Supreme Court of the United States

OCTOBER TERM, 1948.

No. 13 Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

BRIEF IN OPPOSITION TO THE MOTION OF THE FEDERAL GOVERNMENT FOR LEAVE TO FILE A COMPLAINT AGAINST LOUISIANA.

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

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Statement.

Louisiana's objections to the jurisdiction of this Court were filed on January 17, 1949. In answer, the Federal Government filed a four-page Supplemental Memorandum to which Louisiana replied in a Supplemental Memorandum. Sometime later the Federal Government filed a Brief, to which this Brief is submitted in reply.

On This Motion the Federal Government Has the Burden of Proof.

On this motion for leave to file a complaint against Louisiana, the Federal Government has the laboring oar. As set forth in Point 7 (p. 25), the consent of a Sovereign State to be sued is not something which can be presumed;

rather, it is presumed that no Sovereign State has consented to be sued until clear affirmative evidence thereof is presented.

Full burden of proof is thus heavily on the Federal Government to demonstrate the granting of the consent of Louisiana to the present suit; and in this brief, we shall show that the United States has utterly failed to meet that burden.

The Drastic Nature of the Claim Which the Federal Government Seeks to Assert Against Louisiana.

The extraordinary claim which the Federal Government seeks to assert against Louisiana is not only a claim to territory. In addition, it demands vast sums of money from Louisiana *in tort*. While there were several propositions made to the Constitutional Convention that the judicial power of this Court should extend to conflicting claims of the United States and individual States, the only proposition specifically submitted to a vote was to confer jurisdiction over claims between the United States and particular States as to *territory*. The broader proposals were simply ignored as unworthy of debate, and the proposal as to territory was flatly rejected.

There is every reason to believe that as a whole the delegates to the Convention would have been horrified at the suggestion that the Federal Government should be able, in its own Court, and at its pleasure, to sue a Sovereign State *in tort* for vast sums of money.

1. The Constitutional Convention Rejected, Not Once But Five Times, the Very Proposition Now Urged by the Federal Government.

FIRST: The Convention had before it the Paterson Plan, offered June 17, 1787, which was given prominent mention in the record of the Convention (H. Doc. 398, 69th Cong.; 1st Session; pp. 769 and 973; 1 Elliott's Debates, p. 177).

Included in the plan was a striking recommendation which read as follows:

> "Provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory."

On June 19, the Convention adopted a motion by a vote of 7 to 3, 1 state divided, to reject the Paterson Plan. This rejection included the above proposition. (1 Elliott's Debates 180).

SECOND: Mr. Pinckney submitted several propositions to the Convention on August 20, 1787, and they were referred to the Committee of Detail. One of the propositions read as follows:

> "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" (the Madison Papers, Vol. III, p. 1366; H. Doc. 398, 69th Cong.; 1st Sess.; p. 572).

No action was taken on the proposition.

THIRD: On August 22, 1787 Mr. Rutledge for the Committee of Detail, submitted a report to the Convention, suggesting the following amendment to the Randolph or Virginia Plan, then before the Convention:

> "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'" (The Madison Papers, Vol. III, p. 1399; H. Doc. 398, 69th Cong.; 1st Sess.; p. 595-6).

The record shows that *no action was taken on this proposition.*

FOURTH: Mr. Carroll made the following motion to the Convention on August 30, 1787:

> "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 be examined into, and decided upon, by the Supreme Court of the United States." (The Madison Papers, Vol. III, p. 1465; H. Doc. 398, 69th Cong.; 1st Sess.; p. 644).

While the proposed extension of jurisdiction would have only applied to the United States and individual western states, it represents, nevertheless, the same basic proposition which is now under consideration.

The Carroll motion was postponed, and the record shows that *the Convention never took action on it.*

Turning from definitive rejection by inaction to peremptory rejection by action, we come to the proceedings of the Convention on August 30, 1787.

FIFTH: On the date last mentioned the Convention was considering Article XVII of the Randolph Plan (H. Doc. 480), regarding the admission of new states, and a discussion arose in regard to claims of the United States and individual states to territory (The Madison Papers; Vol. III, pp. 1465-1466; H. Doc. 398, 69th Cong.; 1st Sess.; pp. 644-645).

Mr. Gouveneur Morris proposed the following addition to the draft of the Constitution:

> "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."

Thereupon, Mr. L. Martin made a motion to amend the proposal of Mr. Morris so as to add the following sentence:

> "But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

Mr. Morris interposed the suggestion that the L. Martin motion was unnecessary, stating that "all suits to which the United States are parties are already to be decided by the Supreme Court."

Mr. L. Martin expressed disagreement with that statement, and *his motion was put to a vote and defeated.*

The Federal Government infers that the loss of the amendatory motion was influenced by the statement of Mr. Morris; however, we are not concerned with inference but fact, and the recorded fact is that the Convention rejected the amendatory motion of Mr. L. Martin by the vote of the delegates and thereby decisively and lastingly excluded from the judiciary article any provision conferring judicial power on this Court "to examine into and decide upon the claims of the United States and an individual state to territory or property." In this way the Convention confirmed its four other rejections of the same proposal, and of even broader proposals.

Also, the participation of Mr. Gouverneur Morris in the debates of the Convention were such that the other delegates, by August 1787, must have had slight regard for his erratic and offhand views, seldom pursuing a cohesive train of thinking.*

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* The Federal Government could not have selected a member of the Convention less qualified to reflect its views on the Constitution and to understand the meaning of that document, than Gouverneur Morris.

The record of the Convention's proceeding shows he made more speeches and statements than any other delegate, and that he was wrong and voted down oftener than any other delegate at the Convention. He made a great quantity of statements in innumerable speeches in the Convention which do not at all have the weight of authoritative interpretation. The Convention record is replete with Mr. Gouverneur Morris' haughty and cynical attitude towards not only the Convention and its Members, but towards the States and the people of America which do not at all reflect the language or spirit of the Constitution (H. Doc. 398).

At p. 319, Mr. Madison quotes Mr. Gouverneur Morris as saying that the Second Branch, (U. S. Senate) "must have great personal property; it must have the aristocratic spirit, and it must live to lord it thro' pride".

At p. 319, he said "State attachments and State improvements have been the bane of this country we cannot annihilate, but we may, perhaps, take out the teeth of the serpents.".

At p. 330, he stated that he thought the rule of representation (in the 1st Branch, House of Representatives) ought to be so fixed as to secure

Moreover, from the standpoint of sheer logic, we must conclude that the delegates were completely unimpressed by Mr. Morris' contention that the phrase "the judicial power shall extend to" . . . "controversies to which the United States shall be a party" conferred some kind of jurisdiction over the Sovereign States of the Union. Such a contention utterly begs the question; for the language which

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to the Atlantic States a prevalence in the National Councils, by irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have.

At p. 335, he opposed granting to the House of Representatives exclusive right to originate money bills.

At p. 348, he changed about face, and thought the Southern States would have more than their share of representation in the Upper Branch, and that property should not have all the weight in qualification, as he first proposed.

At p. 351, he thought that in time the western people would out-number the Atlantic States, and he wished to put it in the power of the latter to keep the majority of votes in their own hands.

At p. 358, he wound up his debate by stating, "The best course that could be taken would be to leave the interest of the people to the representatives of the people."—To which Mr. Madison answered, p. 358, in effect that he was not a little surprised to hear this implicit confidence urged by a member who on all occasions had inculcated so strongly the political depravity of men and the necessity of checking one vice and interest by opposing to them another vice and interest.

Mr. Gouveneur Morris also paid his compliments to the Judges, when Mr. Madison reports, p. 401, that he, Morris, "supposed it would be improper for an impeachment of the executive to be tried before the Judges. The latter would in such case be drawn into intrigue with the legislature and an impartial trial would be frustrated. As they would be much about the seat of government, they might even be previously consulted and arrangements might be made for a prosecution of the executive."

At p. 549, he advocated the expediency of an absolute negative in the executive over laws enacted by Congress.

Mr. Gouverneur Morris was wrong in all these haughty and wandering observations. Equal representation of States in the U. S. Senate was adopted by the Convention. The Chief Justice was authorized to preside in impeachment trial of the Chief Executive. No absolute negative was given the Chief Executive over laws passd by Congress, but only a qualified veto.

After serving in the Convention with him for several months with full opportunity of observation and appraisal, Major William Peace of Georgia (H. Doc. 398, p. 101-2) says that Gouverneur Morris was a genius with talents that made him conscious, "But, with all these powers he is fickle and inconstant,—never pursuing one train of thinking, nor ever regular".

Mr. Morris quoted (1) says nothing at all about jurisdiction, which is an entirely different thing from judicial power, and (2) it says nothing whatever about the consent of a Sovereign State to suit.

The delegates did not regard the phrase "the judicial power shall extend," "to controversies to which the United States shall be a party", as conferring any such kind of jurisdiction over a Sovereign State. This is borne out affirmatively and clearly by the fact that the clause was adopted on August 27, 1787, while three days later, on August 30, Mr. Carroll moved to confer jurisdiction on the Supreme Court over conflicting claims of the Federal Government and the States "to the western territory". The inference which the Federal Government now seeks to draw is flatly inconsistent with the understanding of the Convention on August 30, 1787.

Another proposition often submitted to the Convention, but never adopted, which might have been construed to extend the jurisdiction of the Federal Courts to "controversies between the United States and any particular State" was the one included in the original Randolph or Virginia plan, to provide a National Judiciary with jurisdiction over "questions which may involve the national peace and harmony". (H. Doc. 398, p. 118, May 29, 1787). On June 13, (H. Doc. 398, p. 198) this provision and others in Resolution 9, were stricken out "in order to leave full run for organization". The same day the Committee of the Whole reported Resolution 9, back including that provision. On June 19, they resumed consideration of the Randolph plan as reported out again, with that provision in Resolution 13. (H. Doc. 398, p. 236) agreed upon.

On July 23, the Convention referred the Randolph plan to a Committee to prepare and report a Constitution and on August 6, Mr. Rutledge filed the Committee Report, (H. Doc. 398, p. 471) with Article XI providing for the Judiciary—(H. Doc. 398, p. 479). However, that broad provision granting peace and harmony", had been excluded,

and it was never suggested or resubmitted at any other time.

It is pertinent at this point again to quote from the cogent summary made by Mr. Justice Campbell in the case of *Florida* v. *Georgia,* 17 How. 478, 518:

> "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."

There is every reason to believe that the majority of the Court held the same view. See *post,* pp. 13-15.

Mr. Justice Campbell clearly identified the proposition that was peremptorily rejected, and that was accomplished on August 30, 1787 when the delegates defeated the amendatory motion of Mr. L. Martin to permit the Supreme Court to inquire into and decide upon claims of the United States and an individual state to territory.

The failure of the Convention to act upon the respective propositions of Mr. Pinckney, Mr. Rutledge, Mr. Paterson, and Mr. Carroll was tantamount to definite and lasting action, and this statement is accentuated by the gravity of the propositions and the number of times the Convention was urged to pass upon them.

Moreover, on August 30, 1787 the Convention took the most positive action on the proposition of Mr. L. Martin by actually voting to exclude it from the judiciary article.

The Federal Government now seeks to belittle the fact that the Convention failed to adopt the very proposal it now urges, by referring to the manner of rejection of the proposal as a "negative circumstance". We may indeed inquire just what sort of "negative circumstances" or re-

jection protocol, in the eyes of the Federal Government, would lend suitable formal dignity to the substantial fact, so clearly apparent, that the very proposal now urged by it was frequently urged to the Convention and failed of adoption. Does it contend that the failure of each proposal would be more effectively shown if proven by formal certificate, duly authenticated by Benjamin Franklin and the Convention officers? What, indeed, would such formal trappings add? Every failure of a proposal is a "negative circumstance"; and every such "negative circumstance" provides an affirmative rejection of the proposal made.

2. In Contrast to These Five Rejections of the Very Proposal Now Urged by it, the Federal Government Has Failed to Show Even a Scintilla in the Convention Record Which Supports Its Present Position.

The Federal Government endeavors to make something of a statement by Mr. Rutledge, and of one by Mr. James Wilson. However, neither statement provides any support for the proposal which it now urges.

The Federal Government quotes Mr. Rutledge as saying to the Convention on August 27, 1787: (Brief in Support of Motion, p. 17)

> "**If** the Supreme Court is to judge between the United States and particular states, this alone is an insuperable objection to the motion." (Emphasis added)

This statement was made three days before the Convention voted upon and rejected Mr. Martin's motion which would have extended the judicial power of this Court to examine into and decide upon claims of the United States and an individual state to territory or property.

This was the same Mr. Rutledge whose proposition to extend the judicial power to controversies between the United States and an individual state, made five days be-

forehand, on August 22, 1787, had not been acted upon. He knew, and so did all of the other delegates, that the proposition was then pending. That was why he couched his language in conditional terms. Moreover, three days later, on August 30, the proposition of Mr. L. Martin in modified form was rejected, 8 to 2, and that vote prevented Mr. Rutledge's "IF" from ever materializing.

The speech made by Honorable James Wilson before the Pennsylvania Convention (Brief in Support of Motion, pp. 17-18), quoted by the Federal Government, is absolutely irrelevant and has no bearing whatever on the question here involved. His speech was nothing more than the expression of individual opinion made to a State Convention. His State, Pennsylvania, had voted against the very proposal to give this Court jurisdiction over suits by the United States against a State claiming territory or property (H. Doc. 398, p. 645, 1 Elliott's Debates 275, 276). He was not construing the Constitution but magnifying his personal views through exhortation. Moreover, Mr. Wilson was talking about whether this Court would have jurisdiction in the reverse situation, that is, when a state sues the United States. Thus, he says in effect that as a "*suiter*" against the United States, a state as a Plaintiff must acknowledge this Court's jurisdiction.

While we have no quarrel with that rule, it simply has no bearing whatever on our question.

3. The Decisions Anteceding the Texas Case Strongly Confirm that the States Have Not Consented to be Sued by the Federal Government at Its Pleasure.

In reading the early decisions of this Court on the judiciary article, one is forcefully struck by the insistence of this Court on the letter of the Constitution to determine (1) the inclusion in the judiciary article of the parties involved, and (2) the consent to be sued.

The iron-bound rule that the jurisdiction of this Court depends strictly upon the language of the Constitution is

clearly stated in *Rhode Island* v. *Massachusetts* (1838) 12 Peters 657, page 720, as follows:

> "But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice,* and its action a nullity. 10 Peters, 474; S. P. 4 Russ. 415. And whether the want or excess of power is objected by a party or is apparent to the Court, it must surcease its action or proceed extrajudicially."

Again, we observe the stress placed upon the letter of the Constitution in the case of *Chisholm* v. *Georgia,* 2 U. S. 2 Dall. 419 (1793). Mr. Justice Iredell made the following statement therein, at page 431:

> "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases."

And Mr. Justice Cushing made the following potent observation, page 469:

> "When speaking of the United States, the Constitution says 'controversies to which the United States shall be a party', *not* controversies *between* the United States and any of their citizens. When speaking of states, it says 'controversies between two or more states'; '*between* a state and citizens of another state'." (Emphasis added)

In the case of *Marbury* v. *Madison,* 5 U. S. 1 Cranch 137, (1803), motion was made for mandamus against the Secretary of State to issue certain Commissions. This necessitated an inquiry into the judiciary article. At page 178 the Court said:

> "Those, then, who controvert the principle that the Constitution is to be considered, in Court, as a paramount law, are reduced to the necessity of maintaining

that Courts must close their eyes on the Constitution. * * * "

"The judicial power of the United States is extended to all cases arising under the Constitution."

"Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?"

In a number of cases, including *The Davis,* 77 U. S. 10 Wall. 15; and *Hans* v. *Louisiana,* 134 U. S. 1, this Court was confronted with the question of ascertaining whether the real parties-defendant were states or the individual officers of states, and this distinction was important to the Court for the reason that, if the states were the real parties-defendant, inquiry had to be made into their consent to be sued. Thus in *Hans* v. *Louisiana* the Court cogently pointed out: (p. 16)

"The suability of a state without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. . . ."

On the proposition that a state is not suable except by its own consent, Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* (1821) 19 U. S. (6 Wheat.) 262, said (p. 380):

"This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, *depends on the instrument by which the surrender is made.*" (Emphasis added).

In *Beers* v. *Arkansas,* (1857) 20 How. 527, Chief Justice Taney, organ of the Court, among other things, said, p. 529:

"It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued

in its own Courts, or in any other, without its consent and permission. . . ."

This requirement of express consent of a State to be sued by the United States is also found in the case of *Florida* v. *Georgia,* 17 How. 478 (1854). Therein the State of Florida had brought suit against the State of Georgia to establish a boundary between them. The Attorney General moved to intervene on behalf of the United States. It was held that the Attorney General could intervene on behalf of the United States in certain limited respects without making the United States a party.

The Attorney General knew that the United States could not become a party to the suit without the consent of the two states involved, and that was why he was trying to keep the United States out of the controversy as a party and to persuade the Court not to consider his motion as an application to intervene in the technical sense of that term. Indeed, in his brief, the Attorney General freely and categorically admitted that **"The Court is not empowered by the Constitution to entertain an original suit between the United States and a State or the United States and two States"**. (15 L. Ed. 184) Hence, the statement made by the Federal Government in its Brief in Support of Motion, p. 8, that "there is nothing in the case which holds that the United States could not have been made a party" is flagrantly in error.

The minority justices were adamant in the view that the allowance of the intervention, though limited in scope, would cause the United States to become a party, and that was why they rendered such a vigorous dissent to show that, under the Constitution, the United States could not be made a party to a controversy in which it would oppose the States without their consent. Moreover, the majority showed its agreement that the United States could not sue a State without its consent by stating plainly:

". . . it is manifest * * * that the United States have a deep interest in the decision of this controversy.

And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this Court or anywhere else." * * *

"In the case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the Court, in the present suit, there is no possible mode by which that decision can be reviewed or re-examined at the instance of the United States". * * * (P. 493)

"But under our government, a boundary between two States may become a judicial question, to be decided in this Court. And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the Court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit." (p. 495).

Accordingly the following statement in Mr. Justice Campbell's opinion (p. 518) must be also understood as the view of the majority:

". . . 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 suit; 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 degree 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."

The same is true of the dissenting opinion of Mr. Justice Curtis, p. 507:

> "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. The State of Georgia has consented to stand joined as a defendant with one or more states, or with a foreign state, and with citizens or subjects of a state other than the one bringing the suit, but with 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."

It is of some significance to bear in mind that Mr. Chief Justice Taney who rendered the majority opinion in this case was also the organ of the Court in the case of *Beers* v. *Arkansas, supra,* referred to above, in which it was held that ". . . the sovereign may not be sued in its own Courts, or in any other, without its consent and permission. . . ."

There is no valid reason to include in this analysis, the case of *United States* v. *North Carolina,* 136 U. S. 211 (1889), except that it was largely relied upon by the Court in deciding the case of *United States* v. *Texas,* 143 U. S. 621 (1891). This suit was brought by the United States against the State of North Carolina to recover interest on state bonds. The question of the state's immunity to a suit brought by the United States was not even raised, and the State entered a general appearance. It settled nothing so far as the question of the right of the United States to sue an individual state without its consent is concerned, and

has no bearing on this case in which Louisiana does not consent to be sued.

Where a State files a general appearance it submits voluntarily to the jurisdiction of the Court and grants its consent to be sued. *Clark* v. *Barnard,* 108 U. S. 436.

Summary of the Pre-Texas Period: Thus, the decisions of this Court, anteceding the *Texas* case, fully recognized (1) that the states surrendered only a portion of their immunity to suit; (2) that the portion surrendered may only be found in the Constitution; (3) that their consent to suit must be express, and may be given by a general appearance; and (4) that a suit may not be brought by the United States against an individual state without its consent.

4. The Texas Case is Not at All a Precedent Supporting the Position of Federal Government.

This suit was an original action brought in this Court against the State of Texas to settle a boundary dispute. One of the jurisdictional issues resulted from the contention made that it was not competent for the United States to sue a state in its own Court, especially in a controversy over the ownership of property. The Court resolved that issue by taking jurisdiction. It is specially noteworthy that Chief Justice Fuller dissented and fifteen years later wrote the opinion in *Kansas* v. *United States* which utterly shattered the reasoning of the *Texas* case.

The following quotations from the decision of the Court in the *Texas* case suffice for our analysis:

> "Did they (the framers of the Constitution) omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina,* 136 U. S. 211 ... 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. 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. . . ." (p. 642)

"We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. . . ." (p. 644)

"**The submission to judicial solution of controversies arising between these two governments,** 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' (*McCulloch* v. *Maryland,* 17 U. S. 4 Wheat. 316, 410) **but both subject to the supreme law of the land,** does no violence to the inherent nature of sovereignty . . . . " (p. 646)

The following inherent errors and points of weakness are found in the decision:

1. It does not follow the earlier decisions of this Court.

2. It relies upon the case of *United States* v. *North Carolina, supra,* for support, while recognizing that the jurisdictional issue was not raised in that case, that there North Carolina consented to be sued, and that the Court said nothing on the subject.

3. Admitting that the *North Carolina* case did not involve the issue, it undertakes to surmise and speculate as to what was on the mind of the Court in that case, and relies upon that conjecture.

4. It *assumes* that, because the jurisdictional point was important in 1892, the Constitutional Convention could not have overlooked it in 1787, and that the framers of the Constitution did not intend to exempt a State from suit by the Federal Government. In other words,

since the court felt that jurisdiction should have been conferred in such cases, it **assumed** that it was conferred, even though it was not conferred.

5. Its findings were made and conclusions reached *dehors* the letter of the Constitution, and the decision is not interpretation but pure and unadulterated *assumption.*

Here, let us remember the solemn admonition of Chief Justice Marshall, regarding jurisdiction:

> "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." *Cohens* v. *Virginia,* 6 Wheat 262, 404.

Standing alone, the *Texas* case has no basis whatever in the Constitution or in authority, and should be carefully re-examined. But, as we will show later, its reasoning has been irretrievably shattered by *Kansas* v. *United States* and, hence it has no force whatever as a precedent.

5. The Decisions Following the Texas Case Also Fail to Support the Federal Government.

We can dispense instanter with a number of cases, for in them the jurisdictional issue was not raised or even mentioned, because in those cases the States consented to be sued by entering general appearances, *United States* v. *Alabama,* 313 U. S. 274 (1941); *United States* v. *Arizona,* 295 U. S. 174 (1935); *United States* v. *Louisiana,* 318 U. S. 743; *United States* v. *Michigan,* 190 U. S. 378 (1902); *United States* v. *Minnesota,* 270 U. S. 181 (1925); *United States* v. *Oklahoma,* 261 U. S. 253 (1922); *United States* v. *Oregon,* 295 U. S. 1 (1935); *United States* v. *Utah,* 283 U. S. 64 (1930); *United States* v. *California,* 332 U. S. 19 (1947); *Oklahoma* v. *Texas,* 252 U. S. 372 (1920); and *United States* v. *Wyoming,* 331 U. S. 440 (1945).

The Court elaborated to some extent on the jurisdictional question in the case of *United States* v. *West Virginia* (1935), 295 U. S. 463, but there also the State did not refuse its consent to be sued.

Where a State files a general appearance it submits voluntarily to the jurisdiction of the Court and grants its consent to be sued. *Clark* v. *Barnard,* 108 U. S. 436.

Moreover, just as the United States may sue a State with the State's consent, a State may sue the United States with the consent of the United States. ~~*New York* v. *United States,* 326 U. S. 572~~, *Arizona* v. *California,* 283 U. S. 423; *Minnesota* v. *Hitchcock,* 185 U. S. 373. *United States* v. *Louisiana,* 123 U. S. 32.

When we come to *Kansas* v. *United States,* (1904) 204 U. S. 331, where the United States did not consent, we find that counsel for Kansas based their case entirely on the *Texas* case, (51 L. Ed. 511). But the opinion in the *Kansas* case was written by Mr. Chief Justice Fuller, who had dissented in the *Texas* case. Having completely disagreed with the *Texas* case, his opinion in the *Kansas* case simply extinguished the *Texas* case as a precedent. Moreover, when the opinion states that "public policy" forbids the conclusion that the United States may be sued by a State without its consent, we can only understand this as a reference to the Constitution itself. The only "public policy" governing relations between the Federal Government and the States, is the language of the Constitution; and the Constitution does not give the consent of either the Federal Government or the States to be sued by the other branch. The upshot of all this is that in *Kansas* v. *United States,* the Court, in substance, returned to the Constitution and absolutely extinguished the *Texas* case as a precedent.

The striking character of *Kansas* v. *United States,* as a complete repudiation of the *Texas* case is all the more apparent when we consider that, in addition to the Chief Justice, only two of the Justices who decided the *Texas*

case were on the Court when *Kansas* v. *United States* was decided fifteen years later. Six new judges had, meanwhile, been added; and the thinking of the Court had so completely changed that the decision in *Kansas* v. *United States* was unanimous, except that Mr. Justice Moody, who had been appointed after the case had been submitted and before decision, did not participate.

Mr. Chief Justice Hughes was the organ of the Court in the case of *Monaco* v. *Mississippi,* 292 U. S. 313 (1933) which held that a foreign state could not sue a State of the Union without its consent. There is even less reason to believe that the United States may sue a State than that a foreign state may do so, for controversies between States and a foreign state are specifically mentioned in the Constitution, while those between the Federal Government and a State were specifically omitted (Point 1, *ante,* p. 2).

Then, resorting to assumption, as distinguished from the letter of the Constitution, the Court's opinion in the *Monaco* case observes as dictum on p. 329:

> "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."

This must be taken as a clear admission that the Constitution itself confers no such jurisdiction. And it is impossible to reconcile the statement quoted with those made by the Court in *Marbury* v. *Madison; Cohens* v. *Virginia; Chisholm* v. *Georgia; Beers* v. *Arkansas,* and *Hans* v. *Louisiana* in which stress was placed upon the express language of the document which, alone, could determine the surrender *vel non* of a state's immunity to suit in given cases. Indeed, this reference to the *Texas* case by Mr. Chief Justice Hughes was the most charitable which he could make.

The final and rather horrifying conclusion to be drawn from the *Texas* case is that it departed from the words of the Constitution and indulged in sheer assumption—a process contrary to the very concept of Constitutional law. And the *Texas* case having been irretrievably crushed by *Kansas* v. *United States,* there is no decision of this Court supporting the position of the Federal Government.

6. The Immunity of Louisiana to Suit by the Federal Government is Exactly Equal to the Immunity of the Federal Government to Suit by Louisiana, and the Federal Government Has Shown No Authority Whatever to the Contrary.

Perhaps the most significant part of the brief of the Federal Government is the casual section on page 10 thereof in which it attempts to reply to what we have described as the shattering effect of *Kansas* v. *United States* on the reasoning of the *Texas* case. Here the Federal Government admits that in the *Texas* case the Court observed that the Federal and State Governments are "both subject to the supreme law of the land". And it does not deny that the entire foundation of reasoning of the *Texas* case is the theory of mutuality, that is, that as part of the Constitutional plan, both Federal and State Governments were considered to have consented to be sued by the other. Nor does it specifically deny that the *Texas* case theory of mutuality, upon which Kansas relied, was irretrievably crushed by the decision in *Kansas* v. *United States.*

Indeed, in substance we now find that the Federal Government has actually abandoned the theory of mutuality of the *Texas* case and taken the position that the Federal Government should be able to sue a state at its pleasure, without the reverse being true, on the authority of a single case, now cited for the first time. It now states that "the respective governments [do not] occupy the same position insofar as immunity to suit from the other may be con-

cerned", because "a suit between the United States and a State 'is not controversy between equals' ", citing the lone case of *Sanitary District* v. *United States,* 266 U. S. 405!

Here indeed do we come to the crux of this case. Does the Federal Government have some greater immunity to suit by Louisiana than Louisiana has to suit by the Federal Government?

To this question we must answer that as far as immunity to suit is concerned, all sovereigns are juridically equal. *Monaco* v. *Mississippi,* 293 U. S. 313. *The Exchange,* 7 Cranch 116; *The Parlement Belge,* L. R. 5 P. S. 197, *Berizzi Bros.* v. *The Pesaro,* 271 U. S. 562. And there is nothing in the Constitution giving either the Federal Government or the State Governments an immunity to suit greater than that of the other. **So far as immunity to suit by the other is concerned, the sovereignties of the two governments are exactly equal.** Also, the sovereignty of the States can be no more invaded by the Federal Government than the action of the State governments can arrest or obstruct the course of the national power. *New York* v. *United States,* 326 U. S. 572; *United States* v. *Texas,* (1892) 143 U. S. 621; *Worchester* v. *Georgia,* (1832) 6 Pet. 520, 8 L. Ed. 483; *Collector* v. *Day,* (1871) 11 Wall. 113, 20 L. Ed. 122; *Texas* v. *White,* (1869) 7 Wall. 700, 725, 19 L. Ed. 227; *United States* v. *Cruikshank,* (1876) 92 U. S. 550, 23 L. Ed. 588; *McCulloch* v. *Maryland,* 4 Wheat 316.

As was said in *Collector* v. *Day,* 11 Wall. 113, 124, in discussing the general equality of the federal and state sovereigns,

> "The supremacy of the general government * * * cannot be maintained. The two governments are upon an equality * * * ."

This juridical equality with respect to immunity to suit is not affected by, and must not be confused with, differences in physical power of governments. Today the United

States has mighty battleships, an air force of almost incredible striking power, and tremendous military strength. The little Republic of Costa Rica does not even maintain a standing army, navy or air force. But this does not mean that Costa Rica has an inferior juridical standing as a sovereign, or fewer legal rights as such under international law, than its powerful neighbor to the north. Indeed, we may confidently say that the United States never has, and never would, assert in either litigation or in international relations that Costa Rica has less integrity as a sovereign under the law, or as a sovereign any less immunity from suit than the United States.

Also, the juridical equality of the Federal and State governments with respect to immunity to suit is not affected by the various grants of regulatory power in the Constitution. In the Constitution the states and the Federal Government have consented that each is to have superior regulatory power in certain fields. Thus, in the field of interstate commerce, the Federal Government has a regulatory power superior to that of the States. Conversely, in the field of the purely internal affairs of the States, the State police power is supreme. These respective supremacies, in various fields of regulatory power, however, have no bearing whatever on the juridical equality of the two sovereigns with respect to immunity to suit. The Constitution contains no provision for diminution of the immunity to suit of either government, and the immunity of each sovereign to suit by the other, is of the same precisely-identical and unvarying equality.

Moreover, the utter lack of substance of the Federal Government's contention that Louisiana must be relegated to an immunity to suit inferior to that of the Federal Government, is shown by the fact that it attempts to bottom that extraordinary contention solely and entirely on the single case of *Sanitary District* v. *United States,* 266 U. S. 405. Except for that case, the Federal Government does not even pretend to deny that all sovereigns are juridically

equal with respect to immunity to suit, and that immunity to suit is an attribute of sovereignty which has an absolutely-unvarying quality.

The *Sanitary District* case, however, does not have the slightest relevance to this question of immunity to suit. In that case the United States sued an Illinois corporation which had no claim whatever to sovereign immunity, seeking to enjoin certain diversion of water from Lake Michigan. The defendant corporation had been clothed with certain statutory power of the State, and the Court merely held, so far as here material, that the powers of the Federal Government to regulate interstate commerce and to carry out treaty obligations to a foreign power, were superior to those of the State. We have no quarrel with that case. We have no doubt that, in a controversy over regulation of interstate commerce, a contest between Federal and State governments is not a contest between equals. Similarly, a contest between Federal and State governments over regulation of a purely internal affair of the State, is also not a contest between equals. While the Federal Government has superior power under our Constitution to regulate interstate commerce, the States have superior power to regulate their internal affairs. But so far as immunity to suit is concerned, the sovereigns are juridically equal and the contest is inherently and fundamentally one between equals.

In Summary on this Point: The Federal Government does not deny that the theory of the *Texas* case is one of mutuality, that is, that under the Constitutional plan, the two branches were said to have each consented to be sued by the other. Nor does it really deny that the theory of mutuality, the entire foundation of reasoning in the *Texas* case, was irretrievably crushed by *Kansas* v. *United States,* which held that a State could not sue the Federal Government without its consent. Now the Federal Government actually abandons the *Texas* case and its theory of mutu-

ality and merely assumes the point by asserting that it is entitled under the law to some greater or superior degree of immunity to suit, than a State Government. The utter emptiness of that assertion is shown by the fact that it is bottomed solely on the *Sanitary District* case, a case which simply has no application whatever. Moreover, this assertion flies squarely in the face of the great doctrine of the juridical equality of sovereigns, and the unvarying classic quality of that immunity to suit which is an inherent attribute of sovereignty. There are not two or more grades of sovereign immunity; there is only the single grade, and it is an attribute of sovereignty of the State of Louisiana.

We have been living in an era when it has been fashionable in political circles to talk about the great physical power and resources of the Federal Government, and to deprecate the economic usefulness of the States. But economic differences, whatever they may be, do not provide a basis for legal discrimination with respect to immunity to suit. The rich and powerful are not entitled, under our legal system, to greater or superior immunity to suit, simply because they are economically or physically more powerful. On the contrary, so far at least, we seek equal justice under law, a principle which in our system is as applicable to State Sovereigns as to individuals, and which must be maintained to preserve our dual system of government.

7. There is No Presumption of Consent by a Sovereign to Suit; on the Contrary, the Presumption is Rigorously Against the Granting of Such Consent and Any Consent Granted Must Be Restricted to Its Terms.

It is apparent from the foregoing that no Sovereign can ever be presumed to have consented to suit, and that on the contrary the presumption is against the granting of consent, except where it has been granted in clear and unambiguous terms. For this reason, whenever a Sovereign consents to be sued, the consent must be restricted to its

terms, as to persons, courts, and procedure. *Ford Motor Co.* v. *Department of Treasury of State of Indiana* (1945) 323 U. S. 459, 89 L. Ed. 389, 65 S. Ct. 347; *Great Northern Life Ins. Co.* v. *Read* (1944) 322 U. S. 47, 88 L. Ed. 1121, 64 S. Ct. 873; *Cohens* v. *Virginia,* 6 Wheat. 262, *Hans* v. *Louisiana,* 134 U. S. 1; *Curran* v. *Arkansas,* 56 U. S. 15 How. 304; *Beers* v. *Arkansas* (1858) 20 How. 527.

This principle summarizes Louisiana's position. Louisiana is a Sovereign State which may not be sued without its consent and which very clearly has not consented to be sued in any document, anywhere, or otherwise; hence, this Court simply does not have jurisdiction over Louisiana, and the motion of the Federal Government should be denied.

Respectfully submitted,

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

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