(41167)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 63, ORIGINAL

THE STATE OF GEORGIA,

Plaintiff,

—v.—

RICHARD M. NIXON, President of the United States, CLAUDE S. BRINEGAR, Secretary of Transportation, JOHN R. OTTINA, Acting Commissioner of Education, ROBERT W. FRI, Acting Administrator of the United States Environmental Protection Agency, and ROY L. ASH, Director of the Office of Management and Budget of the United States,

Defendants.

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE COMPLAINT

Issue Presented

Whether the Court, in the exercise of its discretion, should invoke its original jurisdiction under Article III, section 2, clause 2 of the Constitution by granting the State of Georgia leave to file a complaint?

Statement of the Case

On May 19, 1973 the State of Georgia filed a motion for leave to file a complaint invoking this Court's original

jurisdiction under Article III, section 2, clause 2 of the Constitution. The proposed complaint names as parties defendant, individually and in their official capacities, the President, the Secretary of Transportation, the Commissioner of Education, the Administrator of the Environmental Protection Agency (hereinafter "EPA") and the Director of the Office of Management and Budget.

The gravamen of the complaint is that the several defendants, in pursuance of the Government's program to control inflation, have unlawfully impounded (*i.e.* withheld) funds authorized or appropriated by Congress to implement the Federal-Aid Highway Act of 1956, 70 Stat. 374, as amended, 23 U.S.C. §101 *et seq.*, Title III-A of the National Defense Education Act of 1958, 72 Stat. 1588, as amended, 20 U.S.C. §§441-445 and Title II of the Federal Water Pollution Control Act, 86 Stat. 833, 33 U.S.C. §§1281-1292. The three statutes provide, within their areas of application, for federal grant assistance to States and localities.

Interest of the *Amicus Curiae*

On December 12, 1972 the City of New York (hereinafter "City") filed suit in the United States District Court for the District of Columbia, *City of New York* v. *Ruckelshaus*, — F. Supp. —, Civ. Action No. 2466-72 (D.D.C. May 8, 1973), *appeal docketed sub nom. City of New York* v. *Train*, No. 73-1705, D.C. Cir., June 22, 1973* (hereinafter "*City of New York* v. *Train*") challenging the refusal of the EPA Administrator to allot among the States the sums he is directed to allot by sections 205 and 207 of the Fed-

* The original appellant had been Acting Administrator Robert Fri, who had been substituted for Administrator William D. Ruckelshaus pursuant to Rule 25(d), F.R.C.P. Russel E. Train since has been confirmed and sworn in as Administrator.

eral Water Pollution Control Act. The District Court granted the City's motion for summary judgment and the case is now before the Court of Appeals on an expedited appeal. Argument is ~~tentatively scheduled for~~ expected in late October, 1973.

The District Court's decision in *City of New York* v. *Train* was the first judicial interpretation of sections 205 and 207 of the Federal Water Pollution Control Act and the legislative history surrounding those sections. In its briefs in the District Court and the Court of Appeals the City has developed a full and complete record of that legislative history, which would be of great assistance to this Court should that case ultimately arrive here for final determination.*

The City is opposed to the motion of the State of Georgia for a variety of reasons. Since the Government has joined with the State of Georgia in the latter's motion for leave to file a complaint, the interests and legal position of the City will not be represented by the parties. Accordingly, the City submits this brief, pursuant to Rule 42 (4) of the Court's Rules, as *amicus curiae* in opposition to the motion for leave to file a complaint.

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* At least three District Courts have relied on the District Court's decision in *City of New York* v. *Train* in other suits challenging the reduction of of allotments. *See Martin-Trigona* v. *Ruckelshaus*, — F. Supp. —, No. 72 C 3044 (N.D. Ill., E.D. July 9, 1973); *Campaign Clean Water, Inc.* v. *Ruckelshaus*, — F. Supp. —, Civ. Action No. 18-73-R (E.D. Va., Rich. D. June 5, 1973), *appeal docketed sub nom. Campaign Clean Water, Inc.* v. *Fri*, No. 73-1745, 4th Cir., June 22, 1973; *Minnesota* v. *United States Environmental Protection Agency*, — F. Supp. —, No. 4-73 Civ. 133 (D. Minn., 4th D. June 25, 1973), *appeal docketed* No. 73-1446, 8th Cir., July 10, 1973.

Summary of Argument

It is well-established that this Court may, in its discretion, withhold the exercise of the original jurisdiction conferred upon it by Article III, section 2 of the Constitution. Since there is an adequate and convenient forum available to the State of Georgia in which it may obtain jurisdiction over all of the defendants and pursue its suit without fear of the influence of parochial factors, the withholding of jurisdiction is appropriate here. The historical principles that underlie the original jurisdiction of this Court would not be violated by the denial of the motion for leave to file a complaint.

Furthermore, there are several "reasons of practical wisdom" which militate against the exercise of original jurisdiction. First, the Government's request for appointment of a special master to preside over an evidentiary hearing on the Executive budget-making process would, in effect, have this Court reverse the decisions of twenty-five courts that no such hearing is required. The Court should not permit its original jurisdiction to be utilized as a litigating tactic to circumvent decisions on motions for summary judgment or prelminary injunction with which the Government is unhappy.

The Government also asserts that any attempt by Congress to direct Executive expenditures raises a "major constitutional question" which is compelling ground for invocation of original jurisdiction. Yet previously the Government conceded that power to Congress. The Government's inconsistency thus casts serious doubt upon the urgency of the "constitutional question" and is another reason which argues against the exercise of original jurisdiction.

Moreover, unless this Court decides that the President has unreviewable discretion regarding expenditures, resolution of the constitutional issue by this Court would not end litigation of the type with which this suit is concerned. There would always be questions of construction and interpretation, unique to each statutory program, which would give rise to further litigation. Indeed, the exercise of original jurisdiction here might well open this Court to a plethora of suits by other States with equally compelling reasons to invoke the original jurisdiction of this Court.

Finally, considerations of efficiency and justice argue against the exercise of original jurisdiction. The issues raised in the proposed complaint of the State of Georgia are now before several Courts of Appeals. It is likely that some of those cases will be brought to this Court before the end of this October Term. Thus, this Court will have an early opportunity to resolve the issues involved in these cases in the limited context of an appeal. Conversely, if this Court assumes jurisdiction of this case, the lower courts will understandably be reluctant to decide issues pending here until this Court enters final judgment. The appointment of a special master to preside over the lengthy and complex evidentiary hearing suggested by the Solicitor General will thus inordinately delay the determination of the legal questions involved beyond the time in which those questions would arrive here through the normal appellate process, accompanied by already developed factual and legal records. That delay would necessarily continue the uncertainty under which federal, State and local officials are now performing their duties.

POINT I

This Court should, in the exercise of its discretion, decline to entertain this case on original jurisdiction.

A. Introduction.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), Justice Harlan, speaking for the majority, set forth the precepts which govern whether the Court will exercise its discretion to decline to entertain, on original jurisdiction, a complaint by a State against the citizens of another State:

> only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practial wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.

Id. at 499. Application of those precepts here makes evident that this case is not one which should be entertained on original jurisdiction.

B. The declination of jurisdiction would not disserve the principal policies underlying the original jurisdiction of this Court.

Justice Harlan found that there were two principal considerations which prompted the Framers to confer original jurisdiction upon the Court in suits between States and citizens of other States:

> Two principles seem primarily to have underlain conferring upon this Court original jurisdiction over

> cases and controversies between a State and citizens of another State or country. The first was the belief that no State should be compelled to resort to the tribunal of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisolm* v. *Georgia,* 2 Dall. 419, 475-476 (1793); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S., at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.

Id. at 500.

Neither of these considerations is implicated here. By virtue of 28 U.S.C. §§1331, 1361 and 1391 (e) the State of Georgia can institute this suit in a United States District Court in Georgia or, alternatively, in the District of Columbia. Either court would provide an impartial forum free of suspect parochial influences and competent to exercise jurisdiction over the parties defendant. Hence, it would be inappropriate for this Court to exercise its original jurisdiction in the instant case because of "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972); *accord Washington* v. *General Motors Corp.,* 406 U.S. 109, 114 (1972).

C. "Reasons of practical wisdom" require this Court to withhold the exercise of its original jurisdiction.

This Court's original jurisdiction functions must be kept "attuned to its other responsibilities." *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 499. The Court therefore is "incline[d] to a sparing use of [its] original juris-

diction so that [its] increasing duties with the appellate docket will not suffer." *Illinois* v. *City of Milwaukee, supra,* 406 U.S. at 94 (citation omitted). Accordingly, when "reasons of practical wisdom" persuade the Court that it is an inappropriate forum, it will, in its discretion, withhold the exercise of its original jurisdiction. *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 499. Several such reasons are present in the instant case.

The Government proposes the appointment of a special master to preside over an evidentiary hearing to explore the "complex budgetary and fiscal considerations" involved in "the exercise of Presidential spending power." The adoption of such a procedure would, however, impliedly reverse the decisions of twenty-five courts which have decided against the Government below.* This result would occur because the decisions below determined that the limits of Executive discretion to withhold appropriated or authorized sums were delimited by Congress, as stated in the law, notwithstanding the Executive's disagreement with Congress' judgment respecting national spending priorities. Indeed, in *City of New York* v. *Train,* the District Court held that the duty to make allotments under the Federal Water Pollution Control Act is ministerial. If this holding is correct, no evidentiary hearing on budgetary and fiscal considerations is required. The exercise of original jurisdiction and appointment of a special master in the instant case would thus serve as a litigating tactic by which the Government can, in one stroke and without full briefing or oral argument, obtain reversal of the lower court decisions against its position.

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* The Government's Appendix reveals that of the thirty-seven cases there listed, judgment has been entered against the Government in twelve and injunctive relief has been granted against the Government in thirteen others.

The Government also urges this Court to exercise its original jurisdiction because the proposed complaint involves "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." (Def. Mem., p. 19.) Yet when the Government had the opportunity to have an early resolution of that question by this Court, it determined not to do so.

We speak specifically of the Court of Appeals decision in *State Highway Commission of Missouri* v. *Volpe*, —— F. 2d ——, No. 72-1512 (8th Cir. April 2, 1973). The Government explains that it decided not to seek review by this Court because "[n]either the record nor the arguments of the parties focused on the broader constitutional questions." (Def. Mem., p. 21n.5.) But it is clear from the Court of Appeals opinion that the reason the Court of Appeals did not focus on the constitutional question now proffered by the Solicitor General for immediate determination here is that the Government conceded that there was no such question:

> Resolution of the issue before us does not involve analysis of the Executive's constitutional powers. Nothing in the present record demonstrates that the Secretary of Transportation will continue to exercise controls beyond that which judicial construction finds permissible within the statute. To the contrary, at oral argument counsel for the government stated, "I support our brief comes as close as it can to conceding that were Congress to make this mandatory, that would be the end of the case. . . . I would say almost certainly that without tending to give away what the White House might decide in any particular statute,

> that where it is manifested clearly, the Executive would have to spend that money or would spent [sic] the money." The issue before us is not whether the Secretary abused his discretion in imposing contract controls but whether the Secretary has been delegated any discretion to act in the first place.

State Highway Commission of Missouri v. *Volpe, supra,* slip op. p. 7.

The position taken by the Government in *Volpe* was entirely consistent with the position it had adopted internally some years ago. In a memorandum prepared by Justice Rehnquist when he served as an Assistant Attorney General there was discussion of the power of the President to refuse to spend money when Congress mandates such an expenditure:

> With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A.G. No. 32, p.4 (1967). But that is basically a rule of construction, and does not meet the question whether the President has authority to refuse to spend where the appropriation act or the substantive legislation, fairly construed, require such action.
>
> . . . .
>
> While there have been instances in the past in which the President has refused to spend funds appropriated by Congress for a particular purpose we know of no such instance involving a statute which by its terms sought to require such expenditure.

Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, Executive Impoundment of Appropriated Funds, 92nd Cong., 1st Sess. 282, 283 (1971).

It is evident, then, that until now it has been the position of the Government that Congress can constitutionally compel the President to expend appropriated or authorized sums, but that it is a question in each case of whether the statute manifests such a congressional intent.* The urgency of the constitutional question proffered as ground for the exercise of original jurisdiction is thus subject to doubt, especially since the Government has failed to use earlier opportunities to bring that question to this Court.

Whether or not this case presents a substantial constitutional issue, however, it clearly raises questions of statutory construction. An examination of the Government's Appendix reveals that many similar suits have already been instituted by States. Unless this Court decides that the Executive has unreviewable discretion respecting expenditures, regardless of the statutory language, more such suits are likely to be instituted in the future under different statutes. Since those States equally would have the right to bring suit here under Article III, the exercise of original jurisdiction in the instant case would invite "an abuse of the opportunity to resort to [this Court's] original jurisdiction in the enforcement by States of claims

* It should be noted that on our motion for summary judgment in the District Court in *City of New York* v. *Train* the City fully discussed the power of Congress to compel the Executive to expend money. We concluded that this Court's decision in *Kendall* v. *United States ex rel. Stokes,* 37 U.S. [12 Pet.] 524 (1838), as well as the authorities discussed in the text, made clear that Congress had that power. The Government made only a cursory response in the District Court and has abandoned its constitutional argument on appeal.

against citizens of other States." *Massachusetts* v. *Missouri,* 308 U.S. 1, 19 (1939). The lesson of *Ohio* v. *Wyandotte Chemicals Corp., supra,* is thus particularly apposite:

> nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court. Thus, entertaining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandry whereby we must opt either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters.

Id., 410 U.S. at 504.

There are other reasons why this Court should decline to exercise its original jurisdiction. This Court would be called upon to decide* what the Government characterizes as "major and complex" questions with respect to three different statutory programs.** Each was enacted in a different context which must be separately and arduously investigated. In *City of New York* v. *Train, supra,* for example, there is a wealth of legislative history explaining two amendments which emerged from the conference committee on which the Government has relied.

Finally, considerations of efficiency and justice require declination of original jurisdiction. *See Massachusetts* v.

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* This Court could be expected to decide the statutory questions to determine if it would be necessary to reach the constitutional issue.

** Indeed, in the appeal of *City of New York* v. *Train,* which deals only with the water pollution control program, the Government itself has lodged with the Court of Appeals a document in two volumes entitled "A Legislative History of the Federal Water Pollution Control Act Amendments of 1972."

Missouri, supra, 308 U.S. at 19. Many of the thirty-seven cases listed in the Appendix to the Government's Memorandum are now before the several Courts of Appeals.* Hence, it is quite likely that many of these cases will be before this Court before the end of the October 1973 Term, accompanied by fully developed factual and legal records. It would be highly inefficient to exercise this Court's original jurisdiction to decide issues which are at the threshhold of Supreme Court review in any event.

It is likely, moreover, that the exercise of original jurisdiction will retard, rather than advance, a resolution of the questions involved. The lower courts understandably will be unwilling to decide the pending cases until this Court has spoken. Undoubtedly, many of the plaintiffs below will seek to participate in this case as *amici,* if original jurisdiction is exercised. And, in light of the elaborate evidentiary hearing proposed by the Government, it might be some time before this Court can definitively resolve the various issues, thus perpetuating the uncertainty under which federal, State and local officials are now performing their duties.

In sum, there are five reasons why this Court should decline to exercise its jurisdiction in the instant case. First, the decisions of twenty-five courts would be impliedly reversed through a procedural device. Second, the "major constitutional question" which the Government now urges as ground for the exercise of original jurisdiction has not previously been regarded by the Government as one of much merit or significance. Third, even if there are important constitutional issues raised by this case, they are

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* The appeals in *City of New York* v. *Train, supra,* p. 3 n., *Campaign Clean Water, Inc.* v. *Fri, supra,* p. 3 n., *Minnesota* v. *United States Environmental Protection Agency, supra,* p. 3 n. and *Maine* v. *Fri,* Civ. No. 14-51 (D. Maine July 6, 1973) are scheduled for argument in October, 1973.

intertwined with questions of statutory construction which must also be resolved without the benefit of the reasoning of the various Courts of Appeals. Fourth, if the Court entertains this suit it may open itself to a plethora of suits by States against federal officials which involve questions of statutory construction. Fifth, the exercise of original jurisdiction is not likely to advance resolution of the issues involved and may, in fact, delay such resolution. Thus, as a matter of judicial efficiency, jurisdiction should be declined.

CONCLUSION

The motion of the State of Georgia for leave to file a complaint should be denied, without prejudice to the filing of the complaint in an appropriate United States District Court.

Respectfully submitted,

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