

MAY 31 1969

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No. 35, Original

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF MAINE, NEW HAMPSHIRE,  
MASSACHUSETTS, RHODE ISLAND, NEW YORK,  
NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA,  
NORTH CAROLINA, SOUTH CAROLINA,  
GEORGIA AND FLORIDA

**Brief of the State of Maine in Opposition to Motion  
of the United States of America for Leave to File  
Complaint, and Statement of States of New Hamp-  
shire, Massachusetts, Rhode Island, New York,  
New Jersey, Delaware, Maryland, Virginia, North  
Carolina, South Carolina, Georgia and Florida with  
Respect Thereto.**

STATE OF MAINE,  
JAMES S. ERWIN,  
*Attorney General,*

ROBERT G. FULLER, JR.,  
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State House,  
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STATE OF MAINE, ET AL.

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**Brief of the State of Maine in Opposition to Motion  
of the United States of America for  
Leave to File Complaint**

Comes now the State of Maine and pursuant to Supreme Court Rule 9 (5), files the following brief in opposition to the motion of the United States of America for leave to file its complaint in the above action:

*I. THE COMPLAINT ALLEGES NO FACTS REVEALING THE EXISTENCE OF A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES.*

The United States alleges that this cause is within the original jurisdiction of this Court by virtue of Article III, Section 2, Paragraph 2, of the Constitution of the United States and Title 28, United States Code, Section 1251 (b) (2). (Complaint, Paragraph I.) This jurisdictional allegation appears to be based solely on the naked allegations proffered in Paragraphs IV and V of the complaint, which, in substance, assert that the defendants claim some right adverse to the United States in the seabed and subsoil of the Atlantic Ocean

more than three geographic miles seaward from ordinary low-water mark, and that in the exercise of such rights, Maine has purported to grant exclusive oil and gas exploration rights in the area. These allegations are wholly unsubstantiated in the complaint and in the accompanying brief. In Maine's view, the only conceivable basis for the allegations sought to be advanced in Paragraphs IV and V of the complaint would seem to be the non-reply of Maine and the other defendant States to the Solicitor General's letter of March 19, 1969, which requested Maine and other states bordering on the Atlantic Ocean to disclaim all right or interest in the Atlantic Continental Shelf more than three miles from their respective coastlines or be joined in the instant cause. (Such letter is printed in the Appendix to this brief.) The Solicitor General also, it is true, makes reference in the brief of the United States (page 14) to alleged "repeated public assertions of . . . claims (by Maine) to vast submerged areas lying more than three miles seaward. . . ", but cites not one instance when or where or in what manner such alleged claims have been made.

The pyramiding of allegation upon unsubstantiated allegation, with such allegations, in turn, being based upon the non-reply to a letter and undocumented "public assertions", appears to be an inappropriate basis upon which to invoke the jurisdiction of this Court. This attempt wholly fails to reveal a situation arising to the dignity of the "case or controversy" which, this Court has consistently held, must exist in order to warrant exercise of original jurisdiction under the provisions of the United States Constitution and the United States Code cited by the Solicitor General.

In *United States v. West Virginia*, 295 U. S. 463 (1935), this Court stated:

"General allegations that the State challenges the claim of the United States . . . and asserts a right superior to that of the United States . . . raise an issue too vague and ill-defined to admit of judicial determination." 295 U. S. 463, 474.

Maine submits that the complaint offered by the United States contains no more than "general allegations" similar to those rejected by this Court as a basis for original jurisdiction in the *West Virginia* case.

The defects of the complaint sought to be filed in the *West Virginia* case are present in the complaint sought to be filed here. According to the opinion in *West Virginia*:

"The bill . . . neither asks the protection or alleges the invasion of any property right. It asserts no title in the United States . . . which might afford a basis for a suit to remove a cloud on title . . . [T]here is no allegation of any interference by the state, actual or threatened, with any of the land or property. . . "

295 U. S. 463, 471.

Using these guidelines as a test of the acceptability of the complaint which the United States here offers, it is apparent in the first instance that no state action, capable of construction as an invasion of any property right of the United States, is alleged. It may be said here that certain limited rights to engage in survey and exploratory activities have been granted by the State of Maine to a private company, but even these rights and any projected exercise thereof are subject to further review and approval by the State of Maine. Accordingly, the allegations in Paragraph VII of the complaint that the State of Maine by its conduct and claims is interfering with and obstructing, or threatening to obstruct, the orderly and effective exploration, leasing and development of said mineral resources is considerably premature.

To the best of Maine's knowledge, the private company referred to above has taken no action to date, under color of any document issued by the State of Maine, which could be interpreted as taking possession of any claim area or as engaging in mining or drilling operations.

It is helpful to compare Maine's actions and those of the other defendant states with those of other states in cases where this Court has chosen to exercise its original jurisdiction. For example, no situation exists in this case similar to that in *United States v. Utah*, 283 U. S. 64 (1931). There, the United States had:

" . . . executed and delivered numerous prospecting permits covering portions of the river beds in question, giving to the permittees the exclusive rights of prospecting for petroleum, oil and gas minerals,

and . . . the permittees (had) entered upon development work; . . . ” 283 U. S. 64, 72 (1931).

Utah had leased portions of the same river beds. Thus, clear and conflicting claims of title were presented. Here, however, neither Maine nor any other defendant state has taken any action comparable to that taken by Utah. Maine has conveyed no leasehold interests predicated upon any underlying claim of title adverse to that of the United States. Maine's actions, with respect to granting permission for private survey or exploratory activity, have not infringed upon the rights of any Federal permittee or lessee. To Maine's knowledge there are none in this area. How, then, does Maine's action obstruct and interfere with “orderly and effective exploration, leasing and development of said mineral resources”, as the United States alleges? (Complaint, Paragraph VII.)

Regardless of how firmly convinced the United States might be that at some unknown time in the future some as yet undefined action might be taken which will possibly involve exploring for minerals off the coast of Maine and the coasts of the other defendant states, until that time comes it must be abundantly clear that there is no intrusion upon a Federal interest, and that the alleged conflict between any sovereign state and the United States is quite hypothetical.

It is possible that initial mining operations off the Maine coast, if and when they are begun, will be within the area which the United States concedes to be encompassed by the boundaries of Maine. (Complaint, Paragraph III.) Thus, it is apparent that the facts in this case fall far short of creating a justiciable “case or controversy” as compared to those which led this Court to exercise its original jurisdiction in *Utah*.

Much less is this case like *United States v. California*, 332 U. S. 19 (1946), where this Court found a “controversy in the classic sense”, 332 U. S. 19, 25, to exist where

“(t) here is a claim by the United States, admitted by California, that California has invaded the title of paramount right asserted by the United States to a large area of land and that California has converted to its own use oil which was extracted from that land.” 332 U. S. 19, 25.



The facts alleged in the case at bar fall far short of a classic controversy. The qualified authorization issued by Maine for private survey or exploratory activity has been assumed by Plaintiff to be an invasion of Federal rights, but only in the vaguest sense. Certainly the United States does not allege (as was the situation in the California case) that any defendant has converted any oil or gas from Atlantic off-shore sites to its own use. In fact, no allegation is made that any such oil or gas exists or has been discovered.

*California* would appear to hold that without "conflicting claims of alleged invasions of interests in property and . . . conflicting claims of Governmental powers to authorize its use", 332 U. S. 19, 25, there is no justiciable controversy.

## *II. THE COMPLAINT STATES NO FACTUAL BASIS FOR AN ACCOUNTING.*

Plaintiff alleges it is entitled to an accounting for all sums of money derived by the defendants from the area lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, which are properly owing to the United States. (Complaint, Paragraph VI.)

There is no allegation that the State of Maine or any other defendant has received any such sums of money or that any money is due and owing to the State from the area in question.

The State of Maine has not received any such money for which an accounting could be made. In the absence of any and all such sums of money or any obligation to pay the same, there is nothing for which an accounting can be made. Accordingly, in this area of inquiry there is likewise no controversy or justiciable issue to be determined by the Court.

## *III. THE COMPLAINT FAILS TO ALLEGE FACTS IN SUPPORT OF PLAINTIFF'S CLAIM OF URGENT NEED.*

While it is true, as alleged in paragraph VII of the complaint, that Congress, by the Outer Continental Shelf Lands Act, declared the "urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the

outer Continental Shelf", it must be conceded by Plaintiff that the absence of such exploration and development in the Atlantic coastal area during the sixteen intervening years is not related in any way to interference of any kind by the State of Maine.

Again, in paragraph VIII of the complaint it is suggested there is urgent need for prompt and final settlement of the controversy because the fundamental question in issue relates to undefined aspects of the foreign policy of the United States.

While the State of Maine would not presume to challenge the right of the Plaintiff to determine matters of foreign policy, it would appear to be appropriate to suggest that this is basically the responsibility of the executive branch of the federal government rather than the judiciary. Especially is this true, we hasten to add, where the complaint is stated in terms so vague and general as to leave the State completely uninformed as to what specific elements of foreign policy are involved.

#### IV. CONCLUSION

The United States has failed to show that the actions of Maine or of any defendant state constitute a "conflicting claim" of any sort, beyond the mere allegation that such actions challenge Federal authority, an allegation that presents "an issue too vague and ill-defined to admit of judicial determination". *United States v. West Virginia*, 295 U. S. 463, 474. Without alleging how such actions are adverse to some Federal interest, the complaint falls short of alleging a case or controversy calling for the exercise of this Court's original jurisdiction. The complaint is therefore, at best, premature.

WHEREFORE, the State of Maine respectfully prays that the motion of the United States for leave to file its complaint in this action be denied.

Respectfully submitted,  
STATE OF MAINE,  
JAMES S. ERWIN,  
*Attorney General*,  
ROBERT G. FULLER, JR.,  
*Assistant Attorney General*.

June , 1969.

## Statement and Prayer of Remaining State Defendants

The States of New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, defendants herein, concur and join in the foregoing brief of the State of Maine, and, for the reasons therein stated, likewise pray that the Motion of the United States for leave to file its complaint in this cause be denied.

STATE OF NEW HAMPSHIRE,  
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## Appendix

Letter from the Solicitor General to the Attorneys General of the Atlantic seaboard states.

(Seal)

OFFICE OF THE SOLICITOR GENERAL  
WASHINGTON, D. C. 20530

March 19, 1969

Gentlemen,

This letter, addressed to the Attorneys General of the thirteen Atlantic seaboard States listed on page 3, follows my prior communication of February 25, 1969, and some replies received in the interim.

A few of the States involved have indicated a desire to postpone litigation for an indefinite period with a view to exploring a legislative resolution of the controversy. Such a prospect may be too remote and uncertain to justify further delay in initiating the legal proceedings outlined in my earlier letter. In prior meetings between representatives of the United States and the affected States, the view that the contemplated suit is the only realistic approach at this time was generally concurred in. At all events, in light of the pressing dispute between the United States and the State of Maine, and the Supreme Court's quite reasonable requirement that all States interested in the same question be joined as defendants, there does not appear to be any alternative but to file the proposed original action against all of the Atlantic seaboard States who assert claims in the Ocean beyond three miles from their respective coastlines.

The joinder of States other than Maine is, of course, premised on the assumption that each of them in fact claims submerged lands underlying the Atlantic more than three miles from its coastline. If we are mistaken in this assumption with respect to any of the States involved, you should promptly

advise me. In the absence of such a disclaimer, we are planning to file a complaint on behalf of the United States in the Supreme Court, joining all the listed States, on April 1, 1969, or as soon thereafter as the papers can be prepared.

Very truly yours,

/s Erwin N. Griswold  
Erwin N. Griswold  
Solicitor General



### **Certificate of Service**

I certify that in compliance with Supreme Court Rule 33(2) (a) I have this day served a copy of the foregoing brief upon the plaintiff, United States of America, by mailing such copy by air mail, with postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

**ROBERT G. FULLER, JR.,**  
*Assistant Attorney General,*  
State of Maine.

**Dated:**