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United States v. Maine

Lewis F. Powell Jr.

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Set for argument

See Bill's memo attached

The Special master found that Nantucket Sound is not "inland water"⁽¹⁾ - thus rejecting Mass' claim.

Mass. has filed exceptions
SG has replied.

September 30, 1985 Conference
Summer List 25, Sheet 5

No. 35 Original

Exceptions to Report of
Special Master and Reply
of the United States

UNITED STATES

v.

MAINE, et al.

[Special Master - Walter E. Hoffman]

good

SUMMARY: The Special Master found that Vineyard Sound is an historic bay and that its waters are therefore inland waters belonging to Massachusetts. The Special Master found that Nantucket Sound is not an historic bay. Massachusetts has filed exceptions to the Special Master's findings as to Nantucket Sound arguing that the Special Master improperly required that Massachusetts prove its title to Nantucket Sound by evidence that was "clear beyond doubt." The United States accepts the Special Master's conclusions and has filed a reply brief opposing Massachusetts' exceptions.

SET CASE FOR ARGUMENT.

Bill

if you ~~are~~ are as confused by these cases as I am (yes)

(See my brief memo attached. You may want to read my memo first.)

BACKGROUND: In January 1977, the United States and Massachusetts filed a joint motion for supplemental proceedings to determine the coastline of Massachusetts. On June 29, 1977, the Court appointed Judge Walter E. Hoffman to serve as Special Master. 433 U.S. 917 (1977). Originally, the dispute concerned Buzzards Bay, Massachusetts Bay, Vineyard Sound and Nantucket Sound. In 1981, the parties agreed to a partial settlement. The United States accepted Massachusetts' position on Buzzards Bay and Massachusetts agreed to the position of the United States on Massachusetts Bay. The Court entered a supplemental decree accepting the settlement. 452 U.S. 429 (1981).

The Special Master held hearings on the remaining issues in October and November of 1982 and in June and July of 1983. On May 24, 1985, the Special Master filed his Report with the Court. On June 17, 1985, the Court ordered the Special Master's Report filed and gave the parties 45 days in which to file exceptions. Massachusetts filed its exceptions on August 2, 1985 and the United States tendered a reply brief on September 10, 1985.

At issue is the treatment of Vineyard Sound and Nantucket Sound. Massachusetts claims that it has historic or ancient title to the Sounds and therefore they are inland waters belong to Massachusetts. The United States argues (a) that Massachusetts never had title to the Sounds and (b) that in any event, the United States has disclaimed title to the Sounds and therefore the Sounds cannot belong to Massachusetts. According to the United States, the Sounds are territorial waters, or if more than three miles from a coast, high seas.

MASTER'S REPORT: To facilitate this presentation, I have divided the Special Master's Report into five sections: (1) the legal setting for Massachusetts' claim; (2) the United States' disclaimer of Massachusetts' title; (3) the doctrine of ancient title; (4) the evidence supporting Massachusetts' claims and (5) the Special Master's evaluation of Massachusetts' claim.

1. The Legal Setting. The Master initially set Massachusetts' claim of historic title to Vineyard Sound and Nantucket Sound in the context of the present legal system. He explained that this Court has directed that the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639 [hereinafter the Convention] be used to define inland or internal waters.¹ The Master noted that Article 7 of the Convention sets forth rules of determining whether a body of water is a bay and is therefore inland water. Neither Sound meets the specific criteria for bays. However, Article 7(6) of the Convention provides that "historic bays" may be treated as bays even if they do not meet the other criteria listed in the Convention.

Massachusetts claims both Sounds under the "historic bays" savings clause of Article 7(6). The Master cited the following passage from United States v. Alaska, 422 U.S. 184-189 (1975), to explain the elements of a valid historic claim:

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water

¹Citing United States v. Louisiana, 394 U.S. 11, 17-35 (1969) and United States v. California, 381 U.S. 139, 161-167 (1965). See also United States v. Maine, ___ U.S. ___ 53 U.S.L.W. 4151, 4154 (1985) and United States v. Louisiana, ___ U.S. ___ 53 U.S.L.W. 4186, 4187 (1985).

is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." United States v. California, 381 U.S. at 172. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of the authority, Louisiana Boundary Case, 394 U.S. at 75 and 23-24, n. 27.

The Master went on to find that an additional barrier to a state advancing a claim of historic title was the possibility that the United States "would disclaim that the disputed areas in fact are historic waters." Report at 12.

2. The United States' Disclaimer. In this case, the United States disclaimed Massachusetts' title. The Special Master responded with two inquiries: (a) whether the United States had effectively disclaimed "any intention on its part to establish Vineyard Sound or Nantucket Sound as historic inland waters"; and (b) what "burden of proof rests on Massachusetts to produce sufficient evidence to overcome the disclaimer."

The Special Master concluded that the United States' attempt to disclaim historic title to the two Sounds "was ineffective for the purposes of this litigation." He based his finding on two factors. First, he noted that for two years, from 1977 until 1979, the Coast Guard issued regulations pursuant to the International Regulations for Preventing Collisions at Sea, that applied inland water regulations to vessels moving in both Sounds. The regulations were changed in 1979 only after the Justice Department became aware of the conflict between the regulations and the United States' position

in this litigation. Second, the Master noted that the United States conceded the validity of Massachusetts' historic title to Buzzards Bay, which title rested on the same kind of historic evidence as Massachusetts' claim to Vineyard Sound and Nantucket Sound. The Master concluded "[T]he willingness of the United States ultimately to concede an historic title which it had disclaimed strenuously for almost four years makes suspect the genuineness of its disclaimer to the Sounds." Report at 20.

Despite his finding that the United States' disclaimer was ineffective, the Master went on to consider what standard of proof would be required in light of an effective disclaimer. His analysis started with the Court's statement in United States v. California, 381 U.S. 139, 175 (1965) that "[w]e are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." The parties disagreed whether this quote and subsequent cases established a "clear beyond doubt" standard. The Special Master concluded:

Were this a case of first impression, the Special Master would be inclined to agree with Massachusetts that the "clear beyond doubt" standard is an impossibly high burden to impose on a state putting forth a historic claim. However, the Supreme Court has had the opportunity to ease the states' burden when it considered the Special Masters' reports in the Florida and Louisiana cases. In both cases, the Supreme Court overruled the States' exceptions; by implication, therefore, the Court also affirmed the propriety of the "clear beyond doubt" standard. Report at 24.²

3. The Doctrine of Ancient Title. The Master next turned to a discussion of ancient title. He explained that the

²The Special Master, however, noted that to avoid needless relitigation should the Supreme Court accept Massachusetts' position, his Report would also indicate his conclusions "as to the validity of the Massachusetts' claim under either standard."

doctrine of ancient title "can apply only to the acquisition of territories which international law considers terra nullius, land currently having no sovereign but susceptible to sovereignty." Applied to waters normally considered high seas, a claim of ancient title requires that a state show that the occupation took place before the freedom of the high seas became part of international law. The claim is based "on occupation as an original mode of acquisition of territory," in other words, "clear original title which is fortified by long usage." Report at 25.

The Master explains the difference between "historic" and "ancient" title as follows:

Unlike a claim based on historic title, one based on ancient title is not prescriptive, i.e., it does not assert dominion over waters which belong equally to all countries. A state making an ancient title claim therefore need not prove all the elements necessary to establish historic title. Effective occupation, from a time prior to the victory of the doctrine of freedom of the seas, suffices to establish a valid claim to a body of water under ancient title. Report at 25-26.

The Master found that the doctrine of ancient title is recognized as a general principle of international law [citing the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116] and therefore is properly applicable to this proceeding as an alternative to the doctrine of historic title.

4. The Evidence Supporting Massachusetts' Claim. The bulk of the Special Master's Report is devoted to discussing the legal and factual support for Massachusetts' claim. The Master discussed the material in three parts: (a) Massachusetts as the successor in interest to the British Crown; (b) the history of activity in the Sounds; and (c) the 1881 legislation and Vineyard Sound.

a. Massachusetts as the Successor in Interest to the British Crown.

Massachusetts argued that it has ancient title to the two Sounds because: (1) the Crown had title by way of discovery and passed that title to Massachusetts through the Royal Charters of 1664 and 1691; or alternatively, (2) if the Charters did not pass title, the Sounds were inland county waters under the inter fauces terrae doctrine of the English common law. The Master found that both theories required that Massachusetts show that: (a) "the two Sounds were indeed county waters under generally accepted English legal theories during the colonial period"; and (b) "assuming the general validity of an ancient title claim, the Sounds were inland waters at the time that Massachusetts acceded to the Union." Report at 31.

The Master concluded, based on English and American precedents, that the county waters doctrine was "viable both in English and American legal doctrine well into the nineteenth century." The Master also concluded that both Sounds were "the kinds of bodies of water which both English and American practice would have considered suitable for treatment as inland, county water." Report at 37 and 38.

The Master next studied the language of the Charters, considered the practices of colonial times and reviewed this Court's opinion in Martin v. Waddell, 41 U.S. 367 (1842). He concluded that the Charters could have conveyed title to only such "arms of the sea" as would have been recognized as county waters or waters inter fauces terrae. Report at 43.

This conclusion required a determination of the definition of "county waters" and the application of the definition to the

two Sounds. The Master found that three theories defining county waters "had widespread acceptance and were used, either singly or in combination with one another." The first, and oldest, was the "line of sight between headlands" theory. Under this theory, "if an individual standing on one headland could see across to the other, then waters landward of an imaginary closing line connecting the headlands could be treated as inland." Report at 44. However, the authorities on this theory contained conflicting statements as to the requisite degree of visibility between headlands. This led to the development of two competing theories. Lord Coke stressed the range of visual knowledge, rather than the range of sight. Coke limited county waters to bays "where a man standing on one side of the land may see what is done on the other." A competing and more expansive theory was propounded by Lord Hale. Lord Hale wrote:

that arm or branch of the sea, which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county; and therefore within the jurisdiction of the sheriff or coroner.

M. Hale, De Jure Maris C.4, in S.A. Moore, History of the Foreshore and Seashore and Law Relating Thereto, 376 (1888).

The Master found that the Hale test was dominant at the time of the Charters, but that the Coke test was dominant in the United States by the early nineteenth century.

The Master noted that Vineyard Sound met both the Coke and the Hale tests. On largely uncontradicted evidence the Master found that: (1) a person was visible across Vineyard Sound's largest mouth (less than six nautical miles wide); (2) "one could see appreciably farther and more clearly in colonial times

than today"; and (3) due to erosion, Vineyard Sound's southwest mouth is wider now than it was in colonial times. Report at 48-49.

Nantucket Sound, however, presented a more complex situation. Its mouth is approximately 9.2 nautical miles wide today. The Master noted that Massachusetts conceded that its claim to the sound could not be established under the Coke test. The United States argued that Massachusetts could not prevail even under the Hale test. The Special Master disagreed and concluded "that Nantucket Sound meets the line of sight test of Lord Hale and would be considered waters inter fauces terrae before the Revolution." However, the Master went on to state:

Nevertheless, because of the ambiguity of the evidence concerning the size of the eastern entrance to the sound during the colonial period, the Special Master cannot conclude that Massachusetts has proven this part of its case under the "clear beyond doubt" standard of proof. Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the "clear beyond doubt" standard is inappropriate for this proceeding. Report at 51.

This statement is critical as Massachusetts' bases its exceptions on it.

b. The History of Activity in the Sounds.

The Master then turned his attention to the history and historical geography of the Sounds. The Master found that (a) an historic claim could be established "by evidence of an effective and long-term exploitation of relatively small, shallow, and at least partially landlocked bodies of water" and (b) "Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the Sounds was

equivalent to a formal assumption of sovereignty over them."

Report at 58.

c. The 1881 Legislation and Vineyard Sound.

The Master also reviewed the impact of certain Massachusetts legislation passed in 1881. The legislation directed the preparation of charts delimiting the State's boundaries. The charts clearly showed Vineyard Sound as inland water. The Master concluded that this legislation "operated as an effective assertion of Massachusetts' sovereignty over Vineyard Sound and therefore created an independent basis for the present Massachusetts' claim to the Sound as historic inland waters." Report at 60.

5. Evaluation of Massachusetts' Claims. The Special Master found that as to Vineyard Sound, Massachusetts established its sovereignty under "the doctrine of ancient title, based on the royal charters and the county waters doctrine (waters inter fauces terrae)" and also on historic title. Report at 61.

The Special Master, however, found that Massachusetts had failed to adequately prove its sovereignty over Nantucket Sound. Specifically, the Special Master found:

Massachusetts has established to the Special Master's satisfaction the fact that either the United States or Massachusetts could have treated Nantucket Sound as internal waters under the legal principles applicable in the late eighteenth century. Massachusetts has presented considerable evidence to show that Nantucket Sound was the kind of body of water which seventeenth and eighteenth century English law could have treated as waters inter fauces terrae and therefore capable of passing to Massachusetts, and has also shown convincingly that Nantucket Sound formed a unique economic and geographical

unit during the colonial era. Both of these factors, however, could only have served to justify an exercise of jurisdiction. They are insufficient by themselves to prove the existence of an actual intent to establish jurisdiction over Nantucket Sound. It is therefore the Special Master's opinion that the Commonwealth has failed to establish that either the United States or Massachusetts ever asserted jurisdiction over the sound until Massachusetts did so relatively recently.
Report at 64.

The Master, in finding that neither party had asserted jurisdiction over Nantucket Sound, paid special attention to two factors. The first factor was the description of the customs districts established by the First Congress. The district for Dukes County [Martha's Vineyard and the Elizabeth Islands] included "all waters and shores within the county." However, the district for Nantucket included only the Island of Nantucket. The second factor was the evidence that Massachusetts "failed to assert jurisdiction over the center of Nantucket Sound until relatively recently." The Master noted that it was unlikely that post-colonial Massachusetts ever claimed the interior of Nantucket Sound because the Massachusetts courts adopted the more restrictive Coke test and that in the second half of the nineteenth century, the legislature adopted a strict test claiming as inland water only those arms of the sea with mouths of six miles or less. The Master pointed out that the official maps of Massachusetts issued during the nineteenth century "failed to claim the interior of Nantucket Sound for Massachusetts." Report at 65.

The Master's Report concludes with a section rejecting the United States' claim that the Sounds cannot be inland waters

because they are international straits and an addendum noting the Court's February 26, 1985 opinion in United States v. Louisiana, ___ U.S. ___, 53 U.S.L.W. 4186. The Master found that the Court's opinion in United States v. Louisiana did not change any of the Master's findings in this case. The Special Master's Report concludes with the recommendation that each party bear its own costs and share the actual expenses of the Special Master.

MASSACHUSETTS' EXCEPTION: Massachusetts' basic argument is that the Master found that Massachusetts had presented sufficient evidence of ancient title to Nantucket Sound, but was constrained from awarding the Sound to Massachusetts because he erroneously believed that Massachusetts had to present evidence that was "clear beyond doubt."

Massachusetts' brief is presented in two parts. The first part outlines Massachusetts' analysis of the Special Master's Report. The second contains Massachusetts' legal arguments that it should not be required to establish its claim of ancient title by evidence which is "clear beyond doubt."

1. Analysis of the Special Master's Report

Massachusetts commences its review of the Special Master's Report by noting that it no longer claims historic title to Nantucket Sound and will only assert its claim under the doctrine of ancient title. Exception at 4. Massachusetts alleges that it established its title by showing that (a) the Crown acquired title to the Sound by virtue of its discovery and occupation in the colonial period, and (b) Massachusetts acquired its title from the Crown by virtue of its colonial

Charters (or, at the latest, by virtue of the Treaty of Paris in 1783). Exception at 4.

Massachusetts reads the Special Master's Report as holding that whatever title the Crown acquired by discovery and occupation passed to Massachusetts through the colonial charters. Exceptions at 4 citing Report at 43. To establish the Crown's title to Nantucket Sound, Massachusetts presented evidence that the Sound was inland waters under the doctrine of county waters and that in the colonial period, British colonists in fact occupied the Sound. The State points out that the Master found that Massachusetts had adduced "sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the Sounds was equivalent to a formal assumption of sovereignty over them." Report at 58.

Massachusetts concludes that all that remained was "to establish that the Sound qualified in the colonial period as inland waters under the county waters doctrine." Exception at 5. Massachusetts contends that the Special Master found that Nantucket Sound "would have been considered waters inter fauces terrae before the Revolution," but concluded that this finding was not established by evidence which was "clear beyond doubt" because of the lack of evidence as to the exact width of the mouth of the sound in colonial times. Exception at 6.

2. Legal Arguments against the use of a "Clear Beyond Doubt" Standard of Review

Massachusetts first reviews the "Juridical Regime of Historic Waters, Including Historic Bay" [1962] 2 Y.B. Int'l

Comm'n 1, O.N. Doc. A/CN. 4/143 (1962) (hereafter the Juridical Regime) which the Court has considered authoritative,³ and concludes that "there is nothing in the Juridical Regime that even implies that a claimant state has to meet this exceptional clear beyond doubt standard of proof, and every indication therein is to the contrary." Exception at 11. Massachusetts also reviews the International Court of Justices' opinion in the Anglo-Norwegian Fisheries Case, [1951] I.C.J. Reports 116, which the Master discussed, and finds that the characterizations given to Norway's evidence of ancient title demonstrates that the ICJ did not have in mind an "exceptional" standard of proof. Exception at 12. Massachusetts concludes that the exceptional standard is not required by international law.

Massachusetts next argues that even where there is a disclaimer, the imposition of an extraordinary standard of proof finds no support in policy or in the decisions of this Court. The State makes a distinction between "the argument that a disclaimer should be given conclusive or extraordinary weight for reasons of policy, and the argument that it should be given such weight because of its evidentiary significance to the issues at hand." Exception at 14. Massachusetts does not question the second argument. However, Massachusetts rejects the United States' suggestion that a disclaimer is entitled to weight simply because a disclaimer is an exercise of its foreign affairs power. Massachusetts argues that this is "an argument of opportunity" and that the Court has rejected the argument

³Massachusetts cites the Mississippi Sound Case, 105 S.Ct. at 1080, United States v. Alaska, 422 U.S. at 200 and the Louisiana Boundary Case, 394 at 23-26, nn. 27-30, 76 n. 103.

that a disclaimer is conclusive. The State also argues that under the Submerged Lands Act, Congress chose as a baseline for state interests, the seaward limit of a state's inland waters and left the task of delimiting inland waters to the Court (citing United States v. California, 381 U.S. at 164-165).

Massachusetts distinguishes the Supreme Court cases that the Special Master relied upon in imposing a "clear beyond doubt" standard. Exception 16-18. Massachusetts recognizes that Masters in some cases have construed the Court's opinions to require States to prove historic water claims by evidence which is "clear beyond doubt," but argues that those specific rulings have never been confirmed by the Court.

Finally, Massachusetts contends that if an extraordinary standard of proof applies, it only applies where there has been an effective disclaimer by the United States and, here, the alleged disclaimer is ineffective. The State bases this conclusion on arguments that (a) the disclaimer was not unequivocal, (b) its genuineness is suspect and (c) "like the alleged disclaimer the inland water status of Mississippi Sound, it was adopted during the pendency of litigation with Massachusetts." Exception at 8.

Massachusetts concludes that it presented sufficient evidence that a person could see across the entrance of Nantucket Sound in colonial times so as to require a finding that Massachusetts has ancient title to the Sound and that, therefore, Nantucket Sound is inland water.

THE UNITED STATES REPLY: Although the United States supports the Master's conclusion that Nantucket Sound does not

qualify as inland waters,⁴ its reply takes issue with a number of the Master's findings and conclusions. The United States argues that; (a) regardless of the standard for proof, Massachusetts did not acquire ancient title to Nantucket Sound in colonial times; and (b) any colonial title that might have existed was lost either upon Massachusetts entry into the United States or subsequently renounced by both Massachusetts and the United States. Finally, the United States argues that the "clear beyond doubt" standard for evidence, although not dispositive in this case, is the appropriate standard of proof where the United States has disclaimed a State's claim of historic title.

1. No Inland Water Title to the Sound was Perfected in Colonial Times

The United States advances three objections to any finding of ancient title in Nantucket Sound. First, the United States argues that assuming the doctrine of ancient title is still viable,⁵ it requires effective occupation "from a time prior to the victory of the doctrine of freedom of the seas" and that

except for the relatively brief period of excessive Stuart pretensions, never fully accepted by the world community, freedom of the seas has been the prevailing

⁴The United States does not believe that the Master's conclusion as to Vineyard Sound was correct. However, as the only practical effect of the holding is to add a 1,000 acre wedge to Massachusetts submerged lands, the United States concluded that it "ought not burden the Court with this issue." Reply at 1 n. 1.

⁵The United States suggests that a State may not today base its claim on maritime titles that were last asserted in the 17th and 18th centuries. Reply 6-8, n. 5.

international law regime since several centuries before the alleged appropriation of Nantucket Sound, especially where British views held sway.
Reply at 7.

The United States second argument is that, even accepting the more generous Hale line-of-sight test, Nantucket Sound does not physically qualify for treatment as inland water. The United States contends that the doctrine of county waters only applies to "a bay or estuary or gulf whose waters lie sheltered 'between the jaws of the land' culminating in mainland headlands." Reply at 9. Nantucket Sound is defined, except at the north, entirely by islands, and therefore cannot be considered an "arm or branch of the sea, which lies within the fauces terrae" (or jaws of the land).

The United States third point is that the Master erred to the extent that he found that there was "effective occupation" of Nantucket Sound. The United States describes Massachusetts' evidence as

simply that the local inhabitants of the area in colonial times took full advantage of the natural resources offered by Nantucket Sound - as would any coastal people, whether the adjacent waters were "inland" or not.
Reply at 10.

2. No Colonial Title Survives

The United States suggests that regardless of the Master's finding of ancient title in colonial times, the Master was clearly correct in finding that neither the United States nor Massachusetts ever asserted jurisdiction over the Sound until recently. The United States argues that (a) no colonial title survived independence or the formation of the union, (b) any title that survived statehood was later voluntarily renounced or abandoned by

Massachusetts, and (c) any colonial title that survived statehood was effectively repudiated by the United States.

The United States notes that there is no inhibition to a new sovereign renouncing a portion of the maritime territory enjoyed by a preceding sovereign and that the United States has repudiated "the sweeping claims once asserted in the ocean by Spain, Mexico and Great Britain."⁶ Although one ought not presume retrenchment, the United States argues that there are very strong indications against the claim of ancient title in this case. It argues that: (a) Justice Story as early as 1829 endorsed the Coke test - which Massachusetts concedes will not embrace Nantucket Sound and inland waters, (2) in Commonwealth v. Peters, 53 Mass. (12 Met.) 387 (1847), the Massachusetts courts adopted a standard for inland waters that Nantucket Sound could not satisfy, and (3) in 1859, the Massachusetts enacted legislation limiting inland water to "arms of the sea" with mouths of six miles or less. The United States also contends that now

[i]t is now well settled that whatever right a State may have enjoyed in the marginal sea and beyond as an independent nation were surrendered to the United States upon acceding to the Union. United States v. Maine, 420 U.S. 515, 522-523 (1975); United States v. Texas, 339 U.S. 707, 717-718 (1950).
Reply at 12-13.

The United States concludes that the law and the facts support the Master's finding that the United States, in fact, never claimed Nantucket Sound as inland water.

⁶Reply at 11, citing United States v. California, 332 U.S. 19, 32 (1947). See also United States v. Louisiana, 363 U.S. 1, 30, 71 (1960); Special Master's Report of October 14, 1952, in No. 6, Orig., O.T. 1954, United States v. California, at 37-38, approved, 381 U.S. 139, 172-175, 177 (1965).

The United States's argument that Massachusetts abandoned its claim to Nantucket Sounds is based on the same evidence: Justice Story's opinion, Commonwealth v. Peters, supra, and the 1859 legislative acts. The SG also alleges that Massachusetts did not advance any claim to the Sound until 1971. The United States fortifies its factual presentation by arguing that "a loss of sovereignty and property rights can result from abandonment." The United States argues that although ancient title is originally lawful appropriation and not a usurpation,

ancient title is relied upon only when the claim is inconsistent with modern legal standards; it is, in effect, a non-conforming use, entitled to be "grandfathered" only because it was established before the current "zoning" rules were enacted. Accordingly, an ancient title that offends prevailing international law criteria is susceptible to loss by non-use. Reply at 16.

Whatever claim to Nantucket Sound survived Massachusetts' statehood, was lost through Massachusetts' failure to attempt to exercise sovereign rights before 1971."⁷

The United States also argues that its repudiation of Massachusetts' claim to Nantucket Sound does not "work an impermissible 'contraction of a State's recognized territory' in violation of the constitutional principle embodied in Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)." Reply at 20-21. The United States argues that a State's title to tideland and offshore lands, once vested, is not indefeasible and that changes in geography, whether natural or artificially caused, can deprive a

⁷The United States suggests that the Master erred in apparently assuming "that this position was reserved for straits with a significant amount of international traffic." Reply at 18, n. 14.

State to title of the beds and shores of tidal waters.⁸ The United States' conclusion appears to be that changes in legal definitions concerning coastlines may also properly cause a State's boundaries to expand or contract and that, in this context, the federal Government's disclaimer is entitled to consideration.

3. In Light of the Federal Disclaimers, Massachusetts Must Establish its Colonial Title and the Title's Survival by Evidence "Clear Beyond Doubt"

The United States explains that it does not believe that the Court need address the standard of proof issue. However, the United States argues that when, as here, the United States disclaims an area as inland water, the State must prove its title by evidence "clear beyond doubt." The SG finds support for the standard in the Court's recognition of foreign policy concerns and the unique nature of historic inland waters. A claim of historic inland waters is by definition a claim that is contrary to current international norms and therefore the claim must be "open and notorious." International law usually looks to the United States to define, at least initially, its own boundaries. Thus, in the face of a federal disclaimer, the State's evidence should be so strong as to justify a foreign nation's failure to follow the federal Government's position. Only title that is "clear beyond doubt" justifies the

⁸Reply at 21, citing Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-378 (1977), United States v. California, 381 U.S. 139 (1965), Hughes v. Washington, 389 U.S. 290 (1967), California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982) and the Submerged Lands Act (43 U.S.C. 1301).

embarrassment inherent in the rejection of the federal Government's public stance.

DISCUSSION: The case should be set for oral argument because (a) the Special Master's Report does not clearly state the Master's basis for holding that Nantucket Sound is not inland water, and (b) Massachusetts and the United States disagree as to the basis of the Special Master's conclusion.

Massachusetts focuses on the Special Master's statement that Massachusetts can establish ancient title to Nantucket Sound "only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate." Report at 51. Massachusetts makes a strong factual argument that this is an unreasonably high standard, at least where, as here, the Special Master found that "although the United States attempted to disclaim historic title to the two Sounds, this disclaimer was ineffective for the purposes of this litigation." Report at 19.

The United States, on the other hand, focuses on the Special Master's statement that Massachusetts "has failed to establish that either the United States or Massachusetts ever asserted jurisdiction over the Sound until Massachusetts did so relatively recently."⁹ Report at 64. The United States argues that this finding is dispositive because it means that even if Massachusetts once had ancient title to Nantucket Sound, it lost

⁹This finding is a little confusing in light of the Special Master's earlier finding that the United States' attempted disclaimer was ineffective. How can the United States disdain a claim that has not been asserted?

that title by failing to assert it.¹⁰ The United States makes a strong argument that a claim of ancient title, like a claim of historic title, may be lost if it is not openly and notoriously asserted. However, neither the Special Master nor Massachusetts directly address this issue.

Since the Court must consider whether a claim of ancient title is lost if not openly asserted, it may wish to also address the United States' other objections to the Master's treatment of the doctrine of ancient title. Three of the United States' arguments are that (1) the doctrine of ancient title was discredited before England colonized Massachusetts, (2) the doctrine of ancient title is not applicable to Nantucket Sound because the Sound is formed by islands and not by the jaws of the mainland, and (3) Massachusetts' evidence of the colonial use of the natural resources of the Sound does not by itself, regardless of its quantum, establish "effective occupation." None of the United States' arguments are addressed by Massachusetts and while the Master's finding appear to be adverse to the United States' position, his reasoning, where expressed, is not clearly persuasive.

In light of the ambiguity of the Master's reasoning, the parties' disagreement over what the Master actually held and Massachusetts' failure to anticipate or reply to the United States' arguments,¹¹ the Court has little choice but to set the

¹⁰If the United States is correct, there is no standard of proof issue. There was no evidence before the Master of any assertion of jurisdiction by Massachusetts or the United States before 1971. There was evidence of disclaimers. Thus, under any standard of proof, Massachusetts would not prevail.

¹¹The United States' reply brief was filed on September 10, 1985, and Massachusetts has not filed a response. However, it is not clear that Massachusetts is entitled to file a response to a reply brief. The Court might consider requesting further

case for oral argument. Argument should help the Court determine which issues are dispositive and need to be decided. Depending on which issues prove to be persuasive, the Court may (1) adopt the Master's conclusions, (2) accept Massachusetts' exceptions or (3) refer the case back to a Master for further proceedings.

CONCLUSION: Neither party has filed exceptions to the Master's conclusion that Vineyard Sound is inland water and that conclusion appears to be correct.¹² However, Massachusetts takes exception to the Master's conclusion that Nantucket Sound is not inland water and the parties reasonably disagree as to how the Master reached his conclusion. Under these circumstances, the Court should set the case for oral argument.

The United States has filed a reply to Massachusetts' exceptions.

9/25/85

Schickele

¹²Massachusetts submitted considerably more evidence on Vineyard Sound than on Nantucket Sound. The Master found that Massachusetts had demonstrated that it had both ancient title and historic title to Vineyard Sound. A review of Massachusetts' evidence in light of the Court's discussion of historic title in United States v. Louisiana, ___ U.S. ___, 53 U.S.L.W. 4186 (February 26, 1985) suggests that Massachusetts has historic title to Vineyard Sound even if it does not have ancient title to the Sound.

TO: Mr. Justice Powell
FROM: Bill
DATE: September 27, 1985
RE: United States v. Maine, et al., No. 35 Original
Exceptions to Special Master's Report

The
~~this~~ sole remaining issue in this case is whether Nantucket Sound is an "historic bay," and is therefore "inland water" under the Submerged Lands Act of 1953. If Nantucket Sound is an historic bay, then Massachusetts has title to it. If not, the Sound either belongs to the U.S. or is part of the high seas. The Special Master determined that the Sound is not "inland water."

Massachusetts claims that the Sound is an historic bay because the state has "ancient title" to it. The United States counters that it has formally disclaimed the Sound's inland water status, and that Massachusetts must therefore establish its ancient title by evidence which is "clear beyond doubt." In addition, the United States argues that Massachusetts' title lapsed, because the state

failed to assert jurisdiction over the Sound for a long period of time.

The parties disagree as to just what the Special Master found, but it appears that the Special Master determined that (1) Massachusetts' ancient title claim is supported by the evidence, but is not "clear beyond doubt"; (2) the United States' disclaimer was ineffective; and (3) Massachusetts failed to assert jurisdiction over the Sound for a long period of time, ending only recently. If I correctly understand the underlying law, the third ^{yes} finding makes the first two irrelevant. Massachusetts' exceptions thus miss the point, because they focus on whether the state must prove its title under the "clear beyond doubt" standard. In short, it appears to me that the Master's conclusion was probably correct.

The memo writer recommends that the case be set for argument to clarify the parties' positions. I tentatively agree, although I'm not sure how much the Court will benefit from oral argument in this case. If my initial view on the merits proves to be correct, the case should perhaps be disposed of in a brief per curiam affirming the Master's findings.

OK
GRANT leave to file reply brief
Schickele

October 11, 1985 Conference
List 5, Sheet 6

No. 35 Original

Motion of Massachusetts
for Leave to File Reply
Brief

UNITED STATES

v.

MAINE, et al.

SUMMARY: On June 17, 1985, the Court ordered that the Special Master's Report be filed and allowed exceptions to be filed. On August 2, 1985, Massachusetts filed its exceptions to the Special Master's Report. On September 10, 1985, the United States filed its reply brief which supports the Master's recommendation but objects to his reasoning.¹ Massachusetts requests leave to file a reply to the United States' objections to the Special Master's findings and conclusions.

¹See the Legal Office's memorandum on the exceptions to the Master's Report prepared for the September 30, 1985 Conference. On October 7, 1985, the Court ordered the exceptions set for oral argument.

GRANT leave to file reply brief -
Bill

CONTENTIONS: In support of its motion for leave to file a reply brief on or before October 25, 1985, Massachusetts advances three arguments: (1) the United States' reply brief exceeds the proper scope of a reply brief; (2) the United States' reasons for the scope of its reply brief are unsound; and (3) in any event, fairness requires that Massachusetts be permitted to respond to the reply brief filed by the United States.

Massachusetts argues that because the United States filed no exceptions to the Special Master's Report, it may not in its reply brief, "mount a broad-based attack on the Special Master's findings and conclusions." Massachusetts alleges that the United States in its reply brief makes arguments that were never briefed to the Special Master and relies on "alleged evidence which was either never introduced, or never referred to in the arguments to the Special Master." Massachusetts then lists eight arguments advanced by the United States which Massachusetts claims were rejected, explicitly or implicitly, by the Special Master or not raised before the Special Master.

Massachusetts' second argument is that the Court's June 17, 1985 order "cannot reasonably be read to authorize the parties to reserve arguments against the Special Master's findings and rulings until the reply brief." Massachusetts notes by example that in United States v. Florida, 420 U.S. 531, 533 (1975), "the Court declined to decide arguments raised by the United States for the first time in exceptions, and instead referred them back to the Special Master." Massachusetts concludes that although

the procedures for original cases are not prescribed by statutes or rules, this does not excuse the United States from complying with the Court's June 17, 1985 order.

Massachusetts' final argument is that fairness requires that it be given an opportunity to respond to the United States' reply brief. Because the reply brief exceeds the usual scope of a reply brief and raises issues allegedly not presented to the Special Master, Massachusetts could not anticipate the arguments advanced by the United States. Massachusetts suggests that its oral arguments will be "ineffectual" if it cannot, before argument, refer the Court to those portions of the record that rebut the points raised by the United States.

The SG has submitted a response to the motion defending the United States' reply brief, but agreeing that Massachusetts should be allowed to file a reply brief.

DISCUSSION: The motion for leave to file a reply brief should be granted. The United States' reply brief does raise several issues that are not explicitly addressed by the Special Master and are not directly responsive to Massachusetts' exceptions. Massachusetts could not have anticipated that the United States would raise these issues. A reply brief by Massachusetts should help the Court both in determining which of the United States' issues should be considered and in resolving these issues.

A reference of an original case to a Special Master is analogous to a DC's reference of a case to a magistrate. Like the DC, the Court is responsible for the findings and conclusions which are entered. Therefore, the Court may

consider challenges to a Special Master's Report, even though they are untimely or were not raised before the Master. For example, in United States v. Florida, supra, the United States raised in its exceptions to the Special Master's Report, contentions which it had not presented to the Master. The Court did not ignore the late contentions, instead it referred them to the Master for consideration. Massachusetts' reply brief will refer the Court to evidence and portions of the Master's Report which, in Massachusetts' opinion, refute the arguments advanced by the United States. This should help the Court determine whether the issues are ripe for disposition or require further development.

Granting the motion will not inconvenience the Court. Although the Court has ordered the exceptions set for oral argument, there is no urgency in the case (the original reference to the Master was made in 1977). Argument can be put off until after the reply brief has been received.

CONCLUSIONS: The motion by Massachusetts for leave to file a reply brief should be granted. The United States filed a reply brief of unusual scope containing several arguments that could not have been anticipated. A response to those arguments should be helpful to the Court in its review of the Special Master's Report.

There is a response.

10/8/85

Schickele

Reviewed 12/09 - fine memo
with which I'm inclined to agree.

BENCH MEMORANDUM

To: Mr. Justice Powell

December 3, 1985

From: Cabell

No. 35, Original, U.S. v. Maine (*Involves Nantucket*

Exception to Report of Special Master Walter E. Hoffman
Wednesday, December 11, 1985 (1st case)

Sounds

Questions Presented

1. Does Massachusetts possess title to Nantucket Sound if the burden of proof is merely to "persuade[] the finder of its claim"? Mass.Br. 7.
2. Did the Special Master err in applying a "clear beyond doubt" burden of proof to coastal boundary litigation between a State and the United States?

1. BACKGROUND

This case arises from the United States' action to quiet title commenced in 1968. Massachusetts now seeks possession under the theory that it had ancient title even if it did not have historical title.

There is an important contrast between "ancient title" and "historic title" (the traditional basis upon which States have relied in claiming sovereignty over disputed waters). "Ancient title" requires that the claimant show that it occupied the waters in question and "that the occupation took place before the freedom of the high seas became part of international law." Because ancient title does not involve the assertion of sovereignty over waters that otherwise would belong equally to all countries, a state claiming ancient title "therefore need not prove all the elements necessary to prove historic title. Effective occupation, from a time prior to the victory of the doctrine of freedom of the seas, suffices to establish a valid claim to a body of water under ancient title." Report 25-26.

In establishing ancient title through a series of legal tests that are irrelevant here, Massachusetts had introduced evidence that someone standing on the Great Point could have seen the southern shore of Cape Cod at points where the Sound is wider than it is at the eastern mouth. The Special Master concluded that:

✓ Nantucket Sound meets the line of sight test of Lord Hale and would have been considered waters inter fauces terrae before the Revolution. Nevertheless, because of the ambiguity of the evidence concerning the size of the eastern entrance to the sound during the colonial period, the Special Master cannot conclude that Massa-

chusetts has proved this part of its case under the 'clear beyond doubt' standard of proof. Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate for this proceeding." S.M.Rpt. 51.

Standard

The United States advances a number of alternative grounds to support the Special Master's finding that Massachusetts failed to establish continuing ancient title over Nantucket Sound. It begins by noting that: "

"Had we the courage of our convictions, we would rest with a mere reference to pages 64 and 65 of the Report in which the Special Master unequivocally [sic], and unanswerably, disposes of the Commonwealth's claim to Nantucket Sound by demonstrating that any earlier title to the area has long since lapsed. ... [T]he Master's conclusion there is unhesitating and plainly does not depend on the standard of proof required of Massachusetts--the only matter to which its present brief is addressed." U.S.Br. 2.

Even if Massachusetts did prove that it once had ancient title to the Sound, and that is all the Special Master's alternative finding concluded, Report 51, the critical issue is whether that ancient title survived.

Q of standard is irrelevant

II. DISCUSSION

Although it appears that the United States is correct in arguing that Massachusetts must meet a heightened evidentiary burden, that question is irrelevant. Massachusetts has failed to satisfy the other half of the ancient title test: showing that sovereignty has been exercised continuously.

Mass failed to show

A. Ancient Title

Massachusetts has conceded that it failed to demonstrate a sufficient continuing exercise of sovereignty over Nantucket Sound to justify a finding of historic title, but contends that it has a valid claim to ancient title. The Special Master found that Massachusetts's claim to historic title had lapsed during the nineteenth century because Massachusetts adopted a restricted definition of its coastal waters that could not be met with respect to Nantucket Sound under any standard of proof. Assuming for a moment that Massachusetts could establish that it once had ancient title -- I deal with the burden of proof question below -- the Special Master's findings concerning the lapse of historic title mean that any claim to ancient title would similarly have lapsed.

Massachusetts argues that the quantity of evidence required to show retention of sovereignty is significantly less than the quantity of evidence required to show establishment of sovereignty. "While it is theoretically possible in international law for a sovereign title to territory to be 'abandoned,' actual instances therefore are exceedingly rare." Reply Br.Mass. 23. In other cases, gaps of over two centuries did not constitute abandonment. Ibid.

But it appears that the cases and commentators dealing with ancient title do not distinguish sharply between ancient and historic title -- and a lapse in the latter would also mean a lapse in the former. Moreover, they seem to assume that some continuing evidence of sovereignty is necessary. See, e.g., Case

of the Minquiers and Ecrehos, 1953 I.C.J. 47, 53 (describing French and English claims that each possessed "an ancient or original title ... and that their title has always been maintained and never lost"); Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 133 (finding relevant "certain economic interests ... the reality and importance of which are clearly evidenced by a long usage"); Juridical Regime 34, ¶ 71 (ancient title based on "a clear original title which is fortified by long usage"); Y. Blum, Historic Titles in International Law 250 (ancient title "can be recognized to-day only if the claimant state is in a position to prove that it asserted its authority over the allegedly historic waters since the emergence of the relevant rules of the modern international law of the sea").

Massachusetts would have to show that its claim was maintained after the acceptance of the doctrine of the doctrine of the freedom of the high seas. Although the Special Master did not address this element in his discussion of ancient title, he did in his discussion of historic title. He found that, far from continuing to exercise sovereignty over the center of Nantucket Sound, "[i]t is unlikely that post-colonial Massachusetts ever claimed the interior of Nantucket Sound." Report 65. It effectively disclaimed sovereignty, both judicially, through its adoption of a boundary test that cannot be met by Nantucket Sound (the Coke test), and administratively, through the publication of official maps that failed to claim the interior of the Sound. The Special Master's finding that "whatever rights [Massachusetts] may have had over Nantucket Sound during the colonial pe-

riod lapsed until the Commonwealth's recent attempt to resuscitate them," ibid, must logically include its ancient rights since, because the colonial period antedated freedom of the high seas, the rights Massachusetts may have had were necessarily ancient rights.

Massachusetts essentially argues that the findings with respect to the lapse of historic title are insufficient to support a finding that the ancient title has also lapsed. But (1) Its reliance on the "leading case" involving the Channel Islands, Case of the Minquiers and Ecrachos, 1953 I.C.J. 47, is misplaced because the Court did not find a total gap in the exercise of jurisdiction in excess of two centuries to be irrelevant to the assertion of sovereignty; (2) There is no reason a lesser standard of proof should apply to ancient titles, and because the frequently extravagant ancient titles carve out an exception to the presumption of freedom of the high seas that is even greater than that of historic titles, the standard possibly should be higher; and (3) The Special Master's discussion of the lapse of historic title shows that the issue of continuing jurisdiction was not even close.

B. The Burden of Proof

If the Court reaches this question, I am persuaded by the United States' argument that the nature of the federal system counsels placing a heavy burden on States whose claims are contested by the United States. Some elaboration on that standard may be necessary. The contrast in United States v. California,

381 U.S., at 175, and the Louisiana Boundary Case, 394 U.S., at 77, between evidence that is "clear beyond doubt" and "questionable evidence" suggests that "clear beyond doubt" is merely the Court's way of describing the kind of evidence likely to overcome an effective disclaimer. Thus the apparent amalgam of two different conventional evidentiary standards -- "clear and convincing" and "beyond reasonable doubt" -- suggests that the Court was not trying to expound a new evidentiary standard, but was instead trying to convey the heightened showing required by States whose territorial claims are contested by the Federal Government. Moreover, I believe that the heightened standard should apply to State claims whether or not the United States explicitly disclaimed the State's position prior to litigation, and therefore agree with the Special Master's seeming paradoxical application of a heightened standard of proof after he found no effective disclaimer.

III. CONCLUSION

I recommend overruling Massachusetts' exception to the Special Masters Report without reaching the question of burden of proof.

December 3, 1985

Cabell

Bench Mem.

Cabell

35 Orig. UNITED STATES v. MAINE

Argued 12/11/85

But see
Bill's memo
of 9/27 that is
a brief & helpful
summary.

Involves Nantucket Sound
& Water - in effect - finds
it is not "inland waters"
subject to Maine's jurisdiction

Herrman ^{Speck} (Ant A G - Man) (able argument)

Sole Q that remains is whether Man has "ancient title" - acquired in Colonial Times.

Elements of "ancient title" contrast with "historic title". Ancient title is not acquired by prescription.

Should reach evidentiary issues.

See SG's concession on p 25 of Reply Brd

It was error to impose ~~the~~ highest standard

See Reply Br of Man that makes some persuasive arguments in favor of ancient title. Also

(Clairborne (SG) (good argument - see Troncentat))

Nantucket is not like other Bays
(e.g. ~~the~~ Chesapeake) that are clear
indentations into the mainland.
Nantucket, in contrast, is a part of
the "open sea."

Mass. claims on basis of "ancient title".
It concedes it cannot claim "historic title".

SG argues that no inland water
title to the Sound was perfected in
Colonial times. Even if it had, the U.S.
has rejected such title.

Responding to SOIC, Clairborne concedes
Master's Report is not entirely clear

(~~the~~) (Master found that Mass
failed to exercise juris. over
Nantucket Sound "until relatively
recently" - 65 ~~to~~ Interior of
Sound was not claimed by
Mass. on its official maps
during first half of 19th
century.)

(See next pg)

Henneman (Reply)

Concede U.S. had the power, but it
has not exercised it.

Repeated that Master's error in
using the "clear beyond doubt" standard.

The Chief Justice ~~Over-Rule~~ ~~Exception~~

Master's report is not well written. (cf. p 51 with ¶64).

Not so clear whether the ancient title was in Mass.

Justice Brennan Over-Rule

Prior to 1971, Mass never asserted ^{any} sovereignty over the Sound. If this is true, this ~~is~~ resolves the case.

Master's Report is not well written.

Justice White Over-Rule ~~that was~~

Master did find that if there was "ancient title," Mass let it lapse.

Not easy to know what ancient title really is.

Failure of Mass to exercise sovereignty is significant

Out

Over-rule

(no discussion)

In view of the finding that
Mass. neglected to exercise
juris. over the Bay for
a number of years, the burden
of proof
is in
Mass. unless
- cant

Overrule
Aff in re Marlet's Report; ~~Mass~~ Mass' Exception

The Q is whether Nantucket Sound is an
"historic bay", & therefore is "inland
water" of the State under the Submerged Lands
Act of 1953.

The S/M found the Sound is not
"inland water"

S/Master ~~to~~ found Mass. failed to exercise
juris. over the Sound for many years. This
finding, that is supported, seems to dispose of Mass'
claim

Justice Rehnquist

Over-rule

(no discussion)

Justice Stevens

Over-rule

No discussion

Could apply clear beyond doubt
standard

Justice O'Connor

Over-rule

Man abandoned whatever title it
had

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: 1-22-86

Recirculated: _____

*Well written
& sets no bad
precedent*

1st DRAFT

Reviewed

SUPREME COURT OF THE UNITED STATES

No. 35, Orig.

UNITED STATES OF AMERICA, PLAINTIFF *v.*
STATES OF MAINE, NEW HAMPSHIRE, MASSACHU-
SETTS, RHODE ISLAND, NEW YORK, NEW JERSEY,
DELAWARE, MARYLAND, VIRGINIA, NORTH CARO-
LINA, SOUTH CAROLINA, GEORGIA AND FLORIDA

L.F.P.

Joni

ON BILL OF COMPLAINT

[January —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question now before the Court is whether Nantucket Sound qualifies as "internal waters" of the Commonwealth of Massachusetts rather than partly territorial sea and partly high seas as the United States contends. We agree with the Special Master's conclusion that the Commonwealth's claim should be rejected.

I

Pursuant to an earlier decree of this Court,¹ the United States and Massachusetts in 1977 filed a Joint Motion for Supplemental Proceedings to determine the location of the Massachusetts coastline. After our appointment of a Special Master, 433 U. S. 917 (1977), the parties agreed on a partial settlement, which we approved in 1981. 452 U. S. 429.

¹ In 1968 the United States invoked our original jurisdiction to quiet title to the seabed along the coast of the Atlantic Ocean. In 1975 we entered a decree affirming the title of the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the three geographic mile zone. *United States v. Maine*, 423 U. S. 1 (1975). See also *United States v. Maine*, 420 U. S. 515 (1975). In that decree we reserved jurisdiction which either the "United States or any defendant State [could] invoke . . . by filing a motion in this Court for supplemental proceedings." 423 U. S., at 2.

Left unresolved was the status of Vineyard Sound and Nantucket Sound, a dispute which gave rise to extensive hearings before the Special Master. The Master concluded that Vineyard Sound is a "historic bay" and therefore a part of the inland waters of Massachusetts. However, he reached a contrary conclusion concerning Nantucket Sound. Explaining that the decision concerning Vineyard Sound has only minimal practical significance,² the United States has taken no exception to the Master's report. Massachusetts, however, has excepted to that part of the report concerning Nantucket Sound. Specifically, although Massachusetts acquiesces in the determination that the doctrine of "historic title" does not support its claim, it continues to maintain that it has "ancient title" to Nantucket Sound.

Nantucket Sound is a relatively shallow body of water south of Cape Cod, northeast of the island of Martha's Vineyard, and northwest of the island of Nantucket. Massachusetts contends that the English Crown acquired title to this territory as a result of discovery and occupation by colonists in the early 17th Century and that it succeeded to the Crown's title by virtue of various Royal Charters or by the Treaty of Paris, which ended the Revolutionary War.³

² According to the Solicitor General, all but 1,000 acres of the submerged lands of Vineyard Sound belong to the Commonwealth of Massachusetts as underlying territorial waters, even under its view that those waters are not inland.

³ In particular, the Commonwealth points to the charter granted in 1664 by King Charles II to the Duke of York conveying title to New York, New Jersey, and most of New England, cf. *Martin v. Waddell*, 16 Pet. 367, 413-414 (1842); *Mahler v. Norwich & N. Y. Transp. Co.*, 35 N. Y. 352, 355 (1866), and to the charter granted in 1691 by the English monarchs William and Mary to the colonists of Massachusetts consolidating into "one reall Province by the Name of Our Province of the Massachusetts Bay in New England" the territories and colonies that were then commonly known as Massachusetts Bay, New Plymouth, "the Province of Main" and the territory called Accadia or Nova Scotia, see Mass. Ex. 45, p. 8. Alternatively, Massachusetts asserts that it acquired sovereignty over the area by virtue of the Treaty of Paris signed in 1793. Cf. *Manchester v. Massachusetts*,

To prove that Great Britain acquired title to Nantucket Sound which it could pass to Massachusetts, much of the evidence presented to the Special Master concerned whether Nantucket Sound would have been considered "county waters" under English law in the 17th century. Under the "county waters" doctrine, waters "*inter fauces terrae*" or landward of an opening "between the jaws of the land" could be subject to the jurisdiction of the littoral county rather than the Admiral if the jaws were close enough to each other to satisfy a somewhat ambiguous line-of-sight test. Under Lord Coke's version of the test a person standing on one jaw must be able to "see what is done" on the other jaw;⁴ under Lord Hale's more expansive version, it is merely necessary that "a man may reasonably discern between shore and shore."⁵

The relevant jaws of land in this case are the southern tip of Monomoy Island, which extends south from the elbow of Cape Cod, and the northern tip of Nantucket Island. At the present time, those two jaws are 9.2 nautical miles apart, but the distance may have been greater in colonial times. In any event, the parties agree that the distance was too great to satisfy Lord Coke's version of the test. Whether it would meet Lord Hale's test depends, in the opinion of the Master, on whether the Commonwealth's burden of proof is merely to persuade by a preponderance of the evidence or by evidence

139 U. S. 240, 256-257 (1891); *Mahler v. Norwich & N. Y. Transp. Co.*, 35 N. Y., at 356.

⁴Coke, Fourth Institute, cap. 22, 140 (describing as inland waters those arms of the sea "where a man standing on one side of the land may see what is done on the other.").

⁵M. Hale, *De Jure Maris et Branchiorum ejusdem* cap. iv (1667), reprinted in R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* App. vii (2d ed. 1875) ("That arm or branch of the sea, which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is, or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner." (citation omitted)).

that is “clear beyond doubt.” For purposes of our decision, we put to one side the parties’ argument about the burden and assume that Lord Hale’s test is satisfied.⁶ On the assumption that Nantucket Sound could have been considered “county waters” under the common law of England in the 17th century, we nevertheless conclude that Massachusetts cannot prevail under the doctrine of “ancient title” on which it relies.

II

This Court has consistently followed principles of international law in fixing the coastline of the United States.⁷ We have relied in particular on the Convention on the Territorial Sea and Contiguous Zone, adopted on April 29, 1958, 15 U. S. T. 1607, T. I. A. S. 5639.⁸ The Convention provides that the sovereignty of a state extends to “internal waters.” Article 1. The Convention also contains a set of rules delimiting those waters. Generally speaking, Article 3 defines

⁶The Special Master rested his conclusion that Massachusetts had to prove its claim “clear beyond doubt” on two cases of this Court and three reports of Special Masters in other original jurisdiction cases. See *Louisiana Boundary Case*, 394 U. S. 11, 77 (1969); *United States v. California*, 381 U. S. 139, 175 (1965); Report of the Special Master, O. T. 1984, No. 35 Orig., p. 11; Report of the Special Master, O. T. 1974, No. 9 Orig., pp. 18–19; Report of the Special Master, O. T. 1973, No. 52 Orig., p. 42. Cf. *Alabama and Mississippi Boundary Case*, — U. S. —, — (1985) (slip op. 18–19).

Although the Master’s conclusion regarding the burden of proof was the focus of the Commonwealth’s opening brief, we find it unnecessary to address the issue given our disposition of the case. Whatever the measure of proof, Massachusetts concedes that it bears the risk of nonpersuasion. See Brief for Defendant 7.

⁷See *United States v. California*, 381 U. S., at 161–167. See also *Alabama and Mississippi Boundary Case*, — U. S., at — (slip op. 4–5); *United States v. Maine (Rhode Island and New York Boundary Case)*, — U. S. —, — (1985) (slip op. 8–9); *United States v. Alaska*, 422 U. S. 184, 188–189 (1975); *Louisiana Boundary Case*, 394 U. S., at 35.

⁸See *Louisiana Boundary Case*, 394 U. S., at 21 (Convention contains “the best and most workable definitions available” (quoting *United States v. California*, 381 U. S., at 165)).

“internal waters” as those waters landward of a baseline which Article 5(1) in turn defines as “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal states.” Of importance to this case, the Convention also includes as a state’s “internal waters” those waters enclosed in “bays” as defined in Article 7. Most of the rules in this Article identify the criteria for defining “juridical” bays, but Article 7(6) further includes as “bays” “so-called ‘historic’ bays” and waters landward of baselines marked when “the straight baseline system provided for in article 4 is applied.”

In this case, Massachusetts relies exclusively on the provision recognizing “historic bays,” for it is agreed both that the United States has legitimately eschewed the straight baseline method for determining its boundaries,⁹ and that Nantucket Sound does not qualify as a juridical bay. Because “historic bay” is not defined in the Convention, we have previously relied on a United Nations study authored by the U. N. Secretariat and entitled *Juridical Regime of Historic Waters, Including Historical Bays*, [1962] 2 Y. B. Int’l L. Comm’n 1, U. N. Doc. A/CN.4/143 (1962) (hereinafter “Juridical Regime”). See *Alabama and Mississippi Boundary Case*, — U. S. —, — (1985) (slip op. 8–9). That study prescribes the three factors of dominion, continuity, and international acquiescence recognized in our own cases for identifying a “historic bay.”¹⁰ The Commonwealth submits

⁹ We have previously held that the decision to use the straight baseline system provided for in Article 4 of the Convention rests with the Federal Government. See *Alabama and Mississippi Boundary Case*, — U. S., at — (slip op. 6); *Louisiana Boundary Case*, 394 U. S., at 72–73; *United States v. California*, 381 U. S., at 167–168.

¹⁰ “The term ‘historic bay’ is not defined in the Convention and there is no complete accord as to its meaning. The Court has stated that a historic bay is a bay ‘over which the coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.’ *United States v. California*, 381 U. S., at 172. See also *United States v. Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23. The Court

that the three part test is actually the standard for finding “historic title” and that a different doctrine—the doctrine of “ancient title”—is also a sufficient basis for identifying a “historic bay” under Article 7(6) of the Convention. According to Massachusetts, “historic title” is the maritime counterpart of title acquired by adverse possession. It is prescriptive in character because it arises as a result of a state’s exercise of dominion over water that would otherwise constitute either high seas or territorial sea in which all ships enjoy the right of innocent passage. Before this Court, Massachusetts no longer claims “historic title” as it uses the term. Brief for Defendant 4; Reply Brief for Defendant 22.

The Commonwealth instead relies entirely on a claim of “ancient title.” This is the first case in which we have been asked to evaluate such a claim to coastal waters. According to the Juridical Regime, an “ancient title” is based on a state’s discovery and occupation of territory unclaimed by any other sovereign when it was first acquired. To claim “ancient title” to waters that would otherwise constitute high seas or territorial sea, a state must

“affir[m] that the occupation took place before the freedom of the high seas became part of international law. In that case, the State would claim acquisition of the area by an occupation which took place long ago.

also has noted that there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) that continuity of this exercise of authority; and (3) the acquiescence of foreign nations. See *United States v. Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 75 and 23–24, n. 27. An authoritative United Nations study concludes that these three factors require that ‘the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.’ *Juridical Regime of Historic Waters, Including Historic Bays* 56, U. N. Doc. A/CN.4/143 (1962).” *Alabama and Mississippi Boundary Case*, — U. S., at — — — (footnotes omitted) (slip op. 8–9).

Strictly speaking, the State would, however, not assert a historic title, but an ancient title based on occupation as an original mode of acquisition of territory. The difference is subtle but should in the interest of clarity be not overlooked: to base the title on occupation is to base it on a *clear original title which is fortified by long usage.*" Juridical Regime, *supra*, at 12 (¶71) (emphasis added).

Assuming, *arguendo*, that waters that would otherwise be considered high seas or territorial sea may be claimed under a theory of "ancient title," both parties agree that effective "occupation" must have taken place before the freedom of the high seas became a part of international law. Tr. of Oral Arg. 16–17, 34; Brief for Defendant 4. By this analysis, the title must have been perfected no later than the latter half of the 18th century.¹¹

¹¹ One cannot, as a historical matter, point to a precise date on which the international community would have rejected an assertion of sovereignty over Nantucket Sound as contrary to international law. It is clear, however, that such a claim would have become progressively less tenable throughout the eighteenth century:

"The seventeenth century marked the heyday of the *mare clausum* (closed sea) with claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey, and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away." L. Brownlie, *Principles of Public International Law* 233–234 (2d ed. 1973) (footnotes omitted).

III

Although the Special Master discussed “the history of [Nantucket Sound], especially [its] role in the development of the colonial economy of Martha’s Vineyard and Nantucket Island,” Report 27, his discussion leaves us in doubt whether he felt that “the colonists’ exploitation of the marine resources of the soun[d] was equivalent to a formal assumption of sovereignty over” it *before* freedom of the seas became generally recognized. *Id.*, at 58.¹² Because the Commonwealth relied on the same historical evidence to establish both “historic” and “ancient” title, and because “the ultimate responsibility for deciding what are correct findings of fact remains with us” in any event,¹³ we have examined for ourselves the pertinent exhibits and transcripts. Our independent review leads us to conclude that the Commonwealth did not effectively “occupy” Nantucket Sound so as to obtain “clear original title” and fortify that title “by long usage” before the seas were recognized to be free.

“[I]t is an undeniable fact that, since the days of Grotius, the principle of the freedom of the high seas found an ever wider currency and that, after a gradual evolution, it gained the upper hand towards the beginning of the nineteenth century, when it crystallized into a universally accepted principle of international law.” Y. Blum, *Historic Titles in International Law* § 61, pp. 242–243 (1965).

We find it unnecessary to select a “critical date” upon which the community of states would have rejected a British claim to Nantucket Sound. Because the colonists’ activities changed gradually in character and intensity over time, we need say only that effective “occupation” must have ripened into “clear original title,” “fortified by long usage,” no later than the latter half of the 1700s.

¹²The Special Master discussed this history only as regards “historic” title, see Report 27, even though he recognized that “[e]ffective occupation, from a time prior to the victory of the doctrine of freedom of the seas” is necessary “to establish a valid claim to a body of water under ancient title,” *id.*, at 25–26.

¹³*Colorado v. New Mexico*, — U. S. —, — (1984) (slip op. 6). See *Alabama and Mississippi Boundary Case*, — U. S., at — (slip op. 8) and cases cited therein.

Massachusetts relies on the colonists' "intensive and exclusive exploitation" of the marine resources of Nantucket Sound to establish occupation. Reply Brief for Defendant 17. At the outset, we have some difficulty appraising the Commonwealth's historical evidence because the cases and publications cited to us uniformly discuss occupation in the context of "historic" rather than "ancient" title. Assuming that the parties are correct in their unspoken assumption that occupation sufficient to establish "historic title" resembles that necessary to acquire "ancient title" as well, and further assuming that such title extends to the whole of the waters of the Sound and is not merely a right to exploit its resources, we believe that occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed.¹⁴ The history of the two most publicized cases conveys the international understanding of occupation.

In the *Fisheries Case (U. K. v. Nor.)*, 1951 I. C. J. 116, the Permanent International Court of Justice upheld Norway's use of straight baselines (now approved expressly by Article 7(6) of the Convention), in part because Norway had proved a historic claim to the "comparatively shallow" waters between the mainland and the fringing islands known as the Skjaergaard, or "rock rampart." The Court acknowledged

¹⁴The Juridical Regime quotes two definitions of "occupation":

"[Occupation] is defined by Oppenheim as follows:

'Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State.'

A similar definition is given by Fauchille:

'Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any other State but which is susceptible of sovereignty.'" Juridical Regime, *supra*, at 12 (¶ 70).

On the possible difference between occupation as a mode of original acquisition of territory as contrasted to occupation eventuating in prescriptive acquisition, see M. Strohl, *The International Law of Bays* 328, n. 27 (1963).

that Norwegian fishermen had exploited fishing grounds in this region "from time immemorial," *id.*, at 127, and that the King of Denmark and Norway had excluded fishermen from other States "for a long period, from 1616–1618 until 1906." *Id.*, at 124; see *id.*, at 142.

Of similar effect is the case of *Annakumary Pillai v. Muthupayal*, 27 Indian L. Rep. 551 (Mad. Ser. 1903). The complainant in that case was a lessee of the Rajah of Ramnad who accused the defendant of stealing chanks (mollusks) from the seabed five miles off the Ramnad coast. The Indian High Court upheld its own jurisdiction and the liability of the defendant "upon the immemorial claim of the land sovereign over this body of water." P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 16 (1927) (footnote omitted). The Officiating Chief Judge, relying on historical evidence dating from the 6th century B. C. and explaining the concessions under which chanks and pearls were historically gathered by the state's licensees, declared that "it would be impossible to ignore the fact that for ages in this country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him." 27 Indian L. Rep., at 557. "And [because] chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sovereign, . . . the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer." *Id.*, at 554. The Officiating Chief Judge concluded that this history demonstrated "exclusive occupation" of "the fisheries in question." *Id.*, at 566.¹⁵

¹⁵ Because of a division of opinion between the Officiating Chief Judge and the second judge on the two-judge panel, the case was subsequently heard by a three-judge panel. The later panel unanimously agreed with the judgment of the Officiating Chief Judge and with his historical analysis. See *Annakumary Pillai v. Muthupayal*, 27 Indian L. Rep. 551, 572 (Mad. Ser. 1903).

We have encountered additional examples of claims to title based on exploitation of marine resources—the pearl fisheries in Australia, Mexico, and Columbia, the oyster beds in the Bay of Granville and off the Irish Coast, the coral beds off the coasts of Algeria, Sardinia, and Sicily, and various grounds in which herring, among other fishes, are found. See T. Fulton, *The Sovereignty of the Sea* 696–698 (1911). The continuation of apparently longstanding state regulation over these fisheries does not contradict, and is indeed perfectly consistent with, the understanding of occupation reflected in the Norwegian and Indian cases just discussed.

In contrast, the historical evidence introduced by Massachusetts does not show effective occupation of Nantucket Sound. To be sure, the Commonwealth's expert witness on the history of the Sound, Dr. Louis DeVorse, a historical geographer, did conclude that Nantucket Sound was part of an "amphibious resource region" due to the "intimate relationship" between the inhabitants of the area and the surrounding waters.¹⁶ By this Dr. DeVorse meant essentially that the residents took their livelihood from the sea. Although fascinating from a historical geographer's point of interest, the testimony of Dr. DeVorse and the exhibits introduced through him do not satisfy the legal threshold for occupation of a coastal water body.

To begin with, the opinion that Nantucket Sound formed part of an "amphibious resource region" does not prove occupation of the entirety of Nantucket Sound. That conclusion was based largely on activity which undoubtedly took place

¹⁶Dr. DeVorse inferred this intimate relationship in part from 17th and 18th century maps naming prominent features and attempting to chart the depths of Nantucket Sound. As Dr. DeVorse acknowledged, however, none of these maps identified Nantucket Sound as a separate body of water even though they did identify other bodies of water such as Cape Cod Bay, Buzzard's Bay, and, in two instances, Vineyard Sound. These early maps do not support Massachusetts' contention that the area's inhabitants established a special relationship with the protected waters of Nantucket Sound as opposed to the surrounding waters and ocean in general.

either within territorial waters or on dry land. For example, to evidence the colonists' close relationship with the sea, Dr. DeVorsey pointed to the use of sand for glassmaking, stone polishing, and farming. Other activities, such as the building of mills powered by the tide, the making of salt from sea water, and the gathering of seaweed for fertilizer and insulation, also fail to establish occupation of Nantucket Sound. Even considering this evidence together with the more water-based pursuits of harvesting oysters and clams and hunting whales, we do not find sufficient evidence of occupation of Nantucket Sound as a whole. Massachusetts concedes that oysters were dug mainly in the harbors, and for decades the colonists' exploitation of whales was restricted to those that had drifted onto the beach. Although the residents by the mid-18th century had developed a technique for driving whales onto beaches by pursuing them in modified four to five man Indian canoes, and they certainly caught shellfish and clams outside the shallow water near shore, there is no satisfactory evidence that these activities occurred over the entirety of Nantucket Sound, and in particular over the portion of the Sound which the United States contends is high seas.

The evidence of occupation adduced by Massachusetts is also deficient because it does not warrant a finding that the colonists asserted any exclusive right to the waters of Nantucket Sound. ~~The evidence of occupation adduced by Massachusetts is also deficient because it does not warrant a finding that the colonists asserted any exclusive right to the waters of Nantucket Sound.~~ The closest the Commonwealth comes is a 1672 contract by which the Town of Nantucket attempted to engage a whaler by the name of Lopar to "follow the trade of whaling on the island" for two years in exchange for, *inter alia*, an exclusive license to hunt whales and ten acres of land. There is no evidence that the contract was carried out (and in particular no record of a conveyance of real property), and no suggestion in the contract that the li-

cense was limited, or even especially concerned with, whaling in Nantucket Sound. Indeed, the contract does not clearly reflect an exclusive proprietary interest in whales anywhere: it may simply represent a covenant on the part of the Nantucket islanders not to compete with the whaling company or companies chartered under the proposed contract. The only other evidence of an assertion of exclusive control was a 1692 Colonial Resolve to build a vessel to protect coastal ships in Vineyard Sound against the depredations of New Yorkers, with whom a dispute was brewing at the time.¹⁷ But this evidence concerning Vineyard Sound merely highlights the lack of any comparable evidence concerning Nantucket Sound. In the absence of evidence limiting use of Nantucket Sound to the inhabitants of its shores, there is no reason to exempt these waters from such rights as innocent passage traditionally enjoyed in common by all members of the international polity.

Even if Massachusetts had introduced evidence of intensive and exclusive exploitation of the entirety of Nantucket Sound, we would still be troubled by the lack of any linkage between these activities and the English Crown. Cf. *United States v. Alaska*, 422 U. S. 184, 190–191, 203 (1975). Unless we are to believe that the self-interested endeavors of every sea-faring community suffices to establish “ancient title” to the waters containing the fisheries and resources it exploits, without regard to continuity of usage or international acquiescence necessary to establish “historic title,” solely because exploitation predated the freedom of the seas, then the Commonwealth’s claim cannot be recognized. Accordingly, we find that the colonists of Nantucket Sound did not effectively occupy that body of water; as a consequence, Great

¹⁷The dispute was resolved peacefully, there is no evidence that the vessel was built, and the only other patrol vessel of which Dr. DeVorse testified was engaged in convoying merchantmen, not in protecting Nantucket Sound.

Britain did not obtain title which could devolve upon Massachusetts.

IV

Our determination that Massachusetts had not established clear title prior to freedom of the seas is corroborated by the Commonwealth's consistent failure to assert dominion over Nantucket Sound since that time.¹⁸ Three examples should suffice to demonstrate that during the 18th and 19th centuries Massachusetts continued to treat Nantucket Sound in a manner inconsistent with its recent characterization of that body as internal waters.

First, in 1847, the Supreme Judicial Court of Massachusetts issued an opinion which is generally understood as having adopted Lord Coke's more demanding version of the line-of-sight test for determining whether jaws of land enclosed inland waters.¹⁹ Since it is agreed that Nantucket Sound

¹⁸ See *Temple of Preah Vihear*, 1962 I. C. J. 6, 61 (separate opinion of Sir Gerald Fitzmaurice) ("It is a general principle of law . . . that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or closely connected matter—of his attitude, state of mind or intentions at an earlier date also; . . . the existence of a state of fact, or of a situation, at a later date may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration." (citations omitted)).

While the position of Massachusetts is discussed in text, it bears mention that the United States did not assert sovereignty over Nantucket Sound either. In 1789 the First Congress established a customs enforcement system, which included a number of separate districts in Massachusetts. The statutory definition of the District of Nantucket included "the Island of Nantucket" without any reference to adjacent waters, whereas the District of Edgartown, which included Martha's Vineyard and the Elizabeth Islands, expressly incorporated "all the waters and shores" within Duke County. Act of July 31, 1789, 1 Stat. 29, 31. This distinction was repeated in subsequent legislation in 1790, Act of Aug. 4, 1790, 1 Stat. 145, 146, and in 1799, Act of Mar. 2, 1799, 1 Stat. 627, 629.

¹⁹ In *Commonwealth v. Peters*, 53 Mass. 387, 392 (1847), the Massachusetts high court held:

could not qualify as inland waters under the Coke test, the Court's decision that that test was part of the common law of Massachusetts supports the further conclusion that the Sound was not part of the internal waters of the Commonwealth.

This conclusion was confirmed in 1859 when the Massachusetts legislature enacted a statute defining the seaward boundary of the Commonwealth at one marine league (or three nautical miles) from the coast. See Acts of 1859, Chapter 289, Mass. Ex. 53. In accordance with this measure, the statute treated arms of the sea as part of the Commonwealth if the distance between their headlands did not exceed two marine leagues. Thus, the statute replaced the ambiguous line-of-sight test for applying the *inter fauces terrae* doctrine with a fixed standard of six nautical miles. Since the distance between Monomoy Point and Nantucket Island is admittedly more than six nautical miles, Massachusetts's statutory definition of its own coastline excluded Nantucket Sound.

"All creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county."

Chief Judge Shaw's adoption of the Coke test in *Peters* is consistent with Judge Story's earlier exposition in *United States v. Crush*, 26 Fed. Cas. 48, 52 (C. C. D. Mass. 1829):

"I do not understand by this expression that it is necessary that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is might be distinctly seen with the naked eye and clearly distinguished from each other."

The parties do not disagree with the Master's conclusion that the American view of the proper test, which followed Coke, differed from the British view, which followed Hale.

Finally, in 1881, the Massachusetts legislature enacted a statute directing its Harbor and Land Commission to prepare charts identifying the boundaries that had been established by the 1859 law. Official charts prepared pursuant to that legislation are consistent with the Master's conclusion that Vineyard Sound was considered part of the Commonwealth, but that Nantucket Sound was not.

It was not until 1971 that Massachusetts first asserted its claim to jurisdiction over Nantucket Sound. There is simply no evidence that the English Crown or its colonists had obtained "clear original title" to the Sound in the 17th century, or that such title was "fortified by long usage." Without such evidence, we are surely not prepared to enlarge the exception in Article 7(6) of the Convention for historic bays to embrace a claim of "ancient title" like that advanced in this case.²⁰

The parties are directed to prepare and submit a decree conforming to the recommendations of the Special Master.

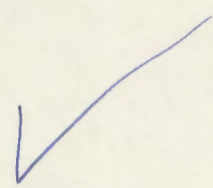
It is so ordered.

²⁰The validity of and any limits to the "ancient title" theory are accordingly reserved for an appropriate case. In view of our decision that the history of Nantucket Sound does not support the acquisition of "ancient title" by Massachusetts, we similarly decline to address the question whether the Commonwealth abandoned or renounced that title, and the antecedent issue of under what standard that judgment should be made.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 22, 1986



No. 35 Orig. United States v. Maine

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

✓
January 23, 1986

Re: 35 Original - United States v. Maine

Dear John:

Please join me.

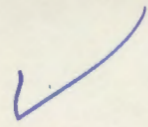
Sincerely,

WRM

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 23, 1986

No. 35 Original

Maine v. United States, et al.

Dear John,

Please join me.

Sincerely,

Justice Stevens

Copies to the Conference

January 23, 1986

35 Orig. United States v. Maine

Dear John:

Please join me.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

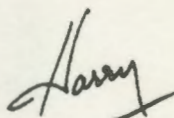
January 24, 1986

Re: 35 Original - United States v. Maine

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

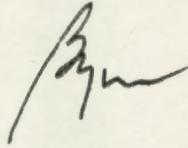
January 27, 1986

No. 35, Orig. - United States v. Maine

Dear John,

Please join me.

Sincerely yours,

A handwritten signature in dark ink, appearing to be "By" or similar, written in a cursive style.

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

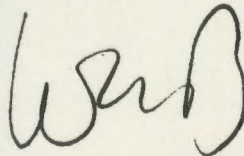
January 28, 1986

Re: No. 35-Orig. - United States v. Maine

Dear John:

I join.

Regards,



Justice Stevens

Copies to the Conference

35 Orig. United States v. Maine (Cabell)

JPS for the Court 12/13/85

1st draft 1/22/86

2nd draft 1/28/86

3rd draft 2/6/86

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WHR 1/23/86

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HAB 1/24/86

BRW 1/27/86

CJ 1/29/86