No. —, Original

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

INDEX

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STATEMENT

The question presented by this motion and the objections thereto filed by the State of Louisiana [1] is whether the United States may institute in this Court an original proceeding against a State of the Union in the absence of the specific consent of that State. The United States, in its proposed complaint, has set forth the circumstances whereby a controversy between the parties exists (cf. *United States* v. *California,* 332 U. S. 19, 24–26)

[1] The State has filed a document entitled "Objections to Motion for Leave to File Complaint by the United States against the State of Louisiana," which we shall refer to as "Objections to Motion." It has also filed a supplemental memorandum, which we shall refer to as "Supplemental Memorandum in Support of Objections."

and has stated that the jurisdiction invoked is that defined in Article III, Section 2, Clause 2, of the Constitution. The State has not suggested that the matters set forth in the proposed complaint are not sufficient to establish a case or controversy, nor has it taken the position that this Court should not, in the absence of other objections, exercise its original jurisdiction in a suit to which a State is a party defendant. The objections made by the State have been directed to the suability of the State by the United States in any court, it being asserted (Objections to Motion, p. 1) that "Louisiana is a sovereign State which cannot be sued without its consent, and which has not consented to be sued herein."

The State recognizes that its position is contrary to *United States* v. *Texas,* 143 U. S. 621, but asks that the decision be overruled, suggesting that it has already been discredited by *Kansas* v. *United States,* 204 U. S. 331. (Objections to Motion, pp. 5–7, 10–12.) And in further support of its position it relies upon what it alleges to be the understanding of the members of the Constitutional Convention. (Supplemental Memorandum in Support of Objections, pp. 5–8.) We respectfully submit that none of the State's contentions can be sustained, either in principle or in fact. We shall undertake to show, first, that it has become firmly established by the decisions of this Court that the United States may bring suit against a State of the Union pursuant to Article

III, and second, that not only is there nothing in the history of the Constitutional Convention that calls for a different conclusion, but the contemporaneous statements of certain Members of the Convention affirmatively support the results reached in the unbroken line of decisions of this Court.

I

DECISIONS OF THIS COURT

The argument advanced by the State of Louisiana is directed, primarily, against the decision rendered by this Court in *United States* v. *Texas,* 143 U. S. 621, which holds that the specific consent of the defendant State is not a prerequisite to the maintenance of a suit by the United States against a State of the Union. In its criticism of the *Texas* case, Louisiana asserts (1) that the holding is contrary to a decision said to have been reached by the Constitutional Convention to withhold the consent of the States to be sued by the Federal Government; (2) that the *Texas* case was decided without precedent and was, in fact, contrary to earlier decisions of this Court; and (3) that the reasoning of the *Texas* case leads to the conclusion that, if the States in adopting the Constitution thereby consented to suit by the general government, it follows that the United States also consented to be sued by the States, and to this extent the *Texas* case has been overruled by the

decision of this Court in *Kansas* v. *United States,* 204 U. S. 331.

The case of *United States* v. *Texas* was an original suit brought by the United States in this Court to obtain an adjudication with respect to the ownership of certain territory situated between the States of Texas and what was then the Indian Territory. The relief sought was a determination of the true boundary line between the United States and the State of Texas within the disputed area. The State demurred to the complaint, urging as the principal ground therefor that a suit brought by the United States against one of the States of the Union is not within the contemplation of the Constitution.[2] The question was thoroughly briefed and argued on behalf of the State of Texas, and many of the matters mentioned by counsel were the same as those now urged by the State of Louisiana, particularly the considerations set forth in the dissenting opinions of Mr. Justice Curtis and Mr. Justice Campbell in *Florida* v. *Georgia,* 17 How. 478, at 496–513 and 513–523, respectively, from which counsel for Texas quoted at length. See 143 U. S. at 627–629.

The Court, in a clear and comprehensive opin-

[2] In support of its demurrer the State of Texas also contended (1) that the question was political in nature and not susceptible of judicial determination, and (2) that this Court, sitting as a court of equity, had no jurisdiction, since the cause of action asserted was legal and not equitable in nature. Both of these contentions were considered and disposed of by the Court.

ion by Mr. Justice Harlan, held that it had jurisdiction to entertain the proceeding sought to be brought by the United States and that the specific consent of the defendant State was not required, since the several States, in subscribing to the provisions of the Constitution, had, in effect, consented to the institution of such suits against them by the United States. The language in which the Court expressed its conclusions in respect to this question is as follows (143 U. S. at 646):

> The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. *The exercise, therefore, by this court, of such original jurisdiction* in a suit brought by one State against another to determine the boundary line between them, or *in a suit brought by the United States against a State* to determine the

> boundary between a Territory of the United States and that State, *so far from infringing,* in either case, *upon the sovereignty, is with the consent of the State sued.* Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. [Italics supplied.]

As above indicated, the *Texas* case involved a boundary dispute, but the jurisdiction there sustained has been exercised by this Court in a number of other proceedings brought by the United States against various States of the Union for the resolution of a variety of controversies.[8] Moreover, the decision has on numerous occasions been

[8] These cases and the relief sought therein are as follows: *United States* v. *Michigan*, 190 U. S. 379 (accounting as to sales of lands); *United States* v. *Oklahoma*, 261 U. S. 253 (priority of claim to assets of liquidating bank); *United States* v. *Minnesota*, 270 U. S. 181 (cancellation of swamp-land patents); *United States* v. *Utah*, 283 U. S. 64 (quieting of title to bed of river); *United States* v. *Oregon*, 295 U. S. 1 (quieting of title to bed of nonnavigable lake); *United States* v. *Arizona*, 295 U. S. 174 (injunction against interference with construction of Government dam); *United States* v. *West Virginia*, 295 U. S. 463 (injunction against construction of dam under State authority); *United States* v. *Alabama*, 313 U. S. 274 (removal of State real property tax liens); *United States* v. *Louisiana*, 318 U. S. 743 (perpetuation of testimony); *United States* v. *Wyoming*, 331 U. S. 440 (quieting of title and recovery of damages); *United States* v. *California*, 332 U. S. 19 (declaration of rights in lands underlying Pacific Ocean). In addition the United States was intervener in *Oklahoma* v. *Texas*, 252 U. S. 372 (boundary dispute) and in *Nebraska* v. *Wyoming*, 325 U. S. 589 (dispute as to water rights in North Platte River).

cited with approval in connection with the Court's recognition of its jurisdiction over such proceedings. See *United States* v. *Michigan,* 190 U. S. 379, 396; *United States* v. *Minnesota,* 270 U. S. 181, 195; *United States* v. *West Virginia,* 295 U. S. 463, 470; *United States* v. *Wyoming,* 331 U. S. 440, 442. Also of significance in this connection are the remarks of Mr. Chief Justice Hughes in *Monaco* v. *Mississippi,* 292 U. S. 313, where, in his discussion of the various aspects of State immunity from suit in the light of the provisions of Article III, Section 2, there appears the following (pages 328–329):

> 1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution, § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting "in their highest sovereign capacity, in the convention of the people," waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established "by their own consent and delegated authority" as a necessary feature of the formation of a more perfect Union. * * *
>
> 2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the

> consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. * * * Without such a provision, as this Court said in *United States* v. *Texas, supra,* "the permanence of the Union might be endangered."

Louisiana suggests as a reason for overruling *United States* v. *Texas* (Objections to Motion, p. 7) that the decision therein is contrary to the precedent established by this Court in *Florida* v. *Georgia,* 17 How. 478. This suggestion is clearly without merit. In *Florida* v. *Georgia,* which involved a boundary dispute between those States, the Attorney General of the United States was granted leave to appear, offer evidence and be heard on the argument in the proceeding, without making the United States a party to the litigation. However, there is nothing in the case which holds that the United States could not have been made a party.[4] The Attorney General expressly stated that he did not desire to make the United States a party to the proceeding[5] (17 How. at 482–483), and the Court specifically found that it was not necessary to examine or decide that question. 17 How. at 493.

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[4] Cf. *Oklahoma* v. *Texas*, 252 U. S. 372; *Nebraska* v. *Wyoming*, 325 U. S. 589.

[5] The apparent reason for this was the possibility that the United States might become a party defendant without an Act of Congress to authorize it. See 17 How. at 493.

It is clear, therefore, that the decision in *Florida* v. *Georgia* did not, as Louisiana asserts, provide a "positive precedent against the taking of jurisdiction" in *United States* v. *Texas*. The remarks of the Court from which Louisiana quotes at length are, as indicated above, *supra*, p. 4, taken from the dissenting opinions in *Florida* v. *Georgia;* they did not constitute the ruling of the Court, and, of course, did not serve as a controlling precedent.

On the other hand, the Court did have before it and fresh in its memory the consideration given to this question in *United States* v. *North Carolina,* 136 U. S. 211, decided by substantially the same Court on May 19, 1890, less than two years prior to the decision in the *Texas* case. Louisiana seeks to emphasize the statement of the Court in *United States* v. *Texas* in regard to the *North Carolina* case that "no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject." 143 U. S. at 642. However, it is most significant that immediately following this statement, the Court also said (*Ibid.*):

> But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.

It is obvious, therefore, that the Court considered the question of its jurisdiction in the case of

United States v. *North Carolina,* on its own motion.[6] See discussion of this problem by Dr. James Brown Scott, in *Judicial Settlement of Controversies between States of the American Union* (1919), p. 254.

There is also no basis for Louisiana's contention that *United States* v. *Texas* has been overruled in part by *Kansas* v. *United States,* 204 U. S. 331, where it was held that a State may not sue the United States without its consent. There is nothing in the *Texas* case which suggests the contrary. To be sure, the Court observed in the *Texas* case that the Federal and State governments are "both subject to the supreme law of the land" (143 U. S. at 646), but it does not follow from this that the respective governments occupy the same position insofar as immunity to suit from the other may be concerned. Indeed, a suit between the United States and a State "is not a controversy between equals." See *Sanitary District* v. *United States,* 266 U. S. 405, 425. In any event, however, the decision in *Kansas* v. *United States* did not, even by indirection, overrule *United States* v. *Texas,* in whole or in part. On the contrary, in the *Kansas* case the Court referred to and quoted from the *Texas* case with approval, and stated its conclusion as follows (204 U. S. at 342):

> It does not follow that because a State may be sued by the United States without its

[6] Cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 382.

> consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

See also *United States* v. *Louisiana,* 123 U. S. 32, 36–37; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386.

The foregoing clearly demonstrates, we submit, that the decision in *United States* v. *Texas,* with its comprehensive and well-reasoned analysis of the question therein decided, is not in conflict with any earlier decision of this Court, nor has it been overruled, even in part, by any subsequent decision. The decision is correct and should be adhered to in the present instance.

II

CONTEMPORANEOUS INTERPRETATION OF JUDICIARY ARTICLE

In further support of its contention that the Court has no jurisdiction over a suit brought by the United States against a State without its consent, Louisiana argues that such a proceeding is not within the purview of Article III of the Constitution, as evidenced both by the language of that Article and the decisions reached in respect thereto while the Article was being considered by the Constitutional Convention.

The matters to which Louisiana refers occurred at various times during the consideration by the Convention of the draft of a Constitution submitted by Mr. Rutledge on behalf of the Committee of Detail on August 6, 1787. (2 Madison

Papers (1840 ed.), 1226; 5 Elliot's Debates, 376; H. Doc. 398, 69th Cong., 1st Sess., 471.) On August 20, Mr. Pinckney submitted to the Convention several propositions which were referred to the Committee of Detail. One of these propositions was as follows (3 Madison Papers (1840 ed.), 1366; 5 Elliot's Debates, 446; H. Doc. 398, 69th Cong., 1st Sess., 572):

> The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual State; or the United States and the citizens of an individual State.

On August 22, Mr. Rutledge, a member of the Committee to which Mr. Pinckney's propositions had been referred, submitted a report recommending certain additions to the report before the Convention, among them being the following insertion to be made in Article XI, Section 3,[7] which related

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[7] The text of Article XI, Section 3, as reported on August 6, 1787, was as follows (2 Madison Papers (1840 ed.) 1238; 5 Elliot's Debates, 380; H. Doc. 398, 69th Cong., 1st Sess., 479):

"Sect. 3. 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 public 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 jurisdiction); between a state and citizens of another State; between citizens of different States; and between a state, or the citizens thereof, and foreign states, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other

to the jurisdiction of the Supreme Court (3 Madison Papers (1840 ed.), 1399; 5 Elliot's Debates, 462; H. Doc. 398, 69th Cong., 1st Sess., 596):

> 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."

When the Convention, on August 27, took up the consideration of Article XI, and the various recommendations relative thereto, no action was taken with respect to the above-quoted proposition of Mr. Pinckney or the similar addition proposed by the Committee. From this negative circumstance Louisiana attempts to conclude that the Constitutional Convention affirmatively refused to confer jurisdiction on this Court over a suit brought by the United States against a State.

It is submitted that the inference which Louisiana seeks to draw in this regard cannot be sustained. It is true that the specific provision recommended by the Committee of Detail was not adopted, nor was a similar proposal considered

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public ministers and consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases beforementioned, 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."

on August 30, which would have provided that claims of the United States, and of the individual States, to territory "shall be examined into, and decided upon, by the Supreme Court of the United States."[8] 3 Madison Papers (1840 ed.) 1465–1466; 5 Elliot's Debates, 496–497; H. Doc. 398, 69th Cong., 1st Sess., 645. However, the failure of the Convention to adopt these recommendations[9] does not mean that the framers of the Constitution did not intend to and did not actually provide for the adjudication of suits brought by the United States against a State.

When all the circumstances surrounding the action of the Convention in respect to the judiciary article are taken into consideration, the reason for its decision in respect to the above-mentioned proposals is obvious. *The adoption of the provisions as proposed was not necessary.* The draft of the article submitted to the Convention by the Committee of Detail contained no

[8] It is this latter proposition to which Mr. Justice Campbell was apparently referring in his dissent in *Florida* v. *Georgia*, when he observed that one such proposal before the Convention was "peremptorily rejected." 17 How. at 521.

[9] There had also been submitted to the Convention, in the Patterson plan, a recommendation that "provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory," but such provision was not included in the draft submitted by the Committee of Detail. This proposal, which does not appear in the version of Patterson's plan given by Madison (2 Madison Papers (1840 ed.), 862–867), is set forth in the Journal of the Convention. 1 Elliot's Debates, 177; H. Doc. 398, 69th Cong., 1st Sess., 769, 973.

provision whatever with respect to suits brought by the United States, and on August 27, when the article was being considered, Mr. Madison and Mr. Gouverneur Morris moved to insert, after the word "controversies," the words "to which the United States shall be a party;" which was agreed to. 3 Madison Papers (1840 ed.), 1438; 5 Elliot's Debates, 482; H. Doc. 398, 69th Cong., 1st Sess., 624. This, it is submitted, was regarded by the members of the Convention as an appropriate substitute for the recommendations of the Committee in regard to suits between the United States and an individual State and suits between the United States and an individual person.[10] Indeed, any doubt which might exist on this point would seem to be removed by the discussion which took place on August 30, when the Convention was considering certain proposed additions to Article XVII of the draft. The pertinent portions of the discussion are as follows (3 Madison Papers (1840 ed.), 1465–1466; 5 Elliot's Debates, 496–497; H. Doc. 398, 69th Cong., 1st Sess., 644–645):

> Mr. CARROLL withdrew his motion and moved the following:
>
> "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual States, to the Western territory; but all such claims shall

[10] This view as to the effect of Madison's motion on August 27 is concurred in by Mr. Charles Warren. See *The Making of the Constitution* (1928), 536–537.

be examined into, and decided upon, by the Supreme Court of the United States."

Mr. GOUVERNEUR MORRIS moved to postpone this, in order to take up the following:

"The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained, shall be so construed as to prejudice any claims, either of the United States or of any particular State." The postponement agreed to, *nem. con.*

Mr. L. MARTIN moved to amend the proposition of Mr. GOUVERNEUR MORRIS, by adding: "But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

Mr. GOUVERNEUR MORRIS. *This is unnecessary, as all suits to which the United States are parties are already to be decided by the Supreme Court.*

Mr. L. MARTIN. It is proper, in order to remove all doubts on this point.

On the question on Mr. L. MARTIN'S amendatory motion—

New Jersey, Maryland, aye—2; New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, no—6. States not further called, the negatives being sufficient, and the point being given up. [Italics supplied.]

Further evidence of the intention of the members of the Convention to extend the judicial

power[11] to suits brought by the United States against a State is to be found in a statement made on August 27 while the Convention was considering a motion to amend Article XI, Section 2, of the draft to provide that members of the judiciary might be removed from office by the Executive on the application of the Senate and House of Representatives. In the course of the debate on the motion, Mr. Rutledge declared (3 Madison Papers (1840 ed.), 1436; 5 Elliot's Debates, 481; H. Doc. 398, 69th Cong., 1st Sess., 623):

> If the Supreme Court is to judge between the United States and particular States, this alone is an insuperable objection to the motion.[12]

Finally, the fact that the framers of the Constitution envisioned the necessity for suits by the United States against a State is confirmed by certain remarks subsequently made by one of the members of the Convention. In explaining Article III of the Constitution, as finally drafted, before the Pennsylvania Convention for the

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[11] On August 27, 1787, on the motion of Mr. Madison and Mr. Gouverneur Morris, the words "the Judicial power" were substituted for the words "the jurisdiction of the Supreme Court" in the judiciary article. 3 Madison Papers (1840 ed.), 1439; 5 Elliot's Debates, 483; H. Doc. 398, 69th Cong., 1st Sess., 625.

[12] Mr. Charles Warren appropriately observes that in this remark Rutledge was anticipating the decision of this Court in *United States* v. *Texas*. See *The Making of the Constitution* (1928), 532.

adoption thereof, the Honorable James Wilson, later a member of this Court, made the following statement (2 Elliot's Debates, 490):

> The next is, "*to controversies to which the United States shall be a party.*" Now, I apprehend it is something very incongruous, that, because the United States are a party, it should be urged, as an objection, that their judges ought not to decide, when the universal practice of all nations has, and unavoidably must have, admitted of this power. But, say the gentlemen, the sovereignty of the states is destroyed, if they should be engaged in a controversy with the United States, because a suiter in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy: the government of each state ought to be subordinate to the government of the United States.

The above-quoted excerpts from the remarks of various members of the Constitutional Convention are, it is submitted, more than sufficient to establish that, in adopting the language of the judiciary article, the framers of the Constituion intended that the provisions thereof should embrace a suit brought by the United States against a State. In ratifying the Constitution, or in joining the Union on an equal footing with the original States, the several States have given their consent to such suits.

CONCLUSION

The jurisdiction of this Court to entertain this suit is clearly established by the provisions of Article III of the Constitution and the interpretations given thereto by this Court and the framers of the Constitution. The objections interposed by Louisiana are wholly without merit and cannot be sustained, either in theory or in fact.

The motion for leave to file the complaint should be granted.

Respectfully submitted.

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