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THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON, D.C. 20543

DKT/CASE NO. No. 9 Orig.
TITLE UNITED STATES, Plaintiff v. LOUISIANA, ET AL.
PLACE Washington, D. C.
DATE Monday, November 26, 1984
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :
4 Plaintiff :
5 v. : No. 9 Orig.
6 LOUISIANA, ET AL. :
7 - - - - -X

8 Washington, D.C.

9 Monday, November 26, 1984

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:01 a.m.

13 APPEARANCES:

14 LOUIS F. CLAIBORNE, ESQ., Deputy Solicitor General,
15 Department of Justice, Washington, D.C.; on behalf
of the Plaintiff.

16 JIM R. BRUCE, ESQ., Special Counsel for Mississippi,
17 Kennett, Mo.; on behalf of Mississippi.

18 BENJAMIN COHEN, ESQ., Special Assistant Attorney General
of Alabama, Birmingham, Ala.; on behalf of Alabama.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Claiborne, I think you may proceed whenever you're ready.

CRAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,
ON BEHALF OF THE PLAINTIFF

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

In this companion case we are concerned with a body of water commonly labeled the Mississippi Sound. It's a long, elongated, sausage-like strip of water off the coast of Mississippi and Alabama. It is some 80 miles long and at most 10 miles wide. It's perhaps most clearly illustrated in the map -- the first of the maps at the back of our exceptions, and I have no quarrel with the comparable map which has been distributed, I think, at the bench on behalf of Mississippi and Alabama.

But referring to our Chart 1, the Court will see that it's defined, Mississippi Sound, at the east by Mobile Bay, a discrete, separate body of water, and at the west by something called Lake Borgne. And when I say 80 miles long, I do not include either Lake Borgne or Mobile Bay.

Now, referring to the second of our charts to indicate what is disputed and what is not disputed, we of course concede that Mobile Bay at the east is an

1 inland water of Alabama, a juridical bay, and at the
2 west Lake Borgne and that portion of the Mississippi
3 Sound which is hashed, which goes from Isle Au Pitre to
4 the north towards one of the headlands of St. Louis
5 Bay. The portion to the west of that is likewise inland
6 water.

7 What is in controversy, therefore, is that
8 long, thin strip in between, defined by those two inland
9 bodies of water at the east and west and by what are
10 called the Barrier Islands at the south; that is, Cat
11 Island, Ship Island, Horn Island, Petit Bois Island, and
12 Dauphin.

13 Now, the claim was that this area constitutes
14 a juridical bay under Article 7 of the International
15 Convention and, independently, alternatively, that it is
16 historic inland water.

17 The Special Master appointed by this Court
18 concluded that it was enclosed. We challenge each of
19 those conclusions.

20 Now, straight away I should say that the
21 result in this case may seem perfectly sensible,
22 perfectly reasonable, because that area looks somewhat
23 enclosed, sheltered by those islands. One might say why
24 shouldn't that be treated as inland water? The answer
25 is that as a matter of international law it could indeed

1 be treated as inland water. It is a textbook example of
2 an instance where straight baselines under Article 4 of
3 the Convention would be appropriately drawn. But as I
4 said in the previous case, this Court quite emphatically
5 twice, in the California case and in the Louisiana case,
6 held that the question whether to invoke that straight
7 baseline way of enclosing inland waters is one to be
8 made by the United States. It is not reviewable by this
9 Court, and in this, as in all other instances, the
10 United States, for good or bad reasons, has determined
11 not to invoke that way of enclosing inland water. And
12 that decision cannot be got round, as is sought to be
13 done here, by creating a bay out of islands -- a thing
14 which this Court has firmly said may not be done.

15 Now, recognizing that, the Master looked to
16 see whether he could find a bay that would satisfy the
17 rules of the Convention. First, he addressed the
18 question of juridical bay.

19 Now, when you look at this area, it doesn't
20 look like a bay. It's too long and too thin, and
21 normally wouldn't satisfy any of the tests. However, if
22 one is willing to indulge in contrivances, one can eke
23 out a bay because one can draw an opposing line anchored
24 on the islands, thereby the distance, the water
25 distance, both for the purpose of the 24-mile line and

1 for the purpose of the semi-circle test -- both things
2 permissible under the Convention. But one still --

3 QUESTION: What's the width of the Mississippi
4 Sound?

5 MR. CLAIBORNE: The width of the Mississippi
6 Sound --

7 QUESTION: From the islands, I mean, to the --

8 MR. CLAIBORNE: It -- the distance between
9 Isle Au Pitre, which is viewed as part of the mainland,
10 and Cedar Point by going via Dauphin Island is less than
11 24 miles, just under 24 miles.

12 QUESTION: If you don't count the islands.

13 MR. CLAIBORNE: If you don't count the islands.

14 QUESTION: Yeah. Which you're not suppose to,
15 I guess.

16 MR. CLAIBORNE: Which you're not supposed to
17 if that's a proper way of doing it. On the other hand,
18 the distance between Isle Au Pitre and Mobile Point to
19 the east is more than 24 miles, just a little bit more.

20 QUESTION: Just over 24?

21 MR. CLAIBORNE: Just over 24 miles, which is
22 why one has to talk about Dauphin Island, which is the
23 key to the juridical bay argument.

24 It is, the Master himself concluded, that
25 unless Dauphin Island could be assimilated to the

1 mainland, there is no juridical bay here, except, of
2 course, Mobile Bay and a portion of Lake Borgne to the
3 west and the little discrete bays which we've indicated
4 at the north.

5 And so he concentrated his mind on the
6 question: Can Dauphin Island properly be viewed as an
7 extension of the mainland? Once again, the question of
8 distance, use of the intervening waters, and alignment
9 of that island with the mainland were considered; but
10 once again, as it seems to us and as we detail in our
11 brief, those tests simply do not justify Dauphin Island
12 as an extension of the mainland. And indeed, the Master
13 himself so concluded. And so, finding that applying the
14 tests of the Louisiana case to Dauphin Island would not
15 satisfy the test here, would not satisfy Dauphin Island
16 here, the Master invoked what is a truly novel
17 proposition, which is that when an island is separated
18 from the mainland by inland water as opposed to
19 territorial water or high seas, then that intervening
20 water may be treated as land, and of course, the island
21 becomes a peninsula -- a remarkably neat, self-serving
22 result, but one which leads to quite ridiculous results
23 if carried out too far, as this very same Master had
24 himself recognized ten years previously when writing his
25 report in the Louisiana case, because Louisiana had made

1 precisely this argument and had been rejected by him and
2 by the Court.

3 It is of course true that inland water is in
4 some sense assimilated to the land; that is to say, the
5 sovereignty of the coastal state of is fully applicable
6 to its internal or inland waters, but it hardly follows
7 that that equality of jurisdiction turns water into
8 land. And indeed, Article 7 of the Convention in every
9 portion of it distinguishes between land and water. It
10 measures water gaps as opposed to the land gaps in a
11 bay, all of which are inland waters. It treats those
12 gaps differently both for the semi-circle test and for
13 the 24-mile rule, thereby very clearly distinguishing
14 and not confusing land and water.

15 And yet, it's quite clear that that is the
16 prime, basic reason why the Master concluded that what
17 was under the Louisiana case an island too far removed
18 from land should nevertheless be treated as an extension
19 of it.

20 We point out that this argument had been
21 rejected by him in one place and, most relevantly, in
22 the case of the Isle Dernieres in Louisiana where a
23 formation, an arm of a putative bay called Caillou Bay
24 was sought to be constructed on that same theory; that
25 at the eastern end those islands touched inland water

1 and therefore were connected to land by those inland
2 waters.

3 And indeed, in this case for reasons which I
4 do not fully appreciate, one of the state briefs has
5 reproduced that very submission by Louisiana rejected by
6 the Master and rejected by this Court.

7 It's perhaps well to indicate precisely what
8 Alabama was -- and Mississippi were doing here. In the
9 reply brief of Alabama, which is the thickest volume in
10 the pile, there are a number of maps at the back, and
11 the first one indicates how Alabama treats Mobile Bay as
12 connecting Dauphin Island to the mainland. There it's
13 simply hatched. And in the next one we find that
14 Alabama -- the Mobile Bay is truly assimilated to --

15 QUESTION: Which one is that, Mr. Claiborne?

16 MR. CLAIBORNE: The -- and, of course, Dauphin
17 Island then looks like an extension of the mainland.

18 Now, that is precisely what Louisiana has
19 sought to do, as Attachment 6 to this brief
20 illustrates. There's Caillico Bay as -- this is an
21 exhibit Louisiana used -- and the part that is hatched is
22 mostly water -- Lake Pelto and other water bodies, but
23 inland water bodies, and therefore, said Louisiana,
24 assimilated land.

25 It seems to us, therefore, that this argument,

1 which has no validity independently, has been addressed
2 by this Master and by, more relevantly, by this Court
3 and rejected, and that accordingly, it is not a viable
4 method for assimilating islands to land.

5 QUESTION: Well, Mr. Claiborne, I guess there
6 still is the question of whether it should be treated as
7 an historic bay.

8 MR. CLAIBORNE: Indeed, Justice O'Connor, and
9 I turn to that.

10 QUESTION: And when -- when you discuss that,
11 I -- I would be interested to know what facts led the
12 Government to think that Long Island Sound meets that
13 test, but Mississippi Sound does not.

14 MR. CLAIBORNE: Let me say straight away with
15 respect to the Long Island Sound that there was a
16 congressionally-approved compact setting the boundary
17 between Connecticut and New York in Long Island Sound, a
18 thing which would be relevant only if those were waters
19 of those two states. That is lacking in Mississippi
20 Sound.

21 There was a long history of enforcement by the
22 United States of its own laws against foreign vessels in
23 Long Island Sound, not true with respect to Mississippi
24 Sound.

25 QUESTION: Well, I guess during the Civil War,

1 a fort was constructed or started to be constructed to
2 do the same thing?

3 MR. CLAIBORNE: A -- as Your Honor rightly
4 says, a fort was more or less constructed. It lasted
5 all of 15 years. It was never quite finished. But in
6 all events, let's assume that it was an indication of
7 the determination actually of the Union to block
8 shipment to aid the Confederacy; nothing much to do with
9 international relations.

10 But even if it was intended to block British
11 vessels from aiding the South, it does not indicate any
12 view that the waters adjacent to that fort, Fort
13 Massachusetts on Ship Island, were inland. That fort
14 was designed to prevent belligerent traffic, a thing
15 permissible to do --

16 QUESTION: Well, didn't -- didn't your --
17 didn't the SG take a contrary position about Mississippi
18 Sound at one point and concede that it was inland waters?

19 MR. CLAIBORNE: I freely confess that like all
20 others, Solicitors General had fallen into error in the
21 past.

22 QUESTION: Well, but didn't this Court as well
23 treat it as inland waters and apply the law of the
24 thalweg to some question?

25 MR. CLAIBORNE: Well that, Your Honor, here

1 refers to the decision of this Court in litigation to
2 which the United States was not a party entitled
3 Louisiana v. Mississippi, the decision of this Court in
4 Volume 202 of United States Reports decided in 1906.

5 It is argued that that case effectively
6 determined that Mississippi Sound was inland waters. We
7 say that if there was such a holding, it is not binding
8 on the United States; and this Court has twice made that
9 point by indicating in the first California case and in
10 a subsequent decision that Louisiana v. Mississippi was
11 litigation to which --

12 QUESTION: Well, that -- that might be true as
13 to res judicata, but it's certainly not true as stare
14 decisis. You're -- you're -- a decision of the Court
15 between two other parties on a question of law binds
16 everybody.

17 MR. CLAIBORNE: Your Honor is of course
18 correct, but this Court laid Louisiana v. Mississippi
19 aside as though it were not a relevant precedent in the
20 first California case. But in all events, it seems to
21 us that that decision did not determine that Mississippi
22 Sound as a whole was inland water, or indeed that any
23 portion of it was.

24 The Court ruled notice on close examination of
25 that case that there were two holdings. One was that

1 certain marshy islands in St. Bernard parish, the
2 eastern portion of Louisiana, should be treated as
3 mainland and not as islands -- a question which has
4 spawned the debate on that score, but very
5 distinguishable from Dauphin Island or from Long Island.

6 The second holding was that the dividing line
7 between Mississippi and Louisiana ought to be drawn in
8 the main channel which went south of Cat Island and
9 north of Ilse Au Pitre. And the issue was whether that
10 rule, the thalweg rule, following the navigation channel
11 was a rule applicable only to strictly inland waters
12 like rivers.

13 The Court said not so; that rule can apply to
14 arms of the sea, to lakes, to bays, to inlets, and so it
15 seemed to territorial --

16 QUESTION: But not to open sea.

17 MR. CLAIKORNE: Not to the open sea, but the
18 Court seemed to say to territorial waters. Since it was
19 speaking of a belt of water over which the coastal
20 states hold sway, language appropriate to the
21 territorial belt, not to inland water, and since the
22 Court noted that the Mississippi Sound was waters of the
23 United States, because the openings between the islands
24 were less than six miles, the distance, twice the
25 distance of the territorial sea.

1 The decision is somewhat ambiguous, and it may
2 be that at the time the distinction between territorial
3 and inland waters was not clear either in international
4 or national law. But it is not fair to treat that case
5 as clearly holding what was unnecessary to hold, that
6 Mississippi Sound as a whole was inland water.

7 QUESTION: When -- when did the SG concede or
8 purport to concede that this was in inland waters?

9 MR. CLAIBORNE: On two occasions in the
10 Louisiana case, the Solicitor --

11 QUESTION: Yes. Why did he? He must have
12 felt it necessary to do so.

13 MR. CLAIBORNE: Well, it was simply a matter
14 of distinguishing a way from the Louisiana context what
15 had been thrown up as an example of inland waters from
16 islands -- that is, Mississippi Sound. And he said this
17 is very unlike Mississippi Sound, which he wrongly said
18 this Court had previously ruled is inland waters because
19 of the presence of the islands and the narrowness of the
20 gaps between them. That was in 1958.

21 QUESTION: So he -- he -- he -- he misread our
22 prior -- the Court's prior decisions, too.

23 MR. CLAIBORNE: Indeed. But he did so with
24 his main eye on litigation involving Louisiana, not
25 concentrating on the Mississippi situation. But he also

1 was then, before this Court had imported the
2 International Convention as the governing rule,
3 concentrating on what was a somewhat vague, but
4 nevertheless different approach to how to define inland
5 waters.

6 It may be that under the approach that was
7 then in vogue, it was proper to treat inland waters as
8 defined by a series of islands reasonably close
9 together. That approach was made impossible once the
10 United States adhered to the International Convention in
11 1961 and once this Court held in 1965 that that
12 Convention governed for purposes of the Submerged Lands
13 Act. Those two ingredients were not present when the
14 Solicitor General somewhat casually distinguished
15 Mississippi Sound in 1958.

16 Now, turning to the other aspects of the claim
17 of historic inland water, it is a little odd to be
18 claiming that this Court so decided, and therefore
19 Mississippi Sound is historic inland water. If this
20 Court so decided, perhaps that's the end of it. But
21 historic claim is a claim of adverse possession contrary
22 to the rules of international law. That requires a
23 showing that this nation as a nation -- and the Master
24 disregarded all evidence of state action on the ground
25 that it was too ambiguous, it didn't show inland as

1 opposed to territorial claims, territorial water claims
2 -- it must be shown that this nation exercised
3 jurisdiction of the body of water as inland water. The
4 only clear way of knowing that is to exclude foreign
5 vessels -- not one bit of evidence of that in this
6 record.

7 QUESTION: Was there any occasion to do so,
8 Mr. Claiborne?

9 MR. CLAIBORNE: The record is surprisingly
10 silent with respect to that, but we can suppose that
11 this being a well-known fishing area, there might indeed
12 have been foreign fishing vessels that would have wished
13 to come into the area.

14 QUESTION: Mr. Claiborne, how deep is the
15 water in the bay?

16 MR. CLAIBORNE: Well, the channel that
17 separates Dauphin Island from the mainland, though
18 somewhat artificially maintained, but artificially
19 maintained for well over 150 years, if I remember is
20 some 12 feet in depth. Some other -- there is a channel
21 all the way to Lake Borgne which is maintained.

22 QUESTION: That's the Intercoastal Waterway.

23 MR. CLAIBORNE: Intercoastal Waterway. And it
24 accommodates purely coastal vessels, but it's an -- it's
25 an artery of commercial commerce.

1 QUESTION: And the balance of the sound is how
2 deep?

3 MR. CLAIBORNE: Oh, anywhere from 6 to and
4 perhaps even shallower portions up to 10 feet, I think
5 I'm correct in saying. But, of course, depth has never
6 been in international law a criterion for high seas.

7 QUESTION: Of course, it might have some --
8 might explain why there's not as much foreign shipping
9 as there might otherwise be.

10 MR. CLAIBORNE: Indeed. Indeed. Right.

11 Now, this nonconforming use by the United
12 States of the area as its own inland waters, excluding
13 foreign shipping, must have been clearly asserted; it
14 must have continued for a long period of time so as to
15 develop into a usage; and must have won the acquiescence
16 of foreign nations.

17 QUESTION: Well, but if the water is so
18 shallow that it isn't used, and there's no evidence of
19 such use by foreign vessels, what would you look to?

20 MR. CLAIBORNE: Well, I would say, Justice
21 O'Connor, that the burden is on the states to show, and
22 indeed as this Court has said, to show beyond doubt when
23 the United States disclaims the area as its own historic
24 waters that history, contrary to the rules of
25 international law, make this area the internal waters of

1 the United States --

2 QUESTION: When did the United States first
3 indicate this position, that it disclaimed any --
4 disclaimed these waters as inland waters?

5 MR. CLAIBORNE: It first did so, Justice
6 White, in 1970.

7 QUESTION: And what was the occasion for that,
8 the starting of this lawsuit?

9 MR. CLAIBORNE: No. The occasion -- this
10 lawsuit -- this aspect of this lawsuit didn't begin
11 until ten years later. The occasion for that was that
12 there was a delimitation of the coast of the entire
13 United States. A committee was formed for that purpose,
14 and it was then discussed and determined that what had
15 once been supposed to be inland waters, that it did not
16 fit the rules of the International Convention, and
17 accordingly, enclaves must be drawn inside the body of
18 water.

19 QUESTION: By the way, what was the basis for
20 say -- saying that the waters inside that line from Isle
21 Au Pitre to the coast -- what was the basis for treating
22 the waters to the west of that as inland waters?

23 MR. CLAIBORNE: Well, they meet all the tests
24 provided one takes Isle Au Pitre as an extension of the
25 mainland, and it is of the same sort of deltaic

1 formation as the rest of those waters which were
2 involved in this Court's decision in -- in Louisiana v.
3 Mississippi.

4 QUESTION: But -- but they weren't
5 adjudicated, these particular islands. This was --

6 MR. CLAIBORNE: Well, Isle Au Pitre was
7 mentioned. It's hard to tell from the decision whether
8 Isle Au Pitre was treated as part of the mainland or as
9 an island.

10 QUESTION: But this was -- is -- were the
11 waters treated as inland waters because they were --
12 they were a juridical bay?

13 MR. CLAIBORNE: Oh, yes. Oh, yes.

14 QUESTION: Not a historic bay.

15 MR. CLAIBORNE: Not a history bay.

16 I may say that the official line of the United
17 States is not in Isle Au Pitre but is at the place west
18 of that. In the hearing of this case, the expert for
19 the United States -- well, I think it was in answer to
20 an interrogatory -- we conceded that Isle Au Pitre might
21 be an appropriate headland, and we -- the Master so
22 accepted, and we have not accepted the previous
23 determination. It makes no practical difference whether
24 --

25 QUESTION: But Isle Au Pitre -- you have to --

1 all those islands, that whole chain of islands has to be
2 treated as a part of the mainland.

3 MR. CLAIBORNE: Yes, but as far as the whole
4 chain, if one means the Chandeleur Sound islands --

5 QUESTION: Well, the ones -- the ones --

6 MR. CLAIBORNE: West --

7 QUESTION: The ones southwest of Isle Au Pitre.

8 MR. CLAIBORNE: Yes, but that is a
9 determination this Court made with respect to all but
10 perhaps Isle Au Pitre in Louisiana v. Mississippi and
11 which is almost unavoidable because it's nothing but a
12 criss-cross. Our map is a little -- shows a bit too
13 much water there. If you follow the low water line --

14 QUESTION: For your case it shows too much,
15 that's true.

16 MR. CLAIBORNE: But the map submitted by the
17 states perhaps gives a more accurate impression, because
18 they've used a darker color.

19 I'll reserve what time I have for rebuttal.

20 CHIEF JUSTICE BURGER: Mr. Bruce.

21 GRAL ARGUMENT OF JIM B. BRUCE, ESC.,

22 ON BEHALF OF MISSISSIPPI

23 MR. BRUCE: Mr. Chief Justice, and may it
24 please the Court:

25 The states take the position that the Master's

1 findings and conclusions are eminently well founded.
2 They further submit that his reasoning is further
3 reinforced by certain bases which the states have
4 submitted in the way of exceptions merely to support the
5 Master's ultimate finding.

6 In the brief time allotted to me I will
7 address the question of the Master's finding as to
8 Mississippi Sound as inland waters under Article 7 of
9 the Geneva Convention. Mr. Cohen will address the
10 treatment of Mississippi Sound as inland waters. While
11 we've separated these arguments for the purpose of
12 presentation, we certainly invite the Court's questions
13 as to either issue at any time.

14 I think the most interesting thing that tends
15 to jump out at one as you look at the map which we have
16 submitted for the purpose of oral argument are the four
17 patches of high seas within the territorial boundaries
18 of the state of Mississippi and Alabama.

19 The United States takes the position in this
20 case and a similar position in the Long Island case that
21 all it's doing is applying the Convention, and that when
22 the Convention is properly applied, at least in the
23 Mississippi Sound, enclaves of high seas -- in some
24 instances no more than six feet deep -- necessarily
25 occur.

1 The states would suggest that that is a
2 selective application of the Convention. Nowhere but in
3 a domestic dispute between the United States and a state
4 would enclaves in fact appear. Were a foreign nation
5 claiming Mississippi Sound or an area such as that, the
6 question of enclaves would never arise. It has no
7 international significance in that sense. A foreign
8 nation could easily validate its claim to those enclaves
9 and to the entire sound by proper application of other
10 provisions of the Convention.

11 The witnesses on behalf of the United States
12 pointed out that the Government's position did not
13 further freedom of the high seas. They further pointed
14 out that it didn't serve an important policy
15 consideration, and that the inclusion of Mississippi
16 Sounds as internal waters of the state of Mississippi
17 would not in fact extend the traditional boundaries of
18 the United States. It was also conceded that it would
19 not jeopardize the United States' position so far as
20 international relations in objecting to -- objecting to
21 excessive claims by foreign nations.

22 The questions I think that relate to Article 7
23 I think are most important, and I would like to correct
24 the statement that's been made by the Solicitor's
25 office, especially with regard to Caillou Bay. He

1 suggested that Caillou Bay involved a very similar
2 situation; that is, a situation where the islands lying
3 in the mouth of a pre-existing bay. I believe reference
4 to a map of this area will indicate that not to be the
5 situation. Neither of the two islands which would have
6 been used as headlands for the bay in fact lie at the
7 mouth of the bay to the east.

8 I'm referring to the attachment to Mississippi
9 -- to Alabama's reply brief, Attachment No. 7. The two
10 large islands which jut out from the Louisiana coast at
11 approximately a 45 degree angle do not appear in the
12 least to be a part of a pre-existing juridical bay. I
13 believe Attachment No. 8 will show the western extremity
14 or the eastern extremity of that particular area. I've
15 looked at these maps, and I don't see the island the
16 United States is referring to.

17 I might also note the Court did raise a
18 question a little bit earlier when the United States
19 changed its position. The Master, of course, found that
20 the position was not announced until 1971, and of
21 course, as late as 1979 in its litigation with
22 Louisiana, the United States still contended that
23 Mississippi Sound was internal waters. And I would
24 refer to page 39 of our brief in which we reproduced
25 that concession. They were again relying on Louisiana

1 v. Mississippi.

2 At another point in their brief they conceded
3 that Mississippi Sound was different from the islands
4 along the Louisiana coast. They said that the islands
5 there were islands in the open sea -- a situation which
6 was quite different from Mississippi Sound, with the
7 clear implication being Mississippi Sound constituted
8 islands in the mouth of the bay.

9 I think it's interesting that a former
10 geographer for the State Department, Mr. Percy, back in
11 1959, writing just about the time that the Geneva
12 Convention was being considered by other nations,
13 shortly before its ratification by the United States,
14 discussed the terms of the Convention, and he talked
15 about islands in the mouth of a bay. When he did, he
16 pointed to Mississippi Sound, which he described
17 Mississippi Sound as being one of the most impressive
18 dimensions involving juridical bays is Mississippi
19 Sound, partially closed off by a series of sandy islands.

20 The former geographer at least read the
21 Convention to constitute a juridical bay. Of course,
22 Mississippi Sound has had various names in its history.
23 At one time it was called Pascagoula Bay, Pascagoula
24 Sound. As of about 1940 -- 1945, it was termed
25 Mississippi Sound as a result of a government survey of

1 the area.

2 QUESTION: Mr. Bruce, what does the record
3 show with respect to commercial shipping destined or --
4 to or from Pascagoula or to or from Biloxi or to or from
5 Gulfport? Does the record show how that shipping moves
6 with respect to Mississippi Sound?

7 MR. BRUCE: Yes, it does, Your Honor. So far
8 as -- so far as Biloxi, the channel there is not
9 sufficiently deep to accommodate anything but
10 pleasurecraft. So far as the channels between
11 Pascagoula and Gulfport, the water there -- the
12 harbor master testified and pointed out it was the most
13 shallowest port, Gulfport, shallowest port on the Gulf
14 Coast. I believe the depth -- my recollection is it's
15 very shallow.

16 QUESTION: But my question is: Looking at the
17 defendant's map for oral argument which you've passed
18 out, how does shipping move to and from Gulfport, I mean
19 with respect to those various islands and that sort of
20 thing?

21 MR. BRUCE: Your Honor, with regard to
22 Gulfport, the ships would come in a dredged channel made
23 for that purpose for entering the harbor works at
24 Gulfport. The channel extends from Gulfport between Cat
25 Island and Ship Island.

1 QUESTION: Between Cat -- Cat Island and Ship
2 Island.

3 MR. BRUCE: Yes, Your Honor. In fact, the way
4 the ships come in, they come in the channel. Once they
5 get in, there's not room enough to turn around, and they
6 have a turntable that the ship is turned around on the
7 turntable and goes out the same way it comes in.

8 QUESTION: How does a ship coming from
9 somewhere else in the Gulf of Mexico approach Pascagoula?

10 MR. BRUCE: Your Honor, the channel there
11 would be between Petit Bois Island and Horn Island.
12 Again, it goes straight in and straight out in very much
13 the same way.

14 QUESTION: Does -- does -- does a ship headed
15 from Mobile -- is there anything in the record about a
16 ship headed from Mobile either to Gulfport or
17 Pascagoula, would -- would that go seaward of Dauphin
18 Island?

19 MR. BRUCE: Your Honor, it would have to. As
20 the Master found, the water there is extremely shallow.
21 It's only no more than six feet deep except for the
22 channel, project channel of -- by the way, it's the
23 Intracoastal Waterway -- is only twelve feet deep. It's
24 not sufficiently deep to accommodate international
25 shipping.

1 QUESTION: Mr. Bruce, what's the depths of
2 those channels?

3 MR. BRUCE: Your Honor, the channels vary from
4 time to time, and I can't give you a specific idea. The
5 -- the largest area typically, historically, the tip of
6 Ship Island where the port was built provided a small
7 harbor for ships in the 18th and 19th centuries. The
8 water there I believe reached a maximum depth of about
9 17 feet. So that is the deepest area that I know of in
10 the Sound.

11 QUESTION: So not very big vessels --

12 MR. BRUCE: No, Your Honor. In fact, I think
13 it's rather interesting from a historical point of view
14 when the D'Aiberville and the early explorers were
15 sailing in that area they would anchor outside the
16 islands and send small boats in because of the
17 shallowness of the water. At one point I believe
18 D'Aiberville or somebody was able to get a boat into
19 Ocean Springs, Mississippi, but they had to wait a
20 considerable time before they could get the boat out or
21 almost a change of seasons. It was not the kind of
22 thing that you did.

23 The testimony in the record indicates that
24 there were launches, flatbottom boats and so on that
25 navigate this area. The traffic you have in there is

1 not international traffic lengthwise of the sound. It
2 is purely domestic, the same kind of traffic, I suppose,
3 that the Court noticed in the Anglo-Norwegian Fisheries
4 case. It was basically used by local people. It was
5 basically domestic traffic.

6 QUESTION: I take it you support the reason
7 the Special Master gave for treating Dauphin Island as
8 part of the mainland.

9 MR. BRUCE: Yes, I do, Your Honor. In fact,
10 there are two reasons why we support that. Number one,
11 we think he was eminently correct so far as his
12 application of the standards which this Court set forth
13 in the Louisiana case. And by the way, a review of
14 those standards should go beyond just the Court decision
15 in that case. It should include Louisiana v.
16 Mississippi, and it should also include the
17 International Court's finding that the fringe of islands
18 along the Norwegian coast constitute an extension of
19 that mainland. And I might point out that the islands --

20 QUESTION: Because? Why do they -- why did
21 they constitute an extension of the mainland?

22 MR. BRUCE: Well, Your Honor, one of the
23 things they pointed out --

24 QUESTION: The reason that the -- the same
25 reason that the Special Master gave, that they were --

1 abutted inland waters?

2 MR. BRUCE: Your Honor, that is part of it.
3 In fact, the Court said there that there are numerous
4 bays, straits, arms of the sea and so on, and these
5 provide internal navigation. That was one of the
6 factors that was taken into consideration. The depth of
7 water was another; the fact that from -- from the sea
8 they appeared to be a whole with the mainland. In fact,
9 the same factors appear in both this Court's decision in
10 '69 and the -- in the fisheries case. In the Court's
11 directions here, the guidance for the Masters are
12 certainly much more replete and leave less to the
13 imagination of the Master.

14 I might point out that there there were
15 islands much, much larger than Dauphin Island and at
16 considerably greater distances from the mainland shore.

17 So far as the Master's consideration as to the
18 second point -- and that is, treatment of islands -- or
19 treatment of inland waters as mainland -- we think the
20 Master did nothing more there than state the obvious.
21 The question perhaps might be --

22 QUESTION: Well, that's -- you can't find that
23 obvious stated in any of our cases, can you?

24 MR. BRUCE: Well, Your Honor, I think --

25 QUESTION: Can you or not?

1 MR. BRUCE: -- there is some indication.

2 QUESTION: Can you give me a citation?

3 MR. BRUCE: Well, Your Honor, so far as --

4 QUESTION: To support the -- that particular
5 holding of the Special Master? He didn't cite any, did
6 he?

7 MR. BRUCE: Not exactly. No, he did not, Your
8 Honor, insofar as that particular --

9 QUESTION: Well, can you cite any?

10 MR. BRUCE: Well, I think there is something
11 very relevant, and that is this Court's consideration of
12 Article 11 in the 1969 Louisiana decision. The question
13 there was one of straight baselines, which I consider to
14 be the point here. It's not a question so much of
15 whether inland waters may be mainland, but it's a
16 question of how you treat a baseline under Article 7 and
17 under the Geneva Convention.

18 We contend that a baseline is a part of the
19 coast, and therefore, if a baseline lies along an
20 island, it may, too, be part of the coast within the
21 meaning of the Convention. That's all this Court has
22 required.

23 There is a baseline drawn from Mobile Point to
24 Dauphin Island, from Dauphin Island to the mainland.
25 Dauphin Island lies in the mouth of Mobile Bay;

1 therefore, it is a part of --

2 QUESTION: Where does the baseline intersect
3 Dauphin Island? At the east end of it?

4 MR. BRUCE: The baseline would go from Mobile
5 Point to the east end of Dauphin Island.

6 QUESTION: Why does it include all of Dauphin
7 Island then?

8 MR. BRUCE: Well, Your Honor, the Dauphin
9 Island would be an integral part of the mainland or a
10 part of the baseline. The baseline would go around
11 Dauphin Island and of course would pick up on the other
12 side and go from the northern tip of Dauphin Island to
13 Cedar Point.

14 QUESTION: What is the approximate distance
15 between Dauphin Island and Mobile Point?

16 MR. BRUCE: 2.68 miles, Your Honor. The
17 distance between Cedar Point and Dauphin Island to the
18 south is less than 1.6 miles. I think that is an
19 important factor to consider, and that is, the distance
20 between the island and the size of the island. While
21 1.6 miles, as the Master noted, might have been
22 excessive for a mud lump at the mouth of the
23 Mississippi, we think for an island 14.75 miles long and
24 which encloses waters to the north and meets the other
25 criteria, certainly constitutes an extension of the

1 mainland.

2 So far as the question about inland waters as
3 being mainland, I think a very good instance might be
4 the situation with a river. There's no doubt but what a
5 river is a part of the mainland. Although it is water,
6 it is mainland. And the line joining the entrances to a
7 river is certainly nonetheless mainland. In fact, it's
8 treated the same way for a delimitation of territorial
9 seas is mainland.

10 Just as that is the case there, we think that
11 the closing line for a bay, which is also internal
12 waters, serves to -- the same as mainland, and an island
13 which adjoins a closing line would also be treated as
14 mainland for purposes of applying Article 7.

15 And the real question here is not whether land
16 is water. That's never been in dispute. The question
17 is whether the Convention would recognize the use of an
18 island to help form a bay, and it does so only in a very
19 limited situation -- in a situation which this Court and
20 the International Court of Justice have both said can
21 only happen where the waters between are so closely
22 related to the mainland as to be justly treated as
23 internal waters. We think that's the only instance
24 where that may happen.

25 CHIEF JUSTICE BURGER: Mr. Cohen.

1 ORAL ARGUMENT OF BENJAMIN COHEN, ESQ.,
2 ON BEHALF OF ALABAMA

3 MR. COHEN: Mr. Chief Justice, and may it
4 please the Court:

5 Special Master Armstrong found that
6 Mississippi Sound was a historic bay. He based his
7 conclusion on a systematic analysis of the facts, guided
8 by the legal principles laid down by this Court.

9 QUESTION: Does it make any difference to the
10 states which it might be?

11 MR. COHEN: Whether under juridical idea? No,
12 sir, it doesn't. I think it would be inland waters
13 under either situation.

14 The result of the Master's recommendation we
15 believe for several reasons is factually logical. The
16 United States international law expert testified that a
17 historic claim to Mississippi Sound would be
18 strengthened by the fact that the Sound is totally
19 enclosed from the open sea.

20 The borders of the Mississippi Sound on the
21 north are land, on the east and west they're inland
22 water, and on the south it's a total three-mile belt of
23 territorial waters.

24 Second, this geographical configuration is a
25 cul-de-sac. As Mr. Bruce explained, there's no reason

1 for international shipping to enter Mississippi Sound
2 other than to go to an inland port. It is not a route
3 of passage between areas of high seas, and it is so
4 shallow as not to be readily navigable for ocean-going
5 vessels.

6 QUESTION: How does the evidence satisfy the
7 continuity requirement for historic status?

8 MR. COHEN: First, as you correctly pointed
9 out earlier, this Court's opinion in Louisiana v.
10 Mississippi, 1905, found that Mississippi Sound was
11 internal waters.

12 QUESTION: Well, how does the evidence
13 introduced in this proceeding support the continuous
14 exercise of dominion over the Sound?

15 MR. COHEN: Once -- the Master looked at
16 pre-admission history and post-admission history. He
17 found that the United States exercised authority over
18 Mississippi Sound beginning shortly after the United
19 States acquired this territory from France in 1803, the
20 Louisiana Purchase. In 1804 the United States Congress
21 annexed the waters of the Mississippi Sound into a
22 customs district. From that time forward Congress
23 considered those waters as internal waters and proposed
24 in about 1817 the Intracoastal Waterway between Mobile
25 and New Orleans.

1 Those incidents are consistent with the
2 background reasons why nations claim historic bays.
3 It's natural for a nation to lay claim to an area that
4 is adjacent to its coast that is important for reason of
5 economy or vital reasons of security.

6 Congress then established that Intracoastal
7 Waterway, which is the Gulf Intracoastal Waterway
8 today. Considering that congressional activity, which
9 continued from about 1803 until the turn of the century,
10 and then this Court decided the Louisiana v. Mississippi
11 case in 1905. And from that time I don't believe there
12 has been any -- any question about the inland water
13 status of the Mississippi Sound. As it was pointed out
14 earlier, the Solicitor General, based on Louisiana v.
15 Mississippi, believed that Mississippi Sound was inland
16 waters.

17 I believe the -- the Master found in this case
18 that the United States had exercised jurisdiction over
19 Mississippi Sound, and that that exercise had been
20 continuous, and that foreign nations had acquiesced in
21 that exercise, and that they knew or should have known
22 of the claim being made.

23 The two issues in this case that go to the
24 heart of the dispute between the states and the United
25 States is whether there was a claim to inland waters

1 made and whether nations knew or reasonably should have
2 known that that claim had been made.

3 All of these relate directly to the common
4 sense recommendations of the Master's and the
5 geographical configuration of the Sound.

6 I'd like to discuss in a little bit more
7 detail the Louisiana v. Mississippi opinion, the 1905
8 opinion of this Court. As an opinion of this Court of
9 course it is notice to the world, notice to foreign
10 nations of the claim made.

11 As was pointed out, in order to decide that
12 case, the Court had to apply the doctrine of thalweg.
13 The doctrine of thalweg only applies in inland waters.
14 The issue in that case was to decide whether the
15 boundary line between Louisiana and Mississippi would
16 lie in a deepwater sailing channel between the states.
17 The Court applied thalweg and found that it did. In so
18 doing, the Court extended a lateral state boundary over
19 Lake Borgne and over Mississippi Sound to the Gulf of
20 Mexico, which it found to lie south of the Barrier
21 Islands. And, in essence, it acknowledged and
22 recognized the United States exercise of authority over
23 Mississippi Sound.

24 As I mentioned earlier, the Master, believing
25 that this Court found that Mississippi Sound was inland

1 waters, also believed that congressional actions from
2 1803 until the turn of the century also believed that
3 the waters were inland waters.

4 The third basis of the Master's opinion was
5 that the United States had had a consistent policy in
6 the international community to enclose waters of the
7 type as Mississippi Sound as inland waters. This the
8 Master referred to commonly as the ten-mile rule, which
9 is basically a rule that inland waters of the United
10 States which are straits or sound which lead to other
11 bodies of inland water, which are no more than ten miles
12 wide, should be dealt with and enclosed as inland water.

13 The policy that created this situation was
14 established in approximately 1903, which is
15 approximately the same time as this Court decided
16 Louisiana v. Mississippi. That in a sense continues the
17 United States exercise of authority from 1903 up until
18 that policy was dropped in approximately 1961 with the
19 adoption of the Geneva Convention.

20 The Master's analysis of this rule was quite
21 similar to the International Court of Justice Analysis
22 of a similar rule in the Anglo-Norwegian Fisheries
23 case. In that case there were two issues: whether the
24 Norwegian government's standard of delimitation of
25 territorial waters was correct under international law.

1 The court found that it was, but once finding that, they
2 turned to the question of whether the waters behind that
3 line could be treated historically as inland waters.

4 In our situation this is basically what the
5 Master did concerning the United States policy. Both
6 the Master and the International Court of Justice found
7 that there was a general policy to delimit inland waters
8 and that these policies had been continuous, and that
9 foreign nations were well aware of those policies. In
10 fact, in both situations -- in the Norway situation
11 there was a request from France asking what was your
12 policy in delimiting waters. In the United States
13 situation there was a request from Norway asking what is
14 your policy. So without question, foreign nations were
15 well aware of both policies.

16 QUESTION: Well, when did Norway make that
17 request of the United States?

18 MR. COHEN: I think it was in 1949, Justice
19 Rehnquist.

20 In addition to that, both the Master and the
21 International Court of Justice relied on an opinion of
22 the supreme court of the country, the respective
23 country. In Norway it was the St. Juste case, and of
24 course in this situation it's the Louisiana v.
25 Mississippi case. Both found that the subject waters --

1 that the dispute of the subject waters were historic
2 inland waters.

3 So we submit that the Master's recommendation
4 in this case is, above all, logical. We believe it is
5 factually and legally correct. We believe that the
6 recommendations should be accepted, and the Master's
7 analysis should be affirmed.

8 If there are no further questions, that's the
9 end of my presentation.

10 CHIEF JUSTICE BURGER: Very well.

11 MR. COHEN: Thank you.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.
13 The case is -- oh, excuse me. You have two minutes
14 remaining, Mr. Claiborne, and I apologize.

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

16 ON BEHALF OF THE PLAINTIFF -- REBUTTAL

17 MR. CLAIBORNE: Mr. Chief Justice:

18 With respect to the concession by the
19 Solicitor General in respect to Mississippi Sound, of
20 course there was a comparable concession in the very
21 case with respect to Caillou Bay; and this Court quite
22 expressly held that that was not binding, nor evidence
23 of any historic inland water claim for that area.

24 The International Court of Justice in the
25 Norwegian case did not hold that they were extensions of

1 the mainland. It held that a nation may enclose islands
2 with a straight baseline, and the international
3 community adopted that rule in Article 4 of the 1958
4 Convention after the International Court had vindicated
5 the principle. And that is, of course, the appropriate
6 role if it were chosen by the United States in this case
7 to enclose Mississippi Sound.

8 The United States has chosen not to, and what
9 this case is is an effort to circumvent that decision
10 not to enclose Mississippi Sound in accordance with
11 principles vindicated by international law, but optional
12 principles.

13 Now, Mississippi in 1905 was arguing that
14 Mississippi Sound was high seas so that the thalweg rule
15 would not apply. We don't tax them with being bound by
16 that any more than we are by what the Solicitor General
17 said in 1957 or '58.

18 I should point out that in the so-called
19 exchanges of correspondence diplomatically there is not
20 a single instance in which any representative of the
21 United States addressing a foreign government pinpointed
22 Mississippi Sound as inland water, nor was that area
23 marked, as it should have been under Article 4, as
24 inland water on our large-scale maps.

25 There were some generalized statements about

1 how we treat and define inland waters which could,
2 extrapolated, mean that somebody might conclude that
3 Mississippi Sound was covered by them. But that is the
4 extent of it, and that is simply not evidence clear
5 beyond doubt in the face of a clear disclaimer by the
6 United States sufficient under this Court's cases to
7 make out a case of historic water. Much stronger cases
8 were made by California, by Florida, by Louisiana, and
9 they failed -- and indeed by Alaska.

10 This, by comparison, is a weaker case and
11 ought not prevail.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.

13 The case is submitted. We'll resume at 1:00
14 with the next case.

15 (Whereupon, at 11:56 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

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No. 9 Orig. - UNITED STATES, Plaintiff v. LOUISIANA, ET AL.

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BY Paul A. Richardson

(REPORTER)

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