IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

-v-

STATE OF FLORIDA,

Defendant.

MEMORANDUM IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS THE COUNTERCLAIM AND DENY THE DEMAND FOR JURY TRIAL FILED BY THE STATE OF FLORIDA

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INTRODUCTION

The Plaintiff, United States of America, has moved to dismiss the counterclaim herein filed by the defendant-counterclaimant, State of Florida. The counterclaim basically alleges that the Congress conveyed title to the submerged lands in question to the State of Florida in 1868 and that the United States is now seeking to take said lands without just compensation in violation of the Fifth Amendment. The United States has moved to dismiss

the counterclaim and to strike the demand for jury trial on the ground, inter alia, of its sovereign immunity.

The Defendant-counterclaimant (hereinafter referred to as "counterclaimant") initially wishes to emphasize what issues are not presented in this case with reference to the doctrine of sovereign immunity. First it should be made clear that counterclaimant does not contest the doctrine of sovereign immunity as it relates generally to tort or contract actions brought by private persons or entities against a government. This case involves an action by one "sovereign" against another on the ground of an alleged constitutional deprivation.

Moreover, counterclaimant does not even advance (nor do the facts of this case present a foundation for presenting) the question of sovereign immunity in an action initially filed by a private person, or even a State. This case concerns the right of a State to present its constitutionally-based claim as a counterclaim in an action instituted by the United States.

Finally, it should be kept foremost that counterclaimant does not even argue the right to advance "unrelated" constitutionally-based counterclaims. The counterclaim in this case concerns the same subject matter as the initial claim. See Rule 13(a), Federal Rules of Civil Procedure (compulsory counterclaims).

Counterclaimant thus submits that the following issue with reference to sovereign immunity is presented by the motion to dismiss, filed by Plaintiff:

WHETHER THE UNITED STATES MAY PLEAD SOVEREIGN IMMUNITY IN A SUIT AGAINST A STATE TO A COUNTERCLAIM ALLEGING A CONSTITUTIONAL VIOLATION AND DEALING WITH THE SAME SUBJECT MATTER AS THE ORIGINAL CLAIM?

I. ARGUMENT ON SOVEREIGN IMMUNITY

A. Sovereign Immunity Should be Abolished

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O. W. Holmes, "Path of the Law," 10 Harvard Law Review 457, 469 (1897).

The doctrine of sovereign immunity was transplanted in our young republic from the early feudal days of England when no baron or lord was subject to suit in his own court. Eventually the doctrine became intertwined with the "divine right of kings" and was predicated on the fact "the king could do no wrong" (at least in this world). Various principles were later advanced in support of the doctrine, the foremost of which was the dogmatic assertion that the sovereign could not be held to answer for a violation of the law the sovereign itself had created (even though this latter proposition appears to

be of doubtful validity, in England at least, after the signing of the Great Charter at Runnymeade). See United States v. Lee, 106 U.S. (16 Otto) 196 (1882).

The vestigial remains of this corollary of the "divine right of kings" were swiftly (albeit unexplainedly) applied by American courts [aside from this Court's abortive demise of it in Chisolm v. Georgia, 2 Dall. 420 (1793)], with a dogmatic fervor, prompted, no doubt, chiefly by the imminent bankruptcy of the State and national governments in the days following the Revolution. See Watkins, The State As a Party Litigant, 52-54(1927).

The legal justification for this blind adherence to the archaic past never really was forthcoming, since "[t]o the Constitution of the United States the term sovereign, is totally unknown." Chisolm v. Georgia, 2 Dall. 420, 454 (1793) (Wilson, J.). Almost a century after Chisolm this Court again found itself at a loss to provide a legal justification for continued adherence to the doctrine, when it stated:

> "What were the reasons which Forbade that the King should be sued in his own court and how do these reasons apply to the political body corporate which we call the United States of America?
>
> ***
>
> "As we have no person in this Government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to

> see on what solid foundation of principle the exemption from liability to suit rests." United States v. Lee, 106 U.S. (16 Otto) 196, 206 (1882).

Even more important than the utter dearth of legal principles to support the doctrine generally are the compelling legal principles which call for its abolition in those instances wherein a State is alleging a constitutional violation on the part of the United States. Here any justification for continued adherence to the doctrine totally disappears since, unlike in feudal England where the law was the creature of the sovereign, "[t]he United States is entirely a creature of the Constitution," Reid v. Covert, 354 U.S. 1, 5-6 (1957) and all branches of national (as well as State) government are subordinate to it. Id.

Simply stated, under our system of government, it is the constitution which is the "sovereign" (until altered by the people). It is the constitution from which the power to create all laws flow. It is from the constitution (not the king) that this Court derives its authority to sit.

If there is any principle in our nation, where "no man is above the law," which should truly be considered as axiomatic, it is that "no government is above the constitution." This all-transcending document "is a law for rulers and people." Ex Parte Milligan, 71 U.S. (4 Wall.) 281, 294 (1866).

Illustration of this principle is found in those early cases wherein States, when

sued in this Court by the United States, sought to plead their sovereign immunity as a bar to the action. This Court rightfully rejected those pleas even though it could not point to any express waiver of such immunity. This Court reasoned that unless a State were held liable to such suits then it could commit all sorts of constitutional violations with impunity. In this Court's words:

> "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. 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.
>
> "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.'"
> Monaco v. Mississippi, 292 U.S. 313, 328-9 (1934). Accord, Minnesota v. Hitchcock, 185 U.S. 371, 386-7 (1902).

Counterclaimant soundly endorses this rule of law and, even more importantly, the compelling reasons which support it. Since no state is above the constitution, no state ought to be able to plead its immunity when brought to the bar for violating it.

However, the question redounds, is justice (in the constitutional sense) to be a "one-way street"? Do not these same compelling reasons dictate that the United States equally ought not to be able to plead its sovereign immunity in a suit by a State? If all States are under the constitution is not also the United States government under it?

Your counterclaimant would here concede that this Court in a decades-old holding appears to have rejected this argument. The Court there stated that,

> "It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion."
> Kansas v. United States, 204 U.S. 331, 342 (1907).

However, one may read the entire Kansas decision (and subsequent similar decisions of this Court) and find not a

single "public policy" principle listed in support of the conclusion -- assuming, of course, that "public policy" may place a government above the constitution. Your counterclaimant submits that the paucity of reason or policy advanced to support the conclusion reached in Kansas is due to the impotency of it and that the Kansas decision ought to be re-examined and summarily rejected. The United States ought to be subject to suit in this Court by a State on an alleged constitutional violation.

What reasons exist for allowing suits against a State but not suits by a State against the United States (non obstante the plain wording of the constitution, which extends the judicial power of this Court to "all cases" Minnesota v. Hitchcock, 185 U.S. 371, 385 (1902) (court's emphasis) in which a State shall be a party)?

Can it be said that only the States and not the United States must function under the constitution? Surely, this is not so. Can it be said, as was done in feudal English courts, that the United States government is not subject to suit in this Court because this court owes its existence to it (as opposed to the constitution)? Surely, this is not so. Can it be said as a factual assumption that only States and not the United States government will exceed the bounds of the constitution? Surely, this is not so. See Ex Parte Endo, 323 U.S. 310 (1944); Korematsu v. United States, 323 U.S. 214 (1944) (Murphy, Jr., dissenting); Bolling v. Sharpe, 347 U.S. 497 (1954). Can it be said that such suits (alleged

constitutional violations brought by States) will be so numerous as to bankrupt the United States (assuming cost to be a valid criterion in constitutional rights area)? Surely, this is not so (in light of the "blanket" waiver of immunity on these actions in the Torts Claims Act).

Counterclaimant thus submits that it is "inherent in the constitutional plan" to bring the United States "before the bar" when the constitution is involved in a suit by a state. The quoted principles of Monaco v. Mississippi, supra, apply with equal force to this case and Kansas v. United States, supra, ought to be overruled.

Terminally, your counterclaimant submits that yet another reason why sovereign immunity should not bar this action is that it involves a counterclaim concerning the same subject matter as the original claim. It is the Plaintiff which has here invoked this Court's jurisdiction and which now seeks to escape it.

Again your counterclaimant must concede the existence of older decisions of this Court which appear to reject the proposition herein advanced. See, e.g., Illinois Central R.R. Co. v. Public Utilities Commission, 245 U.S. 495 (1918). Again, however, your counterclaimant must reemphasize that these decisions totally fail to explain the reason for the conclusion reached.

These decisions appear to create an anomaly in that they are contrary to the

general principle that when the United States comes to Court as a suitor, it stands in the position of a private litigant. Luckenbach S.S. Co. v. The Thekla, 266 U.S. 328 (1924). In the Thekla case the United States joined with admiralty action and then sought to avoid liability on a cross-libel by pleading sovereign immunity. This Court began its opinion by stating the general rule with reference to the status of the United States as a suitor, to wit:

> "When the United States comes into Court to assert a claim it so far takes the position that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." 266 U.S. at 339-40.

This Court then proceeded to hold that the United States could be sued via the cross-libel and rejected the argument that statutory authorization for same was lacking, by stating:

> "It is said that there is no statute by which the Government accepted this liability. It joined the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U.S. at 341.

It must be conceded that in so holding, the Thekla Court placed particular emphasis upon the nature of the cause of action involved, i.e., an "in rem" action. Assuming, without conceding, that the instant action is "in personam" (since the ultimate question in this action is the determination of title to specific land areas), your counterclaimant submits that this factor logically should not materially alter the result.

First, your counterclaimant is unaware of any principle of law which states that the United States, as a suitor, binds itself to do justice only in admiralty (or in rem) cases. To state the possibility of such a rule of law is to uncover the absurdity of it.

Second, your counterclaimant was of the current legal opinion that, at least where constitutional claims are involved, "labels" do not count. In Re Gault, 387 U.S. 1(1967). In this regard it should be clear that the counterclaim deals with the same subject matter as the original claim (albeit seeking different relief) whether the instant action be labelled "in personam," "quasi in rem," or "in rem."

Third, it is clear that utterly none of the reasons originally advanced in support of sovereign immunity apply to actions on counterclaims. Here the sovereign (even in the divine kingly sense) is not being forced to enter his own courts, but rather, he has voluntarily subjected himself to their jurisdiction. So also, in these instances the "monetary" rationale (in those opinions bold enough to state this as a reason for immunity) disappears,

since a holding of liability here would not create the spectre of hundreds or thousands of "uninvited" lawsuits.

With respect to Plaintiff's immunity defense your counterclaimant simply asks this Court to remain true to the admonition of Mr. Justice Holmes and to recognize the Plaintiff's defense for what it is -- the vestigial remains of feudal English monarchial philosophy. Reason and the underlying principles of our system of government and justice dictate against application of the doctrine to the facts presented by this case. Only the echoes of the archaic past call for its application. The counterclaim of the State of Florida should be considered on its merits.

B. Sovereign Immunity Has Been Waived

Alternatively, the counterclaimant contends there has been an effective Waiver of Sovereign Immunity in this case.

Title 28 U.S.C. §1491, provides, inter alia, that the Court of Claims shall have jurisdiction to render judgements upon any claim against the United States founded upon the constitution; or founded upon any act of Congress. The counterclaim Sub Judice is clearly founded upon the aforestated bases of Jurisdiction of the Court of Claims.

It has long been held that the Court of Claims has jurisdiction of actions by the states against the United States for

demands arising out of an act of Congress and the constitution. U.S. v. Louisiana, 123 U.S. 32, 8 S.Ct. 17, 31 L.Ed. 69 (1887). Thus, Congress having waived sovereign immunity as to a state suing the United States in this forum, the only issue to be resolved is whether or not such an action could be maintained in the Supreme Court as well.

Title 28, U.S.C., §1251(b)(2) provides that the Supreme Court shall have original but not exclusive jurisdiction of all controversies between the United States and the states. It was held in U.S. v. Louisiana, supra, that the Supreme Court does not have exclusive jurisdiction of actions where a state is Plaintiff against the United States and that the Court of Claims has concurrent jurisdiction with the Supreme Court in these cases.

The Court of Claims having concurrent jurisdiction with the Supreme Court in original proceeding where a state is suing the United States, and the Court of Claims being per se a waiver of sovereign immunity, a fortiori, such waiver of sovereign immunity must logically extend to original actions in the Supreme Court.

The foregoing contention is fortified by the fact that by virtue of Title 28 U.S.C. §1255, the Supreme Court may review by Writ of Certiorari cases in the Court of Claims. The reviewing of cases wherein sovereign immunity has been waived is a waiver in itself. The Court of Claims, being a "legislative" court (U.S. v. Sherwood 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 [1941]), the "Judicial Power" of Art. III, U.S. Constitution, is not involved and Congress's provision for

review is a legislative grant and a discretionary waiver of sovereign immunity on review.

If this Court denies jurisdiction of the counterclaim, the anomalous effect would be to defer this action to the Court of Claims over which this Court has ultimate power of review; such a circuity of litigation is unwarranted because the facts of this case are presently before the Court.

Logically, if the Supreme Court can review cases involving the waiver of sovereign immunity or if the power to grant review on Petition for Writ of Centiorari is a waiver of sovereign immunity within itself, certainly the Supreme Court can entertain such actions as an original matter.

While perhaps the status of sovereign immunity should be clarified by legislation, counsel for the State implores the Court, pending such legislation, by interpretation to give the widest possible effect to statutes waiving sovereign immunity. Congress by statutes such as the Tucker Act, the Federal Torts Claim Act, and the Court of Claims has abolished sovereign immunity. We suggest the evident spirit of these laws should be carried out. Procedural anachronisms should not be employed to limit the liberal policy of such statutes. The Court may use as their guide the phrase inextricably linked with the history of English attempts to evade the tenacles of the immunity concept -- "Let right be done!"

II. CLAIM UPON WHICH FLORIDA IS ENTITLED TO RELIEF

Basically, the State of Florida contends, inter alia, that Congress, by act of June 25, 1868, 15 Statutes 73, approved Florida's marine boundary in excess of three (3) geographic miles in the Atlantic; thus, conveying all right and interest in title, the United States may have had in the submerged lands and superadjacent waters within such boundary.

The United States seemingly contends that the Submerged Lands Act limits the above stated grant to three (3) geographic miles in the Atlantic.

If the contentions of both parties are correct, the subsequent act of Congress works as a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

Counterclaimant concedes that if the Court agrees with its contention that the Act of 1868 was a grant or conveyance from the United States, and that the Submerged Lands Act has no limiting effect, that the counterclaim would be moot.

However, if the Court finds as a matter of law that the Submerged Lands Act limits Florida's claim or that any holding of this Court, past or present, limits Florida's claim under the Act of 1868, then the counterclaim is viable and states a cause of action.

Therefore, the counterclaimant prays this Court will withhold determination whether vel non the counterclaim states a cause of action at this juncture of litigation.

While the counterclaim may seem precipitous, its presence in regard to final judgement is essential to the inclusiveness and conclusiveness of this matter. If the Court rejects the counterclaim at this time, it is possible that this Court will again be confronted with this matter on Petition for Writ of Certiorari from the Court of Claims; such procedure would be unnecessarily burdensome and expensive to the Court and to the parties.

III. THE DEMAND FOR A JURY TRIAL SHOULD BE GRANTED

Title 28 U.S.C. §1872 provides "In all original actions at law in the Supreme Court against citizens of the U.S., issues of fact shall be tried by a jury."

Florida contends this statute entitles it to a trial by jury. The United States contends that it does not, because a state is not a "citizen."

The absurdity of the movant's contention is best illustrated in its Memorandum in Support of Motion. The movant claims on Page 6 of said Memorandum in regard to sovereign immunity that "[t]here is no reason why this rule, [Government's immunity extends to counterclaims] like the prohibition on initiating suits, should not apply equally to suits by states as to suits by individuals. On Page 9 of said Memorandum the movant states "[t]he State of Florida cannot be construed to be a 'Citizen' under the terms of Section 1872."

Counsel assumes the government's reference to an "individual" in reference to a "citizen."

Rather than take issue with the contradictions of movant's Memorandum, the counterclaimant contends that if §1872 does not provide for jury trials for the states, said section is unconstitutional in regard to the U.S. Constitution, Amendment VII, which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

Alternatively, if §1872 does not provide for jury trials for the States, Florida relies on Amendment VII as a self-implementary provision of the Constitution to provide the right to a jury trial and demands the same.

Terminally, the government contends this "case" is not an "action at law." True, the complaint is in the nature of a quiet title action, but the counterclaim is an action at law insomuch as damages are demanded for an unlawful taking of property as alleged.

Juries are traditional in condemnation cases. The case at bar is similar in nature.

CONCLUSION

For reasons stated, the motion of the U. S. should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of August, 1971, a copy of this Memorandum in Opposition to Motion by the United States to dismiss the counterclaim and deny the demand for jury trial filed by the State of Florida was mailed, postage prepaid, to Honorable John N. Mitchell, Attorney General of the United States, and Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

_____
W. ROBERT OLIVE, JR.
Assistant Attorney General