> student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided."

The neutrality mandated by the high Court's interpretation of the First Amendment is violated by the required use of the Bible, which is unalterably, "an instrument of religion" in the public schools. It might also be noted that the case of *Engel* v. *Vitale*, 370 U.S. 421 is authority for the principle that nonsectarian religious practices, as well as sectarian practices, violate the Establishment Clause.

It is, therefore, our opinion that the provisions of R.S. 18:14-77 and 78 are unconstitutional by virtue of the decision in *Abington* v. *Schempp*, and that the practice authorized thereunder should no longer be enforced, required or continued under the auspices of the State Department of Education.

Sincerely yours,

ARTHUR J. SILLS
Attorney General

JULY 19, 1963

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1963—No. 3

DEAR MR. KERVICK:

You have requested our opinion as to whether the Consul General of the General Consulate of Switzerland in Philadelphia, Pennsylvania is entitled to an exemption from or refund of the tax imposed upon the sale of motor fuels pursuant to N.J.S.A. 54:39-1 et seq. We conclude below that consular personnel are not entitled to the claimed exemption or refund.

This tax is imposed upon "distributors" of motor fuels. N.J.S.A. 54:39-27 states:

> "*Every distributor* shall * * * render a report to the commissioner * * * stating the number of gallons of fuel sold or used in this State by him * * *. A tax of $0.05 per gallon on each gallon so reported shall be paid by *each distributor*, * * *. If *any distributor* shall fail, neglect or refuse to file the report within the time prescribed by this section, the commissioner shall note such failure, neglect or refusal upon his records, and shall estimate the sales, distribution and use of said *distributor*, assessing the tax thereon, adding to said tax a penalty of 20% thereof for failure, neglect or refusal to report, and such estimate shall be prima facie evidence of the true amount of tax due to the commissioner from *such distributor* * * *." (Emphasis added)

A "distributor" is defined by the statute to mean and include every person who imports into the State motor fuels for use, distribution, storage or sale in the State. N.J.S.A. 54:39-3.

The Consul General does not claim an exemption by virtue of the statute itself. There are certain enumerated exemptions from the motor fuels tax specified by the

statute. N.J.S.A. 54:39–65 and 66. None of the statutory exemptions by its terms is applicable to a consular officer.

Rather, the Consul General of Switzerland as a purchaser or ultimate consumer of motor fuels contends that the tax imposed upon a distributor under N.J.S.A. 54:39–1 et seq. is reflected or included in the price which he pays for gasoline. He claims that he is entitled to a refund of this tax by virtue of the "most-favored-nation clause" contained in the Treaty of Friendship of 1850 between the United States and Switzerland. 11 Stat. (1855-1866). The Treaty of Friendship does not provide expressly for the exemption of consular officers from taxes. Article VII of the Treaty, the "most-favored nation clause," states:

> "The contracting parties give to each other the privilege of having, each, in the larger cities and important commercial places of their respective States, consuls and vice-consuls of their own appointment, who shall enjoy the same privileges and powers in the discharge of their duties, as that of the most-favored nation."

The United States Department of State has construed the "most-favored-nation clause" of the Treaty of Friendship between the United States and Switzerland to be conditioned upon principles of reciprocity. It was thus expressed:

> "Prior to the negotiation of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany signed on December 8, 1923, it was the general practice of this Government to regard the most-favored-nation clause in treaties to which it was a party as conditional [i.e., conditioned on reciprocity], regardless of whether the clause related to rights of consular officers or commercial matters. Beginning with the negotiation of the treaty of 1923 with Germany this Government adopted the unconditional form of the most-favored-nation clause as regards commercial matters but there was no change of policy with respect to the interpretation of the most-favored-nation clause as applied to the rights of consular officers.
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> "In the absence of information as to the exact nature of the declaration which is said to have been made by the American Agent and as to what may have been made the understanding between the negotiators of the two Governments regarding the right of consular officers to claim administration of the property falling to their absent nationals, the Department could not, in view of its long established policy of regarding the most-favored-nation clause concerning rights of consular officers as conditional, assume that in the negotiation of the treaty with Switzerland of 1850 it was the intention of this Government that the most-favored-nation clause in Article VII should be regarded as unconditional in its application." Under Secretary Castle to Minister Wilson, No. 1398, May 9, 1931, MS. Department of State, file 711.5421/24, (as quoted in IV Hackworth, Digest of International Law (1942), p. 702).

The General Consul's claim for exemption from the motor fuel tax is predicated upon the alleged existence of comparable tax exemptions granted to United States consular officers in Switzerland. It is asserted, therefore, that the reciprocal conditions of the "most-favored-nation clause" of the Treaty of Friendship between the

United States and Switzerland would require the State of New Jersey to accord a similar exemption to the Swiss General Consul.

It has not been established, however, that American consulate personnel are in fact granted exemptions from taxes comparable to the New Jersey motor fuels tax. According to documents furnished to the United Nations organization by the permanent observer assigned by Switzerland to the United Nations,

> "The [Swiss Federal Government] exempts under reserve of reciprocity * * * [consular officers] * * * from * * * prepaid federal taxes and recommends to cantons to do the same as to all direct taxes * * *. In fact the great majority of cantons exempt consulate personnel from direct cantonal taxes." Law and Regulations Regarding Diplomatic And Consular Privileges And Immunities, *United Nations Legislative Series*, Vol. VII, United Nations (1958).

Several observations are pertinent. First, the New Jersey motor fuels tax is not a "prepaid federal tax." Second, Swiss cantons which are comparable to our states, are only recommended to exempt consulate personnel from taxes. Third, not all cantons have complied with this recommendation to exempt consulate personnel. Fourth, the recommendation of tax exemption applies only to "direct cantonal taxes."

It is to be emphasized that the motor fuel tax imposed by N.J.S.A. 54:39–1 *et seq.* is not a direct tax upon a consumer. It is an indirect tax. *Arneson* v. *W. H. Barber Co.*, 210 Minn. 42, 297 N.W. 335 (S. Ct. 1941); *State* v. *City of El Paso*, 135 Tex. 359, 143 S.W. 2d 366 (1940); *Trinityfarm Const. Co.* v. *Grosjean*, 291 U.S. 466, 54 S. Ct. 469 (1934), *rehearing denied* 292 U.S. 604, 54 S. Ct. 712 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 54 S. Ct. 575 (1935); *In re Wiloil Corp.*, 50 F. Supp. 535 (D.C. Pa. 1941).

As previously stated, N.J.S.A. 54:39–27 imposes the motor fuels tax upon the "distributor" of such motor fuel. While the motor fuels tax thus imposed upon a distributor may ultimately be reflected or included in the cost to the consumer and, in that sense, be paid indirectly by the consumer, such a tax is not considered to be a direct tax but rather an "excise" or "indirect" tax. Compare *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429, 15 S. Ct. 673 (1895) and *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342 (1910) with *Patton* v. *Brady*, 184 U.S. 608, 22 S. Ct. 493 (1902), *Arneson* v. *W. H. Barber Co., supra,* and *State* v. *City of El Paso, supra.* Any increase in the ultimate cost of gasoline attributable to the tax imposed upon distributors imposes only an indirect economic burden upon purchasers or users of motor fuels. Such increased economic burdens are not tantamount to taxes. Cf., *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208 (1937); *Alabama* v. *King & Boozer*, 314 U.S. 1, 62 S. Ct. 43 (1941); *United States* v. *City of Detroit*, 355 U.S. 466, 78 S. Ct. 474 (1958); *United States* v. *Township of Muskegon*, 355 U.S. 484, 78 S. Ct. 483 (1958).

The United States Department of State, in interpreting the scope of the "most-favored-nation clause," has indicated that only a motor fuel tax which is imposed directly upon a consumer or ultimate user could be subject to a claim for exemption under the reciprocal provisions of the "most-favored-nation clause":

> "It is believed that foreign consular officers in the United States generally pay the tax on gasoline. In some instances *where the tax is assessed upon the consumer*, it has been held that, where treaty provides for the exemption

> of consular officers from taxes, they are not obliged to pay the gasoline tax." (Emphasis supplied.) The Assistant Secretary of State (Carr) to the Consul General at Paris (Keena) Oct. 15, 1934, MS. Department of State, file 702.0651/71, (as quoted in IV Hackworth, *op. cit.* p. 792.)

In this same vein, the United States Department of State in 1934 determined as that Mexican consular officers were not exempt from a federal tax upon gasoline. The Federal Act in question was similar to N.J.S.A. 54:39-27. It provided:

> "There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of one cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in a case of sales to a producer of gasoline." Revenue Act of 1932, § 617(a), 26 U.S.C.A. Internal Revenue Acts 1924 to Date.

The United States Department of State advised the Mexican Embassy as follows:

> "Article 20 of the convention concluded at Habana [in 1928, 4 treaties, etc. (Trenwith, 1938) 4741] relative to consular agents provides that consular agents * * * shall be exempt from all national, state, provincial, or municipal taxes levied upon their person or property. It will be noted that the taxes from which consular agents and employees are exempted under the provisions of the consular convention are the 'taxes levied upon their person or property.' The exemption is thus limited in its application to personal taxes and property taxes * * *.
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> "Section 617(a) of the Revenue Act of 1932, as amended, provides for a tax on gasoline 'sold by the importer thereof or by a producer of gasoline.' Thus the Federal tax on gasoline is not a tax on the person or property of consular agents and employees but is an excise on the sale of gasoline. It is the opinion of this Department, therefore, that the tax exemption accorded consular agents and employees under the consular convention with Mexico of February 20, 1928, is without application to the Federal excise tax on gasoline." The Chief of the Division of Mexican Affairs (Reed) to the Second Secretary of the Mexican Embassy (Vazquez-Treserra) May 8, 1934 MS. Department of State, file 702.0611/599, (as quoted in IV Hackworth, *op. cit.*, p. 790.)

The fact that ambassadors of foreign countries may be entitled to an exemption or refund, does not require that similar benefits be accorded to consular personnel.

The distinction between ambassadors or ministers and consular personnel has long been established and recognized. An ambassador or minister is the highest rank of diplomatic agent and is deemed to be the personal representative of his sovereign or of the head of his state. (The Chief of the Division of Foreign Service Administration (Hengstler) to Miss Laura W. Steele, May 11, 1932, U.S. Dept. of State file 701/198, as quoted in IV Hackworth, *op. cit.*, p. 394).

A consul, on the other hand, enjoys only the status of a mercantile agent, *Hamilton* v. *Erie R. Co.*, 219 N.Y. 343, 114 N.E. 399, Ann. Cas. 1918 A. 928 (1918), *error dismissed*, 248 U.S. 369, 395, S. Ct. 95, 63 L. Ed. 307 (1918). An ambassador or minister is absolutely immune from suit even though the suit is based upon a personal transaction. *Magdalena Steam Navigation Co.* v. *Martin*, 2 El. & El. 94

(Q.B. 1859). But a consul is not immune from suit except where the action is based upon acts which he has committed within the scope of his duties. *The Anne*, 16 U.S. 435, 4 L. Ed. 428 (1818); *The Sao Vincente*, 260 U.S. 151, 43 S. Ct. 13, 67 L. Ed. 179; *In re Iasigi*, 79 Fed. 751 (D.C.S.D.N.Y. 1897). A consul may not interpose a claim for the violated rights of his sovereign, *The Sao Vincente, supra*, but an ambassador may interpose such claim, *Compania Espanola* v. *Havemar*, 303 U.S. 68, 58 S. Ct. 432, 82 L. Ed. 667 (1938).

The appointment of an American citizen as an ambassador accredited to the United States will not be acceptable to the United States, [The Chief of the Division of Protocol (Summerlin) to J. E. Korshak, May 20, 1938, MS. Dept. of State, file 701.0011/278, (as quoted in IV Hackworth, op. cit. p. 453)], but an American citizen appointed as a consular representative of a foreign government may receive official recognition from the government of the United States. [Chief Clerk and Administrative Assistant (MacEachran) to Dr. J. L. Arallanal, Dec. 1, 1934, MS. Dept. of State, file 702.0011/138, (as quoted in IV Hackworth, ibid. p. 665)].

Our own court in *Seidel* v. *Peschkaw*, 27 N.J.L. 427, 429 (Sup. Ct. 1859) has described the distinction between diplomats and consular personnel as follows:

> "A consul is a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state. By virtue of his office, he is clothed only with authority for commercial purposes. He is not to be considered as a minister or diplomatic agent of his government, intrusted with authority to represent it in negotiations with foreign states, or to vindicate its prerogatives. 1 *Kent's Com.* 43; 3 *Wheaton* 445, *In re The Annie.*
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> "He has not the immunities of an ambassador, but in civil and in criminal cases is subject to the local laws, in the same manner as other foreign residents owing temporary allegiance to the state to which he is accredited."

Certainly there can be no basis for asserting that an indirect tax paid by consular personnel, which is merely reflected in the price of motor fuel purchased by them, constitutes a direct tax upon the sovereign states which they represent. Cf. *James* v. *Dravo Contracting Co., supra*; *Alabama* v. *King & Boozer, supra*; *United States* v. *City of Detroit, supra*; *United States* v. *Township of Muskegon, supra.*

We advise you, therefore, that consular personnel attached to the Consulate General of Switzerland are not entitled to an exemption from or refund of any taxes imposed upon the sale of motor fuels under N.J.S.A. 54:39-1 *et seq.*

Very truly yours,

ARTHUR J. SILLS
Attorney General

By: ALAN B. HANDLER
Deputy Attorney General