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# Supreme Court of the United States

October Term, 1968

In the Matter of:

JOHN L. SULLIVAN, Tax Commissioner  
of the State of Connecticut, et al.

Appellants;

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

Docket No. 610

Office-Supreme Court, U.S.  
FILED

APR 7 1969

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Place Washington, D. C.

Date April 2, 1969

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C O N T E N T S

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ORAL ARGUMENT OF:

P A G E

F. Michael Ahern, Esq. on behalf of Appellants

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Harris Weinstein, Esq. on behalf of Appellees

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X  
4 JOHN L. SULLIVAN, Tax Commissioner :  
of the State of Connecticut, et al., :

5 Appellants; :

6 vs. :

No. 610

7 UNITED STATES OF AMERICA, et al., :

8 Appellees. :  
9 - - - - -X

10 Washington, D. C.  
11 Wednesday, April 2, 1969

12 The above-entitled matter came on for argument at  
13 10:30 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice  
16 HUGO L. BLACK, Associate Justice  
17 JOHN M. HARLAN, Associate Justice  
18 WILLIAM J. BRENNAN, JR. Associate Justice  
19 POTTER STEWART, Associate Justice  
20 BYRON R. WHITE, Associate Justice  
21 ABE FORTAS, Associate Justice  
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 F. MICHAEL AHERN, Esq.  
25 Assistant Attorney General, State of Connecticut.  
30 Trinity Street  
Hartford, Connecticut  
Counsel for Appellants

HARRIS WEINSTEIN, Esq.  
Assistant to the Solicitor General  
Department of Justice  
Washington, D. C. 20530  
Counsel for Appellees

1                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE WARREN: No. 610, John L. Sullivan,  
3 Tax Commissioner of the State of Connecticut, et al., appellants  
4 versus the United States, et al.

5                   Mr. Ahern?

6                   ARGUMENT OF F. MICHAEL AHERN, ESQ.

7                   ON BEHALF OF APPELLANTS

8                   MR. AHERN: Mr. Chief Justice, and may it please the  
9 Court:

10                  This appeal has been taken by the State of Connecticut  
11 from a decision of the Court of Appeals for the Second Circuit,  
12 affirming a lower court ruling. That ruling held that the appli-  
13 cation of sales and use taxes to the purchase and use of property  
14 by nonresident servicemen in Connecticut to be in contravention  
15 of Section 514 of the Soldiers and Sailors Civil Relief Act.

16                  This case was instituted by a Naval Lieutenant named  
17 Schuman and the United States of America in the District Court  
18 for the District of Connecticut, claiming immunity from the  
19 application of the tax to a boat, a pleasure boat, purchased by  
20 Lt. Schuman in Connecticut, on the basis that Section 514 of  
21 the Soldiers and Sailors Relief Act granted that immunity from  
22 sales taxes.

23                  The District Court dismissed the claim of Schuman for  
24 lack of jurisdiction, from which no appeal has been taken. It  
25 granted summary judgment to the United States, which judgment



1 was affirmed by the Court of Appeals on July 10, 1968. Notice  
2 of Intent to Appeal was filed July 30th, the case was docketed  
3 on October 7th, and this Court noted probable jurisdiction on  
4 January 13, 1969.

5 The jurisdiction of this Court rests on 28 U.S.C. 1254,  
6 subsection 2.

7 I should like to state at this time that the State of  
8 Texas has filed an amicus brief in which 30 other States have  
9 joined. The State of New York and the State of California have  
10 each filed independent amicus briefs. Illinois has joined Cali-  
11 fornia in its brief.

12 We commend these briefs to the Court and thank the  
13 States for their interest and efforts in our behalf, and at the  
14 same time I should like to commend to the Court the second part  
15 of the brief of the appellee in this case, the United States of  
16 America, starting at page 37 through 43, which does not subscribe  
17 to the arguments which are presented in the first part of the  
18 brief.

19 The issues in this case are whether the lower court  
20 erred in determining the Section 514 of the Soldiers and Sailors  
21 Civil Relief Act prohibits the application of sales and use  
22 taxes to the private purchase transactions of servicemen station-  
23 ed in the States throughout the country under military orders;  
24 and further, whether Section 514, as interpreted by the Court of  
25 Appeals, is an unconstitutional infringement on reserve powers

1 of the States to tax under Article X of the United States Con-  
2 stitution.

3 The facts in this case are brief. The parties to the  
4 action stipulated that the everyday purchases of tangible per-  
5 sonal property by servicemen are made at PX's on military instal-  
6 lations and are, therefore, not subject to taxation, so they are  
7 not a part of this case.

8 This case is involved with purchases of larger items  
9 by servicemen, such as pleasure boats, cars, television sets,  
10 and so forth, which they cannot get at PX's.

11 In the lower court, the District Court, the United  
12 States Government presented several affidavits which allegedly  
13 set forth facts illustrative of the situations in which the State  
14 of Connecticut was assessing sales or use taxes against service-  
15 men in Connecticut. I should like to address myself to one of  
16 those affidavits at this time, the affidavit of Commander William  
17 Foster, which is printed in the record appendix at page 21A  
18 through 27A.

19 Commander Foster was a Texas domiciliary stationed in  
20 Connecticut who purchased a car from a Connecticut retail dealer  
21 and paid the tax thereon. Commander Foster, in his affidavit,  
22 claims to have paid a use tax on the transaction. That state-  
23 ment is in error.

24 At page 6 and page 23 of the Government brief, it  
25 refers to the Commander Foster affidavit, and in each instance

1 it states that Commander Foster paid a use tax to the State of  
2 Connecticut. These statements are in error.

3 The purchase by Commander Foster was from a Connecticut  
4 retail dealer. The sale took place within the State and he paid  
5 his sales tax to the dealer.

6 I direct the Court's attention to page 27A of the  
7 record appendix on which is reproduced the invoice covered in  
8 the transaction, and on the invoice it very plainly states that  
9 sales taxes were paid to the dealer. Significantly, at page 41  
10 of the Government's brief, and this is in the second part, which  
11 doesn't agree with the first part, a reference is made to this  
12 affidavit, and the reference is that Commander Foster paid a  
13 sales tax to the State of Connecticut.

14 In this connection also, my friends from the Attorney  
15 General's Office in the State of Texas tell me that I have com-  
16 mitted a grievous error in my brief at page 6, wherein I refer  
17 to Commander Foster's affidavit and state that after paying a  
18 sales tax to the State of Connecticut, Commander Foster was re-  
19 quired to pay a use tax to the State of Texas before registering  
20 the vehicle.

21 The Attorney General's Office in Texas advises me that  
22 since 1961, Texas has had a reciprocity provision in its statutes  
23 granting credit for any sales or use taxes paid to another juris-  
24 diction on a motor vehicle which is brought into Texas for use  
25 therein.

1 I would ask this Court to take judicial notice of the  
2 laws of the State of Texas in that regard.

3 One final reference to the Foster affidavit: In the  
4 lower court, when the motion for summary judgment was heard, the  
5 Government presented three affidavits to the court for its con-  
6 sideration. One of these was the affidavit of Commander Foster.  
7 At that time I filed a motion to strike the affidavit from the  
8 record on the basis that Commander Foster had arrived at the  
9 misapprehension that he had paid a use tax rather than a sales  
10 tax to the retail dealer.

11 The District Court noted my objection, but did not  
12 rule on that objection. Under the circumstances, I renew that  
13 objection at this time and claim that the court erred in not rul-  
14 ing on the motion, and I would ask that this Court disregard the  
15 Foster affidavit in its deliberations.

16 I would like to emphasize to this Court that this is a  
17 case of first impression before the Court. In the last 25 years,  
18 since the 1944 amendment to the Soldiers and Sailors Civil Re-  
19 lief Act, no claim has been advanced that Section 514 encompassed  
20 sales and use taxes. It wasn't until April of 1967, when this  
21 case was filed in the District Court for the District of Con-  
22 necticut, that the claim was made that Section 514 encompassed  
23 sales and use taxes, so this is the first opportunity any court  
24 has had to consider the issue.

25 It is the position of the State of Connecticut that

1 Section 514 was designed and intended by Congress to grant im-  
2 munity to servicemen from property taxes, income taxes, and cer-  
3 tain annual motor vehicle taxes in any State but his home State.

4 The statute accomplishes this by removing the juris-  
5 dictional grounds for the imposition of those taxes, that is,  
6 residence, domicile, and situs of the property.

7 The legislative history of Section 514, and the 1944  
8 amendment and the 1962 amendment thereto, supports this position.  
9 In the legislative history of this section, and the clarifying  
10 amendments -- and that is how they were characterized at the  
11 time they were proposed to Congress, as "clarifying amendments",  
12 not a broadening of the tax immunity already granted by Con-  
13 gress -- the committee hearings and the reports of committees  
14 contained not one single reference to sales and use taxes. How-  
15 ever, those committee hearings and the reports are replete with  
16 references to income and property taxes.

17 We submit to the Court that the silence of the commit-  
18 tee hearings, and the silence of Congress as to sales and use  
19 taxes, is indicative of the intention of Congress in this regard.

20 It might be pointed out, too, to the Court, that in  
21 1940 the Buck Act was passed, which specifically granted the  
22 States the right to collect sales and use taxes on transactions  
23 taking place on Federal enclaves, so that Congress was well aware  
24 of the sales and use tax phase of taxation at the time it passed  
25 Section 514 and its amendments.



1           It is interesting to note that the District of Columbia,  
2 which is governed by a subcommittee of Congress, I understand,  
3 has had a sales and use tax on its books since 1949, a period of  
4 about 20 years, and just two years less than the State of Con-  
5 necticut has had its tax.

6           The Government in the lower court, and in its argument,  
7 and in this Court, is strangely silent as to the position taken  
8 by the taxing officials of the District of Columbia in this re-  
9 gard. Certainly if any taxing officials in the United States  
10 should be aware of the intention of Congress and the mood of  
11 Congress, it would be the taxing officials of the District of  
12 Columbia.

13           I think from the Government's silence in this regard,  
14 we can infer that the District of Columbia does not grant tax  
15 immunity on sales and use taxes on the purchases of servicemen  
16 in this area.

17           We submit that the lower court erred when it equated  
18 a sales tax to a property tax in its decision. The only reason  
19 for equating it to a property tax was that the ultimate burden  
20 of the tax ultimately fell on the consumer. We submit that this  
21 is true of almost any tax; that the ultimate burden will fall on  
22 the consumer. That is hardly a reason for equating two distinct  
23 types of taxes.

24           The Court of Appeals compounded this error by following  
25 the same reasoning. We submit to this Court that a sales tax is

1 not a property tax and, conversely, a property tax is not a  
2 sales tax. A property tax differs from a sales tax in that it is  
3 a recurrent annual demand based on capital value of property;  
4 whereas, a sales tax is based on the purchase price or is based  
5 on the cost of acquisition or the purchase price of property,  
6 and it is only taxed one time -- the date of acquisition of that  
7 property.

8 A property tax is an ad valorem tax, and in 51 American  
9 Jurisprudence at page 53, which is not in my brief, Section 26,  
10 it states it very succinctly, and I would like to quote for the  
11 Court:

12 "An ad valorem tax is a tax on a fixed proportion of  
13 the value of property with respect to which the tax is  
14 assessed, and requires the intervention of assessors or  
15 appraisers to estimate the value of such property before  
16 the amount due from each taxpayer may be determined."

17 To that definition must be added that the statutes pro-  
18 vide a means of appeal from the assessed valuation placed on  
19 property by an assessor to a Board of Tax Review, and ultimately  
20 to the courts. So an owner of property, being assessed by a tax  
21 assessor, has recourse to a Board of Tax Review and the courts.

22 The appellee concedes the difference between a property  
23 tax and a sales tax in his brief at page 20, but he argues that  
24 such difference should not be of real consequence in this case.  
25 We strongly disagree.

1 At page 14 of its brief, also, it claims that Congress  
2 intended that the tax exemption should be applied to any tax  
3 which is measured by the value of property, and in the sales tax  
4 area, the value is the purchase price. With this we must also  
5 strongly disagree.

6 The value in taxation, or the word "value" in taxation,  
7 is peculiarly applicable to personal property taxation. It does  
8 not have the same meaning as "purchase price" in sales taxation.  
9 As stated earlier, in ad valorem taxation of property, a value  
0 is placed on property by an assessor, who is usually a public  
1 official, before the tax is levied, and the owner of property has  
2 the right of appeal to a Board of Tax Review or to the courts  
3 for relief from the amount of the assessment.

4 In the sales and use tax area, the tax is based on the  
5 purchase price of property. The purchase price is set at the  
6 whim of the retailer, and if the purchaser wants the property,  
7 he pays the purchase price, without recourse to anyone.

8 If I may give a concrete example of the two taxes, I  
9 would suggest that we let represent two neighbors in a given  
0 community land label them A and B. Each owns the same model and  
1 year automobile. For local property tax purposes, the tax  
2 assessor places A's automobile on the tax list at the value of  
3 \$2,000. He places B's car on the list at \$4,000. In this case,  
4 B has recourse to the Board of Tax Review and the courts to have  
5 his valuation of \$4,000 reduced to equalize his base with A.

1 In the same manner, when A and B acquired these vehicles,  
2 A very well might have had connections in the automotive field  
3 which allowed him to buy the automobile at the wholesale price  
4 of \$3,000. The sales tax would apply to the purchase price of  
5 \$3,000.

6 In the same manner, B, who didn't have the same con-  
7 nections, might have to pay the full retail price of \$5,000. In  
8 this case, the sales tax would be applied to the \$5,000 figure,  
9 and neither B nor A could complain about the price. The tax is  
10 on the actual purchase price of property.

11 We submit that the Court should give short shrift to  
12 the arguments of the Government in this regard. The Government,  
13 in its brief, places great emphasis on the two leading cases  
14 under Section 514 of the Soldiers' and Sailors' Civil Relief  
15 Act which were decided by this Court. They are Dameron versus  
16 Brodhead and California versus Buzard, both of which are cited  
17 in all of the briefs submitted to this Court.

18 We submit, however, that rather than support the  
19 Government's position, these cases support the State's position.  
20 For example, in Dameron versus Brodhead, which involved an ad  
21 valorem property tax on the property of a serviceman serving in  
22 Colorado, he was a Louisiana resident at the time, this Court,  
23 in striking down the ad valorem property tax stated, and I quote  
24 from page 326 of the decision:

25 "In fact, though the evils of multiple taxation may

1 have given rise to this provision, Congress appears to have  
2 chosen the broader technique of the statute carefully, freeing  
3 servicemen from both income and property taxes imposed by any  
4 State by virtue of their presence there as a result of military  
5 orders. It saved the sole right of taxation to the State of  
6 original residence, whether or not that State exercised the  
7 right."

8 Again, in California versus Buzard, in which the issue  
9 was the arrest, prosecution, and conviction of Capt. Buzard for  
10 driving an unregistered motor vehicle on the highways of Cali-  
11 fornia, this Court, at page 387, opened its decision with the  
12 following paragraph, and I quote again:

13 "Section 514 of the Soldiers' and Sailors' Civil Re-  
14 lief Act of 1940, 56 Stat. 777, as amended, provides a non-  
15 resident serviceman present in a State in compliance with  
16 military orders with a broad immunity from that State's  
17 personal property and income taxation."

18 The two percent license fee which was involved in the  
19 Buzard case was a substitute for an ad valorem property tax  
20 which California had found difficult to administer, so in both  
21 the Dameron case, which involved an ad valorem property tax,  
22 and in the Buzard case, which involved a 2 percent license fee,  
23 a substitute for an ad valorem tax, this Court emphasized that  
24 it was dealing with an immunity granted by Congress from income  
25 and property taxes.



Again, at page 393 of the Buzard decision, this Court states, and I quote:

"The very purpose of Section 514, in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes, was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders. The statute operates whether or not the home State imposes or assesses such taxes against him."

Again the reference is to property taxes and income taxes.

The appellee, in his brief, places great emphasis on this reference to the Buzard case, the latter statement concerning income and property taxes. He quotes it at pages 12, 19, and 26 of the first part of its brief. However, it conveniently leaves out the reference to income and property taxation, so that the out-of-context phrase that is quoted by the Government at the top of page 12 is, and I quote, "The very purpose of Section 514\* \* \*was to relieve\* \* \*the serviceman of the burden of supporting the governments of the States where he was present solely in compliance with military orders." The three asterisks denote the deletion of the reference to income and property taxes.

At pages 19 and 26, the same out-of-context quote is made. However, it is extremely interesting to note that at page 39 of the brief, which is the second part, which does not

1 subscribe to the arguments in the first part, a further reference  
2 is made to the case of California versus Buzard, and in this  
3 case the quotation is given in full, so that the proper context  
4 of the quotation is given, referring to income and property taxes.

5 In any event, we submit that the two cases leave no  
6 doubt that the opinion of this Court was that the immunity  
7 granted by Congress was for property and income taxes, and not  
8 sales and use taxes.

9 At page 37 of its brief, in Note 27, the appellee ad-  
10 vances a novel argument that servicemen who are furlough are no  
11 longer absent from their home State by virtue of military orders.  
12 In effect, this means that a Texas serviceman, stationed in Con-  
13 necticut, who is given a 3-day pass, as soon as he is given the  
14 3-day pass, his status immediately changes so that he becomes  
15 subject to sales and use taxes in Connecticut and any other State  
16 that he might visit on his furlough, under the decision of our  
17 lower court in this case.

18 At the end of his furlough, the mantle of tax immunity  
19 immediately falls on his shoulders, and he again becomes immune  
20 from sales and use taxes until he obtains his next furlough from  
21 his commanding officer. This, we submit, is adding confusion  
22 to an already confusing situation.

23 The effect of the lower court decision, as we view it,  
24 is to foster a discriminatory situation which we claim is, it-  
25 self, unconstitutional. For example, California, at page 2 of

1 its amicus brief, states that there are 345,000 servicemen sta-  
2 tioned at the various bases in California. Of that number,  
3 45,000 of the servicemen are California residents. 300,000 are  
4 nonresident. Yet, in the purchase of tangible personal property  
5 anywhere in California, the 45,000 resident servicemen are re-  
6 quired to pay sales and use taxes, while the 300,000 nonresident  
7 servicemen purchasing the same items for their personal use are  
8 not obliged to pay sales and use taxes under the rationale of  
9 the above decision. We submit that this is built-in discrimi-  
10 nation.

11 Q But none of them pay if they are purchasing at  
12 military exchanges.

13 A That is correct, Justice White.

14 Q Wherever the exchange is.

15 A As long as the exchange is on a military base, a  
16 military enclave, the PX's and the military stores. If they  
17 choose to buy an item at a corner grocery store or a corner  
18 drug store, they pay the tax.

19 Q What is the source of the exemption for the Post  
20 Exchange? Is that a statute or is that a constitutional right?

21 A No, I believe it is a decision of this Court that  
22 the Post Exchanges are agencies of the Federal Government for the  
23 purposes of waging war and supporting armies.

24 Q Isn't that reflected in the statute, too, specific-  
25 ally?

1           A     I don't believe it is, Justice White. I believe  
2 it is by court decision, which satisfies me, I might add.

3           The appellee in this case attempts to minimize the  
4 difficulties which might arise if the lower court decision is not  
5 reversed. We submit that the fact that 34 other States have  
6 joined Connecticut in support of its position in this case is  
7 overwhelming evidence of the seriousness of this situation.

8           Certainly the tax administrators and the Attorneys  
9 General of these 34 States are competent to determine the effects  
10 of the decision on tax revenues and tax administration in the  
11 various States.

12           The main thrust of appellees argument is to the effect  
13 that the addition of just four words after the words "personal  
14 property" in Section 514, that is, "or the use thereof," clearly  
15 shows an intention on the part of Congress to exempt servicemen  
16 or grant immunity to servicemen from both the whole scheme of  
17 sales and use taxation.

18           We submit that this is not a proper subscription to  
19 Congress in view of the fact that it has been silent as to this  
20 intent. To accommodate appellee, all Congress had to do was to  
21 say that a serviceman was immune from all taxation in any State  
22 but his own State, except taxation as to real property and the  
23 operation of a business. But this Congress did not choose to do,  
24 and we submit that if any change is to be made in this sensitive  
25 area, that this Court let Congress make the decision.

1 Connecticut and its officials are not unmindful of the  
2 sacrifices and services being rendered by our servicemen, both at  
3 home and abroad, and if the burden of taxation is so great that  
4 it warrants relief, then we submit they should receive it. How-  
5 ever, we feel that Congress should give them affirmative relief  
6 in the form of a pay increase or exemption from Federal income  
7 taxes, not by seeking to have this Court, by judicial fiat, and  
8 using inferences and implications, expand the provisions of  
9 Section 514 to encompass sales and use taxes when this was not  
10 the Congressional intent.

11 Thank you.

12 MR. CHIEF JUSTICE WARREN: Mr. Weinstein?

13 ARGUMENT OF HARRIS WEINSTEIN, ESQ.

14 ON BEHALF OF APPELLEES

15 MR. WEINSTEIN: Mr. Chief Justice, and may it please  
16 the Court:

17 The United States instituted this action as a plaintiff  
18 in furtherance of the interest of the serviceman and the interest  
19 of the United States in having whatever rights are accorded by  
20 the Soldiers' and Sailors' Civil Relief Act implemented for mem-  
21 bers of the Armed Forces.

22 Since Lt. Schuman was dismissed, and the grounds for  
23 his dismissal were essentially the grounds this Court announced  
24 last week in the decisions in Snyder against Harris, and Gas  
25 Service Company against Coburn, lack of jurisdictional amount



1 in a class action, the United States is the remaining party on  
2 the plaintiff's side of the case.

3 Q You are actually on both sides of the case, are  
4 you not?

5 A I was about to say, Mr. Justice Stewart, my pur-  
6 pose here is to advance the arguments and support the arguments  
7 set forth in Part 1 of our brief, the arguments on behalf of the  
8 serviceman.

9 As Part 2 of the brief indicates, the Solicitor Gen-  
10 eral and the Assistant Attorney General in charge of the Tax  
11 Division do not subscribe to those arguments and are of the  
12 view that the decision below should not be sustained.

13 Q Well, there seem to be no fiscal views of the  
14 Solicitor General and the Assistant Attorney General in charge  
15 of the Tax Division.

16 A I think, Mr. Justice Brennan, that the way to  
17 put it is that we are here, for all practical purposes, as the  
18 representative, in effect, as the guardian ad litem of the ser-  
19 vicemen. This is how the suit was brought. These are the argu-  
20 ments put forth in Part 1, and these are the arguments I pro-  
21 pose to advance here.

22 Q Yes, but what I am trying to get at is, does the  
23 Government support the serviceman or not?

24 A I think this is a situation where the Government  
25 wears, perhaps, more than one hat. To the extent that the

1 Government's function is to formulate a litigating position on  
2 behalf of the Department of Justice, which represents the United  
3 States, as such, that, of course, is formulated by the Solicitor  
4 General, taking, of course, the counsel of the Assistant Attorney  
5 General. But I do not think this is viewed as a case where the  
6 primary function is to advance a position of the United States,  
7 as such.

8 Q Well, that depends on what you have just said,  
9 Mr. Weinstein. The inference I draw from that is that the  
10 Solicitor General, and the Assistant Attorney General's position  
11 is the official position of the United States Government, and  
12 that you just, on behalf of the servicemen, have responsibilities  
13 under the statute to enforce rights of servicemen, but that the  
14 official position on a legal issue is that expressed by the  
15 Solicitor General. Is that right?

16 A Yes, I think that it is clearly the function of  
17 the Solicitor General to formulate what you are describing as  
18 the official position in this Court.

19 Q So that is what we are to understand, then.

20 A Yes, I think that is right.

21 Q Mr. Weinstein, are there only two points of view  
22 in the Department of Justice? Aren't there some lawyers there  
23 who have a third or fourth point of view?

24 A I think the two views are that the judgment below  
25 should be affirmed, which I should like to advance here, and the

1 other view is that the judgment below should be reversed.

2 Q In an oral argument, is anybody for the Government  
3 going to present the view that it should be reversed?

4 A No. I think that reliance is placed on Mr. Ahern  
5 to advance that position, and I think that Part 2 of our brief  
6 indicates that it is not intended as a complete development of  
7 those views, but, rather, a summary of them, and principal re-  
8 liance is placed on the briefs of the appellants and of the  
9 amici curiae on their side of the case.

10 Q Well, is there a case in controversy now between  
11 the United States and the State of Connecticut?

12 A I think there is, Justice White.

13 Q You just said the official position of the United  
14 States was that there wasn't.

15 A If you take the purest case, Justice White, and if  
16 I were not here to advance the argument on behalf of the service-  
17 men, let's assume for the moment a situation where the Government  
18 simply confesses error in a prosecution. I don't think that has  
19 ever been considered to deprive the Court of jurisdiction, to  
20 decide the issue. I don't think that has ever been thought to  
21 remove the basis for this Court's decision.

22 It seems to me that where we sue on behalf of service-  
23 men, in that representative capacity, there is a very real  
24 controversy, the controversy is between the services and the --

25 Q It may be that if the United States had had this

1 position in the first place, that is now its official position,  
2 the suit would never have been brought.

3 A I think that would require some speculation. I  
4 can't answer that.

5 Q Not very much.

6 Q We are not to assume, are we, that on the one  
7 side are the Solicitor General and the Assistant Attorney Gen-  
8 eral, that is to say, that they share the views of the State of  
9 Connecticut, and on the other side is the Attorney General? We  
10 are not to make that assumption, are we?

11 A No.

12 Q Well, who is on the other side?

13 A I am here hoping that I will be able to argue  
14 the other side on behalf of the serviceman.

15 Q By what authority?

16 A Of the Solicitor General.

17 Q Is this a personal view of yours, now?

18 A You mean what is my personal opinion of the  
19 matter?

20 Q Is it your personal view now, that in support of  
21 the serviceman, or in support of the Solicitor General's opinion?

22 A Well, I think to the extent that my personal views  
23 are pertinent, and I am not sure that they are, I support the  
24 arguments I would like to advance.

25 Q Mr. Weinstein, I want to hasten to say that I am

1 eager, and I am sure we all are very eager, to hear your argu-  
2 ments, and your arguments are always very able and very cogent.  
3 The perplexing problem for me is that we are here confronted  
4 with a case which is rather unconventional, since we usually  
5 have adversary parties. Where the United States participates  
6 there is a specific view of the United States which the United  
7 States is advocating.

8 A It is unconventional, Justice Fortas, but I don't  
9 think unpre edented, although I would concede the precedents are  
10 not common. The one that has occurred to me as the closest  
11 example of this procedure might be a tax case called Kornhauser,  
12 which is reported in 276 of the United States Reports. As I  
13 say, it is not unprecedented, but hardly common.

14 I believe that if the Court examines the briefs there,  
15 the Court will find a comparable kind of situation.

16 Q Is that a conflict within the Department of  
17 Justice, because this apparently is a conflict within the Depart-  
18 ment of Justice. It is not like a situation where partly or  
19 wholly as a result of statutes, the ICC for example takes one  
20 position, and the Department of Justice takes another.

21 A I don't think there is a conflict in the Depart-  
22 ment of Justic in the sense that the officials charged with the  
23 responsibility of formulating the position of Presidential  
24 appointees are in agreement and their views are stated in Part 2  
25 of the brief.



1 In the Kornhauser case, I will say the situation was  
2 similar in this way: The disagreement was between the Department  
3 of Justice and what I think was then called the Bureau of In-  
4 ternal Revenue and the Department of the Treasury, and there was  
5 a brief filed in two parts. As I recall, it was an appeal from  
6 the Court of Claims involving a question of deductibility for  
7 income tax purposes of some legal fees.

8 The Court of Claims, as I recall, had disallowed the  
9 deduction. The Treasury thought that was the correct view. There  
10 was first a part of the brief supporting that position and urging  
11 affirmance, and the case was argued, as I recall -- I beg your  
12 pardon. It was submitted. It was not argued. But it was a  
13 separate part --

14 Q Here we have no statement of the position of the  
15 Department of Defense, do we?

16 A No, but I think you have a position of the United  
17 States in its capacity as representative of the servicemen.

18 Q Who is their representative here? It just seems  
19 to me that this is an anomaly that we shouldn't give furtherance  
20 to, to have a Deputy of the Solicitor General come here and seek  
21 to override the opinion of the Solicitor General as to what the  
22 public interest is, and ask us to follow the Deputy as against  
23 the head of his office. Now, that I cannot understand.

24 A Mr. Chief Justice, I don't think that the Solicitor  
25 General assigned me to appear here with that purpose in mind.

1 As I understand my assignment, it proceeds from the Solicitor  
2 General's view that this case should receive an adversarial pre-  
3 sentation and the Court should have before it an adversarial  
4 development of the arguments on both sides. It is for that pur-  
5 pose that the Solicitor General has assigned me to come here and  
6 to present the arguments on behalf of the servicemen.

7 It is not that it is a matter of a deputy attempting  
8 to override him; it is a matter of having been assigned to appear  
9 as an attorney presenting this side of the case.

0 Q Well, if the United States had decided not to  
1 come here at all, I suppose the Court might have been interested  
2 in having this argument anyway; is that your idea?

3 A I should think so. I should think it is com-  
4 parable, as I said before, perhaps a step behind, but comparable  
5 to a situation of a confession of error when you asked me, Mr.  
6 Justice White, is there a case at controversy. If a confession  
7 of error is filed, which has not been filed formally in this  
8 case, that does not remove the case from the Court's jurisdic-  
9 tion.

0 On occasions, there are precedents for the Court  
1 appointing an amicus, or the Solicitor General presenting the  
2 side of the case with which he disagrees.

3 Q The fact is that even if the United States offi-  
4 cially agreed with Connecticut, there happens to be a judgment  
5 of the court below, isn't there?

1 A That is correct, Justice White.

2 Q Mr. Weinstein, is it your submission that it is  
3 neither necessary nor appropriate to push the statute beyond so  
4 as to make it applicable to the ordinary retail sales tax and  
5 the concomitant use tax now imposed by most of the States, end  
6 of quote, on the last page of your brief?

7 A That is the view that is expressed in that part  
8 of the brief and it is not the view that I wish to support here.

9 Q Is that in complete agreement with the Court of  
10 Appeals for the Second Circuit and the petitioner?

11 A No, that is in complete disagreement with the  
12 Court of Appeals and in agreement with the appellants, with the  
13 position taken by the State of Connecticut.

14 Q It is entirely opposite to the Court of Appeals.

15 A The Court of Appeals ruled in this case in favor  
16 of the servicemen. The District Court ruled in favor of the  
17 servicemen.

18 Q That is right.

19 A The position taken in Part 2 of our brief is that  
20 the Court of Appeals and the District Court were wrong, and should  
21 be reversed. That is not the position that I have been assigned  
22 to argue here. I have been assigned to present, in an adver-  
23 sarial fashion, if I may, the other side of the case.

24 Q Well, I notice at the end of the brief you don't  
25 suggest whether this should be affirmed or reversed, or anything.

1 Is that right?

2 A That is correct.

3 Q Well, what do you want us to do?

4 A I would like to be free to argue, if I may, that  
5 the decision below should be affirmed, and present what we con-  
6 ceive of as the arguments on that side of the case.

7 Q And you want it affirmed.

8 Q You say "we". Who is "we"?

9 A Myself and the other gentlemen who are assigned  
10 to work on this part of the case, Mr. Chief Justice.

11 Q You mean all of them from the office who worked  
12 on it are against the Solicitor General?

13 A I would like to think, Mr. Chief Justice, that is  
14 not pertinent; that the pertinent thing is that in the view of the  
15 Solicitor General this issue should be developed before the  
16 Court in argument in an adversarial way.

17 Q Are we entitled to approach the case in this way:  
18 that the Solicitor General of the United States, and the State  
19 of Connecticut, both are of the opinion and are urging upon this  
20 Court that the statute is constitutional, but that his deputy  
21 argues that it is not, and we decide it one way or the other?

22 A No, it is not.

23 Q Why is that not fair?

24 A Because the constitutionality question is the  
25 other way around, Mr Chief Justice, and the basic issue is as it

1 has been argued below and as I would conceive it is not one of  
2 constitutional law, but of interpretation of a specific part of  
3 the Soldiers' and Sailors' Civil Relief Act.

4 Q The supremacy clause would be involved, wouldn't  
5 it, if the Soldiers' and Sailors' Civil Relief Act applies to it?

6 A Yes, of course, but my difference with you wasn't  
7 to the extent that Connecticut and the Solicitor General agree  
8 that the decision should be reversed. The difficulty I had with  
9 your formulation is your statement of who wants the statute to  
10 be held constitutional.

11 The position of Connecticut is that the statute is un-  
12 constitutional. The position of the Solicitor General has not --

13 Q You say the position of the State of Connecticut  
14 is that it is unconstitutional?

15 A That Section 514 is an unconstitutional abridge-  
16 ment of the reserve powers of the State to tax.

17 Q Oh, you are speaking of the Soldiers' and Sailors'  
18 Civil Relief Act.

19 A That is correct.

20 Q I thought you were talking about the Tax Act.

21 A No. There is no question here of the constitution-  
22 ality of the State Tax Act. The question is whether that Act  
23 may be enforced against soldiers and sailors in view of Section  
24 514 of the Civil Relief Act. The Solicitor General does not  
25 take, as I understand it, a position on the constitutionality



1 of the Soldiers' and Sailors' Civil Relief Act.

2 The argument in Part 2 of the Government's brief goes  
3 to the proper interpretation of the Civil Relief Act, and it is  
4 there that I think the Solicitor General expresses a disagreement  
5 with the decision of the Court of Appeals.

6 Q Well, Mr. Weinstein, as I recall, it has not been  
7 so long ago, we had a case here of a tax against an Army officer,  
8 as I remember it. It had something to do with whether he was  
9 taxable on allowances, or something, when he was stationed over-  
10 seas, and he decided not to defend. We granted the Government's  
11 petition. He decided not to defend, and we assigned, as I re-  
12 call it, Stanley F. Reed, Jr., to present the argument on that  
13 side of the case.

14 I gather what you are saying to us now is that while  
15 the Government's position, to the extent you have just related  
16 it, is that expressed by the Solicitor General, you are in much  
17 the same position on behalf of the servicemen that Mr. Redd was  
18 in behalf of the servicemen in that case. Is that it?

19 A Yes, Mr. Justice.

20 Q And we didn't appoint you, but --

21 A Yes. I also call the Court's attention to the  
22 Tellier case, which I think was decided the same term. This was  
23 also a tax case where the Department of Justice disagreed with  
24 the Commissioner of Internal Revenue, and Mr. Levin, from the  
25 Solicitor General's Office, sought to present both sides. My

1 hope here is to present only the one side, the one side that  
2 has not been presented by Mr. Ahern.

3 Q Aren't we entitled to know what the Government  
4 represents is the public interest in this case, and if so, I  
5 again say, who are we to take that conclusion from, from the  
6 Solicitor General, or from his deputy who appears here in the  
7 nature of a friend of the Court?

8 A I think, Mr. Chief Justice, that the position of  
9 the United States before this Court must be taken to be that  
0 formulated by the Solicitor General.

1 Q That is Part 2 of your brief.

2 A I would think so; yes, sir.

3 Q Which you argue against.

4 A Yes.

5 Q Why don't you go ahead as an individual and pre-  
6 sent the best argument that you think can be put forward in be-  
7 half of the servicemen. I would like to hear that.

8 A Thank you.

9 Q I think we are entitled to know. I don't think  
0 the Government can eat its cake and keep it, too. I think we  
1 are entitled to know what does the Solicitor General's Office  
2 represent as the public interest in this case? If we take the  
3 view of the Solicitor General, as we invariably do, as to what  
4 the public interest is, by what right does his deputy come here  
5 and say the opposite?

1 Now, if you appear as a friend of the Court, I would be  
2 perfectly willing to grant you permission to do that as an individ-  
3 dual, but I don't see how you can come here and speak for the  
4 Government as a Deputy Solicitor General, when the Solicitor  
5 General himself has the opposite view and expresses it to this  
6 Court.

7 A I did not think that I had suggested that I would  
8 be speaking for the Government in presenting these views. As I  
9 indicated before, I was assigned to come here not because the  
10 Solicitor General thinks that what I am going to say is right,  
11 but because of his view that this case should have adversaries  
12 on each side of it.

13 Q But you signed the brief as speaking for the  
14 Government. Your name is on this brief, speaking for the United  
15 States.

16 A Perhaps, Mr. Chief Justice, with hindsight we  
17 should have identified the names differently. I think the belief  
18 was that in the introduction to Part 2 of our brief, on page 27,  
19 the statement was, "The foregoing argument has been prepared  
20 by officers of the Department of Justice who support it," meaning  
21 officers of the Department of Justice who felt that they could  
22 formulate those arguments and support them without any reser-  
23 vation.

24 Q May I ask you a question?

25 A Yes, Mr. Justice Harlan.

1           Q     If the servicemen who were dissatisfied with the  
2 position of the Solicitor General, could they have gone out and  
3 hired a private lawyer and brought the case up here?

4           A     Without Lt. Schuman as a party, I question that.

5           Q     I understand what you are doing is representing  
6 these people as a guardian ad litem, or whatever you choose to  
7 call it, in putting forth the best arguments that you can muster  
8 in support of their position. Isn't that all there is to it?

9           A     Yes, sir.

10          Q     Mr. Weinstein, I am sure you are going to make  
11 every argument that can be made on the side that you are repre-  
12 senting. I want to make clear from my point of view what the  
13 basic embarrassment is that I think this procedure presents, and  
14 that is that servicemen might very well feel that this case has  
15 not been presented to this Court on a truly adversary basis.

16                I hasten to say that I know that it will be, in fact,  
17 but in form it is not being presented to this Court, in my judg-  
18 ment, on an adversary basis. In legal procedures, I am sure you  
19 will agree that form has some importance. A soldier's point of  
20 view is being presented here by an extremely able lawyer and  
21 advocate, but as a matter of form, it is being presented by a  
22 man who is subordinate to an official who has taken the opposite  
23 point of view.

24                I think from my point of view, that is the real embar-  
25 rassment, and having stated that, I want to show you that I am

1 very eager to hear what you have to say.

2 A I understand your concern, Justice Fortas. Perhaps  
3 it ought to be made clear that, as I understand it, my assign-  
4 ment is to present that side, and in terms of one being a sub-  
5 ordinate, I do not think or do not conceive that I would have  
6 any difficulty except if I failed to present the serviceman's  
7 side as well as I could.

8 Q Mr. Weinstein, who made this assignment?

9 A Who assigned me?

10 Q Yes.

11 A The Solicitor General, Mr. Justice Black.

12 Q And you and he jointly signed the brief?

13 A Yes, sir.

14 Q And he knew you were going to take this side?

15 A He knew that I was going to take the serviceman's  
16 side. He was fully aware.

17 Q By what authority, statutory authority, do you do  
18 that? Is it quoted in your brief, the statutory authority for  
19 your argument?

20 A The authority, which is in statute and regula-  
21 tions, is the authority, I suppose, of the Solicitor General to  
22 assign attorneys in the employ of the Government to appear in  
23 this Court.

24 Q There is no statute which makes the Solicitor  
25 General or the Justice Department the attorney for the serviceman,



1 or charges him with the responsibility of presenting their views?

2 A I can't answer that question directly, Justice  
3 Black.

4 Q That is not in the Soldiers' and Sailors' Relief  
5 Act?

6 A I can't answer at this point whether there is a  
7 specific statutory authority.

8 Q Well, how did the suit get started?

9 A By the United States.

10 Q Well, there is authority for that, isn't there?

11 A Yes.

12 Q In the Soldiers' and Sailors' Relief Act?

13 A I think the best discussion of our authority is  
14 in the Fourth Circuit decision in United States v. Arlington  
15 County, which is in 326 Federal 2d. I think the discussion of  
16 the United States' standing in a suit of this nature is set forth  
17 there.

18 Q What position does it take?

19 A In that particular case?

20 Q Yes.

21 A That particular case involved the application of  
22 Virginia ad valorem taxation, and the position of the United  
23 States there was that that taxation should not be imposed and  
24 could not be imposed under Section 514.

25 Q What did the court say about your authority?

1           A     That we had proper standing as representatives of  
2 the servicemen to appear.

3           Q     Did they base it on a statute, or just draw it  
4 from general principles?

5           A     My recollection is the latter, Justice White, but  
6 I might be wrong.

7           Q     There is no serviceman in this case.

8           A     Not as a party, Mr Chief Justice. He was dis-  
9 missed for inability to have the jurisdictional amount in a  
10 class action.

11           I see that my time has almost expired and I have yet  
12 to reach any discussion of the merits. If the Court please, I  
13 should like to proceed to the merits, and continue with them.

14           Q     I would like to hear you.

15           A     If I may, if the Court would hear me beyond my  
16 half hour, because I can't believe that in the next five minutes --

17           Q     You may take an extra five minutes.

18           A     I will do my best in that limited time, Mr. Chief  
19 Justice.

20           I think that I would like to turn first, if I may, to  
21 the discussion of Commander Foster's case by Mr. Ahern, because  
22 I think that what happened to Commander Foster may best illus-  
23 trate why Section 514 was adopted and why the courts below were  
24 correct.

25           Commander Foster bought a car in Connecticut. He was

1 a domiciliary of Texas. He wanted to register his car in Texas.  
2 He wrote to Texas, and he was told that to register there he  
3 had to pay a Texas sales tax. The dealer in Connecticut told  
4 him he nevertheless had to pay a Connecticut tax to get his car.

5 His affidavit states that he called the Department of  
6 Motor Vehicles in Connecticut and was told that there was no  
7 credit; he had to pay what he says he was told to be a Connecti-  
8 cut use tax. To get his car, and to register it in his home  
9 State of Texas, he paid the Texas tax and a full Connecticut  
10 tax.

11 It isn't until this Court, in Mr. Ahern's argument  
12 here, that he has been told that he didn't have to pay both  
13 taxes. Now, we suggest that Section 514 was intended to avoid  
14 this kind of situation; that it was intended to create a situa-  
15 tion where the only jurisdiction which could tax a serviceman  
16 in this position would be his home State.

17 514 was added to the Soldiers' and Sailors' Civil  
18 Relief Act in 1942. The language that we are interested in here  
19 was added in 1944.

20 I would suggest that the basic problem is whether the  
21 language, or the policy, or the bases of the statute in any way  
22 allow a distinction to be drawn between ad valorem taxation,  
23 annual ad valorem taxation, which everyone agrees is forbidden  
24 by the statute, and sales and use tax.

25 The starting place, I would suggest, should be the

1 language of the statute. It refers, in its terms, to what is  
2 called "taxation in respect of personal property." Now, this  
3 would seem to be the broadest possible language. It is not ad  
4 valorem taxation. It is not seemingly restricted to any one  
5 specific type of taxation, but taxation in respect of personal  
6 property.

7 This would seem to catch any tax that has to do with  
8 personal property that depends or is triggered by the existence  
9 of personal property. Any such tax under Section 514 is sup-  
10 posed to be forbidden, except when imposed or exacted by the  
11 serviceman's State of residence or domicile.

12 The way this mechanism works is to create what might  
13 be called a fictional location of the serviceman's personal  
14 property. The personal property is deemed not to be in any  
15 State where he appears and is not a resident or a domiciliary,  
16 in any State where he is taken solely by his military orders.  
17 I don't think anyone has suggested exactly how this phrase can  
18 be read in a way that would describe only ad valorem taxes, but  
19 would not describe sales or use taxes.

20 I think this is particularly clear with use taxes.  
21 Use taxes require the physical presence of property within a  
22 taxing jurisdiction. It can be imposed only when property is  
23 used in the jurisdiction, and that cannot occur in the case of a  
24 nonresident serviceman, because of Section 514. His property  
25 can never be deemed to be in a jurisdiction other than his home

1 State for purposes of local taxation.

2 This is also true, I think, of sales taxes. The Con-  
3 necticut statute, which I think is typical, doesn't just, as they  
4 say, tax the privilege of a sale; the tax comes into being only  
5 when there is a sale of personal property, and furthermore, it  
6 only happens when possession of the personal property is taken  
7 in Connecticut.

8 Under Section 514, that possession has got to be con-  
9 sidered as taking place in the serviceman's home State.

10 Q Is that section printed in the brief?

11 A Yes, Mr. Justice Black; in our brief at pages 2  
12 to 4, and also in the Connecticut brief, I think in the appendix.

13 The particular language --

14 Q What date was that brief filed?

15 A The brief?

16 Q That you are reading from. I don't seem to have  
17 it.

18 A Within the last three weeks, I believe.

19 Q March 20th is your brief.

20 A Yes.

21 Q That is my trouble. I don't have it.

22 A The language of the statute is this, Mr. Justice  
23 Black: Personal property, meaning personal property of the non-  
24 resident serviceman, shall not be deemed to be located or pre-  
25 sent in or to have a situs for taxation in such State, and so



1 forth. The situs of a serviceman's personal property is deemed  
2 to be his home State and not the State where he goes on military  
3 orders.

4 So the language and the mechanism of the statute don't  
5 seem to allow any distinction between these types of taxes. I  
6 would suggest the same thing is true of the policies of this  
7 statute.

8 The purpose of the statute, as expressed by Congress  
9 and by this Court, was to avoid any real threat, any possibility  
10 of double taxation by multiple jurisdictions. It was to achieve  
11 this not by some manner of trying to find out which State should  
12 grant a credit for the other State, which is the kind of thing  
13 which has happened in Commander Foster's case, and has never been  
14 really resolved; rather, the purpose of the statute was to leave  
15 the sole function of the tax, the sole ability to tax, to the  
16 home State, to the serviceman's residence or domicile.

17 Q In the case of a sales tax, supposing Connecticut  
18 can collect this sales tax, what risk of double taxation is there  
19 in that?

20 A I think, Justice Harlan, the risk of double tax-  
21 ation comes out of the complimentary functions of the sales and  
22 use taxations. As the two courts below said, they are not  
23 really separate taxes; they are merged into one. The use tax  
24 isn't so much a matter of raising revenue by itself, but it is  
25 a compliment and a means of enforcing the sales tax.

1 I would suggest that this is double taxation when a  
2 serviceman buys a car in one State and is charged a sales tax,  
3 and he goes to another State where he is then charged a use tax,  
4 which use tax would not have been imposed if he had originally  
5 bought the car in the second State and paid a sales tax.

6 Q Would there be a use tax imposed on this trans-  
7 action in the domiciliary State by the domiciliary State?

8 A In one or two situations. If, as Commander Fos-  
9 ter tried to do, a serviceman seeks to register his car in his  
10 home State, generally the home State will seek to impose a tax.

11 The other thing, which comes to the potential of double  
12 taxation, which is also within the purposes of this statute, is  
13 that ultimately, I would assume, the serviceman is going home.  
14 When he goes home, he brings back his property with him, what-  
15 ever he has acquired, and at that time he is going to be sub-  
16 jected to a use tax on this property. This is the point at which  
17 double taxation is almost certain.

18 I would suggest really in terms of potential for double  
19 taxation, this ought to be compared to the structure of the ad  
20 valorem taxation. Ad valorem taxation isn't going to be doubly  
21 imposed any more frequently than the use tax and sales tax struc-  
22 tures. It would really depend on the accident of a man being  
23 switched from jurisdiction to jurisdiction within one year, and  
24 being in one State on its ad valorem tax day, and then in another  
25 State later in the year, or earlier, on its ad valorem tax day.

1 Q Mr. Weinstein, do I understand that the basic  
2 thrust of your argument is that since Congress has said that  
3 possession shall be treated, as in the case of a serviceman's  
4 personal property, as possession in his home State, that there  
5 is not that possession, which is the incident upon which the  
6 sales tax in Connecticut turns?

7 A That is right.

8 Q That is the basic thrust of your argument.

9 A That is right.

10 Q So double taxation and all the rest of it is  
11 really quite irrelevant. If you are right about that, if Con-  
12 gress has said no, you have to treat his personal property as if  
13 it were in Texas, his domiciliary State, whatever Texas may do  
14 is Texas' business as to sales tax, but in any event, Connecticut  
15 can't impose a sales tax because there is no possession of the  
16 car in Connecticut.

17 A That is our position. I think that the other side  
18 argues that the phrase, the initial phrase of the statute, "for  
19 purposes of taxation in respect of personal property," means only  
20 ad valorem taxation in respect of personal property, and it doesn't  
21 catch any other tax.

22 Q What is the part of the statute on which you rely?  
23 Go back to page 2 of your brief, because as I read that, it says  
24 that "Such person shall not be deemed to have lost a residence  
25 or domicile in his State solely by reason of being absent there-

1 from in compliance with military orders, or to have acquired a  
2 residence or domicile in the other State."

3 Now, somewhere in that part of the statute do you find  
4 support for your position?

5 A In speaking of personal property, Mr. Justice  
6 Fortas, I think there are two potential bases for imposing a  
7 tax, and they are dealt with in two separate sentences here.  
8 One is a tax that proceeds on residence or domicile and taxes  
9 personal property --

10 Q That is not applicable here; would you agree?

11 A No.

12 Q What is the other one?

13 A That is the first sentence, Justice Fortas.

14 Now, the sentence that begins on the top of page 3,  
15 in the middle of the first line, which again begins "for the  
16 purposes of taxation in respect of" and it doesn't say "person"  
17 now, but "personal property, income, or gross income."

18 Q Of any such person.

19 A Of any such person.

20 Q It indicates property, personal property owned by  
21 the person, doesn't it?

22 A Yes, and that would be, I think, a reference to  
23 "any person" in the first sentence, perhaps modified, I suppose  
24 modified by the language "a person being absent therefrom, from  
25 his home State, in compliance with military or naval orders" in

1 the first sentence.

2 Then, as you go on in this sentence, first it describes  
3 the source of income and says "Military pay shall not be deemed  
4 to be from within the home State," and then for present purposes,  
5 the language is "Personal property shall not be deemed to be  
6 located or present in or to have a situs for taxation in such  
7 State, Territory, possession, political division or district."

8 Q Just reading that plainly, in the commonplace  
9 manner, it does seem to support the State's position, rather  
10 than yours, doesn't it? In other words, your position has to  
11 depend upon doing a little magic with the words, doesn't it, in  
12 taking what you deem to be the sense of the provision, rather  
13 than its specific language.

14 A I think that whether that is so depends on how  
15 the sales and use tax statutes work. Use tax statutes are  
16 applied only when property is within and used within --

17 Q No, but a use tax in this sense, as I understand  
18 it, is a part of a sales tax in the sense that it is compli-  
19 mentary to the sales tax for the purpose of trying to plug what  
20 would otherwise be an obvious hole in the sales tax. Isn't that  
21 the kind of use tax we are talking about here?

22 A Yes, but the sales tax also depends on physical  
23 presence of the property in the taxing jurisdiction.

24 Under the Connecticut statute, and while the language  
25 is different in other States, the effect is the same. The tax



1 is imposed only when there is a sale and when physical posses-  
2 sion is taken in the taxing jurisdiction.

3 Q Where is the legal instance of this tax?

4 A This is the same kind of tax that was before the  
5 Court last term in the Massachusetts bank case and it is a  
6 vendee tax. The legal incidence is on the buyer. The seller  
7 is given an action in debt and is directed to pass the tax on  
8 to the buyer. It is clearly a vendee tax.

9 Q But the seller is directly liable to the State.

10 A The seller is liable to the State. The buyer is  
11 liable to the seller. It is the same structure as this Court  
12 labeled a vendee tax last term.

13 Q The tax purports, at least, to be imposed on the  
14 transaction, doesn't it, rather than on the property? It is on  
15 the transaction, the sale, measured by the value of the property  
16 sold.

17 A Well, it is imposed on the sale of, first,  
18 tangible personal property. So it purports to be on the sale,  
19 but it is not just the sale alone. There must be tangible  
20 personal property. The word "sale" and "selling" are defined  
21 in the statute, in the Connecticut statute, in words that are  
22 quoted in pages 28 and 29 of the brief here.

23 It says "mean and include any transfer of title, ex-  
24 change or barter," and so forth. Now, transfer of title, under  
25 the general rule of the Uniform Commercial Code, which applies

1 in Connecticut, and I think almost all States by now, is the  
2 title is transferred when the seller's responsibilities as to  
3 delivery are completed. So this definition of sale incorporates  
4 a concept of a transfer of physical possession.

5 So you can't view the sales tax as simply being on  
6 some abstract privilege of selling.

7 Q Well, not necessarily; that is to say, you could  
8 have a transaction in Connecticut -- I have had some -- in which  
9 there is no transfer of physical possession but the sales tax  
10 is collected.

11 A If there is no transfer of possession, if the  
12 property is supposed to stay where it is, this brings into play  
13 a different part of the Uniform Commercial Code which would  
14 transfer title at that earlier time. But I think where we are  
15 talking here about movable chattels, boats, cars, appliances,  
16 things of that sort, they are things that contemplate transfer.

17 Q What we are talking about here mostly, I think,  
18 is food and drink.

19 A Food and drink, under the stipulation, I think --  
20 the stipulation says that everyday purchases are made in the  
21 Post Exchange or Commissary, and those under the Buck Act, which  
22 I think is Section 107 of Title IV, are explicitly exempt from  
23 sales and use taxes.

24 Q How about, is it stipulated here -- I notice it  
25 is stipulated, at least I think I remember it is stipulated --

1 that no attempt would be made, that there is no opposition to  
2 the collection of the sales tax with respect to groceries bought  
3 in a grocery store in New London, for example, by a soldier.

4 What about that?

5 A I didn't understand that to be in the stipulation.  
6 I just understood that while --

7 Q Is it the Government position that when a soldier  
8 goes into a store in New London to buy a pack of cigarettes that  
9 he is exempt from the sales tax?

10 A If I can avoid the cigarette tax, which is a dif-  
11 ferent --

12 Q I am talking about the sales tax on a carton of  
13 cigarettes.

14 A I will take the sales tax on, say, a tube of  
15 toothpaste.

16 Q All right.

17 A I think the position on this side of the case  
18 would be that the exemption applies simply because there is no  
19 way of parsing either Section 514 or the Connecticut tax to  
20 apply only to, say, big-ticket items and not to small ones.

21 Q That is what I thought. In short, your position  
22 is that the sales tax ought not to be collected on a purchase  
23 of toothpaste by a soldier in a store.

24 A Yes. I think the impact -- I am saying that is  
25 the thrust of the legislative judgment in this statute. The

1 function of the stipulation, I think, is to show that that kind  
2 of impact is not likely to exist because purchases of this kind  
3 are not made in stores that are generally subject to the State  
4 tax, but are made in official installations where the tax does  
5 not apply.

6 Q I think I remember in your opposing counsel's  
7 brief that Connecticut imposes a sales tax on the rental of hotel  
8 rooms. Is that correct?

9 A Yes. I think whether that would fall under  
10 Section 514 --

11 Q It hardly would fall under the language, would it?

12 A I would like to start by saying I don't think  
13 that is in this case. At least it hasn't been up until now.

14 Q But I think counsel for the State makes that point  
15 to emphasize his position that the tax is imposed on the trans-  
16 action, rather than being a tax on property.

17 A I have struggled with the problem of how do you  
18 characterize the right to occupy a motel or hotel room for a  
19 night. Under Section 514, the problem comes down to whether you  
20 can characterize this right as intangible personal property. If  
21 it is, it would be exempt. I suspect it isn't. It seems to me  
22 more in the nature of a real property interest, which would not  
23 be caught. But whether that comes under Section 514 is a rather  
24 different problem than these admittedly tangible items which have  
25 physical location, that do move around, where a hotel room does

1 not, and certainly seem to be the type of objects that Section  
2 514 was intended to deal with.

3 There are other points that I think are adequately  
4 covered in Part 1 of the brief, which is a discussion of the  
5 Buck Act, the supposed administrative problem, and the consti-  
6 tutional attack, which I think this Court put to rest in the  
7 case of Dameron against Brodhead some years ago.

8 Q Before you sit down, Mr. Weinstein, may I ask  
9 you one more question about the matter we were discussing at  
10 the outset of your argument.

11 I have looked at this Arlington case. Apparently this  
12 is the rationale of the Government's standing to bring the suit.  
13 I am quoting from it:

14 "Here we find that the interest of the national govern-  
15 ment in the proper implementation of its policies and pro-  
16 grams involving the national defense is such as to vest in  
17 it the non-statutory right to maintain this action. Under  
18 these circumstances, the incapacity of the individual plain-  
19 tiff to maintain his action is immaterial, since he may find  
20 shelter under the Government's umbrella."

21 Now, my question is: I gather the policies and pro-  
22 grams of the United States when this action was brought were on  
23 the side of the servicemen, and that would be the justification  
24 and the defense as an issue of the right of Government to main-  
25 tain the suit had been raised.



1 But now here, when you come to this Court, apparently  
2 the Government's policies and programs have changed. Does that  
3 have a bearing on whether or not we have a case in controversy  
4 before us?

5 A I would think that the existence of the contro-  
6 versy -- again, I would like to go back to confession situation,  
7 because in the confession situation, the Government is clearly  
8 saying "We don't think now, in a criminal case, this man could  
9 have been prosecuted or should have been prosecuted in this way."

0 Q No, but it seems to me, Mr. Weinstein, that by the  
1 time it gets here, if there is a change of policies and programs,  
2 why isn't this moot? Why don't we just vacate it and direct all  
3 down the line that the whole action be dismissed as moot? The  
4 Government now no longer insists that it is enforcing its  
5 policies and programs in this case.

6 A The very least there is here is a controversy  
7 between the servicemen and the State.

8 Q I know, but there can't be in the Federal Court.  
9 The individuals were dismissed here, just as they were in this  
0 Arlington County action. We have the same situation here that  
1 we had in Arlington County, namely, the only party before us as  
2 plaintiff is the United States and its standing to be here de-  
3 pends on whether or not it is seeking, by being here, to enforce  
4 its policies and programs, and now it is not.

5 A The difficulty I have is in distinguishing between

1 this case, as I said, and I guess I am not adding anything new  
2 to what I said, in any instance of confession of error, I think  
3 that what you are saying would lead to the route that if there  
4 is a confession of error, that would moot the controversy. Cer-  
5 tainly if the confession went to the propriety of the charge,  
6 say, that was brought, as opposed to --

7 Q No. As I see it now, I don't think it is any  
8 issue of confession of error at all. It is a simple question of  
9 the right of the United States to maintain an action which is  
0 not brought, as it comes to us, to enforce its policies and pro-  
1 grams in the interest of national defense. It may have started  
2 out that way, but that isn't the way it is presented to us.

3 Q And the servicemen have no right to be here in  
4 Federal Court, or to be here at all. You agree with that, don't  
5 you?

6 A If this were the District Court, or Court of  
7 Appeals, after last Wednesday I would have to agree with that,  
8 because I think it was last Wednesday that decided the case and  
9 I don't think it was a prediction of that outcome that --

0 Q You don't know why they dismissed that Navy Com-  
1 mander in that Arlington case, do you?

2 A You mean why did he not appeal?

3 Q No. He was dismissed out of the action. When  
4 this got before the Court of Appeals, as I read that opinion,  
5 they said only the United States can be here, if the United States

1 can be here.

2 A Are you talking about the Arlington County case?

3 Q Yes.

4 A I am sorry. I was confused.

5 I am not certain of that. I assume it is reasons simi-  
6 lar to this case, where one man would not ordinarily have the  
7 \$10,000 jurisdictional limit.

8 Q Yes. \$121 was involved.

9 A But if I can just try once more on this analogy,  
10 suppose a criminal charge is brought and the claim of the defen-  
11 dant is that this charge is barred by the Constitution, and this  
12 is the manner in which the case is litigated, and in this Court  
13 there is a confession of error, to wit: a statement that it is  
14 the then position of the United States that this charge is, in-  
15 deed, unconstitutional.

16 Q But there is no question in that case about your  
17 standing. The statutes give you the authority to do what you  
18 are doing, and this statute is a matter between the State and  
19 the serviceman. In the criminal case, it is between the United  
20 States and the defendant. Just because the United States says  
21 that they are confessing error doesn't necessarily mean that the  
22 court has to accept that, or that there isn't any case in contro-  
23 versy.

24 A It seems to me that the United States, which clearly  
25 has a function as a guardian, for certain purposes, of servicemen,

1 in that capacity would have a capacity that is different and  
2 distinct from its general position as sovereign.

3 Q So that is a separate rationale from the Arlington  
4 County case.

5 A Yes, but I think that it is part of that because  
6 the serviceman's interest --

7 Q Well, may I put it this way, Mr. Weinstein: Sup-  
8 pose the position of the United States, when this suit was  
9 brought in the District Court, was that which is now presented  
10 to us by the Solicitor General, and that were to appear. Under  
11 Arlington County, would not the District Court have had to dis-  
12 miss the action?

13 A I think it is hard to know what it would have  
14 done. For example, it would be entirely possible for the Depart-  
15 ment of Justice to appear on behalf of the other side of the case.  
16 Now, perhaps then it would have been brought in a State Court  
17 rather than the Federal Court.

18 I would suggest the District Court and the Court of  
19 Appeals jurisdiction has to be viewed in terms of what the situa-  
20 tion was at that time. This Court would have jurisdiction, cer-  
21 tainly, of this case if it came up through the State system, and  
22 if you were to argue that the case or controversy has disappeared  
23 as between the United States, I think in terms of this Court's  
24 jurisdiction it still has to be considered in terms of the  
25 existence of a capacity on the United States to appear as a

1 representative as the guardian of the serviceman.

2 Q Which is only to say the issue is the standing of  
3 the United States to maintain this suit in the Federal Court.

4 A But that is an issue which would depend on some-  
5 thing that developed after the decision in the District Court  
6 and Court of Appeals.

7 Q Mr. Weinstein, I don't think we would have any  
8 problem in this case if what you are arguing to us was the posi-  
9 tion or is the position of the United States Government. But  
10 this is an adversary suit between the United States and the  
11 State of Connecticut and we come into this Court and we don't  
12 have an adversary proceeding at all. We have no arguments at  
13 all on the part of the United States in this Court as to what it  
14 believes the public interest is, or the rights of these veterans.

15 We have a contrary view, a view that is the opposite  
16 of what the Government says officially, and we close this case  
17 without any argument at all from the Government as to why it  
18 agrees with the State of Connecticut in this particular matter.

19 Isn't that a strange situation?

20 A As I said, it is uncommon. As I said earlier, I  
21 do not think it is unprecedented. It occurs to me now that there  
22 is a case that I might have cited that would somewhat better for  
23 this purpose than the Kornhauser case, and perhaps I should have  
24 cited it first, and I think this is Burnett against Northern  
25 Trust Company, again a tax case, I believe, from the 1930's and



1 it may be in 283 United States Reports. I am not certain.

2 But this was a situation where the brief had one part  
3 prepared by the Treasury Department and the other half by the  
4 Department of Justice, and the Treasury appeared to present its  
5 case, although the controversy was as much there between the  
6 Government and the taxpayer.

7 Q But there is a different situation. That is two  
8 agencies of the Government. But here all we have, as I see it,  
9 is that the official position of the Government is that the  
10 statute of the State is constitutional, and this is an internal  
11 fight in the Department, and the Solicitor General, having taken  
12 the official position for the Government, does not appear, and  
13 those in his employ come here and argue the opposite way from  
14 the way he comes out.

15 We are left without any argument at all on the part of  
16 the United States.

17 A I suppose the case would have been closer to the  
18 Northern Trust situation if this case had been brought in the  
19 name of the Secretary of Defense, as the Northern Trust case  
20 was brought against the Collector of Internal Revenue.

21 Q That might be different, but we have had that with  
22 the ICC, we have had the Solicitor General on one side and the  
23 ICC on the other. We have had it with Selective Service recently.  
24 We have had it with a number of them. But we haven't had it  
25 because of an internal difference of opinion in the Department

1 of Justice where the deputies of the Solicitor General prevail  
2 over the Solicitor General; although he states his opinion in  
3 general terms, the deputy comes in here and argues against that  
4 position.

5 A I hope I didn't characterize my function in that  
6 way. I tried to put it in terms of being assigned to come here  
7 for an adversarial presentation.

8 Q Did you argue to us the official position of the  
9 Government?

10 A No, I cannot say I did.

11 Q Then you are hardly giving us a balanced view of  
12 the situation.

13 There is no need of arguing it. It bewilders me and  
14 bothers me as to whether we have had an adversary proceeding here.

15 A I think I have said what I can offer on this,  
16 Mr. Chief Justice.

17 Q Very well.

18 MR. CHIEF JUSTICE WARREN: Mr. Ahern, did you have  
19 anything further?

20 (Whereupon, at 11:55 a.m. the argument in the above-  
21 entitled matter was concluded.)

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