In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,

Appellees.

No 74-548

Washington, D. C.
April 22, 1975

Pages 1 thru 41

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v.	:	No. 74-548
STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al., Appellees.	:	

Washington, D. C.

Tuesday, April 22, 1975

The above-entitled matter came on for argument at 1:58 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

STUART A. SMITH, Esq., Assistant to 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

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-548, United States against State Tax Commission of Mississippi.

Mr. Smith, you may proceed when you are ready.

ORAL ARGUMENT OF STUART A. SMITH ON BEHALF OF APPELLANT

MR. SMITH: Thank you.

Mr. Chief Justice, and may it please the Court: This case comes here again on a second direct appeal from a three-judge district court in the Southern District of Mississippi to consider certain issues which were not reached by the Court in its consideration of the first appeal.

The broad question presented is whether a regulation of the Mississippi State Tax Commission imposes an unconstitutional State tax upon instrumentalities of the United States. The regulation in question requires out-of-State liquor distillers to collect tax from military purchasing facilities and to remit this tax to the State Tax Commission.

It is the position of the United States that the district court was wrong in upholding the validity of the tax as applied to the sales to the military purchases in the four bases within the State of Mississippi. The facts as before are largely undisputed and stipulated.

Prior to 1966 Mississippi completely prohibited the

sale or possession of alcoholic beverages. In 1966 it adopted a local option beverage control law. Those statutes are set forth in the appendix to our brief, pages 47 and 48. The new law provided that the State Tax Commission was to be the sole importer and wholesaler of alcoholic beverages within Mississippi. Under the statute the State Tax Commission is authorized to sell liquor to retailers in the State, including any retailers on military posts within the State. A related statute provides that the Commission shall add such markups within its discretion to cover costs and provide profit.

So the statutory scheme essentially established a monopoly by the State of Mississippi in the wholesaling of liquor. But the State Tax Commission promulgated so-called Regulation 25 which is really at the heart -- the validity of which is at the heart of this case. That regulation permits the military to purchase liquor from the Commission, as could anyone in Mississippi, or directly from the distillers. However, the regulation goes on to provide that if the military chooses to exercise its option to purchase liquor directly from the distiller, then the regulation provides that the distiller must collect the markup from the military and remit that markup to the State Tax Commission, the same mark-up that would have been applicable had the military purchased the liquor from the State Tax Commission. During the time at issue here, the markup with respect to distilled spirits

was 17 percent, and with respect to wine it was 20 percent.

Now, there are four military bases in Mississippi which this Court explored on the first appeal. There are two bases over which the United States maintains exclusive jurisdiction. Those are the Keesler Air Force Base and the Naval Construction Battalion Center. There are two other bases over which the United States and Mississippi maintain concurrent jurisdiction. These are the Columbus Air Force Base and the Meridian Naval Air Station.

Now, prior to 1966 Mississippi was a dry State, but even during that time the military purchased liquor from the out-of-state distillers. Now, after 1966 when the new statute came into effect, the military continued the same practice of purchasing liquor from out-of-state distillers directly. Now, after Regulation 25 became effective, which essentially told the military that even if they had continued their past procurement practice, they were going to have to pay over the tax to the Mississippi State Tax Commission, the military attempted to persuade the Mississippi State tax authorities that collection of this tax on direct purchases was improper.

As a means of providing some kind of interim accommodation, the military suggested that the amount of taxes at issue be paid into an escrow fund and kept there until the matter could be judicially determined. But Mississippi rejected that suggestion and in fact warned the distiller that

if they did not pay over the tax to the State Tax Commission on their direct sales to the military, they would be subject to the criminal penalties which were imposed on the Alcoholic Beverage Act, and they would also be subject to delisting, which essentially meant they would lose their privileges to sell their products to the State Tax Commission for retailing in Mississippi.

Because of this onerous position taken by Mississippi, the military had no choice, at least in the interim, but to pay the amount of tax that Mississippi claimed to be due and owing. As of July 1971 the record indicates that there was some $650,000 collected, and now the military advises me that as of the beginning of this year the sum is something like $1,250,000.

Now, this particular suit was brought in 1969 before a three-judge district court. The United States asked for three modes of relief, a declaration that the Regulation 25 was unconstitutional because it imposed a tax upon Federal instrumentalities; an injunction against its further enforcement; and a money judgment in the amount of the taxes that had thus far been collected.

Now, the first time around the three-judge district court simply held that the 21st Amendment preempted the entire field and that that empowered the State of Mississippi to impose this tax on sales to military purchasers. On the

first direct appeal this Court reversed and vacated the judgment of the district court. It held with respect to the exclusive jurisdiction bases that the 21st Amendment had no application. The reason that the majority of this Court indicated was simply that the 21st Amendment which speaks of importation of alcoholic beverages into any State did not apply to the exclusive jurisdiction bases because those bases as the district court itself acknowledged in its first consideration might as well have been in a sister State or in a foreign country. They simply are not part of the State of Mississippi.

But the Court did not reach the issues which are now before it for resolution, that is, questions of intergovernmental immunity and with respect to both the exclusive jurisdiction bases and the concurrent jurisdiction bases.

Now, on remand, the district court again dismissed the Federal Government's suit, and it did so by holding that the tax at issue here was on the out-of-state distiller and not on the military purchaser, so that there was supposedly no unconstitutional tax on the United States.

The district court further held that even if a tax were on the military purchaser, Congress had consented to the tax, and the district court rejected the Government's constitutional tax immunity doctrine argument on the same ground.

Now, before I begin to talk about what the parties disagree about, I think it would be helpful to the Court if I set forth what are three points of agreement between the United States and the State of Mississippi in this lawsuit.

To begin with, the parties are in agreement with the district court's conclusion that the State's Regulation 25 imposes a tax.

Secondly, parties are in agreement with the district court's finding that the ship stores, the officers clubs and the post exchanges involved in these cases on both the exclusive jurisdiction bases and on the concurrent jurisdiction bases are Federal instrumentalities. As Federal instrumentalities, as arms of the Federal Government, they are entitled to whatever immunity from State taxation that the United States would enjoy.

And thirdly, the parties agree with the district court's statement in this case that the constitutional principle of Federal tax immunity which this Court has reaffirmed on many occasions applies only to bar a tax whose legal incidence falls upon the United States.

So putting aside those three points of agreement, I would like to now turn to what we think is the essential point in this case, and that is the error of the district court's holding that the legal incidence of this tax is not on the United States.

Now, the district court construed the term "legal incidence" which this Court has used many times to mean the legally enforceable liability --

QUESTION: Would you be making the same argument if this case had come here from the State Court of Mississippi?

MR. SMITH: Would we be making the same argument? I think so. I think --

QUESTION: You mean the legal incidence matter is of Federal constitutional --

MR. SMITH: Yes. I think --

QUESTION: We wouldn't have to construe -- take the construction of the Mississippi court as to whether legal incidence --

MR. SMITH: I think the Court has on occasion in its intergovernmental immunity cases stated that what the State's highest construction of its statute is certainly persuasive, but in the Agricultural Bank case, upon which we heavily rely, I think the Court also said that since it does involve a constitutional principle, that the Court feels free to reexamine the basis of that State court's holdings.

QUESTION: So in terms of the question I asked, there is no difference between the Federal court and the State court.

MR. SMITH: I don't think so.

QUESTION: Well, at least this much.

MR. SMITH: Yes. At least this much. I suppose that --

QUESTION: What we have said, and what the highest State court has said what its State statute does in the way of legal incidence, is entitled to great respect?

MR. SMITH: I think that's right.

QUESTION: Considerable weight, and so forth.

MR. SMITH: I think that's absolutely right, Mr. Justice Brennan. But in the Agricultural Bank case I think the Court after stating that -- and that case did come here from the Supreme Judicial Court of Massachusetts -- the Court went on to disagree with the Massachusetts highest court's interpretation of --

QUESTION: I think there is implicit in the way we have stated it that it's still open.

MR. SMITH: I think that's absolutely right. I think that's absolutely right. We think on the basis of the Court's analysis in Agricultural Bank v. State Tax Commission that the legal incidence of this tax plainly falls on the United States and that the district court's construction of the term "legal incidence" is that the legally enforceable liabilities for nonpayment is an improper test.

Now, I think it would be instructive if I simply compared --

QUESTION: Would you mind saying now what is the Government's position as to the proper definition of legal incidence?

MR. SMITH: We think the proper definition of "legal incidence" is that -- in other words, let me put it to you this way: That if the statute requires that the tax be passed on and collected from the purchaser, as it was in Massachusetts and as it is in this case, then we believe that the legal incidence of the tax falls upon the purchaser and not upon the vendor, simply because the vendor pays the tax over, we believe that simply --

QUESTION: When the vendor is free not to do so, then it is really only shifting the economic burden and doesn't affect the incidence.

MR. SMITH: Yes.

QUESTION: Legal incidence.

MR. SMITH: Right.

But here, as in Massachusetts, Regulation 25 requires that the out-of-state distiller pass on the tax to the military. And indeed, if there was any question about the interpretation --

QUESTION: Does your opposition concede that, Mr. Smith?

MR. SMITH: I don't think -- well, I think to the extent that our opposition talks about the Agricultural Bank case here, I think what they have argued to the Court is that that case is not germane because it didn't involve a constitutional holding. Well, we are fully in agreement with

the fact that the Agricultural Bank did not involve a constitutional holding because the Court rested the immunity of national banks in that case upon a Federal statute, a Federal statute of long standing. It was a revised statute.

I am not sure that my opposition really addresses itself to what we think is the critical point of the Agricultural Bank, and that is the mode of analysis that the Court used to construe the term "legal incidence."

QUESTION: Don't they place a great deal of emphasis on the ability of the distiller to absorb this tax himself?

MR. SMITH: They do place some emphasis upon that, but I think that the Court in Agricultural Bank simply said -- in fact, it's really right at the end, because the same point was made in Agricultural Bank, and the Court right at the end of its opinion said, "It seems clear to us that the force of the law is such that regardless of sanctions businessmen will attempt in their everyday commercial affairs to conform to its provisions as written."

Now, the provisions as written in the Massachusetts tax and in this tax require the out-of-state distiller to pass on the tax. And indeed, if there would be any question about the construction of Regulation 25, the State of Mississippi issued a warning to the out-of-state distillers saying that they had to collect the tax from the military

purchasers. The warning is set forth in the appendix at pages 38 and 39. It's a letter from the Director of the Alcoholic Beverage Control Division which said, "Said fee must be invoiced to the Military and collected directly from the Military or other authorized organization located on the Military base." And then the letter concludes by saying, "In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division will be delisted", and that is underlined.

I think that if there would be any question of construction, I think that the administrative position that the State tax authorities took indicated that the out-of-state distiller had to pass on this tax. And since he had to pass it on, as a matter of law, we think that consistent with the Court's Agricultural Bank analysis, that the legal incidence of the tax must fall upon the military --

QUESTION: Do you distinguish James v. Dravo, that there the contractor could or could not pass it along, depending on what he felt like doing?

MR. SMITH: Well, James v. Dravo dealt with several different points, but I think that there that is a distinction, essentially the contractor could or could not. Those cases like James v. Dravo and Alabama v. King & Boozer on which the opposition relies, I think turn really in part on -- really turn on the question of who is the purchaser in that case. I

don't think there was any quarrel that the tax fell upon the purchaser. In fact, the Agricultural Bank analysis of this Court is not really new to Agricultural Bank. The opinion talked about, or cites, Federal Land Bank v. Bizmark Lumber Company which is way back in Volume 314 of the United States Reports. This is standard analysis that this Court has used that when a sales tax must be passed on as a matter of law, the legal incidence of the tax is on the purchaser. The Court referred to it again in a footnote in the National Bellas Hess case.

QUESTION: The legal incidence in King & Boozer was (inaudible)

MR. SMITH: The legal incidence in King & Boozer was on the purchaser. The question was then who is the purchaser? And the Court finally determined that the purchaser in that case was the private contractor.

We don't have any private contractor in this case. This is simply a question of the Federal Government is dealing for itself.

Once one recognizes that the tax is on the military purchaser, that the legal incidence of the tax is on the military purchaser, then it cannot be valid, and it is unconstitutional unless Congress has consented to the tax or in this case, since we are involved with alcoholic beverages, unless the 21st Amendment holds some sway in the area.

Now, I would like to -- our analysis now proceeds along two separate lines, because we had two kinds of bases involved in this case. We had exclusive jurisdiction bases, and we had the concurrent jurisdiction bases.

Now, on the exclusive jurisdiction bases, it is plain that the 21st Amendment has no application because that was essentially the core of this Court's conclusion on the first direct appeal.

QUESTION: The instrumentality argument is the same with respect to both of them.

MR. SMITH: The instrumentality argument is the same.

So with respect to Keesler and the Naval Construction Battalion Center, the 21st Amendment has no application. So the only other avenue under which the tax could be sustained would be if Congress had given consent to such a tax.

Now, Mississippi relies upon the district court's conclusion that section 105(a) of the Buck Act provides such consent. Now, that statute is set forth in our appendix to our brief at page 46, and it essentially says that no person shall be relieved from liability for payment of any sales or use tax levied by any State on the ground that the sale or use with respect to which the tax was levied occurred in whole or in part within a Federal area. So as far as the district court read that language and said that constitutes Congressional consent, we disagree. We don't think the Buck

Act, that that provision of the Buck Act can be read in isolation, because when Congress passed the Buck Act, it just didn't enact section 105, but it also enacted section 107 which we have reproduced directly thereunder. And that says that the provisions of section 105 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof.

Now, all that section 105(a) of the Buck Act does is to put a Federal enclave on the same footing as the normal territory of the State with respect to the imposition of the specified tax. In other words, a taxpayer cannot say, "My transaction took place in a Federal enclave." That is not a sufficient defense after Congress passed the Buck Act.

But what Congress did simultaneously, and the hearings are replete with testimony from people who came forward and were afraid that Congress was about to whittle away at the constitutional doctrines long expounded by this Court as early as Chief Justice Marshall that Federal instrumentalities might be in danger. So Congress enacted section 107 to reaffirm that doctrine which goes back to McCulloch v. Maryland, that the States cannot impose a tax upon Federal instrumentalities.

Now, if we are right, as we submit we are, that the real incidence of the tax falls upon the Federal instrumentality, then the Buck Act supplies no congressional

consent because section 107(a) of the Buck Act constitutes an explicit reservation by Congress and reaffirmation the protection that Federal instrumentalities are supposed to have from State taxation.

Now, turning to the concurrent jurisdiction bases, there are different considerations that are applied. Because here we have the 21st Amendment is applicable. The concurrent jurisdiction bases over which the United States and Mississippi exercise simultaneous sovereignty are part of the State of Mississippi. But we also have a competing constitutional doctrine. We have the doctrine of Federal tax immunity, which I just alluded to as expressed in section 107(a) of the Buck Act.

Now, we submit that nothing in the history or the terms of the 21st Amendment suggests that there was supposed to be an exception for alcoholic beverages with respect to the Federal tax immunity doctrine. The legislative history and the statements on the floor of Congress by its sponsors specifically make reference to the fact that it was not to alter the fundamental principles of federalism upon which the nation was founded.

What we have here is simply a design of Congress to give back to the States control over liquor which the Federal Government had preempted during the period of prohibition.

Now, the Court has had on previous occasions two

opportunities which we think are instructive here to balance the policy of the 21st Amendment when it conflicts with other provisions of the Constitution. The two cases to which we make reference in our brief are Hostetter v. Idlewild Bon Voyage Liquor Corp. case and the Department of Revenue v. James Beam Company case. Those cases decided both on the same day dealt with situations in which two conflicting provisions of the Constitution collided, so to speak.

Now, in Hostetter what you had essentially was the State of New York had attempted to shut down an airport liquor retailer which sold liquor to departing international passengers. The State of New York attempted to do this, grounded its regulatory authority that the establishment was unlicensed and unlicensable under the 21st Amendment.

Now, the retailer, though, on the other hand, pointed to the fact that he was engaged in international commerce and that the commerce clause of Article I says that Congress shall have power to regulate commerce among the several States and with foreign nations apply, and that made the State's power subordinate under the 21st Amendment. He also pointed to the fact that the Bureau of Customs had licensed him under the Tariff Act which presumably was passed by Congress under its Article I power to regulate commerce with foreign nations.

What the Court did was essentially to say that it is

right that the 21st Amendment gives the State power to regulate liquor, but here where we have a competing consideration, that is, the consideration of international commerce, the amendment has to yield.

Now, to the extent that the legislative history of the 21st Amendment indicates that the 21st Amendment had any impact at all, it is in the impact of commerce, because it's supposed to lessen whatever potential commerce clause problems might be applicable. But even so, the Court felt that the competing considerations of international commerce require that the 21st Amendment be subordinated.

We think that this case would seem to follow a fortio because we are not dealing with a situation where the commerce clause is even remotely applicable. What we are dealing with here is Article VI of the supremacy clause upon which this Court has announced an unbroken line of decisions saying that because this Constitution is the supreme law of the land, the United States cannot be subject to taxation by States.

Now, the James Beam Company case ... really just offers another example of that sort of thing. The tax involved was a Kentucky tax on State liquor, on the importation of Scotch whisky, and that conflicted with the export-import clause. And again the Court subordinated the 21st Amendment to the export-import clause.

We would suggest that similarly the 21st Amendment

with respect to the concurrent jurisdiction bases be subordinated to the Federal tax immunity doctrine.

I would like to save my remaining time, unless there are other questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Smith.

Mr. Wright.

ORAL ARGUMENT OF ROBERT L. WRIGHT ON BEHALF OF APPELLEES

MR. WRIGHT: Mr. Chief Justice, and may it please the Court: I think it's clear from the argument you have just heard that the validity of this tax depends on who is taxed for doing what. Now, the tax is not laid by the regulation, it is laid by a State statute of Mississippi, and the tax is laid on the business of wholesaling liquor within the State. The State has preempted for itself that the tax takes the form of a collection of the difference between the wholesaler's price and the price to the retailer, less, of course, whatever wholesaling costs the State may incur.

Now, the regulation gives the military an option. I take it they are not complaining about the option because an option is not a burden, an option is a privilege. What the regulation does is give them a flexibility they wouldn't otherwise have by allowing them to order direct in certain instances, but when they do order direct from the distiller,

the distiller then, of course, is sharing in the State's wholesale monopoly and must account to the State for the State's wholesale markup, which is the tax, the difference between the wholesaler's price and the price to the retailers.

Now, those prices are not set by the State. Each distiller sets his own price, he makes his own deal, whether he deals either directly with the State or whether he deals directly with the distiller --

QUESTION: Doesn't the regulation tell the distiller to collect a certain markup?

MR. WRIGHT: The regulation tells him, of course, and he --

QUESTION: And he is supposed to do that.

MR. WRIGHT: He is supposed, of course, to collect a markup so that he will have the funds to pay the State its tax, but the tax is levied on him, he is required to pay the markup to the State whether or not he ever collects it.

QUESTION: He is also supposed to collect it from his purchasers.

MR. WRIGHT: Well, he has to invoice it, of course. This tax is a percentage of the wholesaler's price, and the only way you know in these exceptional situations where he's allowed to buy from the distiller what the amount of tax is is to require him to list on the invoice the wholesaler's

price and the percentage amount which reflects the State's markup or tax.

QUESTION: Mr. Wright, did you say that the tax can never be collected from the purchaser, it must be collected from the distiller or not at all?

MR. WRIGHT: Well, the State, itself, of course, when it sells a private retailer collects the tax in the form of the purchase price of the liquor.

QUESTION: In this situation, suppose the distiller was unable to collect the tax?

MR. WRIGHT: He pays it first before -- he pays the tax when he bills the retailer, and it's a matter of total indifference to the State whether or not he then is able to receive reimbursement for the tax. By the nature of things, a tax which takes the form of a wholesale markup even without any urging, if Dr. Beacham had never written that letter telling them that they should collect the tax from the purchaser, any wholesale excise tax, a tax levied on wholesale sales is collected by the businessman from the retailer because it is a cost of doing business. If he doesn't collect it, he's no businessman.

QUESTION: If he doesn't collect it, who is responsible for it?

MR. WRIGHT: He is responsible for it, whether he collects it or not.

QUESTION: Is there a time sequence here?

MR. WRIGHT: Yes.

QUESTION: Must he pay it before he delivers the liquor to the purchaser.

MR. WRIGHT: He pays it at the time that he invoices the liquor, yes, he pays it. And then he --

QUESTION: He doesn't wait and collect it from the purchaser before he pays the State?

MR. WRIGHT: No. The district court pointed that out. He is liable for the payment at the point where he invoices, ships the liquor.

QUESTION: So there is no way, in any event, that the tax can be collected by the State. The statute doesn't provide for collection by the State from the purchaser.

MR. WRIGHT: No, the tax is not -- this is the whole point, the tax is not a tax levied on the purchaser, it is a tax levied on wholesale sales, that's the subject matter of the tax, that's the privilege,the excise is exacted for the privilege of doing a wholesale business in the State of Mississippi. And that tax is levied --

QUESTION: If the State wrote a letter to the purchaser and said, "Pay me the tax," the purchaser under the law should say, "I don't owe you anything."

MR. WRIGHT: Well, certainly. The State has never, to my knowledge, ever --you will notice the letters in the

record, they are not addressed to the military retailers, they are addressed to the distillers. They are the people who must pay the tax to the State when they choose to do the wholesaling themselves instead of using the State's wholesale facilities to distribute their liquor.

QUESTION: Mr. Wright.

MR. WRIGHT: Yes.

QUESTION: Could the State solve this problem by requiring that all liquor sold in Mississippi be bought from the Mississippi State stores?

MR. WRIGHT: Yes.

QUESTION: Why doesn't it do it?

MR. WRIGHT: Well, I suggest that the purpose of the option was for the benefit of the retailers rather than for the State, although the State does benefit to this extent: The State, of course, as the exclusive distributor in the State stocks almost all the brands you ever heard of and some you didn't. There is a vodka made in Vicksburg called Dr. Chicago that the State stocks. There are all sorts of off brands that some people want that the State may not necessarily stock. It is a convenience for the military clubs when they want to get one of those brands the State doesn't stock to order it direct from the distiller. That's the purpose of the option so far as the thing is concerned.

QUESTION: And the military uses a whole lot of

vodka. They owe you $2 million now. That's a whole lot of vodka.

MR. WRIGHT: No, they don't, Mr. Justice --

QUESTION: I submit the record shows they buy all kinds of whisky.

MR. WRIGHT: They do buy all kinds. All I am suggesting is there are certain kinds which the State does not stock, and it sets the option as a convenience to them because they can then not go through the slower process of ordering specially through the State; they can go directly to the distiller, order it from him, but in that case, of course, the tax will be collected from the distiller.

QUESTION: Mr. Wright, suppose, taking the hypothetical case which Mr. Justice Powell suggested, suppose the State did that and then the response of the United States was that they would load 100 trucks with all the supplies they needed, including replacement shoes and ammunition and peanut butter and what not along with vodka and whisky and gin and ship the whole thing in. Do you suggest that Mississippi could stop that shipment and stop liquor from coming into a military base?

MR. WRIGHT: If they found out about it. Of course, it's quite possible we don't know how much liquor may be going into those bases, flown in or taken in on a destroyer without any knowledge of the State. All that's involved here

are sales made by distillers who do exploit the Mississippi market, that is, the sellers who want to sell not only to military retailers, but want also to sell to private retailers in Mississippi through the State's wholesale facility, that's all that's involved here.

QUESTION: Well, I am assuming that all the material that I just suggested was used on military bases by military personnel, not distributed outside of the base. And it's your position that Mississippi could stop that inflow?

MR. WRIGHT: If it was brought in for resale.

QUESTION: No, no, loose.

MR. WRIGHT: No. The wholesale tax applies only -- the tax only applies to liquor brought forth for resale within the State, and this is where the Buck Act is decisive. Now, the Buck Act was passed to make precisely this kind of taxation possible. The Buck Act was enacted in 1940. Now, a 1937 case, the case of James v. Dravo Contracting Company had held that you did not impose an unconstitutional burden upon the United States because your receipts were derived from the United States. You could sell the United States and you could still tax sales. That's what West Virginia did. West Virginia taxed the receipts of contractors, construction contractors, from Federal work, and the James case sustained that tax except where the contractor was working on an exclusive jurisdiction base. The James case held as to the

exclusive jurisdiction bases the State has no power to tax, but it held that the fact that the sales were to the United States did not prevent it from taxing those sales on the other bases.

Now, the purpose of the Buck Act as stated in the Senate report which is an appendix to our brief was to extend the doctrine of the James case to the exclusive jurisdiction bases, that's what the purpose of the Act was, to wipe out this distinction that James had created between exclusive jurisdiction bases and other joint jurisdiction bases.

QUESTION: That's true, Mr. Wright, I guess, of 105, section 105, but what about 107?

MR. WRIGHT: 107 was supposed to preserve whatever constitutional immunity, whatever intergovernmental tax immunity that Federal instrumentalities might have. Now, I suggest to you that if you will look carefully at the case of Collins v. Yosemite Park Company again, you will see that that case when they are dealing with a wholesale liquor tax, in that case California's wholesale liquor tax, that that tax was sustained because the Court found no constitutional immunity, we are not interfering with a Federal function by taxing sales. You will recall in the Yosemite Park case the Federal Government had exclusive regulatory jurisdiction over the park. The State, however, when it had ceded the park land had reserved general taxing rights. So the Court when it

decided the case held that California could not impose license fees on the Interior Department concessionaire in that case, but that it could and did impose its wholesaler's excise tax on that retailer. Now that was done notwithstanding the fact that the retailer had in that case bought his liquor outside the State. But he had bought it for resale inside the State, which is exactly what the purchasers we are talking about here were made for, and you have precisely the same kind of a tax, a tax on wholesale transactions. And as the Yosemite case held the fact that in that case direct collection was made of that wholesale sales tax from the Federal retailer did not invalidate the tax.

QUESTION: Mr. Wright, could you tax the sales of the drinks in the exclusive camps in Mississippi?

MR. WRIGHT: I beg your pardon?

QUESTION: On the drinks that are served in the Officers Club on the base which the United States has exclusive jurisdiction.

MR. WRIGHT: No, I don't think so.

QUESTION: If you can tax the whisky that you use, aren't you doing the same thing?

MR. WRIGHT: No. What you are doing here is applying a tax on wholesale sales, that is sales made to a retailer for resale. That's what's being taxed, those sales.

QUESTION: The sale is not made in Mississippi, though.

MR.WRIGHT: Well, they certainly are, if your Honor please. They are made -- the liquor is invoiced to the bases and is resold on the bases. The Buck Act has said that those sales --

QUESTION: Does the Buck Act apply to the exclusive jurisdiction bases?

MR. WRIGHT: It certainly does. That was its expressed purpose.

QUESTION: Why couldn't you tax them on that?

MR. WRIGHT: A sales tax?

QUESTION: Yes.

MR. WRIGHT: I think you probably could, yes, if you are talking about a --

QUESTION: You start taxing these sales on camps, you are really going to have something going.

MR. WRIGHT: Let me point out one more aspect of which this regulation --

QUESTION: How are you going to collect it? If it's exclusive jurisdiction.

MR. WRIGHT: The Buck Act also gives authority to the State to go in and collect its sales tax on exclusive jurisdiction bases.

QUESTION: (Inaudible.)

MR. WRIGHT: That's what it says.

QUESTION: I see.

MR. WRIGHT: That was its purpose, was, as I say, to wipe out this prior distinction the James case had made between exclusive and concurrent jurisdiction bases.

QUESTION: You would go into a missile base, too.

MR. WRIGHT: I beg your pardon?

QUESTION: You would go into a missile base, too.

MR. WRIGHT: Any kind of --

QUESTION: I wouldn't try it.

MR. WRIGHT: I beg your pardon?

QUESTION: I would not try it.

(Laughter.)

QUESTION: Just borrow a tank when you get there.

QUESTION: I think if you could get in, you could collect.

MR. WRIGHT: Well, I suppose the military could bar anyone from a base they please, but the purpose of the Buck Act is made quite clear in the Senate report, and it was to treat all Federal enclaves, whether they are exclusive or concurrent enclaves, alike, that this did extend the State taxing power insofar as taxes measured by sales, only that kind of taxes are concerned.

QUESTION: I don't see how you reconcile that to the expressed language of section 107(a).

MR. WRIGHT: 107(a) is admittedly, both sides agree that that is only supposed to preserve whatever constitutional

immunity arises from the fact that these clubs are Federal instrumentalities.

QUESTION: That covers quite a bit of area, that constitutional immunity.

MR. WRIGHT: Well, the constitutional -- sales to the United States, taxes on sales to the United States haven't been regarded by this Court as taxes on the purchasers since the Panhandle Royal case. Panhandle Royal v. Mississippi? held that sales of gasoline to the United States were in effect taxes on the United States. The dissenting opinion was the one in which Justice Holmes replied to the majority's rhetoric about power to tax being the power to destroy, Holmes said, "Not while this Court sits." And that dissenting opinion of Holmes became prevailing law in the James case and in the King & Boozer case.

QUESTION: It said it expressly, I guess, didn't it?

MR. WRIGHT: Yes.

QUESTION: King & Boozer as I recall it said that whenever --

MR. WRIGHT: So there are no constitutional tax immunity decisions of this Court which say that a tax on sales to the United States or one of its instrumentalities are taxes on the United States. That much is clear.

QUESTION: Of course, Panhandle was a gasoline excise tax on the seller. And the issue there was whether when the

United States bought it for the Coast Guard, as I recall it, and veterans hospitals, that made it a tax on the United States. But you don't doubt that instead of being a tax on the vendor, had it been a tax on the United States directly on its purchases, you would have no problem with that, would you?

MR. WRIGHT: Had it been levied on the retailer it probably would have been invalid. But the point is --

QUESTION: "Probably" if the United States were the purchaser?

MR. WRIGHT: If the tax were laid on the privilege of retailing -- now Mississippi has a liquor tax on the privilege of retailing.

QUESTION: No,but what would be the case had the Panhandle tax, instead of being imposed on the vendor, been imposed on the vendee, the United States?

MR. WRIGHT: It would have been precisely the same because in that case, the Court held, if you are talking about what that Court would have done --

QUESTION: I'm not talking about what that Court would have done. What would be in the context of sovereign immunity, what would be the answer?

MR. WRIGHT: We have the answer in the James case. The tax was imposed on sales made to the Federal Government.

QUESTION: I guess I'm not making myself clear, Mr.

Wright. All those cases are cases where the incidence of the tax was on the vendor. I am talking about the effort to impose a tax directly upon the United States as a purchaser.

MR. WRIGHT: Yes, that would be invalid.

QUESTION: That's right.

MR. WRIGHT: That would come within the Buck Act exemption.

QUESTION: That's 107, isn't it.

MR. WRIGHT: Yes, that's 107.

QUESTION: How do you reconcile that with your answer to Mr. Justice Marshall when you said that they could levy a tax on the sales made in the Officers Club.

MR. WRIGHT: Well, sales made in the Officers Club are not at issue here because we do have a regulation which exempts the military clubs. This is the same regulation they complain about, exempts all the sales they make from retail sales taxes, that's a 5 percent tax, and the regulation also exempts the clubs, exempts the clubs from the gallonage tax that the State imposes on retailers for the privilege of making retail sales. Those taxes on those privileges the military clubs are exempted from.

Now, this tax, the wholesaler's tax is levied on a business that those clubs don't engage in; it is levied on the business of making wholesale sales of liquor in Mississippi and distributed in Mississippi. That's a function that the

military clubs do not perform, the tax is not laid on them; it is laid on the distillers whom the State permits to perform it. Now, that is the situation where you don't --

QUESTION: At the military clubs, if I go in as an officer to purchase a drink, ordinarily in most bars there is a 5 percent sales tax.

MR. WRIGHT: Right.

QUESTION: But there's an exemption for purchases I make at the bar of a military club, is that right?

MR. WRIGHT: Yes.

QUESTION: And then you say there is also an exemption, you said a retail exemption of what kind?

MR. WRIGHT: Yes. Mississippi has a retailer's tax, a gallonage tax --

QUESTION: An excise tax?

MR. WRIGHT: It's an excise tax on the privilege of selling liquor at retail.

QUESTION: And there is an exemption for that, is that it?

MR. WRIGHT: Yes.

QUESTION: And the only one they do collect is this one?

MR. WRIGHT: Yes. There is a $2.50 a gallon tax.

QUESTION: If I'm in uniform, I can still get a cheaper drink at an Officers Club than I can at any other bar

in Mississippi.

MR. WRIGHT: The record is clear that the exemptions in the regulations permitted the clubs both to buy liquor cheaper than any civilian retailer of liquor in Mississippi can buy it, and to sell it cheaper and to still make profits. And there was no proof that those profits that were so made were inadequate for any Federal purpose.

QUESTION: You want two million more.

MR. WRIGHT: How's that?

QUESTION: You just want two million more, $2 million more.

MR. WRIGHT: We have that collected from the distillers. Theyare suing Mississippi to get back from them taxes which were collected from the distillers and were passed on all the way down the line to the people who drank the liquor. As far as that goes, the ultimate burden, of course, of any excise tax, falls on the drinker.

QUESTION: So whichever way it goes, the drinker pays it.

MR. WRIGHT: Right.

QUESTION: As he should.

QUESTION: As he should, Justice Brenner says.

MR. WRIGHT: That much is clear with respect to any excise tax.

QUESTION: I am sure he is restricting that to whisky.

MR. WRIGHT: Now, I just want to say a word about this alleged conflict between the Federal procurement policy and the State's policy. Now, this regulation, the military regulation we are talking about, is one which does not even purport to implement the Armed Services Procurement Act. It's a regulation issued under the Draft Extension Act, the act extending the manpower draft, in 1951, which doesn't mention taxes, doesn't say anything about standards for the Federal procurement of supplies.

Now, one thing more I wanted to -- there is, there is therefore no Federal statute that is in conflict with anything the State is doing here. There is one thing more I want to add, that the military's own regulation provides that these retailers can't sell at prices more than 10 percent lower than what the civilian retailers in the same area are charging. So that the only effect of giving the military an even lower price than what they now get would simply to be to increase the profits of the military retailers at the expense of State revenues.

Now, only one thing more I want to point out, as far as the Constitution is concerned, there certainly is no conflict between the 10th Amendment and the supremacy clause. The 10th Amendment is now the State source of taxing powers. States have been taxing, putting excise taxes on sales of liquor ever since they were colonies. The first one was laid

by the Massachusetts colony in 1646, and at the time the Constitution was adopted, revenue from liquor sales was an important source of revenue for all those States.

What you are talking about here is not depriving the United States of any right it may have to tax liquor. It, too, can tax liquor for its purposes. But what the Government is arguing here is that the State cannot tax liquor sales that are made to these military clubs, although this whole wholesale excise taxation is historically a right they were exercising and it was preserved to them when the 10th Amendment was adopted . If the 10th Amendment means anything at all today, it certainly means that the State's right to tax liquor was not impaired by any other provisions of the Constitution.

I want to say one word about the Agricultural Bank case. As counsel pointed out, it is not a constitutional tax immunity holding; it has really nothing to do, as I see it, with the problem you are presented here, which deals with the taxation of liquor and rests on an entirely different base than the taxation of national banks. What McCulloch v. Maryland did, of course, was Maryland did try to impose a tax on the creation of currency by the Bank of the United States. They wanted the State banks to have the only right to create currency. That's the kind of State tax that very clearly impairs a Federal function. And there is no such impairment involved here at all. The tax has been laid on these wholesale

sales, doesn't prevent these military clubs from doing anything that they are authorized and expected to do, buy and sell liquor cheaper than anyone else and earn a profit on the sale.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Smith?

REBUTTAL ARGUMENT OF STUART A. SMITH ON BEHALF OF THE APPELLANT

QUESTION: May I just ask, Mr. Smith, I'm clear, am I not, that if the Government is wrong and the legal incidence of this tax is on the wholesalers, you lose.

MR. SMITH: No, not necessarily. We have other arguments. We have an argument that the tax as imposed effects a discrimination against the United States. That's covered in our brief. Essentially what it's pointed at is that if the legal incidence of the tax is on the wholesaler, assuming arguendo, then you have a situation where the wholesaler is told by the State of Mississippi, if you sell to us, the State, you don't have to pay any tax; if you sell to the Government, you've got to pay a tax.

Now, the Court has held in Phillips v. Dumas School District and Moses Lake Homes that you cannot levy a tax which is discriminatory against those with whom the Government deals.

QUESTION: That issue, of course, wasn't addressed below.

MR. SMITH: That issue was addressed below, Mr. Justice Brennan. It was not discretely briefed in the way that I --

QUESTION: No, no. I mean, was it addressed in the court opinion below?

MR. SMITH: Yes, it was. Look at page 36a of the district court opinion. It says here at the end, "There being no discrimination against the Federal Government within the State's tax scheme," you look at his footnote and the district court was aware of these cases, but felt --

QUESTION: Also, you separately argue that it would violate the procurement policy.

MR. SMITH: Yes, absolutely. And this is an extraordinary situation where the State of Mississippi is telling the Federal Government, "You have to buy a commodity at a price that we are setting, and in any event, we are also going to tell you -- we limit your sources of supply."

If you look at page 63 of the appendix, the State of Mississippi Alcoholic Beverage Control Division wrote a letter to all vendors which said, "The choice is granted to the purchasing direct from the distiller (and they are underlining) or from the Alcoholic Beverage Control Division of the State Tax Commission. Purchases are not to be placed with any other source." This is an extraordinary situation where a State is telling the Federal Government that its choice with respect

to buying commodities is to be limited in terms of source and as well as in terms of price.

QUESTION: Would you say, for example, if you want to truck it in from Texas, this says you can't.

MR. SMITH: You can't do it.

QUESTION: Do you think that argument goes for the concurrent bases, too?

MR. SMITH: Sure. Sure.

QUESTION: Despite the 21st Amendment.

MR. SMITH: Well, you know, I would simply suggest that this is really almost a concomitant of the doctrine that the Federal Government is immune from State taxation. The Federal Government has to function in a way which is free from interference by States. I mean, the Court has held that in --

QUESTION: Doesn't the 21st Amendment have some relevance to it?

MR. SMITH: I would suggest the 21st Amendment has some relevance. You cannot make an assertion like that without considering the 21st Amendment. But I think that the policy of the 21st Amendment, that is, to police the morals of civilian population, I don't think are applicable here where the military subjects its service personnel to rigid discipline and ensures to the best of its ability that these commodities which come in, including alcoholic beverages, will not be diverted to the civilian population.

I don't have anything else to say.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:56 p.m., the oral argument in the above-entitled matter was concluded.]