In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 72-350
	)	
STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,	)	
	)	
Appellees.	)	

Washington, D.C.
March 19, 1973

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 72-350
STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al., Appellees.	:	

Washington, D. C.,

Monday, March 19, 1973.

The above-entitled matter came on for argument at 1:44 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. JEWEL S. LAFONTANT, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Appellant.

ROBERT L. WRIGHT, ESQ., Washington, D. C.; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-350, United States against State Tax Commission of Mississippi.

Mrs. Lafontant, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. JEWEL S. LAFONTANT,

ON BEHALF OF THE APPELLANT

MRS. LAFONTANT: Thank you.

Mr. Chief Justice, and may it please the Court:

Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year it adopted a local county option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages.

The Commission promulgated a regulation which authorized military post exchanges and other military agencies to purchase liquor either from the Commission or directly from distillers. That required that the distillers collect from the military and remit to the Commission a mark-up cost.

The officers' and non-commissioned officers' clubs, and other non-appropriated fund activities had purchased liquor from out-of-State distillers, and suppliers, when Mississippi was a dry State. And they decided to continue this practice rather than purchase from the Commission itself.

The United States filed an action seeking declaratory and injunctive relief against the enforcement of this Mississippi regulation that required out-of-State distillers to collect a percentage sum designated as a wholesale mark-up on their liquor sales to certain post exchanges, and other military organizations.

QUESTION: Has the military at any time made purchases directly from the State?

MRS. LAPONTANT: None whatsoever. Not from any distillers in the State, and never from the Commission itself. All of the purchases by the military, all of them had been made from out-of-State distillers; never from the State.

So the United States filed an action seeking declarstory judgment, which said that the markup had to be collected from the military and remitted to the State on bases in the State of Mississippi, and also required the distillers to remit the markup to the Mississippi Tax Commission.

The United States, in addition to this, sought to recover the total of all such payments made by these military purchasers. Incidentally, these payments were made under protest and by July 31st of 1971 the total payments made amounted to $648,421.92.

The State of Mississippi ceded, and the United States acquired jurisdiction over lands within the State,

comprising the Keesler Air Force Base and the United States Naval Construction Battalion Center. Mississippi also ceded and the United States accepted concurrent jurisdiction over lands comprising the Columbus Air Force Base and Meridian Naval Air Station.

The court below decided against the United States, stating that the 21st Amendment makes Mississippi law applicable to the sales of liquor to the military bases, and the court entered a summary judgment in favor of the appellees on all issues.

In its opinion, the court found, and Mississippi conceded on page 5 of its motion to affirm and dismiss, that the United States had exclusive jurisdiction on two bases, namely, Keesler Air Force Base, and the United States Naval Construction Battalion Center; and in the opinion of the court the United States and Mississippi had concurrent jurisdiction on the other two, Columbus Air Force Base and the Meridian Naval Air Station.

And we accept the finding of that court.

The 21st Amendment regulates the importation of liquor into a State. Section 2 of that amendment provides the transportation or importation into any State of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

We submit that the mere finding of the lower court, that the government has exclusive jurisdiction, means that the federal enclave is not within a State but is a separate territory outside the ambit of the 21st Amendment.

The interpretation of the lower court that the 21st Amendment makes Mississippi law applicable over the sales to the instrumentalities on the bases over which the United States has exclusive jurisdiction is inconsistent with the case law. In Collins vs. Yosemite Park, 304 U.S. 518, it was held that the regulatory phases of the California law with respect to the importation and sale of intoxicating liquors are applicable to a corporation selling liquor in a national park. Jurisdiction over which has been ceded to the United States with a reservation only of the right to tax persons and corporation in the ceded territory.

To the extent that the statute operates as a purely tax or revenue measure, it was found that it was enforcible in the park.

However, license fees could not be enforced because the State did not reserve the right to regulate or to license without -- I could say for the exception that it did reserve its right to issue license fees for fishing, but nothing concerning alcoholic beverages.

Thus in Collins, California did not derive its right to impose revenue measures from the 21st Amendment, but did so

solely from its reservation of its right to tax.

In this case there was no reservation by Mississippi of a right to tax, Mississippi reserved only the right to serve criminal and civil process.

A proper application of Collins would defeat Mississippi's claim of any right to impose any taxes of a regulatory or revenue nature, or any taxes whatsoever.

QUESTION: Mrs. Lafontant, as I understand it, there are, what, four military installations in Mississippi of which only two are --

MRS. LAFONTANT: Exclusive, yes.

QUESTION: -- are exclusive. And does this case involve only those two?

MRS. LAFONTANT: No, this case involves all four. What I am attempting to do --

QUESTION: But certain of your arguments are applicable only to the two.

MRS. LAFONTANT: So far.

QUESTION: So far. Right.

MRS. LAFONTANT: Yes, sir.

I will take up -- unless you want me to --

QUESTION: No, no. I just want to be sure I understood this.

MRS. LAFONTANT: Right. I'm still on the exclusive jurisdiction --

QUESTION: And that applies to only two out of the four?

MRS. LAFONTANT: That's correct.

QUESTION: Thank you.

MRS. LAFONTANT: Thank you.

QUESTION: Mrs. Lafontant, could I ask a question, please?

MRS. LAFONTANT: Certainly.

QUESTION: What is the government's attitude with respect to Mississippi's power to regulate intoxicants taken off the base?

MRS. LAFONTANT: The position of the government would be that Mississippi would have the right to regulate the taking of intoxicants off the base. Our position is it has no right to tax or regulate intoxicants that are taken in to the base, which is the military enclave, federal enclave.

In other words, they could have a policeman at the door, at the gate of the military enclave to check people who are taking intoxicants off, if that would be the case. Under its police --

QUESTION: Would it follow from that that they could require a declaration each time a person left, much like the declaration you make when you are coming into the United States, a declaration stating that you did not have any liquor, or that you had three fifths. Would that be possible?

MRS. LAFONTANT: I think the State, within its powers to control activity within the State, would have that power.

QUESTION: And make it a criminal offense for any -- or at least attach some kind of sanctions to the violation?

MRS. LAFONTANT: Yes, sir. I believe the State of Mississippi could pass such a law and make that a requirement, to check every individual who would leave a military installation, and make them --

QUESTION: That's just smuggling.

MRS. LAFONTANT: Yes. Yes, sir.

QUESTION: You've told us the post orders these direct from the distillers. I suppose if they followed the other alternative of ordering liquor from the Tax Commission, then they would pay the markup, would they not?

MRS. LAFONTANT: That would be my feeling, yes, sir, Your Honor.

The basic constitutional import of --

QUESTION: Suppose that Mississippi required all purchases to be made from the Tax Commission and didn't permit buyers this alternative of direct purchasing, then where would the government be? Or would they have the right to, in your opinion?

MRS. LAFONTANT: I don't believe in the absence of Congressional action. I don't believe that they would have

the right to prohibit or to really state that they could only buy the liquor from the State of Mississippi.

QUESTION: This is sort of Yosemite, isn't it?

MRS. LAFONTANT: Collins vs. Yosemite; yes, sir.

QUESTION: Would your answer --

QUESTION: Congress could surrender some of this, as a praemissis?

MRS. LAFONTANT: Yes, sir; and it has done so in many cases. But to this State it hasn't done it in this area.

QUESTION: Is your answer to Mr. Justice Blackmun's question the same for both Keesler and Meridian?

The concurrent and the exclusive questions.

MRS. LAFONTANT: No, the answer would not be the same in the concurrent jurisdiction, I don't believe, Your Honor. If I understand the question correctly.

QUESTION: In the concurrent jurisdiction, then, the State of Mississippi could require that liquor be purchased only from the State beverage outfit?

MRS. LAFONTANT: I believe so, yes, that would be our position.

The basic constitutional import of Collins is that the 21st Amendment does not make State laws applicable to an enclave over which the federal government has the exclusive jurisdiction. Any exercise of sovereignty by the State over

such enclave must be only through a reservation of right at the time of cession.

The lower court did not, in its judgment, differentiate between the enclaves over which the United States exercises exclusive jurisdiction and the other two bases over which the United States and MIssissippi have concurrent jurisdiction.

The court found it unnecessary to do so, because of its interpretation of the impact of the 21st Amendment, stating that Mississippi laws are applicable to enclaves under the exclusive jurisdiction of the United States.

It is our opinion that where there is exclusive jurisdiction, the State has no right to impose a regulatory or revenue measure upon a federal instrumentality. Even where there is concurrent jurisdiction, the State can impose regulatory measures only when the transactions involve non-appropriated funds.

So that I really have to return to your question, Mr. Justice, to state that the same would apply for the ones where there's exclusive jurisdiction, as well as concurrent jurisdiction, except where there's non-appropriated funds I think the State could limit Meridian, such as --

QUESTION: Are these funds here all non-appropriated, all appropriated, or are they mixed?

MRS. LAFONTANT: They're mixed, Your Honor.

No, some are appropriated funds. The commissaries are considered appropriated funds; the mess halls are non-appropriated. So we have both kinds in both the exclusive and the concurrent jurisdiction bases.

As I said, even when there is concurrent jurisdiction, the State can impose regulatory measures only when the transactions involve non-appropriated funds, such as the holding of Paul vs. United States, 371 U. S. 245.

The Paul case does not involve any enrichment of the State of California. It deals with regulatory measures, to establish minimum health standards in the distribution of milk through a minimum price statute.

Paul should be interpreted as meaning that even where the State and Federal Government have concurrent jurisdiction, that where the overriding concern of the State for the health of its citizens does not result in any direct expenditure of funds from the United States Government, the interest of the State in the health of its residents shall prevail.

The instant case is even stronger than Paul. In our case here we have a direct imposition of a tax upon the instrumentality of the United States. There is a direct enrichment of the State through the imposition of the markup, and that markup collected by Mississippi, we submit, is a tax. It is not a voluntary payment by the distillers. How can it

be voluntary when the distillers are threatened with delisting unless they impose the markup upon the instrumentalities and remit it to the State?

QUESTION: Now, this argument goes across the board to all four bases, I take it?

MRS. LAFONTANT: Yes, sir. Yes, sir.

If the distiller refuses to collect and remit the markup, he will be denied the right to sell his product, and he may be prosecuted criminally. That is, he can be made to serve up to a year in jail, or pay a fine of $1,000, or both.

We submit that this tax is a contribution toward the cost of maintaining Mississippi's governmental function, since it is paid into the general revenue account.

In addition, there's no service rendered by the State of Mississippi on the exaction of the markup. Thus, it is a payment demanded by the State of Mississippi as a contribution toward maintaining its governmental function and, as I said before, it is a tax.

QUESTION: Would you --

MRS. LAFONTANT: In other words, --

QUESTION: Mrs. Lafontant, would you say that's true as to any State liquor operation where the State gets the markup that a wholesaler normally would, that it's in effect a tax?

MRS. LAFONTANT: It depends on how it's collected.

I would say this, that if the markup was included in the price of the liquor and passed on, you might have some problem showing that it was a direct tax upon the purchaser; but in this case it's almost like social security, or a sales tax, no one has any question about the fact that this money is collected specifically to be submitted to the State of Mississippi, and it's collected from the purchaser itself. And then it's put in the general revenue fund of the State, and the State does nothing to receive this money, although in the brief of my opponent it is stated that this is for services rendered by the distiller, in passing this liquor on and collecting this, this is his service. But he doesn't collect the money, the money goes directly to the State of Mississippi.

So, therefore, it certainly is passed on to the purchaser himself.

QUESTION: Well, if I understand you, this argument is predicated on -- even though concurrent jurisdiction --

MRS. LAFONTANT: Yes, sir.

QUESTION: -- that the base is an instrumentality of the United States?

MRS. LAFONTANT: Yes, sir, the particular agencies of the United States that are involved, both in the concurrent and exclusive.

QUESTION: And would this be true without regard to whether it's appropriated or non-appropriated funds? This

argument.

MRS. LAFONTANT: Yes, sir.

QUESTION: Well, it would be rather difficult to establish it was an instrumentality of the United States if it was non-appropriated funds, wouldn't it?

MRS. LAFONTANT: No, I don't think that's the issue at all. I feel -- we have cases, one case is the Standard Oil case vs. Johnson, that was passed in 1941, where Mr. Justice Black held that the messes, which were considered -- which aren't from appropriated funds, he held in that case, Your Honor, that the messes are instrumentalities of the government. And I have his specific language here.

QUESTION: Those Tort Claim Act cases, we haven't had one here for a long time, but --

MRS. LAFONTANT: Federal Tort Claims?

QUESTION: Yes. What's an activity sponsored by non-appropriated funds, is the United States liable under the Tort Claims Act? In an officers' club, for example. It seems to me I remember a swimming pool case, at the Court of Appeals level, --

MRS. LAFONTANT: Yes.

QUESTION: -- where they held it was an instrumentality for the purposes of the Tort Claims Act.

MRS. LAFONTANT: I'm not familiar with that case, the Federal Tort Claims Act case, but I certainly feel that

what we're dealing with is a tax situation which might not necessarily flow over into --

QUESTION: It wouldn't follow, necessarily, but there's some relevance to it, I would assume.

MRS. LAFONTANT: Well, if we followed that thinking a little further, I would say that where you have non-appropriated activities, where there's no financial detriment to the United States, that the United States would not be liable.

As the Court stated in United States vs. LaFranca, at 282 U.S. 568 and 572, a tax is an enforced contribution to provide for the support of government. Appellees concede that the markup payments may be treated as an excise tax in its motion to affirm or dismiss, at page 11.

This tax, we submit, is imposed upon an instrumentality of the United States in both the appropriated and non-appropriated bases.

QUESTION: Well, I notice at page 29 of your brief, you have citation of a statute, Federal statute, "the status of post exchanges and other non-appropriated fund activities as instrumentalities of the United States is recognized" by that statute.

Is that right?

MRS. LAFONTANT: Yes, sir.

QUESTION: But, independently of statute, you would still say as to non-appropriated funds it would be an instru-

mentality of the United States?

MRS. LAFONTANT: Yes, I would.

QUESTION: Well, does the statute --

MRS. LAFONTANT: Because the -- it has been interpreted in Standard Oil vs. Johnson that these mess halls are instrumentalities of the United States, even though non-appropriated funds are --

QUESTION: Was that statute on the books when that case was decided?

MRS. LAFONTANT: In 1941?

I can't find exactly where you're reading, would you please --

QUESTION: On page 29, second paragraph of your footnote 16.

QUESTION: It begins "The status of post exchanges".

MRS. LAFONTANT: Yes. 5 U.S.C. I don't know what year that would have been.

The fact that Mississippi found it expedient to collect those revenues directly from the distiller does not change the reality that the burden of payment is directly placed upon an instrumentality of the United States Government.

It is true that Mississippi normally imposes the tax upon the distiller, but in operation and effect, the tax is one upon the purchaser.

It is well settled that a State may not impose a

tax upon the transactions of the United States Government, or upon its instrumentalities and agencies. The tax here is imposed upon governmental instrumentalities, the United States Army post exchange and various clubs.

The Supreme Court in 1942, in Standard Oil vs. Johnson, 316 U.S. 481, the question was settled that Army post exchanges are instrumentalities of the United States, and Army post exchanges are out of non-appropriated funds.

Mr. Justice Black said there that post exchanges are arms of the government, deemed by it essential to the performance of governmental functions and partake of whatever immunities the Armed Services may have under the Constitution and the Federal Statutes.

The reasoning of the Johnson case has been extended to include military messes and officers' clubs in many cases.

The fundamental principle that federal instrumentalities are immune from State taxation was first stated in M'Culloch vs. Maryland. That principle is deeply rooted in the concept of federalism and has not been abrogated to this date.

For all of these reasons, and the reasons set out in our brief, we respectfully submit that the judgment of the court below should be reversed.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wright.

ORAL ARGUMENT OF ROBERT L. WRIGHT, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WRIGHT: May it please the Court:

I am going to first describe to you the Mississippi policy toward military sales of liquor, and then describe the federal policy toward those sales, and finally discuss this Court's decisions that accommodate State and Federal liquor control policies with each other.

Mississippi's policy is, as has been pointed out, to preempt for itself all profits made from the wholesale distribution of distilled spirits and wine within its own borders, and Mississippi also imposes an annual privilege tax of $900 on package retailers, and excise taxes on all sales varying from 35 cents a gallon on wine to $2.50 a gallon on distilled spirits.

Now, the State gives to the military retailers, these are the clubs -- and, by the way, those are all stipulated to be non-appropriated instrumentalities of the United States; there's no question about either fact, that they operate with non-appropriated funds and that they are instrumentalities of the government.

Now, the State gives to those military retailers the option of ordering direct from distillers without payment of any State taxes, providing only that the State's wholesale

markup is collected and remitted to the State by the distiller.

Now, the markup is fixed administratively by the Commission in accordance with the statutory direction to cover the cost of operation of the State's wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring States.

During the period here involved, that markup on spirits was 17 percent, 22 percent on wine. Now, that markup is applied uniformly throughout the State, selling to all retailers in the State. And the effect of the military tax exemption, however, was to give the military retailer a price on whiskey and gin that was 50 cents a fifth cheaper than the private retailers pay, because the excise tax exemption allowed for $2.50 a gallon on spirits.

The military retailers were also exempted from the $900 a year privilege tax paid by the private retailers.

Now, the net effect of the State's regulation is that the military clubs are guaranteed a price on distilled spirits that is no more than 17 percent above the price at which distilled spirits are sold in the State. This 17 percent markup, that's the State gross profit margin. The net income to the State from the markup is the difference between the markup and what it costs the State to maintain its wholesale distribution system.

Now, that cost is substantial, because it involves stocking and warehousing a very large inventory of wine and spirits Statewide.

Now, the cost of this, to carry that inventory, has to be borne by the State, whether the military chooses to buy direct from it or direct from suppliers, in accordance with the option given to the military for their convenience.

Now, when military orders are sent direct to the supplier, he's obliged, of course, to perform the wholesaling functions that the State normally performs and to remit the State's normal wholesale markup to the State.

The application of the State's --

QUESTION: Mr. Wright, is it your position that the State could compel purchasing from the State?

MR. WRIGHT: Indeed it could. This option was granted to the retailers for their benefit, for their inconvenience.

QUESTION: Is there any case that you would cite in support of that statement?

MR. WRIGHT: We have cited the Collins v. Yosemite Park case, which held exactly that as far as California's excise tax is concerned. But I'll get to that case later.

I wanted to describe here first how the Mississippi system operates, and then I'll describe how the federal policy operates.

Because after you see how the federal system and the State system perform, I don't think you'll find any conflict that would force you to reach the constitutional issue.

Now, when the military orders are sent direct to the supplier, he has to perform those wholesaling functions, but the military clubs, the United States never performs these wholesaling functions, whether it buys direct from the distiller or whether it buys -- whether it chose to buy from the State, in neither even would the United States or the clubs perform the wholesaler functions, for which a markup is charged.

Now, the application of this markup to direct sales prevents the distiller from adding more than 17 percent to its wholesale price when he sells to military retailers. That's the same ceiling that's applied, of course, to sales that are made by the State to the retailer, because of the fixed 17 percent markup.

QUESTION: But the distillers don't keep that money.

MR. WRIGHT: I beg your pardon?

QUESTION: The distillers don't get that money, right?

MR. WRIGHT: No. What they get is the privilege of selling liquor in Mississippi. They gain access to the Mississippi market that they could not have if they didn't

comply with Mississippi law.

QUESTION: What does Mississippi give either the distiller or the club?

MR. WRIGHT: It gives the distiller two things: it gives him the right to distribute his liquor in Mississippi; and it also gives him a taxfree military market, that can be exploited without paying the State taxes that attach to the sales through the private stores.

QUESTION: But all Mississippi wants is the 17 percent, any way they can get it.

MR. WRIGHT: I am pointing out that the 17 percent is a gross profit margin that in itself is not the profit the States gets. The difference between the 17 percent markup --

QUESTION: But this liquor doesn't go through any State official, nobody in the State does anything for this liquor at all. Right?

MR. WRIGHT: Not with the physical liquor. They, of course, --

QUESTION: Other than to accept the money.

MR. WRIGHT: Well, they have to -- they do keep track of it. And they do not get the money from the military. There is no payment made by the military. These protests that were talked about are not protests made by the suppliers, who are actually assessed the charge and who pay it; those

are protests made by the clubs to the suppliers.

QUESTION: Well, do I assume that the distiller is any different from any other corporation? They pass on all taxes to the purchaser, don't they?

MR. WRIGHT: Precisely.

QUESTION: And that's what they do here.

MR. WRIGHT: Exactly.

QUESTION: And the distiller is a conduit for your taxes.

MR. WRIGHT: Well, it isn't -- I pointed out there has to be a tax --

QUESTION: Well, you don't even pay the distiller for collecting it for you, do you?

MR. WRIGHT: It's a wholesale markup.

Now, no distiller has protested this obligation, which is, of course, --

QUESTION: Because it doesn't cost him anything.

MR. WRIGHT: Well, it costs -- it is an impossible arrangement for him, but I want to point out that the burden is his, it is imposed on him, the markup obligation. He's the one who discharges it.

QUESTION: And if he protests --

MR. WRIGHT: And it is no more of a burden on the clubs than any other State excise tax or State --

QUESTION: But if a distiller sues you or raises a

lot of noise, would you still buy whiskey from him?

You wouldn't, would you?

You wouldn't really allow a distiller to sue you, would you?

MR. WRIGHT: I'm not suggesting that there was no compulsion --

[Laughter.]

MR. WRIGHT: -- on the seller not to comply with Mississippi's law. There is. He'd be prosecuted criminally if he didn't.

QUESTION: Right.

MR. WRIGHT: There's no doubt about that. But the regulation operates on him, and the distiller's --

QUESTION: Mr. Wright.

MR. WRIGHT: Yes.

QUESTION: Excuse me, sir. Do you have a general sales tax in Mississippi?

MR. WRIGHT: I don't believe so. I don't believe the tax applies --

QUESTION: No sales tax.

MR. WRIGHT: There's a tax on liquor.

QUESTION: I'm not talking about liquor, but do you have a retail sales tax in Mississippi?

MR. WRIGHT: There may be one, but I don't think it's significant in this context.

I was just wondering whether a sales tax is collected from commodities sold in an Army post exchange on one of these bases.

MR. WRIGHT: No, it's not. All State taxes are exempted. The military clubs are exempted from all State taxes. That's in the same sentence of the regulation that imposes the market, exempts them from all State taxes.

Now, any distiller, even a private one, knows that none of his wholesale -- if he has an exclusive wholesale distributor, whether he's public or private, the wholesale distributor can't be expected to tolerate direct sales that are made by the manufacturer that undercut his profit. Collecting and remitting a wholesaler's -- an exclusive wholesaler's markup, to him on direct sales made for the convenience of a purchaser, is common industry practice.

Now, at the trial, no effort was made by the United States to show that, absent Mississippi's regulation, any of the affected military clubs could have bought liquor from any supplier at a lower price than they actually paid.

Now, from the nature of the regulation, I think you can see that no such showing was possible, unless you assume that some supplier wanted to penetrate the military market, could offer special inducements that would offend all the principles of both State and Federal regulation of the liquor traffic.

Now, coming to the Federal regulation, Federal liquor control policy, unlike Mississippi's, is centered around practices that have no special bearing on activities within any State.

However, in some aspects, Federal control is more decisive than State control; when it comes to price, for example, the major part of the average cost -- the cost of the average bottle of distilled spirits sold anywhere in the United States is the Federal excise tax, that's $10.50 on every gallon of 100 proof spirits.

This means that roughly half the wholesale price on even the best bonded bourbon is the Federal excise tax.

Now, if the Congress thought, as the contention is made here, that maintenance of military morale requires lower liquor prices, it could cut the club prices in half by simply providing a Federal excise tax refund to military purchasers.

Now, the Congress has never been asked by the Defense Department to solve its morale problems that way. The only Federal legislation now on the books dealing with military liquor is the 1951 law that's quoted in the Appendix here in full, and that statute consists of two sentences, it's the sole authority of the Defense Department of regulation that put the military in the business of selling liquor at retail.

Those are also set out in full in the Appendix.

Now, what this law does, on its face, -- I'm talking about the 1951 Federal Act -- is authorize the Defense Department to make regulations governing sales to or by members of the Armed Forces at or near any military base, any base. It doesn't make any distinction between exclusive and other jurisdictions.

QUESTION: May I ask you a question that's somewhat like Mr. Justice Powell's question:

Does Mississippi have a tax on cigarettes, for example, a State tax?

MR. WRIGHT: I really don't know. I assume they may have.

QUESTION: Probably do, almost everybody does.

MR. WRIGHT: Yes.

QUESTION: Now, can they tax -- I'm not concerned about whether they do or not; do you assert that Mississippi has a right to, the power to tax cigarettes with a State tax if they are sold in the exchanges?

MR. WRIGHT: I assert nothing as to cigarettes, the only assertion here is to liquor, because this is a 21st Amendment case.

QUESTION: Yes, I know.

MR. WRIGHT: The 21st Amendment doesn't apply to cigarettes, and it may well be that Mississippi could not do

with respect to cigarettes what it has done with respect to liquor.

What it has done with respect to liquor is brought within the rights granted by that amendment to control the distribution of liquor in Mississippi.

Now, the statute I just referred to also makes these regulations, that the Secretary of Defense can promulgate, punishable as federal crimes.

QUESTION: Do you have any Indian reservations in Mississippi? - Do you know?

MR. WRIGHT: I couldn't say.

QUESTION: I am just trying to get at some of the same things that --

MR. WRIGHT: It's possible.

QUESTION: -- we were talking about before.

Would you assert the State's power on an Indian reservation, --

MR. WRIGHT: Well, I think --

QUESTION: -- with respect to liquor under the 21st Amendment?

MR. WRIGHT: I think the State's power to regulate stops with the border of the enclave, in any event, as far as what happens on the base. The Federal Government controls what happens, not the State.

But what we're talking about here is the cost of

liquor that goes in to the base. As to that, I don't think there is any question but what the stores operated on the base are in no better position to resist Mississippi's control than the private stores.

The entire -- returning to the statute, this is the only Federal law on this particular question of liquor sales at bases. The law's entire legislative history is found on one page of the Congressional Record, as cited in our brief. That was adopted as an amendment to the Draft Extension Act of 1951 by agreement, just before the House passed it.

The amendment was proposed by Representative Cole of New York as a substitute for one proposed by Representative Bryson of South Carolina.

Bryson's amendment would have made every base where draftees were trained bone dry. Cole said his amendment was preferable, because it would let regulations made by the Secretary apply to all bases. Bryson said that was agreeable to him; Cole's amendment was then adopted without any debate, without a vote.

Now, you should also remember that three years before, the Federal Assimilative Crimes Act had been enacted, in 1948, which made State crimes punishable as federal crimes when committed inside federal enclaves, whether exclusive or concurrent jurisdiction, and subsequently all State liquor

laws were then, as they are now, enforcible by criminal prosecution.

But no mention of those laws was made by Cole or by Bryson or anyone else when this 1951 federal regulation was passed.

Now, whatever else Congress may have meant to do by that '51 law, it certainly didn't intend to make military bases havens for bootleggers.

I use the term "bootlegger" because since the 21st Amendment that's the word that describes the activities of people who sell liquor without payment of taxes, State or Federal.

Now, the Defense Department itself construed this law that I just described as not requiring avoidance of State regulations in sales to military bases, when it amended its own regulation in June 1966. That was just before Mississippi's regulation became effective.

The federal amendment struck out the requirement that the base purchases be made, quote, "without regard to prices locally established by State statutes or otherwise." And it continued to enforce its requirement that its own sales of package liquor be priced, and I quote again, "within ten percent of the lowest prevailing rates of civilian outlets in the area."

I think it's quite clear on the face of the

regulations themselves and the statutes, there is no genuine conflict between federal and Mississippi liquor control policies, as they are expressed in their respective laws and regulations, and those policies, in both cases.

QUESTION: Mr. Wright, what was the situation before 1966? I understand until 1966 Mississippi was simply a bone dry State.

MR. WRIGHT: In theory but not in fact.

QUESTION: Well, but in law it was.

MR. WRIGHT: There was a prohibition in the law.

QUESTION: But in law it was, am I right in that?

MR. WRIGHT: In law, it was a dry State.

QUESTION: And was liquor sold on all of these military bases?

MR. WRIGHT: That I can't tell you about. The stipulation doesn't cover the pre-1966 activities. I would suspect it was being freely sold in country clubs, I would suspect the military clubs also bought it and sold it.

But I don't --

QUESTION: The stipulation doesn't show?

MR. WRIGHT: It's simply not part of the record that you have here.

QUESTION: Well, I wondered what the situation was, because it might bear on the problems, at least as far as some of these bases are not wholly federal enclaves.

MR. WRIGHT: Well, they are all federal enclaves. The difference between them is the two -- they claim that the grant was exclusive jurisdiction; and the other two --

QUESTION: Yes, that's what I mean.

MR. WRIGHT: -- concurrent. But in either event, you understand these cessions of the bases that were made from '42 to '50.

QUESTION: Yes.

MR. WRIGHT: This was while Mississippi was dry.

QUESTION: Was dry.

MR. WRIGHT: But after the 21st Amendment was passed, Mississippi's right to regulate, to tax, or establish a markup, or do anything else with respect to controlling liquor in Mississippi stems from the 21st Amendment.

QUESTION: The 21st amendment and --

MR. WRIGHT: That militated exemptions.

QUESTION: And until 1966 Mississippi chose to exercise its power under the 21st Amendment by having absolute prohibition.

MR. WRIGHT: Right. And that's --

QUESTION: I wondered what the situation was on these bases during that period with respect to the sale of liquor, either by the drink or by the bottle.

MR. WRIGHT: I can't tell you, but I would suspect

that there was liquor on the bases, as there was nearly everywhere else in Mississippi, on an illegal basis.

QUESTION: But to lay aside the fact, what is your view of the power? Could Mississippi have prohibited liquor on a military enclave?

MR. WRIGHT: I think it's a more difficult question than the one we have here, because I think it's clear that when you have a State trying to control what happens on the base, conduct on the base, you have an entirely different question than you do when all the State wants to do is to control the distribution of liquor to the base, which is what you have in the case here. And this was also involved in the Yosemite case.

But this brings me to what I think are the two decisive cases of this Court in this area. Assuming that you do believe there is a conflict between Federal and State policy, which I don't think can really be found on the statutes --

QUESTION: Well, I know, but on that point it seems to me that that regulation you talked about is permissive, I mean it didn't any longer require the military to seek the lowest price or to buy as cheaply as possible.

MR. WRIGHT: It never did require them to seek the lowest price.

QUESTION: But I don't know how you can say there

isn't a conflict when the United States is now asserting the right to buy liquor free of any State-imposed markups.

MR. WRIGHT: This suit created a conflict, unquestionably, but --

QUESTION: Well, all right, but there is now --

MR. WRIGHT: -- what I'm talking about is if you lay the Federal policy side by side with the State policy, as expressed in the laws and regulations of each, --

QUESTION: Well, it would be nice if you could just say to the United States: Awfully sorry, we just won't entertain your lawsuit, because you just shouldn't have brought your lawsuit.

I mean, that's all you're suggesting.

MR. WRIGHT: Well, even if you regard it, a conflict is present, I think your decisions, the Court's decisions in Ohio v. Helvering and in Collins v. Yosemite Park, decide this case in favor of Mississippi.

Now, in 1934, Ohio's Attorney General thought the morale of Ohio citizens would be improved if payment of Federal excise taxes on the State's liquor sales could be avoided. Now, following the 21st Amendment, Ohio preempted for itself the business of both retailing and wholesaling liquor within the State.

Ohio argued that since it had gone into the liquor business itself, as both the controller and a revenue

measure, the sale of liquor in Ohio was a sovereign function that could not be impaired by federal action; and they claimed that the federal excise tax was such an unconstitutional impairment, because it did enormously increase the prices that the State had to pay for the liquor it sold.

Now, this Court's response to Ohio's argument was refusal to allow Ohio to file a complaint. The opinion simply observed that while Ohio could enter the liquor business as a State monopoly, it could only do so subject to normal, non-discriminatory business taxation.

And all you have here is normal imposition of a markup, which is discriminatory only in favor of the clubs, because when the markup is applied to military sales all taxes are waived, but when applied to the private clubs the excise tax has to be paid, which gives them a much higher per-case price.

Now, four years later, in the Yosemite Park case, a liquor selling concessionnaire of the Park Service tried to avoid the payment of the California excuse tax on his liquor sales, it couldn't do it. Now, he argued that he was an agent of the Federal Government operating in an enclave where the United States had exclusive jurisdiction.

This Court held that the concessionnaire did not have to take out a retailer's permit or pay California's tax on retailers. And Mississippi is not attempting to force these

clubs, either, to take out retailer's permits or pay that retailer's tax.

The Court also held, however, that the Yosemite Park concessionnaire did have to pay California's excise tax levied on all liquor sold, quote, "within the State", end quote. Because "within the State" meant anywhere within the State's boundaries, whether on a federal enclave or elsewhere.

Now, the Court noted that California had reserved taxing power when the park was ceded to the government in 1919. But that doesn't explain the distinction it drew between the retailer's tax and the excise tax.

California has treated that 1938 decision as authorizing application of its excise tax to all liquor sales to military bases within the State. And the United States has never challenged that construction. California gives liquor wholesalers no excise tax exemption on sales made to non-appropriated fund agencies selling liquor on military bases.

QUESTION: Well, Mr. Wright, your analysis of the Yosemite case would seem to equate the concessionnaire with an instrumentality, does it not?

MR. WRIGHT: Yes, I think he clearly was an agent of the Park Service.

QUESTION: And you make no distinction on the other factors in Yosemite, about the consent of the --

MR. WRIGHT: No, I think clearly if there's a constitutional prohibition against California's taxing sales of liquor in to a federal enclave, then nothing California could do, by its statutes, would give it the right to do it.

QUESTION: Well, the United States could consent to California's doing it, could it not?

MR. WRIGHT: Well, I think it was held, as to that point, --

QUESTION: Well, answer my question, Mr. Wright: could it?

MR. WRIGHT: They could.

QUESTION: And did it not?

MR. WRIGHT: In that case it did, yes.

QUESTION: Yes.

MR. WRIGHT: All I'm saying is that since that time California has enacted legislation which applies its tax not only to sales to non-appropriated fund instrumentalities, at all the bases in the State, without regard to the terms of cession or without regard to what taxing rights, if any, were reserved when the place was ceded. And that California also gives no excise tax exemption to distillers outside the State who sell direct to military installations, where payment is made on the Federal Treasury.

And the U. S. has never attacked California's right to do that.

Now, in 1947 a distiller did litigate the matter, however, National Distillers tried to avoid payment of the tax on the sale of 41,000 quarts of bonded whiskey that had been bought for medicinal purposes, and it was sent to the Army Medical Depot in Los Angeles.

Now, that whiskey was ordered out of St. Louis and shipped to Los Angeles from Ohio. And the distiller argued that the application of the California excise tax to that shipment cast an unconstitutional burden on federal functions because the tax was included in the price the Army paid.

Now, California Appellate Court rejected the distiller's argument and sustained the tax. That case is cited at page 17 of our brief, in footnote 12.

Now, the U.S. could have intervened in that case, and carried it to this Court on the constitutional issue, but it didn't. What it's doing now is asking you to overturn a construction of that 1938 decision in Yosemite Park that was regarded as settled until this case was brought against Mississippi.

Now, if there is any sound policy reason for doing that, I haven't heard it expressed in the government's argument or seen it in its brief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Does the government have anything further?

REBUTTAL ARGUMENT OF MRS. JEWEL S. LAFONTANT,

ON BEHALF OF THE APPELLANT

MRS. LAFONTANT: Thank you, Mr. Chief Justice.

At this time I would like to waive my right to rebut --

QUESTION: Mrs. Lafontant, let me ask you one question, if I may, before you waive.

It seems to me at least possible that a distiller is either an indispensable party or perhaps the only party here who can raise this type of an issue. The government has made these payments to the distiller, the distillers aren't a public body which you ordinarily pay under protest, the distiller has in turn remitted them, the payments to the State of Mississippi.

Don't you think that perhaps the distillers ought to be parties in order that these issues you've brought can be properly raised and adjudicated?

MRS. LAFONTANT: I see no reason or any real necessity for the distillers being made party plaintiff to this case. The United States Government is attacking the whole regulation, and the United States is certainly the purchaser, the real party in interest, because he has to pay the money, the distiller is just the conduit passing it on, and it's expressly stated that way.

I don't think it would detract from the case,

however, if the distillers were made party plaintiff. But I don't feel that there would be a necessity for it.

QUESTION: Could I ask you, coudn't Mississippi just simply have a law that required all distillers who sell in Mississippi to charge everybody, all of its customers, a certain price?

MRS. LAFONTANT: A certain price. I would agree that Mississippi could do that.

QUESTION: We've already decided that, haven't we?

MRS. LAFONTANT: If Mississippi had passed such a law, I don't believe we could be here, which was not the case --

QUESTION: Then it says, to the --

MRS. LAFONTANT: It's the manner in which, the method of which the State could --

QUESTION: So if Mississippi had a law like that, the distiller would have to charge the United States a certain price.

MRS. LAFONTANT: Except I feel that the exclusive -- on the enclaves where there is exclusive jurisdiction, that there might be a problem.

QUESTION: Well, I don't know. But what Mississippi says to the distiller is: By the way, if you want to sell to anybody in the State, just make sure you charge the United States the same X price.

MRS. LAFONTANT: And we couldn't argue with their price. I would agree with you.

QUESTION: Yes.

MRS. LAFONTANT: If it was in the total price, we would have no cause for argument.

QUESTION: Well, then, -- and if you couldn't complain about that, how come you can complain if they go one step farther and they say: By the way, give us part of the price that we're making you charge the United States.

MRS. LAFONTANT: Well, I think it makes all the difference in the world, the method and the way it's set up.

QUESTION: Yes.

All right, thank you.

QUESTION: But you seem to be conceding something that I am not sure, without some authority, I couldn't accept; namely, that any State has the power to fix the price at which the United States Government buys anything --

MRS. LAFONTANT: Yes.

QUESTION: -- liquor, milk, or turnips.

MRS. LAFONTANT: In my haste, I didn't get to clarify, because then I followed up to a subsequent question, that it would still be the position of the United States Government that on the exclusive jurisdiction basis, that no State could control the price of anything, including --

QUESTION: That's the Paul case.

MRS. LAFONTANT: Yes, sir.

QUESTION: Right.

MRS. LAFONTANT: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you. The case is --

MR. WRIGHT: If I could give you just one citation that I left out of my brief --

MR. CHIEF JUSTICE BURGER: You may give us a citation --

MR. WRIGHT: -- on that last point. All I have is -- this should have been included in my brief; it's the Senate Report on the Buck Act, which was passed in 1940. If you will simply look at the Report of the Finance Committee, Senate Report 1625 76th Congress, May 16, 1940, you will see that the exclusive jurisdiction defense was removed entirely in so far as sales and use taxes on general merchandise is concerned.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:44 o'clock, p.m., the case was submitted.]