Supreme Court of the United States

OCTOBER TERM, 1948.

No. 13 [redacted] 7, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

SUPPLEMENTAL MEMORANDUM OF LOUISIANA IN SUPPORT OF ITS OBJECTIONS TO MOTION BY THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

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

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INDEX.

TABLE OF AUTHORITIES.

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STATEMENT.

This supplemental memorandum is submitted in reply to the Supplemental Memorandum of the Federal Government in support of its motion to file a complaint against Louisiana. It is also filed for the additional purpose of amplifying the original statement of Louisiana in support of its objections to the said motion.

1. By Its Failure to Dispute It, the Federal Government Has in Substance Conceded that the Reasoning in the Texas Case is Wrong and that Such Case Was Overruled by Kansas v. United States.

The Federal Government has made no attempt whatever to answer the basic argument set forth in Louisiana's Objections. In Olympian fashion, it has merely assumed the point by the extraordinary remark that:

> "It is unthinkable that under our Constitutional system a State may not be sued by the United States without its consent." (page 2.)

The Federal Government is thus in the position of having conceded, by its silence, that the Founding Fathers declined to extend, in the Constitution, the consent of the States to be sued by the Federal Government; that proposals having that effect were rejected by the Constitutional Convention; that the view of the Founding Fathers was affirmed in the early decisions of this Court; that the entire foundation of reasoning in the *Texas* case is wrong, with no basis whatever in authority, and was irretrievably crushed by the decision of this Court in *Kansas* v. *United States,* 204 U. S. 331.

2. The Attempt by the Federal Government in this Case to Rely Upon the Constitutional Provision for Jurisdiction of Suits Between States Demonstrates the Utter Lack of Substance of Its Position.

In Article III of the Constitution it is stated in clear language that the judicial power of the United States shall extend "to controversies between two or more States." This provision, in effect, reincorporates the substance of Article IX of the Articles of Confederation, whereby the States consented to submit controversies between them to an instrumentality of the central Government.

But that is of no benefit whatever to the Federal Government in this case. Indeed, the fundamental weakness of its

position, the utter lack of Constitutional source for its position, is shown by the statement on page 2 of its Supplemental Memorandum, that:

> "There is here presented, therefore, 'a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution.' *Nebraska* v. *Wyoming,* 325 U. S. 589, 608 (in which the United States intervened)."

Reading this statement, the uninformed gains the impression that *Nebraska* v. *Wyoming* held that there was involved therein a clash of interests between the Federal Government and a State Government, and that the original jurisdiction of this Court provided an alternative method for settling such a clash of interests. But that impression has no support whatever in the case cited. In *Nebraska* v. *Wyoming,* the statement quoted was made in deciding a motion by the State of Colorado to dismiss Nebraska's complaint, Colorado asserting that no controvery existed *between the two States.* The Court held that a genuine controversy did exist between the two States, saying (325 U. S. 608):

> "A genuine controversy exists. The States have not been able to settle their differences by compact. The areas involved are arid or semi-arid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river. The dry cycle which has continued over a decade, has precipitated a clash of interests, which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution. State of *Missouri* v. *Illinois,* 180 U. S. 208, 241; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237."

3. The California Cause Provides No Foundation for this Motion.

On pages 3 and 4 of the Federal Government's Supplemental Memorandum, it is stated that:

> "The jurisdiction under which the Court heard and rendered its decision in the *California* case (332 U. S. 19) is the same as that now invoked by the United States in respect to its controversy with the State of Louisiana."

Thus we can only conclude that the Federal Government is arguing that the *California* case is a precedent for the taking of jurisdiction by this Court in the proposed suit and for granting the motion for leave to file a complaint against Louisiana.

However, the issue raised now on this motion was never raised at all in the *California* case, because there California consented to be sued, impliedly at least. But Louisiana has not consented and does not consent to be sued by the Federal Government in this case and this Court cannot have jurisdiction over Louisiana in the absence of such consent.

4. This Court Has Had no Opportunity to Examine the Soundness vel non of the Texas Case, Since Kansas v. United States.

In its Supplementary Memorandum, the Federal Government cites thirteen cases in a footnote on page 2 which are relied upon as following the decision in the *Texas* case. But in not one of those cases did any State refuse consent to be sued. The result is that the issue now raised in this motion has never been presented to this Court since the reasoning in the *Texas* case was destroyed by *Kansas* v. *United States.*

5. Portions of the Record of the Constitutional Convention of 1787 Amplifying the Position Taken by Louisiana in Its Objections.

When Louisiana filed its objections and statement in support thereof, on January 17, 1949, time did not permit of exhaustive research into the actual record of what transpired at the Constitutional Convention in 1787. Since then we have carefully examined that record, and painstaking study has been made of, (1), the Philadelphia Convention Journal, published under the direction of the President of the United States, conformably to Congressional Resolution of March 27, 1818 (Wait, 1819); (2), the Madison Papers (1840) Longtree and Sullivan (taken from original documents); and (3), House Document 398 ("Foundation of the United States," a United States document of the 69th Congress, 1st Session).

The national judiciary, its functions and powers, were initially considered on the respective dates of May 29 and June 12, 1787, but nothing was considered then of specific relevance to the question here presented.

It was not until August 6, 1787 that an individual State was mentioned as a subject of jurisdiction by the Supreme Court.

(A) The Proposition Now Urged by the Federal Government was Peremptorily Rejected by the Constitutional Convention of 1787.

On August 6, 1787, the Committee on Detail submitted a draft of a Constitution to the Convention, and for the first time, as heretofore stated, an individual State was mentioned as the subject of jurisdiction. Article XI, Section 3 of the proposed draft read as follows:

> "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other publick ministers and consuls; to the trial of impeachments of officers of the United States; to all

cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdictions); between a state and citizens of another state; between citizens of different states; and between a state and the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations, which it shall think proper, to such inferior courts as it shall constitute from time to time." (Philadelphia Conventional Journal, pp. 226-227; House Document 398, p. 479; The Madison Papers, Vol. II, pp. 1238-1239.)

Significantly, on August 22, 1787, the Committee on Detail, having considered the draft of a Constitution which was submitted to the Convention on August 6, 1787, made recommendations, one of which was:

> **"Between the fourth and fifth lines of the third section of the Eleventh Article, after the word 'controversies,' insert 'between the United States and an individual State, or the United States and an individual person'."** (Philadelphia Convention Journal, p. 278; House Document 398, p. 596; The Madison Papers, Vol. III, p. 1399).

Hence, on the significant date, August 22, 1787, the proposition was made to the Convention, for the first and for the last time, that the jurisdiction of the Supreme Court extend to controversies "between the United States and an individual State . . .". But the proposition was rejected. No action was taken on it. Thereby the States affirmatively refused to confer such jurisdiction on this Court.

The Committee of the Whole gave thorough and exacting study to the judiciary article of the proposed Constitution on August 27, 1787, and many amendments thereto were

adopted; however, no one undertook to re-urge the proposition that the jurisdiction of the Supreme Court extend to controversies "between the United States and an individual State."

So, in the case of *Florida* v. *Georgia,* 17 How. 478, 518, Mr. Justice Campbell aptly summarized the record of the Convention on the point by saying:

> "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 imcorporated into the Constitution, and the last was peremptorily rejected."

When we view the *record* of the Constitutional Convention of 1787 we see there, positively and unmistakably, that the proposition to extend the jurisdiction of the Supreme Court to controversies "between the United States and an individual State" was not lost sight of but "peremptorily rejected." As a result it is absolutely impossible to reconcile (1) the mere assumption of the Court in the *Texas* case that the Framers of the Constitution would not have failed to recognize and provide for so important a matter as suits by the Federal Government against States, with (2) the specific language written into the Constitution, and with (3), the specific language deliberately omitted.

All this is also confirmed by the Tenth Amendment, whereby all powers not delegated to the United States by the Constitution are reserved to the States. No power was delegated to the Federal Government to sue a State without its consent.

(B) "JUDICIAL POWER" AND "JURISDICTION" ARE NOT THE SAME THING.

On August 27, 1787, when the Convention was giving meticulous consideration to the judiciary article, preparatory to the writing of the draft of a Constitution in its final form, a motion was made and seconded "to strike out the words 'the jurisdiction of the Supreme Court' and to insert the words 'the judicial power' ". The motion passed in the affirmative. (Philadelphia Convention Journal, p. 298; House Document 398, p. 625; The Madison Papers, Vol. III, p. 1438.)

Commenting on this change in the judiciary article, Warren points out in his work, entitled "The Making of the Constitution," on pages 331-332, that:

> "It is always important to bear in mind that there is a vital distinction between a court's jurisdiction and a court's power. Judicial power comprises the functions by a court *after it has attained jurisdiction.*" (Emphasis supplied.)

Judicial power cannot be exercised in controversies between the Federal Government and a sovereign State of the Union until the latter gives consent, and the Court thereby obtains jurisdiction as the basis for the exercise of judicial power.

6. The Juridical Equality of Sovereigns and the Unvarying Quality of Sovereign Immunity.

The immunity of the United States from suit without its consent cannot be based on any idea that it is of any higher caliber as a sovereign. It is a fundamental rule of International Law that all sovereigns are juridically equal and that the immunity of each is of the same precise quality as the immunity of the others. In our country, as sovereigns, the United States and the States are juridically equal, except as specifically modified by the language of the Constitution of the United States.

In the case of *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562, Mr. Justice Van Devanter quoted approvingly from the landmark case of "The Schooner Exchange," 7 Cranch. 116, 136, in which the world was described as

> "being composed of distinct sovereignties, possessing equal rights and equal independence."

This Court has declared it to be settled law that in the Constitution the Federal Government did not give its consent to be sued by a State without the consent of the United States, *Monaco* v. *Mississippi,* 292 U. S. 313; *Kansas* v. *United States,* 204 U. S. 331. To permit the Federal Government to sue a State without the latter's consent would not only have the effect of reading into the Constitution something that is not there and be an abuse of the clear intention of the Framers thereof that no such privilege be granted, but it would destroy the great doctrine of sovereign immunity by tearing down the basic principle upon which the rule was founded.

7. It Can Never Be Presumed that One Sovereign is Subject to Suit of Another in the Latter's Court, in the Absence of Consent Given in Clear and Unambiguous Terms.

If one sovereign, on its own motion and in its own Court, can sue another sovereign at its pleasure, the rights of the latter sovereign could be destroyed in a single suit.

Hence, the far-reaching implications of the mere concept of suit by one sovereign, in its own Court, against another, are such that we can never assume or presume consent to such a suit, in the absence of a consent stated in the clearest and most unambiguous terms.

Therefore, concluding with primary logic, no creator ever intentionally sows the seeds of its own destruction.

SUMMARY.

The far-reaching and tremendously-destructive implications of the very concept of suit by one sovereign, in its own Court, against another sovereign, are such that we can never presume or assume such consent, in the absence of a consent stated in the most crystal-clear and unambiguous terms.

But the Constitution contains no provision extending the consent of the States to be sued by the Federal Government. Indeed, proposals to grant that consent were made to the Constitutional Convention and rejected. And the early decisions of this Court uniformly confirm the deliberate decision of the States to withhold their consent to such suits. True, the *Texas* case erroneously assumed that the Federal Government and the States had each consented to be sued by the other, "*both* subject to the supreme law of the land." But, the entire foundation of reasoning in the *Texas* case is not only wrong—it was irretrievably crushed by *Kansas* v. *United States,* which held that the United States may not be sued by a State without its consent. In so holding, the Court must necessarily have conceded, by obvious implication, that the converse situation holds true, viz., that a State may not be sued by the Federal Government without the former's consent.

All these things the Federal Government does not even dispute. It does not dispute them because it cannot do so.

In our system of government, the States are the senior sovereigns. They created the new sovereign of the Federal Government and endowed it with limited powers only, so as to maintain a dual system of government. If that dual system of sovereignty is to survive, it is essential that the consent of the States to be sued be restricted to those cases expressly provided for in the Constitution and contemplated by the Founding Fathers; otherwise the forcing of an assumption of consent upon the States presages their destruction, and that of our dual system.

CONCLUSION.

Louisiana has not consented to be sued by the Federal Government in the proposed suit, and hence this Court has no jurisdiction over Louisiana and the motion of the Federal Government for leave to file a complaint against Louisiana should be denied.

Respectfully submitted,

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