January 11, 1919.

OPINION No. 783.

TAXES: POLL TAX:

Upon the authority of Wilder vs. Noyes, decision of Circuit Judge Copper, and Dobbins vs. Commissioners of Erie County, the Territory of Hawaii is without authority to impose a poll tax upon officers of the United States Government resident In Hawaii.

Honorable Delbert E. Metzger,
Treasurer, Territory of Hawaii,
Honolulu, Hawaii,

Dear Sir: I beg to acknowledge the receipt of your communication of the 18th of October, 1918, in which you request the opinion of this office as to whether certain Federal officers and/or employees are liable for the payment of the poll tax imposed by virtue of the Territorial statute. I regret that I have not been able to answer your inquiry before this time, but because of other pressing matters requiring the immediate attention of this department, I have had to postpone final consideration of this subject until the present time.

In your letter you present three distinct inquiries but in view of the answer which will be made to the first inquiry, it will be unnecessary to answer the second and third. Your first inquiry is as follows: “Are or were Federal Government employees located in the Territory in civil work subject to and liable for personal taxes?”

I understand that by the expression “personal taxes” you mean the poll tax referred to in our statute. I have had considerable difficulty in satisfying myself as to the law upon this question and to be frank in the matter, I am not now entirely satisfied with the conclusion which, somewhat against my will, I have now reached.

The rule relating to the exemption of Federal officers from taxation by a state or Territorial Government is set forth in *1* Cooley on *Taxation,* pp. 129 to 133, from which I quote the following excerpts:

"It is the theory of our system of government that the state and the nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with an independent exercise by the other of its constitutional powers. If it were otherwise, neither government would be supreme within what has been set apart for its exclusive sphere, but, on the other hand, would be liable at any time to be crippled, embarrassed, and perhaps wholly obstructed in its operations, at the will or caprice of those who for the time being wielded the authority of the other. And that an exercise of the power to tax might have that effect is manifest from a consideration of the nature or the power."

"It follows as a necessary and inevitable conclusion, that the means or agencies provided or selected by the federal government as necessary or convenient to the exercise of its functions cannot be subjected to the taxing power of the states, since, if they could be, a state dissatisfied therewith, or disposed for any reason to cripple or hamper the operations of the federal government, might tax them to an extent that would impair their usefulness, or even put them out of existence. . . On the general principle above stated, the states are precluded from taxing, without federal permission, the salaries or emoluments of national officers. . . And the state may tax the property of federal agencies with other property in the state, and as other property is taxed, when no law of congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government. A different rule, as has been well said, would remove from the reach of state taxation all the property of every agent of the government."

The same rule is laid down by the same author in his

work on *Constitutional Limitations on* p. 682 as follows:

"For the like reasons a State is prohibited from taxing an officer of the general government for his office or its emoluments; since such a tax, having the effect to reduce the compensation for the services provided by the Act of Congress, would to that extent conflict with such an act, and tend to neutralize its purpose."

From these citations it is clear that the exemption from Federal Government. The term "Federal Officers" as here cannot be extended to include merely employees of the Federal Government. The term "Federal Officers" as here used has been defined in the case of *United Stats* vs *W. Smith,* 124 U.S. 525, 31 L. Ed. 536, in which case the court said:

"An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in United States vs. Germaine, 99 U. S. 508 (25:482), and in the recent case of United States v. Mouat, 124 U.S. 303 (ante 463). What we have here said is but a repetition of what was there authoritatively declared."

In the case of United States vs.. Hartwell, 73 U. S. 385, 18 L. Ed. 830, at p. 832, it was held that a clerk appointed by an assistant treasurer with the approval of the treasurer was an officer within the meaning of the term as here used. The conclusion arrived at from a study of these cases is that, in order to bring himself within this class, a Federal employee, using the term in its wider sense, must have been appointed by the President of the United States, or by a Federal court, or by a head of a department, or by some officer of the department with the approval of the head of that department. If not so appointed he is an employee merely, not an officer, and not entitled to the benefits of

this rule. The most important and most difficult part of the question as to whether an attempt on the part of a State or Territory to impose a poll or capitation tax on such Federal officers is within the meaning of the rule as laid down by Judge Cooley. I have been very strongly inclined towards answering this question in the affirmative but a careful examination of the authorities has compelled me reluctantly to come to the conclusion that those authorities require an answer in the negative.

This question was before our local Circuit Court for decision and in the case of *Wilder vs. Noyes* decided by Judge Cooper, it was held that a Federal officer was not subject to this tax. Unfortunately, the Attorney General's department at that time neglected to take the necessary steps to have this decision of Judge Cooper's reviewed by the Supreme Court. After an exhaustive study of the authorities, Judge Cooper's decision is the only one that I have been able to discover which is *directly* in point. In no other case has there been a decision upon the effect of this rule upon a poll or capitation tax. Referring to the effect of a single decision, so far as it affects the doctrine of *stare decisis,* the Supreme Court of Utah in Kimball vs. Grantsville City, 45 L. R. A., 629-636, said:

"Where, however, there has been but a single decision, which is clearly erroneous, and important private or public rights are concerned, or where the questionable matter was not necessarily involved in the case or cases, or where the points involved were decided contrary to the well-established legal principles which ought to have governed, and injustice or hardship would result, or where it appears that the facts which impelled the former decisions and the conditions under which they were made were materially different from those in the case under consideration, or where it is manifst that the law has been erroneously decided, and no material property rights or business rules have been established thereunder, the doctrine of *stare decisis* ought not to be applied, so as to prevent a reconsideration of the

former. . . . 'If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. *When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.*

If I had to rely solely on the decision in the case of *Wilder vs. Noyes,* directly in point though it may be, I believe that I would be justified in answering in the affirmative the question which you have propounded, but in view of certain principles laid down in *Dobbins vs. Commissioners of Erie County,* 16 Peters, 435, 10 L. Ed. 1022, I am compelled to the conclusion that that authority sustains the judgment in the Noyes' case.

In that case, which is the leading case upon this subject, the Commissioners of Erie County attempted to assess and tax all offices and posts of profit. Dobbins was the captain of a United States revenue cutter, and as such, claimed that the State of Pennsylvania was without authority to impose a tax on his office or the emoluments thereof. In that case the State attempted to tax the officer. This distinction should be kept in mind in considering the effect of the Dobbins' case. The Supreme Court of the United States in the Dobbins' case decided that the statute of Pennsylvania which sought to impose a tax upon a United States office was unconstitutional. While the point involved in that case was not identical with the question now under consideration, certain observations made by justices of the Supreme Court of the United States in the decision of that case, bear directly upon the solution of our present problem. These observations are as follows:

"The only difficulty in the act has arisen from the

terms directing assessments to he made upon all offices and posts of profit, without restricting the assessments to offices and posts of profit held under the sovereignty of that State and not excluding them from being made upon offices and posts of profit of another sovereignty, the United States.

The case being now cleared of other objections except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it, that is 'whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies.' "

* * * *

"Taxation is a sacred right, essential to the existence of a government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution; and the States by such as *are necessarily implied when the exercise of the right by a state conflicts with the perfect execution of another* sovereign power delegated to the United States. That occurs when taxation by a State acts upon the *instruments, emoluments, and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers.* The Government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress."

"All of this is legislation by Congress to execute sovereign powers. They are the means necessary to an allowed end; the end, the great objects which the Constitution was intended to secure to the States in their character of a nation. *Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the* instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law. These inanimate objects, it is admitted cannot be taxed by *a* State, because they are means. Is not the officer more so who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax. Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? *The execution of national* power by way of compensation to officers can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different."

* * * *

"But the unconstitutionality of such taxation by a State as that now before us may be safely put (though it is not the only ground) upon *its interference with the constitutional means which have been legislated by the government* of the United States to carry into effect its powers to and collect taxes, duties, imposts, etc., and to regulate commerce. In our view it presents a strong interference as was presented by the tax imposed by Maryland in the case McCulloch (4 Wheat, 316), and the tax by the city council of Charleston, in Weston's case (2 Peters, 449); in both which it was decided by this court that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

* * * *

"The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve,' *without that recompense being in any way lessened, except by the soveregn power from whom the officer derives his appointment,* or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminuation in the recompense of an officer is just and lawful unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and which is intended to bear equally upon all according to their estate."

* * * *

"Taxes are never assessed, *unless it be a capitation tax,* upon persons as persons, but upon them on account of their goods, and the profits made upon professions, trades, and occupations."

"Does not a tax, then, by a State upon *the office, diminishing the recompense,* conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; *and any law* of *a State imposing such a tax cannot be constitutional,* because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

It will be noted that in the second excerpt above quoted, the Supreme Court of the United States declares in no uncertain terms that not only the instruments and emoluments, but also the persons which the United States may use and employ, cannot be taxed by a State or Territorial government. It may be said that their reference to "persons" in that excerpt is a dictum only. While that may be true, the United States Supreme Court was discussing in that case the general principles relating to the unconstitutionality of such taxation, and in view of the fact that in the sixth excerpt above quoted it refers to the only tax which may be imposed upon a "person" as such, as a cavitation (poll) tax, I cannot escape the conclusion that the Court had in mind this specific question when it referred to the taxation of "persons" in the second quoted excerpt.

The whole trend of the Dobbins' case is toward a very strong support of the judgment in the Noyes' case to such an extent that I am unable to say that the judgment in the Noyes' case was "clearly erroneous" (Kimball vs Grantsville City).

While I believe that the questions which you have propounded ought to be answered by the Supreme Court of the Territory, yet I am unable to advise you that the decision in the Noyes' case was erroneous, and consequently I

am of the opinion, and so advise you, that Federal officers as herein defined may not be subject to the payment of the poll tax imposed by Territorial laws.

Yours very truly,

HARRY IRWIN,
Attorney General.