In the Supreme Court of the United States

October Term, 1971

No. 55, Original

Richard Eugene Webb, A citizen of Ohio,

Plaintiff

v.

William J. Porter, as Ambassador
and Chief of the United States Delegation
to the Paris Peace Talks

Reply to Memorandum in Opposition to
Motion for Leave to File Complaint

Richard Eugene Webb
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Upper Arlington, Ohio 43212

The Solicitor General for the Defendant contends that the motion for leave to file my complaint should be denied for reasons that this case is not within the original jurisdiction of the Court and that the gist of my complaint is frivolous. These contentions provoke the following rebuttal.

On Jurisdiction

Article II, Section 2 of the U.S. Constitution states: "In all Cases affecting Ambassadors, other public Ministers ... the Supreme Court shall have original Jurisdiction." The Solicitor General relies on the court opinion in Ex Parte Gruber, 302 U.S. 303, to wit: "Manifestly, this refers . . . not to those representing this country abroad." However, the clause does not expressly limit the jurisdiction to "foreign" ministers. In numerous other clauses in the Constitution, the word "foreign" was employed when referring to foreign nations. (Art. I, sec. 8, Cl. 3,5,; Sec. 9, Cl. 8; Sec. 10, Cl. 3; and Art. III, Sec. 2, Cl. 1) The Constitution would have specified foreign ministers if the Framers had wanted to exclude U.S. ministers from the jurisdiction of the Court. The fact is there is no record of either the Federal Convention of 1787, or of the State Conventions which adopted the Constitution, that explicitly excludes U.S. ministers. The Court's opinion in the Gruber Case cites none, nor does the opinion in the reference case Milward v. McSaul. Indeed, the said clause was not elaborated on at all, except in the Virginia Convention. (See Elliot's Debates: II, 490, and III, 517-584.) It seems proper to accord to those who established the Constitution, and their Posterity, the full scope and plain meaning of the words which they were asked to sanction, and not to insert restrictive adjectives after they are gone by other than amendment pro-

cedures, especially since the clause refers to all cases affecting public ministers. It is significant that the Department of Foreign Affairs Act of July 27, 1789 used the phrases "public ministers from foreign states" and "foreign public ministers," which left no doubt as to which ministers.

The Court opinion in Gruber cited The Federalist, No. 80. But that essay does not prove the contention of that Court. As that essay dealt with the extension of the judicial power to cases involving "foreign States, citizens, or subjects," as well as "to all cases affecting ambassadors, other public ministers," the paragraph in the essay dealing with "causes in which citizens of other countries are concerned" could be associated with the former description of cases, and, therefore, does not necessarily indicate the nationality of "public ministers." Of cases affecting public ministers, Hamilton merely asserted that they belong to the class of cases "which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves." Furthermore, Hamilton said that the authority of the federal judiciary "ought to extend to all" such cases, which covers the present case since it concerns foreign intercourse of the highest magnitude, the Paris peace negotiations. In short, the context of Hamilton's essay was not to exclude U.S. ministers from the federal jurisdiction, but to explain why it is necessary to give federal jurisdiction over all cases relating to foreign intercourse.

The original form of the said clause that was first proposed in the Federal Convention was as follows: "/T/he Judiciary so established shall have authority . . . in all cases touching on the rights of Ambassadors." (Records of the

Federal Convention of 1787, M. Farrand, I,244: June 15th) Again, no limitation was given as to the nationality of the ambassadors. As this case challenges William J. Porter's right to his present ambassadorship, it certainly touches on the rights of ambassadors.

An independent reason why the Court should take up this case is that it affects the foreign ambassadors and ministers participating at the Paris Peace Talks. The Supreme Court in Osborn v. U.S. Bank said:

> "suppose a suit to be brought which affects the interest of a foreign minister . . . This Court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties." 9 Wheat.854, 855 (Emphasis added.)

Hamilton in The Federalist, No. 81, said of cases affecting public ministers:

> "All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient

and proper that such questions should be submitted in the first instance to the highest judiciatory of the nation." (Emphasis added.)

There is a more fundamental reason why the Court should grant my motion; it stems from my right to apply to the courts of justice for redress of injuries. The Constitution was ordained and established partly to "establish Justice." (Preamble) Article III, Section 1 declares that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . " Mr. Justice Field said:

"By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." (Cited in Muskrat v. United States, 219 U.S. 357)

Now I have alleged that my right to safety provided by the Constitution is being deprived by the unlawful ministership conferred to the Defendant. (PP. 2,3,6, and 22 of my Complaint and Brief.) This right to safety is further established in Article I, Section 1 of the Ohio Constitution, to wit:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, . . . and seeking and obtaining happiness and safety."

This right is guaranteed in the federal jurisdiction by the Fifth, Ninth, and Tenth Amendments to the U.S. Constitution. Blackstone said:

> "Since all wrong may be considered as merely a privation of right, the plain, natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived." (His Commentaries, III, 116)

In my complaint I contend that the Defendant has no legal right to his present ministership, which violates the Constitution; and that the exercising of the unlawful ministership does injury by depriving my right of safety, and that of my sons. The plain remedy is, therefore, the revocation of the said ministership.

Concerning the pursuit of a remedy, Blackstone asserted:

> "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." (Comm.III,23. See also Marbury v. Madison, 1 Cranch 163.)

Redress of injuries by suits in courts, said Blackstone, is where "the act of the parties and the act of law cooperate." Thus, my right of civil action to pursue a remedy is to have some court apply the full "judicial power" to my case. That power, according to Blackstone, is:

> "to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and, by its officers to apply the remedy." (Comm.III,24)

Thus, as the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, the federal

judiciary must take up my case and carry it through to judgment, i.e., to determine whether any injury has been done. (See also, Blackstone's Comm. III,301-307.) Now of the federal courts, the Supreme Court should have the original jurisdiction, as is plainly required by the Constitution in all cases affecting ambassadors and other public ministers.

On the Defendant's Plea to the Action

The Solicitor General further argues that the Court should not accept my complaint because "the gist of the complaint . . . is frivolous". He cites the Curtiss-Wright Case for support. This argument is nothing other than a plea to the action; that is, an answer to the merits of the complaint. (See Blackstone's Comm.III, 301-303). Inasmuch as the Solicitor General has entered a dilatory plea, the question of jurisdiction, the plea to the action attempts to influence the decision on jurisdiction, and on the motion as a whole. That is, the case is being argued before it has even been accepted, which obliges me to justify my complaint further than I had done in the first brief, as that brief was only to outline the basis for my complaint. (See p.13.)

On the Solicitor General's reliance on Curtiss-Wright, I refer to my first brief, since he completely ignored my critical examination of the Curtiss-Wright dictum on the treaty power; and I give the following additional argument:

> The Solicitor General, quoting from Curtiss-Wright, said, "The President 'makes treaties with the advice and consent of the Senate; but he alone negotiates.' " In comparison, The Federalist said the opposite about the relationship between the President and the Senate during negotiations:

"/T/he management of foreign negotiations will naturally devolve upon him /President/, according to general principles concerted with the Senate, and subject to their final concurrence." (No. 84)

This statement succinctly summarizes the evidence I have uncovered, which includes, among other sources, the evidence contained in Elliot's Debates viz., II:46,47,52,91,287,291,315,505, 506-514; III: 221-22, 331,347,348,359,410,500, 510; and IV: 116-117, 119,120, 125,127,134,258, 265.

Furthermore, the other cases cited by the Solicitor General all revert back to Curtiss-Wright. If the motion is granted, the Plaintiff would examine the applicability of these other cases, and the associated court opinions, to the present Complaint.

In closing, I quote John Marshall in the Virginia Convention of 1788 on the adoption of the U.S. Constitution:

"To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." (Elliot's Debates, III, 554)

I pray the Court will grant the motion to file my complaint. If the Court should determine that it has not the original jurisdiction, I pray that it will determine in which of the federal courts should I file my complaint so that I can obtain justice without delay.

RICHARD EUGENE WEBB
April 28, 1972