No. 75, Original

IN THE

Supreme Court of the United States

STATE OF IDAHO, et al.,

Plaintiffs,

v.

CYRUS R. VANCE, et al.,

Defendants.

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' BRIEF IN OPPOSITION, OR ALTERNATIVELY, FOR ALLOWANCE OF TIME TO RESPOND

WAYNE L. KIDWELL, Esq.
Attorney General, Odaho
RICHARD C. TURNER, Esq.
Attorney General, Iowa
WILLIAM J. GUSTE, JR., Esq.
Attorney General, Louisiana
PAUL L. DOUGLAS, Esq.
Attorney General, Nebraska

By GEO. S. LEONARD, Esq.,
Associate Counsel
1019 Nineteenth St., N.W.
Washington, D.C. 20036

January 3, 1978

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The plaintiff States move for an order striking defendants' Brief in Opposition for default or, in the alternative, for an allowance of thirty days to reply to Part II thereof.

STATEMENT

As described in defendants' brief (p. 6) the complaint states a claim under the Constitution for a declaration as to

> ". . . the proper allocation of power between the legislative and executive branches of the federal government with respect to the disposal of

United States property interests in the Panama Canal Zone."

Plaintiffs claim that the Property Clause, Art. IV, Sec. 3, cl. 2, grants sole power to the Congress to dispose of property of the United States. To the contrary, defendants assert that the President has concurrent foreign affairs power to do the same with only Senate approval under the Treaty Clause, Art. II, Sec. 2, cl. 2. Plaintiffs answer that if such concurrent authority does exist in the Executive Branch, it cannot be exercised so as to annul contrary legislation previously enacted. Defendants deny that there is any such limitation on the treaty power.

On October 13, 1977 the states-plaintiff submitted their complaint to the Clerk and moved under Rule 9 for leave to file it under the original jurisdiction of this Court. Rule 9 provides a 60-day time to respond. That period expired on December 12, 1977.

I

Motion to Strike

On December 22, 1977 the Solicitor General appeared as attorney for the two defendants and mailed their Brief in Opposition to the plaintiff-states. Defendants neither sought nor were granted waiver of the filing date or extension of time to respond. Consequently defendants are in default under the Rules of this Court, and the states-plaintiff accordingly move to strike the Brief in Opposition as now filed, with leave to defendants to answer the complaint.

II

Motion for Extension of Time to Reply

Considering the Constitutional importance of the substantive issue and taking into account the flexible practice of this Court in original cases (Rule 9 (6)), the states-plaintiff accept the possibility that the Court may prefer to move directly to the underlying question at this time. They therefore further move in the alternative that in such event they be allowed at least thirty days to reply to the merits.

The procedural difficulty arises from the substantive argument made in Part II of the defendants' Brief, (pp. 12-20). Part I of the Brief (pp. 6-11) argues procedural questions of standing, denying that the states-plaintiff, either for themselves or as *parens patriae,* have any judiciable interest in the loss of the votes of their state delegation to Congress or the increased burden on their interstate commerce. On that the cases cited by both parties sufficiently answer the points made without further reply, e.g. *Massachusetts v. Mellon,* 262 U.S. 447, 43 S.Ct. 597 (1923) denies state standing to challenge the enforcement of federal *legislation,* and *Pennsylvania v. West Virginia,* 262 U.S. 553, 43 S.Ct. 658 (1923) grants *parens patriae* standing to object to burdened commerce.[1]

The difficulty with Part II is a problem of timing. Under the Federal Rules of Civil Procedure, the complaint is first filed, and thereafter attacked under Rule 12 F.R.C.P. for any failure to state a cause of action, whereas Rule 9 of the

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[1] *A fortiori,* review standing has been recognized as to the effect of a state senator's vote, *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972 (1939), and the holding of *Texas v. Florida,* 306 U.S. 398, 59 S.Ct. 563 (1939) answers the suggestion made in ftn. 13 (Def. Bf. p. 11).

Rules of this Court defers any complaint filing until the required motion for leave to file has been considered. Accordingly, it is not certain that defendants commit error by now arguing the ultimate constitutional issue – as is done in Part II of their brief. But if this procedure is acceptable and the Court prefers to consider Part II at this time, then the defendants' claim of concurrent executive power is effectively the Supreme Court equivalent of a Rule 12, F.R.C.P. motion to dismiss.

If so, the states-plaintiff are not reluctant to brief this fundamental question prior to answer, since the facts as to the President's agreement with Panama are already widely known through press discussions, the State Department's publication of the proposed treaty texts, and the Senate and House committee hearings. Alternatively the allegations of the complaint are hardly disputable, or a proper factual basis for decision might be in the form of an agreed statement.

To respond, however, to the constitutional argument in Part II of defendants' opposition, the states-plaintiff – as well as the members of Congress and other parties who have complementary interests – will need some allowance of time to satisfactorily brief the relative powers of the executive and legislative branches of government to dispose of property of the United States. The direct authorities which plaintiffs wish to cite are numerous, and the distinguishing of defendants' border exchange and Indian treaty cases cannot be done overnight.

Accordingly the states-plaintiff move in the alternative, that in the event the Court prefers not to defer its consideration of the arguments made in Part II of defendants' Brief until the facts have been established of record, that

they be allowed at least thirty days to prepare an adequate reply.

Respectfully submitted,

WAYNE L. KIDWELL, Esq.
Attorney General, Idaho

RICHARD C. TURNER, Esq.
Attorney General, Iowa

WILLIAM J. GUSTE, JR., Esq.
Attorney General, Louisiana

PAUL L. DOUGLAS, Esq.
Attorney General, Nebraska

By /s/ Geo. S. Leonard
GEO. S. LEONARD, Esq.,
Associate Counsel
1019 Nineteenth Street, N.W.
Washington, D.C. 20036

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