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Legal Sidebar

Fifth and Sixth Circuits Divided on Whether the Necessary and Proper Clause Authorizes Federal Ban on At-Home Spirit Distilling

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For more than 150 years, federal law has banned individuals from distilling spirits at home. Internal Revenue Code (IRC) §§ 5601(a)(6) and 5178(a)(1)(B) prohibit individuals from producing spirits at home for personal consumption by restricting a spirit distillery's location and attaching criminal penalties to noncompliance. In the past few years, persons seeking to engage in at-home distilling have filed federal lawsuits challenging the ban as unconstitutional. Among other claims, plaintiffs have argued that the at-home distilling ban exceeds Congress's authority under the Taxing and the Necessary and Proper Clauses of the Constitution.

On April 10, 2026, in *McNutt v. U.S. Department of Justice*, a unanimous three-judge panel for the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) affirmed a district court's permanent injunction that prevents the federal government from enforcing IRC §§ 5601(a)(6) and 5178(a)(1)(B) against a group of plaintiffs. In *McNutt*, the Fifth Circuit concluded that the U.S. District Court for the Northern District of Texas "correctly determined that these statutes . . . violate the Taxation and Necessary and Proper clauses." The Fifth Circuit's opinion serves as binding legal precedent for federal district courts within its territorial jurisdiction—Louisiana, Mississippi, and Texas.

Soon after the Fifth Circuit's decision in *McNutt*, on April 21, 2026, in *Ream v. Department of the Treasury*, a divided three-judge panel for the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) upheld the same two provisions prohibiting at-home distilling on the grounds that the provisions were a lawful exercise of Congress's authority under the Necessary and Proper Clause to pass laws that are "necessary and proper" for executing the Constitution's enumerated powers. The Sixth Circuit's decision in *Ream* did not address the Fifth Circuit's opinion in *McNutt*. The Sixth Circuit's decision is binding legal precedent for federal district courts in Kentucky, Michigan, Ohio, and Tennessee. On July 20, 2026, the plaintiff in *Ream* filed a petition for certiorari seeking Supreme Court review of the Sixth Circuit's decision.

In light of the Sixth Circuit's decision in *Ream*, on May 22, 2026, the federal government petitioned the Fifth Circuit for rehearing en banc in *McNutt*, which the court denied. On August 14, 2026, the federal government filed a petition for certiorari seeking Supreme Court review of the Fifth Circuit's decision in

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McNutt. A previous Legal Sidebar discusses the district court's decision in *McNutt*, which was under a different case caption, *Hobby Distillers Association v. Alcohol and Tobacco Tax and Trade Bureau*.

This legal sidebar provides an overview of the federal distilled spirit provisions at issue, summarizes the Fifth Circuit's and the Sixth Circuit majority's Taxing Clause and Necessary and Proper Clause analyses in *McNutt* and *Ream*, and provides considerations for Congress.

Distilled Spirit Provisions

IRC § 5001(a)(1) imposes a federal excise tax on the production or importation of distilled spirits in the United States "at the rate of $13.50 on each proof gallon and a proportionate tax at the like rate on all fractional parts of a proof gallon." Under IRC § 5001(b), the tax attaches when a distilled spirit is produced. IRC § 5004(a)(1) provides, subject to exceptions, "[t]he tax imposed by section 5001(a)(1) shall be a first lien on the distilled spirits from the time the spirits are in existence as such until the tax is paid."

IRC § 5178(a)(1)(B) restricts the location of distilled spirit production. It provides that "[n]o distilled spirits plant for the production of distilled spirits shall be located in any dwelling house, in any shed, yard, or inclosure [sic] connected with any dwelling house, or on board any vessel or boat, . . . or on premises where any other business is carried on (except when authorized under subsection (b))." Under IRC § 5601(a)(6), subject to exceptions, it is a felony to "use, or possess[] with intent to use, any still, boiler, or other utensil for the purpose of producing distilled spirits" at a location prohibited by IRC § 5178(a)(1)(B), such as a home.

Taxing Clause

Both the Fifth Circuit in *McNutt* and the Sixth Circuit majority in *Ream* held that IRC §§ 5178(a)(1)(B) and 5601(a)(6) could not be sustained as a valid exercise of Congress's authority under the Taxing Clause standing alone. The Constitution's Taxing Clause authorizes Congress "[t]o lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." In reaching their holdings, the Fifth Circuit and the Sixth Circuit majority both relied on the Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius (NFIB)* discussing the scope of the Taxing Clause and constitutional limits on Congress's power to tax.

McNutt

The Fifth Circuit framed the dispute in *McNutt* as whether Congress's Taxing Clause authority extended to legislation that prohibited "activity that would generate taxable spirits" and "impose[d] criminal penalties." To determine the scope of the Taxing Clause, the Fifth Circuit began its analysis by determining the meaning of to "lay" and to "collect" during the founding era. The court concluded that definitions from the founding era "confirm[ed] the obvious," that "Congress can charge or demand money from taxpayers." Next, the Fifth Circuit looked to Supreme Court precedent discussing the reach of Congress's power to tax. Citing the Supreme Court's decision in *NFIB*, the Fifth Circuit held that IRC §§ 5178(a)(1)(B) and 5601(a)(6) did not fall within Congress's Taxing Clause authority because the provisions did not raise revenue. The court reasoned that the challenged statutes reduced revenue by prohibiting at-home distilleries and "amount[ed] to an anti-revenue provision." Additionally, the court maintained that IRC §§ 5178(a)(1)(B) and 5601(a)(6) were inconsistent with the Supreme Court's understanding of Congress's taxing power in *NFIB*. In *NFIB*, the Supreme Court explained that a "tax . . . leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." The Fifth Circuit stated that under the contested provisions, "plaintiffs have only the choice *not* to do as they wish or risk fines and imprisonment."

The Fifth Circuit also rejected the government's argument that the prohibition on at-home spirit distilleries was permissible under the Taxing Clause to prevent tax evasion. The government contended that it was easier for at-home distillers to evade distilled spirit taxes than other distillers because it was easier for at-home distillers to conceal the factors used to calculate the proper tax rate (alcohol proof) and tax base (the amount of gallons produced). Looking to the Supreme Court's analysis in the *License Tax Cases*, the Fifth Circuit reasoned that Congress's power under the Taxing Clause could not reach "activity that may generate subjects of taxation." In the *License Tax Cases*, the Supreme Court proclaimed that Congress's taxing power "reache[d] only existing subjects." Accordingly, in *McNutt*, the Fifth Circuit concluded that there would be "no limit" on Congress's Taxing Clause authority if Congress could prohibit activity that might "give rise to tax evasion."

Ream

In *Ream*, the Sixth Circuit majority succinctly concluded that IRC §§ 5178(a)(1)(B) and 5601(a)(6) exceeded Congress's authority under the Taxing Clause. Like the Fifth Circuit, the Sixth Circuit majority relied on the Supreme Court's analysis in *NFIB*. Quoting *NFIB*, the majority determined that Congress's taxing power is "limited to requiring an individual to pay money into the Federal Treasury, no more."

Necessary and Proper Clause

Because the Fifth Circuit and the Sixth Circuit majority concluded that the Taxing Clause alone could not be used as a basis for the ban on at-home distilling, the courts next considered whether the ban could be sustained as a valid exercise of Congress's authority under the Necessary and Proper Clause. The Fifth Circuit and the Sixth Circuit majority diverged on this issue.

The Necessary and Proper Clause provides Congress with broad power to "make all Laws which shall be necessary and proper for carrying into Execution" the Constitution's enumerated powers, including under the Taxing Clause. The Supreme Court famously described Congress's discretion under the Necessary and Proper Clause in the 1819 case *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Even though both the Fifth Circuit and Sixth Circuit majority applied the *McCulloch* standard to determine whether IRC §§ 5178(a)(1)(B) and 5601(a)(6) fell within the Necessary and Proper Clause's scope, the courts reached different conclusions. In *McNutt*, the Fifth Circuit held that the provisions prohibiting at-home distilling were not a "necessary and proper" exercise of Congress's taxing power. In contrast, in *Ream*, the Sixth Circuit ruled that the contested provisions were a lawful exercise of Congress's power under the Necessary and Proper Clause "when enacted, and remain[ed] so today."

Necessary

McNutt

The Fifth Circuit did not consider IRC §§ 5178(a)(1)(B) and 5601(a)(6) to be *necessary* within the meaning of the Necessary and Proper Clause because, in its view, the provisions did "nothing to further tax collection" and instead "only inhibit[ed] revenue raising." Applying the Supreme Court's conclusions in *McCulloch*, the Fifth Circuit stated that the term *necessary* "encompass[ed] 'indispensable,'" but could also mean "convenient," "useful," or "essential." The Fifth Circuit also recognized that, under the *McCulloch* standard, a law was *necessary* if it was "'plainly adapted' to an enumerated power." Applying these understandings, the Fifth Circuit determined that IRC §§ 5178(a)(1)(B) and 5601(a)(6) were "not 'plainly adapted' to effectuate Congress's taxation of spirits." The court explained that the challenged provisions did "not help Congress raise revenue" because the provisions did not tax distilled spirits or stills. The court considered the provisions to "reduce revenue by preventing individuals from making distilled spirits" in certain locations. Additionally, the Fifth Circuit embraced the lower court's concerns about laws that attempt to use Congress's taxing power to punish individuals not subject to tax. The court expressed that the contested provisions "criminalize[d] the conduct of a person in order to prevent [the] taxation power from taking effect."

The Fifth Circuit dismissed the government's arguments that IRC §§ 5178(a)(1)(B) and 5601(a)(6) were part of a scheme to protect distilled spirit tax revenue. The court acknowledged the government's argument that House Report 39-24 indicated that the motivation for the at-home distilling ban's predecessor was a "perceived need to curb abuse" and to address "then-rampant" distilled spirit tax evasion. Still, the Fifth Circuit maintained that if the challenged provisions were invalidated, other rules for licensing and regulating distilled spirits would "accomplish the purposes of taxation." According to the Fifth Circuit, the surviving rules would allow distilled spirit creation and provide at-home distillers with a choice to either pay the distilled spirit tax or not engage in at-home distilling. The court stressed that at-home distillers who did not pay the tax or failed to acquire a license would remain "sanctionable."

Additionally, the Fifth Circuit did not agree with the government's argument that IRC §§ 5178(a)(1)(B) and 5601(a)(6) were similar to other statutory provisions governing the manufacturing and handling of taxed articles that courts upheld. The Fifth Circuit discussed the Supreme Court's 1902 decision in *Felsenheld v. United States*, where the Supreme Court ruled that a federal law prohibiting coupons and "prize[s]" inside packages of taxed tobacco was constitutional. The Fifth Circuit also reviewed the Eighth Circuit's 1964 decision in *Stilinovic v. United States*, where the Eighth Circuit upheld the constitutionality of a federal statute that prohibited placing "any distilled spirit[]" inside "a liquor bottle" other than the distilled spirit contained in the bottle when taxed. From the Fifth Circuit's perspective, the statutory provisions at issue in *Felsenheld* and *Stilinovic* were unlike IRC §§ 5178(a)(1)(B) and 5601(a)(6) because they "facilitate[d] the measurement and integrity of the taxable products and clearly relate[d] to tax collection." The Fifth Circuit remarked that the case before it concerned articles "on which 'no tax is imposed,'" whereas *Felsenheld* and *Stilinovic* concerned "'the very articles' subject to taxation." Similarly, the Fifth Circuit concluded that other statutory provisions governing distilled spirit manufacturing, bottling, and labeling were distinguishable from IRC §§ 5178(a)(1)(B) and 5601(a)(6) because those other statutes did not ban distilled spirit creation.

Ream

By contrast, the Sixth Circuit majority in *Ream* determined that IRC §§ 5178(a)(1)(B) and 5601(a)(6) were *necessary* to prevent distilled spirit tax evasion. The court regarded *necessary* under the *McCulloch* standard to mean that a law "must be 'plainly adapted' to a legitimate constitutional end." From there, based on the Supreme Court's analysis in *Felsenheld*, the majority reasoned that the *necessary* "formulation in a case concerning 'securing the payment of' taxes" was a rule governing the manufacturing or handling of taxable goods that was "reasonable." The majority understood the ban on at-home distilling to be *necessary* for tax collection at the time of enactment and now under both the "plainly adapted" and the "reasonable" formulations of *necessary*.

According to the *Ream* majority, "[b]y all appearances," at-home distilling was aiding rampant tax evasion before the enactment of the at-home distilling ban. Referencing congressional debates and House Report 39-24, the majority proclaimed that, in 1868, distilled spirit tax evasion "had been rampant for literally all of the nation's history." The Sixth Circuit majority stated that the "rationale" for the at-home distilling ban was "almost self-evident." The majority expressed that, from a "legal and practical" standpoint, stills in homes were easier to hide and harder to search than bonded premises. The majority found that the predecessor to the current at-home distilling ban was part of the Act of July 20, 1868's "monumental effort" to end "these 'stupendous frauds.'"

The Sixth Circuit majority adopted a more holistic approach than the Fifth Circuit when evaluating whether the prohibition on at-home distilling raised revenue. The majority maintained that indirect causal relationships could be considered when determining whether a manufacturing or production rule raised revenue. From the majority's perspective, Congress could have "easily conclud[ed]" that the at-home distilling ban would "increas[e] revenue" by "shift[ing] consumption from untaxed spirits to taxed spirits." The majority noted Congress could have considered spirits produced at home a substitute good for distillery-produced spirits and determined that many at-home distillers would not pay the tax if at-home distilling were permitted and subject to tax.

Proper

McNutt

The Fifth Circuit concluded that the at-home distilling ban "improperly" expanded the federal government's power and encroached upon state powers. The court construed *proper* as used in the Necessary and Proper Clause to encompass a "limiting principle" on the Necessary and Proper Clause's expansion of the taxing power. The court found this limiting principle supported by founding era dictionaries, articles examining the history of the Necessary and Proper Clause, and Supreme Court cases. The Fifth Circuit explained that founding era dictionaries defined *proper* as "'particularly suited to' or 'correct' or 'just,'" and "represented something that was '[n]atural' or 'original' or even '[f]it; accommodated; adapted; suitable; qualified.'" Following the examination of law review articles and *The Federalist No. 33*, the Fifth Circuit deduced that, at the nation's founding, *proper* was "frequently" used in discussions about the division of powers between the federal government's three branches and the allocation of powers between the federal government and state governments. Quoting *McCulloch*, the Fifth Circuit reasoned that the Supreme Court understood a law to be *proper* within the meaning of the Necessary and Proper Clause when other enumerated powers did "not prohibit[]" the law and the law was "consist[ent] with the letter and spirit of the constitution."

Because IRC §§ 5178(a)(1)(B) and 5601(a)(6) appeared "to ban activity" that did not have a "plain connection" to the taxing power, the Fifth Circuit concluded "Congress ha[d] essentially—and 'improperly'" infringed upon state governments' reserved police powers. Building upon *McCulloch* and relying on the Supreme Court's 1997 decision in *Printz v. United States*, the Fifth Circuit reasoned that laws exceeding Congress's powers under the Constitution violate the system of dual sovereignty by "expand[ing] the federal government and . . . infring[ing] on state sovereignty." Quoting *NFIB*, the Fifth Circuit explained it had an "obligation to read the Constitution 'carefully to avoid creating a general federal authority akin to the police power.'"

Returning to the Supreme Court's analysis in *NFIB*, the Fifth Circuit also concluded that the ban on at-home distilling was not a *proper* exercise of Congress's taxing power within the meaning of the Necessary and Proper Clause because it criminalized the activity of at-home distilling instead of providing plaintiffs with a choice to pay the tax on distilled spirits. The court determined that "the Necessary and Proper Clause c[ould not] expand the reach of the taxing power to criminalize conduct that could produce taxable revenue under the pretext that generating revenue for the federal government w[ould] be enhanced." The Fifth Circuit pondered what at-home activity could not be banned if the taxing power authorized that kind of control over conduct. Quoting *NFIB*, the Fifth Circuit concluded that "the taxing power does not give Congress the same degree of control over individual behavior [as the Commerce Clause]."

Ream

In *Ream*, the Sixth Circuit majority did not "see any reason" why the at-home-distilling ban was not *proper* under the Necessary and Proper Clause. The majority determined that the Constitution did not prohibit the ban, the ban did not seek to "indirectly" regulate conduct, and the ban did not seek to "circumvent" a limitation on Congress's power. The majority reiterated that the purpose of the ban was to "collect revenue." For support, the majority quoted an 1884 case, *United States v. Ulrici*, in which the Supreme Court stated that the Act of July 20, 1868's "well-considered and minute provisions" were enacted for the sole purpose of "secur[ing] the payment of" distilled spirit taxes.

The Sixth Circuit majority did not express the same level of concern as the Fifth Circuit about the use of the Necessary and Proper Clause to expand Congress's taxing power. In the majority's view, those concerns were "misplaced" in the context of the at-home distilling ban. The majority explained that it used "means-end scrutiny" to determine whether a law was *necessary* and *proper*. As interpreted by the majority, its "factbound judgment" determined that the at-home distilling ban was "'plainly adapted' to a permissible end." As the majority saw it, alcohol, and relatedly, distilled spirit tax evasion, was in a class by itself "or very close to it," and that distinction served as a basis for the majority to uphold the ban on at-home distilling under the Necessary and Proper Clause. Under the majority's framing, the relevant facts were the nation's long history of distilled spirit tax evasion and Congress's legislative justification for the Act of July 20, 1868, found in House Report 39-24. The majority concluded that IRC §§ 5178(a)(1)(B) and 5601(a)(6) "addressed an actual problem that had confounded the federal government from its earliest days." In ruling for the federal government, the majority highlighted that the judicial power was also bound by constitutional limits, and declared it "should not be so eager to police the limits of Congress's power, that [it] exceed the limits of [its] own."

Considerations for Congress

McNutt and *Ream* provide insight into the considerations that courts weigh when determining whether Congress has the authority to enact a tax-related regulatory provision. These cases indicate that courts pay close attention to tax-related provisions that regulate at-home conduct. The Fifth Circuit definitively ruled that the Necessary and Proper Clause did not expand the federal taxing power to allow Congress to criminalize at-home conduct that might generate taxable revenue to address concerns that such conduct could result in tax evasion and reduce federal revenue. While the Sixth Circuit ultimately upheld the ban on at-home distilling, the court stressed that the evasion of alcohol taxes was a distinct challenge. For that reason, it is unclear whether the Sixth Circuit majority's reasoning could sustain other tax-related provisions regulating at-home conduct outside the alcohol context.

As the Fifth and Sixth Circuits are now divided on whether IRC §§ 5178(a)(1)(B) and 5601(a)(6) are authorized by the Necessary and Proper Clause, Congress might consider passing legislation to change the provisions that prohibit at-home distilling. If Congress sought to permit and tax at-home distilling, Congress might emulate the tax laws governing beer and wine and could exempt certain amounts of distilled spirits produced for personal and family use from tax. If Congress sought to maintain the ban on at-home distilling, Congress might consider drafting legislation that would sustain the ban under another enumerated power or structure the ban to more directly connect with an enumerated power. For example, the federal government may be able to sustain the ban under the Commerce Clause if a court considers the ban a part of a comprehensive statutory scheme regulating the interstate alcohol market.

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