INTOXICATING LIQUOR: Liquor tax provided in Section 4900, R. S. Mo. 1939, to be paid before sale or delivery in the State of Missouri for Naval areas in the State of Missouri.

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August 9, 1945

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Honorable Edmund Burke, Supervisor
Department of Liquor Control
State of Missouri
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your letter of July 31, 1945, requesting our opinion. Your letter of request is as follows:

"The U. S. Navy has established a Merchandise Service office, U. S. Navy, 342 Madison Avenue, New York, New York, which procures for commissioned officers' messes intoxicating liquor for the use of the officers' messes.

"The Navy claims that the State of Missouri is without authority to charge any tax such as provided by Sec. 4900, R. S. Mo., 1939, on whiskey purchased by the Merchandise Service office and shipped directly the distributor to the commissioned officers' mess located at Naval Air Station, St. Louis, Missouri, and the commissioned officers' mess, Coast Guard Barracks, St. Louis, Missouri, respectively.

"I enclose herewith a copy of a letter from H. J. Donnelly, Jr., Commander, USNR, setting out in detail the Navy plan above referred to. Will you please let me have your opinion as to whether

or not the Department of Liquor Control should require the tax provided by Sec. 4900, R. S. Mo., 1939, on intoxicating liquor purchased through the Merchandise Service office, U. S. Navy, above referred to and shipped by the wholesaler to the two officers' messes above mentioned?"

For the purposes of this opinion it may be assumed that the State of Missouri is without authority to regulate the United States Navy or its instrumentalies; that under Article I, Section 8, Clause 17 of the United States Constitution, the Federal government has exclusive jurisdiction over areas purchased by the Federal government, with the consent of the State Legislature, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; that under Article IV, Section 3, Clause 2 of the United States Constitution, Congress has the power to make all needful rules and regulations respecting property belonging to the United States; and that such areas, being integral parts of the government, are not subject to taxation or other regulation by the several states. Mayo v. United States, 319 U. S. 441; Ohio v. Thomas, 173 U. S. 176; Johnson v. Maryland, 254 U. S. 51; see also Federal Land Bank v. Bismarch Lumber Co., 314 U. S. 95; U. S. v. Query, 121 F. (2d) 631.

Upon investigation and for the purposes of this opinion, we find that the Coast Guard Barracks, St. Louis, Missouri, is not contained in the legal description of the territory ceded by the State of Missouri to the United States for naval purposes, as contained in the Missouri Laws of 1943, page 628, and for the purposes of this opinion we concede only that the United States has been granted exclusive jurisdiction over land within the boundaries of the State of Missouri for naval purposes, known as the Naval Air Station, located in St. Louis County, Missouri, and more particularly described in Subsections a and b of Section 1, Missouri Laws of 1943, page 629.

However, we find that the Legislature of the State of Missouri, in ceding exclusive jurisdiction to the United States for all purposes, has saved and reserved, to the State of Missouri, the right of taxation, which is found in the Act of the Session Laws of Missouri 1943, page 630, which provides as follows:

> "Exclusive jurisdiction in and over said lands so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; * *"

The State of California, by legislative act, ceded exclusive jurisdiction to the United States to several tracts of land in the State of California, for park purposes, reserving, however, to the State of California the right to serve civil or criminal process and further, the right to tax persons and corporations, their franchises and property on the lands included in said parks. Subsequently, a question arose as to the excise tax provisions of the alcoholic control act, laying a tax at a specified rate per unit sold on beer, wine and distilled spirits sold "in this state." The park company, by contract with the Department of Interior, enjoyed the franchise and controlled all the concessions within the park. The company urged, because the State of California had ceded exclusive jurisdiction to the United States, giving up their power to regulate intoxicating liquors within the ceded area, that the taxing features were such a part of the regulatory features that they could not be separated and given effect. The case was determined by the United States Supreme Court in Collins v. Yosemite Park & Curry Co., 58 S. Ct. 1009, l. c. 1017, which held as follows:

> "* * * Thus the argument is made that section 23, St. 1937, p. 2143, imposes an excise tax on beer and wine sold by an importer, and applies not to the Company, which sells beverages direct to consumers, but only to importers licensed under the Act, and restricted by their license to sales to retail licensees.
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> "Neither party cites any pertinent state court decision. There is nothing in the statute itself compelling the conclusion that the excise tax and regulatory provisions are inseparable, or requiring the Court to overturn the presumptively correct determination of the administrative officers that the sales within the Park are subject to the excise tax. Section 23 provides that

an excise tax is imposed upon beer and wine sold 'in this State by (an) * * * importer.' Reference to provisions of the Act defining the terms used in this section makes it plain that although appellee Company does not import beverages into California within the meaning of the Twenty-First Amendment, U. S. C. A. Const. Amend. 21, it is an importer for purposes of the Act, and, as such, is subject to the tax. The Act is restricted to sales 'in this State,' but that term embraces all territory within the geographical limits of the State. There is nothing in the Act restricting this taxing provision to sales made by or to persons licensed under the Act. Section 23 clearly applies to beer and wine sold by appellee Company in the Park, and it applies to such sales regardless of the applicability vel non of the regulatory or licensing provisions of the Act.

"Section 24, St. 1937, p. 2144, imposes an excise tax upon all distilled spirits 'sold in this State by rectifiers or wholesalers.' Appellee Company does not come within the statutory definition of either of these groups, but Sec. 24 must be read in conjunction with section 33, St. 1937, p. 2153. Section 33 provides that the 'tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected from rectifiers and wholesalers of distilled spirits and payment of the tax shall be evidenced by stamps issued by the board to such rectifiers and wholesalers,' and continues with the provision that 'in exceptional instances the board may sell such stamps to on- and off-sale distilled spirits licensees and <u>other persons</u>.' (Italics added.) In view of the atypical circumstances of the present case, we cannot consider erroneous an interpretation by the board that stamps, to be affixed to the liquor containers, might be issued and sold to appellee Company. These provisions, like sec. 23, are independent of any licensing or regulatory provisions of the Act, and may be enforced independently, as a purely tax or revenue measure.

> "The objection that collection of the taxes may not only interfere with an agency of the United States but may be actually partly collected from the National Government because of its interest in the profits under the contract is fully answered by the fact that the United States, by its acceptance of qualified jurisdiction, has consented to such a tax."

The California alcoholic beverage control act is similar to the Missouri liquor control act. The Missouri liquor control act provides for additional charges to be collected by the Supervisor of Liquor Control, under Section 4900, R. S. Mo. 1939, which provides as follows:

> "(a) For the privilege of selling in the state of Missouri spirituous liquors, including brandy, rum, whiskey, and gin, and other spirituous liquors and alcohol for beverage purposes, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of eighty cents ($.80) per gallon or fraction thereof.
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> "(b) For the privilege of selling light wines, as herein defined, the sum of two cents ($.02) per gallon; and for the privilege of selling fortified wines, as herein defined, the sum of ten cents ($.10) per gallon. The term 'light wines' as herein used, means any fermented wine containing not to exceed fourteen per centum (14%) of alcohol by weight. The term 'fortified wines', as herein used, means all other wines, containing in excess of fourteen per centum (14%) of alcohol by weight.
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> "(c) The amounts required to be paid by this section shall be evidence by stamps or labels purchased from the supervisor of liquor control and affixed to the container of such spirituous liquor. The person who shall first sell such liquor in this state shall be liable

for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

"(d) Any person who sells to any person within this state any intoxicating liquors mentioned in subsection (a) of this section, unless the same be contained in a container stamped or labeled as provided in this act, shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment.

"(e) It shall be unlawful for any person to remove the contents of any container containing any of the intoxicating liquors mentioned in subsection (a) of this section without destroying such container, or to refill any such container in whole or in part with any of the liquors mentioned in subsection (a) hereof. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.

"(f) Every manufacturer, distiller and wholesale dealer in this state, shall, before shipping, delivering or sending out any of the liquors mentioned in subsection (a) of this section, to any person in this state, cause the same to have the requisite denominations and amount of stamps or labels required by this section affixed as stated herein, and cause the same to be cancelled, and shall, at the time of shipping or delivering such liquors, make a true duplicate invoice of the same, showing the date, amount and value of each class of such liquors shipped or delivered, and retain a duplicate thereof, subject to the use and inspection of the supervisor of liquor control and his representatives for two (2) years.

"(g) Any person who shall sell in this state any intoxicating liquor without first having procured a license from the supervisor of liquor control, authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a fine of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, or by both such fine and imprisonment."

Under the Rules and Regulations of the Supervisor of Liquor Control of the State of Missouri, promulgated and adopted on August 16, 1945, page 18, Regulation No. 7, subparagraph (b), page 20, provides as follows:

"No sale or delivery of spirituous liquors or wines shall be made in this State without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof.

"Any spirituous liquor or wine shipped into, sold or offered for sale in this State without such excise or inspection stamps or labels of approximate number and denomination being affixed thereto, shall be deemed to be contraband and shall be by the Supervisor or his inspectors seized and disposed of as such.

"No person other than a licensed distiller, rectifier or wine manufacturer shall possess in this State any spirituous liquor or wines without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof.

"Every non-resident distiller, rectifier, wine manufacturer or wholesaler licensed to do business in this State as a solicitor

> shall affix the proper number and amount of Missouri excise or inspection stamps or labels to the containers of such spirituous liquors or wines before shipment thereof into this State."

In construing the above section, in an official opinion by this Department, dated May 24, 1935, it was held that the person who shall first sell intoxicating liquor to any person, firm or corporation in this state, shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

Section 4932, R. S. Mo. 1939, provides as follows:

> "Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

In construing the above section this department held, in its opinion dated May 24, 1935, supra, that the stamps must be affixed by the outstate permit holder before he transports any spirituous liquor into this state, and that the Supervisor of Liquor Control should sell the outstate liquor dealer the necessary stamps to be so affixed.

The tax stamps as provided for in Section 4900, supra, being paid by the person first selling intoxicating liquor to any person, firm or corporation in the State of Missouri, it could not be said that the tax was being levied on the United States government or one of its instrumentalities directly. In this respect these questions were answered effectively in Graves v. People of State of New York, 59 S. Ct. 595, l. c. 598:

> "It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to

> the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity nc more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

Again, at l. c. 602, 603, and 604:

> "Mr. Justice FRANKFURTER, concurring.
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> "I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to

individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

"For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage. Congress, on the other hand, to lay taxes in order 'to pay the Debts and provide for the common Defence and general Welfare of the United States', Art. 1, Sec. 8, U.S.C.A. Const., can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike

down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

"The arguments upon which McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in McCulloch v. Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id., at page 431 of 4 Wheat. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in McCulloch v. Maryland. The seductive cliche that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative--because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time. Collector v. Day, 11 Wall. 113, 128, 20 L. Ed. 122.

"All these doctrines of intergovernmental immunity have until recently been moving in the

realm of what Lincoln called 'pernicious abstractions'. The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holme's pen: 'The power to tax is not the power to destroy while this Court sits'. Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223, 48 S. Ct. 451, 453, 72 L. Ed. 857, 56 A.L.R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity. Both the Supreme Court of Canada and the High Court of Australia on fuller consideration--and for present purposes the British North America Act, 30 & 31 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, raise the same legal issues as does our Constitution--have completely rejected the doctrine of intergovernmental immunity. In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.

"The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been

> judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. Neither Dobbins v. Commissioners of Erie County, 16 Pet. 435, 10 L. Ed. 1022, and its offspring, nor Collector v. Day, supra, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day."

The tax on intoxicating liquor, as set out in Section 4900, is a nondiscriminatory tax on intoxicating liquor applied at specified rates. It could not be in form or substance a tax upon the United States or its instrumentalities, or its property, nor could it be paid for by the instrumentality or the government from their funds, and the only possible basis for implying a constitutional immunity from the State Liquor Tax on intoxicating liquor sold to a government instrumentality, or one of its agencies, is that the economic burden of the tax is in some way passed on, so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions. The Congress has never mentioned in its legislation, nor can the State of Missouri recognize that the sale or traffic in intoxicating liquor to the Merchandise Service Office of the United States Navy for use in its commissioned officers' messes, is a necessary function of government, or that such tax upon intoxicating liquor would in any manner interfere with the proper functioning of the United States Navy.

In this opinion we do not think it is necessary to go into the question of state interference with shipments through common

carriers originating outside the state and consigned to a commissioned officers' mess located in a federal area that has been ceded by the State of Missouri to the United States Navy for navy purposes. In the case of Johnson v. Yellow Cab Transit Co., 64 S. Ct. 622, the United States Supreme Court held that the State of Oklahoma did not have the power to control liquor transactions on the Fort Sill reservation, having previously ceded said territory to the federal government for military purposes. However, the State of Missouri does not presume any power to enforce regulatory measures under its police powers in the territory in which it has ceded exclusive jurisdiction to the Navy, and the regulatory features of the Missouri Liquor Control Act are separable from the taxing features, and the taxing features of the Liquor Control Act are in full force and effect in the ceded territory, as much as if no act of cession had been made.

CONCLUSION

Therefore, it is the opinion of this Department that the tax provided for in Section 4900, R. S. Mo. 1939, must be paid on all spirituous liquors or wines before such spirituous liquors or wines shall be sold or delivered in the State of Missouri for or to the Naval Air Station or Coast Guard Barracks in St. Louis, Missouri.

Respectfully submitted,

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APPROVED:

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AVO:CP