

# The Burger Court Opinion Writing Database

*United States v. Tax Commission of Mississippi*  
412 U.S. 363 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 8, 1973

e-111

Re: No. 72-350 - U.S. v. State Tax Commission of Mississippi

Dear Thurgood:

With the sands running on this Term my review of circulated cases brings this case up.

1. I agree with your treatment of the "exclusive" bases.

2. I do not see the need for a remand. I would apply the same doctrine to all U.S. instrumentalities and a non-exclusive base is one such. I thought four votes were to this effect and only three for remand but I may be in error on this.

|||  
The State can readily require a declaration from every person leaving the base and tax any liquor taken off base. I am sure we all agree on this.

I will defer final action until I see Bill Brennan's dissent but this is about where I stand.

Regards,

W. O.

Mr. Justice Marshall

Copies to the Conference

The State remains free to regulate or restrict ~~any~~  
any spirits carried outside the base limits by anyone

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 8, 1973

Re: No. 72-350 - United States v. State Tax Commission  
of Mississippi et al

Dear Thurgood:

When I sent you the memo in the above I think I did not have in mind that the District Court had not addressed itself to the question you would have them explore on remand. I'm going back into the record and briefs and it may be that I will be with you all the way.

(This is the problem of reviewing the draft opinion on Sunday and writing a memo to you on Tuesday!)

Regards,

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 25, 1973

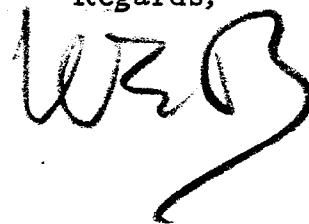
Re: No. 72-350 - U. S. v. State Tax Commission of  
Mississippi

Dear Thurgood:

In view of Bill Douglas' contemplated  
changes in his dissent I fear I must wait on a study  
of his new draft.

This makes a Tuesday release unfeasible.

Regards,



Mr. Justice Marshall

Copies to the Conference

TCG

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

Ready

May 30, 1973

Re: 72-350 - U. S. v. State Tax Commission of Mississippi

Dear Thurgood:

I have resolved the problems I had earlier,  
so please join me.

Regards,

WBC

Mr. Justice Marshall

Copies to the Conference

cir

March 27, 1973

3/27/73

MEMORANDUM TO THE CONFERENCE:

The arguments and briefs in  
No. 72-350 - U. S. v. State Tax Com-  
mission of Mississippi - were so poor  
that I thought I owed the Conference  
a rather detailed statement of my  
position in the case.

Hence the attached Memorandum.

W. O. D.

WD

File  
in  
3/27/73

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 72-350

United States, Appellant, | On Appeal from the United  
v. | States District Court for  
State Tax Commission of | the Southern District of  
Mississippi et al. | Mississippi.

[April —, 1973]

Memorandum from MR. JUSTICE DOUGLAS.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

Under Mississippi law these Post Exchanges may order liquor direct from the distiller or from the state commission. The Mississippi regulation provides, "All orders of such organization shall bear the usual wholesale markup<sup>3</sup> in price but shall be exempt from all state

<sup>1</sup> Mississippi Code Ann. § 10265-01 *et seq.*

<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q).

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

4th DRAFT

From: Douglas, J.

Circulated: 5-8-73

SUPREME COURT OF THE UNITED STATES

No. 72-350

Recirculated:

United States, Appellant, *v.* On Appeal from the United States District Court for the Southern District of Mississippi et al.

Mississippi.

[April —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

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<sup>1</sup> Mississippi Code Ann. § 10265-01 *et seq.*

<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q).

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

9 1,6

To: The Chief Justice  
 Mr. Justice Black  
 Mr. Justice Black  
 Mr. Justice White  
 Mr. Justice Mr. Hall  
 Mr. Justice Sutherland  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

5th DRAFT

From: D.

SUPREME COURT OF THE UNITED STATES:

No. 72-350

Recirculated: 5-11-73

United States, Appellant, } On Appeal from the United  
 v. } States District Court for  
 State Tax Commission of } the Southern District of  
 Mississippi et al. } Mississippi.

[May —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

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<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q).

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

3 / 5, 6, 7, 9

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

6th DRAFT

From: Douglas, A.

No. 72-350

Circulated: 5-15-73

United States, Appellant, | On Appeal from ~~the United~~: 5-15-73  
v. | States District Court for  
State Tax Commission of | the Southern District of  
Mississippi et al. | Mississippi.

[May —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

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<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q).

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

9  
6, 7, 8  
Your  
[Signature]

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## 7th DRAFT

From: Douglas, J.

## SUPREME COURT OF THE UNITED STATES

Circulated:

No. 72-350

Recirculated: 5-19-73

United States, Appellant, } On Appeal from the United  
 v. } States District Court for  
 State Tax Commission of } the Southern District of  
 Mississippi et al. } Mississippi.

[May —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

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<sup>1</sup> Mississippi Code Ann. § 10265-01 *et seq.*

<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q).

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

May 25, 1973

MEMORANDUM TO THE CONFERENCE:

I have today made considerable changes  
in my dissent in No. 72-350 - the Mississippi  
liquor case involving Post Exchanges.

I hope the Printer can get a new print  
in time for everyone interested to see it.

W. O. D.

13  
5 and stylistic  
changes

5129

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-350 Circulated: \_\_\_\_\_  
 United States, Appellant, } On Appeal from the United States District Court for  
 v. } the Southern District of Mississippi.  
 State Tax Commission of Mississippi et al. } Recirculated: 5-25-73

[May —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State.<sup>1</sup> like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler<sup>2</sup> of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

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<sup>1</sup> Mississippi Code Ann. § 10265-01 *et seq.*

<sup>2</sup> Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Ibid.* § 510265-05 (q)

<sup>3</sup> The Act provides in § 1025-106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its

*Just thought*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

9th DRAFT

SUPREME COURT OF THE UNITED STATES, J.

No. 72-350

Circulated:

United States, Appellant, | On Appeal from the United  
v. | States District Court for  
State Tax Commission of | the Southern District of  
Mississippi et al. | Mississippi.

Recirculated: *5/25/73*

[May 29, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

This is an amazing decision doing irreparable harm to the cause of states rights under the Twenty-first Amendment. That Amendment gives the States pervasive control over the "transportation . . . into (the) State . . . for delivery or use therein of intoxicating liquors." The liquors cannot reach these federal enclaves unless they are transported into or across the State.

Two of the Posts are inland enclaves within the State. Two are on Mississippi's coastline. But to reach the latter by water a vessel must enter Mississippi's territorial waters. As we held in *Skiriotes v. Florida*, 313 U. S. 69, the territorial waters are part of the domain over which the coastal State has sovereignty. These shipments therefore constitute "transportation or importation into" Mississippi for "delivery . . . therein of intoxicating liquors" within the meaning of the Twenty-first Amendment. The power of the State to bar the transportation of liquor into the State certainly includes the power to manage its distribution within the State. Mississippi has done no more than that. So it seems clear to me that this is a classic example of the exercise of basic States' rights under the Twenty-first Amendment.

Stylistic

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

10th DRAFT

SUPREME COURT OF THE UNITED STATES

FROM DOUGLAS, J.

No. 72-350

Circulated: \_\_\_\_\_

United States, Appellant, } On Appeal from the United States District Court for  
v. } the Southern District of Mississippi.  
State Tax Commission of Mississippi et al. } Recirculated: 5-29

[June —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

This is an amazing decision doing irreparable harm to the cause of states rights under the Twenty-first Amendment. That Amendment gives the States pervasive control over the "transportation . . . into [the] State . . . for delivery or use therein of intoxicating liquors." The liquors cannot reach these federal enclaves unless they are transported into or across the State.

Two of the Posts are inland enclaves within the State. Two are on Mississippi's coastline. But to reach the latter by water a vessel must enter Mississippi's territorial waters. As we held in *Skiriotes v. Florida*, 313 U. S. 69, the territorial waters are part of the domain over which the coastal State has sovereignty. These shipments therefore constitute "transportation or importation into" Mississippi for "delivery . . . therein of intoxicating liquors" within the meaning of the Twenty-first Amendment. The power of the State to bar the transportation of liquor into the State certainly includes the power to manage its distribution within the State. Mississippi has done no more than that. So it seems clear to me that this is a classic example of the exercise of basic states rights under the Twenty-first Amendment.

5  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 4, 1973

RE: No. 72-350 United States v. State Tax  
Commission of Mississippi

Dear Thurgood:

It is probable that I will write separately  
in this case.

Sincerely,

*Bill*

Mr. Justice Marshall

cc: The Conference

7

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 22, 1973

RE: No. 72-350 United States v. State Tax  
Commission of Mississippi, et al.

Dear Thurgood:

I agree.

Sincerely,

*Brennan*

Mr. Justice Marshall

cc: The Conference

57

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 2, 1973

72-350- U. S. v. Mississippi Tax Commission

Dear Thurgood,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

P.S.  
V

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 11, 1973

Re: No. 72-350, United States v. Tax Commission  
of Mississippi

Dear Thurgood,

I agree with your proposed recasting of  
the opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to: Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell

1

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 22, 1973

72-350 - U. S. v. Mississippi State Tax Commn.

Dear Thurgood,

I agree with your revised opinion for  
the Court in this case, as recirculated May 21.

Sincerely yours,

P. S.  
P.

Mr. Justice Marshall

Copies to the Conference

5  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 1, 1973

Re: No. 72-350 - United States v. State Tax  
Comm'n of Mississippi

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Dear Thurgood:

Please add me to your list in this case.

Sincerely,



Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

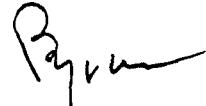
May 15, 1973

Re: No. 72-350 - United States v. Tax  
Commission of Mississippi

Dear Thurgood:

The odds are that I would join an opinion in this case restructured as you have suggested in your note of May 10. Of course, I would like to examine the final product with some care.

Sincerely,



Mr. Justice Marshall

Copies to: Mr. Justice Stewart  
Mr. Justice Blackmun  
Mr. Justice Powell

5

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 22, 1973

Re: No. 72-350 - United States v. State Tax  
Commission of Mississippi

---

Dear Thurgood:

I concur in your May 21 circulation in  
this case.

Sincerely,



Mr. Justice Marshall

Copies to Conference

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

**SUPREME COURT OF THE UNITED STATES**

Circulated:

APR 30 1973

No. 72-350

Recirculated:

United States, Appellant, } On Appeal from the United  
v. } States District Court for  
State Tax Commission of } the Southern District of  
Mississippi et al. } Mississippi.

[May —, 1973]

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a State may require out-of-state liquor distillers and suppliers to collect and remit to the State a wholesale markup on liquor sold to officers' clubs, ship stores, and post exchanges located on various military bases over which the United States exercises either exclusive jurisdiction or jurisdiction concurrent with the State.

Prior to 1966, the State of Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, Mississippi passed a local option alcoholic beverage control law subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages distributed within the State.<sup>1</sup> The Tax Commission was given exclusive authority to act as wholesale distributor in the sale of alcoholic beverages to licensed retailers within the State "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State, . . . exercising such control over the distribution of alcoholic beverages as [seems]

<sup>1</sup> Miss. Code Ann. § 10265-01 *et seq.* (Cum. Supp. 1972).

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 10, 1973

MEMORANDUM TO JUSTICES STEWART, WHITE, AND POWELL

Re: No. 72-350 - United States v. Tax Commission of  
Mississippi

I am contemplating some revision of the opinion in this case. Since each of you have already joined, I wanted, however, to consult with you before making any revision.

Further research has convinced me that the relevance of the Buck Act for the two exclusive jurisdiction bases in this case is more complicated than I had originally appreciated. As the opinion stands, of course, it recognizes in Part II, A, that §105(a) of the Buck Act constitutes a waiver of the exclusive legislative authority argument -- under Art. I, §8, cl. 17 -- with respect to state sales or use taxes sought to be imposed on any transaction occurring within an exclusively federal area. But the opinion then proceeds to argue that the surrender of exclusive jurisdiction qualified by §107(a) insofar as federal instrumentalities are concerned. The problem that the opinion does not squarely face is just how §107(a) qualifies §105(a). Currently the opinion suggests that §107(a) constitutes a qualification of the surrender of exclusive territorial jurisdiction. But a plausible argument can certainly be made that §107(a) merely is an expression by Congress that in surrendering exclusive territorial jurisdiction for state tax purposes in §105(a), it did not intend to affect the continuing validity of other, distinct governmental immunity principles such as the federal instrumentalities doctrine first announced in M'Culloch v. Maryland. Indeed, I am personally inclined to the view at this point that this is the more sensible construction of the Buck Act, and some support for the suggested construction may be drawn from the legislative history associated with the initial version of the Act Passed in 1940 and thereafter superseded by the 1947 codification.

Having said this, I should point out that the Tax Commission placed no reliance upon the Buck Act before the District Court (no reference to the Act is to be found in its papers below), and that the District Court neither relied on nor mentioned the Buck Act in holding the liquor purchases by the nonappropriated fund activities on the four bases to be taxable. Only in its brief before this Court has the Tax Commission relied on the Buck Act -- and, as a study of its brief reveals, even here the Commission has failed to see the real point of the Act for this case, see Brief for Appellees, at 14-15.

At the same time, I remain convinced that the District Court was in error as to the basis on which it did decide the case. It misapplied Art. I., §8, cl. 17, and it badly misconstrued the Collins case. In terms of this Court's institutional function as an appellate body, it seems to me appropriate that our first concern be to correct a misinterpretation of federal law by the lower federal courts. Here it may ultimately turn out that the Buck Act is dispositive of the Government's reliance on Art. I, §8, cl. 17, in the context of the two exclusive bases, but that is an issue on which I think it would be useful to have the views of the District Court in the first instance. Meanwhile, the District Court erred in holding the non-appropriated fund activities taxable in terms of the question it did consider.

Thus, my own conclusion here is that the best course of action is to eliminate the substantive discussion of the Buck Act from Part II, A., of the circulated draft, to limit Part II to a discussion of the District Court's misinterpretation of Collins, and to include the Buck Act in the remand ordered in Part III, pointing out that the Tax Commission did not rely on the Act below and that the District Court did not discuss it. I should add it seems to me that the problem of a perhaps ill-considered interpretation of the Buck Act in Part II, A., of the draft is good evidence of the value of the principle that this Court generally prefers to have question fully considered and evaluated in the lower courts before deciding it here.

I look forward to hearing your views on whether you could continue to join in the opinion if redrafted as suggested, or, for that matter, any other suggestions you may have. I do not anticipate that a redrafting would be very difficult or cause any significant delay.

Sincerely,

  
T.M.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 10, 1973

MEMORANDUM TO MR. JUSTICE BLACKMUN

Re: No. 72-350 - U. S. v. Tax Commission of Mississippi

Your join note arrived after the attached memorandum had been prepared and duplicated. Since you have now joined the opinion, I would also appreciate hearing your views on the revision of the opinion I suggest therein.

Sincerely,



T.M.

cc: Mr. Justice Stewart  
Mr. Justice White  
**Mr. Justice Powell**

PP. 1, 5, 6, 10, 15, 16, 18

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

3rd DRAFT

From: Marshall, J.

## SUPREME COURT OF THE UNITED STATES

Recirculated: MAY 21 1973

United States, Appellant, } On Appeal from the United  
 v. } States District Court for  
 State Tax Commission of } the Southern District of  
 Mississippi et al. } Mississippi.

[May —, 1973]

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are called upon to review the judgment of the District Court for the Southern District of Mississippi that the State of Mississippi may require out-of-state liquor distillers and suppliers to collect and remit to the State a wholesale markup on liquor sold to officers' clubs, ship stores, and post exchanges located on various military bases over which the United States exercises either exclusive jurisdiction or jurisdiction concurrent with the State.

Prior to 1966, the State of Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, Mississippi passed a local option alcoholic beverage control law subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages distributed within the State.<sup>1</sup> The Tax Commission was given exclusive authority to act as wholesale distributor in the sale of alcoholic beverages to licensed retailers within the State "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State, . . . exercising such control

<sup>1</sup> Miss. Code Ann. § 10265-01 *et seq.* (Cum. Supp. 1972).

(WJ)

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

P. 16  
From: Marshall, J.

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 72-350

Recirculated: **MAY 24 1973**

United States, Appellant, } On Appeal from the United  
v. } States District Court for  
State Tax Commission of } the Southern District of  
Mississippi et al. } Mississippi.

[May —, 1973]

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are called upon to review the judgment of the District Court for the Southern District of Mississippi that the State of Mississippi may require out-of-state liquor distillers and suppliers to collect and remit to the State a wholesale markup on liquor sold to officers' clubs, ship stores, and post exchanges located on various military bases over which the United States exercises either exclusive jurisdiction or jurisdiction concurrent with the State.

Prior to 1966, the State of Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, Mississippi passed a local option alcoholic beverage control law subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages distributed within the State.<sup>1</sup> The Tax Commission was given exclusive authority to act as wholesale distributor in the sale of alcoholic beverages to licensed retailers within the State "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State, . . . exercising such control

<sup>1</sup> Miss. Code Ann. § 10265-01 *et seq.* (Cum. Supp. 1972).

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 10, 1973

Re: No. 72-350 - U.S. v. State Tax Commission  
of Mississippi

Dear Thurgood:

Unless further writings convince me to the contrary,  
I am pleased to join your opinion in this case.

Sincerely,

*H. A. B.*

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

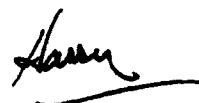
May 11, 1973

Re: No. 72-350 - U.S. v. Tax Commission of Mississippi

Dear Thurgood:

What you propose in your circulation of May 10 to Potter,  
Byron and Lewis meets with my approval.

Sincerely,



Mr. Justice Marshall

cc: Mr. Justice Stewart, Mr. Justice White and Mr. Justice Powell

1

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 22, 1973

Re: No. 72-350 - United States v. State Tax Commission  
of Mississippi

Dear Thurgood:

Unless further writings convince me to the contrary, I am  
still with you on your circulation of May 21.

Sincerely,

*H. A. B.*

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 22, 1973

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No. 72-350 United States v. State Tax  
Commissioner of Mississippi

MEMORANDUM TO THE CONFERENCE:

Although I came to the Conference yesterday prepared to vote to reverse as to all four of the military bases, and I so voted, the discussion prompted me to do some further thinking. I have also reexamined the opinion below.

My notes indicate that Potter would reverse as to the two bases ceded by Mississippi, but is inclined to affirm or remand as to the two bases with respect to which the United States has concurrent jurisdiction. I believe that Thurgood expressed a preference to remand as to the latter two bases, especially in view of the fact that the Court below did not address the "instrumentalities" point. I think Thurgood said that unless five of us were willing to remand, he would reverse across the board. Harry indicated that he was generally in agreement with Potter, although I judge he might be willing also to remand as to the two "concurrent jurisdictions" bases.

The Chief Justice reserved judgment as to his vote on these two bases, although he would reverse as to the two "exclusive jurisdiction" ones.

In view of my further consideration of the case, I am now willing to vote to reverse as to two ceded bases and remand as to the other two bases.

Sincerely,

*Lewis*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 1, 1973

No. 72-350 U. S. v. State Tax  
Commission of Mississippi

Dear Thurgood:

Please join me in your fine opinion.

Sincerely,

*Lewis*

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 22, 1973

No. 72-350 U. S. v. Mississippi State Tax Commn.

Dear Thurgood:

I am still with you.

Sincerely,

*Lewis*

Mr. Justice Marshall

cc: The Conference

lfp/ss

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 10, 1973

Re: No. 72-350 - U. S. v. State Tax Commission of  
Mississippi

Dear Bill:

Please join me in your dissent.

Sincerely,

W.H.R.

Mr. Justice Douglas

Copies to the Conference