Supreme Court of the United States

OCTOBER TERM, 1948.

No. 13, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

OBJECTIONS TO MOTION FOR LEAVE TO FILE COMPLAINT BY THE UNITED STATES AGAINST THE STATE OF LOUISIANA.

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Appearing specially for the sole and only purpose of opposing this Motion.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Now comes the State of Louisiana, through its Attorney General, appearing specially for the sole and only purpose of objecting to this Court granting leave to the United States to file Complaint against it herein, and for reasons therefor show:

I.

That this Court has no jurisdiction over the State of Louisiana in the proposed suit because Louisiana is a sovereign State which cannot be sued without its consent, and which has not consented to be sued herein.

Wherefore, the State of Louisiana prays that its objections be sustained, that the Motion of the United States for leave to file its complaint against Louisiana be fixed for hearing, oral argument, and the filing of further briefs, that the said motion be denied, and for all proper orders or judgment pertaining thereto.

BOLIVAR E. KEMP, JR.,
Attorney General, State of Louisiana.

JOHN K. MADDEN,
Assistant Attorney General,
State of Louisiana.

January, 1949.

Appearing specially for the sole and only purpose of opposing this Motion.

STATEMENT IN SUPPORT OF OBJECTIONS.

The United States seeks to bring suit herein against the State of Louisiana under the authority of Article III, Section 2, Clause 2 of the Constitution of the United States.

Section 2 provides that "The judicial Power shall extend * * * ;—"to controversies between two or more States";— * * * and between a State and foreign States."

Clause 2 thereof provides, "In all Cases affecting Ambassadors, other public Ministers and Consuls, *and those in which a State shall be a Party,* the Supreme Court shall have original jurisdiction. * * *"

Louisiana is a Sovereign State of the Union and cannot be sued without its consent either expressly granted in the Constitution, or by its specific consent in a particular case. Louisiana has not consented to be sued in this proposed suit, for reasons hereinafter stated, and the Court has no jurisdiction over the State of Louisiana for purposes of this suit.

In Article III, Section 2, Clause 1 of the Constitution, the States agreed in specific language that the judicial power of the United States would extend to suits brought by one or more States against another State, or by a foreign State; and in Clause 2 thereof it is provided that this Court shall have original jurisdiction *in those cases* in which a State shall be a party.

1. The Federal Government Has Not Consented to be Sued by the States.

It has been clearly settled that in the Constitution the Federal Government did not give its consent to be sued by a State without the consent of the Federal Government. *Monaco* v. *Mississippi,* 292 U. S. 313; *Kansas* v. *United States,* 204 U. S. 331.

2. Conversely, the States Have Not Consented to be Sued by the Federal Government.

We must equally conclude that under the Constitutional plan adopted by the Founding Fathers, the States declined to extend their consent to be sued by the Federal Government. The very proposition of extending the judicial power to "controversies between the United States and an individual State," and "to examine into and decide upon the claims of the United States and an individual State to territory" were not incorporated into the Constitution. Although, proposed, they were "peremptorily rejected" by the Federal Constitutional Convention which wrote the Constitution of the United States. *Florida* v. *Georgia,* 17 How. 478, 521; 2 Mad. Papers, 861; 3 Mad. Papers, 1366.

In an exhaustive analysis of this Section of the Constitution and the 11th Amendment thereto, Chief Justice Marshall, as organ of the Court in *Cohens* v. *Virginia,* 6 Wheat. 264, 5 Law Ed. 261 at p. 291, among other things, said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. *The one or the other would be treason to the constitution.*" * * *
>
> "This leads to a consideration of the 11th amendment.
>
> "It is in these words: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.'
>
> " * * * *It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued.*" (Emphasis ours)

It is highly significant that Chief Justice Marshall, in his exhaustive analysis, did not recognize the possibility of a suit by the United States against a State.

3. The *Texas* Case.

We are aware, of course, that in the past this Court exercised jurisdiction in several cases where suit was brought by the United States against an individual State, as was reviewed in the case of *United States* v. *West Virginia,* 295 U. S. 463, 55 Sup. Ct. Rep. 789, in which the Court said at p. 791: "It can no longer be doubted that the original jurisdiction given to this Court by section 2, Art. 3 of the Constitution, in cases 'in which a state shall be a party,' includes cases brought by the United States against a state." —citing *United States* v. *Texas,* 143 U. S. 621, and other cases of the United States against the States of Michigan, Minnesota, Utah, and the intervention of the United States in the case of Oklahoma v. Texas, without objection.

The precedent set in the *Texas* case was followed in the later cases against West Virginia and the others there cited, and in *United States* v. *State of Wyoming,* 331 U. S. 440.

In the *Texas* case, the Court significantly said: "Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union?" And then the Court answered that question by stating: "This question is in effect answered by *United States* v. *North Carolina,* 136 U. S. 211. * * * " It is difficult to understand how the Court could have held that the *North Carolina* case answered this question because the Court itself then and there pointed out that in the *North Carolina case "it is true that no question was made as to the jurisdiction of this Court, and nothing was therefore said in the opinion upon that subject."* (Emphasis added)

Thus in the *Texas* case the Court paid no heed to the decision of the Convention to withhold the consent of the States to be sued by the Federal Government, and to its earlier decisions.

The Court took jurisdiction in *United States* v. *California* (1947), 332 U. S. 19, without objection having been urged by the State that it had not granted its consent to be sued.

Thus no question of lack of consent to be sued was raised in the *California* case.

All in all, the *Texas* case, the original precedent for this Court taking jurisdiction in cases of the United States versus individual States, was based on two propositions:

1. The basic supposition that the framers of the Constitution thought that there must be a "submission to judicial solution of controversies arising between these two governments," "**both** subject to the supreme law of the land" (143 U. S. 646), when as a matter of fact in the Constitutional Convention, which wrote the Constitution, that very proposition was "peremptorily rejected"!!

2. Upon the strength of the *North Carolina* case, *supra,* in which, to use the words of the Court, "no question was raised as to the jurisdiction of this Court, and nothing was therefore said in the opinion upon that subject"!!

We must, therefore, necessarily and inevitably come to this final conclusion about the *Texas* case: First, it was clearly wrong when it was decided, for reasons already stated. Second, its basic reasoning that there must be a "submission to judicial solution of controversies arising between these two governments," * * * "**both** subject to the supreme law of the land," (143 U. S. 646) requires the conclusion that in the Constitution the United States consented to be sued by the States. Hence, the *Texas* case has already been necessarily overruled, in part, by *Kansas* v. *United States,* 204 U. S. 331, *supra,* which categorically held that in the Constitution the United States did *not* consent to be sued by the States. If the reasoning of the *Texas* case cannot support that conclusion, it also cannot support the converse conclusion, that in the Constitution the States consented to be sued by the United States.

This Court should now complete the process, irrevocably started by *Kansas* v. *United States,* of completely overrul-

ing the *Texas* case and returning to the Constitution itself, that is, to its language, to the contemporary views of the Founding Fathers, to the decision of the Convention, and the early decisions of this Court.

4. The Opinions of This Court Confirm that Under the Constitutional Plan the States Have not Consented to be Sued by the Federal Government.

In the *Texas* case, the Court did have positive precedent against the taking of jurisdiction, in the absence of consent, by the ruling of this Court in *Florida* v. *Georgia,* 17 How. 478. There the Federal government attempted by intervention to assert an interest or ownership in lands in a controversy between the two States over their boundary. On objection of the State that by the terms of the Constitution the Federal government could not be made a party in an original proceeding in this Court between States, the right to intervene either as party plaintiff or defendant was denied. The Court permitted the Attorney General of the United States to file a bill of information, but through Chief Justice Taney, as organ of the Court, held that the Court did not regard the United States in this mode of proceeding, as either plaintiff or defendant.

Even then, four of the Associate Justices dissented vigorously against the United States appearing in this ambiguous fashion. Mr. Justice Curtis stated (p. 505):

> "It is not to be admitted that there is any real conflict between those clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the Constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says, 'in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction,' it means, in all the cases *before enumerated* in which a State shall be a party. Indeed, it says so in express terms, when it speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

"It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State, in any court.

"But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The Constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the 4th section of the fourth article of the Constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion; and, on application of its Legislature or Executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

"There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, **to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States.** On the contrary, the agency of courts to compel the States to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic; superfluous, because the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are

supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the United States, and (p. 507) impolitic because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

"It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the Constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a State has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. **The State of Georgia has consented to be sued by one or more States, or by foreign States, and by no other person or body politic.** * * * Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend." (Emphasis ours)

In the same case, Mr. Justice Campbell, stated at p. 518:

"* * * *It was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this Article, to legal jurisdictions, by enlarging their liableness to suits;* but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus no suit can be commenced against the United States, foreign States or Ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any decree beyond that to which they were liable, without this Constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions also the title of the States to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court in reference to them is expressed in similar or identical language." (Emphasis added)

"The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit be-

tween two or more States. *The Constitution does not mention such a case.* **There were before the Federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony;' 'to controversies between the United States and an individual State;' and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory.' None were incorporated into the Constitution, and the last was peremptorily rejected.** The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. *This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the Federal legislation naturally inspires a sentiment in favor of the Federal authority.* These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat that the enumeration of the parties in this Article of the Constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion." (Emphasis added)

5. The Texas Case Should Be Reexamined and Overruled, and the Decision of the Constitutional Convention Adhered To.

It was thus the clear view of the Constitutional convention and the early decisions of this Court, that in the Constitution no State had consented to be sued by the United States, and could not be so sued without its consent. While a new view was apparently announced in the *Texas* case,

we must frankly say now that the importance of the point, and the extraordinary nature of the claim now sought to be asserted against Louisiana, necessarily requires a complete re-examination of the *Texas* decision and adherence to the classic, original view of the framers of the Constitution and to the words of that document.

It is highly significant that not until 1892 did the Court arrive at the conclusion that Article III of the Constitution contained an implied consent by the States to be sued by the Federal Government. It is still more significant that this conclusion was predicated mainly on an *assumption* by the Court that the framers would not have failed to recognize and provide for so important a matter as suits by the Federal Government against States. But this assumption is not borne out by the words of the Constitution, nor by the action of the Convention, nor by the views of the Founding Fathers.

The *Texas* case presents a type of Constitutional interpretation which this court has often condemned. Because the judges thought it important in 1892 that the Federal Government should be permitted to sue a State, they assumed that the framers must have had the same view. Actually the framers of the Constitution thought it vitally important not to permit the Federal Government to sue a State without its consent, and expressly refused to extend any such consent in the Constitution. Hence, what the State of Louisiana asks is that the Court examine this question in the light of the Constitution itself, the contemporary records and authorities, and the far-flung ramifications of the question. This Court has often held that it is the Constitution which binds it, not the constructions which have been placed upon that instrument by the views of judges. No better expression of this basic principle could be found than the statement of Mr. Justice Douglas printed in the "Journal of the American Judicature Society," December, 1948, page 106, from which we quote the following:

> "A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. For the gloss may, in his view, offend the spirit of the Constitution or do violence to it. That has been the experience of this generation and of all those that have preceded. It will likewise be the experience of those which follow. And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. *Stare decisis* has small place in constitutional law."

The *Texas* case should be overruled, not as a matter of refined constitutional interpretation, but because it is flatly contrary to the Constitution and the decision of the Convention to withhold the consent of the States to be sued by the Federal Government.

a. The States must be free from the crippling interference of judicial compulsion by the Federal Government.

First, the point involved is one of the gravest importance to all the States of the Union in the administration of their affairs generally. The traditional and fundamental principle of the immunity of the sovereign to suit has recently been given heartening reaffirmance by this Court in *Great Northern Life Insurance Co.* v. *Read* (1944), 322 U. S. 47, and *Ford Motor Co.* v. *Department of Treasury of State of Indiana* (1945), 323 U. S. 459. In those cases it was cogently pointed out that as a sovereign a *state* "must be free from judicial compulsion in the carrying out of its policies" (322 U. S. 51); and that "the history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent" in a very strict sense (322 U. S. 54).

While a sovereign must be free from the crippling interference of judicial compulsion, there are many ways by which controversies between sovereigns are settled all the time. Under international law, and in the intergovern-

mental relations between the states and our Federal Government, many treaties and agreements are arrived at in a continual course of negotiation. Thus, if the Federal Government decides, as a matter of policy and necessity for future national defense, to conserve the oil and other resources within the areas here involved, it can seek to do so through an orderly and fair procedure. Under the Constitution, such matters of policy are for Congress, the legislative branch of the government. For instance, Congress may lay down a basic policy that the conservation of those resources should be carried out by the Federal Government, and authorize officials of the Federal Government to negotiate some joint arrangement with the states, or to acquire the areas involved by purchase or eminent domain.

The procedure above outlined is an example of the practical methods of settlement of problems between governments which underlies the reciprocal immunity from suit between sovereigns.

b. The proposed litigation is impolitic and would destroy the sovereignty of the State.

Second, the present case well illustrates the reasons for the reciprocal immunity from suit which was designed to remain between Federal and State sovereignties. The Federal Government is now demanding not only property rights and natural resources within the State's boundaries, but large sums of money. If such an extraordinary and unprecedented claim were to be upheld, it might well be that the State would be unable to pay these sums without impairing vital functions of government. Also we know of no legal process by which the Federal Government can enforce such a claim. But even if such a process could be found, the enforcement of the claim might easily bankrupt the State and destroy its economic and eventually its political existence. These are the sober consequences that must be faced if the doctrine of the immunity of the sov-

ereign from suit without its consent is not rigidly adhered to. These possible consequences demonstrate graphically why the Founding Fathers did not consent and indeed would never have consented that the States might be sued by the Federal Government at its pleasure.

The consent to be sued is consent to be destroyed.

Conclusion.

In the Constitutional plan there is no more reason to assume that the States consented to be sued by the Federal Government than there is to assume that the Federal Government consented to be sued by the States. And this Court has clearly decided that the Federal Government has not consented to be sued by a State. It should likewise decide that the States have not consented to be sued by the Federal Government.

This Court has only taken jurisdiction of suits brought by the United States against individual States (1) when the States consented to suit, and (2) in the *Texas* case, which simply had no basis in authority, and which was indeed directly contrary to the positive decision of the Constitutional Convention, specifically withholding the consent of the States to be sued by the Federal Government, and to the earlier opinions of this Court. We, therefore, submit that the *Texas* case should be overruled, and that this Court should return to the Constitution as written and as previously understood and interpreted.

From the broader standpoint, the State of Louisiana has never consented to be summarily dragged by the Attorney General before the bar of a Federal Court. To do so in this case would cripplingly interfere by judicial compulsion with Louisiana's administration of its own affairs and upset the balance of our dual form of government. It would be flagrantly incompatible with the very nature of the doctrine of sovereign immunity and with the Constitutional plan; and it would cast the shadows of twilight over sov-

ereignty of the States, leaving them in a position completely inferior to an almost all-powerful central government.

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