No. 54, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF FLORIDA AND TEXAS

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE A COUNTERCLAIM

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This is a suit by the United States against the States of Florida and Texas for a declaration that they lack jurisdiction to enforce their fishery laws against foreign vessels and crews in the sea more than three geographical miles from the coastline of the United States in the Gulf of Mexico. The motion of the United States for leave to file the complaint in this case was granted on March 20, 1972, and the defendant States filed their answers claiming such jurisdiction on May 22, 1972. On June 26, 1972, the Court designated the Honorable Charles L. Powell as Special Master to conduct hearings and

make recommended findings of fact and conclusions of law.* The parties have been engaged in discovery since January 1973. On July 14, 1975, the defendant States jointly moved for leave to file a counterclaim for a declaration that they possess jurisdiction to enforce their fishery laws against foreign vessels and crews within three geographical miles of the coastline.

As we elaborate below (pp. 4-7, *infra*), defendants' motion should be denied because the sovereign immunity of the United States bars their counterclaim, which in any event is not ripe for adjudication. At the outset, however, we suggest another factor that militates against consideration of defendants' counterclaim in this case: whereas defendants are the only States whose interests appear to be implicated by the issue presented for adjudication by the United States, resolution of the question defendants seek to raise would affect the rights of all coastal States.

Defendants in their counterclaim seek adjudication of their rights in the three-mile territorial sea, *i.e.*, the belt of sea lying within three geographical miles of the coastline of the United States, whereas the complaint of the United States relates not to the territorial sea but rather to the nine-mile contiguous zone that extends seaward therefrom. By the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, and the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331 *et seq.*, Congress granted to the separate coastal States proprietary rights in

*/ We are informed that Judge Powell died on August 17,

the natural resources of the seabed of the territorial sea but retained for the United States the ownership of the natural resources of the seabed of the continental shelf seaward thereof, except that the two defendant States were granted proprietary rights in the natural resources of the seabed within their historical boundaries in the Gulf of Mexico (but not extending more than three marine leagues from their coastlines). *United States* v. *Louisiana*, 363 U.S. 1; *United States* v. *Florida*, 363 U.S. 121. See also *United States* v. *Maine*, 420 U.S. 515.

Thus the defendants are the only States that may legitimately claim proprietary interests seaward of the territorial sea, and therefore are the only States that may attempt to assert a claim of jurisdiction over part of the contiguous zone on the basis of such interests. It was for that reason that the United States did not name other States as parties defendant in this case. But since all coastal States now possess proprietary interests in the territorial sea, each could assert a claim of jurisdiction similar to those that defendants now seek to have adjudicated. Accordingly, defendants' counterclaim implicates the concerns of every coastal State. Consideration of that counterclaim on its merits would invite, at this late stage in the proceedings, participation by other coastal States as *amici curiae*, with the resultant expansion of this litigation that such participation would entail.

A. Sovereign Immunity Bars Defendants' Counterclaim

It is well established that the United States may not be sued without its consent. See, *e.g.*, *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609. The rule is no different when the would-be plaintiff is a State. See, *e.g.*, *Kansas* v. *United States*, 204 U.S. 331; *Arizona* v. *California*, 298 U.S. 558, 568; *Minnesota* v. *United States*, 305 U.S. 382, 387; *Hawaii* v. *Gordon*, 373 U.S. 57, 58.

Sovereign immunity bars counterclaims as well as initial complaints. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512; *United States* v. *Shaw*, 309 U.S. 495, 500-505; *Illinois Central R.R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, 504-505. In *United States* v. *Shaw*, *supra*, this Court held that sovereign immunity bars suit by way of counterclaim, notwithstanding the arguments made there by the respondent (309 U.S. at 501-502) that "when a sovereign voluntarily seeks the aid of the courts * * * it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court" and that "the necessity for a complete examination into the [counterclaim]" and the "principle of a single adjudication" militate in favor of allowing counterclaims. In rejecting these arguments and refusing "to extend the waiver of sovereign immunity more broadly than has been directed by the Congress" (309 U.S. at 502), the Court adhered to the longstanding rule enunciated in *Nassau Smelting Works* v. *United States*, 266 U.S. 101, 106:

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.[1]

Since the United States has not consented to the suit that the defendant States seek to bring against it by way of counterclaim, that suit is barred by sovereign immunity.

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[1] In *Shaw* the Court noted (309 U.S. at 501) that Congress has by statute waived the sovereign immunity of the United States to the extent of allowing counterclaims "to the amount of the government's claim." See 28 U.S.C. 2406. This limited exception to the general rule that the United States does not, by initiating suit, consent to be sued on counterclaims has no application where, as here, the government's suit is not for money and the counterclaim is not a "claim for a credit." 28 U.S.C. 2406.

Another possible exception to that general rule may be that when the government brings property into court, it thereby consents to an adjudication of all rights therein. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 26 n. 84 (1963). This exception also does not apply here, for the United States is not seeking an adjudication of property rights in a particular *res* and, even if its suit could be so construed, the "property" involved, however it might be defined, would be the "property" lying more than three miles seaward from the coastline, whereas the defendant States' counterclaim involves different "property" lying within three miles of the coastline.

B. The Issue Defendants Seek To Raise Is Not Ripe For Adjudication

No live controversy exists between the United States and the defendant States concerning the regulation of foreign fishing vessels in the territorial sea. Unlike the situation in the contiguous zone, in the territorial sea neither defendant has enforced its fishery laws against foreign vessels over the objection of the United States. Defendants' counterclaim is therefore premature.

No such controversy has arisen or is likely to arise because the opportunity for regulation itself seldom arises. Since foreign vessels are generally prohibited from fishing within twelve miles of the coastline (see 16 U.S.C. 1081 *et seq.* and 1091 *et seq.*), such vessels are not likely to attempt to fish within the three-mile belt of territorial sea.[2] To our knowledge, no foreign vessel has attempted to fish in the territorial sea adjacent to the coast of either defendant State at least since the enactment, in 1966, of the Contiguous Fishery Zone Act (barring foreign fishing, with some exceptions, in the contiguous zone).

Since there is not now a live controversy between the United States and the defendant States over fisheries regulation in the territorial sea, nor indeed even a substantial likelihood that such a controversy will

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[2] Although the United States is authorized by these provisions to make exceptions to the general prohibition and allow foreign vessels to fish in both the contiguous zone and the territorial sea, it is authorized to do so in the territorial sea only "upon concurrence" of the affected State or States. 16 U.S.C. 1081.

develop, defendants' counterclaim is not ripe for adjudication. Cf. *Warth* v. *Seldon*, No. 73-2024, decided June 25, 1975 (slip op. pp. 6-8).

CONCLUSION

The motion for leave to file a counterclaim should be denied.

Respectfully submitted.

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Solicitor General.

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