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Milton P. Rice

R. Wayne Estes

SALES AND USE TAXES AS AFFECTED BY FEDERAL GOVERNMENTAL IMMUNITY

MILTON P. RICE* AND R. WAYNE ESTES**

Sales and use taxes, since their advent in the early 1930's as significant state revenue producing measures have, like all other state levies, found themselves subject to certain restrictions imposed by the Constitution of the United States. While the constitutional inhibition of greatest significance for most persons subject to these taxes has probably been the one posed by the commerce clause, or its first cousin the due process clause, an obstacle of no mean proportion to the states has been one not expressly mentioned or even alluded to in the Federal Constitution,[1] yet this barrier is as much a part of the organic law of the nation as is the commerce clause, the due process clause, or any of our other constitutional components affecting state revenue systems.

We refer of course, as the title of this article would indicate, to the doctrine of governmental immunity as enunciated in an early case decided by the United States Supreme Court, *McCulloch v. Maryland.*[2] The decision of the Court in that case and the opinion therein by the renowned Chief Justice Marshall, is so deeply rooted in American jurisprudence that it can truly be said to constitute a cornerstone of our constitutional law. Too, it is just as peculiar to the American political system as any of the specific provisions of the Constitution and possibly even more noteworthy, since its foundation lies in the scheme of dual sovereignties evolved by the founding fathers, itself one of the most extraordinary governmental designs ever contrived by political artisans.

The Basis Of The Immunity Doctrine

It is quite unnecessary here to recount familiar history in relating the background of the creation of the Government. It is perhaps beneficial to observe that it represented a compromise between the respective views of proponents of a strong centralized federation on one hand, and advocates of a loose confederation of several sovereign states on the other. The end product as we know became a constitutional union of separate sovereigns, with paramount but sharply limited powers in the central government, and all residual powers in

* Assistant Attorney General, State of Tennessee.
** Associate Editor, Vanderbilt Law Review.

1. Helvering v. Gerhardt, 304 U.S. 405, 411 (1938).
2. 17 U.S. (4 Wheat.) 316 (1819).

the various state governments. Each was to be supreme within its own sphere.[3] Every point in the United States, save the seat of the central government, thus became subject to two sovereigns—the United States and the particular state within which it lay, with the latter part of, yet independent of, the former.

With the concept of state sovereignty so firmly embedded in the Constitution, the states themselves so diverse in political background and culture, and feelings of local autonomy so strong among them, one might well wonder at the fact that it was more than thirty years after the formation of the Government that the Supreme Court was called upon to determine the taxability of one sovereign by another, since perhaps the prime characteristic of any sovereign has always been considered the right to tax.

The issue came to a head in simple and direct fashion when the State of Maryland by legislative enactment levied a tax purporting to cover all banks or branches of banks not chartered by the Maryland Legislature, and sought to apply it to the Baltimore branch of a Philadelphia bank operating under a charter granted by the Congress of the United States. Maryland's imposition of the tax was challenged by the contention that a state could not constitutionally tax an instrumentality of the United States, which contention was countered by the assertion of the state that the denial of its right to tax, that right being the "highest attribute of sovereignty" would be an invasion of state sovereignty unwarranted by the Constitution and never intended by its framers.

Chief Justice Marshall's lengthy opinion struck down the tax as invalid and enunciated his doctrine that the federal government is by constitutional implication immune from state taxation. The singnlar federal-mindedness of Marshall nowhere appears more clearly than in the following excerpt from his classic opinion:

> "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."[4]

Had the learned Chief Justice concluded thus without more, we think it probable that the way might have been left open for a more orderly and realistic adjustment of federal-state fiscal relations than proved to be the case following the epochal decision. Regardless of how

3. See Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926); ROTTSCHAEFER, CONSTITUTIONAL LAW 97 (1939); 51 AM. JUR., *Taxation* § 218 (1944).

4. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). The Court here was reacting to a threat against the Union. "Marshall's fierce loyalty to the Union caused him to respond with brilliant logic and eloquent prose. . . ." Ratchford, *Intergovernmental Tax Immunities in the United States*, 6 NAT'L TAX J. 305, 307 (1953).

offensive the concept of federal immunity may have been to the idea of state sovereignty in the early days of republic, even in regard to instrumentalities created by Congress, the necessity for such a conclusion is of course obvious today in the light of logic, orderly government and experience. Probably no responsible person would today contend that any of the states should enjoy the right to subject the supreme sovereign, or any of the instrumentalities created by it to carry out its purposes, to direct state taxation.

Marshall, however, thought it necessary to buttress his conclusion with the observations that "the power to tax involves the power to destroy" and that "the power to destroy may defeat and render useless the power to create."[5] Such comments were probably relevant enough in the setting which gave rise to them, but subsequent developments have tended to give them a force and vitality altogether apart from their context. In the words of Justice Frankfurter of the present Supreme Court, "this dictum was treated as though it were a constitutional mandate."[6] Five years after the decision in *McCulloch v. Maryland,* the same Chief Justice Marshall found himself with a second opportunity to express himself on the identical question.[7] The State of Ohio, in an 1819 Act admittedly aimed at excluding federal banks from its borders, had levied an annual tax of $50,000 upon each office of banks transacting business in Ohio other than in compliance with Ohio laws, authorizing summary means of collection. In defending its legislative enactment the State of Ohio attempted to draw a distinction between the officers of a federal bank and government agents of public institutions such as the mint or post office, likening the connection of the Government with the bank to its relationship with private contractors, and sought a revision of the doctrine laid down in *McCulloch v. Maryland.*

Said Marshall:

> "It will not be contended that the directors, or other officers of the bank, are officers of the government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for so doing? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control."[8]

5. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).
6. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 489 (1939) (concurring opinion).
7. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).
8. *Id.* at 866, 867.

It is rather evident from this language, again purely dictum, that Marshall conceded to the states only the right to levy ad valorem taxes upon the property of private individuals employed in governmental activity.[9] He manifestly conceived that any kind of state taxation which tended to burden government activity, through whatever means performed, was an attempt by the states to regulate those activities, and therefore in derogation of the national sovereignty. Whether Marshall's attitude would have remained the same had he been able to visualize the conditions of the present century is a matter upon which it would be useless to speculate. The fact is, however, that the strong feelings of the great jurist with respect to federal sovereignty[10] and the reasoning and analogy which he chose to employ in the Maryland and Ohio decisions effectually foreclosed for the next hundred odd years any chance on the part of the states to secure revenues from or on account of any transaction to which the government was a party.

A Century Of Rigid Application

Once crystallized in the *McCulloch* and *Osborn* decisions by the fluent absolutism of John Marshall, the doctrine of federal immunity was applied with inexorable sternness in ensuing years as the prestige of the national government rose and the concept of federal supremacy became more fixed in the popular mind. Yet still another trend of thought came to assume prominence in the judicial approach to state taxing jurisdiction, one destined to bear with especial heaviness upon the type of taxes with which we are here concerned. It too was occasioned by an overzealous endeavor of the State of Maryland to obtain revenue, and it likewise was birthed by the strong-willed Chief Justice Marshall.[11]

Maryland had undertaken to require importers of foreign articles or commodities to take out a $50.00 license before being authorized to sell such goods at wholesale. The taxing statute was challenged as contravening the constitutional provision forbidding states to levy imposts or duties on imports or exports.

In striking down the tax, Marshall said:

> "All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself . . . a tax on the occupation of an importer is, in like manner, a tax on the importer. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution."[12]

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9. *Ibid.*
10. Ratchford, *supra* note 4, at 307.
11. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).
12. *Id.* at 444.

Thus, between 1819 and 1827—a span of only eight years—three principles had become a part of our constitutional law with regard to state taxation, principles which were to form the basis for the complete immunity from state excise taxation enjoyed by the federal government and those with whom it dealt prior to the late 1930's.

First, *McCulloch v. Maryland* had established the immunity of federal instrumentalities from state taxation upon their activities. Second, the dictum in *Osborn v. Bank of the United States* had declared to be beyond state taxing jurisdiction sales to government agencies. And third, *Brown v. Maryland* had identified sales with the business of selling to the extent that a tax upon the business of selling was rejected as bad in cases where a tax upon the vended thing or service itself would be invalid under the Constitution.

These precepts taken together appeared to add up to the idea that the states were prohibited from levying in any form a tax, the identifiable economic burden of which would be cast upon the federal government. This became quite clear in the 1842 decision in the case of *Dobbins v. Commissioners of Erie County*,[13] where the high court condemned an effort by officers of Erie County, Pennsylvania to assess an income tax upon a resident captain of a United States revenue cutter. Said the Court: "To allow such a right of taxation to be in the states, would also be in effect to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress."[14]

Perhaps the most startling example of the length to which the immunity concept carried is found in a series of cases involving state attempts to levy taxes upon telegraph companies. Congress, in the early days of the telegraph, to encourage the erection of telegraph lines, had authorized telegraph companies to use United States military and post road rights of way and the public domain and to cross navigable streams and waters, in return binding the companies to accord the Government precedence in the use of their wires for public business, at rates fixed by the Postmaster General.[15] The transmission of government messages came to comprise a substantial portion of the telegraph business. Concurrently, the various states began to look upon the expanding telegraph companies as sources of revenue.

The State of Texas, having one hundred and twenty-five (125) offices of the Western Union Telegraph Company within its borders, undertook to levy a tax of one cent (1¢) upon every full rate message and one-half of one cent upon each less than full rate message transmitted by every chartered telegraph company doing business in the state. The

13. 41 U.S. (16 Pet.) 435 (1842).
14. *Id.* at 448.
15. See Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).

Western Union Company resisted collection of the tax both on the ground that it contravened the commerce clause with respect to messages sent from points within Texas to points without, and that as it applied to government messages it was imposed upon an agency chosen by the Government for the execution of its powers.

The Supreme Court invalidated the tax as being upon operations beyond the taxing jurisdiction of Texas, sustaining the taxpayer upon both grounds of asserted invalidity.[16] In so holding the Court predicated its decision upon *McCulloch v. Maryland*[17] and *Brown v. Maryland*.[18] Interestingly, and in contrast with some of its later decisions, it had determined the incidence of the tax by looking entirely to the measure. Though conceding that Texas had the right to tax intrastate private business carried on by the company, it regarded the tax as imposed as being upon the messages sent, rather than the overall doing of business. With respect to the governmental immunity aspect of the case the Court speaking through Chief Justice Waite stated: "As to the government messages, it is a tax by the state on the means employed by the Government of the United States to execute its constitutional powers and, therefore, void."[19]

The zenith of the immunity doctrine probably was reached, however, thirty years later, in 1912 when the court decided the case of *Williams v. Talladega*.[20] That case involved a municipal ordinance of the City of Talladega, Alabama which provided that "each person, firm, or corporation commercially engaged in business sending messages to and from the City to and from points in the State of Alabama for hire or reward" should be required to take out a one hundred dollar license. For operating without having done so, the agent of the Western Union Company located there was convicted in the Municipal Court and fined. Defense to the prosecution was made upon the ground that the license ordinance was imposed upon the entire business done by the company and made no exception as to the sending of government messages. The Court agreed with the defendant and held the ordinance void. In so doing it stated:

> "We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business,—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void."[21]

16. Telegraph Co. v. Texas, 105 U.S. 460 (1882).
17. 17 U.S. (4 Wheat.) 316 (1819).
18. 25 U.S. (12 Wheat.) 419 (1827).
19. Telegraph Co. v. Texas, 105 U.S. 460, 466 (1882).
20. 226 U.S. 404 (1912).
21. *Id.* at 419.

In truth, the substance of such reasoning may be said to have been, that the mere touch of the federal government would be sufficient to import the immunity of the federal government to any taxpayer, unless the taxing authority in specific terms stated in its taxing statute that there was no intent to include within its measure any activity connected with or on behalf of the federal sovereign. No great amount of imagination is necessary to perceive the effect upon state and local revenues if such thinking prevailed on the present day court.

However sweeping in nature the immunity doctrine may have been regarded and applied, the test in the early part of the 20th Century was clear enough—it was an economic one. But even that generalization is not quite sufficient. In the words of Justice Frankfurter in a comparatively recent case, the doctrine at its peak "assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government."[22] And, it may be added, that interest did not necessarily have to be clearly defined, as is illustrated in the case of *Williams v. Talladega.*

Following World War I and the introduction of automobiles in large numbers, the demand for more and better highways brought into being a new form of state excise—the gasoline tax. This tax was and is usually imposed on distributors or other dealers in gasoline at a fixed rate per gallon stored, sold or otherwise used and is ordinarily deemed to be upon the privilege of engaging in business.[23] The validity of such a tax as applied to gasoline acquired by federal agencies for use in their activities was soon called into question.

Mississippi levied such a tax at the rate of four cents per gallon, and the Panhandle Oil Company contested the right of the state to include in the tax base gasoline furnished to the Coast Guard and to a Veterans Hospital located in that state.[24] The court held that to use the number of gallons sold to the United States as a measure of the privilege tax was in substance and legal effect to tax the sale, and "that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state."[25]

Though it marked another victory for immunity, the decision in the *Panhandle* case was also a noteworthy one for its opponents and portentous of the changed attitude which was to manifest itself within a few years. For it drew a ringing dissent from the famous Justice Holmes, who took the occasion to launch a frontal attack upon John

22. New York v. United States, 326 U.S. 572, 576 (1946); *accord,* Pollack v. Farmers Loan & Trust Co., 157 U.S. 429 (1895).
23. See Foster & Creighton Co. v. Graham, 154 Tenn. 412, 285 S.W. 570 (1926), for an excellent discussion as to the nature of these taxes.
24. Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928).
25. *Id.* at 222.

Marshall's proposition that the power to tax is the power to destroy, and to proclaim his belief that the high court should permit the exercise of state taxing power up to the point where it imposed an unreasonable burden upon, or discriminated against, the federal government. Said Holmes, with pithiness rivaling that of Marshall, "the power to tax is not the power to destroy while this court sits."[26]

The immunity doctrine was to carry even further, however, before the tide turned. As late as 1936 the Supreme Court decided the case of *Graves v. Texas Company*,[27] involving an Alabama statute imposing a tax upon the "selling, distributing or withdrawing from storage for any use" of gasoline, insofar as such tax was applicable to gasoline withdrawn from storage and sold to the Army and the TVA. It was held that the *Panhandle* case controlled, and the tax was held unconstitutional as to such sales. Said Justice Butler, in the majority opinion from which Justices Brandeis and Cardozo dissented, "Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement."[28]

The New Concept

With the advent of the 1930's came full realization of new economic and social patterns evolved by World War I, with resultant enlarged scope of governmental activities, state, federal and local. Moreover, there was the great depression, which forced millions of people to look to their governments for sustenance. Demands for new expenditures by all governments increased as their revenues diminished.

To meet the new demands, states began to enact general sales taxes.[29] This type of levy became increasingly popular, doubtless because of its ability to produce large amounts of vitally needed revenue at minimum expense and with minimum loss of time.[30] With available purchasing power, to which the potential yield of a sales tax is so closely geared, being buttressed heavily by federal expenditures in the form of work projects, it was not surprising that the hard pressed states sought to make such projects bear a share of the burden.

Under most sales tax laws, the contractor on a construction project, rather than the owner or contractee, is regarded as the consumer of the building materials and other personalty used, and it is the sale

26. *Id.* at 223.
27. 298 U.S. 393 (1936).
28. *Id.* at 401.
29. JACOBY, RETAIL SALES TAXATION 75-77 (1938).
30. *Id.* at 347.

to the contractor which is taxable.[31] It is he who, as a rule, acquires the materials to be incorporated into the project, besides providing the necessary labor to assemble and construct it. He may, depending on the terms of his contract, receive for his services a lump sum, or he may be compensated on a "cost-plus" basis, whereby he is paid the actual cost of the undertaking plus either an agreed percentage of that cost or a specified fixed fee.[32] It was to the contractor therefore that the states looked for any sales taxes accruing with respect to federal projects, and not to the Government itself, though the amount of such taxes would undoubtedly be borne ultimately by the Government in the form of increased contract costs.

The question of whether such a burden would be considered to impinge upon federal immunity was resolved by the Supreme Court in 1937, in the case of *James v. Dravo Contracting Company*.[33] This case arose out of an attempt by West Virginia to apply its sales tax to a contractor engaged in building locks and dams in the Kanawha and Ohio Rivers on behalf of the federal government. The taxpayer sought in the federal courts to restrain collection. A closely divided Supreme Court (5-4), with the majority led by Chief Justice Hughes, upheld the tax. It should be noted that the Attorney General of the United States was heard as amicus curiae and argued strongly that the tax be sustained. Hughes' opinion laid stress upon the fact that the tax was not laid upon the Government, its property, its officers, or its contract, but upon the independent contractor, that it was nondiscriminatory, and that it did not constitute a direct burden upon the Government. It overruled no prior decision, attempted rather inartificially to distinguish the decisions in *Telegraph Company v. Texas*[34] and *Williams v. Talladega*,[35] and dismissed those in *Panhandle Oil Company v. Mississippi ex rel. Knox*[36] and *Graves v. Texas Company*[37] as "limited to their particular facts." It found its precedents in *Metcalf & Eddy v. Mitchell*,[38] a case where federal income tax upon a state contractor's earnings had been upheld; in *Alward v. Johnson*,[39] a case where a gross receipts tax levied in lieu of property taxes had been sustained as against a contract carrier of the mails; in *Fidelity & Deposit Company v. Pennsylvania*,[40] where a gross premiums tax upon surety bonds running to the benefit of the United States had been approved; and in *Trinity Farm Construction Company*

31. State v. J. Watts Kearney & Sons, 181 La. 554, 160 So. 77 (1934).
32. 1 CCH ALL-STATE SALES TAX REP. 7131 (1955).
33. 302 U.S. 134 (1937).
34. 105 U.S. 460 (1882).
35. 226 U.S. 404 (1912).
36. 277 U.S. 218 (1928).
37. 298 U.S. 393 (1936).
38. 269 U.S. 514 (1926).
39. 282 U.S. 509 (1931).
40. 240 U.S. 319 (1916).

v. Grosjean,[41] where a state gasoline tax with respect to a federal levee contractor had been upheld. Hughes likewise apparently placed more than token reliance upon the fact that the taxpayer was derivatively asserting a governmental immunity disclaimed by the Government's own legal officers. The cogent dissent of Justice Roberts[42] reasserted the "burden" test and decried the disregard of precedents.

Close on the heels of the *Dravo* decision, the Court dealt other staggering blows to the immunity doctrine. It disallowed immunity of a state employee's salary from federal income taxation,[43] overruling *Collector v. Day*,[44] then rejected a federal employee's claim of immunity from a state income tax,[45] expressly overruling *New York ex rel. Rogers v. Graves*,[46] and overruling *Dobbins v. Erie County*[47] by implication. The majority opinions in both cases were written by Justice Stone, and were parallel in the thought that nondiscriminatory tax burdens, affecting either state or federal governments but incidentally, should not be deemed to restrict the taxing power of the other by implication of the Constitution.[48]

As the depression of the 1930's had limited private sources of state revenue so did the war which marked the first half of the ensuing decade. A very large measure of the economic activity of the nation came to center around the war effort and the hurried expansion of the military establishment. The work of constructing Army camps, training centers, ordnance plants, and shipyards was usually accomplished through private contractors, and in many cases by the "cost-plus-a-fixed-fee" type of contract.

Such a contract was employed by the Army in the construction of a camp in Alabama. Alabama's sales tax, imposed upon the seller but required to be passed on to the purchaser, was sought to be exacted of furnishers of lumber to contractors for use in construction of the camp. The contract provided that title to the materials pass to the Government upon delivery, and that the Government should make the decision of whether to buy and retain the right to approve all purchases in advance, with the contractor to be reimbursed for the cost. Two cases asserting immunity from the Alabama tax went to the Supreme Court, one, *Alabama v. King & Boozer*,[49] involving the sales tax, and the other, *Curry v. United States*,[50] involving the use

41. 291 U.S. 466 (1934).
42. James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937).
43. Helvering v. Gerhardt, 304 U.S. 405 (1938).
44. 78 U.S. (11 Wall.) 113 (1871).
45. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).
46. 299 U.S. 401 (1937).
47. 41 U.S. (16 Pet.) 435 (1842).
48. For a consideration of the reciprocity of the immunity doctrine on the federal and state levels, see Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 FED. B.J. 3 (1950).
49. 314 U.S. 1 (1941).
50. 314 U.S. 14 (1941).

tax. It was held unanimously in both cases, in opinions by Stone, that under the circumstances the Government was not the purchaser and the tax did not infringe the Government's immunity. *Panhandle Oil Company v. Mississippi ex rel. Knox*[51] and *Graves v. Texas Company*[52] were overruled to the extent that they held that a tax economically burdening the federal government was invalid.

In these cases, counsel for the United States, which had advocated the limiting of immunity in the *Dravo* case, took an opposite view.[53]

Having rejected Chief Justice Marshall's formula of absolutism and embraced various tests of "degree" and "burdens," the Court now found itself, as the Chief Justice had warned, faced with "perplexing inquiry so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."[54]

The Court in the *King & Boozer* case recognized the immunity doctrine but was explicit in stating that federal sovereignty "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."[55] The Alabama sales tax and its ultimate burden on the United States was upheld as "but the normal incident of the organization within the same territory of two independent taxing sovereignties."[56] Former tests of "economic burden,"[57] already weakened by the *Dravo* case, were held no longer tenable[58] by the Court. In the *Curry* case the Court emphasized that "the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."[59]

In place of "the economic burden" test, specifically rejected, the Court espoused the test of "legal incidence." By this test, if the incidence of a state tax is directly upon the United States, or one of its instrumentalities, it is violative of the federal government's implied

51. 277 U.S. 218 (1928).
52. 298 U.S. 393 (1936).
53. "In recent decades the philosophic foundations of the immunity of the government have received practical content from the view that the Government should not be saddled with the economic cost of state taxation. . . . While unsatisfactory as a criterion of validity . . . the economic aspect of intergovernmental tax immunity has lent solidity to a rule otherwise wholly conceptual in nature." Brief for the United States, pp. 53-54, Alabama v. King & Boozer, 314 U.S. 1 (1941).
54. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819).
55. Alabama v. King & Boozer, 314 U.S. 1, 9 (1941).
56. *Id.* at 8.
57. Graves v. Texas Co., 298 U.S. 393 (1936); Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931); Graysburg Oil Co. v. Texas, 278 U.S. 582 (1929); Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928).
58. Alabama v. King & Boozer, 314 U.S. 1, 9 (1941).
59. Curry v. United States, 314 U.S. 14, 18 (1941).

immunity; if the Government is affected by the state tax only through the increased cost of services or materials, the tax is valid.

After a long line of subjective formulae, the Court had alighted upon a test emphasizing form. The application of the state taxing power to the United States now depends upon whether the United States is hit rather than whether it is economically hurt.[60]

Two subsequent cases not squarely in point with the *King & Boozer* case present an interesting demonstration of the Court's employment of the "legal incidence" test. The first of these cases, *United States v. Allegheny County*,[61] was decided in 1944 when a county real property tax was levied on the Mesta Machine Company which had leased machinery from the United States. The property assessed included the leased machinery, and the United States by contract was required to reimburse the company for such taxes. The Court held that the tests established by the *Dravo* and *King & Boozer* cases were not applicable and the tax was invalid since "the Government's property interests are not taxable either to it or to its bailee."[62]

In 1953 in the case of *Esso Standard Oil Company v. Evans*,[63] the Court was faced with the question of the liability of Esso Standard to a Tennessee tax upon the privilege of storing gasoline owned by the United States, a tax measured by the number of gallons stored. The Court held that the privilege tax was not "on" the government-owned gasoline and therefore the *Allegheny County* decision was not controlling and the tax was valid. These two cases saw the Court meticulously applying the "legal incidence" test in determining the validity of state taxes affecting the United States.[64]

Following the *King & Boozer* case, federal immunity appeared to be laid to rest insofar as it posed a barrier to state sales taxation of private contractors with the federal government. Indeed it was, so far as the Supreme Court was concerned, for the next thirteen years. States which had general sales, gross receipts or gross income taxes lined their coffers during the war years and thereafter with money derived from war contractors.[65]

The Contemporary Picture

In considering the liability of federal contractors or other private persons with whom the Government may deal to any form of state

60. See Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757, 787 (1945).
61. 322 U.S. 174 (1944).
62. *Id.* at 187.
63. 345 U.S. 495 (1953); see Sanders, *Constitutional Law-1953 Tennessee Survey*, 6 VAND. L. REV. 1159, 1164-66 (1953).
64. For other instances in which state taxes were upon property in which the federal government had an interest, see the cases collected in 4 VAND. L. REV. 195 (1951).
65. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633, 653 (1945).

taxation, it is to be borne in mind that Congress may grant specific immunity to federal agencies and private parties with whom they may contract where no implied immunity would exist.[66] Numerous cases have recognized this principle. The most recent example of its application is found in state tax cases involving the Atomic Energy Commission.

When the Atomic Energy Act became law in 1946, there was included in section 9(b) thereof the following provision:

> "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision thereof."[67]

The Atomic Energy Commission, with extensive installations in several states, notably Tennessee and Washington, operated in large degree through private contractors in the construction of atomic facilities and the production of fissionable materials. Vast amounts of materials were required for the various projects, which materials the numerous contractors obtained from many sources, local and out-of-state, and for which they were reimbursed by the Commission.[68] When the State of Tennessee undertook to subject these purchases to its new sales and use tax in 1947, the contractors and their suppliers resisted payment on two grounds—first, that the contractors were agents of the United States Government and protected from the tax by the implied constitutional immunity doctrine, and second, that the Commission and its contractors were immunized by section 9(b) of the Atomic Energy Act. The Supreme Court of Tennessee held that the contractors were not governmental agents, but that the quoted language of section 9(b) did serve to confer immunity upon them.[69] In the appeal to the Supreme Court, the latter tribunal was thus required to determine only the effect of section 9(b). Tennessee contended that the statutory language was but affirmative of the undisputed constitutional immunity of the Commission itself, no mention of private contractors being made in the purported exemption, and that the states were entitled to have such exemptions stated in clear and unambiguous language where they were intended to extend to private persons. The Court held that the word "activities" in section 9(b), used in reference to the Commission, was broad enough to include the purchases made by the Commission's contractors,

66. Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939). See also Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579, 588-89 (1869); James v. Dravo Contracting Co., 302 U.S. 134, 160, 161 (1937).

67. 60 STAT. 765 (1946), 42 U.S.C.A. § 1809(b) (1952).

68. For a discussion of the pertinent history of AEC operations, see Carbide & Carbon Chemical Corp. v. Carson, 192 Tenn. 150, 155-59, 239 S.W.2d 27, 29-31 (1951).

69. Carbide & Carbon Chemical Corp. v. Carson, *supra* note 68.

hence the statute amounted to a congressional immunization of the contractors.[70]

This decision, possibly because it deprived several states of sizable amounts of revenue, or possibly because they viewed it as representing a tendency on the part of the Court to constrict the permissable boundaries of state taxation of government contractors, created such a furore among the states that Congress repealed the portion of section 9 (b) held by the Court to exempt the AEC contractors.[71]

The rapidity with which this exemption was removed from the statute books is probably indicative of the temper of Congress with regard to statutory immunization generally of private persons dealing with the Government. Previous efforts in this direction had with but few exceptions fallen by the wayside—a fact upon which counsel for the State of Tennessee placed considerable reliance in arguing against the presence of any congressional intent to exempt AEC contractors in the Atomic Energy Act. The fact that so many of the states presently have sales taxes and similar excises to which practically all business done by private persons are subject will quite likely serve to prevent their elected representatives in Congress from viewing with favor any future attempt to immunize those contracting with the Government. The growing federal tax consciousness of the nation, however, coupled with the omnipresent pressure upon the federal government for expanded domestic outlay and the stark necessity for maintaining a large and effective military arm, could conceivably cause the national lawmakers to take a second look at the policy which permits the states to add their levies to the federal fiscal burden.

February of 1954 found the Supreme Court with a definite and concrete criterion for determining the validity of state sales taxation of federal contractors. However, by the eighth day of that month the Court had handed down its decision in the case of *Kern-Limerick, Inc. v. Scurlock*,[72] a pronouncement which almost immediately occasioned a wave of apprehension among the states lest the state victories in the *Dravo* and *King & Boozer* cases might prove to be swept away.[73] With certain very important exceptions, the facts of the *Kern-Limerick* case were not unlike those in the *King & Boozer* case. A private contractor was under contract to construct a naval ammunition dump in Arkansas and procured two tractors from Kern-Limerick, Inc., for use in the construction. The United States agreed to reimburse any state taxes paid by the contractor. Arkansas levied

70. Carson v. Roane-Anderson Co., 342 U.S. 232 (1952), 22 TENN. L. REV. 437, 32 B.U.L. REV. 241.
71. 67 STAT. 575 (1953).
72. 347 U.S. 110 (1954).
73. See Atkins, *Federal Operations and Potential Effects on the State Tax Base*, PROC. NAT'L ASS'N TAX ADMR'S 25 (22d Ann. Conf. 1954).

its two per cent sales tax on the vendor to the contractors, who, with the United States intervening, sued to recover the taxes paid.

The all important difference in the fact situation of the *Kern-Limerick* case is found in the form of the contract. By its terms, the contractor became a "purchasing agent" for the United States and title to materials and equipment purchased passed directly from the vendor to the United States which was directly liable to the vendor for the price, although the contractor was to advance the payments and be reimbursed.[74] The contract was entered into by the Department of the Navy pursuant to sections 2(c)(10) and 4(b) of the Armed Services Procurement Act of 1947.[75]

The Supreme Court of Arkansas upheld the tax on the grounds that the Armed Services Procurement Act of 1947 did not authorize the Navy Department to constitute an independent contractor as a purchasing agent for the United States, and the contract arrangement was designed to avoid lawful taxation.[76] Therefore the contractor was liable for the tax under the phrasing of the state statute, which read "sales of service and tangible personal property including materials, supplies and equipment made to contractors who use the same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale."[77] The tax was required to be passed on to the purchaser.[78] Reversing the Arkansas court, the Supreme Court held that the sale had been made through a purchasing agent to the United States which of course was constitutionally immune.[79] It also held that the Procurement Act afforded broad powers to the armed forces for obtaining supplies and services, and that the contracting of agents to handle such purchases was within these powers.[80] Furthermore, the United States Supreme Court and not the supreme court of the state, as the *King & Boozer* opinion seemed to say,[81] has the final right to construe state tax statutes to decide the incidence of state taxes.[82]

The real import of the case is that the Supreme Court will recognize "contract agency" under at least questionable[83] congressional authority in applying the legal incidence test of tax immunity. The Court emphasized its recognition of contract form in this manner: "But since purchases by independent contractors of supplies for government construction or other activities do not have federal immunity

74. 347 U.S. at 112 n.2.
75. 62 STAT. 21 (1948), 41 U.S.C.A. § 151 (1952).
76. Parker v. Kern-Limerick, Inc., 221 Ark. 439, 254 S.W.2d 454 (1953).
77. ARK. STAT. ANN. § 84-1903(e) (1947).
78. *Id.* § 84-1908.
79. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).
80. *Id.* at 116.
81. 314 U.S. 1, 9-10 (1941).
82. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121-22 (1954).
83. *Id.* at 123 (dissenting opinion).

from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself."[84]

The contract in the *Kern-Limerick* case embodied substantial changes from the business arrangement in the *King & Boozer* case, where title to the materials passed to the United States upon delivery at the site of work or storage, where the contractors were to purchase in their own name and on their own credit, and where the United States was not bound by the purchases. In the *Kern-Limerick* case, title passed directly from the vendor to the United States, and the contractors did not purchase in their own name but rather pledged the credit of the United States to the vendor.

In some ways the 1954 decision represented a logical corollary to the *King & Boozer* decision which emphasized form, rather than substance, in the legal incidence test. In the *Kern-Limerick* case, the states felt the sharp edge of the legal incidence test, honed sharp to protect their finances, when the Court turned it against them by recognizing contract form in deciding the incidence of state taxes. The resorting of the Government to the scheme utilized in the *Kern-Limerick* contract to avoid state taxation is not surprising. Indeed, the very language of the *King & Boozer* opinion seemed to suggest it,[85] and such action was predicted soon after that case was decided in 1941.[86]

Just what effect does this most recent decision have on the concept of immunity as evolved by the Supreme Court in the late thirties and early forties? Has the Court, as Justice Black's dissent states, effectually overruled the *King & Boozer* case, thereby moving "back in the direction of discredited tax immunities"?[87] Justice Douglas dissents that "the substance of the transaction and the nature of the economic burden on the United States" of the two cases cannot be distinguished.[88] This is true, but since the *King & Boozer* decision, neither substance nor economic burden can be said to be the determining factor, but, rather form and legal incidence are decisive. It would appear that the *Kern-Limerick* case has not overruled the *King & Boozer* holding, but that it is the logical result of the doctrine announced in the earlier case if the Court takes cognizance of the *Kern-Limerick* contract procedure.

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84. *Id.* at 122-23.

85. The Court pointed out that the contractors did not have "the status of agents of the Government to enter into contracts or to pledge its credit." 314 U.S. at 11.

86. Note, 28 VA. L. REV. 251, 263 (1942).

87. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 124 (1954) (dissenting opinion).

88. *Id.* at 126 (dissenting opinion).

Most significant perhaps is that the *King & Boozer* opinion stated that the final determination of who was a "purchaser" within the meaning of a state taxing statute was a matter of state law upon which only the highest court of the affected state could speak with finality.[89] The Court in the *Kern-Limerick* decision held that this statement of the prior case is not to be taken "literally" since it refers only to who is responsible under the law of the state to pay the tax and did not refer to the incidence of state taxes. Although the Court's distinguishing of the *King & Boozer* holding in this regard is rather unconvincing, the result reached—the Court's right to determine facts or constructions affecting federal constitutional issues—is not without precedent.[90]

If any aspect of the *Kern-Limerick* case affords cause for alarm to state taxing authorities it is the apparent attitude the present Supreme Court has manifested in its opinion. The holding therein concededly assumed "that the contract was designed to avoid the necessity in this cost-plus contract of the ultimate payment of a state tax by the United States."[91] Thus, the Court countenances the drafting of government contracts with the design of avoiding otherwise valid state taxes, and appears as a direct invitation for other branches of the federal government to employ such contracts to conserve their funds at the expense of the fiscs of state governments.[92]

The Court's broad interpretation of the Armed Services Procurement Act leaves contracting officers free to follow "business practices" and delegate to private persons the power to buy goods for the Government and to pledge its credit. The dissenters term the majority interpretation as a "tremendous break with long established buying practices."[93]

The attitude of the Court both in broadly interpreting the Procurement Act and in being unfazed by the Government's use of contract form and colorable agency to avoid state taxes otherwise due would appear to furnish considerable basis for apprehension on the part of the states. This is especially true in view of the fact that that portion of the Federal Property and Administrative Services Act of 1949[94] dealing with government contracts is almost identical in wording with the Armed Services Procurement Act.

89. 314 U.S. at 9-10.

90. "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." Carpenter v. Shaw, 280 U.S. 363, 367-68 (1930); *accord*, United States v. Allegheny County, 322 U.S. 174 (1944).

91. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 116 (1954).

92. "Under the instant decision it seems that government agencies can easily attain immunity from taxes levied on their purchases through careful wording of their contracts." 68 HARV. L. REV. 121, 123 (1954).

93. Kern-Kimerick, Inc. v. Scurlock, 347 U.S. 110, 124 (1954) (dissenting opinion).

94. 63 STAT. 393 (1949), 41 U.S.C.A. §§ 251-55 (1952).

It would appear that, though the Court outwardly observed the legal incidence test, the impact of state taxation on government programs has led it to apply once again a test recognizing "economic burden" via a broad interpretation of the Procurement Act and upholding the use of obvious tax avoidance measures by the Government.[95]

Likewise, the *Kern-Limerick* attitude recalls for purposes of comparison that exhibited in the *Roane-Anderson* opinion three years previous. Taken together, these two recent expressions by the Court may well be taken to indicate that, while there is no inclination on the supreme bench to overrule or modify the doctrine that states may tax independent federal contractors without infringing federal immunity, the Court will construe liberally in favor of the Government any congressional action tending either to confer immunity upon such persons or make it available to them at the Government's option.

Future Prospects For Immunity

Any study of the question herein dealt with must readily concede that there are many facets to the problem of whether and to what extent the states should be permitted to levy taxes the burden of which fall upon the federal treasury. Legal determinations in this regard are, have been and probably must be undergirded in large measure by national policy and the degree to which the national government assumes a role in the economic life of the nation. The expressions of the Court upon the subject from *McCulloch v. Maryland* to the present day have been symptomatic of changing attitudes and conditions. John Marshall in the *McCulloch* and *Osborn* opinions was striving vigorously to protect a federal sovereignty which at that time had yet to win either acceptance at home or respect abroad. On the other hand Justice Stone, in *Alabama v. King & Boozer,* was probably endeavoring to conserve, if not state sovereignty as such, at least the ability of the states to pay their way in a political climate which had relegated to the federal sovereign the lion's share of the revenue potential of the nation.

In the present era the merits and demerits of immunity are still asserted with vigor as between federal and state officials. Federal functionaries, beset with the rigors of straitened budgets and taxpayer demands for maximum results from each tax dollar spent, are understandably unhappy at having to pay over indirectly to the states out of government funds even the proportionately small amounts occasioned by state consumption taxes. That immunity would relieve the federal government in the aggregate of substantial additional costs

95. See 34 B.U.L. REV. 224 (1954).

cannot be gainsaid.[96] Another argument for immunity is that it would effectuate taxing parity as between the various states insofar as revenues derived on account of federal projects are concerned. The absence of immunity may occasion some states to grant it to federal contractors as an inducement to the Government to locate economically desirable federal activities in those states when actually it may be more advantageous from other standpoints to place them elsewhere. Still another reason advanced is that the absence of immunity requires the use of cumbersome procurement procedures to avoid state taxation. This is exemplified by the practice prevalent in some government agencies of acquiring themselves the materials scheduled to be used in a construction project, taking title to themselves, then turning them over to a private contractor for use in fulfilment of the contract. The agency of course is exempt from any sales or use tax with respect to the property, though the contractor is not exempt unless the state taxing statute makes him so.

The federal arguments are controverted by contentions made on behalf of the states which are more numerous and, in the opinion of the writers, more compelling.

If it is conceded that absence of immunity deprives the federal government of the full effective use of its money, by the same token it must be admitted that immunity of persons dealing with the federal government would deprive the states of revenue which they not only need but can hardly afford to relinquish. Under the existing tax structure, the most productive fields of revenue have long since been preempted by the national government. Most states are compelled to look to excise taxes for their sustenance. One of the most consistent productive taxes in this field has proved to be the sales tax and it is upon this levy that many states[97] depend usually for the financing of state undertakings such as education and welfare programs. Granting of immunity to government contractors would remove from the base of this tax a substantial and significant portion thereof, with a proportionate decrease in the over-all tax yield, and a resulting necessity either of curtailing the dependent state enterprises or of looking elsewhere for compensating revenue. And it should be noted that tax resistance is no less pronounced on the state level than it is on the federal. Indeed it is probably more so. Another argument vigorously enunciated by the states is that the immunity doctrine

96. "The government [in its brief in the *King & Boozer* case] estimated that a denial of immunity in that case would subject it to a liability of $33,946,177 for 1941 purchases, and $54,000,000 for purchases made in 1942, in fulfilling 548 'cost-plus' contracts having a gross value of $6,720,929,777." Note, *Constitutional and Legislative Bases of Intergovernmental Tax Immunities,* 51 YALE L.J. 482, 483 n.8 (1942).

97. At this writing 33 states, the District of Columbia and numerous large cities levy general sales taxes, occupation taxes, gross receipts taxes or gross income taxes.

insofar as it applies secondarily to those dealing with the Government, is inimical to state sovereignty in that it clothes private persons with an attribute of sovereignty in a manner never intended by the founding fathers of the Republic. If a private person can be given this attribute of sovereignty there is no logical reason why he can not succeed to others.

Also advanced by the states is the fact that the numerous federal installations which have grown up in the past twenty-five years, and particularly during and since World War II, have had a decided impact upon the states and the services which the states are called upon to render. When such projects are located in a state, usually on comparatively short notice, they bring in a great influx of people, which in turn occasions a necessity for new schools and highways, besides increased demand for other services. Some of this demand for new expenditures can be offset by the increased revenue derived from consumption taxes, if those who deal with the Government are not immunized against those taxes.

Again, immunity would serve to maintain inequality of taxing jurisdiction as between the states and the federal government. The federal government looks very largely to personal and corporate income taxes for its revenues. The compensation of state employees and state contractors is not immune from these taxes and probably will never be. State income taxes, where they exist, are nothing comparable to the federal levies, and many states do not have them at all. It can probably be said safely that their existence creates a very inconsequential burden upon the federal treasury. Unless the states are permitted to apply their excise taxes to those dealing with the Government, state taxing jurisdiction will obviously be grossly out of proportion to federal.[98]

As any state tax administrator will readily testify, exemptions or exclusions from tax bases constitute his most consistent harassing problems. In any sales or similar type tax the state looks to the vendor for payment. Where the tax base is broad enough to include all or substantially all of the business done by vendors, administration by tax officials, and bookkeeping by the vendor, is at its simplest. When exemptions or exclusions are introduced, however, complications are occasioned, with more records having to be maintained and more time having to be consumed in the tax computation, not to mention the affording of increased opportunity for tax evasion and the concealment of taxable transactions by the vendor. Likewise, the vendor is never without responsibility to verify exemptions claimed by those who do business with him. Private persons making purchases with the benefit of governmental immunity usually have

98. See Atkins, *supra* note 73, at 26.

the opportunity if they care to exercise it, and in the absence of stringent safeguards, to stock-pile materials for their own private use under the immunity of a government exemption certificate. These facts in all earnestness must be said to militate against the concept of immunity and can no more be ignored by the conscientious federal official than can the substantial costs of state taxation to the federal government be overlooked by state officials.

Whatever the view may be as to the merits or demerits of immunity, for the present its limits are fairly well circumscribed by the legal incidence test. The states can and do tax those from whom the Government may buy or with whom it may contract, in the absence of circumstances making out an agency such as existed in the *Kern-Limerick* case, or congressional action which can be construed as conferring immunity upon such private persons. Of course, the boundaries of legal incidence may in the future be moved in either direction, either as a result of judicial change of attitude or by virtue of legislative enactment.

As for alteration of the Supreme Court's approach to constitutional immunity, consideration of such here must be conceded to be purely in the realm of speculation. Changes in personnel on the court could very well be reflected in its future expressions. Since *Kern-Limerick,* Justice Jackson has died and has been succeeded by Justice Harlan. Other members of the Court are at or past retirement age,[99] indicating the probability of more new faces on the Bench in the not too distant future, and possible differing points of view and new approaches to constitutional questions.

One aspect of immunity yet to be considered is the liability of a private contractor for state taxation with respect to the use of property, title to which is vested in the Government prior to use. The Government not infrequently, as was the case in the *King & Boozer* contract,[100] reserves the right to furnish its contractor with the materials necessary for the construction of a project. In recent years, possibly for tax avoidance or possibly for other reasons, there has been a tendency on the part of government officials to exercise this right with the result that the contractor has nothing to do with the acquisition of the materials from a private supplier or their importation into the state where they are to be used. Since 1954, several states, apparently to counteract the effect of the *Kern-Limerick* decision, have amended their sales tax statutes so as to place on contractors liability for tax with respect to personality used in the performance of contracts, irrespective of the identity of the title holder

99. As of December, 1955, Justice Frankfurter is 73, Justice Burton 72, Justice Reed 71, Justice Black 69, Justice Minton 65 and Chief Justice Warren 64. Retirement age is 70.

100. 314 U.S. at 13.

of such property, or of any immunity which might be enjoyed by such title holder.[101] The high court will doubtless have occasion to pass upon the validity of such provisions as applied to contractors assembling and otherwise making use of government-owned property in connection with the performance of government contracts.

While such alteration in the form and wording of state sales tax statutes might afford relief from the possible consequences of the *Kern-Limerick* decision, it is unlikely to prove a lasting or satisfactory remedy. Even if the Supreme Court should recognize such state laws at the present, there is no guarantee that it will continue to do so. It must be emphasized that where a federal right is concerned, the Court reserves for itself the right to determine the incidence of state taxes[102] affecting the United States, and could look through the veil of form and wording any time it so chose.

This observation brings us to the alternative method of possible alteration of the immunity situation, which is direct action by Congress defining its boundaries. It is not doubted that Congress has the power to legislate upon the problem in any direction it chooses. It can extend immunity to all private persons doing business with the Government to the extent that the Government may be affected by the imposition of state taxes upon such persons, or it may deny immunity to any government agency or instrumentality presently enjoying it either under the Constitution or by statute.[103] Or it can by statute provide for payments directly to state and local governments in lieu of taxes[104] which might be collected in the absence of government installations or operations or the constitutional immunity enjoyed by them.

Recent history would indicate perhaps a greater likelihood of legislative action denying immunity to all save congressionally created agencies of the Government itself. Already there has been introduced in Congress a bill proclaiming as its purpose the prohibiting of "the United States from entering into contracts under which private contractors are constituted agents of the United States to purchase property necessary to carry out such contracts."[105] In addition the House Ways & Means Committee presently is considering a proposal relative to the situation made by the National Association of Tax Administrators.

Substantially the same groups interested in such legislation were

101. CAL. REV. & TAX. CODE ANN. § 6384 (Deering Supp. 1955); GA. CODE ANN. § 92-3448(a) (Cum. Supp. 1955); S.C. CODE ANN. § 65-1361.1 (Cum. Supp. 1955); Tenn. Pub. Acts 1955, c. 242, §§ 6, 8.

102. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121-22 (1954).

103. See Austin v. The Aldermen, 74 U.S. (7 Wall.) 694, 699 (1868); James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937).

104. 48 STAT. 66 (1933), as amended, 54 STAT. 626 (1940), 16 U.S.C.A. § 831(*l*) (1941).

105. S. 2100, 84th Cong., 1st Sess. (1955).

responsible for the congressional action which amended the Atomic Energy Act and placed contractors for the Atomic Energy Commission on a par with other federal contractors in regard to state taxation. It is to be recalled too that in the 75th, 76th and 77th Congresses, which sat in the late 30's and early 40's, unsuccessful efforts were made to exempt government contractors from state taxation,[106] and that in 1940 Congress enacted the Buck Act which made state taxes applicable to income derived from activities in, and transactions taking place on, areas over which the United States has exclusive jurisdiction.[107] Thus Congress has shown itself to be not unsympathetic to state efforts to make economic activity incident to federal projects pay its way.

With this in mind, the indicated course of action would appear to be clear enough for the states. Congress, the fountainhead of national policy, should be made acutely aware of the importance of sales and use taxation to the states, the general effect of federal governmental immunity upon the revenue potential of this type of taxation, and the possible consequences to flow from legally sanctioned avoidance of such taxes when the Government's conceded immunity from state taxation is conferred contractually by executive agencies of the Government upon private persons. Favorable reaction by Congress to the states' position could very well result in legislation putting to rest any present day doubts as to the national policy respecting state taxation which affects the federal purse. On the other hand, a contrary expression by Congress would tend to indicate that body's approval of administrative practices calculated to relieve the federal fisc of state tax burdens. In either event, the states could proceed to fashion their revenue policies in more certain knowledge of the extent to which the federal government's immunity will operate to restrict them.

106. See Atkins, *supra* note 73, at 27.
107. 4 U.S.C.A. §§ 105-09 (Cum. Supp. 1955).