No. 63, Original

In the Supreme Court of the United States

OCTOBER TERM, 1973

STATE OF GEORGIA, PLAINTIFF

v.

RICHARD M. NIXON,
PRESIDENT OF THE UNITED STATES, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MEMORANDUM FOR THE DEFENDANTS

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JURISDICTION

On May 10, 1973, the State of Georgia filed a motion for leave to file a complaint invoking this Court's original jurisdiction. The complaint names as defendants, individually and in their official capacities, the President of the United States, the Secretary of Transportation, the Commissioner of Education, the Administrator of the Environmental Protection Agency, and the Director of the Office of Management and Budget. It seeks, in three causes

of action, a declaration that Georgia is entitled to receive certain federal financial assistance under the Federal-Aid Highway Act of 1956, the National Defense Education Act of 1958, and the Federal Water Pollution Control Act Amendments of 1972, and an order "enjoining defendants from impounding or withholding from the State of Georgia any sums of money, obligational authority or other fiscal assistance or grants to which it is entitled under [those] programs" (Complaint, pp. 19-20). This Court's jurisdiction is invoked under Article III, Section 2, of the Constitution, which confers original jurisdiction in cases "in which a State shall be Party."

SUMMARY OF POSITION

Defendants urge that the Court grant plaintiff's motion, accept jurisdiction over all three causes of action, and refer the case to a special master for a full evidentiary hearing and initial determination of the legal issues.

We believe that these causes of action lie within this Court's original jurisdiction under Article III of the Constitution. The real question, therefore, is whether the Court should exercise its discretion to take this case. We submit that this controversy constitutes one of those extraordinary and important cases which ought to be taken directly by this Court. Not only are the issues of paramount importance to the Nation but there exists no adequate alternative means for their careful exploration and mature decision.

Suits challenging the President's power to control the rate of spending on some congressionally-enacted programs or to decrease the absolute amounts spent on others are now scattered through the district courts and the courts of appeals. Though it is essential that the constitutional and statutory issues involved be decided on fully-developed records, that is impossible, given the number of suits involved.

The present action offers the opportunity to litigate the issues bearing upon three varying and representative statutory programs. The government can concentrate its resources on making one complete record. Other plaintiffs, including other States, will undoubtedly assist Georgia in making the best record and legal arguments for plaintiff's position. Thus, this case offers far and away the best opportunity of reaching a fully-informed and prompt judgment on the complex and profound issues at stake in the assertion of presidential discretion to affect rates and amounts of spending. For that reason, we ask that the Court accept the case and refer it to a special master for prompt trial.

STATEMENT

The complaint alleges three causes of action, one for each of the three federal programs mentioned above. The statutory framework for each of those programs is complex, but a brief outline of each will suffice to place Georgia's claims in their proper context.

1. The Federal-Aid Highway Act of 1956, 70 Stat. 374, *et seq.*, as amended, 23 U.S.C. 101, *et seq.*, offers financial assistance to the states for the construction of the federal-aid highway systems "to meet the needs of local and interstate commerce, for the national and civil defense" (23 U.S.C. 101(b)).

The program works in this way: Funds authorized by Congress for each fiscal year are apportioned among the states by the Secretary of Transportation (23 U.S.C. 104), and each state submits a general program of proposed highway projects for the Secretary's approval (23 U.S.C. 105). Upon approval of the general program, the state submits detailed specifications for each project within the program. The Secretary's approval of a particular project is "deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto" (23 U.S.C. 106(a)). Congress thereafter appropriates funds, pursuant to the earlier authorizations, for progress payments and final reimbursement to the states (23 U.S.C. 121).

The "withholding or impoundment" of which plaintiff complains (Complaint, p. 9) involves not a permanent withholding of funds but only the imposition of spending controls to decrease the rate of obligations under the Act. Since apportionments are certified at least six months before the start of the fiscal year (23 U.S.C. 104 (b)) and may be obligated from that time until two years after the end of that fiscal year (23 U.S.C. 118(b))—a period of at least three and one-half years—the rate of federal-aid highway con-

struction can be decreased, without affecting total expenditures under the Act, by deferring some of the obligation authority until the later portions of the three and one-half year period. That is what was done here.

The President, through the Office of Management and Budget, limited the Secretary of Transportation's authority to obligate apportioned funds to a total of $4.4 billion for fiscal year 1973. The complaint seeks to require the Secretary to obligate the full $5.5 billion that was apportioned by him for that year.

2. Title III-A of the National Defense Education Act of 1958, 72 Stat. 1588, *et seq.*, as amended, 20 U.S.C. 441-445, assists the states by providing matching grants for the acquisition of laboratory and other special equipment for use in public elementary and secondary schools, and for minor remodeling to accommodate that special equipment. The Act provides that the Commissioner of Education shall allot to each state, pursuant to a prescribed formula, its share of the available sums appropriated for each fiscal year by Congress (20 U.S.C. 442). Any state that desires to receive payments under its allotment may submit, for the Commissioner's approval under 20 U.S.C. 443, a plan for spending the available funds on equipment and remodeling. The Commissioner is directed to pay to each state out of its allotment for the fiscal year an amount equal to one-half of the expenditures made for projects under its approved plan (20 U.S.C. 444).

There was no final Appropriations Act for the Department of Health, Education, and Welfare for fiscal year 1973. However, by Joint Resolution (P.L. 92-334, 86 Stat. 402, as amended and supplemented by P.L. 93-9, 87 Stat. 7), Congress provided for interim appropriations for numerous federal programs, including Title III-A of the National Defense Education Act. The resolution made available "[s]uch amounts as may be necessary for continuing the * * * activities [under Title III-A], but at a rate for operations not in excess of the current rate * * *." The "current rate"—*i.e.*, the final appropriation for fiscal year 1972—was $50 million. The effect of the continuing resolution was thus to place a ceiling of $50 million on Title III-A expenditures for fiscal year 1973. Although the President's proposed budget for fiscal year 1973 had recommended no funding for Title III-A, the Secretary of Health, Education, and Welfare, pursuant to a departmental spending plan developed in cooperation with the Office of Management and Budget to govern expenditures under the continuing resolution, allocated to the Commissioner of Education sufficient funds ($2 million) to enable the states to maintain their administrative machinery under Title III-A and thereby to preserve the program's structure in the event Congress determined to continue funding it.

The complaint here seeks to require allotments of the maximum amount permitted under the continuing resolution.

3. Title II of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 833, *et seq.*, 33 U.S.C. 1281-1292, provides for federal financial assistance to states, local governments, and interstate agencies for the construction of waste treatment facilities. The statutory scheme, like that of the Highway Act, involves successive stages leading to contractual obligations on the part of the federal government.

The Administrator of the Environmental Protection Agency allots sums among the states for each fiscal year (33 U.S.C. 1285(a)). Applicants for grants then submit plans and estimates for each proposed treatment works project, and the Administrator's approval of such plans is "deemed a contractual obligation of the United States for the payment of its proportional contribution to such project" (33 U.S.C. 1283(a)).

Acting pursuant to the direction of the President, the Administrator of the Environmental Protection Agency allotted to the states $2 billion for fiscal year 1973 and $3 billion for fiscal year 1974, or a total of $6 billion less than the maximum authorized for those years under 33 U.S.C. 1287. Georgia's complaint seeks to compel an allotment of the maximum amount authorized.

DISCUSSION

We believe the Court has original jurisdiction to entertain the complaint. Assuming there is discretion to decline exercising it, we submit that the importance

and urgency of the issue justify the Court in taking the case now. But, conscious of the Court's burdened docket and believing that the questions presented will be better illumined after an evidentiary hearing and detailed findings of fact, we suggest that the Court initially refer the case to a special master with appropriate directions.

I

THE COURT HAS ORIGINAL JURISDICTION TO ENTERTAIN THE COMPLAINT

The original jurisdiction of this Court is governed by the first two paragraphs of Section 2 of Article III of the Constitution, which provide as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall

> have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Excerpting what seems relevant here, we find that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States, * * * " and that in "all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction." Reading "all Cases" to mean "all cases before mentioned," we immediately reach the conclusion that the present action is within the Court's original jurisdiction—since all of the claims plainly arise under federal law and the Constitution (the basis for federal jurisdiction) and the State of Georgia is a party (the predicate for this Court's original jurisdiction).

In our view, that is the end of the matter—so far as original jurisdiction is concerned. In candor, however, we must alert the Court to two possible obstacles as to one of the causes of action. Neither of these possible obstacles, however, seems seriously troublesome.

The jurisdictional *statute* which adverts to this Court's original jurisdiction, 28 U.S.C. 1251, does not follow the constitutional scheme and makes no express provision for a suit, raising a federal question, by a State which is not against a foreigner or the citizen of a different State. Acting Administrator Fri is a citizen of Maryland, and all the other named de-

fendants are citizens of California—which perfectly fits the statutory provision (28 U.S.C. 1251(b)(3)) that "[t]he Supreme Court shall have original jurisdiction but not exclusive jurisdiction of: * * * [a]ll actions or proceedings by a State against the citizens of another State * * *." But Russel/Train, a citizen of the District of Columbia, has been nominated by the President for the position of Administrator of the Environmental Protection Agency, and, when confirmed, he will automatically be substituted for Mr. Fri as a defendant in this case pursuant to the Court's Rule 48(3). Thus, unless a District of Columbia citizen is viewed as a "citizen of another State" for the purposes of Section 1251, the jurisdictional statute, unlike the Constitution, does not explicitly grant this Court original jurisdiction of Georgia's third cause of action.

Our answer is that Section 1251 of the Judicial Code was not intended to cut down this Court's original jurisdiction. Indeed, the Revisor's Note makes clear that the new section filled some gaps in the predecessor statute, which the Court never treated as binding. We must conclude that some gaps remain. Any other reading would present the serious constitutional question whether Congress may diminish this Court's original jurisdiction—not a matter entrusted to legislative regulation by Article III. *Marbury* v. *Madison*, 1 Cranch 137, 174, *et seq.*, held unconstitutional a statute interpreted as attempting to add to the Court's original jurisdiction. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 332. This Court said

in *Kentucky* v. *Dennison*, 24 How. 66, 96-98, that its original jurisdiction can be exercised without further enabling legislation by Congress. It must follow that enabling legislation cannot curtail original jurisdiction. Certainly it should not be read as an attempt to do so by implication. There is grave doubt concerning Congress' power to limit the appellate jurisdiction of the Supreme Court despite the express power to make "exceptions." The Constitution confers no power to make exceptions to the original jurisdiction, and so it would seem clear that Section 1251, whatever it does,[1] does not deprive the Court of jurisdiction in this case.

A second conceivable obstacle is a dictum in *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261, uncritically followed in *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 163-165, and *New Mexico* v. *Lane*, 243 U.S. 52, 58. Those cases suggested—in what is at best an alternative holding—that this Court's original jurisdiction of a case brought by a State depends upon all defendants being citizens of

[1] Although the phrase "citizens of another State" as it appears in 28 U.S.C. 1251(b)(3) is not defined in the statute and has not been construed by this Court, that provision does not impose any further limitation on the Court's jurisdiction. It merely divides the Court's existing original jurisdiction under Article III into an exclusive class and a non-exclusive class. Since a suit by a State against a citizen of the District of Columbia is within the original jurisdiction under Article III, the statute presumably has, at most, the effect of assigning such a case to the class over which this Court's jurisdiction is not exclusive. To read the statute as denying jurisdiction would, as noted in the text, create the most severe constitutional problems.

another State, even if an independent ground of federal jurisdiction exists, such as the presence of a federal question. The reasoning presumably was that the only kinds of suits of which this Court is given original jurisdiction by virtue of a State being a party are those cases specifically mentioned in Clause 1 of Section 2 of Article III as involving a State, viz.: "Controversies between two or more States" and those "between a State and Citizens of another State."

The rationale of the cited passages is wholly inconsistent with the long line of cases, beginning with *United States* v. *Texas*, 143 U.S. 621, in which this Court has entertained jurisdiction of suits brought by the United States against a State. There is no sound reason to perpetuate what, we submit, is an erroneous reading of Article III. Indeed, the Court's disposition of a motion for intervention by a citizen of Utah in *Utah* v. *United States*, 394 U.S. 89, suggests that the Court has long since abandoned the *Southern Pacific* dictum. There, argument was advanced on the question whether the intervention of Utah claimants would defeat the Court's original jurisdiction—the United States submitting that it would not. But, despite this jurisdictional basis tendered, the Court disposed of the intervention issue on the merits, at least arguably indicating that there was no jurisdictional obstacle.

3. Alternatively, if it is not sufficient (as we have just argued) that federal jurisdiction is conferred by the presence of a federal question and this Court's

original jurisdiction attaches because a State is a party, we suggest another ground for holding that the present case is properly here. That is by assimilating a citizen of the District of Columbia to a citizen of a State, for the purpose of Clause 1 of Section 2 of Article III and 28 U.S.C. 1251(b)(3).

We recognize that a majority of the Court declined, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, to overrule earlier decisions holding that District of Columbia citizens were not State citizens for the purpose of the ordinary diversity-of-citizenship provision of Article III. We deal here, of course, with a different head of jurisdiction. But, even if the same rule should apply to both clauses, it is not inappropriate to urge reconsideration at this time. It is, indeed, an anomaly that, by statute (28 U.S.C. 1332(d)), a District of Columbia citizen is now treated as a State citizen for ordinary diversity-of-citizenship jurisdiction, but not under Article III. Moreover, the changed status of the District of Columbia strongly argues for granting its citizens the same right of audience in this Court, when sued by a State, as citizens of other jurisdictions within the Nation. Certainly it seems inappropriate that issues of this Court's original jurisdiction and its capacity to entertain cases of great constitutional moment should depend upon whether a nominee for an administrative position happens at the moment to reside in the District or in Virginia. A natural reading of Article III requires no such result.

4. It only remains to show that this suit is one properly brought by the State of Georgia and that it is the real party at interest. There can be no doubt on this score.

This Court has consistently declined jurisdiction of original cases where a state merely "elects to make itself * * * a party plaintiff." *Oklahoma* v. *Atchison, T. & S.F. Ry.*, 220 U.S. 277, 289. It has insisted that "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma* v. *Cook*, 304 U.S. 387, 396. On this basis the Court has declined to entertain complaints seeking relief primarily for particular citizens or classes of citizens (*Oklahoma* v. *Cook, supra; Oklahoma* v. *Atchison, T. & S.F. Ry., supra; North Dakota* v. *Minnesota*, 263 U.S. 365), but has permitted states to sue other states or private parties to protect its own sovereign interests or to vindicate the interests of its citizens as a whole, as *parens patriae* (*e.g., Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *New Jersey* v. *New York City*, 283 U.S. 473; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 726).[2]

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[2] A state may *not*, however, maintain an original action as *parens patriae* to challenge action of the federal government, because in a citizen's relations with the federal government the United States is his ultimate *parens patriae*. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324; *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486; *Florida* v. *Mellon*, 273 U.S. 12, 18. That presents no difficulty here, because Georgia alleges that its soverign interests are at stake. Its ability

Georgia meets the standard. It alleges that the defendants' actions have directly affected the state's sovereign and proprietary interests, because the funds being withheld under each of the three programs would otherwise be paid to the state or a wholly-controlled department of the state.[3] This Court has

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to maintain this suit therefore does not depend on its status as *parens patriae* of its citizens. To the extent Georgia seeks, in addition, to represent the interests of particular classes of its citizens, we of course reserve the right to object to the assertion of any claim advanced solely in that capacity.

[3] The state agency with authority to receive and administer federal payments under the Federal-Aid Highway Act (23 U.S.C. 121) is the Department of Transportation (formerly the State Highway Department of Georgia). Ga. Code Ann. 95-1502, 40-35191. The Department is a part of the executive branch of the state government. Ga. Code Ann. 40-3504(a).

Grants under Title III-A of the National Defense Education Act are received and administered by the State Board of Education. Ga. Code Ann. 32-413. The Board has supervisory authority over the State Department of Education, which is a part of the executive branch of the state government. Ga. Code Ann. 32-408, 40-3504(a). Georgia's current "State plan" was approved by the Commissioner of Education under 20 U.S.C. 443 on April 9, 1971.

Under Georgia law, grants under the Water Pollution Control Act Amendments may be received and administered by, among others, the Department of Natural Resources (formerly the State Water Quality Control Board), a part of the executive branch of the state government. Ga. Code Ann. 17-522, 40-35145, 40-3504(a). Though the Act permits municipalities as well as states to apply for grants under a state's allotment (33 U.S.C. 1281(g)(1)), the State of Georgia has in fact applied for such grants itself. An application for a grant by the Board of Regents of the University System, also a part of the executive branch (Ga. Code Ann. 40-3504(a)), for a project at the Skidaway Institute was recently approved by the Administrator.

consistently held that such allegations of pecuniary injury by a state make it a proper party to invoke the original jurisdiction. See, *e.g.*, *South Dakota* v. *North Carolina*, 192 U.S. 286 (suit by one state as a bondholder to recover the amount due on bonds issued by the other); *North Dakota* v. *Minnesota*, 263 U.S. 365, 374-376 (jurisdiction properly invoked on a claim that one state's bridges and roads suffered $5,000 damage because of the other state's drainage system, but not properly invoked on claim that private property of the state's citizens suffered $1,000,000 damage); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 559 (state permitted to file complaint alleging that defendants' construction of a bridge across Ohio River would so obstruct navigation that it would diminish the State's tolls and revenue derived from canals and railroads ending at the river).[4]

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[4] This Court said, in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324, that a State had no standing to invoke the principle of separation of powers in challenging a provision of the Voting Rights Act of 1965 authorizing the assignment of federal examiners on certification of the Attorney General to list qualified applicants. This remark does not rise above the level of dictum, however, for standing was found on other grounds. In that case, moreover, the interest allegedly affected by the violation of separation of powers was the interest in a judicial trial; the Court noted that separation of powers, insofar as it preserves that interest, is meant to protect not States but individuals and groups, "those who are peculiarly vulnerable to nonjudicial determinations of guilt" (383 U.S. at 324). Here, by contrast, the asserted violation is not of the separation between the legislature and the judiciary, giving rise to a fear of legislative trials, but

5. We conclude that Georgia is the real party in interest and a proper plaintiff and that this Court's original jurisdiction is properly invoked. There can be no question whatever as to the Highway Act and Education Act causes of action, for which the named defendants are citizens of a state other than Georgia. In our view, the Court will continue to have jurisdiction of the Water Pollution Control Act cause of action even after Mr. Train becomes the Administrator. But, should we be in error on this point, we know of no barrier to the Court's accepting jurisdiction over the two causes of actions that are properly before it while rejecting jurisdiction over the third.

It is the settled rule that a suit is not within the original jurisdiction if any one of the defendants fails to satisfy the requirements of Article III. See *Louisiana* v. *Cummins*, 314 U.S. 577; *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 245; *California* v. *Southern Pacific Co.*, 157 U.S. 229. But here the Administrator of the Environmental Protection Agency is a party only to one of the three causes of action, and that cause of action is severable from the others. Since Georgia could easily amend its complaint to omit its third cause of action, or could file a new complaint asserting only the first two claims,

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of the separation between the legislature and the executive, raising the question of the impact of laws upon States as well as individuals. The present case illustrates the difference because the claim is of a violation that directly impairs the State's pecuniary interests. In these circumstances, the State is not divested of standing merely because its constitutional claim involves the principle of separation of powers.

there is no substantial reason to conclude that the Court is without any jurisdiction at all if it lacks jurisdiction over even a severable part of the case. It is to be stressed, however, that we adhere to the view that this Court has original jurisdiction of all three causes of action.

II

THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION AND HEAR THIS CASE

1. This case presents major statutory and constitutional issues of enormous importance to the country and on which the definitive determination that only this Court can provide is necessary. The authority of the President to impose controls that reduce federal spending below the amounts Congress has appropriated or allocated is a subject of serious dispute between the Executive and Legislative Branches. This question and the proper role of the judiciary with respect to it, are issues of the importance that this Court traditionally decides. The need for a prompt and final resolution of the issues makes it appropriate for this Court to exercise its original jurisdiction to hear the cases. For the reasons indicated below, it would be inappropriate to relegate these disputes for determination through multiple litigation in the lower courts.

The case involves major spending control issues under three important federal statutes. There are important threshold questions of justiciability and jurisdiction: whether, as the government may contend, the attempt by the State of Georgia to obtain withheld

funds, like the similar attempts of other state and local governmental bodies being made in the large number of pending cases throughout the country, raises non-justiciable political questions and is banned by the doctrine of sovereign immunity as an unconsented suit against the United States. The statutory questions are major and complex: whether, in each of these acts, Congress has attempted to compel the Executive Branch to spend all the money Congress has allocated or appropriated. We contend that Congress has merely encouraged and requested the government to do so, but has left it to the President and the Executive Branch to make the final decision on exactly how much to spend, in the light of the inflationary effect such spending would have upon the economy and upon the particular statutory programs involved.

Finally, these cases involve the major constitutional question whether, if in any of these statutes Congress has attempted to compel the President to spend the full amounts it has allocated or appropriated, it has acted beyond its authority under Article I of the Constitution by thus attempting to control the President. We submit that, in certain circumstances which we believe obtain here, it is the President, and not the Congress, who has the ultimate authority under the Constitution to set the limits for the spending of the appropriated funds.

2. There are presently pending in the federal courts 37 suits involving the validity of spending controls. (The cases are listed in the appendix to

this memorandum.) The issues are novel, and the lack of any judicial guidelines has produced a continuing and expanding duplication of effort by the courts and an enormously wasteful expenditure of litigation resources by the Executive Branch. This extensive litigation, however, cannot finally resolve the issues in the absence of a decision by this Court.

At the same time, both the Legislative and Executive Branches face highly undesirable areas of uncertainty. Their important fiscal and budgetary determinations are being made largely without any clear understanding of their respective powers and obligations. Thus, Congress does not know the effect of various spending and obligation provisions it places in legislation; and the President similarly cannot know either the effect of such provisions, which makes it difficult for him to decide whether to veto appropriations legislation that he believes poses undesirable inflationary consequences, or his authority to impose spending controls on a particular program in an effort to control inflationary pressures. These are only some of the questions that require answers for the effective functioning of government. Both the Congress and the President would be greatly aided in performing their functions by an early and definitive resolution of the issues.

It would be difficult to obtain such a definitive determination under the normal process of a court of appeals decision followed by review by this Court. Although there is a substantial number of pending lower court cases involving various withholding is-

sues (see the Appendix, *infra*), each involves only a particular statute and none presents the broad range of issues here presented. Most of the cases now on appeal were decided on motions for summary judgment and their records are inadequate for the full exploration and informed decision by this Court of the important and delicate statutory and constitutional issues involved.[5]

3. The present case, on the other hand, involves a sufficiently broad coverage of the issues that a decision by this Court will go a long way toward resolving the underlying dispute over the validity of various withholding actions. Such a decision will furnish important guidance to all three branches of the government. Moreover, as explained below, reference of this case to a special master will permit the development of a full record in an expeditious and effective manner.

Both the Highway Act and the Water Pollution Control Act Amendments involve funding by contract

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[5] The Solicitor General has determined not to seek certiorari in *State Highway Commission of Missouri* v. *Volpe*, C.A. 8, No. 72-1512, decided April 2, 1973, the first of the impoundment cases to have reached the courts of appeals, because of the inadequacy of the record as a framework for the important constitutional issues involved. That case was tried and briefed on the theory that the statute, as construed by Attorney General Ramsey Clark (42 Op. Atty. Gen. No. 32) and by the Comptroller General (Comp. Gen. Dec. B-160891, February 24, 1967), permitted the limitation of obligation authority to control inflationary pressures. Neither the record nor the arguments of the parties focused on the broader constitutional questions.

authority, designed to eliminate uncertainty in the appropriations process by authorizing executive officers to obligate the United States to pay a fixed amount toward construction costs. In the highway case, spending controls were imposed by the Office of Management and Budget by deferring obligation authority. Because funds are apportioned at least six months before the start of the fiscal year for which they are authorized and may be obligated for several years thereafter, the deferral of obligation authority has had no present impact on expenditures.

In the Water Pollution Act case, controls were imposed at the allotment stage by the EPA Administrator at the direction of the President. The statute contains discretionary language, and its legislative history shows a purpose to confer power to control spending for fiscal purposes.

The Education Act establishes a grant program under which the Commissioner is directed to make allotments to the states and to reimburse the states out of those allotments for expenditures made under their approved plans. The program's funding for fiscal year 1973 was under a continuing resolution authorizing expenditures not in excess of the current rate. Controls were imposed at the spending stage by the Commissioner pursuant to a spending plan established in cooperation with the Office of Management and Budget.

Each of these programs presents the spending-control issue in a different context, and decision of this case will provide many of the necessary guidelines for

the lower courts in resolving analogous issues under other programs. It will also enable the President and the Congress to make spending decisions with fuller knowledge of the implications of those decisions.

4. There is another reason why this case is a suitable vehicle for resolution of the issues. An informed decision on these issues requires a complete evidentiary record describing in some detail the federal budgetary process, the considerations leading to the imposition of spending controls in these programs, the ways in which the Executive Branch monitors and seeks to improve the state of the economy, and the nature of the working understanding between Congress and the Executive concerning the exercise of their shared spending responsibilities.

Although the development of such a record ordinarily should take place in the district court, there is an overriding practical reason why that course cannot easily be followed here. With so many cases presently in litigation and presumably more to come, it is simply not feasible for the federal government to present the necessary evidence in thirty or more cases. Apart from the problem of needless and expensive duplication, government officials cannot be taken from their normal duties to testify at length in one court after another. We have in many cases submitted affidavits from pertinent officers suggesting some of the relevant facts, but we believe the delicate issues in these cases would be illuminated by a full evidentiary record.

This case, if referred to a special master for a hearing, would offer an otherwise unavailable opportunity to present live testimony and other evidence in order to make a full record for this Court. Because this Court's resolution of the issues will be definitive, the resources of the parties can be concentrated in this single forum (indeed, plaintiffs and potential plaintiffs in other jurisdictions will undoubtedly wish to participate here as *amici*) and a full and adequate record can be assured.

III

THE CASE SHOULD BE REFERRED TO A SPECIAL MASTER

For the reasons stated above, we believe that a decision on the issues presented here should rest on a firm evidentiary foundation. We accordingly urge the Court to refer the case to a special master for the taking of oral testimony and other evidence relating to the issues presented.

There are significant threshold questions that must be resolved before the merits are reached. We intend to argue, if leave to file the complaint is granted, that this is an unconsented suit against the United States and barred by sovereign immunity. See *Hawaii* v. *Gordon*, 373 U.S. 57, in which Hawaii sought to compel the Director of the Bureau of the Budget to convey to the State certain lands under federal control. The complaint was dismissed after leave to file had been granted, on the ground that it was an unconsented suit against the United States. See, also,

Dugan v. *Rank*, 372 U.S. 609; *Malone* v. *Bowdoin*, 369 U.S. 643; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682.

Although sovereign immunity is a legal question, we believe its resolution here may depend to some extent on matters that would be developed at an evidentiary hearing. The question whether "the order requested would require * * * official affirmative action [or] affect the public administration of government agencies" (*Hawaii* v. *Gordon*, *supra*, 373 U.S. at 58), can best be resolved in light of evidence concerning the nation's fiscal management. In these circumstances, we submit that the question of sovereign immunity should appropriately be deferred until after an evidentiary hearing.

Similarly, we may argue that some of the issues raised by the complaint are non-justiciable under the standards stated in *Baker* v. *Carr*, 369 U.S. 186, 217. Our position will be that executive withholding of funds is not judicially reviewable, at least in some legal and factual contexts, because there are no "judicially discoverable and manageable standards" by which to assess the action taken. This issue, because it will depend heavily upon an understanding of the spending process and its problems under different programs, is not ripe for decision at this time.

Moreover, the exercise of Presidential spending power involves complex budgetary and fiscal considerations. Resolution of the question whether the judiciary is equipped to sit in review of the judgments that are made requires a full appreciation of the

budgetary process and fiscal management, both of which could profitably be explored at an evidentiary hearing. Thus, the justiciability question is, like sovereign immunity, best left for resolution after a hearing.

In short, the preliminary issues in this case, like those on the merits, can best be determined after a full record has been made. By accepting the case now, this Court would be asserting jurisdiction to determine jurisdiction.

CONCLUSION

The motion for leave to file the complaint should be granted, and the case should be referred to a special master for the development of an evidentiary record.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

APPENDIX

"IMPOUNDMENT" CASES PENDING IN THE LOWER COURTS DURING 1973

A. *Federal-Aid Highway Act* (23 U.S.C. 101, *et seq.*).

1. *State Highway Commission of Missouri* v. *Volpe*, C.A. 8, No. 72-1512. On April 2, 1973, the court affirmed the district court's order of summary judgment for the plaintiff (W.D. Mo., No. 1616, entered August 7, 1972). Rehearing was denied on May 18, 1973.

2. *Cartwright* v. *Volpe* (W.D. Oklahoma, C.A. No. CIV-72-830). Dismissed by stipulation on April 2, 1973.

3. *State Highway Commission of Kansas* v. *Volpe* (D. Kansas, C.A. No. T-5273). Pending on government's motion to dismiss or, in the alternative, for summary judgment. To be argued on September 13, 1973.

4. *South Carolina State Highway Commission* v. *Volpe* (D. S.C., C.A. No. 72-940). Pending on government's motion to dismiss or, in the alternative, for summary judgment. Argument not yet set.

B. *Federal Water Pollution Control Act Amendments of 1972* (P.L. 92-500, 86 Stat. 816, 33 U.S.C. § 1251, *et seq.*).

1. *Anthony R. Martin-Trigona* v. *Ruckelshaus*, (C.A. 7) On July 9, 1973 summary judgment was granted for plaintiff. (N.D. Ill. C.A. No. 72-C-3044). The order has been temporarily stayed by the district court.

2. *City of New York* v. *Ruckelshaus* (C.A.D.C. No. 73-1705). Plaintiff's motion for summary judgment granted May 8, 1973. (D. D.C. C.A. No. 2466-72). Notice of appeal has been filed. Order has been stayed pending appeal.

3. *Mayor Morton Salkind* v. *Ruckelshaus* (D. N.J., C.A. No. 2027-72). Pending on government's motion to dismiss. Argument not yet set.

4. *Herbert C. Klein* v. *Ruckelshaus* (D. D.C., C.A. No. 151-73). Dismissed for lack of standing.

5. *Campaign Clean Water, Inc.* v. *Ruckelshaus* (C.A. 4 No. 73-1745). District court granted plaintiff's motion for summary judgment. Presently pending on appeal.

6. *George E. Brown, Jr.* v. *Ruckelshaus* (C.D. Calif., C.A. No. 73-154-AAH), consolidated with *Los Angeles* v. *Ruckelshaus* (C.D. Calif., C.A. No. 73-736). Government's motion to dismiss granted on July 16, 1973.

7. *State of Minnesota* v. *United States Environmental Protection Agency, et al.*, (C.A. 8, No. 73-1446). The district court granted plaintiff's motion for summary judgment on June 27, 1973. (D. Minn., C.A. No. 7-73 Civ 133). Presently pending on appeal (notice of appeal filed July 10, 1973).

8. *State of Texas* v. *Ruckelshaus* (W.D. Texas, C.A. No. A-73-CA-38). We have moved to dismiss. Plaintiff has moved for summary judgment.

9. *Maine* v. *Ruckelshaus* (D. Maine, C.A. No. 14-51). Temporary restraining order entered June 29, 1973 requiring allotment of funds to Maine (unlimited time length of effectiveness of the order). Presently pending on appeal (C.A. 1, No. 73-1254).

C. *National Defense Education Act (NDEA)*, Title III, 20 U.S.C. 441; *Elementary and Secondary Education Act of 1965 (ESEA)*, 20 U.S.C. 241(a) *et seq.*; *Vocational Education Act of 1963 (VEA)*, 20 U.S.C. 1241 *et seq.*; *Adult Education Act of 1966 (AEA)*, 20 U.S.C. 1201 *et seq.*; *Library Services and Construction Act of 1970* (LSCA), 20 U.S.C. 351, *et seq.*

1. *Arkansas* v. *Weinberger* (E.D. Ark., C.A. No. LR-73-C-120). On June 22, 1973, the court entered a preliminary injunction requiring allotment of NDEA funds to Arkansas, but requiring that Arkansas cannot incur obligations against such funds unless it posts bond in the amount of $10,000 and 106% of amount of any funds expended. The preliminary injunction was dissolved on July 3, 1973, and an answer was filed on July 16, 1973.

2. *Minnesota* v. *Weinberger* (D. Minn., C.A. No. 4-73 Civ 313). Preliminary Injunction requiring allotment of NDEA and ESEA, Title I funds, but enjoining State from incurring obligations against such funds until further ordered. (Entered June 27, 1973).

3. *Illinois* v. *Weinberger*, (N.D. Ill., C.A. No. 73C1642). (Missouri, Nevada, Michigan, and Texas intervened as plaintiffs). Temporary Restraining Order with respect to allotment of NDEA, ESEA II and VEA, with injunction against incurring obligations of such funds. (Entered June 27, 1973). Michigan, Texas, and Nevada intervened with respect to NDEA only. T.R.O. entered June 29, 1973, as to Michigan, Nevada, and Texas.

4. *Massachusetts* v. *Weinberger* (D. D.C., C.A. No. 1308-73), consolidated with *District of Co-*

lumbia v. *Weinberger* (D. D.C. C.A. No. 1322-73). Plaintiffs' motion for summary judgment granted on July 26, 1973.

5. *Alabama* v. *Weinberger* (M.D. Ala., C.A. No. 4103-N). Preliminary injunction entered on July 18, 1973 requiring the allotment of NDEA, VEA, ESEA, and LSCA funds with protective provisions precluding incurring obligations.

6. *Kansas* v. *Weinberger* (D. Kan. C.A. No. T-5346). Preliminary injunction entered June 30, 1973. Answer filed on July 17, 1973.

7. *Washington* v. *Weinberger* (W.D. Wash., C.A. No. 410-73C2). Preliminary injunction entered July 13, 1973 requiring allotment of NDEA funds with protective provision against incurring of obligations.

8. *Maine* v. *Weinberger* (D. Maine, C.A. No. 14-52), T.R.O. entered on June 29, 1973, requiring allotment of NDEA Title III funds.

9. *Louisiana* v. *Weinberger*, (E.D. La., C.A. No. 73-1763). T.R.O. entered June 30, 1973 requiring allotment of NDEA and LSCA funds with protective provision precluding obligations.

10. *North Carolina* v. *Weinberger* (E.D. N.C., C.A. No. 43-47). Complaint filed June 29, 1973.

11. *Oklahoma* v. *Weinberger* (W.D. Okla., C.A. No. 73-425). (New Mexico and Michigan intervened as plaintiffs). Final Order requiring allotment of LSCA funds entered on June 30, 1973, as supplemented by order dated July 31, 1973.

12. *Pennsylvania* v. *Weinberger* (D. D.C., C.A. No. 1125-73). (Hawaii, Vermont, Nevada, Nebraska, Wisconsin, Washington, Oklahoma, Texas, Illinois, Massachusetts, and City of San Diego intervened as plaintiffs). Preliminary injunction entered

with respect to ESEA, VEA and AEA funds. Order was entered on June 29, 1973, permitting this suit to be maintained as a class action. Order contains protective provisions against actual expenditures of funds. Plaintiffs have moved for summary judgment. Defendants have moved to dismiss or in the alternative, for summary judgment.

D. *Nurses Training Act of 1971* (42 U.S.C. 296e)

National League for Nursing v. *Ash* (D. D.C., C.A. No. 1316-73). Preliminary injunction entered July 10, 1973 requiring HEW to record as a Fiscal Year 1973 obligation the 21.7 million dollars balance of the 38.5 million dollars appropriated for grants to nursing schools.

E. *Section 770 of Comprehensive Health Manpower Act of 1971* (42 U.S.C. 295f)

1. *American Association of Colleges of Podiatric Medicine* v. *Ash* (D. D.C., C.A. No. 1139-73). Consolidated with:

2. *American Association of Colleges of Pharmacy* v. *Ash* (D. D.C., C.A. No. 1244-73). (Association of Schools and Colleges of Optometry permitted to intervene as plaintiff). Preliminary injunction entered June 27, 1973 requiring HEW to record as an obligation for Fiscal Year 1973 the unallotted balance of funds appropriated for grants to Schools of Podiatry, Pharmacy, and Optometry.

F. *Community Mental Health Centers Act* (42 U.S.C. 2688, *et seq.*).

National Council of Community Mental Health Centers, Inc. v. *Weinberger* (D. D.C., C.A. No. 1223-

73). Plaintiff's motion for summary judgment granted on August 3, 1973.

G. *Neighborhood Youth Corps Summer Program,* Section 123 of the Economic Opportunity Act of 1964 (42 U.S.C. 2740).

Community Action Programs Executive Directors Association of New Jersey, Inc. v. *Ash* (D. N.J., C.A. No. 899-73). Final order requiring obligation of approximately $300,000,000 by Labor Department for summer youth programs. Pending on appeal, C.A. 3 73-1574.

H. *Rural Electrification Loans* (7 U.S.C. 901, *et seq.*).

Sioux Valley Empire Electric Ass'n. v. *Butz* (D. S.Dakota, C.A. No. 73-4020). This action challenges the termination of the REA two percent loan program. Cross-motions for summary judgment have been argued. No decision as of this date.

I. *Emergency Agriculture Loans*

1. *Berends* v. *Butz* (C.A. 8, No. 73-1195). On March 20, 1973 the district court held invalid the termination without notice of the emergency loan program in 15 Minnesota counties. (D. Minn., C.A. No. 4-73 Civ 41). The court of Appeals remanded the case for a ruling as to whether or not this action is now moot in view of the enactment of P.L. 93-24. On remand, the district court held the case not moot. On August 2, 1973, the government filed in the Court of Appeals a motion to vacate the district court order as moot.

2. *Fericks* v. *Butz.* (D. S.Dakota). Similar to Berends. Dismissed voluntarily.

J. *Rural Environmental Assistance Program* (REAP) (16 U.S.C. 590g et seq.) and

Federally Assisted Code Enforcement Program (FACE) (42 U.S.C. 1452b)

Augusto Guadamuz v. *Ash* (D. D.C., C.A. No. 155-73). Preliminary injunction entered June 29, 1973 requiring HUD and OMB to record as a Fiscal Year 1973 obligation funds appropriated for the FACE program but reserved by OMB. Actual expenditure of funds not required until further ordered. Plaintiffs have moved for summary judgment.

K. *Suspension of FHA-subsidized Housing Programs*

Commonwealth of Pennsylvania v. *Lynn* (D. D.C., C.A. No. 990-73). Plaintiffs' motions for summary judgment was granted. A motion for a stay of the district court's order was filed on July 30, 1973, and this case is presently pending before Court of Appeals (D.C. Cir., No. 73-1835).

L. *Special Supplemental Food Program* (42 U.S.C. 1786)

Judy Jo Dotson v. *Butz* (D. D.C., C.A. No. 1210-73). Plaintiffs' motion for summary judgment was granted on August 3, 1973.

M. *Farmers Home Administration* Interest Credit Program (42 U.S.C. 1472, 1485).

Willard LaVern Pealo v. *Farmers Home Administration* (D. D.C., C.A. No. 1028-73). Plaintiff's motion for summary judgment granted on July 31, 1973. The district court denied the government's motion for a stay pending appeal on August 10, 1973.

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