INTO AND OUT OF THE BOG: THE INTERGOVERNMENTAL TAX IMMUNITY DOCTRINE

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"[T]he power to tax involves the power to destroy."[1] With that famous phrase, Chief Justice Marshall launched the intergovernmental tax immunity doctrine. The doctrine rocketed on a fairly straight course for more than 100 years. During that time, the United States Supreme Court invalidated a number of state and local tax statutes that directly, and often rather indirectly, impacted the federal government. Under this expansive view of the Supremacy Clause, state and local taxes were struck if the economic incidence of the tax fell, even slightly, on the United States government.[2]

However, in 1937, a 5-4 Court reversed course.[3] In *James v. Dravo Contracting Co.*, the economic incidence of the state's tax fell partially on the United States.[4] In the face of more than one hundred years of precedent, the Court held that a state or local tax infringed on

only if (1) the tax discriminated against the federal government, or (2) the tax reached the United States government or its property.[5]

Since 1937, the line between the immune and the taxable has wavered somewhat erratically. The confusion and baffling line-drawing exercises seemingly embedded in the intergovernmental tax immunity doctrine have prompted jurists to consider this field of law a "bog,"[6] a "much litigated and often confused field,"[7] and a field "that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions."[8] Indeed, as early as 1944, Justice Jackson opined that the field was already heavily litigated because of the "recurring conflicts between the po-0.0lS4, J

This Article focuses on property or possessory interest taxes imposed on private interests in federally owned property. In the interest of more fully exploring the scope and limitations of the intergovernmental tax immunity doctrine, the Article also discusses several seminal cases addressing the imposition of sales, use, gross receipts, and state income taxes on parties contracting with the federal government. It is hoped that a discussion and analysis of these cases will help to illuminate the two major theses of this Article.

Following a brief discussion of possessory interest taxation in Part I, Part II of this Article traces the history of the intergovernmental tax immunity doctrine through the seminal 1958 *City of Detroit*[16] case. In Part III, the Article ventures into the bog to discuss whether a state statute may lawfully authorize a taxing authority to assess a possessory interest tax on federally owned property as if the possessory interest holder held the property in fee simple ownership.

A primary thesis of this Article, also contained in Part III, is that a possessory interest tax measured by the fee simple value of the underlying property may be unconstitutional as applied to users of federally owned property if there are contractual use restrictions on the use of the property. In such a case, the possessory interest holder should not be taxed on more rights than have been transferred under its agreement with the United States. Otherwise, the legal incidence of the tax reaches the federal government's present reversionary interest, and the tax therefore conflicts with the Supremacy Clause.

On the other hand, a state statute providing that the possessory interest may be valued as if the possessory interest holder held the interest in perpetuity should not violate the Supremacy Clause because the property tax is annual, and the federal government's future interest in the property is not being taxed. Under this analysis, cases that appear inconsistent at first glance can generally be reconciled. Moreover, such an approach enhances uniformity of taxation and equity, and is therefore consonant with sound tax policy.

In Part IV, this Article explores the discrimination prong of the intergovernmental tax immunity doctrine. After a discussion of relevant case law, Part IV advocates that statutory exemptions to possessory interest taxation should apply, so far as practicable, equally to private parties using federal, state, or local government property. For example, a state statute that exempts from tax grazing interests in state and local government-owned land, but does not similarly exempt

16. 355 U.S. 466 (1958).

grazing interests in federally owned land, unconstitutionally discriminates against the federal government and its private lessees.

The more difficult case is a statutory scheme that exempts a variety of possessory interests in federal, state, and locally owned property. For instance, a state statute may provide taxation exemptions to grazing interests in federally owned land, the private use of buildings on state university land, and the private use of municipally owned airports. Might this statute unconstitutionally discriminate against the federal government?

This Article contends that in deciding this question, the focus should be on the particular use in question. Moreover, the focus should be on whether similarly situated taxpayers receive equal treatment. In other words, would the private party receive the same treatment if it made similar use of state or locally owned property? If the private party is able to obtain an exemption only by making similar use of state or locally owned property, the statute discriminates against the United States and those with whom it deals. Exemptions to taxation should generally be narrowly construed, particularly when adversely affected parties have less influence with the state legislature than the parties who benefit from the tax exemption. State governments and private parties with whom they deal typically have inherently more political influence with state legislatures than does the United States and those private parties with whom it deals.