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SUPREME COURT, U.S.  
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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 35 Orig.

TITLE UNITED STATES, Plaintiff V. MAINE, ET AL.

PLACE Washington, D. C.

DATE December 12, 1985

PAGES 1 thru 46



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IN THE SUPREME COURT OF THE UNITED STATES

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

----- :  
Washington, D.C.  
Thursday, December 12, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

HENRY HERRMANN, ESQ., Special Assistant Attorney General  
of Massachusetts, Boston, Mass.; on behalf of  
the Plaintiff.

LOUIS F. CLAIBORNE, ESQ., Special Assistant, Department  
of Justice, Washington, D.C.; on behalf of the  
Defendant.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
HENRY HERRMANN, ESQ.	
on behalf of the Plaintiff	3
LOUIS F. CLAIBORNE, ESQ.	
on behalf of the Defendant	23
HENRY HERRMANN, ESQ.	
on behalf of the Plaintiff -- rebuttal	43

P R O C E E D I N G S

(10:02 a.m.)

THE CHIEF JUSTICE: We will hear arguments first this morning in the United States against the State of Maine.

Mr. Herrmann.

ORAL ARGUMENT OF HENRY HERRMANN, ESQ.

ON BEHALF OF THE PLAINTIFF

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

This case is an action to quiet title brought by the United States of America against the Commonwealth of Massachusetts. The area in controversy is a body of coastal water off the coast of Massachusetts known as Nantucket Sound.

The charts appended to both the Massachusetts brief in support of its exception and the United States reply brief, both those charts indicate the configuration and location of Nantucket Sound. They further indicate the precise nature of the controversy on the ground.

Massachusetts claims that the entirety of Nantucket Sound is state, and therefore United States inland waters and that Massachusetts is the owner of the seabed thereof. The United States, as the chart



1 appended to its brief shows, it claims a small, what one  
2 can call a small federal enclave in the center of the  
3 Sound with a narrow passageway leading thereto from the  
4 open ocean.

5 This case at its present state of the  
6 proceeding involves only Nantucket Sound. Other areas  
7 in controversy have so far been disposed of, and the  
8 present stage of the proceedings are before the Court on  
9 the report of its Special Master and on the sole  
10 exception taken by Massachusetts.

11 This exception by Massachusetts is somewhat  
12 unusual for two reasons. First, this is not the type of  
13 submerged land or marine boundary case as the Court has  
14 heard many in the past, where the state and the federal  
15 government are fighting for a small area of land because  
16 of the king's ransom in oil royalties that they portend.

17 Under Massachusetts state law, which has been  
18 in existence for a long time, Nantucket Sound is  
19 designated a state ocean sanctuary and Massachusetts  
20 wishes to preserve its state protection which is  
21 absolutely --

22 QUESTION: What is a state ocean sanctuary?  
23 What is that, a state ocean sanctuary?

24 MR. HERRMANN: Under Chapter 132-A, Sections  
25 14 and 15 of the Massachusetts General Laws, Your Honor,

1 the state has designated certain particularly important  
2 or ecologically or scenically unique areas of its coast  
3 as so-called ocean sanctuaries, and those cannot be  
4 changed or altered in any way by exploitation,  
5 advertising.

6 There can be no change in the water. There  
7 can be no degradation of the seabed, no erection of  
8 structures, no waste disposal. In other words, the  
9 statutory scheme is to preserve the status quo, the  
10 pristine beauty of this area, absolutely for all time.

11 That is the gist of such a designation, Your  
12 Honor. That is the first --

13 QUESTION: Mr. Herrmann, as I understand it,  
14 Massachusetts is claiming ancient title as the theory of  
15 its recovery?

16 MR. HERRMANN: Yes, Justice O'Connor.

17 QUESTION: And I don't know that this Court  
18 has ever recognized ancient title as a theory of  
19 recovery as such. It has had cases dealing with  
20 historic title, and I'm not sure that I understand what  
21 you think the elements are for establishment of ancient  
22 title, and whether you think there are any cases from  
23 this Court that would support the application of that  
24 theory as opposed to normal principles of historic title.

25 MR. HERRMANN: Yes, Your Honor. I think there

1 are two parts to that question. Let me take the second  
2 one first. I think there is indeed solid precedent from  
3 the decisions of this Court -- if I may refer the Court  
4 to Manchester versus Massachusetts, decided in 1981,  
5 there the Court had before it a controversy as to the  
6 status of Buzzards Bay, which if I can again -- if I may  
7 refer the Court to the charts appended to either of the  
8 briefs, you will see that Buzzards Bay is one of the  
9 semi-contiguous bodies of water to Nantucket Sound.

10 First you have Nantucket Sound, and eastward  
11 of that you have Vineyard Sound and then eastward of  
12 that you have Buzzards Bay. Well, as to the famous --  
13 and it is a famous case, it's been discussed by almost  
14 all the international publicists at length, as to the  
15 Buzzards Bay case in 1981 -- interestingly enough, this  
16 Court said very succinctly, without equivocation, "It is  
17 clear," said the Court, "that Massachusetts is the  
18 owner, that it has Buzzards Bay by virtue of its  
19 province charter."

20 Now, I ask the Court for a moment to ponder  
21 the implications of that. How could that be anything  
22 but what we today under modern international law  
23 parlance, as it has been, for example, been expressed by  
24 the U.N. study, the juridical water study, in paragraph  
25 71 thereof which we quote, what else could that mean but

1 an ancient title?

2 To support that finding and that holding by  
3 the Court, the King of England had to have gained it in  
4 the first place, if Massachusetts got it from the  
5 Crown. How could the King of England have gained it?  
6 He could only under then prevailing international law  
7 have gained Buzzards Bay and the surrounding lands by  
8 initial discovery which was at that time, as was also  
9 held by this Court in Martin versus Waddell, the  
10 accepted way of gaining title over newly discovered  
11 land, to just discover it.

12 The title was then fortified by occupation,  
13 through the settlements in the colonial times. Then,  
14 that is how title vested in the Crown. The Crown then  
15 passed the title, as it had the right to do under  
16 British law, and that's unquestioned today as it was  
17 then.

18 The Crown gave title to these lands and these  
19 subsoils in Buzzards Bay as it has, we claim, in  
20 Nantucket Sound, to its colony, to the Province of  
21 Massachusetts. That is the 1691 charter. That's the  
22 one referred to 100 years ago by this Court, and that's  
23 precisely the charter that the Special Master in this  
24 case said was operative in granting us Nantucket Sound.

25 QUESTION: Mr. Herrmann, do you think that



1 title acquired in that fashion can be abandoned by the  
2 states?

3 MR. HERRMANN: Theoretically, yes, Your Honor,  
4 but our position is, we have briefed that, and I would  
5 like to point out again, while in theory it could be  
6 abandoned, in practice prevailing international law  
7 implies extremely strict provisions, how that must  
8 occur, and if those provisions are not met the theory of  
9 lapse or abandonment of an already perfected title, and  
10 may I just address that distinction, what the Master was  
11 talking about and what I think Your Honor is talking  
12 about is, once a title is perfected can it be abandoned  
13 or can it lapse.

14 What the Master was talking about later in the  
15 discussion, and what the Government is focusing on is --  
16 was a so-called historic title ever acquired. But as to  
17 the perfected ancient title which was now perfected in  
18 colonial times, no, I would say in theory yes, but it is  
19 quite clear that international law, both by the courts  
20 and the publicists, this so-called active abandonment  
21 theory is definitely in disfavor.

22 It's in disfavor because it leads to  
23 instability of international titles and possible  
24 international tensions.

25 QUESTION: Well, there's no problem here,

1 because if the state doesn't have it the United States  
2 does. There's no lapse in title, and if abandonment is  
3 possible I must say it's hard for me to understand why  
4 the legislative acts of disclaimer by Massachusetts and  
5 the publication of its official charts don't reflect  
6 abandonment by the State of Massachusetts.

7 MR. HERRMANN: Your Honor, I don't think -- I  
8 submit that they do not reflect abandonment by  
9 Massachusetts for the following reasons. If Your  
10 Honor's referring to the late 19th Century charts that  
11 were published by the harbor and land commissioners,  
12 those were published upon the mandate of the  
13 Massachusetts Legislature, leading back to an 1859  
14 statute by the legislature.

15 Just like the British Territorial Waters  
16 Jurisdiction Act, both those statutes were passed as an  
17 almost emergency measure to cure the problem that  
18 apparently there was no criminal jurisdiction in the  
19 open water, on the seacoast. The problem was quickly --  
20 very quickly, because of two cases that involved the  
21 inability to prosecute a criminal, so the Legislature  
22 almost on an emergency basis extended its jurisdiction  
23 seaward.

24 So, the first thing is they had no intent, and  
25 Mahler versus Transportation which we cite in our brief

1 deals with that problem so there should be no inference  
2 that a state -- a legislature is abandoning a state  
3 seabed unless they expressly say so.

4         The purpose of that legislation was not to  
5 abandon territory already vested in the State. Its  
6 purpose was purely one to extend on an emergency basis,  
7 curial jurisdiction for criminal purposes. That's point  
8 one.

9         Point two is that if you look, as I think one  
10 must, at the state statute and the large-scale charts of  
11 1891 -- I'm sorry, 1883, you look at them together  
12 because they are a unitary manifestation.

13         As we pointed out in our brief, the charts are  
14 ambiguous. They do not show an intent to abandon  
15 Nantucket Sound with -- not specificity as is required  
16 under international law.

17         Why? Because if Nantucket Sound had been high  
18 seas, as the Government contends, there would have had  
19 to have been a closing line between Vineyard Sound,  
20 clearly, and Nantucket Sound. That is Exhibit 4 of  
21 Massachusetts exhibits, Your Honor, as we have referred  
22 to it in your brief.

23         It is clear that the Harbor and Land  
24 Commissioners had a great deal of problem reconciling  
25 that criminal jurisdiction statute and what they

1 perceived to be the actual status of Nantucket Sound,  
2 which was not high seas.

3 Finally, Your Honor, I would ask you to  
4 consider the following point. I submit that it is  
5 constitutionally impermissible for a state to diminish  
6 the national domain, once -- and this is what the  
7 Special Master really found -- if there was a perfected  
8 ancient title, that was then state seabed but it was  
9 also a part of the national domain, and I do not think  
10 that any state legislature under our constitutional  
11 system has the right to disclaim territory that belongs  
12 to the nation as a whole, as well as to it.

13 So, for those three reasons, A, it wasn't the  
14 legislative intent to abandon anything; B, they did not  
15 do so effectively, look at the charts that went with the  
16 statute; and C, I don't think they have the  
17 constitutional power to.

18 But to return again, Your Honor, to the first  
19 part of your question, what is required under  
20 international law? In the first place it would have  
21 been, I suggest to you, an international problem because  
22 at the time the United States says that there was a  
23 lapse, that is in the last century, and this is an  
24 interesting historical point, your only time the United  
25 States acquired title to that seabed, the first time,



1 incidentally, was in 1949 during the Truman proclamation  
2 which extended the United States' assertion of imperium  
3 and dominion from the three-mile limit out to the edge  
4 of the continental shelf.

5           At the time in question, in the late 1890's,  
6 it would have been -- the option was clearly, either  
7 inland waters and ergo, state seabed, or, not belonging  
8 to the United States at all. So, this blending, as it  
9 were, which Your Honor has referred to is only a late  
10 postwar manifestation.

11           The elements, quickly stated in bare outline,  
12 because there has been much written about it by the  
13 publicists, in international law to have abandonment  
14 which is not favored, you have to look to the exact  
15 circumstances. First, the question of time.

16           As long as there is not an adverse claimant  
17 and the United States has not proven -- has not even  
18 suggested that since colonial times any other foreign  
19 nation or group of foreign nations has ever even hinted  
20 at a claim to Nantucket Sound, absent an adverse  
21 claimant, the World Court, the International Court of  
22 Justice has in two leading cases indicated that it would  
23 not deem significant even a 200-year period of absolute  
24 cessation of activity, which of course there is not  
25 present here.

1           There were always exploitation activities and  
2 assertions of dominion. But even assuming for the  
3 moment for the sake of the argument that from colonial  
4 times, let's say from the time of the Revolution, there  
5 had been a total cessation of assertion over Nantucket  
6 Sound, the World Court in the two cases we cited, the  
7 case of the Minkes and Ekrahoes Islands in the Channel,  
8 the British Channel, and in the case, the so-called  
9 Eastern Greenland case, in both those cases a time  
10 period of over 200 years was deemed as not significant  
11 for one reason only, the absence of an adverse claimant  
12 which is also absent here.

13           Secondly, it seems well settled in  
14 international law, according to the pre-eminent experts  
15 whose views we cite in our brief, that you have to  
16 consider two more circumstances if abandonment is to be  
17 argued about. One is the geographical situation on the  
18 ground.

19           It seems well settled that if the so-called  
20 abandoned territory is in direct geographic proximity,  
21 if it's integrated into the territory or very much  
22 adjacent to it, of the so-called abandoning state, that  
23 counts heavily against such a presumption. And most  
24 important, if the so-called abandoning nation at all  
25 times during the time period involved retains the power

1 to assert its control and jurisdiction over that area,  
2 if it wishes -- I'm not talking about actual assertion  
3 but if it has the de facto power to reach out, as it  
4 were, at any point in time and assert its jurisdiction  
5 over that area, then it seems settled in international  
6 law that you can have no presumption of abandonment from  
7 mere inactivity. You must then find an actual overt  
8 express act of renunciation which, I submit to you, is  
9 not present in this case.

10 The only argument the United States has is  
11 that late 19th century legislation by Massachusetts, and  
12 I've already pointed out that was neither the  
13 legislative intent nor did the Legislature even presume  
14 such an attempt to accomplish the purpose.

15 I return now to the sole question which  
16 remains now, I submit, before the Court.

17 QUESTION: May I interrupt you, General  
18 Herrmann. I didn't understand -- I think Justice  
19 O'Connor asked you about ancient title and asked you if  
20 there are cases, and you gave us the citation of one of  
21 them, but then you were going to tell us the elements of  
22 ancient title, or have you done that?

23 MR. HERRMANN: No, Your Honor, I haven't. I'm  
24 glad you reminded me. The elements of ancient title  
25 really are in direct -- somewhat direct contrast to

1 historic title, so-called. Both of them, and this  
2 terminology gets a little confusing if one uses it  
3 quickly, both "ancient title", quote unquote, and  
4 "historic title", quote unquote, are under prevailing  
5 doctrine as stated in the U.N. study, grounds for  
6 finding historic waters.

7           So, the antecedents of "historic waters" may  
8 be either ancient or historic. The terminology is not  
9 optimal but I think we are stuck with it.

10           Now, in case of historic title, that is  
11 really, as the Master explained at length, a matter of  
12 prescriptive title. You attain such a historic title  
13 prescriptively, as against the community of nations, by  
14 fulfilling certain prerequisites, and very briefly  
15 stated they are as expressed again in the U.S. study,  
16 the juridical regime.

17           They are, one, you have to have a claim by the  
18 state, by the sovereign. Secondly, there has to be  
19 continuity for that claim, and again I stress that's  
20 what the Master is talking about, continuity of a claim,  
21 not continuity of an already ripened title.

22           And third, you have to gauge the so-called  
23 reaction of other sovereign states and some scholars say  
24 you have to have an actual lack of protest, you have to  
25 have acquiescence. Others say the mere absence of



1 protest is enough.

2 Those are the elements of historic title.  
3 Ancient title is quite different. Ancient title is not  
4 attained by prescription. It is really a perfected  
5 original title.

6 It must under prevailing law, and this seems  
7 clear, be acquired prior to the regime of freedom of the  
8 seas, because since freedom of the seas became an  
9 accepted doctrine in international law, certainly no  
10 earlier than the 18th century and some experts say as  
11 late as the early 19th century, prior to -- since  
12 freedom of the seas became a doctrine of international  
13 law you cannot acquire ancient title to seabed  
14 non-prescriptively because you would have to be  
15 acquiring it against the interest of the community of  
16 nations, against the res communas which is the open  
17 seabeds, the open ocean seabed.

18 However, prior to the coming into force of the  
19 freedom of the seas doctrine, which I think we have  
20 demonstrated is the case here and which the Master found  
21 in our favor, prior to that doctrine coming to force you  
22 could acquire -- and this is why it's important not to  
23 get overly involved in the term "ancient" -- it can mean  
24 no more ancient than prior to the Revolution, it could  
25 be any time from ancient Greece, really, to the

1 beginning of the 18th century.

2 In ancient title you acquire an original  
3 title, not by prescription but by fulfilling certain  
4 acts which were required under then prevailing  
5 international domestic law. Those acts were discovery  
6 of new territory, of res nullius, of terra nova,  
7 discovery followed by effective occupation to fortify  
8 the title.

9 The Master has quite explicitly found in our  
10 favor on both those issues. That, Justice Stevens and  
11 Justice O'Connor, if as we see the elements, the central  
12 elements of distinction between these two types of  
13 title, both of which can individually without the other  
14 being present lead to a finding of historic waters which  
15 would vest inland status in a particular body of water.

16 QUESTION: Let me clarify one thing. What do  
17 you mean by "occupation," that element of the claim,  
18 when you're talking about this area of water that we're  
19 talking about here?

20 MR. HERRMANN: Under prevailing international  
21 law, and by that I wish to point out to the Court, we do  
22 have a problem of so-called intertemporal law in this  
23 international law related case. Intertemporal law, and  
24 that's a well settled doctrine by now, means you must  
25 apply of necessity the international law rules

1 prevailing at the point in time when you're looking at  
2 the evidence.

3           You do not apply modern international law  
4 retroactively. If you are looking at a claim of  
5 acquired ancient title, say in the 17th century, you  
6 must look to it under standards then prevailing.

7           Under standards then prevailing, Your Honor,  
8 occupation could have been satisfied for a marine area  
9 of this sort by effective settlement of the surrounding  
10 land masses, that's point one. That certainly occurred  
11 here. Indeed, we have evidence on the record that the  
12 British explorer Gosenoll sailed into the Sound and  
13 immediately erected a fort at the entrance to Vineyard  
14 Sound.

15           The second element, and it's a very important  
16 one, is exclusive and extensive exploitation of the  
17 resources of such a body of water. The Master, of  
18 course, based on voluminous evidence by Massachusetts,  
19 made findings that there was -- and I think these were  
20 almost his express words -- he said that there had been  
21 such extensive and exclusive exploitation of the  
22 resources of Nantucket Sound by the British settlers to  
23 be equal to a formal assertion of jurisdiction over  
24 those waters.

25           That was his finding. That would be the

1 second element. I would point out further, Justice  
2 Stevens, that if there is one thing settled in  
3 international law and the Government has conceded this  
4 in his brief, one undisputed way of gaining ancient  
5 title for seabed is through sedentary fisheries.

6 There are several well-known examples. One  
7 was cited by the Government, the so-called Ceylon pearl  
8 fisheries. There are also the fisheries in the Arabian  
9 Gulf, the pearl fisheries off Sicily. There is the  
10 famous case of the Tunisian sponge fisheries.

11 This is one thing that's beyond question by  
12 now, that you can obtain ancient title by that means and  
13 certainly if the Master found anything at all, he found  
14 that the exploitation over the sedentary fisheries in  
15 the Sound were continuous, that they were exclusive, and  
16 that they were vital, just like in the Norwegian  
17 Fisheries case which was cited, that they were a vital  
18 element for the survival of that contiguous community  
19 as our expert witness called it, a marine resource  
20 region. And, that is how one could, and indeed in this  
21 case did acquire ancient title by occupation over seabed  
22 area.

23 Finally, I would add that what you also have  
24 to look to is the domestic law at that time. We have  
25 pointed out, and we return now to the evidentiary issue.



1           The Master said quite correctly, we could not  
2 have claimed any area as ancient title unless it  
3 conformed to the then prevailing domestic British law  
4 which delineated between inland waters and open sea  
5 based upon the fauces terra doctrine, which meant, can  
6 you see from headland to headland across the entrance to  
7 any body of water. If you could, the water therein was  
8 inland. If you couldn't, it was open sea.

9           QUESTION: This was a requirement for ancient  
10 title as well as for other kinds of title?

11           MR. HERRMANN: It is under these  
12 circumstances, Your Honor, as the Master, I think,  
13 correctly found. If we are claiming ancient title in a  
14 give century and we claim it originated in colonial  
15 times, then you must of course look, as I said, to  
16 international law and the domestic law at that time and  
17 see what would the then prevailing sovereign without  
18 dispute have looked to, to international law and his own  
19 domestic law, whether he can claim the waters or not.

20           The prevailing law of England at that time was  
21 that you could only claim it as inland waters if the  
22 eyesight test prevailed. Of course in a later case you  
23 could theoretically, although we're not claiming that  
24 here now, to answer your question, you could claim  
25 historic title after freedom of the seas came into

1 force, and say, we base it on the same theory, it is  
2 encloseable, but we are not doing that here.

3 That would be a claim of historic title  
4 ripening after the freedom of the seas came into force.  
5 We did claim that before the Special Master. We are no  
6 longer pressing that particular claim at this point in  
7 time.

8 We would turn, in connection therewith, to the  
9 crucial remaining issue before this Court, what is the  
10 proper standard of evidence. The Master was satisfied  
11 that Massachusetts to his satisfaction had shown all the  
12 elements of ancient title.

13 The only reason he could not recommend a  
14 decree in our favor was that at one point only he felt  
15 himself constrained by what he thought the implications  
16 of prior decisions of this Court were as to, quote,  
17 "clear beyond doubt evidence." He said that he felt, if  
18 it was a case of first impression, he felt that was not  
19 an appropriate standard for proceedings of this sort.

20 Here you have the situation, Your Honors,  
21 where an experienced federal trial judge found after a  
22 lengthy trial that he was satisfied that in colonial  
23 times you could indeed see across the eastern entrance  
24 of Nantucket Sound, which is all the case boils down  
25 to. He felt that by what he considered the implications

1 of two prior cases, the second California case and the  
2 second Louisiana case, he felt that he could not on that  
3 ground, because that one element was not, quote,  
4 "totally clear beyond doubt," although he was satisfied,  
5 he could not recommend a finding in our favor.

6 The United States has tried to divert a  
7 discussion of that, what we think is the only remaining  
8 issue, by getting into this lapse question. Well, the  
9 Master never found lapse as to any perfected ancient  
10 title, nor -- it's not easy to see why he should have  
11 because the matter wasn't raised before him nor was it  
12 briefed to him.

13 All that was discussed by the Master was  
14 whether an historic title had ripened, whether  
15 acquisition of an historic title had later ripened.  
16 Nobody argued or briefed to the Master the question, did  
17 an already perfected Colonial, ancient title once  
18 acquired, lapse. In other words, the issue is retention  
19 vis-a-vis acquisition and the United States, it seems to  
20 me, commingles this.

21 They say you don't have to reach the  
22 evidentiary issue, and I submit that that is what should  
23 be reached because that's the only remaining element in  
24 the case. The United States -- let me just finish up on  
25 the evidentiary issue by saying that we've come a long

1 way since the briefing began. If the Court will look at  
2 page 25 of the Government's reply brief, there they have  
3 expressly conceded that such a high -- so-called higher  
4 standard of evidence need only be imposed where the  
5 Government has disclaimed.

6 They have now given up their previous argument  
7 that it is of necessity because of the requirements of  
8 international law and domestic law. So, what the  
9 Government is really saying, and I ask the Court to  
10 ponder the implications, they can come into a case even  
11 with a disclaimer which the Court would otherwise hold  
12 to be non-dispositive because it is filed on the even of  
13 or during litigation, and they're really saying in  
14 effect, they can come into court, push a button, and by  
15 pushing a button impose a higher standard of proof on  
16 the claiming state, even though it is a disclaimer made  
17 during litigation.

18 I cannot -- I do not think that can be  
19 reconciled with the previous decisions of this Court.

20 THE CHIEF JUSTICE: Mr. Claiborne.

21 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

22 ON BEHALF OF THE DEFENDANT

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

25 If I may turn from legal theory to the



1 geographical and historical facts appurtenant to  
2 Nantucket Sound for a moment, it may be helpful to the  
3 Court. I invite the Court first to look at the chart  
4 which is appended to the Massachusetts exception, simply  
5 to have a visual picture of the area we're talking about  
6 in a more precise way.

7           It seems to us that when you look at that map  
8 and you look at Nantucket Island, what you see is an  
9 island in the sea, not a bay, not an extra mouth to an  
10 inlet, but an island around which there is a strait.  
11 There's a strait from the eastern entrance to Nantucket  
12 Sound between Vineyard and Nantucket Sound, and there's  
13 another strait which is indeed a well marked navigation  
14 channel going from the eastern entrance to Nantucket  
15 Sound through the Sound and out Vineyard Sound, a deep,  
16 marked navigation channel from one open sea to another  
17 open sea.

18           Now, I suggest that that configuration has  
19 never been found to constitute inland water by ancient  
20 title, by historic title, by juridic title, at any time  
21 except only during the exaggerated period of the Stuarts  
22 which everyone agrees cannot be relied on in this or any  
23 other case, because repudiated by England itself long  
24 before the American revolution, or alternatively, in  
25 modern times under the straight base line system used in

1 the Norwegian case and condoned by the International  
2 Convention under Article 4, but a procedure, a method  
3 which the United States has at all times declined to  
4 follow and which this Court has determined is a matter  
5 for the Government of the United States to determine and  
6 not for the Court to review.

7 This configuration is wholly unlike all the  
8 examples that are mentioned in the briefs and in the  
9 report in this case. It is not like Delaware Bay or  
10 Chesapeake Bay or Boston Harbor or Buzzards Bay or Long  
11 Island Sound, all of which are clear, deep indentations  
12 into the mainland, nor is it like Mississippi Sound And  
13 Chandelier Sound which this Court has characterized as  
14 cul-de-sacs, dead ends, not a straight in and out.

15 Despite the fact that this case has been  
16 proceeding at its usual slow pace for many years,  
17 despite the fact that this question of whether a  
18 configuration of this kind can qualify as inland,  
19 Massachusetts has to this day never suggested that  
20 English law or American law has at any time  
21 characterized such a like body of water elsewhere as  
22 inland. That seems to us a rather telling failure.

23 Now, turning from geography to history, we are  
24 told that the Sound was discovered in 1602 and yet from  
25 that day until 1971 there was not any specific claim to

1 this Sound by anyone in the government in those three  
2 and a half and more centuries. No agency of government,  
3 legislative, executive or judicial, whether of the Crown  
4 of England, the Colony of Massachusetts, the independent  
5 Commonwealth, the State of the Union or the United  
6 States in all that time mentions or claims the interior  
7 center of Nantucket Sound as inland water.

8 The only suggestion that there might be such a  
9 claim is with respect to a 1932 statute which prohibits  
10 trolling within the Sound. We do not read that statute  
11 as claiming jurisdiction over the center of the Sound  
12 because it refers to a three-mile belt in one of its  
13 provisions. It seems to us, quite logically to me,  
14 we're claiming jurisdiction over so much of the Sound as  
15 is within three miles of any shore.

16 But at all events, even if we misread the  
17 statute, this Court has squarely held in the Alaska case  
18 reported in Volume 422 of the United States reports,  
19 that a claim to fishery regulation is not sufficient to  
20 establish an accession of sovereignty as inland water,  
21 and therefore fishery regulation would not suffice.

22 Now, in the hundreds of documents introduced  
23 in this case, spanning more than three centuries, we  
24 don't have a single one that reflects an expressed  
25 accession of of jurisdiction as inland water over the

1 center of the Sound.

2 QUESTION: Well, Mr. Claiborne, it seems to me  
3 that what Massachusetts is claiming is something under a  
4 so-called doctrine of ancient title on the theory that  
5 under that doctrine it in fact acquired title in  
6 colonial times regardless of what its claims were since.

7 Do you concede that there is such a doctrine  
8 as ancient title which we would follow if the elements  
9 are established?

10 MR. CLAIBORNE: Justice O'Connor, I have to say  
11 yes and no.

12 QUESTION: That's not very helpful.

13 MR. CLAIBORNE: Well, I will attempt to  
14 explain. Yes, in that we recognize that there can  
15 indeed be a perfected legal title obtained at a time  
16 when the law was different, which may survive as a  
17 historic waters claim through the intervening change of  
18 law, provided that first the establishment of that old  
19 title is clear and secondly that it was continually  
20 asserted rather than clearly abandoned, as was the case  
21 here, in the intervening time.

22 And, if that is what is meant by ancient  
23 title, we have no quarrel. To the extent that  
24 Massachusetts asserts that there is some doctrine which  
25 requires less occupation, less accession of sovereignty,



1 and which is almost never found to have lapsed or been  
2 abandoned despite very clear, unequivocal statements of  
3 repudiation, we deny that such a doctrine exists and  
4 secondly that it has ever been recognized by this Court.

5 I may say that Manchester versus Massachusetts  
6 sees no such example. The Court there found that with  
7 respect to Buzzards Bay where the opening is less than  
8 six miles, it met all the requirements of then  
9 international law and national law.

10 What is more, it was expressly closed in that  
11 way by Massachusetts legislative declaration of 1881  
12 which had been implemented by a map introduced in the  
13 case in this Court which showed the closure, nothing  
14 whatever reliance on ancient times.

15 QUESTION: All right, but if Massachusetts is  
16 correct that it acquired ancient title at one time, and  
17 if you are correct that it was abandoned later by  
18 Massachusetts at a time when the United States was not  
19 claiming it, does that mean that the title then passed  
20 to international usage and the boundaries of the United  
21 States were altered, at the time of any abandonment?

22 MR. CIAIBORNE: Justice O'Connor, if one  
23 assumes, contrary to our argument that there ever was a  
24 perfected claim or perfected ancient title, and that  
25 that title survived until -- or through the period when

1 the United States became a sovereign nation, then what  
2 Your Honor suggests could indeed be the result, but it  
3 was open to the United States to reclaim that area as it  
4 did with respect to the resources of the seabed in the  
5 Truman Proclamation of 1945, and as it has with respect  
6 to fisheries in other legislation, and as it could with  
7 respect to all jurisdiction by adopting a different  
8 limit than the three-mile limit as it is free to do, or  
9 by using a straight base line method which as a matter  
10 of international law it is free to do.

11 So, there is no difficulty in the fact that  
12 the disclaimer by Massachusetts might have for a period,  
13 subject to the United States' ability to repair it,  
14 momentarily shrink the boundaries of the United States.  
15 But I must confess that we do not concede that such  
16 ancient title ever was perfected and it's all very well  
17 to say that this area was discovered in 1603 but beyond  
18 that, Massachusetts has shown nothing by way of a paper  
19 -- in colonial times or since, nor has it shown any  
20 governmental acts which would amount to effective  
21 occupation of the area.

22 The only evidence in the case with respect to  
23 any activity here, there's no arrest, there's no warning  
24 of vessels, there's no marking of the area, absolutely  
25 nothing by any government. All we have is a quite

1 natural, usual, traditional exploitation of the  
2 resources of the Sound by the people who live on the  
3 coast.

4 That happens on every coast, and here it  
5 happened on the ocean side of the Nantucket Island just  
6 as it did on the inland side, that is, on the northern  
7 side. It proves nothing, but the people who live there  
8 naturally took advantage of the whaling, the sailmaking,  
9 the fishing and the shellfish life accessible to them  
10 from where they lived. That is no governmental  
11 assertion of --

12 QUESTION: Mr. Claiborne, he cited a couple of  
13 cases that said, as I understood him, sedentary fishing  
14 can constitute occupation, or something to that effect.  
15 Are there such cases?

16 MR. CLAIBORNE: There is one such instance  
17 involving, as Mr. Herrmann correctly said, the fisheries  
18 off Ceylon in which according to Judge Jessup, that  
19 particular area has been consistently since a period  
20 B.C., been exploited by the people of Ceylon at a time  
21 when the difference between governmental and  
22 non-governmental activity may have been less clear than  
23 it is today.

24 But, that is a very ancient title, immemorial  
25 usage, and continuous one, very much to be contrasted

1 with here. No precise claim, even on paper, and no  
2 activity whatever by anybody except the local  
3 inhabitants who quite naturally took advantage of what  
4 is available to them.

5 QUESTION: Mr. Claiborne, did you file  
6 exceptions to the Special Master's report?

7 MR. CLAIBORNE: We did not, Your Honor.

8 QUESTION: It sounds to me like your argument  
9 so far is in the teeth of some of the things the Special  
10 Master seemed to say.

11 MR. CLAIBORNE: Well, again, Your Honor, I  
12 must say yes and no. It is --

13 QUESTION: He said that Massachusetts wins  
14 unless the clear and convincing evidence standard  
15 applies.

16 MR. CLAIBORNE: We don't read it that way,  
17 Your Honor. We read Judge Hoffman to have said that  
18 Massachusetts has established an ancient title, not  
19 necessarily one still good, if the clear beyond doubt  
20 standard does not apply. But then, we read his  
21 evaluation of the evidence which is the title of the  
22 chapter, Evaluation of the Massachusetts Claim,  
23 beginning at page 61.

24 When you get to page 64 and the Judge focuses  
25 on Nantucket Sound in particular he quite clearly in our



1 view finds the facts to be that Massachusetts has failed  
2 to prove the existence of an actual intent to establish  
3 jurisdiction over Nantucket Sound, never mind by what  
4 title.

5 "It is therefore" -- I'm reading from page 64,  
6 just below the middle of the page -- "It is therefore  
7 the Special Master's opinion that the Commonwealth has  
8 failed to establish that either the United States or  
9 Massachusetts ever asserted jurisdiction over the sound  
10 until Massachusetts did so relatively recently.

11 Turning to the next page, on page 65 of the  
12 report, the Master says, "It is unlikely that  
13 post-Colonial Massachusetts ever claimed the interior of  
14 Nantucket Sound. Further, nor has Massachusetts  
15 presented any other evidence that it had laid claim to  
16 the Sound during the first half of the 19th Century."

17 And continuing, "During the second half of the  
18 century Massachusetts abandoned the inter fauces terrae  
19 doctrine to delimit its seaward boundaries, substituting  
20 a strict distance test. Under this test, Massachusetts  
21 claimed only those arms of the sea whose mouths were six  
22 nautical miles or less in width. Nantucket Sound  
23 clearly does not meet this criterion."

24 QUESTION: Isn't this all about historic title?

25 MR. CLAIBORNE: I think not, Your Honor.

1 First, the scheme of the report was such that this  
2 entire section is the conclusion of everything that goes  
3 before it. This is Section D, beginning at page 61,  
4 Evaluation of the Massachusetts Claim.

5 This follows, after we've had in the previous  
6 section a detail of the evidence.

7 QUESTION: What about the conclusion on page  
8 -- the carry-over sentence at 65 and 66?

9 MR. CLAIBORNE: "The Special Master therefore  
10 concludes that Massachusetts has failed to meet its  
11 burden of establishing historic title to Nantucket  
12 Sound."

13 QUESTION: Where does it ever -- where does  
14 this section mention ancient title?

15 MR. CLAIBORNE: It doesn't, Your Honor, but it  
16 mentions the evidence which would be common to both, and  
17 it seems to us, he had used the expression "historic  
18 title" to mean a claim under Article 76 of the  
19 Convention but there is no getting round the express and  
20 unequivocal finding that Massachusetts has presented no  
21 evidence of an assertion of sovereignty, and on the  
22 contrary that its own evidence proves that it disclaimed  
23 --

24 QUESTION: Maybe the only evidence it has is  
25 that there was a title to which it fell heir to, and I

1 know you dispute that but do you think it then has to  
2 assert title and continuously assert title?

3 MR. CLAIBORNE: Well, the title -- even  
4 according to the juridical regime --I may say, on which  
5 the Commonwealth appears to clearly rely, the elements  
6 of ancient title are that there be a discovery of an  
7 area which is not yet appropriated for the general  
8 community by the doctrine of open seas, that there be  
9 effective occupation of that area, not merely a  
10 supposition that some charter may or may not by  
11 generally talking about waters --

12 QUESTION: Well, how do you occupy Nantucket  
13 Sound?

14 MR. CLAIBORNE: Well, in the same way that you  
15 would to prove historic title, by marking it, by  
16 legislating about it, by deterring or preventing foreign  
17 vessels from entering it, and by exploiting, by license  
18 from the government, the resources of the area.

19 None of that, nothing approaching that, is  
20 shown here. And finally, the juridical regime says that  
21 ancient title must be fortified by long usage, an  
22 element which has not been mentioned but which is  
23 stated. And so it comes to this, that ancient title is  
24 different from historic title only in that it is not  
25 originally a title founded on prescription adverse to the

1 claims of the general community, but it must be  
2 established in some way that is notorious to the world  
3 community and it must be preserved by usage, and  
4 certainly cannot survive the express disclaimer which  
5 there is no getting around Massachusetts engaged in,  
6 first in 1849 when it declared that henceforward its  
7 boundaries would be those bodies of water as to which a  
8 closure no more than six miles was available.

9 That does meet the test in Nantucket Sound  
10 where the eastern closure is over nine miles in width.

11 QUESTION: May I interrupt you just for a  
12 moment. You are referring to the two different parts of  
13 the Master's report, which I must confess I am a little  
14 confused by.

15 Are you in effect arguing that the burden of  
16 proof issue that your opponent relies on is really an  
17 alternative ground for decision, that in the early part  
18 of the opinion you are saying that the burden of proof  
19 can resolve the question of whether the doctrine of  
20 inter fauces terrae applies, and he falls short because  
21 it's not clear beyond a reasonable doubt, but then later  
22 on 64 and 65 he's saying that even if the doctrine were  
23 to apply it still fails because they didn't assert  
24 jurisdiction?

25 MR. CLAIBORNE: Or because it lacks. And we



1 didn't invent the word "lacks." It is the Master who  
2 says, and this is -- perhaps I should have answered  
3 Justice White in this way, the bottom of page 65, it  
4 seems to me, does refer to the colonial title.

5 It says, the last sentence, last full sentence  
6 on that page, "Therefore, whatever rights it may have  
7 had over Nantucket Sound during the Colonial period."  
8 Now, that's got to be a reference to the so-called  
9 ancient title, "lapsed until the Commonwealth's attempt  
10 to resuscitate" --

11 QUESTION: That would make a whole lot of  
12 sense with the final sentence of the paragraph.

13 MR. CLAIBORNE: Yes, Your Honor. The  
14 expression "historic title," after all, is very close to  
15 the "historic waters" which is the term this Court and  
16 the International Convention have both used. And of  
17 course an ancient title is a historic title. It's one  
18 based on history.

19 QUESTION: Mr. Claiborne, if you look at page  
20 51 of the Master's report, at the end of the paragraph,  
21 the one over paragraph at the top, the Master says,  
22 "Massachusetts can establish an ancient title to  
23 Nantucket Sound only if the Supreme Court holds that the  
24 clear beyond doubt standard is inappropriate in this  
25 proceeding."

1           Then he starts his Section 2, The History of  
2 Historical Geography, which begins with the explanation  
3 that as an independent basis for its claim Massachusetts  
4 argues that even if that title didn't pass under the  
5 Royal Charters or as a result of the doctrine of inter  
6 fauces terra, Massachusetts nevertheless has title by  
7 virtue of history and usage.

8           So, I concluded, frankly, in reading his  
9 report that the language back on page 65 was a  
10 resolution of this historical claim of continuous  
11 occupation and that he had dealt with the ancient title  
12 claim in the language that I read to you in the middle  
13 of page 51.

14           MR. CLAIBORNE: Justice O'Connor, I must  
15 confess that the report seems to us, as to others, less  
16 than absolutely clear. I think the only way you can  
17 reconcile it is to read the passage which Your Honor  
18 referred to on page 51 as meaning that the perfection of  
19 the ancient title has not been shown if the clear beyond  
20 doubt standard is applicable without prejudice to the  
21 second question, whether that title, if effected,  
22 survived.

23           And, that second question is dealt with under  
24 the general heading, in subpart D, I think, repeating,  
25 is not a discrete discussion of historic title. It's a

1 genuine discussion of the entire Massachusetts claim.

2 It doesn't say Evaluation of the Massachusetts  
3 Historic Claim, but the whole of it.

4 QUESTION: Mr. Claiborne, under D-1, Vineyard  
5 Sound, the first sentence says, he concludes that there  
6 is historic title to that. Then he goes through and  
7 discusses why they have historic title, and then  
8 Nantucket Sound, it talks about historic title.

9 MR. CLAIBORNE: However one reads the Master's  
10 report, it does seem to us that the Master has made a  
11 finding, on page 65, that whatever rights over Nantucket  
12 Sound accrued during the Colonial period, which he  
13 suggests were none but whatever they might have been,  
14 have long since lapsed by renunciation.

15 QUESTION: Well, that assumes that --

16 MR. CLAIBORNE: That finding may in the  
17 Master's mind not be relevant to ancient title. We say,  
18 whatever he might have thought about that, his finding  
19 is a matter of fact.

20 QUESTION: His finding is, but that -- you  
21 want to say that the lapse idea applies to ancient title  
22 as well as to historic title?

23 MR. CLAIBORNE: It's professed by -- it's  
24 conceded by Massachusetts that ancient title can be  
25 lost, and since ancient title requires to be fortified

1 by long usage, it must follow that it is lost by  
2 non-usage and all the more so by express disclaimer.

3 QUESTION: If you read page 51 as the end of  
4 the discussion of ancient title, it's a strange posture  
5 to leave the case in if the Master thought that ancient  
6 title had lapsed. It wouldn't make any difference what  
7 standard of proof there was.

8 MR. CLAIBORNE: Well, one can argue that the  
9 rest of the report is superfluous if Massachusetts has  
10 proved ancient title.

11 QUESTION: You are going to argue the standard  
12 of proof?

13 MR. CLAIBORNE: Well, with respect to the  
14 standard of proof, we submit that this Court has very  
15 clearly, and that its Masters have followed what seemed  
16 to them the clear lead of the Court, and that the Court  
17 has approved the Masters' report, to the effect that  
18 when the United States in its sovereign decision  
19 disclaims an area, never mind when it disclaims it, it  
20 is going to be ineffective if it comes too late in the  
21 sense that it's not dispositive, but it at least has  
22 this effect, so the Court has said, which is to require  
23 the State to prove that its historic claim, and that  
24 should apply whether it's an ancient title or a  
25 so-called historic title, is quite clear and that it is



1 therefore quite wrong and unfair for the United States  
2 to come in so late and attempt to defeat it.

3 And that much is due to the decision that the  
4 United States, to define its borders in a certain way.  
5 It seems to us that, as it did to the Master here, that  
6 this Court has quite clearly fixed that standard when  
7 there is a disclaimer, and here there is a disclaimer,  
8 no question about the fact that the United States is and  
9 has disclaimed title to Nantucket Sound or to the center  
10 of it.

11 That disclaimer may or may not be belated, but  
12 it does at least require that the states proof be at a  
13 higher standard, and that is not an extraordinary  
14 proposition. Indeed, what is extraordinary is that the  
15 United States isn't free to fix its boundaries like  
16 every other nation. It's only the oddity of our federal  
17 system, nothing to do with international law, and one  
18 can't look to international law for this, that permits a  
19 state to claim adversely to the ---

20 QUESTION: You are saying you concede that the  
21 State may do that if it is proved by clear and  
22 convincing evidence that it had -- or beyond that  
23 evidence, that it had ancient title?

24 MR. CLAIBORNE: And indeed, that we don't  
25 dispute and we must concede that the Court has -- but a

1 standard seems to us as we explain in the last section  
2 of our brief, to be that clear.

3 QUESTION: Was it urged by the United States  
4 before the Special Master that the notion of lapse did  
5 apply to ancient title?

6 MR. CLAIBORNE: Your Honor, we probably didn't  
7 use the word "lapse," but we very clearly pointed out  
8 and argued at great length that Massachusetts had itself  
9 disclaimed through the adoption judicially of a test  
10 that wouldn't close Nantucket Sound, and mainly through  
11 the legislative --

12 QUESTION: What did the Master do with that  
13 claim?

14 What did -

15 MR. CLAIBORNE: He seems to us, on pages 64  
16 and 65, to have agreed with us entirely that the --

17 QUESTION: Why did he leave us with this  
18 oracular statement on page 51?

19 MR. CLAIBORNE: I can only repeat that it  
20 seems to us that what occurs on page 51 is a step in the  
21 process and not a final conclusion with respect to the  
22 survival of ancient title.

23 It's a statement with respect to the vesting  
24 of title back in the Colonial days, and then the  
25 ultimate conclusion is, it doesn't matter whether it did

1 or didn't because in any event it has been disclaimed.

2 We also pointed out that the United States had  
3 repudiated or contested or denied any title to Nantucket  
4 Sound as the Master himself finds on pages 64 and 65 on  
5 which he says, "Neither the United States nor the State  
6 of Massachusetts" -- never mind the colony of  
7 Massachusetts -- "at any time appears to have claimed  
8 the center of Nantucket Sound."

9 He says that as a matter of fact, and whether  
10 he's thinking in terms of ancient title or not, that  
11 finding, it seems to us, is beyond doubt and indeed it's  
12 stated unequivocally. It's not stated as an issue.

13 QUESTION: Mr. Claiborne, I'm curious about  
14 this clear beyond doubt standard. Do you feel that's  
15 more stringent than the beyond a reasonable doubt  
16 standard employed in a criminal case?

17 MR. CLAIBORNE: I wouldn't have thought so.

18 QUESTION: You would not?

19 MR. CLAIBORNE: I would not.

20 THE CHIEF JUSTICE: Anything further, Mr.  
21 Herrmann?

22 MR. HERRMANN: Yes, Mr. Chief Justice.

23 THE CHIEF JUSTICE: You have four minutes  
24 remaining.

25 MR. HERRMANN: Thank you, Mr. Chief Justice.

1 ORAL ARGUMENT OF HENRY HERRMANN, ESQ.

2 ON BEHALF OF THE PLAINTIFF -- REBUTTAL

3 MR. HERRMANN: I would like to say about the  
4 question of a so-called dispositive United States  
5 disclaimer, does it really matter if one terms a  
6 litigative disclaimer, as I call it, a disclaimer made  
7 either on the eve or during litigation to be  
8 dispositive, or whether the United States can merely  
9 thereby, like dialing an air conditioning, ratchet up  
10 the level of proof needed and thereby dispose of a claim  
11 which, as in this particular instance, the finder of  
12 fact felt had been satisfactorily proven.

13 It seems to me as a functional equivalent --

14 QUESTION: You're just saying it must be --  
15 that's unfair, that's about your submission, that would  
16 just be unfair?

17 MR. HERRMANN: No, Justice White. I don't  
18 think --

19 QUESTION: Don't you think the United States  
20 has the power to disclaim it at that point, in fact it  
21 has the power at any other time?

22 MR. HERRMANN: It has the power to disclaim,  
23 but it seems to me, Your Honor, that the issue is what  
24 effects this Court will give to an exercise of such  
25 power, and it seems to me that the prior decisions of



1 this Court and particularly in the second Louisiana  
2 case, page 77, this Court has made it clear that it and  
3 only it will decide in the individual instance what  
4 effect to give to this claim.

5 QUESTION: What would you say if the  
6 disclaimer had been ten years before this case began?  
7 What would you say about your standard of proof?

8 MR. HERRMANN: If the disclaimer had been  
9 unequivocal, clearly communicated to foreign nations,  
10 and had preceded the outset of the litigation by a full  
11 decade, I would say we would have a serious problem,  
12 Your Honor.

13 QUESTION: Well, what do you mean by that?

14 MR. HERRMANN: By that I mean --

15 QUESTION: Do you mean, the beyond doubt  
16 standard applies?

17 MR. HERRMANN: No, because I don't think the  
18 Court meant, if you look at the Louisiana decision, I  
19 don't think the Court meant to use the beyond doubt  
20 standard in such a fashion. I think as I respectfully  
21 read the Court's decision, it meant that it would use  
22 the "clear beyond doubt" standard to determine -- it was  
23 really analogous to a summary judgment situation.

24 I think the operative discussion is, what  
25 dispositive effect, if any, do you give to the

1 disclaimer as a matter of substantive law. If the  
2 disclaimer had been in the bona fide exercise of the  
3 foreign affairs powers of the United States, well  
4 predating the reservation of jurisdiction by this Court,  
5 then it might perhaps be fairly argued by the United  
6 States that it has now --

7 QUESTION: So, you think the Special Master  
8 read our cases completely inaccurately about the  
9 standard?

10 MR. HERRMANN: I think, Justice --

11 QUESTION: He relied on it. He said that, you  
12 haven't proved it beyond a reasonable doubt.

13 MR. HERRMANN: Well, he said -- I must submit  
14 that he was quite cautious in what he said. He said  
15 that if it were a case of first impression, he would  
16 agree with us. Secondly, he said, impliedly he felt  
17 constrained, but he certainly came as close as one can  
18 get to a -- and saying, take this to the full Court,  
19 this seems to me a judgment call.

20 I think the Master was really as cautious as a  
21 Special Master can be, not foreclosing that issue, and I  
22 think that to give -- again, and I must again point to  
23 the distinction between acquiring historic title and  
24 whether an ancient title prevails. As to acquiring  
25 historic title, if the title had not ripened yet at the

1 time the United States disclaims outside litigation,  
2 prior to litigation, then that might as an evidentiary  
3 matter fairly be said to prevent the ripening of a claim  
4 as an evidentiary matter under public international law,  
5 if the sovereign disclaims.

6 But as to ancient title, I think this Court  
7 has several times indicated it would look with  
8 considerable caution, considerable suspicion, at an  
9 attempt to retrench the territory of states already  
10 vested. So, if the ancient title as the Master found  
11 was already perfected, the question still remains, even  
12 if there had been according to your hypothetical,  
13 Justice White, a bona fide non-litigation related,  
14 non-litigation contemporaneous disclaimer by the United  
15 States, it would nevertheless not operate against an  
16 ancient title.

17 My time is up.

18 THE CHIEF JUSTICE: Thank you, gentlemen. The  
19 case is submitted.

20 (Whereupon, at 10:58 o'clock a.m., the case in  
21 the above entitled matter was submitted.)  
22  
23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 35 Orig. - UNITED STATES, Plaintiff V. MAINE, ET AL.

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BY Paul A. Richardson

(REPORTER)



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