IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ~~14~~ 8, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS,
Defendant

MOTION OF THE STATE OF TEXAS TO DISMISS THE COMPLAINT OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its motion to dismiss the complaint filed herein by the United States of America.

PRICE DANIEL
Attorney General of Texas

MOTION TO DISMISS

Now comes the State of Texas, the defendant, by its Attorney General, and moves the Court to dismiss the complaint filed herein on the ground that it appears on the face of the complaint that this is a controversy between the United States and a State, and as such is not within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution of the United States.

STATEMENT IN SUPPORT OF MOTION

Under Article III, Section 2, Clause 1, of the Constitution, the judicial power of the United States extends, among other things, to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; and to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, and subjects. Article III, Section 2, Clause 2, provides that in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned Clause 2 provides that the Supreme Court shall have appellate jurisdiction.

The first clause of Article III, Section 2, defines the types of cases to which the judicial power of the United States extends. The second clause of this section merely distributes the original and appellate jurisdiction of this Court and does not confer any new class of jurisdiction. *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Minnesota v. Hitchcock*, 185 U.S. 373, 383 (1902); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *California v. Southern Pacific Co.*, 157 U.S. 229, 257 (1895). This being true, Clause 2 must be read in connection with Clause 1.

Only two of the categories of cases in Clause 1 are declared by Clause 2 to be within the original jurisdiction of this Court, namely, those affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. It is on the latter category that plaintiff must rely for its claim that this case is one coming within the original jurisdiction of this Court, because Clause 2 does not profess to confer on this Court original jurisdiction of the category in Clause 1 covering cases in which the United States shall be a party.

At first glance it may appear that Clause 2 gives this Court jurisdiction of all cases to which a State is a party. However, when Clause 2 is considered in connection with Clause 1, it becomes apparent that the cases declared to be within the original jurisdiction of this Court when a State is a party are those cases enumerated in Clause 1 in which a State is listed as a party, namely, "Controversies between two or more States"; between a State and citizens of another State; and between a State and foreign

states, citizens, and subjects. Thus construed, Clause 2 does not confer original jurisdiction upon this Court in cases between the United States and a State, since controversies to which the United States is a party are one of the categories of cases enumerated in Clause 1 which are not taken out and declared to be cases of which the Supreme Court shall have original jurisdiction. "The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases." *Ex parte Vallandigham*, 1 Wall. 243, 252 (U.S. 1863); *Cohens v. Virginia*, 6 Wheat. 264, 397-398 (U.S. 1821); *Marbury v. Madison*, 1 Cranch 137, 174-175 (U.S. 1803).

The Attorney General of the United States recognized that this Court is not empowered by the Constitution to entertain an original suit between the United States and a State in his argument on a motion to intervene in behalf of the United States in *Florida v. Georgia*, 17 How. 478 (U.S. 1855). Although the majority of the Court in that case did not deem it necessary to examine or decide this question, the dissenting opinions of Mr. Justice Curtis and Mr. Justice Campbell, the former being concurred in by Mr. Justice McLean, recognized that this Court does not have original jurisdiction of a suit between the United States and a State. Mr. Justice Curtis said:

> "The judicial power of the United States extends, among other things, to controversies to which the United States shall be a party—to

controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.

"In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

"I am not aware that any doubt has even been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

"There was a case of the United States v. Yale Todd, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of the United States v. Ferreira, 13 How. 52. Of this case the note says:—

" 'The case of Yale Todd was docketed by consent in the supreme court, and the court appears to have been of opinion that the act of congress of 1793, directing the secretary of war and the attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the su-

preme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate.'

"The decision of this court, in Marbury v. Madison, 1 Cranch, 137, settled this construction of the constitution; and, as stated in this note, no one who has examined the subject now questions it.

"We have, then, two rules given by the constitution. The one that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

"It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after

enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

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

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only." (17 How. at 504-506.)

The language of Mr. Justice Campbell's opinion is as follows:

"The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more States? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony;' 'to controversies between the United States and an individual State;' and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory.' None were incorporated into the consti-

tution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion.

"The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint special tribunals 'to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever,' should be submitted.

"Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution

till near the close of the convention, when they were stricken out, and the general jurisdiction over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it." (17 How. at 521-522.)

While it is true that the majority of the Court in *United States v. Texas*, 143 U.S. 621 (1892), declared that the original jurisdiction of this Court extends to a suit between the United States and a State, the dissenting opinion of Mr. Chief Justice Fuller, with which Mr. Justice Lamar concurred, adhered to the view that this type of suit is not within the original jurisdiction of the Supreme Court. In that opinion Mr. Chief Justice Fuller said:

"This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

"The judicial power extends to 'controversies between two or more States;' 'between a State and citizens of another State;' and 'between a

> State or the citizens thereof, and foreign States, citizens or subjects.' Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.
>
> "The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.
>
> "We are of opinion, therefore, that this case is not within the original jurisdiction of the Court." (143 U.S. at 648-649.)

The dissenting opinion in the above case was consistent with all that had been written on this question up to that time and with the proceedings concerning this question in the Constitutional Convention of 1787, where efforts to give this Court original jurisdiction of controversies between the United States and a State were defeated. (See 1 Elliott's Debates 177, 180, 275-276; III Madison Papers 1366, 1399, 1465-1466.)

We respectfully submit that the opinion of the Court in *United States v. Texas, supra,* is in error in its construction of Clause 2 of Article III, Section 2, of the Constitution, and that it and the subsequent cases relying on it in this respect should be overruled.

Section 1251(b)(2) of Title 28 of the United States Code provides that the Supreme Court shall have original jurisdiction over "all controversies between the United States and a State." However, this attempt by the Congress to confer original

jurisdiction upon this Court of cases which are declared by the Constitution to be only within the appellate jurisdiction of this Court is invalid, for it has long been the established doctrine that the original jurisdiction of this Court cannot be enlarged by the Congress. *Cohens v. Virginia*, 6 Wheat. 264, 399 (U.S. 1821); *Marbury v. Madison*, 1 Cranch 137, 174-175 (U.S. 1803); *United States v. Ferreira*, 13 How. 40, 53 (U.S. 1851); *Baltimore and Ohio Ry. v. Interstate Commerce Commission*, 215 U.S. 216 (1909); *Ex parte Yerger*, 8 Wall. 85, 98 (U.S. 1868); *California v. Southern Pacific Co.*, 157 U.S. 229, 261 (1895).

It is respectfully submitted, therefore, that the motion to dismiss the complaint, for the reason that this is not a case coming within the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution, should be granted.

Respectfully submitted,

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August, 1949.