4 historic waters. If in fact they recognize it as a
5 historic bay, then they would have to go the other mile
6 and say it was a juridical bay.

7 But I think this Court has said the best and
8 most workable definition of a bay is the Convention, and
9 the Convention, all the requirements of the Convention
10 were found by the master to apply to this area.

11 Also, the whole concept in international law
12 which permits a bay to be closed is the fact that it is
13 an area that is surrounded by land, it is closely
14 related to that land, and the reason it can be closed
15 off is because by closing it off you are not interfering
16 with through international traffic going between two
17 foreign states.

18 And the master found that that was the
19 situation here, that there was no through foreign
20 commerce passing through this area.

21 For all the reasons I have suggested plus
22 common sense, Long Island forms a bay. The master said
23 if there was ever a situation where a large island would
24 be considered a part of the mainland, so the waters
25 enclosed between the island and the coast can be a

1 juridicial bay, this is it.

2 Mr. Chief Justice, if I may.

3 CHIEF JUSTICE BURGER: Mr. Doherty.

4 ORAL ARGUMENT OF J. PETER DOHERTY, ESQ.,

5 ON BEHALF OF RHODE ISLAND

6 MR. DOHERTY: Mr. Chief Justice, and may it
7 please the Court, this is not a case of Rhode Island
8 imperialism. We are certainly happy to be the smallest
9 state, and we are happy to remain as such. However, we
10 do not wish to have an Argo Merchant accident on our
11 shores.

12 And because the Congress at the very beginning
13 of this Republic in the law now codified as 46 U.S.
14 Code, Section 211, saw fit to delegate to the various
15 states the responsibility or the obligation if they so
16 chose to regulate pilotage in their waters and in the
17 bays, inlets, and harbors of the United States then they
18 could so do.

19 And Rhode Island has chosen to do that, and
20 that is the genesis of this litigation we have here
21 today. A question earlier from the bench certainly made
22 reference to Ball versus Dunlap, which is pending on
23 certiorari before this Court in Docket Number 75-6990.

24 And should we lose this case, should Block
25 Island Sound and Long Island Sound not be found by this

1 Court to be a juridical bay, Rhode Island would no
2 longer be able to regulate pilotage of foreign flag
3 vessels and American vessels under foreign registry in
4 Block Island Sound.

5 This is not a small item. Supertankers
6 navigate through Block Island Sound and into Long Island
7 Sound, passing between the Rhode Island coast and Block
8 Island. They go to Port Jefferson, where there is a
9 major offload facility. Other smaller tankers, because
10 of the draft in the East River, go down and dock and
11 unload in the East River in the vicinity of LaGuardia
12 Airport and those facilities there.

13 So, we are talking about a very serious issue
14 to Rhode Island. Further --

15 QUESTION: You say they go through Block
16 Island Sound --

17 MR. DOHERTY: That's correct.

18 QUESTION: -- and then go down -- come up
19 through the narrows?

20 MR. DOHERTY: No, they go through Block Island
21 Sound, Justice Rehnquist. They then go through the
22 race, which is between Fishers Island --

23 QUESTION: Okay.

24 MR. DOHERTY: -- and a number of small
25 islands, Little Gull Island and Great Gull Island, and

1 then they go down into Port Jefferson, which is on Long
2 Island, which is on the north coast of Long Island,
3 about midway down.

4 QUESTION: And that is their point of
5 destination?

6 MR. DOHERTY: That is their point of
7 destination. They also go to New Haven Harbor. There
8 are also major oil facilities there. The smaller
9 tankers go to Shelter Harbor.

10 QUESTION: How about New London?

11 MR. DOHERTY: There are smaller facilities in
12 New London, not as large as in New Haven, Justice
13 White.

14 QUESTION: This is traffic from -- foreign
15 traffic headed for ports on the sound then.

16 MR. DOHERTY: On the sound.

17 QUESTION: And it goes through Block Island
18 Sound.

19 MR. DOHERTY: There is -- Captain Neery was a
20 Rhode Island witness, and there was testimony also from
21 the United States, Dr. Swanson, I believe, which spoke
22 of vessel movements. The predominant vessels that enter
23 Block Island Sound, they go to ports on Long Island
24 Sound and they go only as far as the East River.

25 They don't navigate through the East River and

1 then go up the Hudson to dock and unload. They go to
2 New Jersey ports, Bayonne and the like. Those vessels
3 come into lower New York Bay. So that we are not
4 talking about through traffic that is going up the
5 Hudson River. They go outside.

6 So that the international usage of these
7 waters is just not there. It is not there in the
8 record, and I don't think the international implications
9 which you referred to, Justice Powell, are there in the
10 record.

11 This scepter that is raised in this sort of
12 litigation, the impact of fisheries, the impact of
13 coastal zone management is just not there in this case.

14 Turning to Block Island Sound, and accepting
15 for the moment New York's argument and Rhode Island's
16 argument that Long Island is an extension of the
17 mainland, the question becomes, how do you close that
18 area of water known as Block Island Sound, and I would
19 refer the Court to the master's report, which should be
20 in Appendix C, which contains a chart of the area and
21 the master's outlines of various alternatives presented
22 to him.

23 As I did in my brief, I would say that the
24 solicitor has characterized the master's report as one
25 of seeking middle ground. Rhode Island would so

1 characterize it. We think he didn't go far enough. He
2 took a compromise, because the line he chose to draw,
3 the line to Watch Hill Point is not a proper one under
4 Article 7.

5 Article 7, Subsection 5 and 4 contemplate that
6 under Article 7 that the nation should close the largest
7 amount of water possible under those rules, and the line
8 to Watch Hill Point is certainly a probable line, and it
9 is less than 24 miles, and the area behind it is greater
10 than a semicircle of its length.

11 But Weekapaug Point, which is slightly to the
12 east, also satisfies that test.

13 QUESTION: Which one would you draw?

14 MR. DOHERTY: We draw the line from Montauk
15 Point to Point Judith. We point out that the Weekapaug
16 Point line is a correct one if you choose not to draw a
17 line to Block Island.

18 QUESTION: But wouldn't that line be longer
19 than 24 miles?

20 MR. DOHERTY: Not the line to Weekapaug
21 Point. No, Justice O'Connor.

22 QUESTION: No, but the line from Montauk to
23 Point Judith?

24 MR. DOHERTY: The line itself from Montauk
25 Point to Point Judith would be slightly in excess of 24

1 miles.

2 QUESTION: And that would violate the
3 Convention.

4 MR. DOHERTY: That would violate the
5 Convention, Justice C'Connor, but if you look at the
6 Court's language in U.S. versus Louisiana, the fact that
7 a line between two headlands does not constitute a bay
8 does not -- would be longer than 24 miles does not mean
9 that you eliminate considering the impact of islands in
10 the vicinity of the mouth of that area.

11 And we suggest that if one was looking at the
12 geography of the area, you have to pick out various
13 geographic points, and you cannot look at this area and
14 not say Block Island is there. We have got to consider
15 how does this impact on the area? And if you draw a
16 line from Montauk to Southwest Point and Block Island,
17 from Sandy Point to Point Judith, that is less than 24
18 miles. It seems to me then you have to look at the idea
19 of, well, it is seaward of that line between Point
20 Judith and Montauk Point --

21 QUESTION: Well, the state's line drawing
22 seems a little weird to me, frankly. I wouldn't know
23 why you wouldn't just make a perpendicular line there,
24 assuming it is -- that we treat Long Island as an
25 island. I am not sure we will by any chance, but if you

1 did, I would think you would just draw your line
2 straight up.

3 MR. DOHERTY: Straight north.

4 QUESTION: Sure.

5 MR. DOHERTY: Well, your guess is in good
6 company. The master thought that as well, Your Honor.
7 But that seems to come from the mindset that one gets
8 that somehow a bay has to be symmetrical, that it has to
9 be that perfect crescent, that arc, and not so.

10 The Convention itself, when they decided to
11 extend the maximum line to 24 miles, really went beyond
12 anything that had previously been thought to be a bay.
13 If you look at some of the treatises which the master
14 relied upon, cited in Rhode Island's brief, the idea
15 that a bay could have a mouth of 24 miles just -- people
16 would shake their heads at back in the revolutionary
17 times and the like.

18 Similarly, I don't think that the idea that a
19 bay has to be a crescent, or has to be symmetrical, like
20 Chesapeake Bay -- that is thrown out when the Convention
21 comes in. You are looking at a fairly objective test
22 which, although some of the words lack definition, you
23 are looking at an objective test, and if you meet the
24 objectivity of the test, then it is a juridical bay,
25 because they didn't want one nation drawing it

1 differently from another.

2 QUESTION: Well, is your theory making Block
3 Island part of the line for a -- that the bay which is
4 formed by the Long Island headland in the south and the
5 Rhode Island-Connecticut coast on the north has two
6 mouths?

7 MR. DOHERTY: There are two entrances, two
8 mouths. Yes, Your Honor. There would be two mouths.
9 Importantly to our argument, however, and the evidence
10 demonstrates, the mouth between Montauk Point and Block
11 Island is not utilized by commerce because of the
12 dangers in the area, the swells in the area, the
13 obstructions in the area, wrecks, ledges, and the like.
14 Currents are tricky in the area.

15 So that all traffic, Your Honor, all
16 commercial traffic entering this body of water enters
17 between Sandy Point and the Rhode Island coast. The
18 master makes that finding. The testimony -- there is no
19 contrary testimony. All commercial traffic. Indeed,
20 commercial traffic coming from Newport, which is a major
21 naval facility, and passing to the south always passes
22 outboard of Block Island.

23 QUESTION: Eastward of Block Island?

24 MR. DOHERTY: Eastward of Block Island. They
25 never -- the straight line distance is shorter if you

1 went -- you know, you could go between the islands if
2 you were going in a straight line. They always pass
3 outboard. It is treated as if the waters behind Block
4 Island and Long Island and the Rhode Island mainland are
5 internal waters by all traffic of that nature. They do
6 not pass between.

7 They always leave Block Island to port on
8 entering and leave it to starboard on leaving. It is
9 coastal traffic. If they are going south of New York,
10 they leave Block Island to the inland, to starboard. If
11 they are going to Boston or Cape Code, they leave it to
12 port.

13 So therefore traffic treats it this way. It
14 is indeed an estuary, too. The estuarine complex which
15 comes from the Connecticut River, the Hoositanic River,
16 the East River itself, and all of the watershed -- the
17 Thames River, the whole watershed of New England comes
18 out, it flushes out between the race and then out at
19 Montauk and Block Island.

20 The salinity of the water is substantially
21 different when you pass seaward of Block Island. Block
22 Island offers protection to navigators, both in small
23 boats, pleasure boats, and to tankers. There is
24 testimony to show that tankers hub to in stormy weather,
25 from the southeast particularly, in the lee of Block

1 Island.

2 Further, if you look at -- to go back to your
3 question, Justice O'Connor, the protection, the idea of
4 protection has to do with the troubling concept of
5 landlocked nature of a bay, and because the water goes
6 east-west, I suggest if you turned your chart so it went
7 -- the bay was a north-south bay instead of an east-west
8 bay, the notion that it is a juridical bay becomes much
9 more clear, because somehow our minds go north-south. I
10 don't particularly know why.

11 The protection of the Rhode Island mainland --
12 the mainland of Rhode Island protects those waters from
13 northwest winds from a northerly direction, from
14 northeasters, harsh northeasters in that area.

15 So that the notion that the master found that
16 you could not use Point Judith and could not use Block
17 Island because parts of the bay that would be enclosed
18 thereby would be not landlocked are defeated by -- if
19 you start looking at it as a north-south fjord, if you
20 might call it so.

21 Similarly, we don't ask the Court, and it
22 upsets us greatly -- we talked about standard of review
23 earlier. The master summarily rejected an argument
24 offered by -- not an argument, testimony of an objective
25 test offered by Mr. White, one of our expert witnesses,

1 from England.

2 He came up with an objective test to determine
3 whether or not an area with an island in the mouth of
4 something that you might be considering to be a bay was
5 landlocked, and if you look at his testimony, and they
6 occur at Pages 164 and 166, and particularly Rhode
7 Island Exhibits 1C through F, his test, and it comes
8 from the basic concept that a semicircle is 180 degrees,
9 an arc, and his concept is that if land, if you enter a
10 bay, you see land around 180 degrees of the horizon at
11 least.

12 And he applies that to Block Island in its
13 actual position and then to its seaward position. He
14 moves it to a notional position slightly two miles
15 seaward, and at that position it flunks the test. It
16 does not satisfy this objective 180-degree test.

17 We submit that because of the size of Block
18 Island, its orientation to the coast and to Long Island,
19 and because of its proximity to the line between Point
20 Judith and Block Island, that any sensible person
21 initially looking at it in a north-south fashion would
22 see that Block Island has a very integral part to --
23 plays a very integral part to the Long Island
24 Sound-Block Island Sound system, and therefore has to be
25 considered to be landlocked waters and has to be -- we

1 are not in shallow water here, either.

2 Mr. Shalawitz, in his treatise, which has been
3 cited by this Court in a number of earlier cases, posits
4 situations where lines should be drawn to seaward
5 islands, islands seaward of natural entrance points, and
6 although he posits something the courts would like, a
7 rule of reason, we posit a rule of reason plus Mr.
8 White's objective test.

9 And upon that, we submit that Block Island
10 Sound and Long Island Sound should be viewed together,
11 and lines should be drawn as Rhode Island posits them
12 and as New York posits them.

13 QUESTION: May I ask you one question?

14 MR. DOHERTY: Yes.

15 QUESTION: Do New York and Rhode Island agree
16 that the government's three charts at the end of its
17 exceptions correctly depict the respective positions of
18 the parties?

19 MR. DOHERTY: Oh, yes.

20 QUESTION: I just wanted to be sure.

21 MR. DOHERTY: They depict Rhode Island's
22 position and New York's position. They accurately
23 depict what the master found, and they depict their
24 position as well. Yes, Mr. Justice Stevens.

25 If there are no further questions, I am

1 through with my presentation. Thank you.

2 CHIEF JUSTICE BURGER: Very well. Do you have
3 anything further, Mr. Claiborne?

4 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

5 ON BEHALF OF THE PLAINTIFF

6 MR. CLAIBORNE: Mr. Chief Justice, three short
7 points.

8 QUESTION: Where do you measure that
9 two-thirds of a mile, by the way?

10 MR. CLAIBORNE: It is, as indicated, at Frog's
11 Neck, on the theory that that is the nearest mainland.

12 QUESTION: So that is the -- what is the name
13 of the bridge? That is area, though?

14 MR. CLAIBORNE: This is Flushing to Frog's
15 Neck is three-quarters of --

16 QUESTION: That's the Bronx.

17 MR. CLAIBORNE: -- seven-tenths of a mile.

18 QUESTION: That goes over to the Bronx.

19 MR. CLAIBORNE: Over to the Bronx. That is
20 the only stipulated distance in the record. I was
21 informed that the shortest distance, that Manhattan was
22 nearer half a mile than a third of a mile, but that is
23 something we oughtn't to be arguing about, because the
24 states were free to introduce such evidence and did
25 not.

1 Now, if I may emphasize a point Justice
2 O'Connor made, which is that this Convention, which the
3 Court adopted partly for this reason, tries very hard to
4 make the test of bays and generally coastline
5 delineation objective rather than subjective.

6 Some subjectivity is unavoidable, but for the
7 most part it is on a two-dimensional chart added only by
8 depths. The navigational chart has depths. It does not
9 tell you how many people cross over to the island and
10 that sort of thing.

11 Those considerations were quite deliberately
12 eliminated in the question of whether an island is an
13 island, whether mainland is properly treated as land,
14 and so forth. Indeed, the United States, when it argued
15 that a mere spoilbank couldn't to count as part of the
16 mainland, was properly rebuffed by this Court.

17 A spoilbank is no different from land
18 naturally -- the second point, Justice White suggested
19 that perhaps the states' case is aided because they are
20 historic inland waters behind Long Island. It is the
21 other way around.

22 The fact that they are historic inland waters
23 behind Long Island means first they are historic because
24 it is adverse possession --

25 QUESTION: Why do you call it historic inland

1 waters rather than a historic bay?

2 MR. CLAIBORNE: Well, I don't. I think it was
3 correctly said that it would --

4 QUESTION: The master thought it was a
5 historic bay.

6 MR. CLAIBORNE: Well, it doesn't matter.

7 QUESTION: The Convention treats it as a
8 historic bay.

9 MR. CLAIBORNE: A historic bay is one that
10 does not conform to the juridical rules, and therefore
11 does not require a headland that is mainland rather than
12 an island, and precisely because the waters behind Long
13 Island, most of them, Long Island Sound proper, is
14 inland water by concession, there is less reason to
15 strain the juridical rules to extend that area.

16 No doubt because that area looks like and is
17 used like a bay, that is why it became historic inland
18 water, but that is no reason to bend the juridical rules
19 to extend it further east.

20 Now, that area could be enclosed under the
21 rules of the Convention under Article 4, but this Court
22 has very clearly said that is a matter for the federal
23 government to determine, whether or not it will invoke
24 the rule of creating bays or inland water by islands.

25 The government has consistently, not only

1 here, but everywhere, decided not to invoke that Article
2 4 straight baseline system, and that decision cannot be
3 got round by creating artificial extensions to the
4 mainland out of what is islands.

5 Now, finally, the East River is not a river.
6 It is a tidal race, a strait, but we do not claim that
7 it is an international strait. If it were, all kinds of
8 different arguments would be available to us. We simply
9 say that there is much navigation, there is considerable
10 depth, there is a substantial width, and that makes Long
11 Island an island.

12 There are many islands separated from mainland
13 by something other than international space. The coast
14 of the United States is such that international traffic
15 does not go between every island and the mainland.

16 Now, finally, Justice Marshall asked what were
17 the ports which were said by this traffic. The actual
18 ports are not identified in the record, but I do refer
19 Your Honor to Pages 40 and 46 of the master's report, in
20 which he says, just as an example, "In 1972, there were
21 in excess of 77,000 commercial movements on the East
22 River, and 52 million short tons of cargo moved on the
23 river."

24 He does point out --

25 QUESTION: Is there any indication that that

1 came from the sound rather than New York Harbor?

2 MR. CLAIBORNE: At Page 46 of the report,
3 Justice Rehnquist, the master says that ships do not
4 pass through Long Island Sound and the East River unless
5 they are headed for New York Harbor or ports on Long
6 Island Sound.

7 We accept, of course, that finding as we have
8 accepted all the findings of the master. I will leave
9 it there.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.
11 The case is submitted.

12 (Whereupon, at 10:54 a.m., the case in the
13 above-entitled matter was submitted.)
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No.35 Orig. - UNITED STATES, V. MAINE, ET AL.

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