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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: NORTH DAKOTA, ET AL., Appellants V. UNITED STATES

CASE NO: 88-926

PLACE: WASHINGTON, D.C.

DATE: October 31, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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NORTH DAKOTA, ET AL., :
Appellants :
v. : No. 88-926
UNITED STATES :
-----x

Washington, D.C.
Tuesday, October 31, 1989

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

NICHOLAS J. SPAETH, ESQ., Attorney General of North Dakota,
Bismarck, North Dakota; on behalf of the Appellants.
MICHAEL R. LAZERWITZ, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on behalf
of the
Respondent.

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P R O C E E D I N G S

(1:46 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-926, North Dakota v. the United States.

General Spaeth, you may proceed.

ORAL ARGUMENT OF GENERAL NICHOLAS J. SPAETH

ON BEHALF OF THE APPELLANTS

MR. SPAETH: Thank you. Chief Justice Rehnquist, members of the Court, and may it please the Court:

It is a special privilege for me to be here because it is only two days shy of the State of North Dakota's hundredth birthday.

The question presented in this case is whether the state, in an effort to prevent bootlegging of liquor from military enclaves, may impose a requirement on the suppliers of that liquor to the bases that requires them to put a label on each bottle destined for the military enclave indicating it is to be consumed only on the base.

QUESTION: Well, that isn't all the law says, is it? You can avoid putting that label on if you do something else.

MR. SPAETH: If you buy it from a local distributor, that is correct.

QUESTION: Oh yeah, yeah.

(Laughter.)

MR. SPAETH: That is correct, and pay the tax.

1 QUESTION: All right, all right.

2 MR. SPAETH: We don't have a bootlegging problem with
3 that, because there isn't a price differential. And that is
4 in fact --

5 QUESTION: Well, why would that -- don't you want to
6 keep the -- you don't want -- you can't even use the liquor
7 off the base --

8 MR. SPAETH: That is correct.

9 QUESTION: -- under this law.

10 MR. SPAETH: That is correct.

11 QUESTION: But if you -- if it is bought from a local
12 distributor --

13 MR. SPAETH: That is correct.

14 QUESTION: -- you may take it off the base.

15 MR. SPAETH: That is correct, because the taxes have
16 been paid. And --

17 QUESTION: Well, what's the purpose of the North Dakota
18 requirement?

19 MR. SPAETH: To prevent bootlegging of the liquor off
20 the base. There is a price differential between liquor sold
21 on the base and off the base, because off-the-base liquor
22 sales are subject to the distribution system and the state
23 taxation. On-base sales are not.

24 QUESTION: What sorts of diversions constitute the evil
25 or the problem?

1 MR. SPAETH: Well, if I can confine myself to answer
2 your question, first of all, solely to the record. In North
3 Dakota the state treasury became aware of liquor being shipped
4 off base and used by people off the premises and being
5 distributed to other individuals who are not authorized to
6 have it. In the State of Hawaii one enterprising person
7 managed to get enough liquor off the base to actually supply a
8 complete liquor store within Hawaii. In the State of
9 Washington, enough liquor was shipped to one particular
10 military enclave where, if it were to be consumed on base,
11 each individual would have had to consume five bottles per
12 day, every day of the year. And anyone who has ever been
13 around --

14 QUESTION: Is that supposed to tax our credibility?
15 (Laughter.)

16 MR. SPAETH: Well, anybody who has been around military
17 bases knows that there is a little bit of drinking that goes
18 on, but I think that is more than -- than its share. And that
19 is precisely what this regulation is designed to do.

20 QUESTION: Does the record show that the labeling
21 requirement is what caused the out of state suppliers to stop
22 supplying liquor to the government?

23 MR. SPAETH: No, it does not. There is, however, of
24 course, a chronological link because once the labeling
25 requirement went into effect, several suppliers indicated that

1 they would prefer to supply through the regular distribution
2 system. Others said that they would go ahead and supply it
3 anyway, and others said we are going to supply it, but it is
4 going to cost you more.

5 QUESTION: Do you think you could require the federal
6 government to affix the labels?

7 MR. SPAETH: That would be certainly more problematical
8 then, because that would be an effort to directly regulate
9 within the military enclave, and prior cases of this Court
10 have not allowed states that kind of discretion. Although
11 this is a special case in the sense that the Twenty-first
12 Amendment interacts in this particular situation. So although
13 the Court hasn't tread on that ground before, it would be a,
14 certainly a more difficult case for me were I to argue that.

15 I brought some labels with me so that the Court could
16 see what they are. These are 16 labels. They are crack-and-
17 peel kind of labels, like bumper stickers. Peel them off and
18 then you affix them to the bottle like that. They cost about
19 three cents or five cents, in that range, to produce. The
20 state generates no revenue from them --

21 QUESTION: Can they be -- may I just ask, you're
22 worrying about the -- having somebody -- an officer buy so
23 much liquor he could open his own liquor store, he could peel
24 off these labels pretty easily, couldn't he?

25 MR. SPAETH: No, you can't. I don't know --

1 QUESTION: Can you peel it off the podium there?

2 (Laughter.)

3 MR. SPAETH: My apologies to the Marshal. I don't
4 think I can.

5 (Laughter.)

6 MR. SPAETH: But if there is anybody who has ever
7 participated in a political campaign knows, as I have, the
8 worst -- the hardest thing to get people to put on, or to
9 identify with you, is a bumper sticker, because it is very
10 difficult to get off. And the same thing here. You can't
11 tear it off without leaving at least part of it on. And that
12 is why this particular kind of label was chosen for this
13 purpose.

14 QUESTION: Do you take the position that it is not a
15 burdensome requirement?

16 MR. SPAETH: No. Excuse me, yes, I do take the
17 position it is not a burdensome requirement.

18 QUESTION: Well, then why couldn't the state just
19 require all of the liquor sold in its stores to have the
20 sticker that it was sold in the stores? And then the federal
21 government would not be impeded and you could accomplish your
22 goal.

23 MR. SPAETH: Well, that wouldn't help us with respect
24 to identifying liquor that is sold on the base versus liquor
25 that might be brought in from Minnesota. In other words, it

1 is possible, in a border state like North Dakota, that liquor
2 could wind up in the state that was purchased in Minnesota.
3 And while the position you -- offer just has some merit, it
4 wouldn't enable us to distinguish liquor brought in from
5 Minnesota or Montana or South Dakota from liquor that was
6 brought off the bases, where tax was not collected. So, I
7 don't think approaching it the reverse way would help us.

8 QUESTION: Does the state have any regulatory interest
9 in liquor brought in from Minnesota? Doesn't it have the same
10 regulatory interest, or is the tax -- or is that not a problem
11 because the price is high?

12 MR. SPAETH: It is not a problem because the prices are
13 roughly equivalent, because again they go through their
14 regular state distribution system and taxes are collected on
15 that liquor.

16 QUESTION: Well, what you are saying is you don't need
17 the stickers because the market takes the place of it there.
18 I don't understand -- now I don't understand your answer to
19 the hypothetical. If you -- if you required labels on all
20 liquor that was sold through your own distributors, that would
21 take care of all the problem, because it is too expensive to
22 bring it in from Minnesota.

23 MR. SPAETH: I am sorry, Justice Stevens. I don't
24 quite understand your question, but I'll try to answer it.
25 There is a substantial price difference between liquor sold on

1 the bases in North Dakota --

2 QUESTION: I understand.

3 MR. SPAETH: -- and liquor sold in North Dakota, in
4 Minnesota, in Montana and in South Dakota.

5 QUESTION: I understand, but there is no similar price
6 differential between the Minnesota liquor and the North Dakota
7 liquor.

8 MR. SPAETH: That is correct.

9 QUESTION: And therefore, if you required all North
10 Dakota wholesalers and retailers to spend the three cents for
11 these stickers on their liquor, anything that didn't have it
12 would either be from Minnesota or from the base.

13 MR. SPAETH: That is right.

14 QUESTION: And presumably, it wouldn't be from
15 Minnesota because it doesn't save any money to get it from
16 Minnesota. So you would then identify the base liquor because
17 it wouldn't have a sticker on it.

18 MR. SPAETH: The difficulty we have, though, is one of
19 the two military enclaves we are talking about here is located
20 in Grand Forks, North Dakota, and I am not -- I don't know
21 your familiarity with North Dakota geography, but that sits
22 squarely on the border with Minnesota. And we would have
23 liquor in North Dakota from Minnesota, and we'd have lots of
24 it, because of sales or whatever features that may cause
25 people to purchase across the -- the border. So there still

1 is a bootlegging problem that is dealt with by using these
2 labels.

3 QUESTION: I'm really, I don't -- aren't there
4 Minnesota tax stamps on the Minnesota liquor?

5 MR. SPAETH: No, there are not.

6 QUESTION: There are not.

7 MR. SPAETH: Only the federal tax stamp exists on both
8 North Dakota and Minnesota liquor. And so we do have an
9 identification problem. In any event, if you look at it
10 simply from the standpoint of practicalities, this is probably
11 the least intrusive thing the State of North Dakota could have
12 done to deal with what it perceived to be a major problem.

13 QUESTION: General Spaeth, one of the affidavits
14 submitted on behalf of the government indicated that one out-
15 of-state wholesaler said he was going to have to raise his
16 price something like \$20 a case if this requirement went into
17 effect. Are there more costs connected with it, the putting
18 on the label, than we might guess, or is this just a rather
19 extravagant estimate, in your view?

20 MR. SPAETH: I think it is a rather extravagant
21 estimate. I mean, the labels themselves only cost a couple of
22 pennies each. And unless their labor costs are enormous, it
23 is hard to believe it would cost that much money to affix
24 these labels.

25 QUESTION: Let me ask you one more question. The

1 posture of the case is that the district court granted summary
2 judgment for the state; the Eighth Circuit reversed and
3 granted summary judgment for the United States.

4 MR. SPAETH: That is correct.

5 QUESTION: So if there were any triable issue in fact
6 in the case, both courts were wrong, in effect.

7 MR. SPAETH: That is right, although both sides
8 stipulated to most of the essential facts in this case. So it
9 -- it's really not a case where there is a real quibble over
10 the factual record. It is rather the inferences to be drawn
11 from the factual record.

12 QUESTION: Well, I think there is a disagreement among
you as to whether there is a "burden" or not.

14 MR. SPAETH: That is correct.

15 QUESTION: And I am not so sure that isn't a factual
16 question.

17 MR. SPAETH: And, it could be, in some sense of the
18 word, because obviously the federal government is arguing that
19 it is extremely burdensome to comply with this requirement,
20 and the state is arguing to the contrary.

21 QUESTION: I -- I take it the \$20 a case figure could
22 include also the substantial cost of having to keep separate
23 inventories in the warehouse of the stickered and the non-
24 stickered liquor. Because the stickers are put on, I assume,
25 before it is put in the box and well before it is shipped.

1 MR. SPAETH: That's correct. It could account for some
2 of that cost to go, again --

3 QUESTION: And of course, if your view prevails, you
4 can have every state requiring stickers and then the distiller
5 would have to keep 49 separate inventories.

6 MR. SPAETH: Unless the states got together and agreed
7 on a sample labeling procedure, that is correct.

8 The state doesn't attempt, of course, to regulate sales
9 on the base in any other way. None of this liquor is taxed.
10 The bases operate at different hours than liquor stores within
11 the state, and sell to any classes, individuals, it wants to
12 on the base, and at different ages. You can buy liquor on the
13 Air Force bases in North Dakota when you are 18. You have to
14 wait until you are 21 within the state.

15 The state believed it had the authority to impose this
16 labeling requirement because of its inherent police powers,
17 and also because of its core powers within the Twenty-first
18 Amendment. Indeed we thought in doing this we were doing
19 exactly what this Court suggested that we do in United States
20 v. Mississippi Tax Commission, when the Court alluded to the
21 fact that the states were free, of course, to regulate the
22 shipments of liquor en route to bases in order to prevent
23 diversion.

24 But notwithstanding what we thought to be a fairly
25 innocuous regulation, and our belief that it was firmly rooted

1 in prior cases of this Court, the federal government chose to
2 challenge it. And as the Court has already noted, the Eighth
3 Circuit overturned the regulations on a two to one vote. The
4 court of appeals found the regulation invalid, I believe,
5 because it mischaracterized it. It saw the regulation as a
6 direct effort to regulate sales of liquor on the base, and
7 that is clearly not the case. The regulation only applies to
8 the suppliers. It is really like a host of other state
9 regulations that indirectly affect federal procurement:
10 safety regulations, minimum wage regulations, environmental
11 regulations, even the highway speed limit.

12 QUESTION: (Inaudible) I gather, if the -- if you don't
13 comply with the labeling, then you have to be -- work through
14 the state wholesalers --

15 MR. SPAETH: That is right.

16 QUESTION: -- and you have to pay the tax, and
17 inevitably, the price of liquor then delivered to the base
18 will go up.

19 MR. SPAETH: That is correct.

20 QUESTION: Every bottle will be -- will cost more.

21 MR. SPAETH: That is right, because the tax will be --

22 QUESTION: And in the long run the people on the base
23 will be paying the same price as -- as people pay off the base
24 at local stores.

25 MR. SPAETH: That assumes that they are going to go

1 through the distribution network, and many of the stores --

2 QUESTION: Well, I know, but if they don't label they
3 go through that.

4 MR. SPAETH: That is correct. But of course, they are
5 free to label it and the Air Force is free to buy, of course,
6 from whomever it wants. There is no requirement for the Air
7 Force purchase through the distribution system. And many
8 suppliers will supply the liquor with the sticker on it, and
9 that -- the record does show that.

10 QUESTION: General Spaeth, you say it is like a lot of
11 other state regulation. Well, in one significant respect it
12 differs from other state regulation, and that is it explicitly
13 applies only to sellers to the United States government.

14 MR. SPAETH: That is correct. But that is because --

15 QUESTION: That is a big difference.

16 MR. SPAETH: Well, it is a difference, but it is a
17 discrimination in favor of the federal government, because
18 every other distributor has to pay the tax and go through the
19 whole distribution network, be licensed and be bonded. It is
20 exactly like the situation this Court endorsed in United
21 States v. Washington, where the state of Washington imposed a
22 tax on federal contractors that was different than the tax
23 imposed on other contractors within the state. The tax was
24 lower. And this Court said there was no problem with that.
25 That is constitutional because you are not discriminating

1 against the federal government.

2 QUESTION: Well, how does this, how does this in favor
3 of the government in any respect?

4 MR. SPAETH: Because it doesn't require -- we are not
5 attempting to tax the distributor or the supplier or purveyor
6 of liquor to the base. The tax isn't collected; the suppliers
7 don't have to go through the state distribution system.

8 QUESTION: They just have to label.

9 MR. SPAETH: They just have to label. It is far less
10 onerous than what other distributors have to do within the
11 state.

12 QUESTION: Do you think you could do that, you could go
13 the other route?

14 MR. SPAETH: Go which route?

15 QUESTION: Re -- impose the tax, require the base to
16 buy it from your -- require the federal enclaves to buy it
17 through the distributor system?

18 MR. SPAETH: I don't think that the state could require
19 the federal enclaves to buy it through the distribution
20 system, but I do think the state, if it wanted to, could tax
21 those suppliers before they sell the liquor to the base.
22 Indeed, the court in the United States v. Mississippi said the
23 states could do that, and in the case I just cited to you,
24 United States v. the State of Washington, the Court said you
25 could do that. You could tax contractors or suppliers to the

1 federal government, as long as you don't do it in a
2 discriminatory way. We are doing far less than that here --

3 QUESTION: Is that true if the supplier -- that's not
4 true if the suppliers are out of state.

5 MR. SPAETH: Well, they are in state, though, for the
6 purpose of doing business, in the sense that they are selling
7 to locations within the state. I mean, that, just as Sears
8 and Roebuck is in the state in the sense that it sells within
9 the state. And I don't think it is any different than
10 situations this Court has endorsed in other cases.

11 The court of appeals also thought in this case that
12 there might be federal preemption. It relied on a statute
13 that requires the federal government to purchase liquor from
14 the competitive source, price and other factors considered,
15 and a regulation that basically parroted the statute. It is
16 difficult for me to see how that could be preemption. First
17 of all, there is no express statement in either the statute or
18 regulation that any state rules or regulations are preempted.
19 Certainly this is not an area where Congress has occupied the
20 field, indeed the Twenty-first Amendment would arguably
21 prevent that. And third, there is no frustration of the
22 federal purchasing objection here.

23 QUESTION: Well, one gets the impression, General
24 Spaeth, from reading about what Congress did, that the intent
25 was to require the bases to purchase locally when they are

1 talking about beer and wine, but to allow liquor to come in
2 from out of state as well as locally, and be competitive, when
3 you are talking about hard liquor.

4 MR. SPAETH: That is correct. That is precisely what
5 Congress intended. And, obviously, it is our position, what
6 the State of North Dakota does here doesn't interfere in any
7 way with what Congress intended, because --

8 QUESTION: (Inaudible) liquor at the lowest prices
9 available.

10 MR. SPAETH: That is right.

11 QUESTION: No matter what the price is, it is the
12 lowest price that is available.

13 MR. SPAETH: That is right, and they are free -- the
14 bases are free to buy from whatever source they want. And the
15 only thing that North Dakota requires is this little label to
16 be affixed to those bottles.

17 So again, it is difficult to see where the preemption
18 comes here, given the language of the statute and the
19 regulation, and I doubt very much if that is what Congress
20 intended to do when it enacted this particular legislation.

21 QUESTION: General Spaeth, do you have any comment on
22 the milk case of Paul against United States, and how it bears
23 on this?

24 MR. SPAETH: Yes, Justice Blackmun. I don't think it
25 applies. In Paul we are dealing with a situation where

1 California had a minimum price law with respect to milk. And,
2 obviously, any time you set a minimum that tends to be where
3 the price falls, if you understand the marketing in milk. And
4 that totally frustrated the federal objective of buying from
5 the most competitive source available, because every quart of
6 milk sold in California was priced at exactly the same price.
7 That's not the situation here. We are not attempting to fix
8 the price of liquor that is sold on the base. All we are
9 doing is imposing a requirement that according to the federal
10 government raises its cost of buying.

11 QUESTION: To cure a danger to your own economy.

12 MR. SPAETH: That is right, bootlegging of liquor
13 within the state.

14 We think what we did here was probably the least
15 intrusive thing we could have done, and the case is important
16 in North Dakota, and in other states as you might guess from
17 the volume of amicus support for the state. We also felt we
18 did what the Court invited us to do in prior cases dealing
19 with this area. And, if the state can't do this, I am not
20 sure what we can do to prevent bootlegging. And it is for
21 that reason I urge this Court to reverse the court of appeals
22 before, below, and reinstate the regulation --

23 QUESTION: How much liquor are we talking about?

24 MR. SPAETH: Being supplied to the base? Lots. There
25 are very large enclaves, they have -- there are very large Air

1 Force bases. Both have bombers and missiles, and there are
2 something like 10,000 people on each base. In addition to
3 that, of course, there are a host of other people who are
4 eligible to buy, retirees, dependents.

5 QUESTION: They drink a lot at Minot and Grand Forks to
6 keep warm, I suppose.

7 MR. SPAETH: That's right. And they do also restore,
8 or bestow honorary privileges on others. I have honorary
9 privileges at the Minot Air Force base, for example. I can go
10 up there and drink, too.

11 QUESTION: You have an interest in this litigation.

12 (Laughter.)

13 MR. SPAETH: It cuts both ways. If I want to bootleg
14 too --

15 QUESTION: Of course, what I am concerned about is
16 your, you show no comfort for the Minnesota bootleggers who
17 need all the help they can get.

18 (Laughter.)

19 MR. SPAETH: Well, the State of Minnesota's economy is
20 doing so much better than ours these days that I have no
21 sympathy whatsoever for it. Notwithstanding the problems the
22 Vikings have been having lately.

23 QUESTION: General Spaeth, I didn't understand the last
24 statement you made. You said if we don't let you do this you
25 don't under -- you don't know what you can do. I thought you

1 said earlier that you could -- you could readily impose a
2 sales tax on the sales at the base.

3 MR. SPAETH: Yes. I think I misstated myself, Justice
4 Scalia. We probably could --

5 QUESTION: Readily.

6 MR. SPAETH: -- enforce some sort of tax, and that
7 would lessen the price differential and help alleviate the
8 bootlegging.

9 QUESTION: But not cure it.

10 MR. SPAETH: But perhaps not cure it because the
11 military enjoys a tremendous purchasing advantage as well
12 because of the volumes it buys.

13 QUESTION: Thank you, General Spaeth.

14 MR. SPAETH: Thank you.

15 QUESTION: Mr. Lazerwitz.

16 ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

17 ON BEHALF OF THE RESPONDENT

18 MR. LAZERWITZ: Mr. Chief Justice, and may it please
19 the Court:

20 The military's procurement of alcoholic beverages has
21 generated its share of controversy ever since the Congress, in
22 1802, included one gill, which is four ounces, of rum, whiskey
23 or brandy in a soldier's daily ration. Before this Court
24 today the issue is whether the federal government, consistent
25 with federal law, may remain free to purchase its alcoholic

1 beverages for resale in military base clubs and package stores
2 from the most convenient and inexpensive sources, regardless
3 of whether those sources are located in a base's home state.

4 In our view the states regulations are constitutionally
5 invalid for three principal reasons. First, Congress has made
6 clear in Section 2488 of Title 10 that the military must
7 remain free to buy its alcoholic beverages at the lowest
8 available price, regardless of where the suppliers and/or
9 distillers are located. Here the record shows that North
10 Dakota's regulatory efforts conflict with this federal scheme,
11 actually thwart it, and thus violate the Supremacy Clause.
12 The regulations would in effect require the military to obtain
13 its liquor for its North Dakota facilities from less
14 competitive in-state sources, and on this record, at an
15 increased annual cost of more than \$200,000.

16 QUESTION: Well, now -- but that is basically an issue
17 of fact, don't you think, Mr. Lazerwitz?

18 MR. LAZERWITZ: That is clearly an issue of fact, and
19 in this case there was an uncontroverted affidavit from Kim
20 Keltz, that would be found at the Joint Appendix 25 to 28, and
21 she -- her affidavit stated that these regulations would in
22 effect require the government to pay more money. And the
23 reason isn't that hard to find. She testified that --

24 QUESTION: That these regulations would require the
25 government to pay more money?

1 MR. LAZERWITZ: Yes. And the reason isn't -- isn't
2 that difficult.

3 QUESTION: But more money than what?

4 QUESTION: But -- I don't see how that is dispositive
5 of a basic factual question. If -- supposing out-of-state
6 suppliers required to put on this sticker if, what Mr. --
7 General Spaeth, says is true, they cost three cents, they will
8 have to pass that along to the purchasers. But I don't see,
9 so long as the other state shippers are willing to keep
10 shipping to these bases and simply add on the cost of this, I
11 don't see how the government plan for, you know, competitive
12 purchasing, is defeated.

13 MR. LAZERWITZ: Well, Ms. Keltz's affidavit, she
14 testified or explained that five of our prime source suppliers
15 said, in light of these regulations, we are no longer going to
16 sell directly to you.

17 QUESTION: Okay, but do we know how many source
18 suppliers you had?

19 MR. LAZERWITZ: No, we don't. The record doesn't say
20 that.

21 QUESTION: So that proves five wouldn't do it. If
22 there were 20 suppliers, maybe five not doing it would make no
23 difference.

24 MR. LAZERWITZ: Mr. Chief Justice, the Court, in the
25 liquor business, with both liquor that is manufactured,

1 distilled, in this country and out of the country, there are
2 exclusive distributors. You can only buy, for example --

3 QUESTION: But is this all in the record?

4 MR. LAZERWITZ: The only record support, or the record
5 that bears on this aspect, is in the Kim Keltz affidavit, and
6 that is not contradicted.

7 QUESTION: And you -- but, you're defending a summary
8 judgment on the basis of a statement that five out-of-state
9 suppliers said they would no longer supply. The record
10 doesn't say how many potential out-of-state suppliers there
11 were.

12 MR. LAZERWITZ: The affidavit further states -- no, it
13 doesn't, that is clear. But the affidavit further states that
14 because of these prime source suppliers would no longer sell
15 us liquor, we would have to buy those supplies from the in-
16 state sources, the distributors.

17 QUESTION: Suppose that all suppliers would go ahead
18 and put the labels on with the inevitable result that the
19 price would go up. If that were the case, there would be no
20 interference with getting the lowest competitive price.

21 MR. LAZERWITZ: In that respect, if in fact every state
22 in the country had one of these -- had a labeling requirement,
23 yes. We would have a much different case. But there is a
24 second aspect to this case.

25 QUESTION: But somebody has to be, some suppliers have

1 to say no, and the base would want to -- nevertheless, to
2 purchase from those suppliers. We don't even know whether
3 they would want to continue to purchase from them if they had
4 to pay this higher price.

5 MR. LAZERWITZ: Whether the government would want to.

6 QUESTION: Yes.

7 MR. LAZERWITZ: The government --

8 QUESTION: They would say okay, so long, friend. If
9 you don't want to sell under this basis, why, that's -- take
10 your business some place else.

11 MR. LAZERWITZ: The government, at least in the liquor
12 field, the government -- there are only certain entities that
13 sell particular brands. That's the problem here, one of the
14 problems. But there is a second aspect --

15 QUESTION: You don't need to have a -- you don't need
16 to have a full line of whiskey to make --

17 MR. LAZERWITZ: Well, the whole point of these
18 enterprises on military bases, they are twofold. One is to
19 provide a service to the servicemen. And another -- and in
20 providing a service you have to provide those products that
21 the consumers demand.

22 QUESTION: We are arguing about something that really
23 there are no findings about, so --

24 MR. LAZERWITZ: Well, there is a second aspect to this
25 case that's equally important in terms of its constitutional

1 invalidity. And that is, look at the regulations themselves.
2 The state tells you it cannot regulate the military's
3 procurement practices, but that is precisely what it is
4 regulations seek to accomplish. And under the Supremacy
5 Clause, the state is not at liberty to take that step.

6 And the final problem with these regulations is that
7 since the state is otherwise engaging in regulation over the
8 military's procurement practices, the Twenty-first Amendment
9 in those circumstances, doesn't save the state's regulations
10 from constitutional invalidity.

11 At the outset, Justice Scalia mentioned before, well,
12 what can a state do if there is this problem. Seven states in
13 this country actually use the most efficient method, which is
14 a tax stamp system. The state could require all licensed
15 wholesalers in the state to affix tax stamps, which would
16 actually be seals on the bottle, on every bottle of liquor
17 that they sell. The state could then readily determine
18 whether any retailer, or any other person for that matter,
19 were selling untaxed liquor. And in that respect, the states
20 that do that -- Minnesota in fact doesn't do that if that is
21 at all relevant, but in that respect there would be no burden
22 on the federal government whatsoever, and how the federal
23 government went about buying its liquor wouldn't affect the
24 efficiency of that system.

25 QUESTION: But they wouldn't --

1 QUESTION: But General Spaeth says that doesn't work at
2 Grand Forks because it is on the border. Minnesota doesn't
3 require a tax stamp, so you can't tell.

4 MR. LAZERWITZ: Well, he says that, we don't know.

5 QUESTION: Well, that is one of the many things we
6 don't know in this case.

7 MR. LAZERWITZ: Well, the -- there is no doubt that
8 because this case was decided on cross motions for summary
9 judgment the record is quite minimal. But we have -- there is
10 more here than just --

11 QUESTION: Excuse me, as far as the Minnesota liquor is
12 concerned, I assume it is a violation of the states law to
13 bring in untaxed liquor, untaxed by North Dakota, whether it
14 is taxed by another state or not. Can you --

15 MR. LAZERWITZ: There are allegations --

16 QUESTION: I mean, I assume they would want to find all
17 liquor that hasn't paid the state tax, whether it is federal
18 liquor or non-federal liquor. So, the system you suggest
19 would -- would be even better than the system that North
20 Dakota has applied. It will enable you to identify not only
21 the bootleg federal liquor, but the bootleg Minnesota liquor.

22 MR. LAZERWITZ: That is true. And there is another
23 aspect to this case. In terms of the diversion of liquor, and
24 the government again, because of the limited record, will
25 assume that there is a problem. And the problem is, as Mr.

1 Spaeth said, bootlegging, the sale -- the resale of untaxed
2 liquor. Assuming that's a problem, liquor on military bases,
3 whether it is bought from out-of-state sources or whether
4 bought from licensed wholesalers in the state, will always be
5 cheaper from liquor off the base in North Dakota. And that is
6 not only because of the source, but because liquor sold to the
7 servicemen on the base is not subject to a retail tax.
8 Therefore, under the state's own terms, there is always going
9 to be the potential -- potential for diversion, of
10 bootlegging, from the liquor on the base. But what happens
11 here, the state doesn't impose any labeling requirement for
12 liquor sold from the local wholesalers.

13 QUESTION: I suppose that also there is probably not as
14 high a mark up on the base either. But, Mr. Lazerwitz, has
15 the federal government ever required the bases to label the
16 stuff, or to require the supplier to put a base on it -- a
17 label on it indicating it is tax-free liquor?

18 MR. LAZERWITZ: Not that I know of, although the
19 military, the Department of Defense, has a specific regulation
20 telling the servicemen that you cannot -- we will sell you the
21 liquor on the base, but if you take it off the base you are
22 subject to state law. And they are certainly told and it's
23 enforced, not to resell this to unauthorized personnel. You
24 and your wife can have a drink, but you can't sell it to your
25 buddy off the base, or to anyone else.

1 QUESTION: No, but you can take it home. Would it be
2 impossible for the federal government to affix the -- spend
3 the three cents and fixing these labels on.

4 MR. LAZERWITZ: Oh, of course not. We could easily do
5 it, but there, but the state can't tell us to do it.

6 QUESTION: The state can't make you do it.

7 MR. LAZERWITZ: And the state has told us in its brief
8 that it can't tell us to do it.

9 QUESTION: But you could presumably satisfy -- if you
10 were willing to go to that burden, you could probably get the
11 liquor. If the supplier won't sell it because of the burden,
12 you could probably get it by paying a three cents a bottle.

13 MR. LAZERWITZ: Actually, no. In this case we
14 couldn't, because the state regulation, as explained to the
15 distillers, requires them to put the label on before it comes
16 into the state. And that is what scared off the distillers
17 and the suppliers. If in fact the regulation were any liquor
18 -- I mean, the problem with the state, the state's difficulty
19 is, if they want us to put the label on once it gets into the
20 state, they can't tell us to do that. And it also won't
21 accomplish what in fact is going on here, which is to change
22 the way the military buys its liquor.

23 And that's -- that is our second point. It is not
24 simply the problem with the increased cost. What the state is
25 doing here is the Paul case, is the Leslie Miller case, is the

1 Public Utilities Commission case. It doesn't matter that the
2 regulation by its terms doesn't apply directly to us. In
3 fact, this regulation is even worse than the regulations at
4 issue in those cases because those cases, in Leslie Miller,
5 Paul, and the Public Utilities Commission cases, those were
6 general regulations that applied to anyone, any firm. And
7 there, those firms got caught up in the net because they did
8 business with the government.

9 This regulation, on its face, tells us who it is
10 seeking to regulate. It is seeking to regulate the
11 transaction between the federal government and its suppliers.
12 It is limited just to the people that do business with us.
13 So, a fortiori it is even more suspect in terms of those
14 cases.

15 QUESTION: Could the state impose a general sales or
16 use tax on these sales?

17 MR. LAZERWITZ: They could not. That is the
18 Mississippi case, the Mississippi cases. And so I disagree
19 with Mr. Spaeth when he suggests that he -- they could readily
20 do this another way. If they -- if the state wants to
21 increase local tax revenue they cannot do that at the expense
22 of the government's procurement of liquor. That is precisely
23 what this Court held in the two Mississippi tax cases.

24 What -- my point at the beginning with the problem, we
25 -- this case is not about the United States trying to disable

1 North Dakota or any other state from policing a legitimate
2 problem. But there are ways to do it that have nothing to do
3 with interfering with what states can't do, and that is
4 regulate military procurement. In terms of the dollars, the
5 practical effects are we wouldn't bring lawsuits if the
6 dollars didn't matter.

7 But here the legislative record, and I mentioned before
8 Title -- Section 2488, Congress considered all these -- this
9 precise matter. Congress has told the military, look, we want
10 you to buy beer and wine for the bases only from in-state.
11 But when it comes to liquor, we want you to buy it from
12 wherever you can get it at the cheapest to save money. And we
13 need the money because Congress doesn't fund what the profits
14 of these sales go for. And it is things like child care
15 centers, libraries, photo labs, bowling alleys, the things on
16 the military bases that are for the servicemen's benefit. And
17 so this is important in that respect. This money is
18 important.

19 Going back to the suggestion that is made in the brief,
20 and it was mentioned here, that perhaps the military can just
21 absorb the cost; we could just raise our prices if it costs us
22 more to buy liquor. In fact, there is a Department of Defense
23 regulation in deference to states and local -- and other local
24 liquor sale -- entities, we will not sell liquor below 10
25 percent of the shelf price in any local market. So, the

1 military works with an effective 10 percent profit margin.
2 Obviously we can't sell above the local price, one, because it
3 makes no economic sense and, two, the entity that runs these
4 shops now, the Army and Air Force Exchange Service, by
5 regulation, its mission is to provide cheaper goods to
6 servicemen.

7 QUESTION: And you -- that is a 10 percent profit
8 margin, assuming you had to pay the same rent for stores and
9 everything else. I mean, you're leaving out of that the fact
10 that you are not only selling lower, but you have -- you have
11 fewer costs.

12 MR. LAZERWITZ: Oh, I don't want to downplay the
13 competitive advantages of military procurement, but I just
14 don't want to leave the Court with the impression that we had
15 a simple option of just raising prices. The fact of the
16 matter is, the military got very smart. It used to buy
17 liquor, a lot of liquor, in-state from the distributors and
18 paid the additional mark up that is the result of the local
19 tax. Well, the military became smarter, and said look, if we
20 can buy this in bulk quantities we are going to save a lot of
21 money, and that is what the military does. And it saves a lot
22 of money. And regulations like this, that effectively take
23 out certain source suppliers of a market, affects us. And it
24 ruins the way we do our business. And that is the problem.

25 QUESTION: Yes, but it is also true, I suppose, that

1 they -- to the extent that there is liquor bootlegged off the
2 base in large volumes, you get the benefit of that by
3 increased sales and increased profit to support your day care
4 centers.

5 MR. LAZERWITZ: Well --

6 QUESTION: So you actually have a financial interest in
7 having the state law violated, in the way they are complaining
8 about it.

9 MR. LAZERWITZ: Well, no, we don't, Justice Stevens,
10 and there are some practical concerns. One is, we have rules,
11 and we don't want -- and military bases are in communities and
12 in states, and the last thing the military wants is for state
13 governments to yell and complain that the military is running
14 a bootleg operation, because that is going to affect how it
15 does its business. It makes -- it's no -- it doesn't make any
16 business sense --

17 QUESTION: It may not, but if its, if the figures he
18 has given us are correct --

19 MR. LAZERWITZ: Well, the --

20 QUESTION: -- it is apparently a serious problem that
21 the Commander of the base should have been able to see was
22 going on out there.

23 MR. LAZERWITZ: Well, the example in Hawaii was, I
24 believe it is Hawaii, it is so silly, but the money, the
25 liquor was stolen from the military. I mean, there are

1 instances where people, the truckers, stop off at a highway
2 before getting to the base and sell the liquor. Now that is,
3 we don't like that either. That is something we call in the
4 FBI about.

5 There is no doubt that there is always going to be the
6 chance of someone buying liquor on the base for \$9, and it
7 sells in the local store for \$11, becoming an enterprising
8 serviceman and sell it to his buddy for \$10. That is, that is
9 always going happen. And what we do, and this is what the
10 court of appeals suggested, and I think there is a lot of
11 sense to it, he said instead of litigating these things, and
12 instead of thinking up ways to try to travel through the cases
13 and spend all these years litigating, why don't we just
14 cooperate. And there are ways to cooperate without litigating
15 something like this. And the fact that the military, by its
16 regulations, says look, we will cooperate with state
17 authorities. We don't want bootlegging; it is not in our
18 interest. We -- and there are also other things the military
19 can do.

20 If, in fact, someone is known to be a bootlegger --
21 that's sort of an odd word, but his privileges can be lifted.
22 He can certainly be punished by the military if he is a
23 serviceman if he is breaking --

24 QUESTION: Who's supposed to read these labels, do you
25 suppose? Who does the state want to read those labels?

1 MR. LAZERWITZ: Well, I think the way the regulations
2 are set up, they don't, they could care less. Because in fact
3 --

4 QUESTION: Yeah, but they -- so, do they think this is
5 really going to be an effective way of curing their problem?
6 Because, after all -- all the label does is repeat what is in
7 the military law --

8 MR. LAZERWITZ: Well, I --

9 QUESTION: -- don't sell off the base, don't use off
10 the base.

11 MR. LAZERWITZ: Well, one curious aspect of this case,
12 and I am not sure it's my province to get into, but the only,
13 if you read North Dakota's laws, there is no law that says
14 it's illegal to consume liquor off the base. The only law
15 cited in this case, and it is actually by the amicus briefs,
16 is that provision of the administrative code saying that all
17 liquor imported into the state must be imported through a
18 licensed wholesaler. Now, the state tells us that it is
19 illegal for a serviceman to have untaxed liquor off base. We
20 can't dispute that, if that is what the state is now saying.
21 But there are no penalties if --

22 QUESTION: Well, do you think there -- I would think, I
23 would think if this -- putting on this label is not an
24 effective way of curing the problem they want to cure, that
25 you would argue that. Do you think this is -- let's assume

1 there is a problem. Do you think the labeling is an effective
2 way of curing it?

3 MR. LAZERWITZ: The labeling would be -- no, it is an
4 incomplete way, and it is an incomplete way for the reason I
5 gave before. The state doesn't require any labeling for those
6 -- we do buy, just for the Court's information, in North
7 Dakota we do buy some liquor from in-state sources. We don't
8 buy all of it from our warehouse, it is not all shipped to our
9 warehouse. And so the reason it is an ineffective requirement
10 is there is no label on those -- on those, first of all, on
11 the beer and wine. There is no label on the beer and wine.
12 And it is always going to be cheaper on the base.

13 QUESTION: But for the state to think this is going to
14 cure their problem, somebody has to read the label and say
15 gee, I had better obey what this label says.

16 MR. LAZERWITZ: Well, the servicemen are told --

17 QUESTION: But that is no different than what the
18 military already requires.

19 MR. LAZERWITZ: We tell the servicemen that we'll sell
20 it to you, but if you take it off the base you are subject to
21 state law.

22 QUESTION: Well, I guess the state wants to be able to
23 identify these bottles off base, if they should come across a
24 cache of liquor in a barn.

25 MR. LAZERWITZ: Oh, sure, or --

1 QUESTION: For example, say ah ha, this is untaxed
2 liquor, I see these little orange labels on it which you can't
3 get off. I assume that that is the purpose of it, isn't it,
4 to identify the bottles --

5 MR. LAZERWITZ: Yes, and also -- I mean, the example
6 cited in Washington where someone was essentially selling to
7 another liquor store. You could -- a state liquor inspector
8 could walk through a liquor store, go through the inventory
9 and say well, there is no label on this, where did you get it
10 from?

11 QUESTION: Well, I suppose it is also not implausible
12 to assume that the sticker requirement is so burdensome that
13 you will have to buy through the local wholesaler.

14 MR. LAZERWITZ: It certainly -- anyone who knows the
15 liquor business would know that you would. And I'll -- I can
16 explain to the Court -- I mean, this is the reason, and
17 Justice Kennedy alluded to it before. The labels, of course,
18 are so innocuous looking and they are so cheap, but it's
19 breaking down the packaging. A lot of liquor comes directly
20 from overseas. It is packaged overseas.

21 If the -- if the distiller, it's actually the importer,
22 has to break down the liquor once it comes here -- he doesn't
23 care about the labels. It's the labor of doing this, instead
24 of the way he normally does his business is just ship it to
25 whichever state or ever local distributor he is going to. And

1 so I don't think it takes any leap of faith to understand why
2 five of our prime source distributors said we are not going to
3 do business with you any more. And one said well, we'll still
4 do business but we are going to raise our prices.

5 And another curious aspect of the case is we will --
6 the distributors and why they don't file their amicus brief,
7 or why they are not here, we are going to still buy their
8 liquor. We are still going to be buying Johnnie Walker Black
9 from Somerset Importers; we're just not going to be buying it
10 directly from the shop. We're going to be buying it from
11 Somerset Importers outlets in North Dakota. So Somerset
12 Importers says fine with us. And that is the problem, because
13 under federal law the price differential from a distiller to a
14 local importer is uniform.

15 QUESTION: Do you feel you may need amicus briefs to
16 win this case?

17 MR. LAZERWITZ: At times I did, but I don't think --the
18 government can stand on its own briefs and its own arguments.

19 Just one final point because the state does rely
20 principally on the Twenty-first Amendment. Again, we have no
21 quarrels with the idea that the state can take all sorts of
22 measures to police trafficking of liquor within their borders.
23 But that is not this case because, even as Mr. Spaeth
24 suggested, what they really concerned is what happens on the
25 base. And that is not something the Twenty-first Amendment

1 gives them the authority to do. Off the base, that's a
2 different matter. But on the base and the federal procurement
3 is something that they can't do, and those are the Mississippi
4 cases.

5 So, no further questions. Thank you.

6 QUESTION: Thank you, Mr. Lazerwitz.

7 General Spaeth, do you have rebuttal?

8 REBUTTAL ARGUMENT OF NICHOLAS J. SPAETH

9 ON BEHALF OF THE APPELLANTS

10 MR. SPAETH: I think the Court understands the case,
11 but I thought I would follow up on a couple of points that
12 came up and perhaps the Court is also in doubt about the
13 answer. The labels, which I showed to you before, are fairly
14 effective because of their bright color in identifying someone
15 who is accumulating large quantities of liquor for
16 bootlegging, and they are subject, in that case, to --

17 QUESTION: But you don't think it is going to add -- be
18 a deterrent effect to -- I mean, somebody reads that label and
19 says I should --

20 MR. SPAETH: No. If they want to, if they are going to
21 bootleg it off the base this isn't going to help. And it is
22 not going to help in typical situations where someone takes
23 one or two bottles off the base.

24 QUESTION: Well, is it -- what is the penalty for
25 possessing liquor in North Dakota which has not been purchased

1 through a wholesaler?

2 MR. SPAETH: It depends on -- on how we find them. If
3 we found someone with simply one or two bottles, we'd -- we
4 would not prosecute. My office --

5 QUESTION: Well, is there a violation?

6 MR. SPAETH: There could be. If we were to prove that
7 that person took -- intended then to redistribute it or resell
8 it, that would be in violation of a host of state laws which
9 impose criminal penalties as well as civil penalties. The
10 criminal penalty is a Class A misdemeanor.

11 QUESTION: So the penalties we are talking about is
12 possession of liquor for resale?

13 MR. SPAETH: That is correct. We would have to prove,
14 of course, in the case of a single bottle, that they intended
15 to do that, and undoubtedly we wouldn't prosecute in that
16 case. But that is not what we are concerned about. We are
17 concerned more with the situation where its large quantities
18 being moved off base, and we can identify them through the use
19 of these labels.

20 QUESTION: Isn't there some rule you're not supposed to
21 be in possession of untaxed liquor in --

22 MR. SPAETH: No, we don't have a possession rule. But
23 we do have a rule, a law that prohibits possession with intent
24 to resell. And that is what we're, that is what our
25 regulations are designed to do.

1 QUESTION: General Spaeth, I had two questions. First,
2 in view of the colloquy with your adversary, and you mentioned
3 this, three cents a label, it is fairly clear, is it not, that
4 if the wholesaler has to un, open up all these cartons and
5 stick the labels on individual bottles, it is a substantial
6 burden in labeling.

7 MR. SPAETH: I don't know if it is substantial, but it
8 is more than three cents a bottle.

9 QUESTION: It is a lot more if you have to open -- I
10 mean just opening a liquor case takes a little work, you know,
11 and it's -- and then getting each bottle --

12 MR. SPAETH: I don't know, I don't buy it by the case,
13 but it could be more burdensome.

14 (Laughter.)

15 QUESTION: And so that is what we are talking about, is
16 that?

17 MR. SPAETH: Yes. That is what we are talking about.

18 QUESTION: And the second thing, is there -- maybe you
19 have answered it, I just wasn't entirely clear. Does North
20 Dakota require any kind of stamp on the bottle on which the
21 tax is paid? Is there anything -- evidence it does?

22 MR. SPAETH: No, there is no labeling requirement.

23 QUESTION: Don't many states do that?

24 MR. SPAETH: Some states do, but many states do not.

25 QUESTION: Yeah.

1 MR. SPAETH: The last point I wanted to address, and
2 then if there are any questions I will answer them, is the
3 dispute we are having with the government about whether we
4 could tax or not. And I know the Court doesn't like to listen
5 to quotes, but if you look at your case United States v.
6 Mississippi State Tax Commission, 421 U.S. at 613-614, the
7 Court does say that nothing in the language of the Twenty-
8 first Amendment leads to the extraordinary conclusion that the
9 amendment abolished federal immunity with respect to sales,
10 but it does, certainly does not say anything -- excuse me, I
11 am misreading it. There is the ability to tax, and I think,
12 you know, that is clear based on a whole line of cases that
13 this Court has declared.

14 Are there any more questions?

15 QUESTION: Thank you General Spaeth.

16 MR. SPAETH: Thank you.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 2:31 p.m., the case in the above-
19 entitled matter was submitted.)
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CERTIFICATION

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No. 88-926 - NORTH DAKOTA, ET AL., Appellants V. UNITED STATES

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BY Leona M. May

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