

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NEW JERSEY, Plaintiff v. NEW YORK
CASE NO: 120 ORIG. c. |
PLACE: Washington, D.C.
DATE: Monday, January 12, 1998
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IN THE SUPREME COURT OF THE UNITED STATES

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NEW JERSEY, :

Plaintiff :

V. : No. 120 ORIG.

NEW YORK :

-----X

Washington, D.C.

Monday, January 12, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOSEPH L. YANNOTTI, ESQ., Assistant Attorney General of
New Jersey, Trenton, New Jersey; on behalf of
the Plaintiff.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae.

DANIEL SMIRLOCK, ESQ., Assistant Attorney General of New York, Albany, New York; on behalf of the Defendant.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 120 Original, New Jersey v. New York.

5 Mr. Yannotti.

6 ORAL ARGUMENT OF JOSEPH L. YANNOTTI

7 ON BEHALF OF THE PLAINTIFF

8 MR. YANNOTTI: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 In his final report the Special Master concluded
11 that New York's jurisdiction on Ellis Island was limited
12 to the island as it existed in April 1834, and New Jersey
13 is sovereign over the portions of the island created by
14 artificial filling of submerged lands in the years after
15 1834.

16 Although we take issue with the amount of
17 territory allocated to New York and with the recommended
18 boundary line of the Special Master, we would first like
19 to offer the Court our reasons why we believe the Special
20 Master's principal conclusion is legally sound and amply
21 supported by the record.

22 First, the Special Master correctly interpreted
23 the 1834 Compact between the States which fixed the
24 territorial limits and jurisdiction of New Jersey and New
25 York along their common boundary.

1 QUESTION: My only observation about that, and
2 it helps your case, I think, I was a little puzzled that
3 the Special Master did not pay more of a -- put more
4 weight on the Holmes' opinion in Central --

5 MR. YANNOTTI: Well, we certainly did place a
6 great deal of weight on the Holmes' opinion and we do
7 think --

8 QUESTION: The Special Master didn't seem to
9 think -- it seems to me it -- on the sovereignty issue
10 that if New York is right we have to overrule that.

11 MR. YANNOTTI: Well, they certainly did make
12 that argument below before the Special Master. Some of
13 the amici have made that point. I did not see a direct
14 attack on the Holmes' opinion or request to see it
15 overruled in the Exceptions, so I'm not sure that's an
16 issue --

17 QUESTION: We would have to overrule it were New
18 York to have sovereignty, would we not?

19 MR. YANNOTTI: Yes, I think so, Your Honor. I
20 think that case squarely decides the question of
21 sovereignty over the submerged lands. What the Court
22 rejected in that case was an argument that all New Jersey
23 had under the Compact was a right of property under these
24 submerged lands.

25 QUESTION: Now, as to the meaning of the

1 jurisdiction that remains, Holmes' opinion is not quite
2 clear, and I think that probably needs further
3 elaboration.

4 MR. YANNOTTI: Under Article III?

5 QUESTION: Yes.

6 MR. YANNOTTI: Yes, well --

7 QUESTION: Well, or whether there is a
8 difference in Article III jurisdiction or Article II
9 jurisdiction is not clear from Central Railroad.

10 MR. YANNOTTI: Well, Justice -- Justice Holmes
11 indicated in the Central Railroad case that under Article
12 II, New York had retained its present jurisdiction of and
13 over Ellis Island, which he interpreted to mean was the
14 States intended to preserve the status quo ante, and the
15 status quo that existed in 1834 was a situation where
16 Ellis Island was on the New Jersey side of the boundary,
17 it was a 2-3/4 acres of fast land to mean high water, it
18 was owned by the Federal Government, who had acquired it
19 in 1808 from the State of New York, and it was utilized as
20 a military fort.

21 New York, in fact, had ceded jurisdiction to the
22 Federal Government in those conveyances, and retained only
23 the right to serve civil and criminal process, so that was
24 the jurisdiction that was retained by the State of New
25 York. That was the -- what we contend was the present

1 jurisdiction in 1834 when the agreement was made, and
2 moreover, our view is that the States recognized that the
3 island then in existence which was, as I said, 2-3/4
4 acres, was the Ellis Island that was being addressed by
5 the terms of that Compact, so I do --

6 QUESTION: Mr. Yannotti, at least as to the land
7 that was once submerged and has now been filled in, there
8 was a significant argument made that Holmes was wrong, at
9 least to the extent that he defined exclusive rights of
10 property to mean sovereignty.

11 MR. YANNOTTI: Well, I respectfully argue that
12 Holmes was not wrong, and that he reached the correct
13 conclusion. In fact, what he did in that opinion for
14 the -- for a unanimous Court was to base his judgment upon
15 the prior decision of the New York Court of Appeals of
16 1870, which had concluded essentially that the territorial
17 line was the principal and dominant purpose of this
18 agreement, that the State of New Jersey was sovereign on
19 its side of the boundaries --

20 QUESTION: Well, that part I understand, the
21 equation of boundary with sovereignty.

22 MR. YANNOTTI: Yes.

23 QUESTION: But Holmes also said something about
24 exclusive right of property.

25 MR. YANNOTTI: Yes.

1 QUESTION: And you know the three-way division
2 that was offered in some of the briefs, of the property
3 right and the public access right and the governing right.

4 MR. YANNOTTI: The argument was made that all
5 New Jersey had was the sovereign right of property, and he
6 found that that actually supported the notion that New
7 Jersey was sovereign in this territory, and he said that
8 the ownership of submerged land was indicative of the
9 division of sovereign territory and actually furthered and
10 supported the notion that this was a line not only of
11 territory but of jurisdiction and sovereignty, so I think
12 the -- what Justice Holmes said --

13 QUESTION: So property means jurisdiction and
14 exclusive jurisdiction doesn't mean exclusive
15 jurisdiction.

16 MR. YANNOTTI: Well --

17 QUESTION: Is -- would there have been a clearer
18 way to say that one of the States had governing
19 authority --

20 MR. YANNOTTI: Well, I think it --

21 QUESTION: -- than to use the phrase, exclusive
22 jurisdiction?

23 MR. YANNOTTI: The -- I think it's important to
24 focus also, not only on that but also on the notion
25 exclusive jurisdiction over the waters, and I think that

1 is the key element of that Article III, because New Jersey
2 had recognized that New York had exclusive jurisdiction,
3 but it was limited. It wasn't full sovereign governmental
4 authority. It was limited to control of the waters, and
5 that's how the New York Court of Appeals interpreted
6 Article III in 1870, to mean --

7 QUESTION: Well, it was control of the waters.
8 It also referred to the submerged lands.

9 MR. YANNOTTI: That's correct.

10 QUESTION: And isn't there a fair argument to be
11 made that when the submerged lands become in effect the
12 basis for filled land, in place of what had been water
13 subject to New York's jurisdiction, that that same
14 territory now newly created above the ground becomes
15 subject to the same exclusive jurisdiction?

16 MR. YANNOTTI: Well, our argument is that that
17 is not the case, and we rely in that regard upon, again,
18 that 1870 decision of the New York Court of Appeals, which
19 said that although there was in Article III a reference to
20 jurisdiction over the submerged lands, that was merely
21 subordinate to and in furtherance of the power over the
22 waters, and it was -- the New York Court of Appeals gave
23 it a very limited reading in that case, and in fact in the
24 1908 decision by Justice Holmes the Court specifically
25 upheld the taxation of submerged lands --

1 QUESTION: Yes, but how could it have no
2 meaning? That is, let's assume you're right. You're
3 right that -- I'm assuming -- that this is within the
4 sovereign -- your sovereign -- New Jersey has sovereignty.

5 MR. YANNOTTI: Yes.

6 QUESTION: Because of Article I. Still, isn't
7 there some kind of jurisdiction to do something --

8 MR. YANNOTTI: Our view of --

9 QUESTION: -- given by Article III, and is --
10 you want an injunction, which injunction says New York can
11 do nothing.

12 MR. YANNOTTI: Yes.

13 QUESTION: All right. How can it be that they
14 could do nothing when Article III says they have
15 jurisdiction over the land below the water and the water?
16 I mean, maybe that jurisdiction doesn't mean sovereignty.
17 Maybe it only means a few things, like just serve process
18 even, but doesn't it mean something?

19 MR. YANNOTTI: Well, again I think the -- we go
20 back to the decision of the New York Court of Appeals in
21 1870, and what the court said was that this was a
22 jurisdiction over navigation.

23 QUESTION: All right, so --

24 MR. YANNOTTI: And once the waters were filled
25 there was no basis upon which to exercise jurisdiction

1 over ships and vessels on the water, that the jurisdiction
2 essentially -- there was no basis upon which to exercise
3 that jurisdiction when the land was filled.

4 QUESTION: In other words, exclusive
5 jurisdiction doesn't mean that. It means that the only
6 thing you could deal with is a ship, so that it --

7 MR. YANNOTTI: It does mean exclusive related to
8 ships, related to navigation.

9 QUESTION: So suppose there is a ship, a ferry
10 boat tied up at the pier that now is in New Jersey's
11 sovereign territory next to that immigration house, all
12 right. Doesn't New York have jurisdiction over that?

13 MR. YANNOTTI: That's specifically addressed in
14 Article III, where New York's jurisdiction is recognized,
15 at least to the extent --

16 QUESTION: Fine. If New York has jurisdiction
17 over that, on your theory, how can you receive an
18 injunction, which is what you requested, saying that they
19 couldn't enforce their law at all?

20 MR. YANNOTTI: Well, I think -- again, my point
21 is that this is a jurisdiction as it relates to vessels,
22 and if they're tied to a port facility on the New Jersey
23 side that creates an entirely different situation than to
24 have filled land, because they cannot --

25 QUESTION: So what sort of injunction -- this is

1 what's confusing me. The injunction that you requested is
2 an injunction that says New York cannot enforce its laws
3 or assert its jurisdiction. Then once you say that there
4 is something at least they could do, even if it's just to
5 a boat that's tied up, then how could you be entitled to
6 that injunction?

7 MR. YANNOTTI: That is not -- again, the request
8 that we sought relates to exercise of jurisdiction on the
9 land. Not on the waters, not on boats who are still on
10 the waters that may very well be tied up on -- to a New
11 Jersey pier, or to a portion of land that is subject to
12 the jurisdiction of the State of New Jersey.

13 QUESTION: And I didn't find in the Special
14 Master's report a discussion of what exclusive
15 jurisdiction meant. I understood that he gives -- he
16 believes that New Jersey is sovereign, and I accept that,
17 so what are we to do to decide whether exclusive
18 jurisdiction means you can do zero, New York can still do
19 zero in respect to the submerged land?

20 MR. YANNOTTI: Well, again it relates to the --

21 QUESTION: Related to the land.

22 MR. YANNOTTI: It relates to the subject matter
23 of that jurisdiction and as it's been interpreted by the
24 courts, that jurisdiction relates to -- the subject matter
25 is navigation, pertains to vessels while they are on the

1 waters, and that is the -- that is the limit there of the
2 jurisdiction.

3 QUESTION: Well, the master touched that in part
4 at page 67, when he said interpreting exclusive
5 jurisdiction in Article Third to mean police or legal
6 jurisdiction as the only reading of Article III that
7 prevents such serious anomalies, but he -- and he -- but
8 he addressed it no further than that. Is that --

9 MR. YANNOTTI: Right. Well, I think this
10 specific argument that's now being offered with regard to
11 the -- some residuum of Article III jurisdiction over the
12 filled lands is not an issue that was really raised very
13 much by the State of New York. It's only come in now in
14 the context of the Exceptions, so the master did not
15 really -- it was not an argument that was pressed before
16 the Special Master.

17 QUESTION: Mr. Yannotti, I'm a little curious as
18 to why New Jersey did not make the argument which seems to
19 me available that the Compact only gives New York
20 exclusive jurisdiction over lands covered by the Hudson,
21 and these lands are not any more covered by the Hudson.
22 If you read that phrase as meaning covered from time to
23 time --

24 MR. YANNOTTI: Well, I think that essentially
25 what --

1 QUESTION: -- you'd be home free.

2 MR. YANNOTTI: Essentially what we have been
3 saying. You put it better than I did.

4 But I think the point is that once they are
5 covered, once they are filled, there is no -- there is
6 no -- nothing upon which to exercise that jurisdiction.
7 It is -- it is -- we made it --

8 QUESTION: I did not understand you as having
9 made that argument.

10 MR. YANNOTTI: Well, that has been our point,
11 and I do believe we have that in our brief, but it is our
12 argument that once the lands were filled, that there is no
13 basis upon which New York may exercise that jurisdiction
14 under Article III.

15 And let me add further with regard to these,
16 what we perceive to be sound interpretations of the
17 Compact that were reached by the New York court in 1870,
18 and also by the New Jersey Court of Errors and Appeals,
19 our highest court, these rulings, which were the basis
20 upon Justice Holmes' decision in 1908 have been accepted
21 by both States, and they have -- they have become over
22 time the -- a meeting of the minds between these two
23 States as to the meaning of this particular compact, and
24 we think for that reason, too, the Court should reaffirm
25 what Justice Holmes said in his -- in the 1908 decision

1 and apply that principle to the submerged lands here once
2 they are filled.

3 Let me --

4 QUESTION: One point on jurisdiction. Is it
5 your point that Article III exclusive jurisdiction is of
6 somewhat lower order than the word present jurisdiction in
7 Article II?

8 MR. YANNOTTI: Well, in order to determine the
9 present juris --

10 QUESTION: Because if so that's a strange use of
11 words, as Justice Scalia pointed out. Exclusive
12 jurisdiction seems to me broader.

13 MR. YANNOTTI: Well, present jurisdiction,
14 really in order to ascertain precisely the meaning of that
15 you have to go back to the situation as it existed in 1834
16 to determine what was the jurisdiction, and at that time
17 New York had virtually no jurisdiction. They had ceded
18 everything to the Federal Government, and the island had
19 been used in those days as a military fort for the
20 exclusive purposes of the Federal Government. It was a
21 Federal enclave, and New York had no presence there, and
22 New York exercised no jurisdiction there, and so therefore
23 that is the present jurisdiction.

24 And if you perceive that to be a lower, some
25 lesser element of jurisdiction, it certainly is supported

1 by the factual record, which shows that this was a Federal
2 enclave subject to Federal jurisdiction.

3 MR. YANNOTTI: The Special Master also
4 determined that New York had failed to establish its
5 affirmative defense of prescription and acquiescence, and
6 on this point, too, we think that the Special Master's
7 analysis was correct. We urge the Court to accept it.

8 Again, as I mentioned, this was an island that
9 was under the Federal Government's exclusive control.
10 This was true prior to the filling in 1890, which
11 commenced in 1890, and it was certainly true right on
12 through the period, the immigration period which New York
13 focuses on so strenuously. There was little opportunity
14 for either State to exercise jurisdiction in the Federal
15 enclave, and our view is that that being the case, New
16 York could not establish the requisite degree of
17 government dominion and control in order to place New
18 Jersey on notice that it was prescribing jurisdiction over
19 this territory.

20 What is more, New Jersey did not acquiesce in
21 the purported assertion of jurisdiction by the State of
22 New York, and as the record amply demonstrates, there were
23 extensive instances where New Jersey either took
24 prescriptive acts, or asserted claims to the territory
25 which were sufficient enough to establish New Jersey's

1 assertion that there was nonacquiescence in New York's
2 claims, so on this point, too, we think the Special Master
3 was correct.

4 QUESTION: Mr. Yannotti, are you going to talk
5 about the recommendation of the master that the actual
6 territorial boundary he proposes be adjusted to take care
7 of certain buildings and improvements?

8 MR. YANNOTTI: Yes, I do, Your Honor. I
9 think -- I understand from the Chief Deputy Clerk that the
10 Court does have the map in front of it today, and that map
11 illustrates, as does Appendix K in the Special Master's
12 report, it illustrates this proposed boundary to which
13 we've taken exception.

14 As you can see on that map, the original island
15 to the mean high water is indicated there, and that is not
16 the line of demarcation that has been recommended to the
17 Court by the Special Master. Our view is that the Court's
18 role --

19 QUESTION: What's North and what's South on this
20 map?

21 MR. YANNOTTI: North would be to the right, West
22 would be to the top of that map.

23 QUESTION: Thank you.

24 MR. YANNOTTI: And the Special Master, of
25 course, has completely departed from the line, the mean

1 high water line from 1834, which is what New Jersey
2 contends is the line which should be employed.

3 The Court has said that when the States make a
4 boundary agreement, and when such an agreement is approved
5 by Congress, that the -- an agreement of that sort is a
6 law, a Federal law, and the Court is without authority to
7 depart from the terms of that agreement, and regrettably
8 that is what the Special Master has recommended here.

9 We think that that is not an appropriate
10 exercise of the Court's power in this regard, that the
11 Court should abide by the boundary that was agreed to by
12 the States. If there are practical concerns that relate
13 to that in its implementation, that remains to the States,
14 with the oversight of Congress, to make whatever
15 adjustments might be deemed appropriate.

16 QUESTION: Do you think we have any choice at
17 all? You say we should.

18 MR. YANNOTTI: Well, I think --

19 QUESTION: Isn't it the case -- I thought your
20 position would be that we must.

21 MR. YANNOTTI: Yes, it is, Your Honor.

22 QUESTION: We must because of what?

23 MR. YANNOTTI: We must -- you must because that
24 is the essential role of the Court in this case, to define
25 the boundary. This is a case about boundaries, not about

1 buildings, and the Court's --

2 QUESTION: Well, isn't it also because we're
3 bound by an act of Congress?

4 MR. YANNOTTI: Yes, they said that. What the
5 Court said in Texas v. New Mexico was that once an act of
6 Congress, an agreement like this which is approved by
7 Congress, it becomes a Federal law, and the Court cannot
8 enter relief that is inconsistent with the terms of that
9 law, and for that reason we think that the Court is
10 limited in providing relief in this case to the boundary
11 that was agreed by the States, and cannot employ practical
12 considerations to write or create a boundary, what the
13 Court may perceive to be a better boundary.

14 That judgment's already been made by the States,
15 and recognized by Congress, and we think it ought to be
16 respected by the Court.

17 QUESTION: May I ask you once more to clarify --
18 I'm still fuzzy about it -- what authority New York --
19 what authority does New York have and enjoy -- those are
20 the words of Article Third -- as a result of that grant of
21 exclusive jurisdiction?

22 MR. YANNOTTI: It has jurisdiction -- a
23 navigational jurisdiction over the waters, and it would
24 pertain to vessels, ships, and passengers as they are on
25 those waters in New York Bay and the Hudson River in this

1 particular area.

2 QUESTION: So with respect to the ferry going
3 back and forth to Ellis Island, New York has control of
4 that, is that --

5 MR. YANNOTTI: Well, yes. So long as it's on
6 the waters. Then New York would have some measure of
7 jurisdiction over that, exclusive jurisdiction.

8 QUESTION: What's some measure?

9 MR. YANNOTTI: Exclusive jurisdiction.

10 QUESTION: Which sounds to me like only.

11 MR. YANNOTTI: Well, yes. We're not saying New
12 Jersey would have jurisdiction over it, but the exact
13 parameters of it, the extent to which they would exercise
14 control, that is not -- has not been elucidated in any
15 particular decision, but I'm not sure that the Court needs
16 to address the full extent of the jurisdiction of New York
17 while a ship is on the waters.

18 QUESTION: Oh, I assume they can exercise
19 control to the maximum extent that any State can ever
20 exercise controls.

21 MR. YANNOTTI: Within the subject matter
22 limitation.

23 QUESTION: What was the submerged land? What do
24 you think they can do, the exclusive jurisdiction over the
25 lands covered by said waters?

1 MR. YANNOTTI: It relates also to navigation.
2 For example, the case of State v. Babcock, which was an
3 early decision by the New Jersey trial court in 1852, what
4 happened in that case was there were vessels which were
5 sunk onto the underwater land, and the -- an action was
6 brought in New Jersey for criminal -- a criminal action to
7 prosecute that, and the Court held that that was within
8 the jurisdiction of the State of New York.

9 QUESTION: Thank you, Mr. Yannotti.

10 Mr. Minear, we'll hear from you.

11 ORAL ARGUMENT OF JEFFREY P. MINEAR

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

13 MR. MINEAR: Mr. Chief Justice, and may it
14 please the Court:

15 The master correctly rejected New York's
16 contention that Article Second of the Compact of 1834
17 gives New York sovereignty over the filled areas of Ellis
18 Island. The Compact was written against a back-drop of
19 common law rules respecting coastal boundaries, and those
20 rules recognized that avulsive changes such as the
21 addition of fill did not change the location of the
22 boundary. The Compact does not address fill, and it does
23 not purport to alter the common law rules. As a result,
24 the Compact should be interpreted as following the common
25 law and therefore granting and preserving New Jersey's

1 sovereignty over the filled areas.

2 Now, the master was also correct in rejecting
3 New York's contention that the filled portions of Ellis
4 Island became territory of New York through the doctrine
5 of prescription and acquiescence, and we think the single
6 most important consideration on this score is the fact
7 that the United States exercised dominant and virtually
8 exclusive jurisdiction over the island during the relevant
9 time period.

10 Now, the United States presence is important for
11 two reasons. First, the United States recognized New
12 Jersey's claim to the filled lands by purchasing that area
13 from New Jersey and by indicating in subsequent maps that
14 it was situated in New Jersey.

15 Second, the United States' dominant sovereign
16 presence prevented New York from taking those acts of
17 sovereignty that would have established its claim of
18 entitlement to the filled areas, and likewise would have
19 put New Jersey on notice of the fact that New York was
20 making such a claim.

21 Now, New York also makes a claim that New Jersey
22 is guilty of laches in this case, but that really adds
23 nothing to New York's claim in this case at all. As this
24 Court indicated in Illinois v. Kentucky, the equitable
25 defense of laches is subsumed within the doctrine of

1 prescription and acquiescence, so nothing is added by
2 making those types of charges here.

3 Now, although we agree with the Master's
4 determination of the historic boundary on Ellis Island, we
5 disagree with his ultimate remedy, which would reconfigure
6 the boundary based on considerations of practicality and
7 convenience. We think it's important to note at the
8 outset that New Jersey asked this Court to determine the
9 historic boundary line. It did not request that the Court
10 withdraw the boundary. Neither did New York make such a
11 request, as well.

12 But equally important, the master's proposal
13 would require this Court to exceed its historic role in
14 determining --

15 QUESTION: Do you think our position would be
16 altered if they had asked us to redraw the boundary?

17 MR. MINEAR: If they had, then I think you'd be
18 faced squarely with the question of whether you have that
19 power or not, and we think that --

20 QUESTION: Oh, I see. I see --

21 MR. MINEAR: -- you do not.

22 QUESTION: That's your point. I thought your
23 point was that if they had asked us, we would have the
24 power.

25 MR. MINEAR: No, that's not, but they have not

1 even asked in this case.

2 (Laughter.)

3 QUESTION: I agree with Justice -- what
4 difference does it make, Mr. Minear, at this point in the
5 litigation, if we were to say that we reject the master's
6 drawing of the boundary line because neither party ever
7 asked for it? I mean, presumably there could be
8 further -- some sort of an amendment to the complaint and
9 they could bring it up again.

10 MR. MINEAR: Well, that might be the -- that
11 might be the case, but we think that ultimately the Court
12 lacks the power to draw that boundary in any event --

13 QUESTION: Then it really doesn't make any
14 difference whether they asked for it or not.

15 MR. MINEAR: Ultimately it does not, but we do
16 think it's significant that neither party asked for it,
17 and this Court does not often grant relief that neither
18 party requested.

19 Now, in the past this Court has decided boundary
20 disputes based solely on its interpretation and
21 application of relevant law, and the Court explicitly
22 recognized that limitation in Washington v. Oregon, where
23 Washington had asked this Court to change a boundary based
24 on changed circumstances, and this Court refused to do so.
25 It refused to do so even though the adjustment would

1 implement an underlying policy that Congress might have
2 preferred.

3 As that case indicates, once this Court
4 determines the location of a boundary, its judicial role
5 is at an end.

6 QUESTION: But that case involved a variable
7 boundary, a boundary that could be here today and some
8 place else tomorrow, as opposed to what the Special Master
9 has done here. He has fixed or recommended fixing a
10 boundary that would not be variable.

11 MR. MINEAR: That's correct, but in this case
12 what we're saying is the historic boundary should be fixed
13 by the original contours of the island, because that's
14 what Congress and the parties intended by virtue of the
15 Compact of 1834.

16 QUESTION: I'm just suggesting that there's a
17 little space between the Washington v. Oregon case and
18 this one.

19 MR. MINEAR: That might be, but we think
20 ultimately the general principle at stake in Washington v.
21 Oregon does control here, which is that this Court should
22 respect the power of the political branches to determine
23 boundaries and draw those boundaries and, in fact, the
24 Constitution provides for adjustments of boundaries if
25 need be. There is a Compact Clause of the Constitution

1 that does allow the States to agree, with Congress'
2 consent, to the alteration of the boundary, and that's in
3 fact what actually happened in Washington v. Oregon. That
4 is how that dispute was ultimately settled, was by virtue
5 of a compact between the two States to alter the boundary.

6 QUESTION: How do you do this little -- maybe
7 it's just a minor -- I don't know. The problem's still
8 bothering me. In the first three paragraphs of the
9 Complaint for Relief, New Jersey wants boundaries drawn in
10 a certain way, and you basically agree.

11 MR. MINEAR: That's correct.

12 QUESTION: Assuming that right, what do we do
13 about paragraph 4, where they ask for an injunction that
14 no New York law at all can be enforced on the filled land?

15 MR. MINEAR: I think --

16 QUESTION: That's what was disturbing me because
17 of the concern that I had that exclusive jurisdiction
18 might mean something in respect to that filled land.

19 MR. MINEAR: I think that takes us back to the
20 suggestion that the United States made at the point when
21 the complaint was first filed in this case and the Court
22 asked for our views on this matter, and at that point we
23 explained that there might be a number of issues that can
24 only be resolved in a specific factual context, and so
25 those issues are simply not ripe at this point. We think

1 that --

2 QUESTION: So what are we supposed to do, then,
3 about that?

4 MR. MINEAR: We think all the Court can do at
5 this point, all the Court should do at this point is draw
6 the -- describe where the historic boundary is, and just
7 simply indicate that any other dispute that might arise
8 can be handled by the parties seeking further relief, as
9 the Court has decreed.

10 QUESTION: So we should not -- I think the
11 master, but I'm not certain, recommended that we accept
12 that paragraph 4, but we should not, in your opinion, do
13 that.

14 MR. MINEAR: As a --

15 QUESTION: I'm not sure about --

16 MR. MINEAR: My recollection might be -- might
17 not be completely accurate, but I'm not sure the master
18 specifically addressed that question, but he -- his
19 proposed decree does leave it open to the parties to seek
20 further relief at the foot of the decree, which is common
21 in the case of original actions and original decrees.

22 QUESTION: I can't think of an original action
23 since I've been here in which the issue is not who owns
24 the land but where one State is simply suing, claiming
25 that the other State has no jurisdiction over a particular

1 action over a particular thing. Usually that issue comes
2 up in the context of a private party defending against the
3 asserted jurisdiction by one State or the other.

4 MR. MINEAR: That is correct, and that's -- this
5 case is unusual insofar as the United States owns title to
6 all of the land in question here.

7 QUESTION: I understand, but you're saying we
8 don't have to decide that question now because the States
9 can come back later when there is more factual context to
10 it, and I'm not entirely sure they can come back later to
11 present us the question of which State has jurisdiction.
12 I --

13 MR. MINEAR: Well, it's likely that the issue
14 could arise between a State and a private party.

15 QUESTION: Right.

16 MR. MINEAR: But ultimately the issue would
17 ultimately return to this Court, and the Court would make
18 a resolution of law in that context. Whether there would
19 be a direct clash between two States over a particular
20 power of regulation is perhaps less likely. It would
21 actually require some situation where both States purport
22 to have the power to regulate over a particular area, and
23 I think that's unlikely to occur in this area simply
24 because the United States does have title and continues to
25 exercise dominant control.

1 QUESTION: So Mr. Minear, in view of that, what
2 practically is at stake? I mean, you said the United
3 States has been there since it was a fort, and now, and
4 it's continuing, so the States want the boundary set, but
5 what consequence does that have as long as the United
6 States owns and exercises jurisdiction over the island?

7 MR. MINEAR: Oh, there are some modest
8 consequences with regard to certain activity, such as the
9 collection of tax revenues and the like. Even if the
10 United States has exclusive jurisdiction over the entire
11 island, which is not something that we're asserting, but
12 even if it did, under the Buck Act the States can still
13 collect certain types of taxes from activities that take
14 place on the land.

15 QUESTION: For example?

16 MR. MINEAR: Sales taxes from concessions on the
17 island would be one example.

18 Both States would have no doubt claimed some
19 interest in the renovation of the southern portion of the
20 island here, but ultimately we think that Congress will
21 make those determinations, taking into account the
22 concerns and considerations of both States.

23 Much of what's at stake here, and I think we
24 indicated this at the time that we filed our initial
25 amicus brief in response to the complaint, is a concern

1 over a notion of the sovereign boundary as it relates to
2 the history of the two States, and the Court has allowed
3 this action to proceed, and we do think that's a
4 significant question, but its practical implications are
5 likely to be limited by --

6 QUESTION: Is the jurisdiction of the United
7 States limited to certain purposes? Could the United
8 States build an office building and rent it out to private
9 developers if the United States wanted to?

10 MR. MINEAR: Well, our perspective on the
11 jurisdiction on the island is as follows. The United
12 States has exclusive jurisdiction over the original
13 3 acres of the island that was granted by New York in
14 19 -- or 1800 as to -- with respect to --

15 QUESTION: Now, when you say exclusive, do you
16 mean exclusive jurisdiction as defined in Article III of
17 the Compact, or some other meaning of exclusive
18 jurisdiction?

19 MR. MINEAR: No. We mean the more conventional
20 description of --

21 QUESTION: Really exclusive jurisdiction.

22 (Laughter.)

23 MR. MINEAR: We actually are referring to the
24 exclusive jurisdiction as it's described in the
25 interdepartmental study on legislative jurisdiction in

1 1957, which deals with this issue quite comprehensively.

2 But as with respect to the filled lands the
3 United States has concurrent jurisdiction over those
4 areas.

5 Thank you.

6 QUESTION: Thank you, Mr. Minear.

7 Mr. Smirlock, we'll hear from you.

8 ORAL ARGUMENT OF DANIEL SMIRLOCK

9 ON BEHALF OF THE DEFENDANT

10 MR. SMIRLOCK: Mr. Chief Justice, and may it
11 please the Court:

12 The Compact of 1834 and the events thereafter
13 show that all of Ellis Island is in New York. No other
14 interpretation of that compact or of those events makes
15 sense. I'll redirect the Court's attention to Article II
16 of the Compact, which we think is the key here, and to
17 which very little attention was paid in the arguments of
18 the United States and New Jersey.

19 QUESTION: Where do we find that in the papers?

20 MR. SMIRLOCK: The appendix to our main brief,
21 our brief on exceptions, page 51 -- 52, I guess, is
22 where -- 51 is where Article Second appears.

23 Article II of that Compact says that Ellis
24 Island, without reservation, is in the State of New York,
25 and as New Jersey conceded in its 1829 complaint in this

1 Court during the negotiations for the Compact and again
2 conceded in this action, the present action --

3 QUESTION: Well, Article II doesn't say what you
4 just said in so many words, certainly.

5 MR. SMIRLOCK: No, but the parties both
6 interpret it that way as to, there is no dispute that the
7 grant to New York of jurisdiction over Ellis Island was in
8 the nature of a grant of sovereignty. The only question
9 in this case is whether that grant of jurisdiction extends
10 to the landfilled portions of Ellis Island as well as the
11 original portion. There is absolutely no dispute between
12 the parties as to the fact that --

13 QUESTION: Well --

14 MR. SMIRLOCK: -- jurisdiction in Article Second
15 of the Compact means sovereignty.

16 QUESTION: In other words, New Jersey did not
17 concede that prescriptive rights had given New York that
18 added jurisdiction.

19 MR. SMIRLOCK: I --

20 QUESTION: In other words, prescriptive rights
21 played no part in New York's jurisdiction over the
22 original island.

23 MR. SMIRLOCK: Correct, Your Honor. The Compact
24 itself, by its own force of the language of Article
25 Second, and New Jersey concedes this, gave New York rights

1 of sovereignty over Ellis Island as it existed in 1834.

2 QUESTION: Well, but it doesn't say sovereignty
3 in Article Second.

4 MR. SMIRLOCK: It doesn't, but in fact that's
5 how it's been interpreted, and that's -- and there is no
6 disagreement that that is what jurisdiction in that
7 article means, and the only question is whether that
8 jurisdiction which is of the nature of sovereignty is
9 sufficient to encompass the landfilled portions of the
10 island that got added after 1834.

11 QUESTION: I find it interesting that that
12 provision also uses the magic words, exclusive
13 jurisdiction, which later turn up in Article III, and
14 where they're used in Article Second they quite clearly
15 mean sovereignty, don't they?

16 MR. SMIRLOCK: I, too, find it very --

17 QUESTION: And shall also retain exclusive
18 jurisdiction over the other islands --

19 MR. SMIRLOCK: Yes, and the reason that there's
20 a distinction, by the way, between the retention of
21 jurisdiction as to Bedloe's and Ellis Island and the
22 exclusive jurisdiction without qualification over the
23 other islands of the bay, which is all the islands, is
24 that Bedloe's and Ellis have had a measure of jurisdiction
25 over them ceded to the United States, and the Special

1 Master made that clear.

2 We go a long way with the Special Master, or can
3 go a long way. We don't think that Article III -- that it
4 must be interpreted, the grant of exclusive jurisdiction
5 must be interpreted to be in the nature of sovereignty for
6 us to prevail.

7 We think that Article II does that of its own
8 force, and we think that's because the Compact intended
9 with respect to expansion of the Article II islands in the
10 harbor, what the Compact intended is clear from what was
11 happening in the harbor at the time, from the structure
12 and purpose of the Compact.

13 What was happening in the harbor at the time is
14 that landfill was in wide use. As the Special Master
15 found, and the parties have joined issue on this in their
16 briefs, Ellis Island actually had landfill on it at the
17 time of the Compact. There was also substantial landfill
18 on both --

19 QUESTION: May I interrupt you with just one
20 question that puzzles me. We can't ignore Article First,
21 either, can we?

22 MR. SMIRLOCK: No, you can't, Your Honor.

23 QUESTION: The boundary is in the middle of the
24 river, and now the portion of the river between the middle
25 and the shore of New Jersey has exclusive jurisdiction in

1 New York under Article Third, but how can that be -- how
2 can you say there's a boundary there if exclusive
3 jurisdiction in Article Third means what you say it does?

4 MR. SMIRLOCK: Let me try to parse the first
5 three articles of the Compact for you, because I think
6 their structure proves our point. Article I of the
7 Compact establishes the sovereign boundary between the
8 States as the midpoint of the bay, with, as it makes
9 clear, certain exceptions.

10 The first of those exceptions appears in
11 Article II, which gives the islands -- the islands which,
12 if they are on the western portion of the bay might under
13 Article First otherwise have fallen to New Jersey, gives
14 those islands without exception to New York.

15 QUESTION: Might -- would, under --

16 MR. SMIRLOCK: Would, without Article Second,
17 but as it's agreed, Article Second gave them to New York.

18 Article Third deals with the waters, the
19 underwater land, and the New Jersey shoreline. It gives
20 exclusive jurisdiction which, we argue, is in the nature
21 of police power, over navigation and commerce in the
22 harbor, and there's Compact history that supports this,
23 and the Special Master cites it, and so do we in our
24 brief, gives exclusive jurisdiction over both the lands
25 under water, which we would argue probably refers to

1 dumping, refers to ships on the ocean floor, and probably
2 refers to landfill, because landfill gets put on
3 subaqueous land.

4 QUESTION: Or anchoring buoys, I suppose --

5 MR. SMIRLOCK: Probably. That --

6 QUESTION: -- would be necessary if you're going
7 to maintain navigation.

8 MR. SMIRLOCK: That sort of thing, and it refers
9 both to underwater land and to the waters in the harbor.

10 Now, New Jersey says that exclusive jurisdiction
11 is extinguished as soon as there is more land, there was
12 new land put in the harbor, but that seems most
13 improbable. Jurisdiction over navigation and commerce
14 obviously entails jurisdiction over both the waters per se
15 and the lands in those waters, used as anchorage, used for
16 docking, used as storage areas, used for lighthouses, and
17 that's --

18 QUESTION: Well, New Jersey's -- as I understand
19 it, New Jersey's answer to that argument is that New York
20 through its courts, it already held that the whole point
21 of that is simply in effect a navigational commercial
22 jurisdiction, and when something was not on or moving over
23 the water, that was the end of it. What's your response
24 to that?

25 MR. SMIRLOCK: Conceding that arguendo -- that's

1 Article III -- we still have to deal, we think
2 dispositively, with Article II, because this case isn't
3 about Article III, really. It's about Article II's grant
4 to New York of those islands without reservation, islands
5 that already had -- or Ellis Island did -- already had
6 landfill on it.

7 So the question is, and really the only
8 question --

9 QUESTION: The landfill being the wharf on
10 the --

11 MR. SMIRLOCK: The pier was built on landfill,
12 yes. It was about a -- 4/10ths of an acre of landfill, as
13 the Special Master found, and what was going on in the
14 harbor at the time of the Compact was that landfill was
15 extensively in use on both sides of the harbor.

16 New Jersey, and Jersey City, and Hoboken, had
17 been extensively expanded by landfill, 750 acres of made
18 land, as it's called, on Manhattan Island by the time of
19 the Compact, the 4/10ths of an acre that I mentioned on
20 Ellis Island already.

21 Moreover, as a -- as the 1836 coastal survey map
22 that's part of the record very vividly shows, the water
23 around Ellis Island was extremely shallow. It was a foot
24 or two deep around Ellis Island at the most. Simply to
25 get out to 3 feet of water, which is the minimum necessary

1 for a barge to have gotten there at the time to supply the
2 fort, they had to build that pier, which is -- was between
3 60 and 100 feet out into the bay.

4 So the use of landfill not only was foreseeable
5 on Ellis Island, but had already occurred, so it certainly
6 was something that the compactors had in their mind, and
7 it is referred to in the Compact.

8 QUESTION: Now, you made this argument to the
9 Special Master, I take it.

10 MR. SMIRLOCK: Yes, Your Honor.

11 QUESTION: And he rejected it, in effect.

12 MR. SMIRLOCK: He did.

13 QUESTION: And wherein do you disagree with his
14 rejection?

15 MR. SMIRLOCK: I disagree with it because he
16 said the evidence of landfill -- that landfill was used --
17 well, he agreed, frankly, with us that landfill had been
18 added to Ellis Island. He agreed with it, but he made
19 nothing of that.

20 He disagreed with us -- he said the evidence
21 that landfill had been extensively used in the harbor was
22 ambiguous, and frankly, Your Honor, it is overwhelming.

23 QUESTION: So --

24 QUESTION: But that's not all he said. Didn't
25 he also say, if he were to take your position, then you

1 could extend forever, and we're not talking about just a
2 little filling in. We're talking about enlarging that
3 island nine times.

4 MR. SMIRLOCK: Well, there are two answers to
5 that. The island was tiny, and it's still tiny. It's
6 still less, even with the filling, than 4/100ths of a
7 square mile, but beyond that, we think the Compact
8 addresses that. There's a very elaborate system of checks
9 and balances in it.

10 First of all, just as a practical matter, if
11 Ellis Island, or any island in the bay, gets extended too
12 far in the direction of New Jersey, it's New Jersey, and
13 that's in the western direction. If it gets extended to
14 the east, true, it was very shallow around Ellis Island,
15 but very soon there was a sharp drop-off off the Jersey
16 Flats, which is what Ellis Island is on, into the main
17 ship channel, which was 20 feet deep, and which would have
18 been very, very hard to fill.

19 Moreover, there was, as I say, a system of
20 checks and balances. On the one hand, if New York had
21 wanted to fill any of those islands they would have had to
22 buy the subaqueous land from New Jersey, which had, under
23 Article III, an exclusive right of property in that
24 subaqueous land, and that's what we think it means. We
25 think property means exactly what --

1 QUESTION: Why do you say that if the island is
2 extended too far toward New Jersey it's New Jersey's?

3 MR. SMIRLOCK: Because they're islands. New
4 York was given the islands, and we think once they stop
5 being islands, they stop having Article II, Article Second
6 apply to them. If somehow or other they became annexed to
7 the New Jersey shore, we don't think that they would --

8 QUESTION: Well, but you -- so far as Ellis
9 Island, it's still an island until it touches the New
10 Jersey shore.

11 MR. SMIRLOCK: Very much so, and that's why we
12 still think it's New York.

13 QUESTION: So it could extend over, all the way,
14 right to the New Jersey shore, and even though it
15 ultimately connected, the boundary then would be the New
16 Jersey shore.

17 MR. SMIRLOCK: Yes. If it -- if somehow or
18 other --

19 QUESTION: That isn't much of a check and
20 balance.

21 (Laughter.)

22 MR. SMIRLOCK: Well, wait a second. I mean, one
23 check and balance, as I say, is that to fill anything we
24 would have had to obtain the right to fill on the
25 subaqueous land that belonged to --

1 QUESTION: But that's true of any kind of fill
2 you put in, anybody.

3 MR. SMIRLOCK: Well, that's true, but that was a
4 check that New Jersey could apply. No, we're not going to
5 sell you this land to fill on it.

6 QUESTION: Wait, couldn't New York condemn it?

7 MR. SMIRLOCK: Frankly, I don't see how New York
8 could condemn it.

9 QUESTION: Why?

10 MR. SMIRLOCK: Because the subaqueous land,
11 insofar as it was subaqueous --

12 QUESTION: You say New Jersey just had a
13 property right --

14 MR. SMIRLOCK: No, no, no. Under Article Third
15 it had a property right. We concur that under the First
16 Article, the article that establishes the boundary -- as I
17 thought I indicated, that territory was sovereign
18 territory of New Jersey, so New York -- it was not in New
19 York. Insofar as it was Ellis Island, or any island,
20 Bedloe's Island, any of the other islands in the bay,
21 those were New York, when it became above water and part
22 of those islands.

23 QUESTION: Mr. Smirlock, here's what troubles me
24 about your argument. We do not normally, when an island
25 is referred to in a compact of this sort, or in any deed,

1 interpret that to mean, the island as it may exist from
2 time to time.

3 I mean, that would have solved a whole lot of
4 our cases if that's the way we interpret a reference to an
5 island. All of these avulsion cases where we have to
6 decide, you know, where was the original island and so
7 forth, if we simply interpreted island to mean, as it may
8 exist from time to time, all those cases would go away.
9 Why should we give Ellis Island that strange meaning in
10 this case?

11 MR. SMIRLOCK: Well, the meaning isn't so
12 strange. You're interpreting, of course, a compact, which
13 is both a contract --

14 QUESTION: Right.

15 MR. SMIRLOCK: -- and a statute.

16 QUESTION: Right.

17 MR. SMIRLOCK: And this Compact gives Ellis
18 Island, including the landfill, as I'll explain, to New
19 York. Not only was landfill in wide use, so the
20 commissioners would have known about it --

21 QUESTION: It was the island then. I mean, it
22 might have been fill, but that was Ellis Island at that
23 time.

24 MR. SMIRLOCK: Well, here's the question, Your
25 Honor. Could the compactors actually, knowing that

1 landfill would probably be added to those islands, could
2 they really have imagined that as soon as 5 feet were
3 added to that pier, 5 feet of landfill added to Ellis
4 Island --

5 QUESTION: Whatever that may have provided then,
6 what Article Second clearly does -- it uses the word
7 present -- it seems to preserve the status quo, what was
8 at the time, and it's silent as to anything else, as far
9 as I can tell.

10 MR. SMIRLOCK: I think it preserves the status
11 quo as to the scope of New York's jurisdiction. That is,
12 Bedloe's and Ellis, as to which the phrase present
13 jurisdiction is used, had already had a measure of
14 jurisdiction ceded to the United States. I don't think it
15 can be taken as a spatial limitation, and the Special
16 Master agreed with that, Justice Ginsburg.

17 QUESTION: How about the common law rule that
18 avulsion doesn't change boundaries?

19 MR. SMIRLOCK: Avulsion doesn't apply here. The
20 common law avulsion rule, as this Court has recognized in
21 Shapleigh v. Mier, applies only when the -- it's a default
22 rule. It applies only when the Compact doesn't address --

23 QUESTION: Well, I'm not at all sure you're
24 correct that that is -- you're saying that something is
25 presumed to be accretion if you don't know how it

1 happened?

2 MR. SMIRLOCK: Well, no, not --

3 QUESTION: No. Then it's not a default rule.

4 MR. SMIRLOCK: I'm not saying that, Your Honor.
5 I'm not saying it's presumed to be accretion. I'm not
6 saying anything about avulsion. I'm saying that the
7 compact deals with Ellis Island.

8 QUESTION: Yes, but when you're talking about
9 what happens when an island is extended by landfill, and
10 as Justice Scalia points out in a number of cases we've
11 had to try to analyze where were the original boundaries
12 of the island, that sort of thing, certainly if this was a
13 compact that didn't specify, you would think that it would
14 follow the common law rule that an avulsion doesn't change
15 a boundary.

16 MR. SMIRLOCK: You would, except that I am
17 saying that it is a compact that does specify, that the
18 grant of Ellis Island in its entirety and without
19 exception to New York, coupled with the foreseeable use of
20 landfill and the great --

21 QUESTION: That's where -- the master disagreed
22 with you about the foreseeable use of landfill, so you're
23 arguing on a factual question.

24 MR. SMIRLOCK: Well, I am, but of course this
25 Court has independent de novo review --

1 QUESTION: Yes.

2 MR. SMIRLOCK: -- of that very thing --

3 QUESTION: We rarely second-guess a master on a
4 factual issue.

5 MR. SMIRLOCK: You very rarely reinvent the
6 wheel, because generally Special Masters get the wheel
7 right, but when the wheel's badly designed, I think you've
8 got to go back and redesign it, and --

9 QUESTION: But Counsel, just the language of
10 Article Second itself doesn't seem to me to support your
11 notion that whatever happens to the island -- it says,
12 shall retain its present jurisdiction, and shall also
13 retain. It's a matter of retaining what now exists --

14 MR. SMIRLOCK: Mm-hmm.

15 QUESTION: -- rather than acquiring what may be
16 added in the future.

17 MR. SMIRLOCK: Well --

18 QUESTION: Just in terms of the language.

19 MR. SMIRLOCK: Let's look at the rest of the
20 Compact, because I think it supports our --

21 QUESTION: It's only Article Second that really
22 supports your position.

23 MR. SMIRLOCK: No. Article Third does as well,
24 and I'll tell you why. Article Third mentions the fact
25 that New Jersey will have exclusive jurisdiction over the

1 improvements on its own shore, and improvements, it's
2 agreed by New Jersey, encompasses landfill.

3 Now, there are two possible ways to read that.
4 The com -- the commissioners either somehow or other
5 envisioned that there would be improvements only to the
6 New Jersey shore, and to the Staten Island shore, which is
7 dealt with similarly in Article V, and not to islands
8 where landfill had already been added, or for some reason
9 or other they didn't -- they envisioned it, but didn't
10 have to deal with it in the Compact, and I think the
11 answer to that is the latter.

12 The improvements mentioned on the Jersey Shore
13 over which New Jersey had exclusive jurisdiction would
14 have abutted overwater and underwater land over which New
15 York had exclusive jurisdiction and that might otherwise
16 have given New York over the -- authority over the
17 landfill placed on the New Jersey shore.

18 QUESTION: Or at least would have given New York
19 the authority to stop it.

20 MR. SMIRLOCK: Yes, and the grant of
21 jurisdiction over those improvements to New Jersey assured
22 that they could wharf out and make land on their own
23 shores.

24 QUESTION: If you lose on your points, those
25 hypothetical --

1 MR. SMIRLOCK: Mm-hmm.

2 QUESTION: -- you lose on Article II --

3 MR. SMIRLOCK: Mm-hmm.

4 QUESTION: -- and suppose I were to think, no,
5 Article II gives sovereignty to New Jersey over the fill.
6 Well, then is there an additional point, or do you concede
7 then, if New Jersey has sovereignty over the fill, that
8 New Jersey law applies over the fill?

9 MR. SMIRLOCK: I don't, Your Honor. I don't --
10 I mean, I don't concede that New Jersey has sovereignty
11 over the fill because --

12 QUESTION: I understand that, but I'm trying to
13 work out a phrase in the injunction. The State of New
14 York is enjoined from enforcing her laws, if that's the
15 recommended injunction, and so what I'm trying to figure
16 out is whether you have made some argument -- I didn't see
17 it in your brief -- whether you have made some argument
18 below, or whether you have conceded the point that if
19 you're wrong about sovereignty, and New Jersey is
20 sovereign over the fill, then New Jersey law applies to
21 the fill, not New York law.

22 MR. SMIRLOCK: I believe the point is conceded,
23 Your Honor, yes.

24 QUESTION: It is --

25 MR. SMIRLOCK: New Jersey law applies, yes.

1 QUESTION: Thank you.

2 QUESTION: What about the provision in Article
3 Fifth that the State of New York shall have the exclusive
4 jurisdiction of and over the waters, docks, and
5 improvements made and to be made on the shore of Staten
6 Island?

7 MR. SMIRLOCK: Exact -- it's the inverse of the
8 Article Third provision I was talking about a moment ago.
9 Again, you had Staten Island, over which New York had
10 jurisdiction, sovereignty --

11 QUESTION: Right --

12 MR. SMIRLOCK: -- and abutting Staten Island
13 you had waters over which New Jersey --

14 QUESTION: Just like Ellis Island.

15 MR. SMIRLOCK: Right, and that's -- no, not just
16 like Ellis Island. New York had exclusive jurisdiction
17 over those waters and the underwater land surrounding
18 Ellis Island.

19 QUESTION: But not the -- not over the waters
20 surrounding Staten Island?

21 MR. SMIRLOCK: No. No. If you look at the
22 Compact, New Jersey was given exclusive jurisdiction over
23 those waters, and --

24 QUESTION: New York didn't even have the
25 navigation jurisdiction?

1 MR. SMIRLOCK: Not in that small territory, and
2 that's why the compacting parties had to sort out --

3 QUESTION: I see.

4 MR. SMIRLOCK: -- who had authority over those
5 improvements, so when you see that in the Compact you have
6 to say either, they envisioned landfill on Staten Island
7 in New Jersey but not on islands where it had already been
8 put, which seems to us most improbable, or, they simply
9 didn't feel they had to deal with it because there was no
10 potential conflict between exclusive jurisdiction under
11 Article Third or Fifth and New York sovereignty over the
12 islands under Article Second.

13 If you think that New Jersey's right, you must
14 think -- you must think that the commissioners who made
15 the Compact actually thought that when that 5 feet of
16 landfill got added to the pier, that would be in New
17 Jersey, that they agreed to Balkanize the islands,
18 notwithstanding having given them without exception or
19 qualification under Article Second to New York, and that
20 is a very improbable conclusion.

21 Now, I will turn now to our argument that,
22 notwithstanding the Compact, New York prevails in this
23 case by virtue of the doctrine of prescription and
24 acquiescence. I'll recite some of the prescriptive acts
25 in which New York engaged over Ellis Island.

1 Ellis Island was in United States New York
2 congressional districts, in New York Assembly and Senate
3 districts. The United States in the New York censuses
4 enumerated Ellis Island in New York. Ellis Island
5 residents, who lived only on the landfill portion of the
6 island, voted in New York.

7 The INS, which occupied the island throughout
8 the immigration period from 1890 to 1954, thought, without
9 exception, that it was in New York. Other Federal
10 agencies doing business on or with Ellis Island, including
11 on the fill, thought that it was in New York.

12 Congress, in its legislation and in its
13 committee hearings, described it repeatedly as Ellis
14 Island, New York, referring often to the fill. The
15 Federal courts of New York took jurisdiction over Ellis
16 Island. The Federal courts of New Jersey not only didn't
17 take jurisdiction, they rejected it. They refused it when
18 it was proffered.

19 The New York Worker's Compensation law applied
20 both before and after the Buck Act was passed. New York
21 City wage rates applied to labor on Ellis Island both
22 before and after the Davis-Bacon Act.

23 The individuals who lived and worked on the
24 island thought, as far as we have their evidence, that it
25 was in New York. When people were born on Ellis Island,

1 in the hospitals that were on landfill, they were born in
2 New York. When they died in those hospitals, they died in
3 New York. When they married in -- on Ellis Island, they
4 married in New York.

5 None of those things can be said of New Jersey,
6 and against those things the weight of New Jersey's
7 counterexamples of nonacquiescence simply isn't
8 sufficient.

9 QUESTION: Well, how much opportunity did New
10 Jersey have to object to some of these things? I mean, to
11 what extent did it make any difference?

12 MR. SMIRLOCK: They were -- well, I think those
13 are two different questions. The acts were certainly
14 public. We're talking about things that were done by the
15 Federal Government and by the New York legislature, so
16 they knew about them.

17 To what extent did it make any difference in --
18 I'm not quite sure what you're asking, Your Honor.

19 QUESTION: Well, I mean, so someone is
20 identified as having been born in a hospital on Ellis
21 Island and born in New York, and this somehow comes to the
22 attention of New Jersey, I mean, is -- are -- is New
23 Jersey suppose to seek a correction of that record to show
24 the person was born in New Jersey?

25 MR. SMIRLOCK: If they think they're sovereign

1 over the land, but it's not -- I'm not saying that they --

2 QUESTION: This is a very -- that's a very
3 abstract difference with no consequences to the State. I
4 mean, it isn't as if New York and New Jersey were both
5 seeking to tax, or something like that.

6 MR. SMIRLOCK: Well, as a matter of fact, Ellis
7 Island, erroneously for New Jersey, was on both tax rolls
8 of the State, and in fact, although the tax records are so
9 old that we don't have them, in fact, at least as of 1940,
10 income tax earned by people who worked on the island would
11 have been taxable by a State. It wasn't a completely
12 abstract matter, and it would have been a question as to
13 which State was entitled to tax.

14 QUESTION: Well, that I grant you, but it seems
15 to me some of the examples that you give are things where
16 it really wouldn't have made any difference in the
17 operations of the State.

18 MR. SMIRLOCK: Well, some are obscure, but some
19 are as -- open and notorious, you might say. Let's
20 take --

21 QUESTION: Are you saying that those acts put
22 New Jersey on notice that it should have filed its suit
23 earlier? But if you say that, then is that just a laches
24 argument in disguise?

25 MR. SMIRLOCK: It's not a laches argument in

1 disguise, it's --

2 QUESTION: Or is it still prescription?

3 MR. SMIRLOCK: No, it's not a laches argument in
4 disguise. I think that's the separate laches argument.
5 I'm not arguing at this moment that New Jersey should
6 have -- should have filed suit, though I will later on.

7 But no, all I'm arguing is that the acts of New
8 York that I described, especially the legislative acts,
9 and the censuses, certainly were public acts as to which
10 New Jersey was on notice.

11 QUESTION: But isn't it the overwhelming
12 presence of the United States throughout the period that
13 stops New Jersey -- what is there to object to? The
14 governing power in fact is the United States, and the one
15 thing that is clear in this Compact is that Congress
16 reserved -- the hydra-headed word, jurisdiction, the
17 United States jurisdiction.

18 MR. SMIRLOCK: As to that, Your Honor, as this
19 Court has often made clear, even when the United States
20 has plenary jurisdiction, enclave jurisdiction over
21 particular territory within a State, there's a good deal
22 of residual jurisdiction that can be exercised by that
23 State.

24 As the Court's pointed out, territory doesn't
25 stop being part of a State just because the United States

1 takes it under the Enclave Clause. The municipal laws of
2 a State, to use the term that this Court has used, laws
3 designed to preserve the good order of society, remain in
4 effect. Federal law doesn't supplant them.

5 And then there are all the areas where, by
6 statute, State law applies. The Assimilative Crimes Act,
7 the Davis-Bacon Act that I mentioned before, the Buck Act,
8 in all those areas, State law would still apply, so there
9 was plenty of play for New York jurisdiction, and our
10 point is that to the extent there was State jurisdiction
11 to be exercised, and there was plenty of room for it, it
12 was always New York that exercised it.

13 QUESTION: Well, the Davis-Bacon is mixed, isn't
14 it? There was some indication that New Jersey standards
15 were used, too.

16 MR. SMIRLOCK: It depends upon what you mean by
17 mixed, Your Honor. Up until 1947, New York standards were
18 used exclusively. In 1947, as New Jersey's expert
19 explained at trial, because the Federal Government wanted
20 to save some money, and New Jersey rates were lower, there
21 was a brief interregnum of about 2 years when New Jersey
22 rates were applied, erroneously, because they were also
23 applied on the main island, the original island as well.

24 And then in 1949, and this is a repeated pattern
25 with New Jersey's supposed acts of nonacquiescence, the

1 Federal Government recognized its error, just as it had
2 many other times before, and said, oh, we made a mistake,
3 back to New York rates, and they started applying them
4 again.

5 It's hard to call that mixed.

6 QUESTION: Well, I think all of that has less to
7 do with who they thought owned it than with whether the
8 rates are higher or lower and whether they're seeking
9 union support or not. Don't you really think that's
10 what's driving all the Davis-Bacon stuff?

11 MR. SMIRLOCK: Possibly with the Davis-Bacon
12 stuff it is, but with much of the -- I recited already the
13 examples of New York's prescription.

14 QUESTION: How many people lived on Ellis
15 Island?

16 MR. SMIRLOCK: Between 100 and 200 over the
17 years. There's one anomalous -- at least while Ellis
18 Island was a going concern as an immigration station,
19 between 100 and 200, all of them on landfill, and they all
20 voted in New -- well, they may not all have voted, but
21 they could all have voted in New York.

22 The examples of acquiescence, or nonacquiescence
23 that New Jersey offers simply don't measure up. There's
24 the 1904 deed that I'll deal with first, because that's
25 their Exhibit A, and what's fascinating about that deed is

1 that at no point, even though in 1904 Ellis Island had 12
2 acres of landfill on it, at no point did the United States
3 or New Jersey say, oh, and by the way, that 12 acres must
4 be in New Jersey.

5 The negotiations between those two parties
6 always dealt with the subaqueous land, and we think that
7 supports our view of the Compact, which is, if it was
8 underwater land, it was in New Jersey, but if it became
9 abovewater land by virtue of fill, it was Ellis Island,
10 and because under Article II of the Compact Ellis Island
11 goes to New York --

12 QUESTION: Well, that really wasn't a very good
13 deal for New Jersey, certainly, if as soon as -- if they
14 owned the water -- owned the land when it was under water,
15 but as soon as it emerged from the water it went to New
16 York.

17 MR. SMIRLOCK: Well, it was valuable land, Your
18 Honor. They still had -- for one thing, they still had
19 the right of property in it. For another thing --

20 QUESTION: How much value is land that's under
21 water?

22 MR. SMIRLOCK: As -- to wharf out on, extremely
23 valuable. That was one of the reasons -- and this is all
24 in the record -- that the Federal Harbor Line Board took
25 over the establishment of harbor lines in the bay was

1 because the States were building out landfill from both
2 sides, and they had to have some kind of plenary control
3 over navigation. That was very valuable land, Your Honor.
4 It was not a pittance.

5 QUESTION: Mr. Smirlock, you know, I think it's
6 a hard row to hoe to establish prescription. It really is
7 a very difficult thing. I guess I'm more sympathetic to
8 your arguments as simply indicative of what the Compact
9 was understood to mean.

10 Just as in a normal contract interpretation one
11 can look at the parties' subsequent behavior after the
12 contract was signed, so also I'm sympathetic to the notion
13 that we can look to New York and New Jersey's subsequent
14 behavior as indication of what it meant.

15 MR. SMIRLOCK: Right.

16 QUESTION: But to establish prescription --

17 MR. SMIRLOCK: Very well, Your Honor. It's an
18 easily convertible argument, and in fact in Massachusetts
19 v. New York, among other cases, that's exactly what this
20 Court did. It looked as if it was analyzing the case in
21 terms of prescription and acquiescence, and then at the
22 last minute in its opinion it said, well, we think this
23 shows what the Compact meant, and I agree with you, it
24 does show what the Compact meant.

25 QUESTION: Are we supposed to go back -- I mean,

1 I notice the Special Master says that New York was unable
2 to prove that the births, marriages and deaths she
3 documented occurred on the island, let alone the
4 landfilled portions, so is it your thought that we would
5 go back and read all the evidence on that, and then we
6 come to an opposite conclusion?

7 MR. SMIRLOCK: If you read even any of the
8 evidence you'll come to an opposite conclusion, Your
9 Honor. I think that was the single biggest error that the
10 Special Master made. The evidence is all that those --
11 the marriages, it's ambiguous. The evidence as to births
12 and deaths, they occurred, it is pretty clear, in the
13 hospital, and the hospital was on island number 2, and
14 island number 2 was fill. He is simply mistaken, and I
15 ask you in your --

16 QUESTION: Well, you said, now, it's pretty
17 clear.

18 MR. SMIRLOCK: It is entirely clear. Forgive
19 me. It was rhetoric. It is entirely clear that that's
20 where those births and deaths occurred because that's
21 where the certificates say they occurred. The death
22 certificates say, Ellis Island Hospital, Marine Hospital,
23 Ellis Island, and that hospital was on fill. It's
24 undisputed.

25 As I say, I believe that to be the single most

1 patent error in the Special Master's report.

2 Now, I want to return in the moment I have
3 left --

4 QUESTION: Well, if one concludes that even if
5 that's so, a few births and a few deaths don't make Ellis
6 Island filled-in land, under the sovereignty of one State
7 or the other, that's --

8 MR. SMIRLOCK: If that were all we have, maybe
9 not, but there is this pattern of everything that happened
10 on Ellis Island that was subject to any State's
11 jurisdiction or any sort of action by any State was always
12 taken control of by New York.

13 If all we had were a few birth certificates,
14 that would be problematic, but we have so much more, in
15 addition to those birth certificates, and New Jersey, and
16 this is an important point, has none of those things.

17 QUESTION: Don't they have Mayor Hague? Didn't
18 Mayor Hague at some point --

19 MR. SMIRLOCK: Ah, yes, the Mary Norton episode.
20 They have Mayor Hague coming in, and Mary Norton was his
21 cat's paw, and --

22 QUESTION: Answer the question.

23 MR. SMIRLOCK: And Mayor Hague came in and said,
24 I don't know anything about a compact, but New -- Ellis
25 Island, New Jersey workers want Ellis Island, so give us

1 jobs, and even then they couldn't get away with it, Your
2 Honor. The United States had to agree with the Second
3 Circuit in Collins, and say that Article II awarded the
4 entire island.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Mr. Smirlock.

7 The case is submitted.

8 (Whereupon, at 11:03 a.m., the case in the
9 above-entitled matter was submitted.)

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CERTIFICATION

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The United States in the Matter of:

NEW JERSEY, Plaintiff v. NEW YORK
CASE NO: 120 ORIG.

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BY Donna Marie Federico

(REPORTER)