No. 17-5140

IN THE
United States Court of Appeals
for the District of Columbia Circuit

HO-CHUNK, INC. et al.,
Appellant,

v.

JEFF SESSIONS et al.
Appellee,

On Appeal from the
United States District Court of the District of Columbia
Case No. 1:16-cv-01652 (Hon. Christopher R. Cooper)

OPENING BRIEF FOR APPELLANTS

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November 21, 2017

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel for Appellants in the above-captioned matter submits this Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici.

Plaintiffs in the court below and Appellants in this Court are Ho-Chunk, Inc.; Woodlands Distribution Company; HCI Distribution Company; and Rock River Manufacturing Company.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel further submits that:

- Ho-Chunk, Inc. (HCI) is the economic development arm of the Winnebago Tribe of Nebraska, a federally-recognized Indian tribe (Winnebago Tribe). HCI's main purpose is to foster economic development on the Winnebago Reservation by creating jobs and other economic opportunities for Tribal members and to provide revenue directly to the Winnebago Tribal Government. The Winnebago Tribe is the sole owner of HCI; HCI has no parent company and no publicly-held company owns 10% or more of its stock.

- Woodlands Distribution Company (Woodlands) is a tobacco products distributor. Woodlands' parent company is HCI and no publicly-held company owns 10% or more of its stock.

- HCI Distribution Company (HCI Distribution) is a tobacco products distributor. HCI Distribution's parent company is HCI and no publicly-held company owns 10% or more of its stock.

- Rock River Manufacturing Company (Rock River) is a tobacco products manufacturer. Rock River's parent company is HCI and no publicly-held company owns 10% or more of its stock.

Defendants in the court below and Appellees in this Court are Jeff Sessions in his official capacity as Attorney General of the United States of America; the United States Department of Justice; Thomas Brandon in his official capacity as Acting Director of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives; and the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

(B) Ruling Under Review. Appellants seek review of the District Court Judge Christopher R. Cooper's Order authored May 24, 2017 (Docket 22), granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Cross-Motion for Summary Judgment, which was accompanied by a Memorandum Opinion (Docket 21) issued the same day. The Order is contained in

the Deferred Appendix (DA) at ECF 22, and the Memorandum Opinion is at DA ECF 21. The ruling under review pertains to the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. §§ 2341, *et seq.*, as implemented by 27 C.F.R. §§ 646, *et seq.* (1980).

(C) Related Cases. The case on review has not been previously before this Court or any other court. To the best of counsel's knowledge, no other related cases currently are pending in this Court or in any other federal court of appeals, nor in any other court in the District of Columbia.

/s/ B. Benjamin Fenner
B. Benjamin Fenner

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
GLOSSARY v
JURISDICTIONAL STATEMENT 1
STATEMENT OF ISSUES PRESENTED FOR REVIEW 1
STATUTES AND REGULATIONS 2
STATEMENT OF THE CASE AND FACTS 2
I. Congress passes the CCTA and ATF issues the current recordkeeping regulations 2
II. Formation of the Tribal Entities 3
III. The CCTA is amended 5
IV. The Tribal Entities receive record demands 6
V. District Court litigation 7
SUMMARY OF THE ARGUMENT 8
ARGUMENT 9
I. STANDARD OF REVIEW 9
II. ATF VIOLATED THE APA WHEN IT ENFORCED THE RECORDKEEPING REQUIREMENTS AGAINST THE TRIBAL ENTITIES 10
A. ATF violated the APA when it changed its rule and departed from longstanding practice unknowingly and without a detailed justification 10
B. ATF violated the APA because it did not engage in notice and comment rulemaking when it amended its regulations 14
C. ATF did not give the Tribal Entities the notice or the opportunity to comment that the APA demands. 15

III. ATF VIOLATED THE CCTA IN ENFORCING THE RECORDKEEPING REQUIREMENTS AGAINST THE TRIBAL ENTITIES 19

A. The Canon favoring Indians applies here 19

B. ATF's inclusion of Indian country within the definition of "State" and of tribal government instrumentalities within the definition of "person" violate the CCTA 20

CONCLUSION 30

CERTIFICATE OF COMPLIANCE WITH FRAP 32 31

CERTIFICATE OF SERVICE 32

ADDENDUM

TABLE OF AUTHORITIES

Cases

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) 13
City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003) 19
Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001).......................................19
Crooks v. Mabus, 845 F.3d 412, 416 (D.C. Cir. 2016) 9, 14
Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros.,
512 U.S. 61, 73 (1994)..21
*Dillmon v. Nat'l Transp. Safety Bd., 588 F.3d 1085, 1089
(D.C. Cir. 2009) 10, 11, 12
*FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)....... 10, 11, 12, 13
Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop
Colony, 538 U.S. 701 (2003) 22
*McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988). 15, 16
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982)...............................28
Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) 21
Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)), cert. denied,
488 U.S. 1010 (1989)...19
*Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins.
Co., 463 U.S. 29, 57 (1983) 10, 12
*Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45
(D.C. Cir. 1988) 19, 22
Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1206 (2015)............................14
United Savings Ass'n v. Timbers of Inwood Forest Associates,
484 U.S. 365, 371 (1988)...21
Washington v. Confederated Tribes of Colville Indian Reservation,
447 U.S. 134, 156-57 (1980) 21
Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979).....................................22

Statutes

1 U.S.C. § 1 .... 2, 6, 21, 22, 25, 26, 28
5 U.S.C. § 702 1
5 U.S.C. § 706 9
15 U.S.C. §§ 375, *et seq.*...28

* Authorities upon which we chiefly rely are marked with asterisks.

18 U.S.C. § 1151 20
18 U.S.C. § 2341 ..... 20, 27
18 U.S.C. § 2343 ..... 1, 5, 21, 25, 26, 27, 28
18 U.S.C. § 2346 ..... 5, 6, 19, 20, 21, 25, 27
25 U.S.C. §§ 5301 *et seq.* (1975) 28
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 2201 1

Regulations

27 C.F.R. §§ 646, *et. seq.* (1980) 1, 11, 20

Other Authorities

124 Cong. Rec. 33277 (1978) 23
151 Cong. Rec. H6273-04, (daily ed. July 21, 2005) (Statement of Rep. Coble), 2005 WL 1703380 ..... 5, 24, 26
45 Fed. Reg. 2855 (Jan. 15, 1980) 2
45 Fed. Reg. 48,609 (July 21, 1980)(to be codified at 27 C.F.R. pt. 296) 2
45 Fed. Reg. 48,612 ..... 2, 8, 10, 13, 15, 22, 24
75 Fed. Reg. 44,173 (July 28, 2010).....6
79 Fed. Reg. 73,905 ..... 18, 28
Advisory Comm. on Intergovernmental Relations, 95th Cong., Rep. on Cigarette Bootlegging: A State and Fed. Responsibility 58 (Comm. Print 1977) 24
H.R. Conf. Rep. 95-1778, 1978 U.S.C.C.A.N. 5535 at 5538..... 6, 22, 24
Kelly S. Croman, *Why Begger Thy Indian Neighbor?*, Joint occasional Papers on Native Affairs, 5 (May 4, 2016) 3
Office of the Attorney General, Department of Justice Policy Statement on Tribal Consultation, 0300.01 (Aug. 29, 2013) 18
S. Rep. No. 95-962, at *1 (1974) 22, 23
Staff of J. Comm. on Taxation, 95th Cong., Report on Cigarette Taxation and Cigarette Smuggling (Comm. Print 1978).....23
USA PATRIOT Improvement and Reauthorization Act of 2005. PL 109-177, March 9, 2006, 120 Stat. 192.....5

GLOSSARY

ATF: Bureau of Alcohol, Tobacco, Firearms and Explosives

CCTA: Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341 *et seq*.

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OPENING BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702, which waives the sovereign immunity of the United States with respect to any action for declaratory relief under 28 U.S.C. § 2201. This action sought a declaratory judgment on the rights, privileges, and immunities of the parties under the recordkeeping provisions of the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2343, as implemented in 27 C.F.R. §§ 646, *et. seq.* (1980).

This appeal is from a final Order dated May 24, 2017, which disposed of all parties' claims. Appellant filed a timely notice of appeal on June 6, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did ATF violate the Administrative Procedure Act (APA) when it changed its policy, originally promulgated through notice and comment rulemaking and exempting government instrumentalities from its recordkeeping requirements, by letters demanding the records of tribal government instrumentalities, contrary to longstanding practice and without notice and comment rulemaking?

Did ATF violate the CCTA by demanding records from tribal government instrumentalities in Indian country?

STATUTES AND REGULATIONS

The pertinent Statutes and Regulations are reprinted in the Addendum to this Brief.

STATEMENT OF THE CASE AND FACTS

This case is about tribal governments, recordkeeping under the CCTA, and the limits on an agency's authority to change its rules and longstanding practice for the first time in litigation and without notice and comment rulemaking.

I. CONGRESS PASSES THE CCTA AND ATF ISSUES THE CURRENT RECORDKEEPING REGULATIONS

On January 15, 1980, ATF issued a notice of proposed rulemaking to implement the recordkeeping provisions of the 1978 CCTA. 45 Fed. Reg. 2855 (Jan. 15, 1980). It gave interested persons forty-five days to submit comments. Id. at 2856. Approximately five months after the comment period closed, ATF issued its regulations resulting from the notice of proposed rulemaking. 45 Fed. Reg. 48,609 (July 21, 1980)(to be codified at 27 C.F.R. pt. 296).

In one comment, the government instrumentality that handles cigarettes for sale on military reservations requested "specific" regulatory language exempting it from the recordkeeping regulations. Id. at 48,612. ATF declined to add the requested specific exemption, reasoning as follows: because "person" under 1 U.S.C. § 1 applies in the CCTA, it applies in the regulations. Further, because that definition exempts government instrumentalities, no exemption "specific" to the

government instrumentality handling cigarettes for military reservations was necessary. Id. Congress has not amended the definition of "person" in the CCTA and ATF has not changed its policy through notice and comment rulemaking.

II. FORMATION OF THE TRIBAL ENTITIES

The history of the Winnebago Tribe, like that of many tribes, is one of tragic upheaval and displacement. Before HCI's creation, the Winnebago Reservation experienced chronic and severe unemployment reaching as high as sixty-five percent. ECF 1: 7; ECF 11-4: 2. This was due in large part to the unavailability of capital. ECF 1: 6-7. Much of the Winnebago Tribe's land is held in trust by the United States government or has been diminished through allotment leaving the Tribe unable to fund its governmental programs through property tax revenue. Id. Compounding these difficulties is the fact that the Winnebago Tribe's trust land may not be used as collateral for conventional loans. See generally Kelly S. Croman, *Why Begger Thy Indian Neighbor?*, Joint occasional Papers on Native Affairs, 5 (May 4, 2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf. The historic attrition and legal form of tribal land holdings denies tribes the major source of funding available to virtually every other government. See Id. Tribes, including the Winnebago Tribe, are required to provide essential governmental services but do

not have the real property tax base available to other governments to fund those services. ECF 1: 6-7; ECF 11-4: 2.

In order to address this problem, in 1994 the Winnebago Tribe created HCI. HCI's main purpose is to foster economic development on the Winnebago Reservation, create economic opportunities for Tribal members, and provide revenue directly to the Winnebago Tribal Government. ECF 1: 6-7; ECF 11-4: 3.

The Winnebago Tribe owns one hundred percent of the profits earned by HCI. ECF 11-4: 3. It uses these funds to support Winnebago Tribal social welfare programs, such as elder and child care, as well as basic government services. ECF 1: 7; ECF 11-4: 3. The Winnebago Tribe has also used this money to fund special programs such as down payment assistance for tribal members seeking to buy a home. Id. A copy of HCI's 2016 Annual Report and a short video highlighting the development in the Winnebago Tribal community made possible by HCI is available at http://www.hochunkinc.com.

Subsidiaries are a necessary part of HCI's structure given both the variety of businesses it oversees and its involvement in federal government contracting, which often requires a separate organizational structure. ECF 11-4: 3-4. HCI Distribution, Woodlands, and Rock River (collectively, the Tribal Entities) are three subsidiary corporations of HCI. ECF 11-4: 4. Each of the Tribal Entities was created by the Winnebago Tribe and organized under Winnebago Tribal law. ECF

11-4: 4. Each is wholly owned by HCI. ECF 1: 4. Their profits are also wholly owned by HCI and thus the Winnebago Tribe. ECF 11-4: 4. ATF does not dispute that the Winnebago Tribe created HCI as "a wholly-owned tribal corporation to serve as the Tribe's primary economic development arm." ECF 14-1: 1.

III. THE CCTA IS AMENDED

In 2006, Congress enacted the USA PATRIOT Improvement and Reauthorization Act of 2005. PL 109-177, March 9, 2006, 120 Stat. 192. This amended the CCTA to, among other things, add reporting requirements to federal and state authorities for non-face-to-face "delivery" sales and provide for State, local, and private civil enforcement of the CCTA. Id.

Tribes raised concerns to Congress over the amendment's impacts to tribal sovereignty. See 151 Cong. Rec. H6273-04, (daily ed. July 21, 2005) (Statement of Rep. Coble), 2005 WL 1703380, at *H6284. In response, Congress added language to the amendment to "mitigate" these tribal concerns by "protecting tribal governments and tribal sovereignty . . . ." Id.

Congress mitigated tribal concerns by adding an explicit tribal government exemption from the reporting requirement. 18 U.S.C. § 2343(b). It also, like state and local governments, exempted tribes from private enforcement actions. 18 U.S.C. § 2346(b)(1). Congress further aligned tribal governments with state and local governments by upholding each government's sovereign immunity from

unconsented lawsuits. 18 U.S.C. § 2346 (b)(2). Finally, Congress added language that nothing in the CCTA "shall be deemed to . . . restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe." Id.

Notably, the 2006 amendment to the CCTA did not change the definition of "person" used in the statute. H.R. Conf. Rep. 95-1778, 1978 U.S.C.C.A.N. 5535 at 5538 ("The conference substitute deletes the definition of 'person' because 'person' is defined in 1 U.S.C. 1 for all act [sic] of Congress.")

ATF attempted to implement the 2006 amendment to the CCTA through notice and comment rulemaking. 75 Fed. Reg. 44,173 (July 28, 2010). This notice of proposed rulemaking (NPRM) was never finalized. See ECF 21: 2. Regardless, like the underlying 2006 amendment to the CCTA, the NPRM did not attempt to change the definition of "person" in the regulations. 75 Fed. Reg. 44,173. Neither did it address the exemption for government agencies and instrumentalities in the recordkeeping regulations. See Id.

IV. THE TRIBAL ENTITIES RECEIVE RECORD DEMANDS

In keeping with the government instrumentality exemption and sovereignty protections in the CCTA and carried forward in the regulations, prior to 2016, none of the Tribal Entities had ever received a demand for records under the CCTA. Nor had the CCTA been enforced against any of the other tribal government

instrumentalities dealing in tobacco products through the recordkeeping provisions or otherwise. Trans. at 7:22-25, 8:1-13, 17:21-25, 18:1-18 May 2, 2017.

Then, on or about June 24, 2016, HCI Distribution, Woodlands, and Rock River each received substantively identical letters from ATF at their locations on the Winnebago Tribe's Reservation. ECF 1: 7, 17-18, 21-22, 25-26. The letters demanded records the Tribal Entities were now supposedly "required" to maintain pursuant to the regulations. Id. Lacking any findings of fact, explanation, or analysis, ATF merely imposed the recordkeeping requirements on each of the Tribal Entities as a non-exempt "person." ECF 1: 17-18, 21-22, 25-26. In a footnote, the letters stated that the CCTA applies to Native Americans and Native American entities. Id. (citing cases against individuals). Nowhere do the letters recognize or address the government instrumentality exemption from the recordkeeping requirements or the sovereign immunity protections in the CCTA. Finally, the letters referenced the civil and criminal penalties for knowing violations of the "rules and regulations." Id. at 18, 22, 26.

V. DISTRICT COURT LITIGATION

The Tribal Entities filed their complaint shortly after receipt of the record demands. ECF 1. The complaint sought a declaration that ATF violated the APA because the recordkeeping provisions of the CCTA as implemented by ATF do not apply to the Tribal Entities. Id. The District Court assumed that the Tribal Entities

are instrumentalities of a tribal government, held that the recordkeeping provisions of the CCTA as implemented by ATF apply to them, and, on cross-motions for summary judgment, upheld ATF's record demands. ECF 21: 11, 15.

SUMMARY OF THE ARGUMENT

In June 2016, ATF sent letters to Woodlands, Rock River, and HCI Distribution demanding inspection of records and threatening fines and imprisonment for "knowing violations of rules and regulations promulgated under [the CCTA]. . . ."

Such demands and threats were unprecedented: prior to June 2016, ATF never once requested records from the Tribal Entities in all their time operating in the tobacco-product business.

ATF's longstanding practice of not demanding records from the Tribal Entities is consistent with the regulations promulgated through notice and comment rulemaking in 1980 and still effective today. In the regulations, ATF explicitly states that "government agencies and instrumentalities are exempt from the requirements of this rule." 45 Fed. Reg. 48,612. As arms of the federally-recognized Winnebago Tribe, the Tribal Entities are government instrumentalities. See ECF 14-1: 1.

By enforcing the recordkeeping requirements against the Tribal Entities, ATF amended its policy through enforcement letters and then applied it

discriminately to just one of several tribes operating in the tobacco-product business without notice and comment. ATF also failed to recognize or offer any explanation for changing the regulatory exemption and departing from its longstanding practice. For these reasons, ATF violated the APA.

In addition to the APA violation, ATF violated the CCTA when it attempted to enforce the recordkeeping requirements against the Tribal Entities. Specifically, ATF's demands violate the statutory protections of tribal sovereign governmental immunities in the CCTA, protections evident in the text and legislative history of the statute.

ATF's June 2016 record demands violate the APA and the CCTA and should be vacated.

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals reviews a district court's decision to grant summary judgment *de novo*. Crooks v. Mabus, 845 F.3d 412, 416 (D.C. Cir. 2016). Thus, this Court reviews agency action under the APA independently, giving "no particular deference to the judgment of the District Court." Id. This Court must vacate agency action found to be "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. (quoting 5 U.S.C. § 706(2)(A)).

II. ATF VIOLATED THE APA WHEN IT ENFORCED THE RECORDKEEPING REQUIREMENTS AGAINST THE TRIBAL ENTITIES

A. ATF violated the APA when it changed its rule and departed from longstanding practice unknowingly and without a detailed justification.

ATF has failed to acknowledge or provide a detailed justification for changing its position that government instrumentalities are exempt under the recordkeeping requirements. Its actions are thus arbitrary and capricious and should be vacated.

In FCC v. Fox Television Stations, Inc., the Supreme Court addressed the standard of review used when an agency changes or reverses its own prior policy. When an agency changes or reverses a prior policy, it must "display awareness that it *is* changing position." Fox Television Stations, 556 U.S. 502, 515 (2009) (emphasis in original). That is, it may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." Id. The agency must also supply a "reasoned analysis" for the change in position. Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983); Dillmon v. Nat'l Transp. Safety Bd., 588 F.3d 1085, 1089 (D.C. Cir. 2009).

During notice and comment rulemaking, ATF stated on the record that "government agencies and instrumentalities" are exempt from the "recordkeeping requirements of this subpart." 45 Fed. Reg. 48,612. It added in response to a

request for regulatory language exempting a specific government instrumentality that "ATF does not feel that any further specific regulatory language is necessary." Id. This statement was signed by the ATF's Acting Director and approved by its Assistant Secretary of Enforcement and Operations for publication in the Federal Register as the "Final rule: Treasury decision" with an effective date of September 19, 1980. Id. These regulations, as codified in 27 C.F.R. §§ 646, *et seq.*, are still the law.

ATF has not once enforced the recordkeeping requirements against any tribal government instrumentality dealing in tobacco products since the regulations were published. Trans. at 7:22-25, 8:1-13, 17:21-25, 18:1-18 May 2, 2017. It has not sought records from any of the Tribal Entities since HCI Distribution began distributing tobacco products. This exhibits ATF's longstanding policy of exempting government instrumentalities from the recordkeeping requirements.

This change in longstanding policy is arbitrary and capricious under Fox Television Stations. First, ATF has not displayed any "awareness that it *is* changing position." Fox Televisions Stations, 556 U.S. at 515 (emphasis in original). The purpose of this requirement is to ensure that an agency's "prior policies and standards are being deliberately changed, not casually ignored." Dillmon, 588 F.3d at 1089 (internal quotations omitted). In demanding records here, ATF did not acknowledge its longstanding policy of exempting government

instrumentalities from the recordkeeping requirements or its lack of prior enforcement against tribes. Neither did it recognize that its decision to begin enforcing the recordkeeping requirements against government instrumentalities such as the Tribal Entities was contrary to that policy.

Additionally, ATF failed to exhibit the reasoned decision making required of agencies. "Reasoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent," and an agency that neglects to do so acts arbitrarily and capriciously. Id. at 1089-90. This also includes a showing that "there are good reasons for the new policy." Fox Television Stations, 556 U.S. at 515. Finally, a "more detailed justification" than that required for a policy "created on a blank slate" is required when an agency's "prior policy has engendered serious reliance interests," or when the new policy rests on factual findings that contradict those underlying the previous policy. Id.

When ATF sent demand letters to each of the Tribal Entities, it failed to explain why government instrumentalities are no longer to be considered exempt under the recordkeeping provisions. In lieu of any explanation, let alone "good reason," the letters merely list the statutory and regulatory provisions under which ATF demands inspection. ECF 1: 17-18, 21-22, 25-26. In neglecting to address that the Tribal Entities are government instrumentalities, ATF "entirely failed to

consider an important aspect of the problem," which is quintessential "arbitrary and capricious" decision making. See State Farm, 463 U.S. at 43.

ATF provided a justification for exempting government instrumentalities from its recordkeeping requirements in 1980. 45 Fed. Reg. 48,612. As ATF is not creating policy on a "blank slate," it now must give a "more detailed justification" for its new policy removing or altering that exemption. Fox Television Stations, 556 U.S. at 515. The Tribal Entities have relied on their status as government instrumentalities since HCI Distribution formed as a government instrumentality of the Winnebago Tribe in 1999. ATF did not take into account the legitimate reliance of tribal government instrumentalities or the communities they support when changing its longstanding policy for the first time in its demand letters.

Similarly, the Supreme Court cautions that "when an agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a 'convenient litigation position' or a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack," the new interpretation should not be given deference. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (internal citations and alteration omitted). Otherwise, the Tribal Entities would have to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands

deference." Id. at 159. ATF's lack of awareness and detailed justification violates the APA and its attempt to amend its policy to apply the recordkeeping requirements to tribal government instrumentalities for the first time in this litigation should be vacated.

B. ATF violated the APA because it did not engage in notice and comment rulemaking when it amended its regulations.

ATF did not engage in notice and comment rulemaking when it changed the recordkeeping rule to include government instrumentalities. Its actions are thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and should be vacated. Mabus, 845 F.3d at 416.

In Perez v. Mortgage Bankers Ass'n, the Supreme Court makes clear that when a government agency promulgates a rule through notice and comment rulemaking, it must also follow notice and comment procedures when amending that same rule. See Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1206 (2015).

ATF nonetheless attempted to rely on the Perez court's finding that "an agency need not use notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted." Reply in Support Mot. Summ. Affirm. at 9-10. ATF's selective reliance on Perez ignores that court's finding that the "D.C. Circuit correctly read[s] § 1 of the APA to mandate that agencies use the same procedures

when they amend or repeal a rule as they used to issue the rule in the first instance." Perez, 125 S.Ct. at 1206.

Unlike here, at issue in Perez was whether an agency can give ***a new interpretation*** of a regulation that conflicts with ***a prior interpretation*** without complying with notice and comment. At issue on this appeal, however, is ATF's amendment of a regulation it promulgated through notice and comment rulemaking, not a departure from a previous interpretation.

Here, ATF used notice and comment in 1980 to issue the rule that "government agencies and instrumentalities are not included in the definition of 'person' in these regulations." 45 Fed. Reg. 48,612. It has adhered to that rule ever since. ATF now attempts to amend that rule, some thirty-seven years later, through letters to the Tribal Entities demanding records. ECF 1: 17-18, 21-22, 25-26. Compliance with the APA requires that an amendment to the government instrumentality exemption be accomplished through notice and comment rulemaking, not by enforcement letters.

C. ATF did not give the Tribal Entities the notice or the opportunity to comment that the APA demands.

ATF did not give the Tribal Entities any notice or opportunity to comment on its proposed rule change. This procedural failing alone is sufficient to vacate ATF's action.

On this point, McLouth Steel Products Corp. v. Thomas is controlling. 838 F.2d 1317 (D.C. Cir. 1988). Like the Tribal Entities here, the Petitioners in McLouth Steel Products argued that the administrative agency promulgated a rule without adherence to notice and comment rulemaking. Id. at 1319. In response, the agency argued that it complied with notice and comment because it listed the details of the challenged rule in the appendix to a "proposed rule and request for comment" published in the Federal Register. Id. at 1322. The court found this inadequate; "notice," it said, "must be clear and to the point." Id. (citing cases).

Responding to the court's finding of defective notice, the agency argued that, "despite the procedural irregularities, [petitioner] cannot secure reversal of the [agency action] . . . unless it demonstrates that the irregularities caused 'specific prejudice . . . .'" Id. The court rejected this argument, setting out the rule in this Circuit that an agency's failure to comply with notice and comment cannot be considered harmless if there is any question as to whether that failure had any effect. "Even if the challenger presents no bases for invaliding the rule on substantive grounds, we cannot say with certainty whether petitioner's comments would have had some effect if they had been considered when the issue was open." Id. at 1324.

More so than the EPA in McLouth Steel Products, ATF failed to give any sort of notice or the opportunity to comment on the rule change amending the

application of the recordkeeping requirements, effectively forcing the Tribal Entities to make substantive arguments in this litigation that they could have made during the notice and comment process. ATF's failure to engage in notice and comment rulemaking before imposing new obligations on the Tribal Entities violates the APA. ATF's attempt to amend the regulations to apply the recordkeeping requirements to the Tribal Entities should be vacated.

Vacating ATF's actions for lack of notice and comment is not only the law but is good policy. First, ATF has yet to update its regulations to implement the 2006 revisions to the CCTA. These revisions substantively changed the statute and have not yet been incorporated into ATF's rules. Paradoxically, the District Court cited these unimplemented statutory revisions as evidence of the scope of the regulations. ECF 21: 9,13. During the process of updating the regulations to comport with the amended CCTA, ATF would have the opportunity to conduct notice and comment on whether to apply the recordkeeping requirements to government instrumentalities (tribal or otherwise).

Further, in responding to comments, ATF would have an opportunity to address the concerns of tribal instrumentalities throughout the country dealing in tobacco products and the tribal populations they serve. This would allow for fair and evenhanded application of any new rule to similarly situated tribal instrumentalities, avoiding the disparate and prejudicial application of the rule

change ATF seeks to apply solely against the Winnebago Tribe in this litigation without forewarning, reasoning, or guidance.

Finally, enforcing the notice and comment requirement here would help to uphold the Department of Justice's tribal consultation policy. See 79 Fed. Reg. 73,905. This policy requires the department to engage in meaningful consultation with tribal officials when "developing new or amended policies" that may affect tribes. Id. See also Office of the Attorney General, Department of Justice Policy Statement on Tribal Consultation, 0300.01 (Aug. 29, 2013), available at https://www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf (last visited Nov. 20, 2017) ("The Department of Justice will consult with federally recognized Tribes before adopting policies that have Tribal implications. . . . [P]olicies have Tribal implications if they 'have substantial direct effects on one or more Indian tribes . . . .'") (quoting Executive Order 13175). ATF did not consult with the Tribal Entities or with any Winnebago Tribal official before it sought to change its longstanding policy and prejudicially apply its recordkeeping requirements for the first time in this litigation. Not only does the law, but policy considerations also direct that ATF's attempt to impose new obligations on the Tribal Entities without notice and comment should be vacated.

III. ATF VIOLATED THE CCTA IN ENFORCING THE RECORDKEEPING REQUIREMENTS AGAINST THE TRIBAL ENTITIES

A. The Canon favoring Indians applies here.

As the United States Supreme Court and this Court recognize, standard tenets of interpretation "do not have their usual force in cases involving Indian law." Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)), cert. denied, 488 U.S. 1010 (1989). When analyzing the text of a statute, it is "settled" in this Circuit that ambiguities "are to be read liberally in favor of the Indians." City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (citing cases). See also Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (applying the Indian canon of construction to agency policy as well as statutes). If there is any ambiguity in cases involving Indian law, and if the text "can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." Hodel, 851 F.2d at 1445 (emphasis in original).

This is especially true here where the statute contains exceptions expressly enacted for the benefit of Tribes. CCTA § 2346 states as follows:

> Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.

18 U.S.C. § 2346(b)(2). As discussed below, the CCTA's protections against restricting, expanding, or modifying any state, local, or tribal immunity take form in the CCTA's text and legislative history.

B. ATF's inclusion of Indian country within the definition of "State" and of tribal government instrumentalities within the definition of "person" violate the CCTA.

a. The definitional language used and incorporated within the CCTA supports the Tribal Entities' construction.

The CCTA and regulations define "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands." 18 U.S.C. § 2341(4); 27 C.F.R. § 646.143. "Indian country," a legal term of art defined in 18 U.S.C. § 1151 as reservation trust lands, dependent Indian communities, and Indian allotments, is not among the jurisdictions listed under the definition "State." This is evident not only in the precise definition of "State" above, but also throughout the CCTA, where Congress distinguished "Indian country (as defined in [18 U.S.C. § 1151])" as a distinct jurisdiction beyond the reach of "State, . . . local, [or private]" civil enforcement actions. 18 U.S.C. § 2346(b)(1). Interpreting CCTA § 2341(4) (defining "State"), as incorporated in 27 C.F.R. § 646.142 (establishing the "Territorial extent" of the regulations), to apply to the Tribal Entities operating in "Indian country" expands the definition of "State" beyond the statutory text.

Implying the inclusion of "Indian country" within "State" also impermissibly places Indian country under the jurisdiction of the state, leading to unlawful results. It is a bedrock tenet of federal Indian law that states generally do not have jurisdiction over Indian country. See, e.g., Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014). This extends to tax and regulatory jurisdiction over tobacco product sales in Indian country for, among other things, tribal-value-added tobacco products (see, e.g., Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156-57 (1980)), and non-tribal-value-added tobacco products sold to non-tribal members in Indian country where the state imposes more than "minimal burdens" on Indian businesses to aid in state tax collection or enforcement. See, e.g., Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

"Indian country" is not legally or jurisdictionally part of a state. It is a distinct reservation that is, as relevant here, generally outside a state's power to regulate or tax. Impliedly including Indian country within "State" violates the rights Tribes retain within their reserved lands and violates the sovereign immunity protections in CCTA § 2346(b)(2).

In addition to the definitions of "State" and "Indian country" in the CCTA (as carried forward in the regulations), the definition of "person" must also be construed according the plain language of the statute so as to uphold the sovereign

immunity protections in § 2343(b)(2). See United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988).

As ATF recognizes, "Congress has intended the definition of 'person' in 1 U.S.C. § 1 to apply in [the CCTA]. Government agencies and instrumentalities are not included in that definition." 45 Fed. Reg. 48,612. See also H.R. CONF. REP. 95-1778, 1978 U.S.C.C.A.N. 5535 at 5538 (deleting the definition of "person" from the CCTA "because 'person' is defined in 1 U.S.C. 1 for all act [sic] of Congress"). Like states, tribal government agencies and instrumentalities are not "persons" under 1 U.S.C. § 1. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) (stating that in "common usage, the term 'person' does not include the sovereign . . . ."). See also Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701 (2003) (holding that a tribal corporation is not a "person").

The definitions used in the CCTA as carried forward in the regulations are clear in: (1) distinguishing between "State" and "Indian country," and (2) the exclusion of government instrumentalities from "person." Additionally, the legislative history, CCTA text, and broader policy concerns support the Tribal Entities' interpretation. Cf. Hodel, 851 F.2d at 1145.

b. The legislative history of the CCTA supports the Tribal Entities' construction.

In June 1974, the Senate first reported S. 1487, "relating to racketeering in the sale and distribution of cigarettes." S. Rep. No. 95-962, at *1 (1974). In the "Legislative Need" section of the report, the Senate found as follows:

> Four distinct types of cigarette bootlegging have been identified by those who have surveyed and analyzed the problem: [1] Organized cigarette smuggling . . . from low-tax States to high-tax States for profit . . . . [2] Mail-order purchase of cigarettes . . . from low-tax to high-tax States . . . . [3] Purchase of cigarettes through tax-free outlets includes cigarettes obtained from three primary sources: international points of entry, military post exchanges, and Indian reservations. In some instances the cigarettes are resold for profit within a high-tax State . . . . [4] Casual cigarette smuggling . . . [where] the individual . . . does not make a profit . . . ."

Id. at *5-6. Above, and throughout the CCTA's legislative history, the Senate (and House) distinguished between these "four distinct types of cigarette bootlegging," and repeatedly grouped "tax-free" sales from "military post exchanges [] and Indian reservations" together. Id. As discussed immediately below, Congress retained this distinction in the final version of the statute and ATF incorporated it into the recordkeeping regulations.

In March 1978, the Joint Committee on Taxation prepared a Description of Bills Relating to Cigarette Taxation and Cigarette Smuggling. Staff of J. Comm. on Taxation, 95th Cong., Report on Cigarette Taxation and Cigarette Smuggling

(Comm. Print 1978). Similar to the Senate report on S. 1487, it equated "tax-free sales on military bases and Indian reservations." Id. at 12.

In the October 1978 Congressional Record, the House Judiciary Committee explicitly noted that it "does not intend this bill to address the current exemption from State taxation of cigarette sales on Indian reservations, and nothing in this bill is intended to affect any immunity from State tax held by any Indian or Indian tribe . . . ." 124 Cong. Rec. 33277 (1978). Similarly, the Senate Judiciary Committee attached as an exhibit to its October 1977 Hearing, the Advisory Committee on Intergovernmental Relations report distinguishing the "Tax-Free Purchase of Cigarettes" as "sales exempt from State and local taxation . . . due to the exemption of sales at military bases and . . . Indian reservations." Advisory Comm. on Intergovernmental Relations, 95th Cong., Rep. on Cigarette Bootlegging: A State and Fed. Responsibility 58 (Comm. Print 1977).

Finally, when asked whether government instrumentalities supplying cigarettes to military reservations had to keep records, ATF upheld the statutory intent as expressed above and reiterated in the October 1978 Conference Report,[1] and said no: "government agencies and instrumentalities are not included in the definition of 'person' in these regulations." 45 Fed. Reg. 48,612.

[1] H.R. Conf. Rep. 95-1778, 1978 U.S.C.C.A.N. 5535 at 5538.

The tribal government exemption from "person" finds further support in the legislative history behind the 2006 amendments to the CCTA. The House colloquy recognized that tribal sovereignty is a "fundamental principle of law" and stated as follows: "enforcement against tribes or in Indian country, as defined in Title 18 Section 1151, will not be authorized . . . ." 151 Cong. Rec. H6273-04, (daily ed. July 21, 2005) (Statement of Rep. Coble), 2005 WL 1703380, at *H6284.

c. The text of the CCTA supports the Tribal Entities' construction.

The distinctions between State, local, and tribal jurisdictions and the exclusion of government instrumentalities from the definition of "person" in the statutory definitions and legislative history are applied throughout the rest of the CCTA.

Initially, the enforcement section of the CCTA says that a State, through its attorney general; a local government, through its chief law enforcement officer; or a federally licensed manufacturer may bring a civil action against "any person" violating the CCTA. It clarifies the definition of person by stating that: (1) federally licensed manufacturers may not bring an action against a State or local government and (2) that no civil action may be brought under this section against an Indian tribe. 18 U.S.C. § 2346(b)(1). These government exclusions from "person" carry forward the 1 U.S.C. § 1 definition of "person."

In addition, the government exemption from "person" applies in the reporting section of the statute. The CCTA requires "any person" who engages in a "delivery sale" (defined as a non-face-to-face transaction) to submit reports to the United States Attorney General and Secretary of the Treasury and to the "attorneys general and the tax administrators of the States from where the shipments . . . originated and concluded." 18 U.S.C. § 2343(b). As in the enforcement section, here too Congress excluded tribal governments from "any person." This exemption was inserted by Congress to uphold the jurisdictional protections in the statute: not only are tribes explicitly protected from State and local civil enforcement action, they are also explicitly protected from reporting sales to State law enforcement and State tax administrators.

The District Court, however, erroneously reasoned that because a tribal government is not a "person" under the reporting requirements of § 2343(b), it is a "person" under the recordkeeping requirements of § 2343(a). ECF 21:13.

In the CCTA, when establishing State monitoring and enforcement powers, Congress deliberately inserted and distinguished tribal jurisdiction to mitigate the concerns tribes expressed during the amendment process. See 151 Cong. Rec. H6273-04, (daily ed. July 21, 2005) (Statement of Rep. Coble), 2005 WL 1703380, at *H6284. Contrary to the District Court's reading, these explicit exemptions evidence the care Congress took in the 2006 amendments to wall off tribal and

state authorities in the tobacco product tax monitoring and enforcement contexts, authorities too often contentiously competing for tax and regulatory jurisdiction. The exemptions are not, as the District Court reads, the result of a randomly implied inclusion of tribal governmental instrumentalities into "person" in only one section of the statute, a result that violates both 1 U.S.C. § 1 and the protections of immunities in 18 U.S.C. § 2346(b)(2). The District Court turned this Congressional balance on its head: instead of recognizing the deliberate and careful protection of tribes from state monitoring and enforcement in the 2006 amendments, protections fought for by tribes during the amendment process, it expanded the definition of "person" to include tribal government instrumentalities in violation of the CCTA and the regulations.

Additionally, the District Court erred in finding that state and local government instrumentalities, but not tribal government instrumentalities, are explicitly exempt "persons." ECF 21:12-13. This finding relied solely on the CCTA's exemption for "an officer, employee, or other agent of . . . any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties." 18 U.S.C. § 2341(2)(D). This section, however, merely exempts tax, regulatory, and law enforcement personnel acting in their official capacity: these "persons" may possess untaxed cigarettes in

the performance of their official duties without violating the CCTA. It does not serve to distinguish between state and local instrumentalities and tribal instrumentalities.

Finally, the District Court's reading of tribal governments into "person" for the recordkeeping provisions fails to recognize the correlation between the legislative history and the history of the tribal tobacco industry. When Congress passed the recordkeeping provisions of § 2343(a) in 1978, tribal governments were not yet engaged in the commercial manufacture or sale of tobacco products. When the reporting provisions of § 2343(b) were added in 2006, provisions mirroring the contemporaneous reporting and tribal sovereign immunity concerns ultimately enacted in the PACT Act, 15 U.S.C. §§ 375, *et seq.*, tribal governments were heavily invested in the tribal tobacco business. Like the definition of "person" in 1 U.S.C. § 1, the CCTA tribal government exemption in 18 U.S.C. § 2343(b) recognizes that government involvement and protects the government interests at stake.

d. Policy concerns support the Tribal Entities' construction of the CCTA.

It is also sound policy to require ATF to uphold its trust obligation to tribes, see 79 Fed. Reg. 73,905, which, here, ATF has violated by discriminately enforcing the recordkeeping requirements on the Tribal Entities, without notice or consultation, to restrict, expand, or modify state, local, or tribal sovereign

immunities. Moreover, allowing ATF's interpretation to stand would almost certainly lead to increased litigation costs for governments at the expense of funding public services for their citizens. In the context of tribal governments, this violates the policy of tribal self-determination, the cornerstone of federal Indian law and policy for the last forty-two years. See Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 5301 *et seq.* (1975). See also, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) (the presumption of statutory interpretation favoring tribes "comport[s] with traditional notions of sovereignty and with the federal policy of encouraging tribal independence.") (omission and internal quotations omitted). Finally, including "Indian country" within the definition of "State," but not including Tribe within the definition of "State," creates a power vacuum where that "State" does not have jurisdiction over Indian country.[2] This creates the sort of tax haven the CCTA intended to address.

Because the definitions incorporated in the CCTA exclude tribal government instrumentalities in Indian country, ATF's record demands should be vacated. Additionally, because the text, legislative history, and policy concerns support the Tribal Entities' construction of the CCTA, the statute must be constructed that way and ATF's record demands should be vacated.

[2] See discussion of state jurisdiction in Indian country in section III.B.a. above.

CONCLUSION

ATF violated the APA by enforcing the recordkeeping provisions against the Tribal Entities by letter demands, effectively amending its regulations and longstanding practice without engaging in notice and comment rulemaking. Alternatively, ATF violated the CCTA because Indian country is not part of a "State" and because tribal government instrumentalities are exempt from the recordkeeping requirements. For these reasons, ATF's record demands should be vacated.

Dated: November 21, 2017

Respectfully submitted,

HO-CHUNK, INC.; WOODLANDS DISTRIBUTION COMPANY; HCI DISTRIBUTION COMPANY; and ROCK RIVER MANUFACTURING COMPANY, Appellants

By: /s/ B. Benjamin Fenner
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CERTIFICATE OF COMPLIANCE WITH FRAP 32

This Brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure 32 because it has been prepared in a proportionally spaced typeface using in Times New Roman typeface with 14 point font and contains 6,509 (excluding cover, tables, and certificate of service and compliance), according to the count of the computer program Microsoft Word used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st of November2017, the foregoing Opening Brief for Appellants has been served by Electronic Case Filing.

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ADDENDUM

TABLE OF CONTENTS

Contraband Cigarette Trafficking Act (CCTA)……………………………….A1

27 C.F.R. 646……………………………………………………………….A6

Joint Committee Report – March 1978 (selected pages)………....………..…A9

124 Congressional Record 33277……………………………………………A12

Advisory Committee on Intergovernmental Relations Report (selected pages)...A19

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 45 of 68

§ 2(2), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 108–375, div. A, title X, § 1089, Oct. 28, 2004, 118 Stat. 2067.)

AMENDMENTS

2004—Par. (3). Pub. L. 108–375 amended par. (3) generally. Prior to amendment, par. (3) read as follows: "'United States' includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49."

1994—Par. (1). Pub. L. 103–415 substituted "within his custody" for "with custody".

Par. (3). Pub. L. 103–429 substituted "section 46501(2) of title 49" for "section 101(38) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1301(38))".

EFFECTIVE DATE

Section 506(c) of Pub. L. 103–236 provided that: "The amendments made by this section [enacting this chapter] shall take effect on the later of—

"(1) the date of enactment of this Act [Apr. 30, 1994]; or

"(2) the date on which the United States has become a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." [Convention entered into Force with respect to United States Nov. 20, 1994, Treaty Doc. 100–20.]

§ 2340A. Torture

(a) OFFENSE.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) JURISDICTION.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) CONSPIRACY.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

(Added Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–322, title VI, § 60020, Sept. 13, 1994, 108 Stat. 1979; Pub. L. 107–56, title VIII, § 811(g), Oct. 26, 2001, 115 Stat. 381.)

AMENDMENTS

2001—Subsec. (c). Pub. L. 107–56 added subsec. (c).

1994—Subsec. (a). Pub. L. 103–322 inserted "punished by death or" before "imprisoned for any term of years or for life".

§ 2340B. Exclusive remedies

Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.

(Added Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 464.)

CHAPTER 114—TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO

Sec.
2341. Definitions.
2342. Unlawful acts.
2343. Recordkeeping, reporting, and inspection.
2344. Penalties.
2345. Effect on State and local law.
2346. Enforcement and regulations.

AMENDMENTS

2006—Pub. L. 109–177, title I, § 121(g)(3), (4)(A), Mar. 9, 2006, 120 Stat. 224, substituted "TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO" for "TRAFFICKING IN CONTRABAND CIGARETTES" in chapter heading, added items 2343 and 2345, and struck out former items 2343 "Recordkeeping and inspection" and 2345 "Effect on State law".

§ 2341. Definitions

As used in this chapter—

(1) the term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person—

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having posses-

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 46 of 68

sion of such cigarettes in connection with the performance of official duties;

(3) the term ''common or contract carrier'' means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49, or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term ''State'' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

(5) the term ''Attorney General'' means the Attorney General of the United States;

(6) the term ''smokeless tobacco'' means any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted;

(7) the term ''contraband smokeless tobacco'' means a quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, that are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as manufacturer[1] of tobacco products or as an export warehouse proprietor, a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311, 1555), or an agent of such person;

(B) a common carrier transporting such smokeless tobacco under a proper bill of lading or freight bill which states the quantity, source, and designation of such smokeless tobacco;

(C) a person who—

(i) is licensed or otherwise authorized by the State where such smokeless tobacco is found to engage in the business of selling or distributing tobacco products; and

(ii) has complied with the accounting, tax, and payment requirements relating to such license or authorization with respect to such smokeless tobacco; or

(D) an officer, employee, or agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State), having possession of such smokeless tobacco in connection with the performance of official duties;[2]

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2463; amended Pub. L. 97–449, §5(c), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 107–296, title XI, §1112(i)(1), Nov. 25, 2002, 116 Stat. 2277; Pub. L. 109–177, title I, §121(a)(1), (b)(1), (6), Mar. 9, 2006, 120 Stat. 221, 222.)

REFERENCES IN TEXT

Chapter 52 of the Internal Revenue Code of 1986, referred to in pars. (2)(A) and (7)(A), is classified generally to chapter 52 (§5701 et seq.) of Title 26, Internal Revenue Code.

[1] So in original. Probably should be ''a manufacturer''.

[2] So in original. The semicolon probably should be a period.

AMENDMENTS

2006—Par. (2). Pub. L. 109–177, §121(b)(6), which directed amendment of par. (2) by substituting ''State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government'' for ''State cigarette taxes in the State where such cigarettes are found, if the State'' in introductory provisions, was executed by making the substitution for ''State cigarette taxes in the State where such cigarettes are found, if such State'', to reflect the probable intent of Congress.

Pub. L. 109–177, §121(a)(1), substituted ''10,000 cigarettes'' for ''60,000 cigarettes'' in introductory provisions.

Pars. (6), (7). Pub. L. 109–177, §121(b)(1), added pars. (6) and (7).

2002—Par. (5). Pub. L. 107–296 added par. (5) and struck out former par. (5) which read as follows: ''the term 'Secretary' means the Secretary of the Treasury.''

1986—Par. (2)(A). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954''.

1983—Par. (3). Pub. L. 97–449 substituted ''subtitle IV of title 49'' for ''the Interstate Commerce Act''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE

Section 4 of Pub. L. 95–575 provided:

''(a) Except as provided in subsection (b), this Act [enacting this chapter, amending section 1961 of this title and sections 781 and 787 of former Title 49, Transportation, and enacting provisions set out as a note under this section] shall take effect on the date of its enactment [Nov. 2, 1978].

''(b) Sections 2342(b) and 2343 of title 18, United States Code as enacted by the first section of this Act, shall take effect on the first day of the first month beginning more than 120 days after the date of the enactment of this Act [Nov. 2, 1978].''

AUTHORIZATION OF APPROPRIATIONS

Section 5 of Pub. L. 95–575 provided that: ''There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of chapter 114 of title 18, United States Code, added by the first section of this Act.''

§ 2342. Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 in a single transaction.

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2464; amended Pub. L. 109–177, title I, §121(a)(2), (b)(2), Mar. 9, 2006, 120 Stat. 221, 222.)

AMENDMENTS

2006—Subsec. (a). Pub. L. 109–177, §121(b)(2), inserted ''or contraband smokeless tobacco'' after ''contraband cigarettes''.

Subsec. (b). Pub. L. 109–177, §121(a)(2), substituted ''10,000'' for ''60,000''.

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 47 of 68

EFFECTIVE DATE

Subsec. (a) of this section effective Nov. 2, 1978, and subsec. (b) of this section effective on first day of first month beginning more than 120 days after Nov. 2, 1978, see section 4 of Pub. L. 95–575, set out as a note under section 2341 of this title.

§ 2343. Recordkeeping, reporting, and inspection

(a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000, or any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Attorney General may prescribe by rule or regulation. The Attorney General may require such person to keep such information as the Attorney General considers appropriate for purposes of enforcement of this chapter, including—

(1) the name, address, destination (including street address), vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;

(2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and

(3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.

Such information shall be contained on business records kept in the normal course of business.

(b) Any person, except for a tribal government, who engages in a delivery sale, and who ships, sells, or distributes any quantity in excess of 10,000 cigarettes, or any quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, within a single month, shall submit to the Attorney General, pursuant to rules or regulations prescribed by the Attorney General, a report that sets forth the following:

(1) The person's beginning and ending inventory of cigarettes and cans or packages of smokeless tobacco (in total) for such month.

(2) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person received within such month from each other person (itemized by name and address).

(3) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person distributed within such month to each person (itemized by name and address) other than a retail purchaser.

(c)(1) Any officer of the Bureau of Alcohol, Tobacco, Firearms, and Explosives may, during normal business hours, enter the premises of any person described in subsection (a) or (b) for the purposes of inspecting—

(A) any records or information required to be maintained by the person under this chapter; or

(B) any cigarettes or smokeless tobacco kept or stored by the person at the premises.

(2) The district courts of the United States shall have the authority in a civil action under this subsection to compel inspections authorized by paragraph (1).

(3) Whoever denies access to an officer under paragraph (1), or who fails to comply with an order issued under paragraph (2), shall be subject to a civil penalty in an amount not to exceed $10,000.

(d) Any report required to be submitted under this chapter to the Attorney General shall also be submitted to the Secretary of the Treasury and to the attorneys general and the tax administrators of the States from where the shipments, deliveries, or distributions both originated and concluded.

(e) In this section, the term ''delivery sale'' means any sale of cigarettes or smokeless tobacco in interstate commerce to a consumer if—

(1) the consumer submits the order for such sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or by any other means where the consumer is not in the same physical location as the seller when the purchase or offer of sale is made; or

(2) the cigarettes or smokeless tobacco are delivered by use of the mails, common carrier, private delivery service, or any other means where the consumer is not in the same physical location as the seller when the consumer obtains physical possession of the cigarettes or smokeless tobacco.

(f) In this section, the term ''interstate commerce'' means commerce between a State and any place outside the State, or commerce between points in the same State but through any place outside the State.

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2464; amended Pub. L. 107–296, title XI, §1112(i)(2), Nov. 25, 2002, 116 Stat. 2277; Pub. L. 109–177, title I, §121(a)(3), (b)(3), (c), (g)(1), Mar. 9, 2006, 120 Stat. 221, 222, 224; Pub. L. 111–154, §4, Mar. 31, 2010, 124 Stat. 1109.)

AMENDMENTS

2010—Subsec. (c). Pub. L. 111–154 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''Upon the consent of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 in a single transaction, or pursuant to a duly issued search warrant, the Attorney General may enter the premises (including places of storage) of such person for the purpose of inspecting any records or information required to be maintained by such person under this chapter, and any cigarettes kept or stored by such person at such premises.''

2006—Pub. L. 109–177, §121(g)(1), substituted ''Recordkeeping, reporting, and inspection'' for ''Recordkeeping and inspection'' in section catchline.

Subsec. (a). Pub. L. 109–177, §121(a)(3)(A), (b)(3), (c)(1), in introductory provisions, substituted ''10,000, or any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages,'' for ''60,000'' and ''such information as the Attorney General considers appropriate for purposes of enforcement of this chapter, including—'' for ''only—'' and, in concluding provisions, struck out ''Nothing contained herein shall authorize the Attorney General to require reporting under this section.'' at end.

Subsec. (b). Pub. L. 109–177, §121(c)(3), added subsec. (b). Former subsec. (b) redesignated (c).

Pub. L. 109–177, §121(a)(3)(B), substituted ''10,000'' for ''60,000''.

Subsec. (c). Pub. L. 109–177, §121(c)(2), redesignated subsec. (b) as (c).

Subsecs. (d) to (f). Pub. L. 109–177, §121(c)(4), added subsecs. (d) to (f).

2002—Pub. L. 107–296 substituted ''Attorney General'' for ''Secretary'' wherever appearing.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE

Section effective on first day of first month beginning more than 120 days after Nov. 2, 1978, see section 4 of Pub. L. 95–575, set out as a note under section 2341 of this title.

§ 2344. Penalties

(a) Whoever knowingly violates section 2342(a) of this title shall be fined under this title or imprisoned not more than five years, or both.

(b) Whoever knowingly violates any rule or regulation promulgated under section 2343(a) or 2346 of this title or violates section 2342(b) of this title shall be fined under this title or imprisoned not more than three years, or both.

(c) Any contraband cigarettes or contraband smokeless tobacco involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture. The provisions of chapter 46 of title 18 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. Any cigarettes or smokeless tobacco so seized and forfeited shall be either—

(1) destroyed and not resold; or

(2) used for undercover investigative operations for the detection and prosecution of crimes, and then destroyed and not resold.

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2464; amended Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 103–322, title XXXIII, §330016(1)(K), (S), Sept. 13, 1994, 108 Stat. 2147, 2148; Pub. L. 109–177, title I, §121(b)(4), (d), Mar. 9, 2006, 120 Stat. 222, 223.)

AMENDMENTS

2006—Subsec. (c). Pub. L. 109–177 inserted "or contraband smokeless tobacco" after "contraband cigarettes", substituted "seizure and forfeiture. The provisions of chapter 46 of title 18 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. Any cigarettes or smokeless tobacco so seized and forfeited shall be either—" for "seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of such Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.", and added pars. (1) and (2).

1994—Subsec. (a). Pub. L. 103–322, §330016(1)(S), substituted "fined under this title" for "fined not more than $100,000".

Subsec. (b). Pub. L. 103–322, §330016(1)(K), substituted "fined under this title" for "fined not more than $5,000".

1986—Subsec. (c). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

§ 2345. Effect on State and local law

(a) Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

(b) Nothing in this chapter shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by a number of State or local governments, through interstate compact or otherwise, to provide for the administration of State or local cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized in violation of such laws, and to establish cooperative programs for the administration of such laws.

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2465; amended Pub. L. 109–177, title I, §121(b)(5), (e), (g)(2), Mar. 9, 2006, 120 Stat. 222–224.)

AMENDMENTS

2006—Pub. L. 109–177, §121(g)(2), substituted "Effect on State and local law" for "Effect on State law" in section catchline.

Subsec. (a). Pub. L. 109–177, §121(b)(5), (e)(1), substituted "a State or local government to enact and enforce its own" for "a State to enact and enforce" and inserted "or smokeless tobacco" after "cigarettes".

Subsec. (b). Pub. L. 109–177, §121(b)(5), (e)(2), substituted "of State or local governments, through interstate compact or otherwise, to provide for the administration of State or local" for "of States, through interstate compact or otherwise, to provide for the administration of State" and inserted "or smokeless tobacco" after "cigarettes".

§ 2346. Enforcement and regulations

(a) The Attorney General, subject to the provisions of section 2343(a) of this title, shall enforce the provisions of this chapter and may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.

(b)(1) A State, through its attorney general, a local government, through its chief law enforcement officer (or a designee thereof), or any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986, may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person (or by any person controlling such person), except that any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986 may not bring such an action against a State or local government. No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151).

(2) A State, through its attorney general, or a local government, through its chief law enforcement officer (or a designee thereof), may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter from any person (or by any person controlling such person), including civil penalties, money damages, and injunctive or other equitable relief. Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.

(3) The remedies under paragraphs (1) and (2) are in addition to any other remedies under Federal, State, local, or other law.

(4) Nothing in this chapter shall be construed to expand, restrict, or otherwise modify any

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 49 of 68

right of an authorized State official to proceed in State court, or take other enforcement actions, on the basis of an alleged violation of State or other law.

(5) Nothing in this chapter shall be construed to expand, restrict, or otherwise modify any right of an authorized local government official to proceed in State court, or take other enforcement actions, on the basis of an alleged violation of local or other law.

(Added Pub. L. 95–575, §1, Nov. 2, 1978, 92 Stat. 2465; amended Pub. L. 107–296, title XI, §1112(i)(2), Nov. 25, 2002, 116 Stat. 2277; Pub. L. 109–177, title I, §121(f), Mar. 9, 2006, 120 Stat. 223.)

REFERENCES IN TEXT

Chapter 52 of the Internal Revenue Code of 1986, referred to in subsec. (b)(1), is classified generally to chapter 52 (§5701 et seq.) of Title 26, Internal Revenue Code.

AMENDMENTS

2006—Pub. L. 109–177 designated existing provisions as subsec. (a) and added subsec. (b).

2002—Pub. L. 107–296 substituted ''Attorney General'' for ''Secretary''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

CHAPTER 115—TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES

Sec.
2381. Treason.
2382. Misprision of treason.
2383. Rebellion or insurrection.
2384. Seditious conspiracy.
2385. Advocating overthrow of Government.
2386. Registration of certain organizations.
2387. Activities affecting armed forces generally.
2388. Activities affecting armed forces during war.
2389. Recruiting for service against United States.
2390. Enlistment to serve against United States.
[2391. Repealed.]

AMENDMENTS

1994—Pub. L. 103–322, title XXXIII, §330004(13), Sept. 13, 1994, 108 Stat. 2142, struck out item 2391 ''Temporary extension of section 2388''.

1953—Act June 30, 1953, ch. 175, §5, 67 Stat. 134, added item 2391.

§ 2381. Treason

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, §330016(2)(J), Sept. 13, 1994, 108 Stat. 2148.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§1, 2 (Mar. 4, 1909, ch. 321, §§1, 2, 35 Stat. 1088).

Section consolidates sections 1 and 2 of title 18, U.S.C., 1940 ed.

The language referring to collection of the fine was omitted as obsolete and repugnant to the more humane policy of modern law which does not impose criminal consequences on the innocent.

The words ''every person so convicted of treason'' were omitted as redundant.

Minor change was made in phraseology.

AMENDMENTS

1994—Pub. L. 103–322 inserted ''under this title but'' before ''not less than $10,000''.

§ 2382. Misprision of treason

Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be fined under this title or imprisoned not more than seven years, or both.

(June 25, 1948, ch. 645, 62 Stat. 807; Pub. L. 103–322, title XXXIII, §330016(1)(H), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §3 (Mar. 4, 1909, ch. 321, §3, 35 Stat. 1088).

Mandatory punishment provision was rephrased in the alternative.

AMENDMENTS

1994—Pub. L. 103–322 substituted ''fined under this title'' for ''fined not more than $1,000''.

§ 2383. Rebellion or insurrection

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

(June 25, 1948, ch. 645, 62 Stat. 808; Pub. L. 103–322, title XXXIII, §330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §4 (Mar. 4, 1909, ch. 321, §4, 35 Stat. 1088).

Word ''moreover'' was deleted as surplusage and minor changes were made in phraseology.

AMENDMENTS

1994—Pub. L. 103–322 substituted ''fined under this title'' for ''fined not more than $10,000''.

§ 2384. Seditious conspiracy

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

SUBCHAPTER D—MISCELLANEOUS REGULATIONS RELATING TO ALCOHOL AND TOBACCO

PART 646—CONTRABAND CIGARETTES

Sec.

GENERAL

646.141 Scope of part.
646.142 Territorial extent.
646.143 Meaning of terms.

RECORDS

646.146 General requirements.
646.147 Required information.
646.150 Retention of records.

OTHER PROVISIONS RELATING TO THE DISTRIBUTION OF CIGARETTES

646.153 Authority of appropriate ATF officers to enter business premises.

PENALTIES AND FORFEITURES

646.154 Penalties.
646.155 Forfeitures.

AUTHORITY: 18 U.S.C. 2341–2346, unless otherwise noted.

SOURCE: 45 FR 48612, July 21, 1980, unless otherwise noted. Redesignated by T.D. ATF–487, 68 FR 3753, Jan. 24, 2003.

EDITORIAL NOTE: Nomenclature changes to part 646 appear by T.D. ATF–487, 68 FR 4753, Jan. 24, 2003.

GENERAL

§ 646.141 Scope of part.

The regulations in this subpart relate to the distribution of cigarettes in excess of 60,000 in a single transaction.

§ 646.142 Territorial extent.

The provisions of the regulations in this part apply in the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

§ 646.143 Meaning of terms.

When used in this part, terms are defined as follows in this section. Words in the plural shall include the singular, and vice versa. Words indicating the masculine gender shall include the feminine. The terms ''includes'' and ''including'' do not exclude other things not named which are in the same general class or are otherwise within the scope of the term defined.

Appropriate ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any functions relating to the administration or enforcement of this part by ATF Order 1130.28, Delegation of the Director's Authorities in 27 CFR Parts 45 and 646.

Business premises. When used with respect to a distributor, the property on which the cigarettes are kept or stored. The business premises includes the property where the records of a distributor are kept.

Common or contract carrier. A carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act, or under equivalent operating authority from a regulatory agency of the United States or of any State.

Contraband cigarettes. Any quantity of cigarettes in excess of 60,000, if—

(a) The cigarettes bear no evidence of the payment of applicable State cigarette taxes in the State where the cigarettes are found;

(b) The State in which the cigarettes are found requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes; and

(c) The cigarettes are in the possession of any person other than an exempted person.

Disposition. The movement of cigarettes from a person's business premises, wherever situated, by shipment or other means of distribution.

Distribute. To sell, ship, issue, give, transfer, or otherwise dispose of.

Distributor. Any person who distributes more than 60,000 cigarettes in a single transaction.

Exempted person. Any person who is—

(a) Holding a permit issued pursuant to Chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor;

(b) Operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555);

(c) An agent of a tobacco products manufacturer, an export warehouse proprietor, or an operator of a customs bonded warehouse;

(d) A common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of the cigarettes;

(e) Licensed or otherwise authorized by the State, in which he possesses cigarettes, to account for and pay cigarette taxes imposed by that State; and who has complied with the accounting and payment requirements relating to his license or authorization with respect to the cigarettes involved; or

(f) An agent of the United States, of an individual State, or of a political subdivision of a State and having possession of cigarettes in connection with the performance of official duties.

(g) Operating within a foreign-trade zone established under 19 U.S.C., section 81b, when the cigarettes involved have been entered into the zone under zone-restricted status or, in respect to foreign cigarettes, have been admitted into the zone but have not been entered in the United States.

Person. Any individual, corporation, company, association, firm, partnership, society, or joint stock company.

State. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands.

[45 FR 48612, July 21, 1980, as amended by T.D. ATF–472, 67 FR 8881, Feb. 27, 2002]

RECORDS

§ 646.146 General requirements.

Each distributor of cigarettes shall keep copies of invoices, bills of lading, or other suitable commercial records relating to each disposition of more than 60,000 cigarettes. Dividing a single agreement for the disposition of more than 60,000 cigarettes into the delivery of smaller components of 60,000 cigarettes or less does not exempt the distributor from the recordkeeping requirements of this part. The distributor shall include the information prescribed in § 646.147 in his commercial records of disposition.

§ 646.147 Required information.

(a) *Distributors who are exempted persons.* Each distributor who is an exempted person as defined in § 646.143 shall show the following information in his commercial records.

(1) For each disposition of more than 60,000 cigarettes to an exempted person; or for each disposition of more than 60,000 cigarettes to a person who is not an exempted person and which is delivered by the distributor to the recipient's place of business, the distributor shall show on dated records—

(i) The full name of the purchaser (or the recipient if there is no purchaser);

(ii) The street address (including city and state) to which the cigarettes are destined; and

(iii) The quantity of cigarettes disposed of.

(2) For each disposition of more than 60,000 cigarettes, other than the dispositions specified in paragraph (a)(1) of this section, the distributor shall show on dated records—

(i) The full name of the purchaser (if any);

(ii) The name, address (including city and state), and signature of the person receiving the cigarettes;

(iii) The street address (including city and state) to which the cigarettes are destined;

(iv) The quantity of cigarettes disposed of;

(v) The driver's license number of the individual receiving the cigarettes;

(vi) The license number of the vehicle in which the cigarettes are removed from the distributor's business premises;

(vii) A declaration by the individual receiving the cigarettes of the specific purpose of receipt (such as personal use, resale, delivery to another person, etc.); and

(viii) A declaration by the person receiving the cigarettes of the name and address of his principal when he is acting as an agent.

(b) *Distributors who are not exempted persons.* Each distributor who is not an exempted person as defined in § 646.143 shall show on dated commercial records the information specified in

paragraphs (a)(2) (i) through (viii) of this section for each disposition of more than 60,000 cigarettes.

(Approved by the Office of Management and Budget under control number 1512–0391)

[45 FR 48612, July 21, 1980, as amended by T.D. ATF–172, 49 FR 14943, Apr. 16, 1984]

§ 646.150 Retention of records.

(a) *General*. Each distributor of cigarettes shall retain the records required by §§ 646.146 and 646.147 for three years following the close of the year in which the records are made. The distributor shall keep the required records on his business premises.

(b) *Shorter retention periods*. The appropriate ATF officer may, pursuant to an application submitted by a distributor, approve a shorter retention period where—

(1) The distributor requesting the shorter retention period is an agent of a tobacco products manufacturer;

(2) The tobacco products manufacturer will keep the required record for each disposition of more than 60,000 cigarettes from the agent's premises for the full retention period specified in paragraph (a) of this section; and

(3) The approval of a shorter retention period will not unduly hinder the administration of enforcement of this subpart.

(c) *Application requirements*. Each distributor proposing to employ a shorter retention period shall submit a written application, in duplicate, to the appropriate ATF officer. A distributor may not employ a shorter retention period until approval is received from the appropriate ATF officer. Each application should indicate the duration of the proposed retention period and should include the information required by paragraph (b) of this section.

[45 FR 48612, July 21, 1980, as amended by T.D. ATF–472, 67 FR 8880, 8881, Feb. 27, 2002]

OTHER PROVISIONS RELATING TO THE DISTRIBUTION OF CIGARETTES

§ 646.153 Authority of appropriate ATF officers to enter business premises.

Any appropriate ATF officer may enter the business premises of any distributor of cigarettes to inspect the records required by §§ 646.146 through 646.147 or to inspect any cigarettes stored on the premises—

(a) Pursuant to duly issued search warrant or an administrative inspection warrant; or

(b) Upon the consent of the distributor to enter his premises.

[45 FR 48612, July 21, 1980, as amended by T.D. ATF–472, 67 FR 8881, Feb. 27, 2002]

PENALTIES AND FORFEITURES

§ 646.154 Penalties.

(a) Any person who knowingly ships, transports, receives, possesses, sells, distributes, or purchases contraband cigarettes shall be fined not more than $100,000 or imprisoned not more than five years, or both.

(b) Any person who knowingly violates any regulation contained in this part or makes any false statement or misrepresentation with respect to the information required to be recorded by this part shall be fined not more than $5,000 or imprisoned not more than three years, or both.

§ 646.155 Forfeitures.

(a) Any contraband cigarettes involved in any violation of the provisions of 18 U.S.C. chapter 114 shall be subject to seizure and forfeiture. All provisions of the Internal Revenue Code of 1954 (title 26 U.S.C.) relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures of contraband cigarettes under the provisions of 18 U.S.C. chapter 114.

(b) Any vessel, vehicle or aircraft used to transport, carry, convey, or conceal or possess any contraband cigarettes with respect to which there has been committed any violation of any provision of 18 U.S.C. chapter 114 or the regulations in this subpart shall be subject to seizure and forfeiture under the Customs laws, as provided by the Act of August 9, 1939 (49 U.S.C. 781–788).

(18 U.S.C. 2344; 53 Stat. 1291 (49 U.S.C. 782))

[COMMITTEE PRINT]

DESCRIPTION OF BILLS

RELATING TO

CIGARETTE TAXATION AND CIGARETTE SMUGGLING

LISTED FOR A HEARING

BEFORE THE

SUBCOMMITTEE ON MISCELLANEOUS REVENUE MEASURES

OF THE

COMMITTEE ON WAYS AND MEANS

ON MARCH 21, 1978

PREPARED FOR THE USE OF THE

COMMITTEE ON WAYS AND MEANS

BY THE STAFF OF THE

JOINT COMMITTEE ON TAXATION

MARCH 20, 1978

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1978

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CONTENTS

		Page
I.	Summary	1
II.	Background on the cigarette smuggling problem	3
III.	Previous government actions and recommendations for action	13
IV.	Summary of testimony before the Subcommittee on Crime of the House Judiciary Committee	16
V.	Description of bills to be considered during public hearing	17
VI.	Analysis of tax provisions of the bills before the subcommittee	19
VII.	Criticisms expressed of proposed bills	38
VIII.	Additional considerations	40

Tax-Free Purchases of Cigarettes

The ACIR report also discussed the problem of tax-free sales on military bases and Indian reservations.[4]

Based on a comparison of Federal and State cigarette tax collections between fiscal years 1970 and 1975, the ACIR stated that an average of 1.74 billion packs of cigarettes (or 6.2 percent of total U.S. cigarette sales) were exempt from State and local taxation. Of this amount, nearly two-thirds was estimated to be due to the exemption of sales at military bases and the majority of the remainder to sales at Indian reservations.

Indian reservations.—ACIR indicated that five western States (Idaho, Montana, Nevada, New Mexico and Washington) consider the purcahse of tax-free cigarettes on reservations by non-Indians as a major evasion problem.

Military sales.—According to the ACIR, the purchase of tax-free cigarettes from military commissaries and exchanges for non-military persons generally is not done on an organized basis but can represent a significant revenue loss to the States. In a previous report, the ACIR commented as follows:

> The higher per capita sales figures for military store patrons . . . suggest either that military people consume more cigarettes on the average than do civilians (and this mainly in high-tax States), or that some military persons are buying tax-free cigarettes for the consumption of persons other than themselves and their dependents. In the absence of any reasons to assume that the military are heavier smokers than civilians or that high taxes promote heavy smoking, it is reasonable to conclude that cigarette bootlegging is a significant problem in some States.[5]

[4] See *Report*, pp. 36 and 37.
[5] ACIR, *State Taxation of Military Income and Store Sales* (July 1976), p. 18, quoted in *Report*, p. 37.

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 56 of 68

FRENZEL) will be recognized for 20 minutes each.

The Chair recognizes the gentleman from Louisiana (Mr. WAGGONNER).

Mr. WAGGONNER. Mr. Speaker, I yield myself time as I may consume.

Mr. Speaker, H.R. 12828 expands the exemption enacted in the Tax Reform Act of 1976 for income derived by labor unions and trade associations from convention and trade show activities, and extends the exemption to charitable organizations.

Under present law, exemption from the unrelated business income tax applies to income derived from "member shows" at which the products and services of the involved industry or trade group are displayed and sold. The Ways and Means Committee has concluded that the reasons which supported granting the member-show exemption in the 1976 act also support extending the exemption to income from "supplier shows," at which suppliers display and sell products and services affecting the industry or trade represented by the exempt organization.

In addition, the committee has concluded that there is no reason to treat charitable, educational, or religious organizations less favorably than labor unions or trade organizations with respect to income from convention activities. Accordingly, the bill provides rules for exemption of income from certain convention activities carried on by tax-exempt charitable organizations.

The provisions of the bill will reduce budget receipts by less than $1 million annually.

Mr. Speaker, I urge the adoption of this bill to provide appropriate rules for exemption of income derived by labor unions, trade associations, and charitable organizations from their annual conventions or other trade shows.

Mr. FRENZEL. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 12828 concerning the treatment of trade show and convention income received by certain tax-exempt groups.

Tax-exempt organizations are subject to tax on their "unrelated business income." The Tax Reform Act of 1976 provided that in very limited situations, income received by organizations exempt from tax under section 501(c) (5) or (6) (relating to labor groups and business leagues respectively) from specified conventions and trade shows would not be subject to the unrelated business tax.

The bill extends the 1976 act's unrelated business tax exemption to income earned from specified trade shows and conventions by charitable, religious, and other organizations exempt from tax under section 501(c) (3).

The bill also exempts from the unrelated business tax, income earned by an organization from certain conventions and trade shows which are sponsored to educate people in the field concerning products, services, techniques, or procedures.

Mr. Speaker, I have no further requests for time, and I yield back the remainder of my time.

Mr. WAGGONNER. I have no further requests for time, and I yield back the remainder of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Louisiana (Mr. WAGGONNER) that the House suspend the rules and pass the bill H.R. 12828, as amended.

The question was taken; and (two-thirds having voted in favor thereof), the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. WAGGONNER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the Ways and Means Committee bills just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Louisiana?

There was no objection.

UNITED STATES CODE, TITLE 18, AMENDMENTS, RE CIGARETTE SALE RACKETEERING

Mr. CONYERS. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 8853) to amend title 18 of the United States Code to eliminate racketeering in the sale and distribution of cigarettes, and for other purposes, as amended.

The Clerk read as follows:

H. R. 8853

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 18, United States Code, is amended by inserting after chapter 113 the following new chapter:

"Chapter 114—TRAFFICKING IN CONTRABAND CIGARETTES

Sec.
"2341. Definitions.
"2342. Unlawful acts.
"2343. Recordkeeping, reporting, and inspection.
"2344. Penalties.
"2345. Effect on State law.
"2346. Enforcement and regulations.

"§ 2341. Definitions.

"As used in this chapter—

"(1) the term 'cigarette' means—

"(A) any roll of tobacco wrapped in paper or in any substance containing tobacco; and

"(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

"(2) the term 'contraband cigarettes' means a quantity in excess of 30,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

"(A) a person holding a permit issued pursuant to chapter 52 of the International Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

"(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

"(C) a dealer—

"(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

"(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

"(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

"(3) the term 'common or contract carrier' means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act, or under equivalent operating authority from a regulatory agency of the United States or of any State;

"(4) the term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

"(5) the term 'dealer' means any person who sells or distributes in any manner any quantity of cigarettes in excess of 30,000 in a single transaction; and

"(6) the term 'Secretary' means the Secretary of the Treasury.

"§ 2342. Unlawful acts

"(a) It shall be unlawful knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

"(b) It shall be unlawful knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of a dealer.

"§ 2343. Recordkeeping, reporting, and inspection

"Each dealer shall—

"(1) maintain such records of shipment, receipt, sale, and other distribution of cigarettes; and

"(2) submit to the Secretary such reports and information with respect to such records;

in such form and manner as the Secretary shall by regulation prescribe. Upon the consent of any dealer, or pursuant to a duly issued search warrant, the Secretary may enter the premises (including places of storage) of such dealer for the purpose of inspecting any records or documents required to be maintained by such dealer under this chapter, and any cigarettes kept or stored by such dealer at such premises.

"§ 2344. Penalties

"(a) Whoever violates any provision of this chapter or regulations promulgated thereunder shall be fined not more than $10,000, or imprisoned not more than two years, or both.

"(b) Any contraband cigarettes involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of such Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 57 of 68

"§ 2345. Effect on State law

"Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the the violation of such laws.

"§ 2346. Enforcement and regulations

"The Secretary shall enforce the provisions of this chapter and may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.".

SEC. 2. The table of chapters of part I of title 18, United States Code, is amended by inserting immediately below the item relating to chapter 113 the following:

"114. Trafficking in Contraband Cigarettes 2341".

SEC. 3. (a) Section 1(b) of the Act of August 9, 1939 (ch. 618, 53 Stat. 1291 (49 U.S.C. 781(b))), is amended—

(1) by striking out "or" at the end of paragraph (2);

(2) by striking out the period at the end of paragraph (3) and inserting in lieu thereof "; or"; and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) Any cigarette, with respect to which there has been committed any violation of chapter 114 of title 18, United States Code, or any regulation issued pursuant thereto.".

(b) Section 7 of the Act of August 9, 1939 (ch. 618, 53 Stat. 1291 (49 U.S.C. 787)), is amended—

(1) by striking out "and" at the end of subsection (e);

(2) by striking out the period at the end of subsection (f) and inserting in lieu thereof "; and"; and

(3) by inserting after subsection (f) the following new subsection:

"(g) The term 'cigarettes' means 'contraband cigarettes' as now or hereafter defined in section 2341 of title 18, United States Code.".

(c) Section 1961(1)(B) of title 18, United States Code, is amended by inserting after "sections 2314 and 2315 (relating to interstate transportation of stolen property)," the following: "sections 2341–2346 (relating to trafficking in contraband cigarettes),".

SEC. 4. (a) Except as provided in subsection (b), this Act shall take effect on the date of its enactment.

(b) Sections 2342(b) and 2343 of title 18, United States Code, as enacted by the first section of this Act, shall take effect on the first day of the first month beginning more than 120 days after the date of the enactment of this Act.

The SPEAKER pro tempore. Is a second demanded?

Mr. BAUMAN. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from Michigan (Mr. CONYERS) will be recognized for 20 minutes, and the gentleman from Maryland (Mr. BAUMAN) will be recognized for 20 minutes.

The Chair recognizes the gentleman from Michigan (Mr. CONYERS).

Mr. CONYERS. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 8853. Recognizing the Federal Government's obligation to aid the States in organized crime control measures, the purpose of this legislation is to create a federal criminal statutory framework to enable the Treasury and Justice Departments to assist the States in combatting cigarette racketeering, which has become a major source of income for organized crime and others engaged in the sale and distribution of contraband cigarettes.

The cigarette bootlegging proscribed by this legislation is the practice of purchasing large quantities of cigarettes in low tax States—primarily the tobacco-producing States of North Carolina, Virginia, and Kentucky—and transporting them to high tax States for resale without payment of the second State's tax. The cause of this problem is amazingly simple. Tax rates now range from 2 cents to 3 cents in North Carolina, Virginia, and Kentucky to 12 cents to 23 cents in 28 States. These disparities create a difference in price of up to $2.10 per carton and, hence, generally, the profit motive for cigarette bootlegging.

A total of 23 bills sponsored or cosponsored by 83 Members and introduced in the House during the 95th Congress were referred to the Subcommittee on Crime of the House Committee on the Judiciary.

In three lengthy hearings before the subcommittee, uncontroverted testimony by the Justice Department, Treasury Department (both of which support the bill) and additional witnesses clearly established that organized crime involvement in cigarette bootlegging has become a serious national problem which State law enforcement efforts have failed to adequately deter. Profits gained through cigarette racketeering by organized criminal elements are channeled into other illicit enterprises, such as narcotics. In addition, at least 34 States are now losing an estimated $400 million per year in evaded cigarette taxes.

H.R. 8853, as amended, establishes in its main provisions a four-pronged basis for Federal assistance to the States in combatting cigarette bootlegging.

First, the bill proscribes the act of bootlegging cigarettes by making it unlawful to knowingly ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes. "Contraband cigarettes" are defined as 30,000 cigarettes or more bearing no evidence of State cigarette tax payment in the State where they are found, which are in the possession of any person other than the specified various classes of excepted persons.

Second, the bill makes it possible for the Secretary of the Treasury to discover that cigarette bootlegging has occurred by requiring "dealers" (persons selling or distributing over 30,000 cigarettes in a single transaction) to keep records of shipment, receipt, sale and distribution and to submit to the Secretary of the Treasury such reports as the Secretary shall by regulation prescribe; authorizing the Secretary to enter dealers' premises upon consent or with a proper warrant to inspect required records or cigarettes stored on the premises and authorizing the seizure and forfeiture of contraband cigarettes and vehicles and other instrumentalities employed in the course of the illicit trafficking of cigarettes.

The bill provides a fine of up to $10,000 or imprisonment for up to 2 years, or both, for dealing in contraband cigarettes, knowingly making any false statements regarding information required to be kept in the records of dealers, or for violating any provision of this chapter or regulations promulgated thereunder.

Third, the bill authorizes seizure and forfeiture of contraband cigarettes involved in any violation of the provisions of this bill and makes all provisions of the Internal Revenue Code of 1954 relating to seizure, forfeiture and disposition of firearms applicable to seizure and forfeiture of contraband cigarettes.

Finally, the bill provides additional statutory basis for the Department of Justice to interdict organized cigarette racketeering by amending the "Racketeer Influenced and Corrupt Organization" (RICO) statute to include cigarette bootlegging as a specifically enumerated offense.

Cigarette bootlegging has steadily worsened since 1965, primarily because of the growing profit incentive provided by ever-increasing disparities in many States' cigarette tax rates. The undisputed testimony of virtually every witness corroborated the findings of several recent studies that cigarette bootlegging has become a major source of income for organized crime. Edgar N. Best, Deputy Assistant Director of the FBI, testified that cigarette bootlegging had become so lucrative—with profits of up to $126,000 per truckload—that all major organized crime families have taken a role in the trafficking of contraband cigarettes He stated that estimates that organized crime controls 40 to 50 percent of all cigarette bootlegging may be "conservative." Hijackings, murder, corruption of public officials, the ruination of the businesses of thousands of cigarette wholesalers and retailers and the attendant loss of thousands of jobs, are the prevalent characteristics of organized crime involvement in cigarette bootlegging.

According to the Advisory Commission on Intergovernmental Relations (ACIR), a total of 34 States are losing almost $400 million in uncollected State cigarette taxes because of bootlegging. It must be emphasized that the major responsibility for enforcing State cigarette tax laws is now and must continue to be the burden of the States. The proposed legislation is designed to supplement current efforts by the States to combat cigarette smuggling, not to supplant them. States are encouraged to upgrade their capabilities in this regard, both in terms of increased resources and stronger State cigarette bootlegging statutes.

Nevertheless, because of the interstate nature of cigarette bootlegging, and the necessity of conducting surveillance and following actual shipments across State lines, cooperation among the States themselves has proved to be of limited effectiveness. The interstate character of illicit cigarette trafficking creates major jurisdictional limitations for State law enforcement agencies. Moreover, some State cigarette enforcement bureaus have been plagued by internal corruption. There also have been indications that some State and local law enforcement officials have harassed or refused to coop-

erate with agents from other States who entered to conduct surveillance in cigarette bootlegging cases.

It should be recognized that this bill will not eliminate cigarette bootlegging altogether. Since wide disparities among State cigarette tax rates provide the profit motive for cigarette bootlegging, the Subcommittee on Crime spent much time in its hearings taking testimony on "tax equalization" bills which have as their main objective the elimination of cigarette bootlegging through the equalization of State cigarette taxes by the application of a uniform Federal tax on cigarettes. It is recognized that the "tax equalization approach" by eliminating the profit motive, would likely eliminate cigarette bootlegging altogether. However, since the House Ways and Means Committee had jurisdiction over the tax equalization proposals, the Subcommittee on Crime did not attempt to report such provisions to the full Judiciary Committee.

It should also be noted parenthetically that the committee does not intend this bill to address the current exemption from State taxation of cigarette sales on Indian reservations, and nothing this bill is intended to affect any immunity from State tax held by any Indian or Indian tribe.

The question arose in the course of committee debate as to whether absence of specific reference to "interstate commerce" in the bill renders it constitutionally defective. In answer to this concern, I would like to insert into the record a letter from the Department of Justice and a legal memorandum from the American Law Division of the Library of Congress. Both of these documents state unequivocally that absence of the words "interstate commerce" from this bill does not render it constitutionally defective. Cigarette bootlegging by its very nature "affects interstate commerce". In fact, it is because of the interstate nature of the activity that this legislation was undertaken. Supreme Court decisions such as Perez versus United States and Heart of Atlanta Hotel versus United States clearly establish that cigarette bootlegging constitutes a class of activities which the Congress can constitutionally proscribe by criminal statute. In fact, the interstate nature of the problem provides the classic constitutional basis for Federal criminal jurisdiction. Even purely "intrastate" activities may be constitutionally proscribed by Federal criminal statute under modern case law if the activity "affects interstate commerce", as cigarette bootlegging does. This concept could conceivably come into play in instances where the knowing purchase, sale, shipment, transportation, possession, receiving or distributing of contraband cigarette is the focal point of prosecution pursuant to section 2342 of the bill.

The letter and memorandum follows:

DEPARTMENT OF JUSTICE,
Washington, D.C., October 2, 1978.

Hon. JOHN CONYERS, Jr.,
Chairman, Subcommittee on Crime, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN CONYERS: This is in response to your letter of September 18, 1978, requesting the formal views of this Department as to whether or not absence of specific mention of "interstate commerce" in H.R. 8853 renders it constitutionally defective.

We do not think the bill is constitutionally defective because of its failure to mention "interstate commerce" specifically. The interstate aspects of cigarette bootlegging is inherent in the activity. Congress' legislative efforts to make it a crime are premised on the interstate element: it is because of the interstate nature of the activity, and the inability of the States to control it, that the effort to legislate was undertaken. These factors are made clear, as you point out, by the legislative history of the bill. Therefore, the lack of a statement of findings and purposes relating to the interstate nature of bootlegging in this most recent version of the bill does not seem to us to be a defect. Most bills, after all, do not specifically set forth the findings of fact upon which they are based, and there is no requirement that they do so. *Perez* v. *United States*, 402 U.S. 146, 156 (1971).

Nor do we see a problem because in substantive provisions are not limited to interstate traffic in cigarettes. With respect to prospective criminal cases where an interstate element is shown, the bill is clearly constitutional. Should strictly intrastate activities become the subject of prosecution, we think any court would find, just as the Supreme Court did in *Perez, supra*, that the activities affect interstate commerce on the basis of the Congress' detailed findings as they appear in the legislative history of the legislation.

In *Perez*, the Court found that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." *Id.* at 154. According to the Court, Congress may deliberately write a law encompassing "more than the precise thing to be prevented" if necessary to prevent an evil. Finally, as a practical matter, the incidence of cases involving purely intrastate activities should be rare since the Department has repeatedly declared its intention to prosecute only when organized crime is involved.

In our view, the only question here is whether cigarette bootlegging is a class of activities within the power of Congress to regulate. The answer to the question is unlikely to depend on whether Congress restricts the bill's substantive provisions to transactions involving interstate activities or whether it attaches formal findings as a preamble.

Please let me know if I can be of any further assistance.

Sincerely,

JOHN C. KEENEY,
Deputy Assistant Attorney General, Criminal Division.

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., September 18, 1978.

To: Subcommittee on Crime. Attn: Steven Raikin.

From: American Law Division.

Subject: Constitutionality of the Criminal Provisions of H.R. 8853 (Trafficking in in Contraband Cigarettes) in Light of the Omission of any Statutory Reference to a Federal Jurisdictional Base.

This is in response to your request for a memorandum discussing the possible constitutional difficulties associated with the provisions of H.R. 8853 (Trafficking in contraband cigarettes) as agreed to by the Subcommittee on Crime because of the bill's failure to refer to any federal jurisdictional base such as the authority to regulate interstate and foreign commerce.

H.R. 8853 would make it unlawful to knowingly "ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes"; to knowingly "make any false statement or representation" in connection with records and statements required under the bill; to fail to "maintain such records of shipment, receipt, sale, and other distribution of cigarettes" or "to submit to the Secretary such reports and information with respect to such records"; or to violate any regulations promulgated under the bill.

As introduced, the bill contained a statement of findings and purpose declaring a congressional finding that, "there is a widespread traffic in cigarettes moving in or otherwise affecting interstate or foreign commerce . . ." and "there is a causal relationship between the flow of cigarettes into interstate commerce to be sold in violation of State laws and the rise of racketeering in the United States . . ." The statement of findings and purpose has been deleted from the bill as agreed to by the Subcommittee although it has been asserted that the hearings and report when printed will reflect evidence of and a congressional intent to combat the unlawful traffic in cigarettes moving in or otherwise affecting interstate commerce and to combat racketeering by attacking its unlawful traffic in cigarettes.

The absence of congressional findings within the language of the bill would not seem to raise constitutional difficulties, see *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 252 (1964) ("While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."); *Perez* v. *United States*, 402 U.S. 146, 156 (1971) ("We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer the Congress need make particularized findings in order to legislate.")

The absence of a reference to interstate commerce in the definition of the offenses in the bill would likewise seem to pose no constitutional difficulty. In *Perez*, the Supreme Court found the extortionate credit provisions, which likewise make no express reference to interstate commerce, to be a valid exercise of the commerce power. As the Court noted there:

"The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as for example, the shipment of stolen goods (18 USC § 2312–2315) or of persons who have been kidnapped (18 USC § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 USC § 32), or persons or things in commerce, as, for example, thefts from interstate shipment (18 USC § 659). Third, those activities affecting commerce. It is with this last category that we are here concerned. . . .

". . . Chief Justice Stone wrote for a unanimous Court in 1942 that Congress could provide for the regulation of the price of intrastate milk, the sale of which, a competition with interstate milk, affects the price structure and federal regulation of the latter. United States v. Wrightwood Dairy Co., 315 U.S. 110. . . . The commerce power, he said, "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." Id. at 119. . . .

"In United States v. Darby, 312 U.S. 100 . . . , the decision sustained in Act of Congress which prohibited the employment of workers and the production of goods "for interstate commerce" at other than prescribed wages and hours, *a class of activities* was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. A unanimous Court said: . . .

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 59 of 68

"sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the *class* last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." Id., at 120–121. . . .

"That case is particularly relevant here because it involved a criminal prosecution, a unanimous Court holding that the Act was 'sufficiently definite to meet constitutional demands.' Id. at 125. . . . Petitioner is clearly *a member of the class which* engages in 'extortionate credit transactions' as defined by Congress and the description of that class has the required definiteness. . . .

"In emphasis of our position that it was the *class of activities* regulated that was the measure, we acknowledge that Congress appropriately considered the 'total incidence' of the practice on commerce. [Katzenbach v. McClung, 379 U.S. 294, 301]

"Where the *class of activities is regulated* and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. Maryland v. Wirtz, 392 US 183. . . . *Perez* v. *United States*, 40 U.S. 46, 150–54 (1971)

From *Perez*, it would seem apparent that failure to expressly refer to interstate commerce within the definition of a criminal offense does not render the statute an invalid exercise of congressional authority to regulate interstate commerce.

CHARLES DOYLE,
Legislative Attorney.

Mr. Speaker, in closing, I would like to recognize the important contribution of the gentlewoman from New York, Ms. HOLTZMAN, the sponor of this legislation. She, together with Judiciary Committee Chairman RODINO and Subcommittee on Crime, Member TOM RAILSBACK, are to be commended, not only for sponsoring some of the major legislation in this area, but also for working so hard to help bring this legislation before the House as expeditiously as possible.

● Mr. GUDGER. Mr. Speaker, I rise in support of H.R. 8853 which was reported from the Judiciary Committee on which I have the privilege to serve. This bill is designed to make it a Federal crime to possess or sell 30,000 or more cigarettes in a State in which the taxes have not been paid as imposed by that State. The so-called bootlegging of cigarettes rises because of the disparity between the "high-tax States," such as New York, and the "low-tax States," such as North Carolina from which I was elected.

It should be clearly understood that it is not now, nor will it be under this bill, a crime to purchase any quantity of cigarettes in North Carolina, or any other "low-tax" State, and to sell them within that State—becomes a crime only when those cigarettes are transported into other States and are there sold without paying the proper tax of that State. Under the legislation being considered, the crime will occur as soon as such quantity of cigarettes are transported outside of the State where the lawful purchase was made.

Mr. Speaker, on last Friday, September 29, when the other body considered a similar bill to that before the House today, a complete substitute was offered by the Senator from Massachusetts, Mr. KENNEDY, who was managing the Senate bill. The CONGRESSIONAL RECORD of that date, beginning on page S16618, will reveal the provisions of the substitute and the proceedings thereon. The Senators from North Carolina, MORGAN and HELMS, the Senators from Kentucky, FORD and HUDDLESTON, the Senator from South Carolina, Mr. THURMOND, and the Senator from Oklahoma, Mr. BELLMON, all supported and commended the substitute as more effective legislation than that reported from the committee. Their substitute was designed to get at the criminal conspiracy and "racketeering" of contraband cigarettes, leaving the States to a traditional role of enforcing their laws to collect their taxes. The Governor of North Carolina, the Honorable Jim Hunt, when testifying on this bill before the House subcommittee, indicated that North Carolina was expanding its efforts to stop smuggling and to assist in law enforcement in other States. These efforts should continue, and Federal legislation should be aimed at the conspiracy and racketeering as proposed by the Senate-passed bill.

Mr. Speaker, our House committee report, on page 8, pointed out that the "contraband approach" would, at best, only reduce cigarette bootlegging by 30 percent. It would be my hope that the Senate-passed bill could be agreed to when it comes over to this body, or in conference. Due to the lateness in this session, I am voting for the House-reported bill to insure the possibility of enactment of legislation in this Congress.●

● Mr. RAILSBACK. Mr. Speaker, I rise in support of H.R. 8853, a bill to eliminate the serious problem of cigarette bootlegging.

As a member of the Judiciary Subcommittee on Crime, I have had the opportunity over the past months to review the troublesome issue of cigarette bootlegging. I first became aware of the seriousness of this problem almost a year ago through the informational efforts of the then Illinois Director of Revenue, Robert M. Whitler. From my communications with Mr. Whitler and the hearings our subcommittee has held, I have become convinced that the illegal trafficking in untaxed cigarettes is an interstate crisis that demands a prompt Federal solution.

Bootlegging's root cause is clear: The wide disparity in taxes on cigarettes among the States makes it highly profitable to purchase them in low-tax States and sell them illegally in high-tax States. The most visable consequence of this smuggling is the revenue loss to State and local governments—about $400 million each year nationwide. Illinois, 1 of the 14 States most seriously burdened by this problem, estimates its revenue losses at between $10 and $26 million annually despite the fact that its 12-cent-per-pack tax is lower than the tax in 21 other States. But the consequences of this problem extend far beyond the loss of government revenues.

Profits from bootlegging are a major source of income for organized crime, income used to fund other illegal activities such as drugs, loansharking, and prostitution. According to Time magazine, May 16, 1977, those who practice this form of smuggling may profit by as much as $1.5 billion annually. With such high stakes and only a minimal risk of apprehension because of the interstate nature of the operation, organized crime's involvement in cigarette trafficking can be expected to increase at the expense of legitimate wholesalers and retailers. Illinois calculates, for example, that bootlegging means a loss of between $30 and $75 million a year for private businesses within the State. In New York City alone, according to Forbes magazine, December 15, 1977, over half of the tobacco wholesalers and more than a quarter of the licensed retailers have gone out of business within the last decade largely because of competition from smugglers. Organized crime's exploitation of lawful commerce and their expansion into this area of illicit activity must be stopped. In my opinion, only Federal intervention will achieve that objective.

It has been suggested by some that the problem of cigarette bootlegging could be significantly reduced by increased State enforcement efforts alone. A few have even argued that State and local officials are not sincere in their resolve to eliminate illegal trafficking. I respectfully disagree with both of these assessments. New York, for example, already spends in excess of $1 million a year on cigarette tax collection. Illinois, like many States, has joined an interstate cooperative organization in an effort to pool its resources and overcome State territorial hurdles. As a member of the Interstate Revenue Research Center, which has offices in Indiana and consists of seven States, Illinois has received services and information crucial to the fight against cigarette bootlegging. One tip from the center led to a raid on December 23, 1976, by Illinois enforcement officials that netted more than 20,000 cartons of cigarettes bearing counterfeited tax stamps. But bootlegging is undeniably an interstate crime requiring a national commitment impossible at the State level because of jurisdictional limitations. Additional State efforts would be futile without Federal assistance.

The form Federal assistance should take is the subject of some disagreement. Those supporting the tax approach accurately state that by reducing the interstate tax differential on cigarettes, the incentive for cigarette bootlegging would be eliminated. Nonetheless, I opposed the uniform tax proposals pending before the subcommittee for the following reasons:

First. For residents of most States, such bills would impose significant tax increases. Congressman DRINAN's bill, for example, calls for a total Federal tax of 31 cents on each package of cigarettes. Twenty-three cents would be rebated to any State that eliminated its own tax. For Illinois, which is at the national tax rate average of 12 cents per package, the tax proposal would produce windfall revenue but would nearly double the tax on cigarettes our citizens now pay. The cost to citizens of lower-tax States, obviously, would be even higher.

Second. There is no guarantee under any of the Federal tax proposals that the disparities in tax rates actually will be eliminated. States are offered incentives

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 60 of 68

to drop their taxes, but they are not required to do so. It is possible, in fact, that they cannot be required to do so constitutionally.

Third. There is no realistic consideration given to the impact of local cigarette taxes on smuggling. Local taxes, when added to the cost of a State's tax on a package of cigarettes, increase the tax differential on cigarettes between the States, which makes smuggling an even more attractive enterprise. The Drinan bill does not address this city tax problem. And measures like those of Congressman JONES of Oklahoma say only that a State must eliminate city cigarette taxes to qualify for money from Federal tax collections. States like Illinois, which have provided home-rule authority for many local governments, will find that a difficult thing to do.

Fourth. Not all States face a cigarette smuggling problem. A significant tax increase, required by the Federal tax proposals, would be high prices for these States to pay for a problem that has had a beneficial effect on them. And the significant loss in State power required by the Federal tax proposals would be a high price for any State to pay.

Fifth. When they need revenue, most States look to the so-called discriminate or nuisance taxes. The cigarette taxes are among these. A person can avoid the tax simply by not buying the product on which it is applied. Federal tax proposals would eliminate State controls over cigarette tax rates.

Sixth. A State, once under the Federal collection umbrella, would be hard-pressed to back out. Under the Drinan proposal, for example, a State would have to levy 46 cents before it could add its own rate to secure additional revenues. This considers the loss of 23 cents in Federal revenue, the need to tax an additional 23 cents to make up for the Federal tax, and then an additional State tax.

In short, I sincerely believe that the disadvantages of the tax concept make it unacceptable at this time and a less offensive solution to the problem of bootlegging must be found.

I believe that the most realistic form of Federal assistance in combating this problem is the so-called contraband approach, an approach endorsed by virtually every witness that appeared before the subcommittee. The contraband approach, as contained in H.R. 8853, would impose Federal criminal penalties for the transportation of more than 30,000 cigarettes across State lines without payment of the applicable State taxes. Responsibility for enforcement would be delegated to the Secretary of the Treasury and violators could be fined up to $10,000, or imprisoned for up to 2 years, or both.

Supporters of the contraband approach include the Departments of Justice and Treasury, the National Governor's Association, the Advisory Commission on Intergovernmental Relations, the National Association of Tax Administrators, the National Tobacco Tax Association, and the National Association of Tobacco Distributors.

As a sponsor of legislation which tracks the contraband approach, I feel that it is the only acceptable solution to this growing interstate problem. To those who suggest that such a Federal criminal sanction for evasion of a State tax is unprecedented, I would only point out the existence of the Jenkins Act. This Federal law has for many years been an effective tool used by the States to halt mail order operations aimed at evading their cigarette tax laws. Further, those who point to estimates that a contraband law would only eliminate one-third of the bootlegging problem fail to recognize that the variables involved in such predictions render them conjectural at best. The fact remains that with the enactment of a Federal cigarette contraband law the mechanism will exist for a substantial, cross-jurisdictional effort to eradicate this major source of income for organized crime.

For this reason, I encourage my colleagues on both sides of the aisle to support the pending legislation as a reasonable step toward solving the growing problem of cigarette bootlegging.●

● Mr. FISH. Mr. Speaker, on behalf of myself and my colleague from New York (Ms. HOLTZMAN) I rise in support of H.R. 8853 to eliminate racketeering in the sale and distribution of cigarettes.

I was first alerted to the danger presented by the illegal trafficking of cigarettes in my discussions with New York State Commissioner of Taxation and Finance, James H. Tully, Jr. As a result of his disclosures, Ms. HOLTZMAN and I introduced the legislation before the House today as a workable solution to this alarming problem.

As noted in the House Judiciary Committee report, the problem of cigarette bootlegging has steadily worsened since 1965, primarily as a result of the profit incentive provided by the State cigarette tax differentials. Congressional recognition of this problem is evidenced by the introduction of 20 similar measures in the House of Representatives in the 95th Congress.

Congressional interest in the pervasive and costly problem of cigarette bootlegging is not surprising. Revenue losses to individual States as a result of cigarette smuggling have approached the $400 million mark—34 States have suffered losses in tax revenue due to this illegal enterprise and 14 States have identified cigarette smuggling as a major problem.

Many of my colleagues are extremely aware of the devastating effects of illicit trafficking in their home States. Pennsylvania has lost $176 million over the past 10 years and is now losing on an average of $40 million annually. Illinois and Ohio have suffered losses of $25 million and $30 million, respectively, as a result of cigarette bootlegging.

My own State of New York provides the best example of the costly effects of these smuggling operations. Over 450 million packs of cigarettes are smuggled into New York State every year. Out of every two packs sold in New York City, one is bootlegged costing the taxpayers $85 million annually in lost tax revenues from legitimate sales. Over the past decade, New York State has incurred losses of over $600 million.

Job loss is frequently a result of the bootlegging operations. In New York it is estimated that one-half of the employees of cigarette wholesalers and vendors have lost their jobs as a result of the impact of illegal trafficking and one-third of the wholesalers have been forced out of business.

In the testimony presented to the Subcommittee on Crime, it was noted that organized crime involvement in cigarette bootlegging has become a serious national problem, second only to narcotics as a source of profits for their operations. Commissioner Tully also noted that there is evidence of organized crime involvement in bootlegging in at least 10 States. Congressional inaction would only succeed in contributing to the severity and the continuance of this thriving enterprise.

While many States, such as New York and Pennsylvania, have strengthened their enforcement programs, it appears that State law enforcement efforts have failed to adequately deter this problem. New York spends over $1 million annually just on cigarette tax enforcement. Increased interstate cooperation has also failed to have a significant effect on the sale of contraband cigarettes.

Mr. Speaker, the problems of cigarette bootlegging have reached serious proportions. The Department of Justice and the Department of the Treasury, who have historically opposed legislation of this nature, testified in general support of the remedy prescribed in H.R. 8853. This measure enjoys the support of the National Governor's Association, the Federation of Tax Administrators, and the Advisory Commission on Intergovernmental Relations. I urge my colleagues to recognize the need for Federal intervention in this area and vote to approve H.R. 8853.●

● Mr. DRINAN. Mr. Speaker, I rise in support of H.R. 8853, which would amend title 18 of the United States Code to enable the U.S. Treasury and Justice Departments to assist individual States in combating interstate cigarette bootlegging. I must, however, restate my firm conviction that this approach will not fully solve the problem of cigarette bootlegging. The prevention of this crime can only be brought about through eliminating economic incentives for bootlegging, and specifically by amending the Federal cigarette tax to eliminate wide price differentials between States.

The crime of bootlegging costs States upward of $500 million annually. The reason is simple: It is an offense which is relatively "safe," or undetectable. Criminals purchase large quantities of cheap cigarettes in a handful of States with very low tax rates, and transport them, usually over the interstate highways, to a State with a significantly higher tax. At that point, they are sold at a huge profit.

H.R. 10066, a cigarette tax reform bill which I introduced jointly with the gentleman from New York (Mr. PATTISON) last November, and which has been cosponsored by 15 Members of the House, attacks this problem at its root. This bill would amend the Internal Revenue Code to remove entirely the incentive for interstate cigarette smuggling by establishing a uniform Federal tax on cigarettes. Additional revenue thus generated would be rebated on a pro rata basis to States which refrain from imposing cigarette taxes of their own. In addition to elimi-

nating bootlegging, a major involvement of organized crime, this legislation would produce increased cigarette tax revenue for the States.

In testimony before the Subcommittee on Crime of the House Judiciary Committee, Mr. Glen R. Murphy, Director of the Bureau of Governmental Relations and legal counsel of the International Association of Chiefs of Police, endorsed H.R. 10066, saying that by establishing a uniform cigarette tax rate "the incentive to smuggle contraband cigarettes would be alleviated in its entirety. Such a program would meet the issue head-on at its outset, thus being a preventive measure."

At the same hearings, Mr. Wayne F. Anderson, Executive Director of the Council on Inter-governmental Relations, estimated that enactment of a pure law enforcement measure such as the one we are discussing today would optimistically only result in a 30 percent decline in the incidence of cigarette smuggling, while enactment of H.R. 10066 would totally eliminate the problem.

Thus Mr. Speaker, while I support passage of H.R. 8853 as an interim measure to control cigarette bootlegging, I remain convinced that reform of the cigarette tax would be the best possible solution to this serious problem. I will do all I can to ensure the passage of such legislation early in the 96th Congress.●

Mr. BAUMAN. Mr. Speaker, is it the intent of the gentleman from Michigan to ask general leave for all Members?

Mr. CONYERS. Mr. Speaker, I will do that, if I have not done it already.

Mr. BAUMAN. Mr. Speaker, I have no requests for time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Michigan (Mr. CONYERS) that the House suspend the rules and pass the bill, H.R. 8853, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. CONYERS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks, and to include extraneous matter, on H.R. 8853, the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

There was no objection.

Mr. CONYERS. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the Senate bill (S. 1487) to eliminate racketeering in the sale and distribution of cigarettes, and for other purposes, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

There was no objection.

The Clerk read the Senate bill as follows:

S. 1487

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

STATEMENT OF FINDINGS AND PURPOSE

SECTION 1. (a) The Congress finds that—

(1) there is widespread traffic in cigarettes moving in or otherwise affecting interstate or foreign commerce, and that the States are not adequately able to stop the movement into their States and the sale of such cigarettes in violation of their tax laws through the exercise of their police power;

(2) there is a causal relationship between the flow of cigarettes into interstate commerce to be sold in violation of State laws and the rise of racketeering in the United States;

(3) a Federal role in the fight against cigarette smuggling will assist the States in their law enforcement efforts and will be undertaken with the recognition that primary enforcement responsibility remains with the individual States;

(4) certain records maintained by persons possessing, selling, distributing, carrying, transporting, purchasing, or receiving cigarettes could have a high degree of usefulness in criminal investigations.

(b) It is the purpose of this Act to provide a timely solution to a serious organized crime problem and to help provide law enforcement assistance to individual States.

SEC. 2. Title 18, United States Code, is amended by inserting immediately after chapter 59 thereof the following new chapter:

"Chapter 60.—CIGARETTE TRAFFIC

"Sec.
"1285. Definitions.
"1286. Unlawful acts.
"1287. Enforcement and regulations.
"1288. Penalties.
"1289. Effect on State law.

"§ 1285. Definitions

"As used in this chapter—

"(a) 'Cigarette' means—

"(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

"(2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1).

"(b) 'Contraband cigarettes' means a quantity of sixty thousand or more cigarettes, bearing no evidence of the payment of applicable State cigarette taxes in the State in which they are found, and which are in the possession of any person other than—

"(1) a person holding a permit issued pursuant to chapter 52 of title 26, United States Code, as a manufacturer of tobacco products or as an export warehouse proprietor or a person operating a customs-bonded warehouse pursuant to section 1311 or 1555 of title 19, United States Code, or an agent of such person;

"(2) a common or contract carrier: *Provided, however,* That the cigarettes are designated as such on the bill of lading or freight bill;

"(3) a person licensed or otherwise authorized by the State in which the cigarettes are found to deal in cigarettes and to account for and pay applicable cigarette taxes imposed by such State; or

"(4) an officer, employee, or other agent of the United States, or its departments and wholly owned instrumentalities, or of any State or any department, agency, or political subdivision having possession of the cigarettes in connection with the performance of his official duties.

"(c) 'Common or contract carrier' means a carrier holding a certificate of convenience or necessity or equivalent operating authority from a regulatory ageny of the United States or of any State.

"(d) 'State' means any State or the District of Columbia, Puerto Rico, or a territory or possession of the United States.

"(e) 'Secretary' means the Secretary of the Treasury or his delegate.

"(f) 'Person' means any individual, corporation, company, association, firm, partnership, society, or joint stock company.

"§ 1286. Unlawful acts

"It shall be unlawful for any person knowingly to possess, sell, distribute, transport, purchase, or receive contraband cigarettes.

"§ 1287. Enforcement and regulation.

"The Secretary shall enforce the provisions of this chapter and may prescribe such rules and regulations which are reasonably necessary to carry out the provisions of this chapter: *Provided, however,* That nothing contained in this chapter shall be interpreted as authorizing the Secretary to require persons who sell, distribute, transport or purchase cigarettes in the ordinary course of business to maintain records of such activities to the Secretary; except that the Secretary may require that any person involved in any transaction of a quantity of sixty thousand or more cigarettes shall note, on existing business records kept in the ordinary course of business, the identity and destination of the person receiving such cigarettes.

"§ 1288. Penalties

"(a) A person who knowingly violates section 1286 of this chapter shall be sentenced to a fine of not more than $100,000, or imprisoned for not more than five years, or both.

"(b) A person who knowingly violates any rules or regulations promulgated under section 1287 or knowingly makes any false statement or representation with respect to the information required by the Secretary to be kept in the records of a person, thereunder shall be sentenced to a fine of not more than $5,000, or imprisoned for not more than three years, or both.

"(c) Any contraband cigarettes involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of the Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

"§ 1289. Effect on State law

"(a) Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State to enact and enforce State cigarette tax laws, to provide for the confiscation of cigarettes and other property seized in violation of such laws, and to provide penalties for the violation of such laws.

"(b) Nothing in this chapter shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by a number of States, through interstate compact or otherwise, to provide for the administration of State cigarette tax laws, to provide for the confiscation of cigarettes and other property seized in violation of such laws and to establish cooperative programs for the administration of such laws."

SEC. 3. Chapter 60 of title 18, United States Code, shall take effect on the date of enactment of this Act.

SEC. 4. The title analysis of title 18, United States Code, is amended by inserting immediately after the item relating to chapter 59 the following:

"60. Cigarette Traffic................ 1285.".

SEC. 5. (a) Section 1(b) of the Act of August 9, 1939 (c. 618, 53 Stat. 1291), as amended (49 U.S.C. 781(b)), is amended by (1) striking out "or" at the end of paragraph

USCA Case #17-5140 Document #1705591 Filed: 11/21/2017 Page 62 of 68

(2); (2) striking out the period at the end of paragraph 3 and inserting in lieu thereof "; or"; and (3) adding after paragraph 3 the following new paragraph (4) to read as follows:

"(4) Any cigarettes, with respect to which there has been committed any violation of any provisions of chapter 60 of title 18 or any regulation issued pursuant thereto."

(b) Section 7 of the Act of August 9, 1939 (c. 618, 53 Stat. 1291), as amended (49 U.S.C. 787), is amended by (1) striking out "and" at the end of subsection (e); (2) striking out the period at the end of subsection (f) and inserting in lieu thereof ","; and"; and (3) adding after subsection (f), the following new subsection (g) to read as follows:

"(g) The term 'cigarettes' means 'contraband cigarettes' as now or hereafter defined in section 1285(b) of title 18.".

(c) Section 1961(1)(B) of title 18, United States Code, is amended by inserting after "sections 2314 and 2315 (relating to interstate transportation of stolen property)," the following: "sections 1285–1289 (relating to trafficking in contrabrand cigarettes),".

SEC. 6. (a) The Secretary of the Treasury is authorized and directed to carry out a study with a view to recommending to the Congress a program pursuant to which the several States would be encouraged to adopt and administer comprehensive laws establishing reasonable cigarette taxes and effective criminal provisions providing penalties for trafficking in contraband cigarettes in order to eliminate or control such trafficking.

(b) Such study shall include recommendations relating to the types and amounts of Federal assistance, including technical and financial, which should be provided under any such program. Such program shall, among other things—

(1) provide for the administration of such financial assistance by an appropriate State law enforcement agency;

(2) provide for review and analysis, on a continual basis, of cigarette tax-avoidance activities together with an analysis of the effectiveness of State law enforcement efforts to minimize such activities;

(3) incorporate and make recommendations with respect to innovative and advanced techniques to control cigarette tax-avoidance activities and contain a comprehensive outline of priorities for the improvement and coordination of all aspects of law enforcement and criminal justice in the area of trafficking in contraband cigarettes, including descriptions of: (A) general needs and problems; (B) existing law enforcement efforts; (C) available resources; (D) organizational systems and administrative machinery for implementing the plan; and (E) the direction, scope, and general nature of improvements to be made in the future;

(4) demonstrate the means by which a State may indicate its willingness to assume the costs of improvements funded under any such program after a reasonable period of Federal assistance;

(5) set forth policies and procedures designed to assure that Federal funds made available under any such program will be so used as not to supplant State or local funds, but to increase the amounts of such funds that would, in the absence of such Federal funds, be made available for law enforcement and criminal justice efforts to control trafficking in contraband cigarettes;

(6) provide for such fund accounting, audit, monitoring, and evaluation procedures as may be necessary to assure fiscal control, proper management, and disbursement of funds received pursuant to such program.

(c) The Secretary shall, within the twelve-month period following the date of the enactment of this Act report to the Congress the results of the study carried out pursuant to this section. Such report shall contain the recommendations, among others, of the Secretary in accordance with subsections (a) and (b) of this section.

SEC. 7. There is hereby authorized to be appropriated for the fiscal year beginning October 1, 1978, such sums as may be necessary to carry out the provisions of this Act.

MOTION OFFERED BY MR. CONYERS

Mr. CONYERS. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. CONYERS moves to strike out all after the enacting clause of S. 1487 and insert in lieu thereof the text of H.R. 8853, as passed by the House.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

The title was amended so as to read: "A bill to amend title 18 of the United States Code to eliminate racketeering in the sale and distribution of cigarettes, and for other purposes."

A motion to reconsider was laid on the table.

A similar House bill (H.R. 8853) was laid on the table.

APPOINTMENT OF CONFEREES

Mr. CONYERS. Mr. Speaker, I ask unanimous consent to insist on the House amendment to the Senate bill, S. 1487, and request a conference with the Senate thereon.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan? The Chair hears none, and, without objection, appoints the following conferees: Mr. CONYERS, Ms. HOLTZMAN, and Messrs. ERTEL, GUDGER, VOLKMER, RODINO, RAILSBACK, and ASHBROOK.

There was no objection.

COAL LEASING AMENDMENTS

Mr. KAZEN. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 13553) to further amend the Mineral Leasing Act of 1920 (30 U.S.C. 201(a)), to authorize the Secretary of the Interior to exchange Federal coal leases and to encourage recovery of certain coal deposits, and for other purposes, as amended.

The Clerk read as follows:

H.R. 13553

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) notwithstanding any provision of law to the contrary and notwithstanding the provisions of section 2(a) (1) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 201(a) (1)), the Secretary of the Interior is authorized to issue leases for coal on other Federal lands in the State of Utah to the lease applicant named in preference right lease applications serial numbers U1362, U1363, U1375, U5233, U5234, U5235, U5236, and U5237 upon surrender and relinquishment by the applicant of such preference right lease applications and all right to lease the lands covered by such applications, such surrender and relinquishment to be made in exchange for the lease or leases to be issued by the Secretary.

(b) Notwithstanding any provision of law to the contrary and notwithstanding the provisions of section 2(a)(1) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 201 (a)(1)), the Secretary of the Interior is authorized to issue leases for coal on other Federal lands in the State of Wyoming to the owner or owners of Federal coal leases serial numbers W0313666, W0111833, W073289, W0312311, and W0313668, B-025369, W0256663, W5035, W0322794 covering lands in the State of Wyoming upon the surrender and relinquishment of such leases or portions thereof.

(c) The leases to be issued by the Secretary pursuant to the authority granted by subsections (a) and (b) of this Act and the leases or portions thereof or rights to leases to be exchanged therefor shall be of equal value. If such leases or portions thereof or rights to leases are not of equal value, the Secretary is authorized to receive, or pay out of funds available for that purpose, cash in an amount up to 25 per centum of the value of the coal lease or leases to be issued by the Secretary in order to equalize the value of the lease or lease rights to be exchanged.

(d) Any exchange lease issued by the Secretary under the authority of this Act shall contain the same terms and conditions as those leases surrendered, or in case of a surrendered lease right, the same terms and conditions as those to which the lease applicant would be entitled.

(e) This subsection does not require or obligate the Secretary to take any action or to make any commitment to a lessee or lease applicant with respect to issuance, administration, or development of any lease.

SEC. 2. Section 2(a)(1) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 201(a)(1)), is further amended by striking the period at the end of the first sentence and inserting in lieu thereof the following: "; *Provided*, That notwithstanding the competitive bidding requirement of this section, the Secretary may, subject to such conditions which he deems appropriate, negotiate the sale at fair market value of coal the removal of which is necessary and incidental to the exercise of a right-of-way permit issued pursuant to title V of the Federal Land Policy and Management Act of 1976.".

SEC. 3. Section 3 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 203), is further amended by adding after the word "contiguous", the words "or cornering", and by deleting the period at the end of the second sentence thereof and adding the following clause: "except that nothing in this section shall require the Secretary to apply the production or mining plan requirements of section 2(d)(2) and 7(c) of this Act (30 U.S.C. 201(d)(2) and 207(c)). The minimum royalty provisions of section 7(a) of this Act (30 U.S.C. 207(a)) shall not apply to any lands covered by this modified lease prior to a modification until the term of the original lease or extension thereof which became effective prior to the effective date of this Act has expired."

SEC. 4. Section 37 of the Mineral Leasing Act of 1920 (30 U.S.C. 193) is further amended by the addition of the words "except as provided in sections 206 and 209 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2756, 2757–8), and" after "only in the form and manner provided in this Act," and before the word "except".

SEC. 5. Section 30 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 187) is further amended by striking the word "boy" and inserting in lieu thereof "child" and by striking the phrase "or the employment of any girl or woman, without regard to age,".

SEC. 6. (a) The Secretary of the Interior is authorized and directed within nine months of the date of enactment of this Act to evaluate and review the scenic, recreational, fish and wildlife, cultural, historic, and other public values of the reservoir in Johnson County, Wyoming, known as Lake De-Smet and the adjoining and adjacent coal properties. The Secretary's review and evaluation shall be for the purpose of determining

RACKETEERING IN THE SALE AND DISTRIBUTION OF CIGARETTES

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1487

OCTOBER 21, 1977

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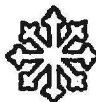

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(II)

CONTENTS

Statement of— Page

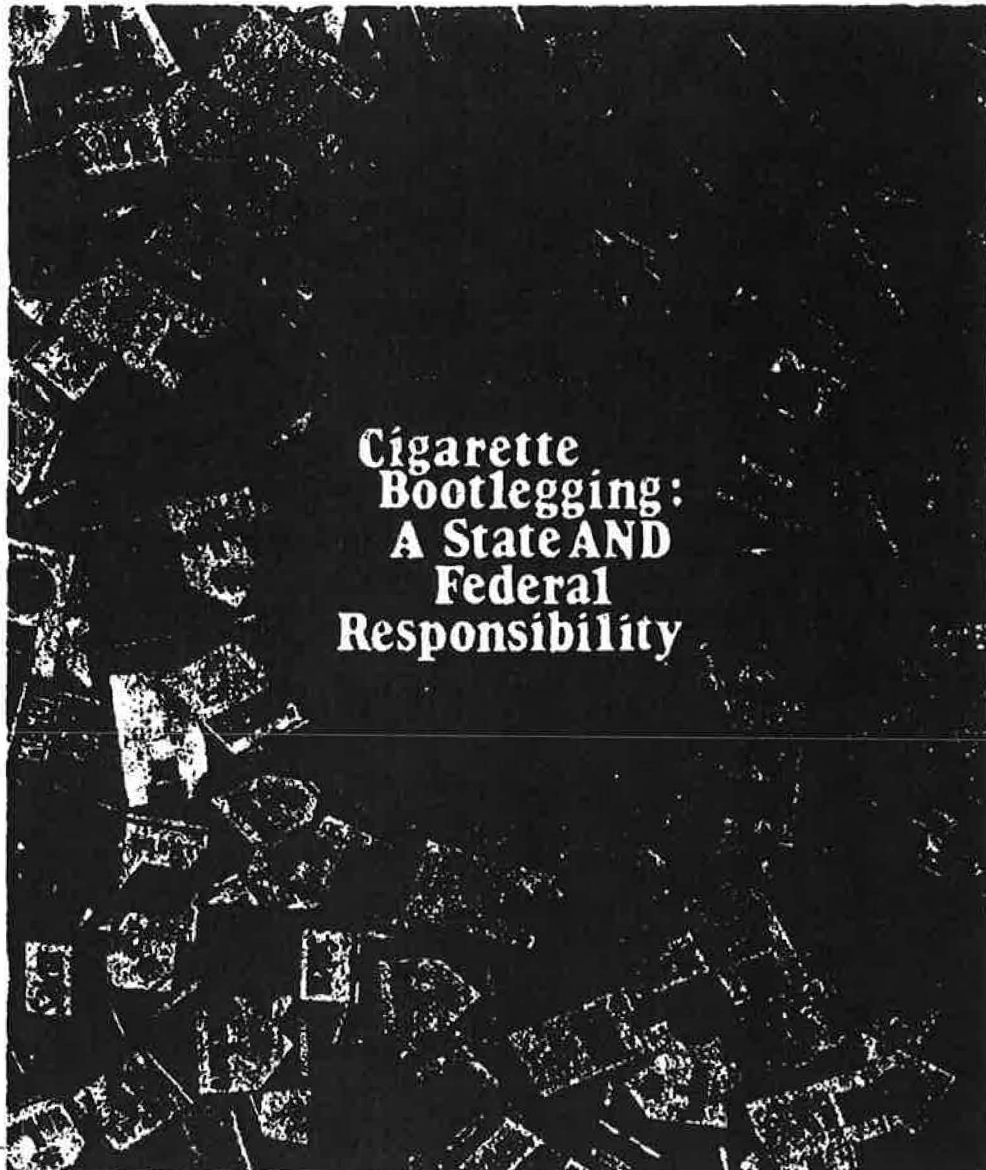
Anderson, Wayne F., Executive Director, Advisory Commission on Intergovernmental Relations, accompanied by Robert J. Kleine ... 7
Chiles, Lawton, a U.S. Senator from the State of Florida ... 2
Davis, Rex D., Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, accompanied by Marvin Dessler, Chief Counsel, Bureau of Alcohol, Tobacco and Firearms ... 152
Tully, James H., Jr., Commissioner, New York State Department of Taxation and Finance, accompanied by Alfred Donati, Jr., director, Special Investigations Bureau and Pat Vecchio, assistant director, Special Investigations Bureau ... 141

Statement submitted by—

Bellmon, Henry, a U.S. Senator from the State of Oklahoma ... 6
Bullock, Bob, Comptroller of Public Accounts, State of Texas ... 170
Ehrlich, Louis H., Jr., chairman, National Association of Tobacco Distributors, Committee on Legislation and Taxation ... 159
Heffernan, Gerald J., Tax Commissioner, Tax Department, State of Connecticut ... 164
Hess, Harold J., inspector, commanding officer, Intelligence Division, Police Department, city of New York ... 165
Interstate Revenue Research Center, George F. Stewart, Executive Director, Indianapolis, Ind ... 167
Kolodny, Joseph, managing director, National Association of Tobacco Distributors ... 168
Murphy, J. Robert, deputy director, New Jersey Division of Taxation ... 172
National Association of Tax Administrators and the National Tobacco Tax Association ... 161
National Governors' Association, policy position ... 178
O'Flaherty, William A., president, Tobacco Tax Council, Inc ... 174
Raucher, Morris B., director, Department of Finance, Office of Legal Affairs, city of New York ... 175
Roemer, Arthur C., Commissioner of Revenue, State of Minnesota ... 176
Shapp, Honorable Milton J., chairman, Committee on Executive Management and Fiscal Affairs ... 177
Sheehan, John J., executive director, Department of Taxation, State of Nevada ... 178
Stewart, George F., executive director, Interstate Revenue Research Center, Indianapolis, Ind ... 167
Whitler, Robert M., Director of Revenue, Department of Revenue, State of Illinois ... 179
Wood, Jayne Ann, Commissioner, Department of Revenue, State of Tennessee ... 183

Exhibits—

S. 1487, a bill to eliminate racketeering in the sale and distribution of cigarettes and for other purposes ... 156
Cigarette Bootlegging: A State and Federal Responsibility, Report, Advisory Commission on Intergovernmental Relations ... 16
Explanation of the ACIR methodology for estimating revenue gains and losses resulting from cigarette tax evasion ... 138
Letter of March 8, 1978, from Patricia M. Wald, Assistant Attorney General, Department of Justice, proposing amendments to S.1487 ... 184
Letter of November 25, 1977, from the chairman of the subcommitte, requesting additional statements for the hearing record ... 158
Ban Cigarette Smuggling, Kansas City Times, September 5, 1977 ... 161
Estimate of Federal cost, ATF ... 154



A-65

Advisory Commission on Intergovernmental Relations

WASHINGTON, D.C. 20575 • MAY 1977

tences (fines and custodials) against violators as it is the only means of curtailing their illicit operations. The violator must be hurt in his "pocket book" if it is to have any impact. Major violators are not prone to rehire drivers or peddlers who are "lossers," (sic) i.e., having been arrested.[6]

The New York State Special Task Force on Cigarette Bootlegging has recommended that criminal penalty provisions be transferred from tax law to penal law. Enforcement agents and prosecutors have stated that this change would result in a substantive improvement in cigarette tax compliance and judicial enforcement of cigarette tax laws.

A more concerted effort in this area will be helpful in the States' effort to combat cigarette smuggling activities. However, the general view among State law enforcement officials is that the States will never be able to enforce effectively cigarette tax laws without Federal assistance. But until the States strengthen their own laws, they will be open to criticism that they have not made sufficient effort to stop cigarette smuggling and the case for Federal contraband legislation will be weakened.

Tax-Free Purchase of Cigarettes

Based on a comparison of Federal and State cigarette tax collections between fiscal years 1970 and 1975, an average of 1.74 billion packs of cigarettes or 6.2 percent of total U.S. cigarette sales were exempt from State and local taxation. Of this amount, nearly two-thirds was due to the exemption of sales at military bases and the majority of the remainder to sales at Indian reservations.

Indian Reservations

Five western States consider the purchase of tax-free cigarettes on reservations by non-Indians as a major tax evasion problem.[7] The problem appears to be particularly severe in Washington State. The Washington Department of Revenue estimated the revenue loss at $0.7 million in 1969 and at over $10 million in 1975. A case was cited of one Indian smoke shop owner who sold 932,283 cartons of cigarettes in a 1-year period, realizing a gross income of over $1,000,000. The State of Washington's loss on these cigarettes was $1,687,000.

Court decisions have limited State taxing on Indian reservations. The decisions are based largely on Article I, Section 8, Clause 3 of the U.S. Constitution, which authorizes Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian Tribes; . . ."

In recent years, the U.S. Supreme Court has rendered several decisions on the States' powers to tax reservation Indians. In 1973, the Court, in *McClanahan vs. Arizona Tax Commission*, held that the Arizona income tax does not apply to Indians employed on a reservation.

In *Mescalero Apache Tribe vs. Jones*, the Supreme Court in 1973 upheld the New Mexico sales tax on ski lift tickets at a resort operated by reservation Indians but not located on reservation land. In this decision, the Court applied the principle that unless Federal law expressly prohibits the taxation of Indians beyond reservation boundaries, they are subject to all nondiscriminatory laws applicable to citizens of the State.

Several recent cases are more directly relevant to the State cigarette tax evasion problem. In *Moe vs. Confederated Salish and Kootenai Tribes*, decided by the Supreme Court in 1976, the major issue was the right of Montana to impose a tax on cigarettes sold to Indian residents of the reservation. The Court held that the cigarette tax could not be imposed on reservation purchases by an Indian resident, but because the cigarette tax is paid by the consumer or user, the tax could be imposed on the sales to non-Indians. More recently, the U.S. Supreme Court, in Bryon vs. Itasca County, Minnesota, overturned a Minnesota Supreme Court ruling that extended all nonrestricted tax laws of the State to Indian reservations.

The State of Minnesota has handled its problem with Indian cigarette sales by precollecting the tax on cigarettes sold on Indian reservations and refunding the tax to the Indians on the basis of average State per capita consumption times the population of the reservation.

In South Dakota, the problem was solved by the State and the Indian tribes passing legislation to enable the State Department of Revenue to precollect the tax on cigarettes sold to

Indians on the reservation. The Indian tribes in South Dakota impose a tax on cigarettes at the same rate as the State and have authorized the State Commissioner of Revenue to collect these taxes on reservation sales. In turn, South Dakota passed enabling legislation to permit the Commissioner of Revenue to collect the cigarette taxes on behalf of the Indians.

As it is unlikely that State taxing powers will be extended to the Indian reservations, the solution to this cigarette tax evasion problem appears to be a cooperative effort between the Indians and the State, as has occurred in Minnesota and South Dakota. The major barrier to a cooperative effort is the loss of cigarette sales by Indian smoke shops if they levied the State cigarette tax. To overcome this problem, States could provide the Indians a certain portion of the cigarette tax as compensation for lost sales in addition to the refund for the tax paid by reservation Indians.

Military Sales

The purchase of tax-free cigarettes from military commissaries and exchanges for nonmilitary persons generally is not done on an organized basis but can represent a significant revenue loss to the States. This Commission concluded in a recent report:

> The higher per capita sales figures for military store patrons . . . suggest either that military people consume more cigarettes on the average than do civilians (and this mainly in high-tax States), or that some military persons are buying tax-free cigarettes for the consumption of persons other than themselves and their dependents. In the absence of any reasons to assume that the military are heavier smokers than civilians or that high taxes promote heavy smoking, it is reasonable to conclude that cigarette bootlegging is a significant problem in some States.[8]

On the basis of the evidence of tax evasion resulting from military store sales, the Commission recommended that "the current exemption of on-base sales to military personnel from State and local taxation should be removed."[9] The implementation of this recommendation will end this particular problem.

The revenue losses attributable to military store sales exceed 10 percent of total cigarette tax collections in five States—Alaska, Hawaii, New Mexico, South Carolina, and Washington. The largest percentage losses are 27.4 percent in Alaska and 28 percent in Hawaii—States with a large military population relative to total population. (See Appendix Table A-6.)

The extension of State and local sales taxes to all military sales will probably not be achieved in the near future. Meanwhile, a strong case can be made that, at a minimum, State and local cigarette taxes and sales taxes on cigarettes should be extended to military sales.

FOOTNOTES

[1]Memorandum to Rep. Peter W. Rodino from W. Vincent Rakestraw, U.S. Assistant Attorney General, dated April 1974.
[2]Indiana Criminal Justice Planning Agency, *Evaluation of the Interstate Revenue Research Center* (Indianapolis, Ind.: undated) conducted by Donald E. Balner, pp. 9-10.
[3]Ibid., pp. 16-17.
[4]*The News and Observer*, Raleigh, N.C., July 14, 1974.
[5]National Tobacco Tax Association, *Report of the Committee on Cigarette Tax Evasion* (Chicago, Ill.: September 1976) p. 5.
[6]National Tobacco Tax Association, *Report of the Committee on Cigarette Tax Evasion* (Chicago, Ill.: September 1975) p. 3.
[7]Idaho, Montana, Nevada, New Mexico, and Washington.
[8]ACIR, *State Taxation of Military Income and State Sales* (Washington, D.C.: Government Printing Office, July 1976) p. 18.
[9]Ibid., p. 3.