March 15, 1920.

William D. Guthrie, Esq.,

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My dear Mr. Guthrie:

I have your letter of the 11th inst. The Clerk of the Supreme Court gave me a copy of your Brief and I have read it. You have presented various contentions relating to the Eighteenth Amendment in a very strong way. I think, however, as I have heretofore thought, that your strongest point is that relating to the "concurrent power" clause. The truth about it is, I do not believe that anybody, in either House of Congress had the slightest idea what was intended by it.

The Amendment came to the Judiciary Committee of the Senate in the 64th Congress, the year before my term expired. I know at that time nobody on the Judiciary Committee had any information on the subject and after discussion, it was stricken out and reported to the Senate in the language of the 13th, 14th and 15th Amendments – that is, providing enforcement by Congress alone. I talked with Senator Shepard about the matter and he had no clear idea respecting the purpose and agreed with me, at that time, that it should be stricken out. It seemed to all of us that it was an anomaly to provide for the enforcement of the

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Federal Constitution by the several states. So far as I know, the purpose of the provision was never stated to any Committee or upon the floor of either House.

My own view of the effect of the provision has been that it conferred coequal power upon the States to legislate for the enforcement of the Amendment. This seems to be its plain and literal meaning and this is the effect of your argument as I understand it. I suggest, however, for what it may be worth, another interpretation, which, if adopted, would, at least render the provision workable.

The Amendment deals with a subject theretofore partly under the jurisdiction of Congress and partly under that of the several states. The manufacture and sale of intoxicants was exclusively within the police powers of the States; transportation within the United States was under the jurisdiction of Congress when interstate and under that of the several States when intra-state, while exportation from and importation into the United States were under the exclusive control of Congress. If the Amendment be construed as conferring equal power upon Congress and the several States to enforce the Amendment in all these phases we can readily imagine cases where legislation will be diametrically opposed and an impasse will result.

May it not, therefore, be plausibly argued that the provision is to be distributively construed so that, so far as its enforcement calls for the exercise of the Federal authority as heretofore understood, Congress may enact legislation and in so far as it involves the exercise of the ordinary police powers of the several States, they may enact legislation. In other words, the Amendment accomplishes three things.

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1. – It absolutely prohibits the manufacture, sale, transportation, exportation and importation of intoxicating liquors for beverage purposes. The effect of this is to render it unlawful to do any of these things, whether they were heretofore within the control of the Federal Government or within that of the several States. The provision, however, is not self-executing. It carries no means for its enforcement. The framers of the Amendment, while desiring to make an unqualified prohibition, did not desire to interfere with the internal powers of the States to deal with the subject in its local as distinguished from its national aspect. Therefore, the provision which they framed for the enforcement of the Amendment is to be construed:

2. – As authorizing Congress to enforce it by <u>appropriate</u> legislation –, that is, in its federal aspect, and,

3. – As authorizing the several States to enforce it by <u>appropriate</u> legislation, - that is, in its various local aspects.

I quite understand that the foregoing suggestion is open to the objection that it does violence to the precise language of the Amendment, but it is the only theory which I have been able to evolve that will make the Amendment at all workable, and which will prevent the destruction of the historic relations of the Federal and State Governments which you strongly present in your Brief. In this view of the matter the Amendment may be treated as a declaration of national policy and as evolving upon the Federal Government and the several States the power (and of course the duty) of enforcing this policy by appropriate legislation; that is, to legislate within their respective and historic fields of jurisdiction. The several states could, of course, pass

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no legislation which would be contrary to the prohibition but would have the same power within their field of jurisdiction to define the terms used in the Constitution as Congress would have within its field of jurisdiction. If then, for example, State Legislation allowing the manufacture and sale of 3% beer came before the Supreme Court that Court would uphold the legislation if it would uphold similar legislation passed by Congress within its sphere of action. The Amendment prohibits the manufacture and sale of intoxicating liquor for beverage purposes. The State under this construction of the "concurrent power" clause would be authorized to provide for the manufacture and sale of such liquors for other than beverage purposes.

Under a literal interpretation of the "concurrent power" clause a State could legislate on the subject of exportation and importation and interstate transportation. If it be argued that this involves an absurdity, which it obviously does, then may it not be insisted that if by the word "concurrent" it was not intended to give the States equal power with congress in this respect, by the case of reasoning it follows that it was not intended by the same word to give Congress equal power to legislate within the hitherto exclusive domain of State jurisdiction.

I am not at all sure that I have expressed what I have in mind with entire clearness but if the point appeals to you as of any value, you will, of course, put it in a more definite language.

Very sincerely,

GS/MC