Tulsa Law Review

Volume 10
Issue 1 *Dedicated to John Rogers*

1974

The Federal Enclave Problem: A Case Note on United States v. Mississippi Tax Commission

Bruce Peterson

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Bruce Peterson, *The Federal Enclave Problem: A Case Note on United States v. Mississippi Tax Commission*, 10 Tulsa L. J. 104 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol10/iss1/11

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE FEDERAL ENCLAVE PROBLEM: A CASE NOTE ON *UNITED STATES v. MISSISSIPPI TAX COMMISSION*

Bruce Peterson*

United States v. Mississippi Tax Commission, 41 U.S.L.W. 4774 (U.S. June 4, 1973) resulted in the failure of the Mississippi Tax Commission getting a man on base in the first of what may go as a three-game series.

The Facts. In 1966 the State of Mississippi passed a local option law, thus repealing the former "dry" status of the state. The Mississippi law vested the Tax Commission as the exclusive wholesalers of all alcoholic beverages within the state, "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State . . . ."[1] The Tax Commission was also given authority to add to the cost of such beverages an amount equal to cover the cost of operations of the state wholesale liquor business, to make it competitive with surrounding states, and render a profit. The Tax Commission marked up distilled spirits 17 per cent and wines 20 per cent.

Prior to 1966, officers' clubs, post exchanges and ships stores purchased their liquor direct from distillers located outside of the state. Following repeal of Mississippi's prohibition these nonappropriated fund activities were permitted the option of either purchasing liquor from the Mississippi State Tax Commission, or direct from the distiller; but in either event the state markup was imposed. These nonappropriated fund activities continued to purchase direct from the out-of-state distiller, who in turn added the markup to the cost of the liquor. To this the Government protested, but such protest fell on deaf ears in the Tax

* Professor of Law, College of Law, The University of Tulsa; B.S., LL.B. University of Oklahoma; LL.M. New York University.

This article previously appeared in THE ARMY LAWYER, DA Pamphlet 27-50-13, January, 1974. Reprinted by permission of the Judge Advocate General's School.

1. Miss. Code Ann. § 10265 *et seq.* (Cum. Supp. 1972).

Published by TU Law Digital Commons, 1974

Commission. Then the Government sought to pay the markup into an escrow fund pending judicial determination of the legality of the markup. This arrangement was of no avail, and the nonappropriated funds continued to pay the markup under protest. Finally, in November, 1969, the United States sought a declaratory judgment and injunctive relief against the collection of the markup by the Tax Commission from the out-of-state distillers and for reimbursements of the amounts paid under protest for the period 1966-1969. Four United States military installations were involved: Keesler Air Force Base and the Naval Construction Battalion Center, over which the United States exercised exclusive jurisdiction; and two installations over which concurrent jurisdiction existed by both the United States and the State of Mississippi, Columbus Air Force Base and the Meridian Naval Air Station.

How the Lines Were Drawn. The Government in its brief, both at the district court and Supreme Court level, argued that as to the two bases over which the United States exercised exclusive jurisdiction, article I, section 8, clauses 14 and 17 of the United States Constitution prohibited state regulation without the express consent of Congress. As to the two concurrent jurisdiction installations, the Government contended that the markup constituted an unconstitutional tax on a federal instrumentality[2] interfering with federal procurement regulations and policy established by the Department of Defense.[3] Mississippi, on the other hand, placed all their eggs in one basket and relied solely on the twenty-first amendment to the Constitution. The second section of the twenty-first amendment reads as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The three-judge district court bought the rationale of the Tax Commission and held that the markup was not an unconstitutional foray into the federal domain.[4] The district court took a rather novel approach as to the two bases over which the United States exercised exclusive jurisdiction. This was necessary in order to avoid prior Supreme Court decisions. The Supreme Court in *Collins v. Yosemite Park Co.*[5] held that the twenty-first amendment did not grant Califor-

2. McCulloch v. Maryland, 4 Wheat. 316 (1819).
3. 32 C.F.R. § 261.4(c).
4. United States v. State Tax Commission of the State of Mississippi, 340 F. Supp. 903 (S.D. Miss. 1972).
5. 304 U.S. 518 (1938).

nia power to prevent the shipment of liquor into and through her territory destined for distribution and consumption in a national park over which the government exercised exclusive jurisdiction. The Court said that this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the amendment. This ruling was later characterized by the Court as holding "that shipment through a state is not transportation or importation into the state within the meaning of the Amendment."[6]

Faced with these decisions the three-judge federal district court found that neither Keesler Air Force Base nor the Naval Construction Battalion Center, the exclusive jurisdiction installations, had promulgated any regulations concerning the transportation of liquor purchased on the reservations into the State of Mississippi; and in fact that patrons authorized to purchase from the beverage stores did transport the liquor into the state and consume it there. Thus, the district court held, *Collins* was not applicable as delivery and use was restricted to the park in that case.[7] As to the two installations, Columbus Air Force Base and Meridian Naval Air Station, over which the United States and the State of Mississippi exercised concurrent jurisdiction, the district court relied on Supreme Court decisions involving state minimum price laws. In one of these cases *Penn Dairies Inc. v. Milk Control Comm. of Pennsylvania*[8] minimum prices were placed on the sale of milk by dealers under the Pennsylvania Milk Control Act. Renewal of one dealer's license was denied because he sold milk in violation of the minimum price pursuant to a contract with the United States for milk to be consumed by troops stationed at a camp situated on land belonging to the State of Pennsylvania and over which there had been no surrender of state jurisdiction or authority. The Supreme Court held that the statute was applicable with respect to these sales and the state could properly enforce its policy by denying the dealer a renewal of its license. The state law did not conflict with the legislation of Congress requiring competitive bidding in the purchase of supplies for the Army. Superimposed on this decision were subsequent pronouncements by the Supreme Court that hardly clarified a hitherto murky area. In a near companion case with *Penn Dairies,* the Supreme Court

6. Carter v. Virginia, 321 U.S. 131, 137 (1944), Johnson v. Yellow Cab Co., 321 U.S. 383 (1944), aff'g 137 F.2d 274 (10th Cir. 1943). Comments, 72 HARV. L. REV. 1145 (1959), 27 N.Y.U.L. REV. 127 (1952).

7. *Supra* note 4 at 907.

8. Penn Dairies Inc. v. Milk Control Comm. of Pennsylvania, 318 U.S. 261 (1943).

held that a state cannot apply its regulations fixing a minimum price for milk sales consummated on an Army base which was subject to exclusive federal jurisdiction.[9]

In 1963 the Supreme Court, in *Paul v. United States*,[10] held that the State of California could not enforce its law fixing a minimum price on the sale of milk at wholesale with respect to milk sold to the United States at military installations for strictly military consumption and for resale at federal commissaries. The enforcement of such a minimum price law was found to conflict with the provisions of federal law regulating the procurement of all basic provisions by the armed services where appropriations of federal funds were involved. The statutes required competitive bidding and the awarding of the contract to the lowest responsible bidder. The Court distinguished *Penn Dairies* holding that subsequent to this decision there had been a comprehensive revision of the laws governing procurement of supplies and services by the War and Navy Departments. However, the Court did hold in *Paul* that purchases by the United States of milk for resale at military clubs and post exchanges—purchases not made out of appropriated funds and hence not controlled by federal procurement policy—were subject to minimum price laws in effect when the United States acquired the land for a military installation.

The district court, pinning its hopes on the second section of the twenty-first amendment, sent their progeny on to Washington, D.C. via certiorari without probing the other two issues raised by the Government, i.e., whether the markup constituted a tax on a federal instrumentality immune from taxation or was in conflict with the federal procurement regulations and policy, and thus in violation of the Supremacy Clause.

In the Halls of the Supreme Court. Hampered by the narrowness of the lower court's opinion, the Court held that the twenty-first amendment did not cut as wide a swath as the district court envisioned. The Supreme Court's treatment of the exclusive jurisdiction federal enclave problem has not always been necessarily consistent.[11] The Court's opinion in the instant case centered around two facets: first the scope of the twenty-first amendment, and second the status of the federal enclave over which the Government exercised exclusive jurisdiction.

As to the first point, the Court reiterated the rule that the twenty-

9. Pacific Coast Dairies v. Dept. of Agriculture of Calif., 318 U.S. 285 (1943).
10. 371 U.S. 245 (1963).
11. Evans v. Cornman, 398 U.S. 419 (1970).

first amendment conferred something greater than the conventional state police power as to the importation of liquor destined for use, distribution or consumption within the borders of a state.[12] Thus the limitations otherwise imposed by the Commerce Clause are simply not present where intoxicants are destined for use, distribution, or consumption within the state.[13] Following the rationale of the *Collins* case,[14] the Supreme Court concluded that shipment of liquor from an out-of-state wholesaler to a military installation over which the United States exercised exclusive jurisdiction did not give rise to a nexus or event vesting the state with regulatory jurisdiction. The Court pointed out that the markup was not directed toward regulation of the use, consumption or disposition of liquor within the State of Mississippi, to which the second section of the twenty-first amendment is directed, but rather runs afoul of the provisions of article I, section 8, clause 17 of the Constitution regarding the exclusive federal legislation with respect to such territory.

As to the two concurrent jurisdiction military facilities, the scope of article I, section 8, clause 17 was found inapplicable. Interestingly enough, at the Supreme Court level the State of Mississippi asserted the view that the markup was for all intents and purposes a sales tax, and that Section 105(a) of the Buck Act[15] consented to the imposition of such a tax on the sale by wholesalers to the federal instrumentality. In reversing and remanding the case to the district court, the Supreme Court specifically directed the lower court to explore the parameters of the Buck Act, and specifically Section 197(a) that deals with various exceptions to the consent provisions. Section 107(a) states that the general consent provisions of the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. . . ."

What on Remand? In this next series it is possible that the Mississippi Tax Commission may get a man on two bases—and it is remotely possible that they may get a man on all four bases. The second issue that the district court is going to have to look into is that of the possi-

12. California v. LaRue, 409 U.S. 109, 114-15 (1972); Seagram & Sons v. Hostetter, 384 U.S. 35, 41 (1966).
13. On questions tried under the Commerce Clause and the twenty-first amendment with respect to the power of the state to control the transportation of liquor through and out of their respective jurisdictions, see Ziffren v. Reeves, 308 U.S. 132 (1939); Duckworth v. Arkansas, 314 U.S. 390 (1941).
14. *Supra* note 5.
15. 4 U.S.C. §§ 105-10.

bility of a conflict regarding the markup and the federal procurement regulations and policy. In the dissenting opinion of Mr. Justice Douglas, joined in by Mr. Justice Rehnquist, the impact of the Buck Act is emphasized and Justice Douglas points out that, even viewing the markup in the worst possible light, as a sales tax, the legal incidence of this tax is not on an instrumentality of the United States, but rather on the wholesaler. The dissenting opinion appears to have taken the view that officers' clubs, ship stores, and post exchanges are in fact federal instrumentalities. This squares with a 1942 Supreme Court decision.[16]

The district court has some interesting options. First, as to the two exclusive jurisdiction bases, the Supreme Court has precluded the use of the twenty-first amendment on which to bottom the markup. Should the district court determine the markup not to be a tax on the wholesaler allowed by the Buck Act, then the Tax Commission strikes out twice. But should the court determine the markup to be a sales tax, then it's a new ball game. They must then turn their attention to Section 107(a) of the Buck Act and ascertain whether the markup is removed from the consent provisions of Section 105(a). Even should this come to pass, a final hurdle remains with the lower court's determination of whether or not the markup provisions are in conflict with federal procurement regulations and policies.[17] The lower court looked into this aspect of the case in the first instance, but reached no definitive conclusions.

As to the two concurrent jurisdiction enclaves, the district court must ignore the twenty-first amendment, as the Mississippi scheme is not designed to prevent the illegal diversion of liquor into the state, but is couched rather undeniably in revenue measure terms. The safest successful approach for Mississippi would be through Sections 105(a) and 107(a) of the Buck Act if the markup is deemed by the lower court to be a tax on the sale by the wholesalers to the federal instrumentality. Even if no sales tax is found, such a markup would presumably still be constitutional as legitimate state regulation—subject then only to a finding that such practice did not conflict with federal procurement regulations or policies.

Assuming that the lower court should find that the markup does

16. Standard Oil Co. v. Calif., 316 U.S. 481 (1942), held that a U.S. Army post exchange was to be regarded as a federal instrumentality for the purpose of a California law which exempted from the state gasoline sales tax "sales to the government of the United States or any department thereof for official use of said government."

17. 50 U.S.C. App. § 473. The Secretary of Defense implemented this statute by issuing Department of Defense Directive 1330.15, (32 C.F.R. § 261.1-261.5).

Peterson: The Federal Enclave Problem: A Case Note on United States v. Miss

not constitute a tax within the meaning of the Buck Act, thus precluding the markup on installations over which the United States exercises exclusive jurisdiction, but authorizing such regulation as to concurrent jurisdiction installations, it could result in a knot of truly Gordian proportions.[18] Many of the larger military installations are comprised of both exclusive and concurrent jurisdiction land. Location of housing, clubs and bars then might be of major importance, insofar as state regulation is concerned.

18. The Commission of Intergovernmental Relations: A Report to the President (June, 1955), 237. For an excellent analysis of the enclave problems, see Note, 101 U. PA. L. REV. 124 (1952).

Published by TU Law Digital Commons, 1974