12-7-1972

12-07-1972 Preliminary Memorandum

Ralph I. Miller
Associate Justice, US Supreme Court

Supplement to bench memo: (jurisdiction)*

Linda R.S. v. Richard D. and Texas: The issue here, as I understand it, is the effect of joining Texas as a party defendant. The 11th A reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Court has held that immunity under the Eleventh Amendment "is a personal privilege which may be waived." Missouri v. Fiske, 290 U.S. 18, 24 (1933).

The state has immunity (whether from the 11th A or a penumbra is not clear) from suits brought by its own citizens:

> Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. ... But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented. ... We think Alabama has consented to the present suit.

Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184 (1964, per Brennan; White Douglas, Harlan, and Stewart dissented on the issue of waiver in fact).

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* I reversed the order of presentation in this memo because I was waiting for the record in Gomez.

The Court has held that a general appearance will waive the State's immunity from suit by its own citizens. Clark v. Barnard, 108 U.S. 436 (1883). The Clark case has been cited as authoritatively establishing the proposition that the State may waive the immunity "at its pleasure ... as by a general appearance in litigation in a federal court ..." Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959, per Douglas).

The answer of Texas in this case is an unequivocal general appearance. Appx at 9-10. Texas entered into stipulations of fact. Appx at 11-12.

I am convinced that, if a State can waive its immunity from suit by its own citizens (i.e., if the Court does not want to overrule Clark), Texas has consented to jurisdiction here.

Gomez v. Perez: The issue here, as I understand it, is whether the state court decided in favor of the state statute after its validity was "drawn in question." 28 U.S.C. § 1257 (2).

First, the verbatim predecessor to art. 4.02 (with punctuation changes) was in existence throughout the entire course of the litigation. It was enacted in 1967, to be effective on Jan. 1, 1968. Texas Session Laws, 60th Legislature, Regular Session, ch. 309 at 736 (1967).

Secondly, I can find no evidence that this particular statute was cited and "drawn in question" in the courts below. Art 602 (the criminal provision) was cited in the brief in the Court of Civil Appeals and in the brief seeking writ of error. But I find no citation either to art. 4614 or its successor art. 4.02.

The result on this issue is up to the Court. The Court can grant cert, of course, and can consider the claimed discrimination. The EP claims were squarely raised, although bad lawyering did obfuscate the focus. There is no doubt that the Texas lower courts passed on the absence of laws requiring support. They assumed that support of legitimates was required, but they did not cite the statute requiring support.

My personal opinion is that the Court has no jurisdictional problem here if it treats the case as cert. Of course, the Court may decide that the remedy is so unacceptable (i.e., eliminating all support obligations or creating an obligation judicially) that an easy way out is desirable. Dismissing the appeal for want of jurisdiction and denying cert would be an easy way out.

My recommendation is that the case be granted as cert. A great deal of judicial time has gone into this case, and the Court should decide it at this point.

If the case is dismissed, I think the Texas Legislature will read this as approval. I sincerely doubt that legislation will result. If the Court declares the support statute unconstitutional without issuing a mandate, some legislative response will be compelled. I would prefer to see the Court face the issue rather than putting the problem off. I see no prejudice to the state or to judicial efficiency from this approach, and this is the only fair thing to do for the lawyers and judges who have struggled with the problem. Further, if the Court is going to invalidate the statute, action now may provide support for illegitimate children who would otherwise have to wait for the legislature. In Texas, that could be a long wait.

RIM
Dec 7, 1972