JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES

REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES

PART II

A Text of the Law of Legislative Jurisdiction

Submitted to the Attorney General and transmitted to the President

June 1957

Reprinted by Constitutional Research Associates
P.O. Box 550
So. Holland, Illinois 06473

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JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES

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LETTER OF ACKNOWLEDGMENT

THE WHITE HOUSE
Washington, July 8, 1957

DEAR MR. ATTORNEY GENERAL: I have taken note of the final report (Part II) which you transmitted to me, rendered by the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States. It is my understanding that the report is to

be published and distributed, for the purpose of making available to Federal administrators of real property, Federal and State legislators, the legal profession, and others, this text of the law of legislative jurisdiction in these areas.

In view of the fact that the work of the Committee is completed, and since other departments and agencies of the Government now have clear direction for turning this work into permanent gains in improved Federal-Study of Jurisdiction over Federal Areas within the States is hereby dissolved.

Chairman Perry W. Morton and the members of this Committee have my congratulations and sincere appreciation of their service to our country in bringing to light the facts and law in this much neglected field. This monumental work, culminating three years of exhaustive effort, lays an excellent foundation for allocating to the States some of the functions which under our Federal-State system should properly be performed by State governments.

Sincerely,
THE HONORABLE HERBERT BROWNELL, JR.,
The Attorney General,
Washington, D.C.

Preface

The Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States was formed on December 15, 1954, on the recommendation of the Attorney General approved by the President and the Cabinet. The basic purpose for which the Committee was founded was to find means for resolving the problems arising out of jurisdiction status of Federal lands. Addressing itself to this purpose, the Committee, with assistance from all Federal agencies interested in the problems (a total of 33 agencies), from State Attorneys General, and from numerous other sources, prepared a report entitled Jurisdiction over Federal Areas within the States--Part I, The Facts and Committee Recommendations.1 This report, approved by the President on April 27, 1956, set out the findings of the Committee and recommended changes in Federal and State law, and in Federal agencies' practices, designed to eliminate existing problems arising out of legislative jurisdiction. It included two appendices.

The Committee's research involved a general survey of the jurisdictional status of all federally owned real property in the 48 States, and a detailed survey of the status of individual such properties in the State of Virginia, Kansas, and California. These three named States were selected as containing Federal real properties representative of such properties in all the States. Information was procured concerning the practices and problems related to legislative jurisdiction of the 23 Federal agencies controlling real property, and of the advantages and disadvantages of the several legislative jurisdiction statuses for the various purposes for which federally owned land is used. This information is reflected and ana-

lyzed in the several chapters of part I of the report, and is summarized in appendix A of the same part.

The Committee's study included a review of the policies, practices, and problems of the 48 States related to legislative jurisdiction. Information concerning these matters similarly is reflected and analyzed in various portions of part I of the report, with chapter V of the part being entirely devoted to the laws and problems of States related to legislative jurisdiction. Also, the texts of State (and Federal) constitutional provisions and statutes related to jurisdiction in effect as of December 31, 1955, are gathered in appendix B of part I.

The major conclusions of the Committee, set out in part I of the report, which, of cause, are applicable only to the 48 States to which the Committee's study extended, and do not apply to present Territories or the District of Columbia, are to the effect that in the usual case the Federal Government should not receive or retain any of the States' legislative jurisdiction within federally owned areas, that in some special cases (where general law enforcement by Federal authorities is indicated) the Federal Government should receive or retain legislative jurisdiction only concurrently with the States, and that in any case the Federal Government should not receive or retain any of the States' legislative jurisdiction with respect to taxation, marriage, divorce, descent and distribution of property, and a variety of other matters, specified in the report, which are ordinarily the subject of State control.

The conclusions reached by the Committee were, of course, made only after an appraisal of the facts adduced during the study in the light of applicable law, including the great body of decisions handed down by courts and opinions rendered by governmental legal officers, Federal and State, interpretative of situations affected by legislative jurisdiction.

Recommendations made by the Committee, based on the conclusions indicated above and on certain subsidiary findings, now constitute the policy of the Executive branch of the Federal Government, and are being implemented by Federal agen-

cies to the extent possible under existing law. However, full implementation of these recommendations must await the enactment of certain suggested Federal and State legislation.

In the course of its study the Committee ascertained the existence of a serious lack of legal bibliography on the subject-matter of its interest. With the concurrence of the Attorney General of the United States and the encouragement of the President, it has proceeded with the publication of this part II of its report, a compilation of the court decisions and legal opinions it weighed in the course of its study of the subject of legislative jurisdiction.

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CHAPTER I

OUTLINE OF LEGISLATIVE JURISDICTION

FEDERAL REAL PROPERTIES: Holdings extensive.--The Federal Government is the largest single owner of real property in the United States. Its total holdings exceed the combined areas of the six New England States plus Texas, and the value of these holdings is enormous. They consist of over 11,-000 separate properties, ranging in size from few hundred square foot monument or post office sites to million acre military reservations, and ranging in value from nearly worthless desert lands to extremely valuable holdings in the hearts of large metropolitan centers.

Activities thereon varied.--The activities conducted on these properties are as varied as the holdings are extensive. They include, at one extreme, the development of nuclear weapons, and at the other, the operation of soft drink stands. Some of the activities are conduct in utmost secrecy, with only Government personnel present, and others, such as those in national parks, are designed for the enjoyment of the public, and the presence of visitors is encouraged. In many instances, the performance of these activities requires large numbers of resident personnel, military or civilian, or both, and the presence of these personnel in turn necessitates additional functions which, while not normally a distinctively Federal operation (e.g., the personnel), are nevertheless essential to procuring the performance of the primary Federal function.

Legal problems many.--In view of the vastness of Federal real estate holdings, the large variety of activities conducted upon them, and the presence on many areas of resident employees and other person, it is to be expected that many legal problems will arise on or with

respect to these holdings. In addition to the problems normally encountered in administering and enforcing Federal laws, complicated by occasional conflict with overlapping States laws, the ownership and operation by the Federal Government of areas within the States gives rise to a host of legal problems largely peculiar to such areas. They arise not only because of the fact of Federal ownership and operation of these properties, but also because in numerous instances the federal Government has with respect to such properties a special jurisdiction which excludes, in varying degrees, the jurisdiction of the State over them, and which in other instances is, to varying extends, concurrent with that of the State.

FEDERAL POSSESSION OF EXCLUSIVE JURISDICTION: By constitutional consent.--This special jurisdiction which is often possessed by the United States stems, basically, out of article I, section 8, clause 17, of the Constitution of the United States, which provides, in legal effect, that the Federal Government shall have exclusive legislative jurisdiction over such area, not exceeding 10 miles square, as may become the seat of government of the United States, and like authority over all places acquired by the Government, with the consent of the States involved, for various Federal purposes. It is the latter part

of the clause, the part which has been emphasized, with which this study is particularly concerned. There is a general public awareness of the fact that the United States Government exercises all governmental authority over the District of Columbia, by virtue of power conferred upon it by a clause of the Constitution. There is not the same awareness that under another provision of this same clause the United States has acquired over several thousand areas within the States some or all of these powers, judicial and executive as well as legislative, which under our Federal-State system of government ordinarily are reserved to the States.

By Federal reservation or States cession.--For many years after the adoption of the Constitution, Federal acquisition of State-type legislative jurisdiction occurred only by direct operation of clause 17. The clause was activated through the enactment of State statutes consenting to the acquisition by the Federal Government either of any land, or of specific tracts of land, within the State. In more recent years the Federal Government has in several instances made reservations of jurisdiction over certain areas in connection with the admission of a State into the Union. A third means for transfer of legislative jurisdiction to the Federal Government. Courts and other legal authorities have distinguished at various times between Federal legislative jurisdiction derived, on the one hand, directly from operation of clause 17, and, on the other, form a Federal reservation or a State cession of jurisdiction. In the main, however, the characteristics of a legislative jurisdiction status are the same no matter by which of the three means the Federal Government acquired such status. Differences in these characteristics will be specially pointed out in various succeeding portions of this work.

Governmental power merged in Federal Government.--Whether by operation of clause 17, by reservation of jurisdiction by the United States, or by cession of jurisdiction by

States, in many areas all governmental authority (with recent exceptions which will be noted) has been merged in the Federal Government, with none left in any State. By this means same thousands of areas have become Federal in lands, sometimes called "enclaves," in many respects foreign to the States is which they are situated. In general, not State but Federal law is applicable in an area under the exclusive legislative jurisdiction of the United States, for enforcement not by State but Federal authorities, and in many instances not in State but in Federal courts. Normal authority of a State over areas within its boundaries, and normal relationships between a State and its inhabitants, are disturbed, disrupted, or eliminated, as to enclaves and their residents.

The State no longer has the authority to enforce its criminal laws in areas under the exclusive jurisdiction of the United States. Privately owned property in such areas is beyond the taxing authority of the State. It has been generally held that residents of such areas are not residents of the State, and hence not only are not subject to the obligations of residents of the State but also are not entitled to any of the benefits and privileges conferred by the State upon its residents. Thus, residents of Federal enclaves usually cannot vote, serve on juries, or run for office. They do not, as a matter of right, have access to State schools, hospitals, mental institutions, or similar establishments. The acquisition of exclusive jurisdiction by the Federal Government render as unavailable to the residents of the affect areas the benefits of the laws and judicial and administrative processes of the State relating to adoption, the probate of wills and administration of estates, divorce, and many other matters. Police, fire-fighting, notarial, coroner, and similar services performed by or under the authority of a State may not be rendered with legal sanction, in the usual case, in a Federal enclave.

EXERCISE OF EXCLUSIVE FEDERAL JURISDICTION: Legislative little exercised.--States do not have authority to legislate for areas under the exclusive legislative jurisdiction of

the United States, but Congress has not legislated for these areas either, except in some minor particulars.

Exercise as to crimes.--With respect to crimes occurring within Federal enclaves the federal Congress has enacted the Assimilative Crimes Act, which adopts for enclaves, as Federal law, the State law which is in effect at the time the crime is committed. The Federal Government also has specifically defined and provided for the punishment of a number of crimes which may occur in Federal enclaves, and in such cases the specific provision, of course, supersedes the Assimilative Crimes Act.

Exercise as to civil matters.--Federal legislation has been enacted authorizing the extension to Federal enclaves of the workmen's compensation and unemployment compensation laws of the States within the boundaries of which the enclaves are located. The Federal Government also has provided that State law shall apply in suits arising out of the death or injury of any person by the neglect or

wrongful act of another in an enclave. It has granted to the States the right to impose taxes on motor fuels sold on Government reservations, and sales, use, and income taxes on transactions or uses occurring or services performed on such reservations; it has allowed taxation of leasehold interests in Federal enclaves; and it has retroceded to the States

jurisdiction pertaining to the administration of estates of residents of Veterans' Administration facilities. This is the extent of Federal legislation enacted to meet the special problems existing on areas under the exclusive legislative jurisdiction of the United States.

RULE OF INTERNATIONAL LAW: Extended by courts to provide civil law.--The vacuum which would exist because of the absence of State law or Federal legislation with respect to civil matters in areas under Federal exclusive legislative jurisdiction has been partially filled by the courts, through extension to these areas of a rule of international law that when one sovereign in effect at the time of the taking which are not inconsistent with the laws or policies of the second continue in effect, as laws of the succeeding sovereign, until changed by that sovereign.

Problems arising under rule.--While application of this rule to Federal enclaves does provide a code of laws for each enclave, the law varies from enclave to enclave, and sometimes in different parts of the same enclave, according to the changes in State law which occurred in the periods between Federal acquisition of legislative jurisdiction over the several enclaves or parts. The variances are multiplied, of course, by the number of States. And Federal failure to keep up to date the laws effective in these enclaves renders such laws increasingly obsolete with passage of time, so that business and other relations of long elsewhere discarded. Further, many former State laws become wholly or partially inoperative immediately upon the transfer of jurisdiction, since the Federal Government does not furnish the machinery, formerly furnished by the State or under State authority, necessary to their operation. The Federal Government makes no provision, by way of example, for executing the former State laws relating to notaries public,

coroners, and law enforcement inspectors concerned with matters relate to public health and safety.

ACTION TO MITIGATE HARDSHIPS INCIDENT TO EXCLUSIVE JURISDICTION: By Federal--State arrangement.--The requirement for access of resident children to school has been met by financial arrangements between the Federal Government and the State and local authorities; as a result, for the moment, at least, no children resident on exclusive jurisdiction areas are being denied a primary and secondary public school education. No provision, however, has been made to enable residents to have access to State institutions of higher leaning on the same basis as State residents.

Federal efforts limited; State efforts restricted.--While the steps taken by the Federal Government have served to eliminate some small number of the problems peculiar to areas of exclusive jurisdiction, Congress has not enacted legislation governing probate of wills, administration of estates, adoption, marriage, divorce, and many other matters which need to be regulated or provided for in a civilized community. Residents of such areas are dependent upon the willingness of the State to make available to them its processes relating to such matters. Where the authority of the State to act in these matters requires jurisdiction over the property involved, or requires that the persons affected be domiciled within the State, the State's proceedings are of doubtful validity. Once a State has, by one means or another, transferred jurisdiction to the United States, it is, of course, powerless to control many of the consequences; without jurisdiction, it is without the authority to deal with many of the problems, and having transferred jurisdiction to the United States, it cannot unilaterally recapture any of the transferred jurisdiction. The efforts of the State to ameliorate the consequences of exclusive jurisdiction are, therefore, severely restricted.

By State statute or informal action, and State reservations.--One of the methods adopted by some States to soften the effects of exclusive Federal legislative jurisdiction has consisted of granting various rights and privilege and rendering various services to residents of areas of exclusive jurisdiction, either by statute or by informal action; so, residents of certain enclaves enjoy the right to vote, attend schools, and use the State's judicial processes in probate and divorce matters; they frequently have vital statistics maintained for them and are rendered other services. The second method has consisted of not transferring to the Federal Government all of the State's jurisdiction over the federally owned property, or of reserving the right to exercise, in varying degrees, concurrent jurisdiction with the Federal Government as to the matters specified in a reservation. For example, a State, in ceding jurisdiction to the United States, might reserve exclusive or concurrent jurisdiction as to criminal matters, or more commonly, concurrent jurisdiction to tax private property located within the Federal area.

RESERVATION OF JURISDICTION BY STATES: Development of reservations.--In recent years, such reservations and withholdings have constituted the rule rather than the exception. In large part, this is accounted for by the sharp increase, in the 1930's, in the rate of Federal land acquisition, with a consequent deepening awareness of the practical effects of exclusive Federal jurisdiction. In earlier years, however, serious doubts had been entertained as to whether article I, section 8, clause 17, of the Constitution, permitted the State to make any reservations of jurisdiction, other than the right to serve civil and criminal process n an area, which right was not regarded as in derogation of the exclusive jurisdiction of the United States. Not until, relatively recent years (1885) did the Supreme Court recognize as valid a reservation of jurisdiction in a State cession statute, and not until 1937 did it approve a similar reservation where jurisdiction is transferred by a consent under clause 17, rather than by a cession. It is

clear that today a State has complete discretion as to the reservations it may wish to include in its cession of jurisdiction to the United States or in its consent to the purchase of land by the United States. The only over-all limitations that the reservation must not be one that will interfere with the performance of Federal functions.

Early requirement, of R.S. 355, for exclusive Federal jurisdiction,--The extent of the acquisition of legislative jurisdiction by the United States was influenced to an extreme degree by the enactment, in 1841, of a Federal statute prohibiting the expenditure of public money for the erection of public works until there had been received from the appropriate State the consent to the acquisition by the United States of the site upon which the structure was to be placed. The giving of such consent resulted, of course, in the transfer of legislative jurisdiction to the United States by operation of clause 17. Not until 1940 was this statute amended to make Federal acquisition of legislative jurisdiction optional rather than mandatory.

The intervening 100-year period saw Federal acquisition of exclusive legislative jurisdiction over several thousand areas acquired for Federal purposes, since in the interest of facilitating the carrying on of Federal activities on areas within their boundaries each of the States consented to the acquisition of land by the United States within the State. Areas acquired with such consent continue under the exclusive legislative jurisdiction of the United States, since only with respect to a very few areas has the Federal Government retroceded to a States jurisdiction previously acquired.

Present variety of jurisdictional situations.--Removal of the Federal statutory requirement for acquisition of exclusive legislative jurisdiction has resulted in amendment by many States of their consent and cession statutes so as to reserve to the State the right to exercise various powers and authority. The variety of the reservations in these amended statutes has created an almost infinite number of jurisdiction situations.

JURISDICTION STATUTES DEFINED: Exclusive legislative jurisdiction.--In this part II, as in part I, the term "exclusive legislative jurisdiction" is applied to situations wherein the Federal Government has received, by whatever method, all the authority of the State, with no reservation made to the State except of the right to serve process resulting from activities which occurred off the land involved. This term is applied notwithstanding that the State may exercise certain authority over the land, as may other States over land similarly situated, in consonance with the several Federal statutes which have been mentioned above.

Concurrent legislative jurisdiction.--The term "concurrent legislative jurisdiction" is applied in those instances wherein in

granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

Partial legislative jurisdiction.--The term "partial legislative jurisdiction" is applied in those instances wherein the Federal Government has been granted for exercise by it over an area in a State certain of the State's authority, but where the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than the right to serve civil or criminal process in the area (e.g., the right to tax private property).

Proprietorial interest only.--The term "proprietorial interest only" is applied in those instances where the Federal Government has acquired some right of title to an area in a State but has not obtained any measure of the State's authority over the area. In applying this definition, recognition should be given to the fact that the United States, by virtue of its functions and powers and immunities with respect to areas in which are not possessed by ordinary landholders, and of the further fact that all its properties and functions are held or performed in a governmental rather than a proprietary (private) capacity.

OTHER FEDERAL RIGHTS OWNED AREAS: To carry out constitutional duties.--The fact that the United States has only a "proprietorial interest" in any particular federally owned area does not mean that agencies of the Federal Government are without power to carry out in that area the functions and duties assigned to them under the Constitution and statutes of the United States. On the contrary, the authority and responsibility vested in the Federal Government by various provisions of the Constitution, such

as the power to regulate commerce with foreign nations and among the several States (art. I, sec. 8, cl. 3), to establish Post Offices and post roads (art. I, sec. 8 cl. 7), and to provide and maintain a Navy (art. I, sec. 8, cl. 13) are independent of the clause 17 authority, and carry, certainly as supplemented by article I, section 18, of the Constitution, self-sufficient power for their own execution.

To make needful rules, and necessary and proper laws, and effect of Federal supremacy clause.--There is also applicable to all federally owned land the constitutional power (art. IV, sec. 3, cl. 2) given to Congress, completely independent of the existence of any clause 17 authority, "to * * * make all needful Rules and Regulations respecting the Territory or other of Congress (art. I, sec. 8, cl. 18), "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," is, of course, another important factor in the Federal functions. And any impact of State or local laws upon the exercise of Federal authority under the Constitution is always subject to the limitations of what has bee termed the federal supremacy clause of the Constitution, article VI, clause 2.

GENERAL BOUNDARIES OF THE WORK: The following pages deal, within the bounds generally outlined above, with the law--the constitutional and statutory provisions, the court decisions, and the written opinions of legal officers, Federal and State--relating to Federal exercise, or non-exercise, of legislative jurisdiction as to areas within the several States. They are not purported to deal with the law cited may, or may not, be applicable. Opinions are those of the authorities by whom they were rendered, and unless otherwise clearly indicated do not necessarily coincide with those of the Committee.

CHAPTER II

ORIGIN AND DEVELOPMENT OF LEGISLATIVE JURISDICTION

ORIGIN OF ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION: Harassment of the Continental Congress.--While the Continental Congress was meeting in Philadelphia on June 20, 1783, soldiers from Lancaster, Pennsylvania, arrived "to obtain a settlement of accounts, which they supposed they had a better chance for at Philadelphia than at Lancaster." On the next day, June 21, 1783:

> The mutinous soldiers presented themselves, drawn up in the street the state-house, where Congress had assembled. The executive council of the state, sitting under the same roof, was called on for the proper interposition. President Dickinson came in [to the hall of Congress], and explained the difficulty, under actual circumstances, of bringing out the militia of the place for the suppression of the mutiny. He thought that, without some outrages on persons or property, the militia could not be relied on. General St. Claire, then in Philadelphia, was sent for, and desired to use his interposition, in order to prevail on the troops to return to the barracks. His report gave no encouragement.

* * * * *

> In the mean time, the soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink, from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to

the barracks.

* * * * *

> The [subsequent] conference with the executive [of Pennsylvania] produced nothing but a repetition of doubts concerning the disposition of the militia to act unless some actual outrage were offered to persons or property. It was even doubted whether a repetition of the insult to Congress would be a sufficient provocation.
>
> During the deliberations of the executive, and the suspense of the committee, reports from the barracks were in constant vibration. At one moment, the mutineers were penitent and preparing submissions; the next, they were meditating more violent measures. Sometimes, the bank was their object; then the seizure of the members of Congress, with whom they imagined an indemnity for their offence might be stipulated.

The harassment by the soldiers which began on June 20, 1783, continued through June 24, 1783. On the latter date, the members of Congress abandoned hope that the State authorities would disperse the soldiers, and the Congress removed itself from Philadelphia. General George Washington had learned of the uprising only on the same date at his head-

quarters at Newburgh, and, reacting promptly and vigorously, had dispatched a large portion of his whole force to suppress this "infamous and outrageous Mutiny" (27 Writings of Washington (George Washington Bicentennial Commission, G.P.O., 1938) 32), but news of his action undoubtedly arrived too late. The Congress then met in Princeton, and thereafter in Trenton, New Jersey, Annapolis, Maryland, and New York City. There was apparently no repetition of the experience which led to Congress' removal from Philadelphia, and apparently at no time during the remaining life of the Confederacy was the safety of the members of Congress similarly threatened or the deliberations of the Congress in any way hampered.

However, the members of the Continental Congress did not lightly dismiss the Philadelphia incident from their minds. On October 7, 1783, the Congress, while meeting in Princeton, New Jersey, adopted the following resolution:

> That buildings for the use of Congress be erected on or near the banks of the Delaware, provided a suitable district can be procured on or near the banks of the said river, for a federal town; and that the right of soil, and an exclusive or such other jurisdiction as Congress may direct, shall be vested in the United States.

Available records fail to disclose what action, if any, was taken to implement this resolution. In view of the absence of a repetition of the experience which gave rise to the resolution, it may be that the feelings of urgency for the acquisition of exclusive jurisdiction diminished.

Debates in Constitutional Convention concerning clause 17.--Early in the deliberations of the Constitutional Convention, on May 29, 1787, Mr. Charles Pinckney, of South Carolina, submitted a draft of a proposed constitution, which authorized the national legislature to "provide such dockyards and arsenals, and erect such fortifications, as may be necessary for the United States, and to exercise exclusive jurisdiction therein." This proposed constitution authorized, in addition, the establishment of a seat of government for the United States "in which they shall have exclusive jurisdiction." No further proposals concerning exclusive jurisdiction were made in the Constitutional Convention until August 18, 1787.

In the intervening period, however, a variety of considerations were advanced in the Constitutional Convention affecting the establishment of the seat of the new government, and a number of them were concerned with the problem of assuring the security and integrity of the new government against interference by any of the States. Thus, on July 26, 1787, Mason, of Virginia, urged that some provision be made in the Constitution "against choosing for the seat of the general government the city or place at which the seat of any state government might be fixed," because the establishment of the seat of government in a State capital would tend "to produce disputes concerning jurisdiction" and because the intermixture of the two legislatures would tend to give "a provincial tincture" to the national deliberations. Subsequently, in the course of the debates concerning a proposed provision which, it was suggested, would have permitted the two houses of Congress to meet at places chosen by them from time to time, Madison, on August 11, 1787, urged the desirability of a permanent seat of government on the ground, among others, that "it was more necessary that the government should be in that position from

which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation."

The genesis of article I, section 8, clause 17, of the Constitution, is to be found in proposals made by Madison and Pinckney on August 18, 1787. For the purpose of having considered by the committee of detail whether a permanent seat of government should be established, Madison proposed that the Congress be authorized:

> To exercise, exclusively, legislative authority at the seat of the general government, and over a district around the same not exceeding square miles, the consent of the legislature of the state or states, comprising the same, being first obtained.
>
> * * * * *
>
> To authorized the executive to procure, and hold, for the use of the United States, landed property, for the erection of forts, magazines, and other necessary buildings.

Pinckney's proposal of the same day, likewise made for the purpose of reference to the committee of detail, authorized Congress:

> To fix, and permanently establish, the seat of government of the United States, in which they shall possess the exclusive right of soil and jurisdiction.

It may be noted that Madison's proposal made no provision for Federal exercise of jurisdiction except at the seat of Government, and Pinckney's new proposal included no reference whatever to areas other than the seat of Government.

On September 5, 1787, the committee of eleven, to whom the proposals of Madison and Pinckney had been referred, proposed that the following power be granted to Congress:

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance

> of the legislature, become the seat of government of the United States; and to exercise like authority over all places purchased for the creation of forts, magazines, arsenals, dock-yards, and other needful buildings.

Although neither the convention debates, nor the proposals made by Madison and Pinckney on August 18, 1787, had made any reference to Federal exercise of jurisdiction over areas purchased for forts, etc., the committee presumably included in its deliberations on this subject the related provision contained in the proposed constitution which had been submitted by Pinckney on May 29, 1787, which provided for such exclusive jurisdiction.

The debate concerning the proposal of the committee of eleven was brief, and agreement concerning it was reached quickly, on the day of the submission of the proposal to the Convention. The substance of the debate concerning this provision was reported by Madison as follows:

> So much of the fourth clause as related to the seat of government was agreed to, new. con.
>
> On the residue, to wit, "to exercise like authority over all places purchased for forts, & c."--
>
> MR. GERRY contended that this power might be made use of to enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government.
>
> MR. KING thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word "purchased," the words, "by the consent of the legislature of the state." This would certainly make the power safe.
>
> MR. GOUVERNEUR MORRIS seconded the motion, which was agreed to, nem. con,; as was then the residue of the clause, as amended.

On September 12, 1787, the committee of eleven submitted to the Convention a final draft of the Constitution. The committee had made only minor changes in the clause agreed to by the Convention on

September 5, 1787, in matters of style, and article I, section 8, clause 17, was contained in the draft in the form in which it appears in the Constitution today.

Aside from disclosing the relatively little interest manifested by the Convention in that portion of clause 17 which makes provision for securing exclusive legislative jurisdiction over areas within the States, the debates in the Constitutional Convention relating to operation of Federal areas, as reported by Madison, are notable in several other respects. Somewhat surprising is the fact that consideration apparently was not given to the powers embraced in article I, section 8, clause 18, and the supremacy clause in article VI, as a means for securing the integrity and independence of the geographical nerve center of the new government, and, more particularly, of other areas on which the functions of the government would in various aspects be performed. In view of the authority contained in the two last-mentioned provisions, the provision for exclusive jurisdiction appears to represent, to considerable extent, an attempt to resolve by the adoption of a legal concept a problem stemming primarily from a lack of physical power.

The debates in the Constitutional Convention are also of interest in the light they cast on the purpose of the consent requirement of clause 17. There appears to be no question but that the requirement was added simply to foreclose by the Federal Government of all of the property within that State. Could the Federal Government acquire exclusive jurisdiction over all property purchased by it within a State, without the consent of that State, the latter would have no means of preserving its integrity. Neither in the debates of the Constitu-

tional Convention, as reported by Madison, nor in the context in which the consent requirement was added, is there any suggestion that the consent requirement had the additional object of enabling a State to preserve the civil rights of persons resident in areas over which the Federal Government received legislative jurisdiction. As will be developed more fully below, in the course of the Virginia ratifying conventions and elsewhere, Madison suggested that the consent requirement might be employed by a State to accomplish such objective.

Debates in State ratifying conventions.--Following the conclusion of the work of the Constitutional Convention in Philadelphia, article I, section 8, clause 17, received the attention of a number of State ratifying conventions. The chief public defense of its provisions is to be found in the Federalist, #42, by Madison (Dawson, 1863). In that paper, Madison described the purpose and scope of clause 17 as follows:

> The indispensable necessity of complete authority at the seat of Government, carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted with impunity; but a dependence of the members of the General Government on the State comprehending the seat of the Government, for protection in the exercise of their duty, might being on the National Councils an imputation of awe or influence, equally dishonorable to the Government and dissatisfactory to the

other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the Government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the Government, as still fur-

ther to abridge its necessary independence. The extent of this Federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it;; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government, which is to exercise authority over them; as a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole People of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated. The necessity of a like authority over forts, magazines, etc., established by the General Government, is not less evident. The public money expended on such places, and the public property deposited in them, require, that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.

In both the North Carolina and Virginia ratifying conventions, clause 17 was subjected to severe criticism. The principal criticism levied against it in both conventions was that it was destructive of the civil rights of the residents of the ares subject to its provisions. In the North Carolina convention, James Iredell (subsequently a United States Supreme Court justice, 1790-1799) defended the clause against this criticism,

and at the same time urged the desirability of its inclusion in the Constitution, as follows:

They are to have exclusive power of legislation--but how? Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people? What would be the consequence if the seat of the government of the United States, with all the archives of American, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers

went and insulted Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself. * * *

In the Virginia convention, Patrick Henry voiced a number of objections to clause 17. Madison undertook to defend it against these objections:

He [Henry] next objects to the exclusive legislation over the district where the seat of government may be fixed. Would he submit that the representatives of this state should carry on their deliberations under the control of any other of the Union? If any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress. If the safety of the Union were under the control of any particular state, would not foreign corruption probably prevail, in such a state, to induce it to exert its controlling influence over the members of the general govern-

ment? Gentlemen cannot have forgotten the disgraceful insult which Congress received some years ago. When we also reflect that the previous cession of particular states is necessary before Congress can legislate exclusively any where, we must, instead of being alarmed at this part, heartily approve of it.

Patrick Henry specifically raised a question as to the fate of the civil rights of inhabitants of the seat of the government, and further suggested that residents of that area might be the recipients of exclusive emoluments from Congress and might be excused from the burdens imposed on the rest of society. Mason also raised the question of civil rights of the inhabitants, and, in addition, suggested that the seat of government might become a sanctuary for criminals. Madison answered some of these objections as follows:

I did conceive, sir, that the clause under consideration was one of those parts which would speak its own praise. It is hardly necessary to say any thing concerning it. Strike it out of the system, and let me ask whether there would not be much larger scope for those dangers. I cannot comprehend that the power of legislating over a small district, which cannot exceed ten miles square, and may not be more than one mile, will involve the dangers he apprehends. If there be any knowledge in my mind of the nature of man, I should think that it would be the last thing that would enter into the mind of any man to grant exclusive advantages, in a very circumscribed district, to the prejudice of the community at large. We make suppositions, and afterwards deduce conclusions from them, as if they were established axioms. But, after all, being home this question to ourselves. Is it probable that the members from Georgia, New Hampshire, & c., will concur to sacrifice

> the privileges of their friends? I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether. How could the government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations, of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress? * * * We must limit our apprehensions to certain degrees of probability. The evils which they urge might result from this clause are extremely improbable; nay, almost impossible.

The other objections raised in the Virginia convention to clause 17 were answered by Lee. His remarks have been summarized as follows:

> Mr. Lee strongly expatiated on the impossibility of securing any human institution from possible abuse. He thought the powers conceded in the paper on the table not so liable to be abused as the powers of the state governments. Gentlemen had suggested that the seat of government would become a sanctuary for state villains, and that, in a short time, ten miles square would subjugate a country of eight hundred miles

> square. This appeared to him a most improbable possibility; nay, he might call it impossibility. Were the place crowded with rogues, he asked if it would be an agreeable place of residence for the members of the general government, who were freely chosen by the people and the state governments. Would the people be so lost to honor and virtue as to select men who would willingly associate with the most abandoned characters? He thought the honorable gentleman's objections against remote possibility of abuse went to prove that government of no sort was eligible, but that a state of nature was preferable to a state of civilization. He apprehended no danger; and thought that persons bound to labor, and felons, could not take refuge in the ten miles square, or other places exclusively governed by Congress, because it would be contrary to the Constitution, and palpable usurpation, to protect them.

In the ratifying conventions, no express consideration, it seems, was given to those provisions of clause 17 permitting the establishment of exclusive legislative jurisdiction over areas within the States. Attention apparently was directed solely to the establishment of exclusive legislative jurisdiction over the seat of

government. However, the arguments in support of, and criticisms against, the establishment of exclusive legislative jurisdiction over the seat of government are in nearly all instances equally applicable to the establishment of such jurisdiction over areas within the States. The difference between the two cases is principally one of degree, and in this fact in all probability lies the explanation why areas within the States were not treated as a separate problem in the ratifying conventions. Because of the similarity between the two, the arguments concerning the seat of government are relevant in tracing the historical background of exclusive legislative jurisdiction over areas within the States.

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Federal legislation prior to 1886.--The matter of exclusive legislative jurisdiction received the attention of the first Congress in its first session. It provided that the United States, after the expiration of one year following the enactment of the act, would not defray the expenses of maintaining light-houses, beacons, buoys and public piers unless the respective States in which they were situated should cede them to the United States, "together with the jurisdiction of the same." The same act also authorized the construction of a lighthouse near the entrance of Chesapeake Bay "when ceded to the United States in the manner aforesaid, as the President of the United States shall direct." The policy of requiring cession of jurisdiction as a condition precedent to the establishment and maintenance of lighthouses was followed by other early Congresses, and it subsequently became a general requirement.

Unlike the legislation relating to the maintenance and acquisition of lighthouses, the legislation of the very early Congresses authorizing the acquisition by the United States of land for other purposes did not contain any express jurisdiction requirement. The only exceptions consist of legislation enacted in 1794, which authorized the establishment of "three or four arsenals," provided that "none of the said arsenals [shall] be erected,until purchases of the land necessary for their accommodation be made with the consent of the legislature of the

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state, in which the same is intended to be erected," and legislation in 1826 authorizing the acquisition of land for purposes of an arsenal. Express jurisdiction requirements were not, however, contained in other early acts of Congress providing for the purchase of land at West Point, New York, for purposes of fortifications and garrisons, the erection of docks, the establishment of Navy hospitals, the exchange of one parcel of property for another for purposes of a fortification, and the establishment of an arsenal at Plattsburg, New York. An examination of the early federal statutes discloses that in various other instances the consent of the State was not made a prerequisite to the acquisition of land for fortifications and a customhouse.

The absence of express jurisdictional requirements in Federal statutes did not necessarily result in the United States acquiring a proprietorial interest only in properties. In numerous instances, apparently, jurisdiction over the acquired properties was ceded by the

States even without an express Federal statutory requirement therefor.

In other instances, however, as in the case of the property at Plattsburg, New York, the United States has never acquired any degree of legislative jurisdiction. In at least one instance, a condition imposed in a State cession statute proved fatal to the acquisition by the United States of legislative jurisdiction; thus, in United States v. Hopkins, 26 Fed. Cas. 371, No. 15,387a (C.C.D. Ga., 1830), it was held that a State statute which ceded jurisdiction for "forts or fortifications" did not serve to vest in the United States legislative jurisdiction over an area used for an arsenal.

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In 1828, Congress sought to achieve a uniformity in Federal jurisdiction over areas owned by the United States by authorizing the President to procure the assent of the legislature of and State, within which any purchase of land had been made for the erection of forts, magazines, arsenals, dockyards and other needful buildings without such consent having been obtained, and by authorizing him to obtain exclusive jurisdiction over widely scattered areas throughout the United States. The remarks of Representative Marvin, of New York, who questioned the practicality of legislative jurisdiction, were summarized as follow:

> MR. MARVIN, of New York, said, that the present discussion which had arisen on the amendment, had, for the first time, brought the general character of the bill under his observation. Indeed, no discussion until now had been had of the merits of the bill; and, while it seemed in its general objects, to meet with almost universal assent, from the few moments his attention had been turned to the subject, he was led to doubt whether the bill was one that should be passed at all. One of the prominent provisions of the bill, made it the duty of the Executive to obtain the assent of the respective States to all grants of land made within them, to the General Government, for the purposes of forts, dockyards, &c. and the like assent to all future purchases for similar objects, with a view to vest in the United States exclusive jurisdiction over the lands so granted. The practice of the Government hitherto had been, in most cases, though not in all, to purchase the right of soil, and to enter into the occupancy for the purpose intended, without also acquiring exclusive jurisdiction, which, in all cases, could be done, where such exclusive powers were deemed important, The

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> National Government were exclusively vested with the power to provide for the common defence; and, in the exercise of this power, the right to acquire land, on which to erect fortifications, was not to be questioned. While the National Government held jurisdiction under the Constitution for all legitimate objects, the respective States had also a concurrent jurisdiction. As no inconvenience, except, perhaps, from the exercise of the right of taxation, in a few instances, under the State authorities, had hitherto been experienced from a want of exclusive jurisdiction, he was not, at this moment, prepared to

give his sanction to the policy of the bill. Mr. M. said, he could see most clearly, cases might arise, where, for purposes of criminal jurisdiction, a concurrent power on the part of the State might be of vital importance. Your public fortresses may become places of refuge from State authority. Indeed, they may themselves be made the theatres where the most foul and dark deeds may be committed. The situation of your fortifications must, of necessity, be remote. In times of peace, they were often left with, perhaps, no more than a mere agent, to look to the public property remaining in them; thus rendered places too will befitting dark conspiracies and acts of blood. Their remote situation, and almost deserted condition, would retard the arm of the General Government in overtaking the offender, should crimes be committed. While no inconvenience could result from a concurrent jurisdiction on the part of the State and National tribunals, the public peace would seem to be thereby better secured. Mr. M. instanced a case of murder committed in Fort Niagara, some years ago, where after trial and conviction in the State courts, an exception was taken to the proceedings, from an alleged exclusive jurisdiction in the courts of the United States. The question thus raised, was decided, after argument in the Supreme court of the State

of New York, sustaining a concurrent jurisdiction in the State tribunals. Mr. M. regarded the right claimed, and exercised by the State, on that occasion, important. If important then, there were reasons, he thought, why it should not be less so now.

The legislation was nevertheless enacted, and a provision thereof has existed as section 1838 of the Revised Statutes of the United States. Following the enactment of this statute, Congress did not take any decisive action with respect to legislative jurisdiction until September 11, 1841, when it passed a joint resolution, which subsequently became R.S. 355, requiring consent by a State to Federal acquisition of land (and therefore a cession of jurisdiction by the State by operation of article I, section 8, clause 17, of the Constitution), as a condition precedent to the expenditure of money by the Federal Government for the erection of structures on the land. As in the case of R. S. 1838, the Congressional debates do not indicate the considerations prompting the enactment of R.S. 355. There had, however, been a controversy between the United States and the State of New York concerning title to (not jurisdiction over) a tract of land on Staten Island, upon which fortifications had been maintained at Federal expense, and the same Congress which enacted the joint resolution of 1841 refused to appropriate funds for the repair of these fortifications until the question of title had been settled. The 1841 joint resolution also required the Attorney General to approve the validity of title before expenditure of public funds for building on land. By these two means the Congress pre-

sumably sought to avoid a repetition of the Staten Island incident, and to avoid all conflict with States over title to land. While these

suggested considerations underlying the enactment of the 1841 joint resolution are based entirely upon historical circumstances surrounding its adoption, the available records of not offer any other explanation, and there has not been discovered any means for ascertaining definitely whether Congress was aware, in enacting the joint resolution, that it was thereby requiring States to transfer jurisdiction to the Federal Government over most areas thereafter acquired by it. Debate had in the Senate in 1850 (Cong. Globe, 31st Cong., 1st sess. 70), indicates that as of that time it was not understood that the joint resolution required such transfer.

Thirty years after the adoption of the 1841 joint resolution, the effects of exclusive legislative jurisdiction on the civil rights of residents of areas subject to such jurisdiction were forcibly brought to the attention of Congress. In 1869, the Supreme Court of Ohio, in Sinks v. Reese, 19 Ohio St. 309, held that inmates of a soldiers' home located in an area of exclusive legislative jurisdiction in that State were not entitled to vote in State and local elections, notwithstanding the reservation of such rights in the Ohio statute transferring legislative jurisdiction to the United States. As a consequence of this decision, Congress retroceded jurisdiction over the soldiers' home to the State of Ohio. The enactment of this retrocession statute was preceded by extensive debates in the Senate. In the course of the debates, questions were raised as to the constitutional authority of Congress to retrocede jurisdiction which had been vested in the United States pursuant to article I, section 8, clause 17, of the Constitution, and it was also suggested that exclusive legislative jurisdiction was essential to enforce discipline on a military reservation. The

constitutional objections to retrocession of jurisdiction did not prevail, and, whatever the views of the senators may have been at that time as to the necessity for Federal exercise of legislative jurisdiction over military areas, the views expressed by Senator Morton, of Indiana, prevailed:

> Mr. President, there might be a reason for a more extended jurisdiction in the case of an arsenal or a fort than i the case of an asylum. I admit that there is no necessity at all for exclusive jurisdiction or an extended jurisdiction in the case of an asylum. Now, take the case of a fort. Congress, of course, would require the jurisdiction necessary to punish a soldier for drunkenness, which is the case put be the Senator, or to punish any violation of military law or discipline; but is it necessary that this Government should have jurisdiction if two of the hands engaged in plowing or gardening should get into a fight? Such cases do not come within the reasoning of the rule at all. It so happens, however, that exclusive jurisdiction has been given in those cases, but I contend that it has always been an inconvenience and was unnecessary. * * *

In addition to providing for, and subsequently requiring, the acquisition of legislative jurisdiction, the early Congresses enacted legislation designed to meet, at least to an extent, some of the problems resulting from the acquisition of legislative jurisdiction. In attempting to cope with some of these problems, the efforts of some of the States antedated legislation passed by Congress for the same

purposes. When granting consent pursuant to article I, section 8, clause 17, with respect to lighthouses and lighthouse sites some of the States from earliest times reserved the right to serve criminal and civil

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process in the affected areas. Recognizing the fact of the existence of these reservations, together with the adverse consequences which would result from an inability on the part of the States to serve process in areas over which jurisdiction had passed to the Federal Government, Congress in 1795 enacted a statute providing that such reservations by a State would be deemed to be within a Federal statutory requirement that legislative jurisdiction be acquired by the United States, and, in addition, Congress provided that regardless of whether a State had reserved the right to serve process in places where lighthouses, beacons, buoys or public piers had been or were authorized to be erected or fixed as to which the State had ceded legislative jurisdiction to the United States, it would nevertheless have the right to do so.

While the right thus reserved to the States to serve criminal and civil process served to prevent exclusive legislative jurisdiction areas from becoming a haven for persons charged with offenses under State law, R.S. 4662 did not serve to enlarge the jurisdiction of the State to enforce its criminal laws within

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such areas. Only Congress could define offenses in such areas and provide for their punishment.

At an early date, Congress initiated a series of legislative enactments to cope with the problem of crimes within Federal areas. In 1790, it provided for the punishment of murder, larceny and certain other crimes, and complete criminal sanctions were provided for by the enactment of the first Assimilative Crimes Act in 1825. This latter enactment adopted as Federal law for areas subject to exclusive legislative jurisdiction the criminal laws of the State in which a given area was located.

While making provision for punishment for criminal offenses in areas subject to exclusive legislative jurisdiction, and authorizing the States to serve criminal and civil process in certain of such areas, Congress did not give corresponding attention to civil matters arising in the areas. Although Congress retroceded jurisdiction in order to restore the voting rights of residents of the soldiers' home in Ohio, no other steps were taken to preserve generally the civil rights of residents of areas of exclusive legislative jurisdiction. The confident predictions in the State ratifying conventions that civil rights would be preserved by means of appropriate conditions in State consent statutes did not materialize. Only in the case of the cession of jurisdiction to the United States for the establishment of the District of Columbia was even a gesture made in a State consent statute towards preserving the rights of its citizens. Thus, in its act of cession, Virginia included the following proviso:

> And provided also, That the jurisdiction of the laws of this commonwealth over the persons and property of individuals

> residing within the limits of the cession aforesaid, shall not cease or determine until Congress,

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> having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in the manner provided by the article of the Constitution before recited [article I, section 8].

In 1790, Congress accepted this cession, and in its acceptance included the following corresponding proviso:

> * * * Provided nevertheless, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.

The constitutionality of these provisos in the Virginia cession statute and the Federal acceptance statute was sustained in Young v. Bank of Alexandria, 4 Cranch 384 (1808).

Early court decisions. The decisions of the courts prior to 1885 relating to matters of exclusive legislative jurisdiction are relatively few and of varying importance.

It was held at an early date that the term "exclusive legislation," as it appears in article I, section 8, clause 17, of the Constitution, is synonymous with "exclusive jurisdiction." United States v. Bevans, 3 Wheat. 336, 388 (1818); United States v. Cornell, 25 Fed. Cas. 646, No. 14,867 (C.C.D.R.I., 1819), "the national and municipal powers of government, of every description, are united in the government of the Union." Pollard v. Hagan, 3 How. 212, 223 (1845). Reservation by a State of the right to serve criminal and civil process in a Federal area is, it was held, in no way inconsistent with the exercise by the United States of exclusive jurisdiction over the area. United States v. Travers, 28 Fed. Cas. 204, No. 16,537 (C.C.D. Mass., 1814); United States v. Davis, 25 Fed. Cas.

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781, No. 14,930 (C.C.D. Mass. 1829); United States v. Cornell, supra; United States v. Knapp, 26 Fed. Cas. 792, No. 15,538 (S.D.N.Y., 1849).

Justice Story, in United States v. Cornell, supra, expressed doubts, however, as to "whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dock-yards, etc., with the consent of a State Legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of congress there." This view has not prevailed. In United States v. Hopkins, 26 Fed. Cas. 371, No. 15,387a (C.C.D. Ga., 1830), it was, on the other hand, held that a State may limit its consent with the condition that the area in question be used for fortifications; if used as an arsenal, the United States would not have exclusive jurisdiction.

In considering the application of the Assimilative Crimes Act of 1825, the United States Supreme Court held that it related only to the

criminal laws of the State which were in effect at the time of its enactment and not to criminal laws subsequently enacted by the State. United States v. Paul, 6 Pet, 141 (1832). In United States v. Wright, 28 Fed. Cas. 791, No. 16,774 (D. Mass., 1871), it was held that the Assimilative Crimes Act adopted not only the statutory criminal laws of the State but also the common law of the State as to criminal offenses.

The power of exclusive legislation, it was said by the United States Supreme Court in an early case, is not limited to the exercise of powers by the Federal Government in the specific area acquired with the consent of the State, but includes incidental powers necessary to the complete and effectual execution of the power of exclusive jurisdiction; thus, the United States may punish a person, not resident o the Federal area, for concealment of his knowledge concerning a felony committed within the Federal area. Cohens v. Virginia, 6 Wheat. 264, 426-429 (1821).

Article I, section 8, clause 17, it was held at an early date, does not extend to places rented by the United States. United

States v. Tierney, 28 Fed. Cas. 159, No. 16,517 (C.C.S.D. Ohio, 1864). The consent specified therein must be given by the State legislature, not by a constitutional convention, it was held in an early opinion of the United States Attorney General. 12 Ops. A. G. 428 (1868). But, it will be seen, it was later decided that the United States may acquire exclusive legislative jurisdiction by means other than under clause 17. In Ex parte Tatem, 23 Fed. Cas. 708, No. 13,759 (E.D. Va., 1877), it was held that the term "navy yard," as it appeared in a Virginia cession statute, "meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the nave yard." The consent provided for by article I, section 8, clause 17, of the Constitution, may be given either before or after the purchase of land by the United States. Ex parte Hebard, 11 Fed. Cas. 1010, No. 6312 (C.C.D. Kan., 1877). The United States may, if it so choses, purchase land within a State without the latter's consent, but, if it does so, it does not have any legislative jurisdiction over the areas purchased. United States v. Stahl, 27 Fed. Cas. 1288, No. 16,373 (C.C.D. Kan., 1868).

In an early New York case, the court expressed the view that State jurisdiction over an area purchased by the United States with the consent of the State continues until such time as the United States undertakes to exercise jurisdiction. People v. Lent, 2 Wheel. 548 (N.Y., 1819). This view has not prevailed. In a State case frequently cited connection with matters relating to the civil rights of residents of areas of exclusive legislature jurisdiction, the Massachusetts Supreme Court, in Commonwealth v. Clary, 8 Mass. 72 (1811), said (p. 77):

> An objection occurred to the minds of some members of the Court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges. * * *

> We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants; because they are not interested in any elections made within the state, or held to pay any taxes imposed by its authority, nor bound by any of its laws.--And it might be very inconvenient to the United States to have their laborers, artificers, officers, and other persons employed in their service, subjected to the services required by the commonwealth of the inhabitants of the several towns.

In Opinion of the Justices, 1 Metc. 580 (Mass., 1841), the Supreme Court of Massachusetts in essence restated this view. Thus, although the fears expressed in the Virginia and North Carolina ratifying conventions as to the effects of legislative jurisdiction on the civil rights of inhabitants of areas subject to such jurisdiction were completely borne out, these effects were at the same time interpreted as distinct advantages for the parties concerned.

CHAPTER III

ACQUISITION OF LEGISLATIVE JURISDICTION

THREE METHODS FOR FEDERAL ACQUISITION OF JURISDICTION: Constitutional consent.--The Constitution gives express recognition to but one means of Federal acquisition of legislative jurisdiction--by State consent under article I, section 8, clause 17. The debates in the Constitutional Convention and State ratifying conventions leave little doubt that both the opponents and proponents of Federal exercise of exclusive legislature jurisdiction over the seat of government were of the view that a constitutional provision such as clause 17 was essential if the Federal government was to have such jurisdiction. At no time was it suggested that such a provision was unessential to secure exclusive legislative jurisdiction to the Federal Government over the seat of government. While, as has been indicated in the preceding chapter, little attention was given in the course of the debates to Federal exercise of exclusive legislative jurisdiction over areas other than the seat of government, it is reasonable to assume that it was the general view that a special constitution provision was essential to enable the United States to acquire exclusive legislative jurisdiction over any area. Hence,the proponents of exclusive legislative jurisdiction over the seat of government and over federally owned areas within the States defended the inclusion in the Constitution of a provision such as article I, section 8, clause 17. And in United States v. Railroad Bridge Co., 27 Fed. Cas. 686, 693, No. 16,114 (C.C.N.D. Ill., 1855), Justice McLean suggested that the Constitution provided the sole mode for transfer of jurisdiction, and that if this mode is not pursued no transfer of jurisdiction can take place.

State cession.--However, in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), the United States Supreme Court sustained the validity of an act of Kansas ceding to the United States legislative jurisdiction over the Fort Leavenworth military reservation, but reserving to itself the right to serve criminal and civil process in the reservation and the right to tax railroad, bridge, and other corporations, and their franchises and property on the reservation. In the course of its opinion sustaining the cession of legislative jurisdiction , the Supreme Court said (p. 540):

> We are here net with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her Legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. * * * In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different form those of the State, they are not those of a different country; and the two, the State

> and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States.

Had the doctrine thus announced in Fort Leavenworth R.R. v. Lowe, supra, been known at the time of the Constitutional Convention, it is not improbable that article I, section 8, clause 17, at least insofar

as it applies to areas other than the seat of government, would not have been adopted. Cession as a method for transfer of jurisdiction by a State to the United States is now well established, and quite possibly has been the method of transfer in the majority of instances in which the Federal

Federal reservation.--In Fort Leavenworth R.R. v. Lowe, supra, the Supreme Court approved second method not specified in the Constitution of securing legislative jurisdiction in

the United States. Although the matter was not in issue in the case, the Supreme Court said (p. 526):

> The land constituting the Reservation was part of the territory acquired in 1803 by cession from France, and until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. * * * [Emphasis added.]

Almost the same language was used by the Supreme Court of Kansas in Clay v. State, 4 Kan. 49 (1866), and another suggestion of judicial recognition of this doctrine is to be found in an earlier case in the Supreme Court of the United States, Langford v. Monteith, 102 U.S. 145 (1880), in which it was held that when an act of congress admitting a State into the Union provides, in accordance with a treaty, that the lands of

an Indian tribe shall not be a part of such State or Territory, the new State government has no jurisdiction over them. The enabling acts governing the admission of several of the States provided that exclusive jurisdiction over certain areas was to be reserved to the United States. In view of these development, an earlier opinion of the United States Attorney General indicating that a State legislature, as distinguished from a State constitutional convention,

had to give the consent to transfer jurisdiction specified in the Federal Constitution (12 Ops. A.G. (1868)), would seem inapplicable to a Federal reservation of jurisdiction.

Since Congress has the power to create States out of territories and to prescribe the boundaries of the new States, the retention of exclusive legislative jurisdiction over a federally owned area within the State is admitted into the Union would not appear to pose any serious constitutional difficulties.

No federal legislative jurisdiction without consent, cession, or reservation.--It scarcely needs to be said that unless there has been a transfer of jurisdiction (1) pursuant to clause 17 by a Federal acquisition of land with State consent, or (2) by cession from the State to the Federal Government, or unless the Federal Government has reserved jurisdiction upon the admission of the State, the Federal Government possesses no legislative jurisdiction over any area within a State, such jurisdiction being for exercise entirely by the State, subject to non-interference by the State with Federal functions, and subject to the free exercise by the Federal Government of rights

with respect to the use, protection, and disposition of its property.

NECESSITY OF STATE ASSENT TO TRANSFER OF JURISDICTION TO FEDERAL GOVERNMENT: Constitutional consent.--The Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a State. Article I, section 8, clause 17, of the Constitution, provides that legislative jurisdiction may be transferred pursuant to its terms only with the consent of the legislature of the State in which is located the area subject to the jurisdictional transfer. As was indicated in chapter II, the consent requirement of article I, section 8, clause 17, was

intended by the framers of the Constitution to preserve the States' jurisdictional integrity against Federal encroachment.

State cession or Federal reservation.--The transfer of legislative jurisdiction pursuant to either of the two means not spelled out in the Constitution likewise requires the assent of the State in which is located the area subject to the jurisdictional transfer. Where legislative jurisdiction is transferred pursuant to a State cession statute, the State has quite clearly assented to the transfer of legislative jurisdiction to the Federal Government, since the enactment of a State cession statute is a voluntary act on the part of the legislature of the State.

The second method not spelled out in the Constitution of vesting legislative jurisdiction in the Federal Government, namely, the reservation of legislative jurisdiction by the Federal Government at the time statehood is granted to a Territory, does not involve a transfer of legislative jurisdiction to the Federal Government by a State, since the latter never had jurisdiction over the area with respect to which legislative jurisdiction is reserved. While, under the second method of vesting legislative jurisdiction in the Federal Government, the latter may reserved such jurisdiction without

inquiring as to the wishes or desires of the people of the Territory to which statehood has been granted, nevertheless, the people of the Territory involved have approved, in at least a technical sense, such reservation. Thus, the reservation of legislative jurisdiction constitutes, in the normal case, one of the terms and conditions for granting statehood, and only if all of the terms and conditions are approved by a majority of the Territorial legislature, is statehood granted.

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NECESSITY OF FEDERAL ASSENT: Express consent required by R. S. 355.--Acquiescence, or acceptance, by the Federal Government, as well as by the State, is essential to the transfer of legislative jurisdiction to the Federal Government. When legislative jurisdiction is reserved by the Federal Government at the time statehood is granted to a Territory, it is, of course, obvious that the possession of legislative jurisdiction meets with the approval of the Federal Government. When legislative jurisdiction is to be transferred by a State to the Federal Government either pursuant to article I, section 8, clause 17, of the Constitution, or by means of a State cession statute, the necessity of Federal assent to such transfer of legislative jurisdiction has been firmly established by the enactment of the February 1, 1940, amendment to R.S. 355. While this amendment in terms specifies requirement for formal Federal acceptance prior to the transfer of exclusive or partial legislative jurisdiction, it also applies to the transfer of concurrent jurisdiction. The United States Supreme Court, in Adams v. United States, 319 U.S. 312 (1943), in the cause of its opinion said (pp. 314-315):

> Both the Judge Advocate General of the Army and the Solicitor of the Department of Agriculture have con-

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> strued the 1940 Act as requiring that notice of acceptance be filed if the government is to obtain concurrent jurisdiction. The Department of Justice has abandoned the view of jurisdiction which prompted the institution of this proceeding, and now advises us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the Act. These agencies cooperated in developing the Act, and their views are entitled to great weight in its interpretation. * * * Besides, we can think of no other rational meaning for the phrase "jurisdiction, exclusive or partial" than that which the administrative construction gives it.
> Since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorized the government to take jurisdiction, since at the critical time the jurisdiction had not been taken.

Former presumption of Federal acquiescence in absence of

dissent.--Even before the enactment of the 1940 amendment to R.S. 355, it was clear that a State could not transfer, either pursuant to article I, section 8, clause 17, of the Constitution, or by means of a cession statute, legislative jurisdiction to the Federal Government without the latter's consent. Prior to the 1940 amendment to R.S. 355, however, it was not essential that the consent of the Federal Government be expressed formally or in accordance with any prescribed procedure. Instead, it was presumed that the Federal Government accepted the benefits of a State enactment providing for the transfer of legislative jurisdiction. As discussed more fully below, this presumption of acceptance was to the effect that once a State

legislatively indicated a willingness to transfer exclusive jurisdiction such jurisdiction passed automatically to the Federal Government without any action having to be taken by the United States. However, the presumption would not operate where Federal action was taken demonstrating dissent from the acceptance of proffered jurisdiction.

Presumption in transfers by cession.--In Port Leavenworth R.R. v. Lowe, supra, in which a transfer of legislative jurisdiction by means of a State cession statute was approved for the first time, the court said (p. 528) that although the Federal Government had not in that case requested a cession of jurisdiction, nevertheless, "as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part." See also United States v. Johnston, 58 F.Supp. 208 aff'd., 146 F.2d 268 (C.A. 9, 1944), cert. den., 324 U.S. 876; 38 Ops. A. G. 341 (1935). A similar view has been expressed by a number of courts to transfers of jurisdiction by cession. In some instances, however, the courts have indicated the existence of affirmative grounds supporting Federal acceptance of such transfers. In Yellowstone Park Transp. Co. v. Gallatin County, 31 F. 2d 644 (C.A. 9, 1929), cert. den., 280 U.S. 555, it was stated that acceptance by the United

States of a cession of jurisdiction by a State over a national park area within the State may be implied from acts of Congress providing for exclusive jurisdiction in national parks. See also Columbia River Packers' Ass'n v. United States, 29 F. 2d 91 (C.A. 9, 1928); United States v. Unzeuta, 281 U.S. 138 (1930).

Presumption in transfers by constitution consent.--Until recent years, it was not clear but that the consent granted by a State pursuant to article I, section 8, clause 17, of the Constitution, would under all circumstances serve to transfer legislative jurisdiction to the Federal Government where the latter had "purchased" the area and was using it for one of the purposes enumerated in clause 17. In United States v. Cornell, 25 Fed. Cas. 646, No. 14,867 (C.C.D.R.I., 1819), Justice Story expressed the view that clause 17. In the course of his opinion in that case, Justice Story said (p. 648):

> The constitution of the United States declares that congress shall have power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings. When therefore a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted. * * * [Italics added.]

As late as 1930, it was stated in Surplus Trading Co. v. Cook, 281 U.S. 647, that (p. 652):

> It long been settled that where lands for such a purpose [one of those mentioned i clause 17] are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction. [Italics added.]

The italicize portions of the quoted excepts suggest that article I, section 8, clause 17, of the Constitution, may be self-executing where the conditions specified in that clause for the transfer of jurisdiction have been satisfied.

In Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937), however, the Supreme Court clearly extended the acceptance doctrine, first applied to transfers of legislative jurisdiction by State cession statutes in Fort Leavenworth R.R. v. Lowe, supra, to transfers pursuant to article I, section 8, clause 17, of the Constitution. The court said (p. 207):

> Even if it were assumed that the state statute should be construed to apply to the federal acquisitions here involved, we should still be met by the contention of the Government that it was not compelled to accept, and has not accepted, a transfer of exclusive jurisdiction. As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which com-

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indicated that transfers of legislative jurisdiction between the Federal Government and a State are matters of arrangement between the two governments. Although in that case the United States Supreme Court did not consider the question of whether State consent is essential to a State cession of legislative jurisdiction would, if applied to Federal retrocession to the State, lead to the conclusion that the latter's consent is essential in order for the retrocession to be effective. The presumption of consent, suggested in the Fort Leavenworth case, would likewise appear to apply to a State to which the Federal Government has retroceded jurisdiction.

While the reasoning of the Fort leavenworth decision casts substantial doubt on the soundness of the view expressed in Renner v. Bennett, supra, it should be noted that the Oklahoma Supreme Court, in two cases, adopted the conclusions reached by the Ohio Supreme Court. In the later of the two Oklahoma cases, McDonnell & Murphy v. Lunday, 191 Okla. 611, 132 P. 2d 322 (1942), the court, in its syllabus to its opinion, stated that consent of the State is not essential to a retrocession of legislative jurisdiction by the Federal Government. The matter was not discussed in the opinion, however, and the similarity in the wording of the court's syllabus with that of the syllabus to the Ohio court's opinion suggests that the Oklahoma court merely accepted the Ohio court's conclusion without any extended consideration of the matter. In the earlier of the two cases, which were decided in the same year, the Oklahoma Supreme Court also stated that the effectiveness of Federal retrocession of legislative jurisdiction was not dependent upon the acceptance of the State. In that case, Ottinger Bros. v. Clark, 191 Okla. 488, 131 P.2d 94 (1942), the court said (p. 96 of 131 P.2d):

> If an acceptance was necessary, then it would have been equally necessary that the Congress of the United States accept the act of the legislature of 1913 ceding Jurisdic-

> tion to the United States. That was never done. But as shown in Fort Leavenworth R. Co. v. Lowe, supra, and St. Louis-San Francisco R. Company v. Saterfield, supra, said act was effective without any acceptance by Congress. The Act of Congress of 1936, supra, Therefore became effective immediately after its final passage.

The Oklahoma court's reliance on the Fort Leavenworth decision suggests that its statement that acceptance by the State is not necessary means that there need not be any express acceptance. As was indicated above, the United States Supreme Court in Fort Leavenworth R. R. v. Lowe, supra, stated that there was a presumption of acceptance; it clearly indicated, however, that while it might not be necessary to have an express acceptance, nevertheless, the Federal Government could reject a State's offer of legislative jurisdiction.

While the decision of the Ohio court in Renner v. Bennett, supra, provides some authority for the proposition that a Federal

retrocession of legislative jurisdiction is effective irrespective of the State's wishes in the matter, the later decision of the United States Supreme Court in Fort Leavenworth R. R. v. Lowe, supra, appears to support the contrary conclusion; for if, as the United States Supreme Court there indicated, transfers of legislative jurisdiction other than under clause 17 are matters of arrangement between the Federal Government and a State, and if the former may reject a State's offer of legislative jurisdiction, the same reasoning would support the conclusion that a State might likewise reject the Federal Government's offer of a retrocession of legislative jurisdiction. The Oklahoma Supreme Court's decisions do not, for the reasons indicated above, appear to be reliable authority for a contrary conclusion. The reasoning in the Fort Leavenworth R. R. case further suggests, however, that in the absence of a rejection the State's acceptance of the retrocession would be presumed.

Exception.--A possible exception to the rule that a State

may reject a retrocession of legislative jurisdiction may consist of cases in which, as is indicated below, changed circumstances no longer permit the Federal Government to exercise legislative jurisdiction, as for example, where the Federal Government has disposed of the property.

DEVELOPMENT OF RESERVATIONS IN CONSENT AND SESSION STATUTES: Former Federal requirement (R.S. 355) for exclusive jurisdiction.--Under the act of September 11, 1841 (and subsequently under section 355 of the Revised Statutes of the United States, prior to its amendment by the act of February 1, 1940), the expenditure of public money for the erection of public buildings on any site or land purchased y the United States was prohibited until the State had consented to the acquisition by the United States of the site upon which the structure was to be erected. An unqualified State consent, it has been seen, transfers exclusive legislative jurisdiction to the United States. But State statutes often contained conditions or reservations which resulted in a qualified consent inconsistent with the former requirements of R. S. 355. In construing State statutes during the 1841-1940 period, the Attorneys General of the United States was essential in order to meet the requirements of R. S. 355. Attorneys General expressed differing views, however, as to what constitutes such a consent.

In at least two opinions, the Attorney General held that State consent given subject to the condition that the State retain concurrent jurisdiction with the United States granted

the requisite consent of the State to a proposed purchase. Also, the Attorney General in other opinions held that, if an act of a State legislature amounted to a "consent," then any attempted exceptions, reservations or qualifications in the act were void, since, consent being given by the legislature, the Constitution vested exclusive jurisdiction over the place, beyond the reach of both Congress and the State legislature.

The view was also expressed, on the other hand, that State

statutes granting the "right of exclusive legislation and concurrent jurisdiction" failed to transfer the requisite jurisdiction. And statutes consenting to the purchase of land by the United States which provided that the State should retain concurrent jurisdiction for he trial and punishment of offenses against the laws of the State did not satisfy the requirements of section 355 of the Revised Statutes. States statutes consenting to the purchase of lands with reservation of (1) the right to administer criminal laws on lands acquired by the United States for Federal building sites, (2) the right to punish offenses against State laws committed on sites for United States buildings or (3) civil and criminal jurisdiction over persons in territory ceded to the United States for Federal buildings were found not compatible with the requirements of R. S. 355.

In addition, the Attorney General expressed the view that a State statute ceding jurisdiction to the United States was insufficient to meet the requirements of R. S. 355 because express reservations therein imposing State taxation, labor, safety and

health laws are inconsistent with exclusive jurisdiction; and statutes expressing qualified consent to acquisitions of land by the United States, it was held by the Attorney General, did not meet the requirements of R.S. 355.

Therefore, it may well be said that, until the 1940 amendment to R. S. 355 was enacted, it was the view of Attorneys General of the United States that cessions by a State had to be free from conditions or reservations inconsistent with Federal exercise of exclusive legislative jurisdiction.

This view is compatible with an opinion of the Attorney General of Illinois, who ruled that under section 355 of the Revised Statutes a State in ceding land to the United States with a transfer of exclusive jurisdiction may only reserve the right to serve criminal and fugitives from justice who have committed crimes and fled to such ceded territory to the same extent as might be done if the criminal or fugitive had fled to another part of the State.

Earlier theory that no reservations by State possible.--It was at one time thought that article I, section 8, clause 17, did not permit the reservation by a State of any jurisdiction over an area falling within the purview of that clause except the right to serve criminal and civil process. This, as was indicated in Chapter II, in 1819, Justice Story, in United States v. Cornell, supra, expressed doubts as to "whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dockyards, &c., with the consent of a state legislature, where such consent is so qualified that it will not justify the 'exclusive jurisdiction,' of congress there,"

In support of Justice Story's view, it may be noted that clause 17 does not, by its terms, suggest he possibility of concurrent

or partial jurisdiction. Moreover, the considerations cited by Madison and others in support of clause 17 suggest that the framers of the Constitution sought to provide a method of enabling the

Federal Government to obtain complete and sole jurisdiction over certain areas within the States. Whatever the merits of Justice Story's suggestion may be, however, it is clear that his views do not represent the law today.

State authority to make reservations in cession statutes recognized.--The principle that Federal legislative jurisdiction over an area within a State might be concurrent or partial, as well as exclusive, was not judicially established until 1885, and it was approved by the Supreme Court in a case involving the acquisition of a degree of legislative jurisdiction less than exclusive pursuant to a State cession statute instead of under article I, section 8, clause 17, of the Constitution. In that year, the Supreme Court, in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, said (p. 539):

> As already stated, the land constituting the Fort Leavenworth military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post..

In the Fort Leavenworth R.R. case the State of Kansas had reserved the right not only to serve criminal and civil process

but also the right to tax railroad, bridge, and other corporations, and their franchises and property in the military reservation. As a result of this reservation, the Federal Government was granted only partial legislative jurisdiction, and such limited legislative jurisdiction, provided for by a State cession statute, was held to be valid. This view has prevailed since 1885, but not until 1937 did the Supreme Court adopt a similar view as to transfers of legislative jurisdiction pursuant to article I, section 8, clause 17, of the Constitution.

In a case decided after the Fort Leavenworth R. R. case, Crook, Horner & Co. v. Old Point Comfort Hotel Co., 54 Fed. 604 (C.C.E.D.Va., 1893), the court implied the same doubts that had been expressed in the Cornell case concerning the inability of the Federal Government to acquire through a State consent statute less than exclusive jurisdiction provided for in clause 17. Again, the same view appears to have been expressed by the Supreme Court in United States v. Unzenta, 281 U.S. 138 (1930), in which it was said (p. 142):

> When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings," (Const. Art. I, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this Court said in Ft. Leavenworth Railroad Company v. Lowe, 114 U.S.

525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State as would impair their effective use for the purposes for which the prop-

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perty was acquired. When, in such cases, a State cedes jurisdiction to the United States, the State may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. * * *

A distinction was thus drawn, insofar as the reservation by the State of legislative jurisdiction is concerned, between transfers of legislative jurisdiction pursuant to article I, section 8, clause 17, of the Constitution, and transfers pursuant to a State cession statute.

State authority to make reservations in consent statutes recognized.--In 1937 the Supreme Court for the first time sanctioned a reservation of jurisdiction by a State in granting consent pursuant to article I, section 8, clause 17, of the Constitution, although an examination of the State consent statutes set forth in appendix B of part I of this report discloses that such reservations had not, as a matter of practice, been uncommon prior to that date. In 1937, the Supreme Court, in James v. Drave Contracting Co., 302 U.S. 134 (1937), sustained the validity of a reservation by the State of West Virginia, in a consent statue, of the right to levy a gross sales tax with respect to work done in a federally owned area to which the consent statute was applicable. In sustaining the reservation of jurisdiction in a State consent statute, the Supreme Court said (pp. 147-149):

It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired.

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The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl v. United States, 91 U.S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses. * * * The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and

> of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases. Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation.
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> Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the

> freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.

Retention by Federal Government of less than exclusive jurisdiction on admission of State.--The courts have not had occasion to rule on the question of whether the Federal Government, at the time statehood is granted to a Territory, may retain partial or concurrent jurisdiction, instead of exclusive jurisdiction, over an area within the exterior boundaries of the new State. There appears to be no reason, however, why a degree of legislative jurisdiction less than exclusive in Fort Leavenworth R. R. v. Lowe, supra, and James v. Drawo Contracting Co., supra, the Supreme Court would conclude that partial or concurrent legislative jurisdiction may not be retained.

Non-interference with Federal use now sole limitation on reservations by State.--At this time the quantum of jurisdiction which may be reserved in a State cession or consent statute is almost completely within the discretion of the State, subject always, of course, to Federal acceptance of the quantum tendered by the State, and subject also to non-impingement of the reservation upon any power or authority vested in the Federal Government by various provisions of the Constitution. In Fort Leavenworth R. R. v. Lowe, supra, the Supreme Court indicated (p. 539) that a cession might be accompanied with such conditions as the State might see fit to annex "not inconsistent with the free and effective use of the

fort as a military post." In Arlington Hotel Company v. Fant, 278

U.S. 439 (1929), the Supreme Court likewise indicated (p. 451) that the State had complete discretion in determining what conditions, if any, should be attached to a cession of legislative jurisdiction, provided that it "saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of Jurisdiction." In United States v. Unzeuta, 281 U.S. 138 (1930). the Supreme Court stated (p. 142) that in the cession statute the State "may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition." While, it will be noted, these limitations on State reservations of jurisdiction over Federal property all related to reservations in cession statutes, no basis for the application of a different rule to reservations in a consent statute would seem to exist under the decision in James v. Dravo Contracting Co., supra. And it should be further noted that the Supreme Court in the Drave case implied a similar limitation as to the discretion of a State in withholding jurisdiction under a consent statute by stating (p. 149) that the reservation involved in that case "did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired."

Specific reservations approved.--While the general limitation of non-interference with Federal use has been stated to apply to the exercise by a State of its right to reserve a quantum of jurisdiction in its cession or consent statute, apparently in no case to date has a court had occasion to invalidate a reservation by a State as violative of that general limitation. State jurisdictional reservations which have been sustained by the

courts include the reservation of the right to tax privately owned railroad property in a military reservation (Fort leavenworth R.R. v.Lowe, supra; United States v. Unzeuta, supra); to levy a gross sales tax with respect to work done in an area of legislative jurisdiction (James v. Dravo Contracting Co., supra; to tax the sale of liquor in a national park subject to legislative jurisdiction (Collins v. Yosemite Park, 304 U.S. 518 (1938)); to permit residents to exercise the right of suffrage (Arapojolu v. McMenamin, 113 Cal.App.2d 824, 249 P.2d 318 (1952)); and to have criminal jurisdiction as to any malicious, etc., injury to the buildings of the Government within the area over which jurisdiction had been ceded to the United States (United States v. Andem, 158 Fed. 996 (D.N.J., 1908)0. And, of course, there are numerous areas, used by the Federal Government for nearly all of its many purposes, as to which the several States retain all legislative jurisdiction, solely or concurrently with the United States, or as to which they have reserved a variety of rights while granting legislative jurisdiction as to other matters to the Federal Government, and as to which no question concerning the State-retained jurisdiction has been raised.

LIMITATIONS ON AREAS OVER WHICH JURISDICTION MAY BE ACQUIRED BY CONSENT OF STATE UNDER CLAUSE 17: In general.--Article I, section 8, clause 17, of the Constitution, provides that the Congress shall have the power to exercise exclusive legislation over "Places" which have been "purchased" by the Federal Government, with the consent of the legislature of the State, "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The quoted words serve to limit the scope of clause 17 (but do not apply, since the decision in the Fort Leavenworth R.R. case, supra, to transfers of

jurisdiction by other means). They exclude from its purview places which were not "purchased" by the

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Federal Government, and, if the rule of ejusdem generis applied, places which, though purchased by the Federal Government, are for use for purposes not enumerated in the clause.

Area required to be "purchased" by Federal Government.--The "purchase" requirement contained in clause 17 serves to exclude from its operation places which had been part of the public domain and have been reserved from sale. See Fort Leavenworth R.R. v. Lowe, supra; United States v. Unzeuta, supra; Six Cos., Inc. v. De Vinney, 2 F.Supp. 693 (D.Nev., 1933); Lt. Louis-San Francisco Ry. v. Satterfield, 27 F.2d 586 (C.A. 8, 1928). It likewise serves to exclude places which have been rented to the United States Government. Unites States v. Tierney, 28 Fed.Cas. 159, No. 16,517 (C.C.S.D.Ohio, 1864); Mayor and City Council of Baltimore v. Linthicum, 170 Md. 245, 183 Atl. 531 (1936); People v. Bondman, 161 Misc. Rep. 145, 291 N.Y.S. 213 (1936). Acquisition by the United States of less than the fee is insufficient for the acquisition of exclusive jurisdiction under clause 17. Ex Parte Hebard, 11

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Fed. Cas. 1010, No. 6312 (C.C.D.Kan., 1877); United States v. Schwalby, 8 Tex.Civ.App. 679, 29 S.W. 90 (1894), writ of error refused, 87 Tex. 604, 30 S.W. 435, rev'd. on other grounds, 162 U.S. 255. And Federal purchase of property at a tax sale has been held not to transfer jurisdiction. United States v. Penn, 48 Fed. 669 (C.C.E.D.Va., 1880).

The term "purchased" does, however, include acquisitions by means of condemnation proceedings,as will as acquisitions pursuant to negotiated agreements. See James v. Dravo Contracting Co., supra; Mason Co. v. Tax Com'n, supra; Holt v. United States, 218 U.S. 245 (1910); Chaney v. Chaney, 53 N.M. 66, 201 P.2d 782 (1949); Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948); People v. Collins, 105 Cal. 504, 39 Pac. 16, 17 (1895). The term also includes cessions of title by a State to the Federal Government. United States v. Tucker, 122 Fed. 518 (W.D.Ky., 1903). A conveyance of land to the United States for a consideration of $1 has likewise been regarded as a purchase within the meaning of clause 17. 39 Ops. A.G. 99 (1937). Acquisition of property by a corporation created by a special act of Congress as an instrumentality of the United States for the purpose of operating a soldiers' home constitutes a purchase by the Federal Government for purposes of clause 17. Sinks v. Reese, supra; People v. Mouse, 203 Cal. 782, 265 Pac. 944, app. dism., sub nom. California v. Mouse, 278 U.S. 662, cert. den., 278 U.S. 614 (1928); State v. Intoxicating Liquors, 78 Me. 401, 6 Atl. 4 (1886); State ex rel.

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Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906); Foley v. Shriver,

81 Va. 568 (1886). However, it has been held that a purchase by such a corporation does not constitute a purchase by the Federal Government. In re O'Connor, 37 Wis. 379, 19 Am. Rep. 765 (1875); In re Kelly, 71 Fed. 545 (C.C.E.D. Wis., 1895); Brooks Hardware Co. v. Greer, 111 Me. 78, 87 Atl. 889 (1911), (question was left open); see also Tagge v. Gulzow, 132 Neb. 276, 271 N.W. 803 (1937). Since acquisitions by condemnation are construed as purchases under article I, section 8, clause 17, of the Constitution, it seems that donations would also be interpreted as purchases. See Pothier v. Rodman, 285 Fed. 632 (D.R.I., 1923), aff'd., 264 U.S. 399 (1924); question raised but decision based on other grounds in Mississippi River Fuel Corporation v. Fontenot, 234 F.2d 898 (C.A. 5, 1956), cert. den., 352 U.S. 916.

In State ex rel. Board of Commissioners v. Bruce, 104 Mont. 500, 69 P.2d 97 (1937), the court considered the question when a purchase is completed. Originally, Montana had a combined cession and consent statute,reserving to the State only the right to serve process. Another statute was enacted in 1934 consenting to the acquisition of and ceding jurisdiction over lands around Fort Peck Dam, but reserving to the State certain rights, including the right to tax within the territory. The Government, prior to the passage of the second act, secured options to purchase land from individuals, entered into possession and made improvements under agreements with the owners. Contracts of sale and deeds were not executed until after the passage of the second act. The court held that by going into possession and making improvements the United States accepted the option and completed a binding obligation which was a "purchase" under the Constitution, and that the State had no right to tax within the ceded territory. The case came up again on the same facts in light of several Supreme Court decisions. The Supreme Court of Montana reached the same decision. State ex rel. Board of Commissioners v. Bruce, 106 Mont. 322, 77 P.2d 403 (1938), aff'd., 305 U.S. 577. But

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in Valley County v. Thomas, 109 Mont. 345, 97 P.2d 345 (1939), the Montana court came to a contrary conclusion, specifically overruling the Bruce cases.

Term "needful Buildings" construed. The words "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," as they appear in article I, section 8, clause 17, of the Constitution, generally have not been construed according to the rule of ejusdem generis; the words "other needful Buildings"have been construed as including structures not of a military character ad any buildings or works necessary for governmental; purposes. 28 Ops. A.G. 185 (1935). Thus, post offices, courthouses and customs houses all have been held to constitute "needful Buildings." The term "needful Buildings" in

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clause 17 has also been held to include national cemeteries, penitentiaries, steamship piers, waters adjoining Federal lands, aeroplane stations, Indian schools, canal locks and dams, National Homes for Disabled Volunteer Soldiers, res-

ervoirs and aqueducts, and a relocation center. In Nikis v. Commonwealth, 144 Va. 618, 131 S.E. 236 (1926), it was held that the abutment and approaches connected with a bridge did not come within the term "buildings," but a cession statute additionally reciting consent rather than a simple consent statute was there involved.

The Attorney General has said (26 Ops. A.G. 289 (1907), (p. 297)):

> There can be no question and, so far as I am aware, none has been raised that the word "buildings" in this passage [of the Constitution] is used in a sense sufficiently broad to include public works of any kind * * *

The most recent, and most comprehensive, definition of the term "needful Buildings," as it appears in clause 17, is to be found in James v. Dravo Contracting co., 302 U.S. 134, in which the court said (pp. 142-143):

> Are the locks and dams in the instant case "needful buildings" within the purview of Clause 17? The State contends that they are not. If the clause were construed according to the rule of ejusdem generis, are those of the same sort as forts, magazines, arsenals and dockyards, that is, structures for military purposes. And it may be that the thought of such "strongholds" was uppermost in the minds of the framers. Eliot's Debates, Vol. 5, pp. 130, 440, 511; Cf. Story on the Constitution,

> Vol. 2 Sec. 1224. But such a narrow construction has been found not to be absolutely required and to be unsupported by sound reason in view of the nature and functions of the national government which the Constitution established. * * * We construe the phrase"other needful buildings" as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government.

In this decision,the Supreme court expressed its sanction to the conclusion therefore generally reached by other authorities, that the rule of ejusdem generis had been renounced, and that acquisition by the United States for any purpose might be held to fall within the Constitution, where a structure is involved.

LIMITATIONS ON AREAS OVER WHICH JURISDICTION MAY BE ACQUIRED BY CESSION OF STATE: Early view.--Until the Fort leavenworth R.R. case, the courts had made no distinction between consents and cessions, and had treated cessions as the "consent" referred to in the Constitution. United States v. Davis, 25 Fed. Cas. 781, No. 14,930 (C.C.D.Kan..,

1877). In the case of In re O'Connor, 37 Wis. 379, 19 Am. Rep. 765 (1875), decided before Fort Leavenworth R.R. v. Lowe, supra, the stated (p. 387):

> For it is not competent for the legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States, for the specific purposes contemplated by the constitution. When that is done, the state may cede its jurisdiction over them to the United States.

Present view.--After the Fort Leavenworth R.R. case, it was held that either a purchase with the consent of the States or an express cession of jurisdiction could accomplish a transfer of legislative jurisdiction. United States v. Tucker, 122 Fed. 518 (W.D. Ky., 1903); Commonwealth v. King, 252 Ky. 699, 68 S.W.2d 45 (1934); State ex rel. Jones v. Mack, 23 Nev. 359, 47 Pac. 763 (1897); Curry v. State, 111 Tex.Cr.App. 264, 12 S.W.2d (1928); 9 Ops.A.G. 263 (1858); 13 Ops.A.g. 411 (1871); 15 Ops.A.G. 480 (1887); cf. United States v. Andem, 158 Fed. 996 (D.N.J., 1908).

By means of a cession of legislative jurisdiction by a State, the Federal Government may acquire legislative jurisdiction not only over areas which fall within the purview of article I, section 8, clause 17, of the Constitution, but also over areas not within the scope of that clause. While a State may cede to the Federal Government legislative jurisdiction over a "place" which was "purchased" by the Federal Government for the "Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," it is not essential that an area be "purchased" by the Federal Government in order to be the subject of a State cession statute. Thus, the transfer of legislative jurisdiction pursuant to a State cession statute has

been sustained with respect to areas which were part of the public domain and which have been reserved from sale or other disposition. Fort Leavenworth R.R. v. Lowe, supra; Chicago, Rock Island & Pacific Railway v. McGlinn, 114 U.S. 542 (1885); Benson v. United States, 146 U.S. 325 (1892). It is not even essential that the Federal Government own an area in order to exercise with respect to it legislative jurisdiction ceded by a State. Thus, a privately owned railroad line running through a military reservation may be subject to federal legislative jurisdiction as the result of a cession. Fort Leavenworth R.R. v. Lowe, supra; Chicago, etc., Ry. v. McGlinn, supra; United States v. Unazeuta, supra. Similarly, a privately operated hotel or bath house leased from the Federal Government and licitation a military reservation may, as a result of a State cession statute, be subject to Federal legislative jurisdiction. Arlington Hotel Company v. Fant, 278 U.S. 439 (1929); Buckstaff Bath House Co. v. McKinley, 308 U.S. 358 (1939). Superior Bath House Co. v. McCaroll, 312 U.S. 176 (1941). Legislative jurisdiction acquired pursuant to a State cession statute may extend to privately owned land within the confines of a national park. Petersen v. United States, 191 F.2d 154 (C.A. 9, 1951), cert. den., 342 U.S. 885. It will not so extend if the State's cession statute limits cession to lands owned by the Government. Op. A.G., Cal., No. NS3019 (Oct. 22, 1940). In United States v. Unzeuta, supra, the extension of Federal legislative jurisdiction over a privately owned railroad right-of-way located within an area which was owned by the Federal Government and

subject to the legislative jurisdiction of the Federal Government was justified as follows (pp. 143-145):

> * * * There was no express exception of jurisdiction over this right of way, and it can not be said that there

> was any necessary implication creating such an exception. The proviso that the jurisdiction ceded should continue no longer than the United States shall own and occupy the reservation had reference to the future and cannot be regarded as limiting the cession of the entire reservation as it was known and described. As the right of way to be located with the approval of the Secretary of War ran across the reservation, it would appear to be impracticable for the State to attempt to police it, and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purpose to which it was devoted.
>
> * * * * *
>
> The mere fact that the portion of the reservation in question is actually used as a railroad right of way is not controlling on the question of jurisdiction. Rights of way for various purposes,such as for railroads, ditches. pipe lines, telegraph and telephone lines across Federal reservations, may be entirely compatible with exclusive jurisdiction ceded to the United States. * * * While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation.

This excerpt from the court's opinion appears to indicate that the proctocolitis of a given situation will be highly persuasive, if not conclusive, on the issue of whether Federal legislative jurisdiction may be exercised over privately owned areas used for non-governmental purposes.

Cessions of legislative jurisdiction are free not only from the requirements of article I, section 8, clause 17, as to purchase--and, with it, ownership--but they are also free from the requirement that the property be used for one of the purposes enumerated in clause 17, assuming that however broad

those purposes are under modern decisions the term "other needful Buildings" used therein may have some limitation. In Collins v. Yosemite Park Co., 304 U.S. 518 (1938), in which the Supreme Court sustained the exercise of Federal legislative jurisdiction acquired pursuant to a State cession statute,it was said (pp. 529-530):

> * * * There is no question about the power of the United States to exercise jurisdiction secured by cession, thought this is not provided for by Clause 17. And it has been held that such a cession may be qualified. It has never been necessary,

heretofore, for this Court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. It was raised but not decided in Arlington Hotel v. Fant, 278 U.S. 439, 454. It was assumed without discussion in Yellowstone Park Transportation Co. v. Gallatin County, 31 F.2d 644. On account of the regulatory phases of the Alcoholic Beverage control Act of California, it is necessary to determine that question here. The United States has large bodies of public lands. These properties are used for forests,parks, ranges,wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17. In Silas Mason Co. v. Tax commission of Washington, 302 U.S. 186, we upheld in accordance with the right of the United States to acquire private property for use in "the reclamation of arid and semiarid lands" and to hold its purchases subject to state jurisdiction. In other instances,it may be deemed important or desirable by the National Government and the State Government in which the particular property is located that exclusive jurisdiction be vested in the United States by cession or consent. No ques-

tion is raised as to the authority to acquire land or provide for national parks. As the National Government may, "by virtue of its sovereignty" acquire lands within the border of states by eminent domain and without their consent, the respective sovereignties should be in a position to abject their jurisdiction. There is no constitutional objecting to such an adjustment of right. * * *

This quoted excerpt suggests that the Federal Government may exercise legislative jurisdiction, ceded to it by a State, over any area which it might own, acquire, or use for Federal purposes. In Bowen v. Johnston, 306 U.S. 19 (1939), the Supreme Court again indicated that it was constitutionally permissible for the Federal Government to exercise over a national park area legislative jurisdiction which might be ceded to it by a State.

Specific purposes for which cessions approved.--While the Collins case, supra, indicates the current absence of limitations, with respect to use or purpose for which the Federal Government acquires land, on the authority to transfer legislative jurisdiction to that Government by cession, it is of interest to note something of the variety of specific uses and purposes for which cessions had been deemed effective: post offices, court-houses and custom houses: United States v. Andem, 158 Fed. 996 (D.N.J., 1908); Brown v. United States, 257 Fed. 46 (C.A. 5, 1919), rev'd. on other grounds, 256 U.S. 335 (1921); State ex rel. Jones v. Mack, 23 Nev. 359, 47 Pac. 763 (1897), (cession statute treated as a consent); Saver v. Steinbasuer, 14 Wis. 70 (1881); lighthouses: Newcomb v. Rockport, 183

Mass. 74, 66 N.E. 587 (1903); national penitentiary: Steele v.

Halligan, 229 Fed. 1011 (W.D. Wash., 1916); national home for disabled volunteer soldiers: People v. Mouse, 203 Cal. 782, 265 Pac. 944, app. dem., 278 U.S. 662 (1928); bridge for military purposes: 13 Ops. A.G. 418 (1871); national parks: Robbins v. United States, 284 Fed. 39 (C.A. 8, 1922); Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (C.A. 9, 1929), cert. den., 280 U.S. 555; State ex rel. Grays Harbor Construction Co. v. Department of Labor and Industries, 167 Wash. 507, 10 P.2d 213 (1932). Cf. Via v. State Commission on Conservation, etc., 9 F.Supp. 556 (W.D.Va., 1935), aff'd, 296 U.S. 549 (1939); waters contiguous to nave yard: Ex parte Tatem, 23 Fed. Cas. 708, No. 13,759 (E.D.Va., 1877).

LIMITATIONS ON AREAS OVER WHICH JURISDICTION MAY BE RETAINED BY FEDERAL RESERVATION: The courts have not, apparently,had occasion to consider whether any limitations exist with respect to the types of areas in which the Federal Government may exercise legislative jurisdiction by reservation at the time of granting statehood. There appears, however, to be no reason for concluding that Federal legislative jurisdiction may not be thus retained with respect to all the variety of areas over which Federal legislative jurisdiction may be ceded by a State.

PROCEDURAL PROVISIONS IN STATE CONSENT OR CESSION STATUTES: A number of State statutes providing for transfer of legislative jurisdiction to the Federal Government contain provisions for the filing of a deed, map, plat, or description pertaining to the land involved in the transfer, or for other action by Federal or State authorities, as an incident of such transfer. Such provisions have variously held to constitute conditions precedent to a transfer of jurisdiction, or as

pertaining to matters of form noncompliance with which will not defeat an otherwise proper transfer. It has also been held that there is a presumption of Federal compliance with State procedural requirements. Steele v. Halligan, 229 Fed. 1011 (W.D.Wash., 1916).

JUDICIAL NOTICE OF FEDERAL EXCLUSIVE JURISDICTION: Comfit of decisions.--There is a conflict between decisions of several State courts with respect to the question whether the court will take judicial notice of the acquisition by the Federal Government of exclusive jurisdiction. In Baker v. State, 47 Tex. Cr.App. 482, 83 S.W. 1122 (1904), the court took judicial notice that a certain parcel of land was owned by the United States and was under its exclusive jurisdiction. And in Lasher v. State, 30 Tex. Cr.App. 387, 17 S.W. 1064 (1891), it was stated that the courts of Texas would take judicial notice of the fact that Fort McIntosh is a military post, ceded to the United States, and that crimes committed within such fort are beyond the jurisdiction of the State courts.

A number of States uphold the contrary view, however. In People v. Collins, 105 Cal. 504, 39 Pac. (1895), the court

took the view that Federal jurisdiction involves a question of fact

and that the courts would not take judicial notice of such questions.

In United States v. Carr, 25 Fed.Cas. 306, No. 14,732 (C.C.S.D.Ga., 1872), the court held that allegation of exclusive Federal jurisdiction in the indictment, without a deniable the defendant during the trial, was sufficient to establish Federal jurisdiction over the crime alleged. As to lands acquired by the Federal Government since the amendment of section 355 of the Revised Statutes of the United States on February 1, 1940, which provided for formal acceptance of legislative jurisdiction, it would appear necessary to establish the fact

of such acceptance in order to establish Federal jurisdiction. In any event, whether the United States has legislative jurisdiction over an area, and the extent of any such jurisdiction, involve Federal questions, and a decision on these questions by a State court will not be binding on Federal courts.

CHAPTER IV

TERMINATION OF LEGISLATIVE JURISDICTION

UNILATERAL RETROCESSION OR RECAPTURE OF JURISDICTION: RETROCESSION.--There has been discussed in the preceding chapter whether the United States, while continuing in ownership and possession of land, may unilaterally retrocede to the State legislative jurisdiction it has held with respect to such land. It was concluded that, while there is opinion to the contrary, by analogy to the decision in the case of Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), acceptance of such retrocession by the State is essential, although it seems probable that such acceptance may be presumed in the absence of--to use the term employed in the Fort Leavenworth R.R. case, supra--a "dissent" on the part of the State.

Recapture.--In Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (C.A. 9, 1929), cert. den., 280 U.S. 555, it was stated that a State cannot unilaterally recapture jurisdiction which had previously been ceded by it to the Federal Government. A similar rule must apply, for lack of any basis on which to rest any different legal reasoning, where Federal legislative jurisdiction by the Federal Government at the time the State was admitted into the Union, or where it is derived

from the provisions of article I, section 8, clause 17, of the Constitution. In any case, therefore, it would appear clear that a

State cannot unilaterally recapture legislative jurisdiction once it is vested in the Federal Government.

MEANS OF TERMINATION OF JURISDICTION: In general.--Federal legislative jurisdiction over an area within a State will, however, terminate under any of the following three sets of circumstances:

1. Where the Federal Government, by or pursuant to an act of Congress, retrocedes jurisdiction and such retrocession is accepted by the State;

2. Upon the occurrence of the circumstances specified in a State cession or consent statute for the reversion of legislative jurisdiction to the State; or

3. When the property is no longer used for a Federal purpose.

FEDERAL STATUTORY RETROCESSION OF JURISDICTION: In general.--Over the years the United States Government has, in the natural course of events, acquired legislative jurisdiction over land when such jurisdiction obviously was neither needed nor exercised. In some such cases where hardship has been worked on the Federal Government, on State and local governments, or on individuals, statutes have been enacted by the Congress returning jurisdiction to the States. These statutes can be grouped into categories:

1. Those enacted to give the inhabitants of federally owned property the normal incidents of civil government enjoyed by the residents of the State in which the property is located, such as voting and access to the local courts i cases where residence within a State is a factor.

2. Those enacted to give State or local governments authority for policing highways traversing federally owned property.

A small number of other somewhat similar statutes cannot easily be categorized.

This chapter deals only with general retrocessions of legislative jurisdiction possessed by the United States. Retrocessions relating to particular matters, such as taxation, will be dealt with in chapter VII.

Right to retrocede not early apparent.--The right of Congress to retrocede jurisdiction over lands which are within the exclusive legislative jurisdiction of the United States has not always been apparent. Justice Story, it has already been noted, had expressed the view in 1819 that the Federal Government was required by clause 17 to assume jurisdiction over areas within the conflicting views that continued to exist on the subject of retrocession even at that late date. Both the senators who favored the bill and those who opposed it were desirous of finding a means of negating or avoiding a decision of the Supreme Court of Ohio, preceding the enactment in 1871 of a statute retroceding jurisdiction over a disabled soldiers' home in Ohio demonstrates the conflicting views that continued to exist on the subject of retrocession even at that late date. Both the senators who favored the bill and those who opposed it were desirous of finding a means of negating or avoiding a decision of the Supreme

Court of Ohio, which had held that the residents of the home could not vote because of Federal possession of legislative jurisdiction over the area on which the home was located. Contemplating Justice Story's decision on the one hand, and the Ohio decision on the other, Senator Thurman of Ohio said, "the dilemma, therefore, is one out of which you cannot get." Out of the dilemma, however, Congress did get, but not without much debate. Without detailing the arguments, pro and con, advanced during Senate debate, a few quotations will suffice to point out the reasoning in favor of and against the measure.

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During the debate Senator Thurman also said:

> It [the bill] provides, that "the jurisdiction over the place" shall be ceded to the State of Ohio. Is it necessary for me to say to any lawyer that that is an unconstitutional bill? The Constitution of the United States says in so many words that the Congress shall have power "to exercise exclusive jurisdiction in all cases whatsoever over" such territory. Can Congress cede away one of its powers? We might as well undertake to cede away the power to make war, the power to make peace, to maintain an Army or a Navy, or to provide a civil list, as to undertake to cede away that power.

and:

> * * * As was read to the Senate yesterday from a decision made by Judge Story, it is not competent for Congress to take a cession of land for one of the purposes mentioned in the clause of the Constitution which I read yesterday, to wit, for the seat of the national capital, for forts, arsenals, hospitals, or the like; it is not competent for Congress to take any such cession limited by a qualification that the State shall have even concurrent jurisdiction with the Federal Government over that territory, much less that the State can have exclusive jurisdiction over it; because the Constitution of the United States, the supreme law of the land, declares that over all territory owned by the United States for such a purpose Congress shall have exclusive jurisdiction. Then, obviously, if it is not competent for Congress to accept from a State a grant of territory the State reserving jurisdiction over it, or even a qualified jurisdiction over it, where the territory is used for one of these purposes, as a matter of course Congress cannot cede away the jurisdiction of the United States.

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In discussing whether it was necessary that exclusive jurisdiction be in the United States, Senator Morton of Indiana, one of the proponents of the bill, said:

> It [clause 17] does not say it shall have; but the language is, "and to exercise like authority;" that is, it may acquire complete jurisdiction; but may it not acquire less? Now, I undertake to say that the rule and the legislation heretofore by

> which the Government has had exclusive jurisdiction over arsenals in the States has been without good reason. It has always been a difficulty. There is not any sense in it. It would have been a matter of more convenience from the beginning, both to the Federal Government and the States, if the ordinary jurisdiction to punish crimes and enforce ordinary contracts had been reserved over arsenal grounds and in forts. There never was any reason in that. It has always been a blunder and has always been an inconvenience.
>
> But the question is now presented whether the Government may not, by agreement with the State, take jurisdiction just so far as she needs it, and leave the rest to the State, where it was in the first place. It seems to me that reason says that that may be done, because the greater always includes the less. It seems, too, that convenience would say that it should be done. * * *

The bill was passed. The Supreme Court of the State of Ohio, in another contested election case, thereafter upheld the right of the inmates of the home to vote. In the course of the court's opinion the authority of Congress to retrocede jurisdiction was likewise upheld.

Right to retrocede established.--That the Federal Government may retrocede to a State legislative jurisdiction over an

area and that a State may accept such retrocession would appear to be fully established by the reasoning adopted by the Supreme Court in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), in which it was stated that the rearrangement of legislative jurisdiction over a Federal area within the exterior boundaries of a State is a matter of agreement by the Federal Government and the particular State in which the federally owned area is located. While this reasoning was employed to sustain a cession of legislative jurisdiction by a State to the Federal Government, it would appear to be equally applicable to a retrocession of legislative jurisdiction to a State.

Some 27 years after enactment of the legislation retroceding jurisdiction over the disabled soldiers' home in Ohio, Congress enacted a statute similarly retroceding jurisdiction over such homes in Indiana and Illinois. The Supreme Court of Indiana, in a case contesting the inmates' right to vote, upheld this right and the right of Congress to retrocede jurisdiction. An additional such retrocession statute, involving a home in Kansas, was enacted in 1901.

Construction of retrocession statutes.--It has been held that statutes retroceding jurisdiction to a State must be strictly construed. This view was not followed, on the other hand, in Offutt Housing Company v. Sarpy County, 351 U.S. 253 (1956). There, the Supreme Courts said (p. 260):

> * * * We could regard Art. I, Sec. 8, cl. 17 as of such overriding and comprehensive scope that consent by Congress to state taxation of obviously valuable private interests located in an area subject to the power of "exclusive Legislation" is

to be found only in explicit and unambiguous legislative enactment. We have not here-

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tofore so regarded it, see S.R.A., Inc. v. Minnesota, 327 U.S. 558; Baltimore Shipbuilding Co. v. Baltimore, 195 U.S. 375, nor are we constrained by reason to treat this exercise by Congress of the "exclusive Legislation" power and the manner of construing it any differently from any other exercise by Congress of that power. This is one of those cases in which Congress has seen fit not to express itself unequivocally. It has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To that end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide. Charged as we are with this function, we have concluded that the more persuasive construction of the statute, however flickering and feeble the light afforded for extracting its meaning, is that the States were to be permitted to tax private interests, like those of this petitioner, in housing projects located on areas subject to the federal power of "exclusive Legislation." We do not hold that Congress has relinquished its power over these areas. We hold only that Congress, in the exercise of its power, has permitted such state taxation as is involved in the present case.

It is difficult to follow the reasoning in the Offutt case that the Congress did not relinquish the Federal power of "exclusive Legislation" over the areas involved, but merely permitted State taxation, since imposition of taxes requires "jurisdiction" in the State over the subject matter, aside from any "consent" of the Federal Government, as will be more fully developed hereinafter.

SUMMARY OF RETROCESSION STATUTES: Retrocessions few.--There have been relatively few instances, however, in which the federal Government has retroceded all legislative jurisdiction over an area that is normally exercised by a State. The

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instances mentioned below are all which were found in a diligent search of Federal statutes.

Statutes enacted to afford civil rights to inhabitants of Federal enclaves.--One of the earliest retrocession statutes enacted by the Congress of the United States involved a portion of the District of Columbia. The seat of the general government had been established on territory received in part from the State of Maryland and in part from the State of Virginia, embracing the maximum ten miles square permitted by clause 17. By the act of February 27, 1801, 2 Stat. 103, that portion of the District of Columbia which had been ceded by Maryland was designated the county of Washington, and that portion which had been ceded by Virginia was denominated the county of Alexandria. A report on the bill providing for retrocession to Virginia of Alexandria County stated:

> * * * The people of the county and town of Alexandria have been subjected not only to their full share of those evils which affect the District generally, but they have enjoyed none of those benefits which serve to mitigate their disadvantages in the county of Washington. The advantages which flow from the location of the seat of government are almost entirely confined to the latter county, whose people, as far as your committee are advised, are entirely content to remain under the exclusive legislation of Congress. But the people of the county and town of Alexandria, who enjoy few of those advantages, are (as your committee believe) justly impatient of a state of things which subjects them not only to all the evils of inefficient legislation, but also to political disfranchisement. To enlarge on the immense value of the elective franchise would be unnecessary before an American Congress, or in the present state of public opinion. The condition of

> thousands of our fellow-citizens who, without any equivalent, (if equivalent there could be,) are thus denied a vote in the local or general legislation by which they are governed, who, to a great extent, are under the operation of old English and Virginia statutes, long since repealed in the counties where they originated, ad whose, sons are cut off from many of the most highly valued privileges of life, except upon the condition of leaving the soil of their birth, is such as most deeply move the sympathies of those who enjoy those rights themselves, and regard them as inestimable. * * *

It has been noted that other statutes, the acts of January 21, 1871, 16 Stat. 399, July 7, 1898, 30 Stat. 668, and March 3, 1901, 31 Stat. 1175, were thereafter enacted by the Congress in concern over voting rights. During the debate on the Congress in concern over voting rights. During the debate on the 1871 bill much was said, pro and con, concerning the "right" of the inhabitants of the disabled soldiers' home to vote.

Other statutes of "special" application have been passed which involved additional fields of civil rights. One such statute is the act of March 4, 1921. During World War I the United States Housing Corporation acquired exclusive jurisdiction over a site on which a town was to be built for the purpose of housing Government employees. After the war, according to the report which accompanied the bill to the House of Representatives, the Federal Government desired:

> * * * that the property [jurisdiction] be retroceded to the State of Virginia in order that that State may exercise political power, so that taxes may be levied and the town may be incorporated. As it is now, the town of Cradock, consisting of 2,000 people, is without the protection of any civil government, as the National Government is no longer in charge there.

The bill passed both the Senate and House without discussion or

debate. Another statute of "special" application which deals with the problem of normal civil rights for inhabitants of Federal enclaves is the act of March 4, 1949, known as the Los Alamos Retrocession Bill. Identical bills were introduced in the House and Senate to cover the problems arising at the Atomic Energy Commission area at Los Alamos. The House bill was finally enacted. The following extract from the Senate report on the bill indicates the problems desired to be eliminated by the legislation:

> The need for establishing uniformity of jurisdiction in the administration of civil functions of the Los Alamos area, and the further need for assuring the people of the area the right of franchise and the right to be heard in the courts of New Mexico, was emphasized by two recent decisions of the Supreme Court of the State of New Mexico. These decisions declared that those persons residing on territory subject to exclusive Federal jurisdiction are not citizens of the State of New Mexico and, therefore, have neither the right to vote nor the right to sue in courts of that State for divorce. However, under an act of Congress approved October 9, 1940 (Buck Act), the State of New Mexico is authorized to require such noncitizens to pay sales, use, and income taxes just as do those persons enjoying full State citizenship.
>
> The effect of this bill will be to remove disabilities inherent in the noncitizen status of persons residing on the areas now under exclusive Federal jurisdiction. It will give them the same rights and privileges which those persons residing on lands at Los Alamos under State jurisdiction now enjoy. It will give them the right to

> vote in State and Federal elections. It will give them the right to have full effect given to their wills and to have their estates administered. It will give them rights to adopt children, to secure valid divorces in appropriate cases, and to secure licenses to enjoy the land for hunting and fishing.

The Atomic Energy Act of 1954 included a section which similarly retroceded jurisdiction over Atomic Energy Commission land at Sandia Base, Albuquerque, to the State of New Mexico.

Statutes enacted to give State or local governments authority for policing highways.--These statutes may be divided into two groupings, "general" and "special." There are two in the "general" category, one authorizing the Attorney General, and the other the Administrator of Veterans' Affairs, in very similar language, to grant to States or political subdivisions of States easements in or rights-of-way over lands under the supervision of the Federal officer granted the power, and to cede to the receiving State partial, concurrent, or exclusive jurisdiction over he area involved in the grant. Both these statutes, it is indicated by information in official records, were enacted to resolve problems arising out of the desirability of State, rather than Federal, policing of highways. Efforts of the Department of Defense to acquire authority similar to that given by these statutes to the Attorney General and the Administrator of Veterans' Affairs have not been successful to this

time, notwithstanding that apparently all the "special" statutes enacted to provide State authority for policing highways have involved military installations.

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The first of the statutes of "special" application in the field of jurisdiction over highways concerned the Golden Gate Bridge and the California State highways, which crossed the Presidio of San Francisco Military Reservation and the Fort Baker Military Reservation. On February 13, 1931, the Secretary of War, exercising a congressional delegation of authority, granted to the Golden Gate Bridge and Highway District of California certain rights-of-way to extend, maintain and operate State roads across these military reservations. The grant from the Secretary of War was subject to the condition that the State of California would assume responsibility for managing, controlling, policing and regulating traffic. A subsequent statute retroceded to the State of California the jurisdiction necessary for the State to carry out its responsibility for policing the highways.

The next statute related to another approach to the Golden Gate Bridge. Statutes enacted thereafter have related to highways occupying areas at Vancouver Barracks Military Reservation, Washington, Fort Devens Military Reservation, Massachusetts, Fort Bragg, North Carolina, Fort Sill, Oklahoma, Fort Belvoir, Virginia, and Wright-Patterson Air Force Base, Ohio.

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Miscellaneous statutes retroceding jurisdiction.--Six statutes appear to have been enacted by the Federal Government retroceding jurisdiction for reasons not demonstrably connected with civil rights of inhabitants or State policing of highways. The first of these in point of time was enacted in 1869, to permit the State of Vermont to exercise jurisdiction over a State court building which was permitted to be constructed on federally owned land. A 1914 statute temporarily retroceded to the State of California jurisdiction over portions of the Presidio of San Francisco and Fort Mason, so that city and State authorities could police these areas during a period when the Panama-Pacific International Exposition was to be held thereon.

A 1927 statute ceded to the Commonwealth of Virginia jurisdiction over an area known as Battery Cove, for the purpose of transferring from Federal to Virginia officials authority to police the area. The cove, which was on the Potomac River abutting Virginia, had been transformed into dry land during dredging operations in the Potomac. It was part of the territory originally ceded to the United States by Maryland for the seat of government. In 1939, the Congress enacted a statute retroceding to the Commonwealth of Massachusetts jurisdiction over a bridge in Springfield. The reason for this retrocession was that, while

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the bridge spanned a pond located on territory over which the United States exercised exclusive legislative jurisdiction, both ends of the bridge were located on land controlled by the city.

In 1945, long existing disputes and confusion over the boundary line between the District of Columbia and the Commonwealth of Virginia led to the enactment of a statute by the Federal Government ceding concurrent jurisdiction to the Commonwealth over territory to a line fixed as a boundary.

The only remaining instance found of the Federal enactment of a retrocession statute for a miscellaneous purpose relates to the Chain of Rocks Canal in Madison County, Wisconsin. That statute was enacted, it seems, simply because the United States had no further requirement for jurisdiction over the area involved.

REVERSION OF JURISDICTION UNDER TERMS OF STATE CESSION STATUTE: In general.--Most State statutes providing for cession of legislative jurisdiction to the United States further provide for reversion of the ceded jurisdiction to the State upon termination of Federal ownership of the property. Some of these, and other State statutes, contain various provisions otherwise limiting the duration of Federal exercise of ceded jurisdiction. The Attorney General has since an early date approved such limitations.

Leading cases.--In two important Federal court cases consideration was given to the effect of provisions in a State cession statute that the legislative jurisdiction transferred by such statute to the Federal Government shall cease or revert

to the State upon the occurrence of the conditions specified in the statute. In each of these cases, the legal validity of such provision was fully sustained although in one instance the Supreme Court indicated that Federal legislative jurisdiction might merely be "suspended" while the circumstances specified in the State statute prevailed.

In Crook, Horner & Co. v. Old Point Comfort Hotel Co., et al., 54 Fed. 604 (C.C.E.D.Va., 1893), the court gave effect to the provisions in a Virginia cession statute that legislative jurisdiction diction shall exist in the United States only so long as the area is used for fortifications and other objects of national defense, and that such jurisdiction shall revert to Virginia in the event the property is abandoned or used for some purpose not specified in the Virginia cession statute.

In Palmer v. Barrett, 162 U.S. 399 (1896), New York had ceded to the United States jurisdiction over the Brooklyn Navy Yard subject to the condition that it be used for a navy yard and hospital purposes. Part of the area in question was subsequently leased to the city of Brooklyn for use by market wagons. The lease was terminable by the United States on thirty days' notice; it provided that the city of Brooklyn would patrol the premises, that no permanent buildings would be erected on the premises, and that during the period of the lease the water tax for water consumed by the Navy Yard would be reduced to that charged to manufacturing establishments in Brooklyn. The plaintiff brought suit in the State courts to recover damages for his alleged unlawful ouster from two market stands which had been in his possession. One of the defenses was that the State court had no jurisdiction. The United States Supreme Court disposed of this

contention as follows (p. 403):

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> * * * The power of the State to impose this condition [that the land be used for purposes of a navy yard and hospital] is clear. In speaking of a condition placed by the State of Kansas on a cession of jurisdiction made by that State to the United States over land held by the United States for the purposes of a military reservation, this court said in Fort Leavenworth Railroad v. Lowe, (p. 539), supra: "It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post."

As to the question of jurisdiction, the court said (p. 404):

> * * * In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States had been free from condition or limitation, the land should be treated and considered as within the e jurisdiction of the United States, it is clear that under the circumstances here existing, in view of the reservation made by the State of New York in the act ceding jurisdiction, the exclusive authority of the United States over the land covered by the lease was at least suspended whilst the lease remained in force.

Had the Federal Government, instead of leasing the property to the city of Brooklyn on a short-term lease, devoted it to Federal purposes other than those specified in the New York cession statute, legislative jurisdiction would presumably have

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reverted to the State of New York Although the court in the case before it spoke of the suspension of jurisdiction, instead of termination of jurisdiction, it presumably took into account the fact that the lease was of short duration and that there was no evidence that the Federal Government had abandoned all plans for the future use of the leased area for the purposes specified in the New York statute. It must be assumed that a permanent reversion, instead of a temporary suspension, of Federal legislative jurisdiction would occur where the evidence indicates that it is no longer the intention of the Federal Government to use the property for the purposes specified in the State cession statute.

REVERSION OF JURISDICTION BY TERMINATION OF FEDERAL USE OF PROPERTY: Doctrine announced.--In the case of Fort Leavenworth R.R. v. Lowe, U.S. 525 (1885), when considering a cession statute which did not contain a reverter provision the court nevertheless said of

the ceded jurisdiction (p. 542):

> * * * It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.

Discussion of doctrine.--Only in one case, however, has the Supreme Court concluded that reversion for such reasons had occurred. In S.R.A., Inc v. Minnesota, 327 U.S. 558 (1946), the question presented was whether the State of Minnesota had jurisdiction to tax realty sold by the United States to a private party under an installment contract, the tax being assessed "subject to fee title remaining in the United States," where such realty had been purchased by the United States with the consent of the State. After stating that a State must have jurisdiction in order to tax, the court said (pp. 563-564):

> In this instance there were no specific words in the contract with petitioner which were intended to retain sovereignty in the United States. There was no express retrocession by Congress to Minnesota, such as sometimes occurs. There was no requirement in the act of cession for return of sovereignty to the State when the ceded territory was no longer used for federal purposes. In the absence of some such provisions, a transfer of property held by the United States under state cessions pursuant to Article I, Sec. 8, Clause 17, of the Constitution would leave numerous isolated islands of federal jurisdiction, unless the unrestricted transfer of the property to private hands is thought without more to revest sovereignty in the States. As the purpose of Clause 17 was to give control over the sites of governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property. We shall treat this case as though the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power. Recognition has been given to this result as a rule of necessity. If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of a tax on the property. Under these assumptions the existence of territorial jurisdiction in Minnesota so as to permit state taxation depends upon whether there was a transfer of the property by the contract of sale.

The court concluded that under its contract of sale with the United States, the vendee acquired the equitable title to the land, and that therefore the Federal legislative jurisdiction over the property reverted to the State.

Of interest in the above-quoted excerpt from the Supreme Court's

opinion is the reference to the State's acceptance of the reversion of legislative jurisdiction. As has been indicated in the preceding chapter, the consent of the State and Federal Government is ordinarily essential to effect transfers of legislative jurisdiction from one to the other. However, where--as is suggested in the S.R.A. opinion--the termination of federal ownership and use of the property results in a termination of Federal legislative jurisdiction, it would seem that to add to this rule a proviso that a State must accept such jurisdiction would result, in the event of a State's refusal to accept the reversion, either in the continuance of Federal legislative jurisdiction over an area not owned or used by the Federal Government, or in the creation of a "no-man's land" over which neither the Federal Government nor the State has jurisdiction. It seems highly doubtful in view of these practical results, and barring special circumstances, that the State's acceptance is essential. Moreover, in the S.R.A. opinion, the court seemed to imply that the termination of federal legislative jurisdiction over an area no longer owned or used by the Federal Government rests o constitutional principles. If so, Federal legislative jurisdiction over such area would appear to revert to the State irrespective of the latter's wishes in the matter. In any event the Congress could, for example, expressly provide for reversion of jurisdiction to the State upon cessation of Federal ownership of property, although the S.R.A. decision would seem to make such express provision unnecessary.

An early Federal statute granting authority for the sale of surplus military sites contained a provision that upon sale of any such site jurisdiction thereover which had been ceded to the Federal Government by a State was to cease. The statute made no provision for State acceptance of the retrocession. The modern counterpart of this statute, providing for disposition of surplus Federal property, makes no reference whatever to termination of jurisdiction had by the United States over property disposed of thereunder, but the General Services Administration, which administers the existing statute, has no information of any exception to full acceptance by agencies of the Federal and State governments of the theory that all jurisdiction reverts to the State upon Federal disposition of real property under this statute. While the case of S.R.A., Inc. v. Minnesota, supra, is the only case in which the Supreme Court concluded that on the facts presented Federal legislative jurisdiction reverted to the State, the court in several earlier cases indicated that changed circumstances might result in a reversion of legislative jurisdiction. In Benson v. United States, 146 U.S. 325 (1892), the intervening factor was an action of the Executive branch. In that case it was contended that jurisdiction passed to the United States only over such portions of the military reservation as were actually used for military purposes, and that the United States therefore had no jurisdiction over a homicide which was committed on a part of the reservation used for farming purposes. In rejecting this contention, the court said (p. 331):

> * * * But in matters of that kind the courts follow the action of the political department of the government. The entire tract had been legally reserved for military purposes. * * * The character and purposes of its occupation having been officially

and legally established

> by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put. * * *

The views expressed by the court in the Benson case, which presumably would be applicable to a retrocession as well as a cession, narrow substantially the rule as stated in the excerpt from the Fort Leavenworth case quoted earlier in this chapter.

The Bernson case was followed in Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929), in overruling an argument that jurisdiction was not lodged in the United States over an area leased to a private hotel operator within a reservation over which jurisdiction had been ceded to the United States, and it was again followed in the case of United States v. Unzeuta, 281 U.S. 138 (1930), where the Federal Government was held to have jurisdiction over an area (on which a crime had been committed) constitution a right-of-way over a Federal enclave. The same rule has been applied in other case.

The reluctance of the court to ignore jurisdiction determinations by the Executive branch is further illustrated by its opinion in Phillips v. Payne, 92 U.S. 130 (1876), in which was presented the question of the legal validity of the retrocession by the Federal Government to Virginia of that portion of the District of Columbia which had previously been ceded by Virginia to the Federal Government. In the course of its opinion, the court stated (p. 131) the position of the plaintiff in error that the Federal legislative procedures leading to the

retrocession were "in violation of the Constitution" but it held that (p. 134):

> The plaintiff in error is estopped from raising the point which he seeks to have decided. He cannot, under the circumstances, vicariously raise a question, nor force upon the parties [i.e., the Federal Government and Virginia] to the compact an issue which neither of them desires to make.
>
> In this litigation we are constrained to regard the de facto condition of things which exists with reference to the county of Alexandria as conclusive of the rights of the parties before us.

The position taken by the court in the Benson, Arlington Hotel, Unzeuta, and Phillips cases suggests that the rule announced in the Fort Leavenworth case would not apply in any situation in which the Executive branch has indicated that the area involved, thought presently used for non-Federal purposes, is intended to be used for Federal purposes. Where, of course, a condition in a State cession or consent statute pursuant to which legislative jurisdiction was obtained by the Federal Government provides that jurisdiction shall revert to the State if the areas, or any portion of it, is used, even

temporarily, for purposes other than those specified in the State consent or cession statute, full effect would be given to such condition. Absent such express condition in the State consent or cession statute, it seems probable that the courts would conclude that Federal legislative jurisdiction has terminated only upon a clear showing that the area is not only not being used for the purposes for which it was acquired but also that there appears to be no plan to use it for such purpose in the future.

CHAPTER V

CRIMINAL JURISDICTION

RIGHT OF DEFINING AND PUNISHING FOR CRIMES: Exclusive Federal jurisdiction.--Areas over which the Federal Government has acquired exclusive legislative jurisdiction are subject to the exclusive criminal jurisdiction of the United States. Bowen v. Johnston, 306 U.S.19 (1939); United States v. Watkins, 22 F.2d 437 (N.D.Cal 1927). That the States can neither define nor punish for crimes in such areas is made clear in the

case of In re Ladd, 74 Fed. 31 (C.C.N.D.Neb., 1896), (p. 40):

> * * * The cession of jurisdiction over a given territory takes the latter from within, and places it without, the jurisdiction of the ceding sovereignty. After a state has parted with its political jurisdiction over a given tract of land, it cannot be said that acts done thereon are against the peace and dignity of the state, or are violations of its laws; and the state certainly cannot claim jurisdiction criminally be reason of acts done at place beyond,or not within, its territorial jurisdiction, unless by treaty or statute it may have retained jurisdiction over its own citizens, and even then the jurisdiction is only over the person as a citizen. * * *

The criminal jurisdiction of the Federal Government extends to private land over which legislative jurisdiction has been vested in the Government, as well as to federally owned lands. United States v. Unzenuta, supra; see also Petersen v. United States, 191 F.2d 154 (C.A. 9, 1951), cert.den., 342 U.S. 885. Indeed, the Federal Government's power derived from exclusive legislative jurisdiction over an area may extend beyond

the boundaries of the area, as may be necessary to make exercise of the Government's jurisdiction effective; thus, the Federal Government may punish a person not in the exclusive jurisdiction

area for concealment of his knowledge concerning the commission of a felony within the area. Cohens v. Virginia, 6 Wheat. 264, 426-429 (1821).

In Hollister v. United States, 145 Fed. 773 (C.A. 8, 1906), the court said (p. 777):

> Instances of relinquishment and acceptance of criminal jurisdiction by state Legislatures and the national Congress, respectively, over forts, arsenals, public buildings, and other property of the United States situated within the states, are common, and their legality has never, so far as we know, been questioned.

On the other hand, while the Federal Government has power under various provisions of the Constitution to define, and prohibit as criminal, certain acts or omissions occurring anywhere in the United States, it has no power to punish for various other crimes, jurisdiction over which is retained by the States under our Federal-State system of government, unless such crimes occur on areas as to which legislative jurisdiction has been vested in the Federal Government. The absence of jurisdiction in a State, or in the Federal Government, over a criminal act occurring in an area as to which only the other of these governments has legislative jurisdiction is demonstrated by the case of United States v. Tully, 140 Fed. 899 (C.C.D.Mont.,

1905). Tully had been convicted by a State court in Montana of first degree murder, and sentenced to be hanged. The Supreme Court of the State reversed the conviction on the ground that the homicide had occurred on a military reservation over which exclusive jurisdiction was vested in the Federal Government. The defendant was promptly indicted in the Federal court, but went free as the result of a finding that the Federal Government did not have legislative jurisdiction over the particular land on which the homicide had occurred. The Federal court said (id. p. 905):

> It is unfortunate that a murderer should go unwhipped of justice, but it would be yet more unfortunate if any court should assume to try one charged with a crime without jurisdiction over the offense. In this case, in the light of the verdict of the jury in the state court, we may assume that justice would be done the defendant were he tried and convicted by any court and executed pursuant to its judgment. But in this court it would be the justice of the vigilance committee wholly without the pale of the law. The fact that the defendant is to be discharged may furnish a text for the thoughtless or uninformed to say that a murderer has been turned loose upon a technicality; but this is not a technicality. It goes to the very right to sit in judgment. * * * These sentiments no doubt appealed with equal force to the Supreme Court of Montana, and it is to its credit that it refused to lend its aid to the execution of one for the commission of an act which, in its judgment, was not cognizable under the laws of its state; but I cannot being myself to the conclusion reached by that able court, and it is upon the judgment and conscience of this court that the matter of jurisdiction here must be decided.

The United States and each State are in many respects separate sovereigns, and ordinarily one cannot enforce the laws of the other.

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State and local police have no authority to enter an exclusive Federal area to make investigations, or arrests, for crimes committed within such areas since Federal, not State, offenses are involved. Only Federal law enforcement officials, such as representatives of the Federal Bureau of Investigation and United States marshals and their deputies, would be authorized to investigate such offenses and make arrests in connection with them. The policing of Federal exclusive jurisdiction areas must be accomplished by Federal personnel, and an offer of a municipality to police a portion of a road on such an area could not be accepted by the Federal official in charge of the area, as police protection by a municipality to such an area would be inconsistent with Federal exclusive jurisdiction.

Concurrent Federal and State criminal jurisdiction.--There are, of course, Federal areas as to which a State, in ceding legislative jurisdiction to the United States, has reserved some measure of jurisdiction, including criminal jurisdiction, concurrently to itself. In general, where a crime has been committed in an areas over which the Untied States and a State have concurrent criminal jurisdiction, both governments may try the accused without violating the double jeopardy clause of the Fifth Amendment. Grafton v. United States, 206 U.S.

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333 (1907), held that the same acts constituting a crime cannot, after a defendant's acquittal or conviction in a court of competent jurisdiction of the Federal Government, be made the basis of a second trial of the defendant for that crime in the same or in another court, civil or military, of the same government. However, where the same act is a crime under both State and Federal law, the defendant may be punished under each of them. Hebert v. Louisiana, 272 U.S. 312 (1926). It was stated by the court in United States v. Lanza, 260 U.S. 377 (1922), (p. 382):

> It follows that an act denounced as a crime by both national and state sovereignties is an offence against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, Barron v. Baltimore, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. * * *

It is well settled, of course, that where two tribunals have concurrent jurisdiction that which first takes cognizance of a matter has the right, in general, to retain it to a conclusion, to

the exclusion of the other. The rule seems well stated in Mail v. Maxwell, 107 Ill. 554 (1883),(p. 561):

> Where one court has acquired jurisdiction, no other court, State or Federal, will, in the absence of supervising or appellate jurisdiction, interfere, unless in pursuance of some statute, State or Federal, providing for such interference.

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Other courts have held similarly. There appears to be some doubt concerning the status of a court-martial as a court, within the meaning of the Judicial Code, however.

Law enforcement on areas of exclusive or concurrent jurisdiction.--The General Services Administration is authorized by statute to appoint its uniformed guards as special policemen, with the same powers as sheriffs and constables to enforce Federal laws enacted for the protection of persons and property, and to prevent beaches of the peace, to suppress affrays or unlawful assemblies, and to enforce rules made by the General Services Administration for properties under its jurisdiction; but the policing powers of such special policemen are restricted to Federal property over which the United States has acquired exclusive or concurrent jurisdiction. Upon the application of the head of any Federal department or agency having property of the United States under its administration or control and over which the United States has exclusive or concurrent jurisdiction, the General Services Administration is authorized by statute to detail any such special policeman for the protection of such property and, if it is deemed desirable, to extend to such property the applicability of regulations governing property promulgated by the General Services Administration. The General Services Administration is authorized by the same statute to utilize the facilities of existing Federal law-enforcement agencies, and, with the consent of any State or local agency, the facilities and services of such State or local law enforcement agencies.

Although the Department of the Interior required protection for an installation housing important secret work, the General

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Services Administration was without authority to place uniformed guards on the premises in the absence in the United States of exclusive or concurrent jurisdiction over the property, and notwithstanding the impropriety of permitting the policing of the property by local officials, if they were willing, without necessary security clearances.

Civilian Federal employees may be assigned to guard duty on Federal installations, but there is no Federal statue (other than that appertaining to General Services Administration and three statutes of even less effect--16 U.S.C. 559 (Forest Service), and 16 U.S.C. 10 and 10a (National Park Service)) conferring any special authority on such guards. They are not peace officers with the usual powers of arrest; and have no greater powers of arrest than private citizens. As citizens, they may protect their own lives and property

and the safety of others, and as agents of the Government they have a special right to protest the property of the Government. For both these purposes they may bear arms irrespective of State law against bearing arms. Such guards, unless appointed as deputy sheriffs (where the State has at least concurrent criminal jurisdiction), or deputy marshals (where the United States has at least concurrent criminal jurisdiction), have no

more authority than other private individuals so far as making arrests is concerned.

State and local officers may, by special Federal statute, preserve the peace and make arrests for crimes under the laws of States, upon immigrant stations, and the jurisdiction of such officers and of State and local courts has been extended to such stations for the purposes of the statute.

Partial jurisdiction.--In some instances States in granting to the Federal Government a measure of exclusive legislative jurisdiction over an area have reserved the right to exercise, only by themselves, or concurrently by themselves as well as by the Federal Government, criminal jurisdiction over the area. In instances of complete State retention of criminal jurisdiction, whether with respect to all matters or with respect to a specified category of matters, the rights of the States, of the United States, and of any defendants, with respect to crimes as to which State jurisdiction is so retained are as indicated in this chapter for areas as to which the Federal Government has no criminal jurisdiction. In instances of concurrent State and Federal criminal jurisdiction with respect to any matters the rights of all parties are, of course, determined with respect to such matters according to the rules of law generally applicable in areas of concurrent jurisdiction. Accordingly, there is no

body of law specially applicable to criminal activities in areas under the partial legislative jurisdiction of the United States.

State criminal jurisdiction retained.--State criminal jurisdiction extends into areas owned or occupied by the Federal Government, but as to which the Government has not acquired exclusive legislative jurisdiction with respect to crimes. And as to many areas owned by the Federal Government for its various purposes it has not acquired legislative jurisdiction. The Forest service of the Department of Agriculture, for example, in accordance with a provision of Federal law (16 U.S.C. 480), has not accepted the jurisdiction proffered by the statutes of many States, and the vast majority of Federal forest lands are held by the Federal Government in a proprietorial status only.

The Federal Government may not prosecute for ordinary crimes committed in such areas. Federal civilians who may

be appointed as guards in the areas do not have police powers, but possess only the powers of arrest normally had by any citizen unless they receive appointments as State or local police officers.

Acts committed partly in area under State jurisdiction.--Where a crime has been in part committed in a Federal exclusive legislative jurisdiction area, the States in some instances have asserted jurisdiction. It was held in Commonwealth v. Rohrer, 37Pa. D. and C. 410 (1937), that a dealer furnishing milk for use at a veterans' hospital was subject to the provisions of the Milk Control Board Law. The court was of the opinion that while the State had no jurisdiction with respect to a crime committed wholly within the area over which legislative jurisdiction had been ceded to the Federal Government for the hospital, it did have jurisdiction of a crime the essential elements of which were committed within the State, even though other elements thereof were committed within the ceded territory. Two more recent decisions of the Supreme Court (i.e., Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943), and Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U.S. 285 (1943)) suggest that only where the federal Government does not have exclusive legislative jurisdiction would a State have such authority. It has been held, however, that even where acts are done wholly on Federal property, a State property, a State prosecution is proper where the effects of the acts are felt in an area under State jurisdiction. People v. Commonwealth Sanitation Co., 1007 N.Y.S.2d 982 (1951); cf. State v. Kelly, 76 Me. 331 (1884).

On the other hand, transportation through a State for delivery to an area, within the boundaries of the State, which is

under the exclusive jurisdiction of the United States has been held not to be a violation of laws prohibiting the importation into the State of the matter transported.

Retrial on change in jurisdiction.--Where a person is convicted of a crime in a State court and the territory in which the crime was committed is subsequently ceded to the United States, he may be properly retried or sentenced in the State court, it was held in Commonwealth v. Vaughn, 64 Pa. D & C. 320 (1948). The court said (p. 322):

> * * * The act when done was a violation of the law of this Commonwealth which is still in full force and effect, done within its territorial jurisdiction; the Commonwealth had jurisdiction of the subject matter and obtained jurisdiction of the person by proper process, and its proper officer proceeded with legal action in the proper court, which court has never relinquished its jurisdiction, so obtained. * * * When the jurisdiction of a court has legally and properly attached to the person and subject matter in a legal proceeding, such jurisdiction continues until the cause is fully an completely disposed of * * *.

The court points out that if the subject matter (in this case, the crime) is wiped out the court loses its jurisdiction. The crime would no longer exist and no one can be punished for a crime which does not exist at time of trial therefor, or of meting out punishment.

SERVICE OF STATE CRIMINAL PROCESS: In general.--That State criminal process may extend into areas owned or occupied by the United States but not under its legislative jurisdiction is well set out in the case of Cockburn v. Willman, 301 Mo. 575, 257 S.W. 458 (1923), (p. 587):

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> The mere fact that he was territorial within the confines of a Government reservation at the time the warrant was served upon him did not render him immunity exists only when it appears in the cession by the State to the National Government that the former has divested itself of all power over the place or territory in regard to the execution of process or the arrest and detention of persons found thereon who are charged with crime.

Right by Federal grant.--The immunity of persons in areas under the exclusive jurisdiction of the federal Government from service upon them of State process occasioned great concern at the constitutional ratifying conventions that such areas might become havens for felons. At an early date, Congress provided that in lighthouse and certain related areas criminal and civil process might be served by the States notwithstanding the acquisition of exclusive jurisdiction by the Federal Government over such sites.

Right by State reservation.--States have commonly included in their consent and cession statutes a reservation of the power to serve civil and criminal process in the areas to which such statutes relate, and all such State statutes which are currently in effect contain such reservations. The words of reservation vary, but usually are contained in a clause following the cession language and are worded approximately as follows:

> * * * this state, however, reserving the right to execute

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> its process, both criminal and civil, within such territory.

Reservations to serve process not inconsistent with exclusive jurisdiction.--The reservation by a State of the right to serve criminal and civil process in an area over which such Federal jurisdiction exists is not, however, inconsistent with the exercise by the Federal Government of exclusive jurisdiction over the area, and a State does not by such a reservation acquire jurisdiction to punish for a crime committed within a ceded area. United States v. Travers, 28 Fed. Cas. 204, No. 16,537 (C.C.D.Mass., 1814); United States v. Davis, 25 Fed. cas. 646, No. 14,867 (C.C.D.R.I., 1819). Indeed, it has been said that process served under a

reservation becomes, quo ad hoc, process of the United States, and that when a State officer acts to execute process on a Federal enclave he acts under the authority of the United States, but these statements appear inconsistent with the generally prevailing view of reservations to serve process as retention by the State of its sovereign authority. Even, as is often the case, where a State retains "concurrent jurisdiction," to serve civil

and criminal process, or the right to serve such process as if jurisdiction over lands "had not been ceded," the quoted words have been construed not to give the State jurisdiction to punish persons for offenses committed within the ceded territory. United States v. Cornell, 25 Fed. Cas. 646, No. 14,867 (C.C.D.R.I., 1819); Lasher v. State, 30 Tex. Cr.App. 387 17 S.W. 1064 (1891); Commonwealth v. Clary, 8 Mass. 72 (1811). In the Cornell case, supra, the United States purchased certain lands in Rhode Island for military purposes. The State gave its consent to these purchases, reserving, however, the right to execute all civil and criminal processes on the ceded lands, in the same way as if they had not been a reservation of concurrent jurisdiction by the State. The court answered this in the negative as follows (pp. 648-649):

> In its terms it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal processes, issued under the authority of the state, which must of course be for acts done within, and cognizable by, the state, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanc-

> tuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits * * *.

And reservation of right to "execute" process, it has been held, retains no more authority in the State than a reservation to "serve" process, even in the absence of the word "exclusive" in the description of the quantum of jurisdiction ceded to the United States. Rogers v. Squier, F.2d 948 (C.A. 9, 1946), cert. den., 330 U.S. 840.

The Supreme Court of Nevada has held (State ex rel. Jones v. Mack, 23 Nev. 359, 47 Pac. 763 (1897)) that exception from a cession of the "administration of the criminal laws" reserved to the State only the right to serve process, and a similar holding with respect to a similar California statute was once made by a Federal court; but at least on five occasions Attorneys General of the United States have ruled that such language gave a State cognizance of criminal

offenses against its laws in the place ceded. It has also been held that a reservation to serve process for "any cause there [in the ceded area] or elsewhere in the state arising, where such cause comes properly under the jurisdiction of the laws of this state," merely reserved he right to serve process, and was not inconsistent with a transfer of exclusive jurisdiction.

In People v. Hillman, 246 N.Y. 467, 159 N.E. 400 (1927), it was held that the courts of the State of New York had no jurisdiction over a robbery committed on a highway which passed through the West Point Military Reservation. Ownership of the land had been acquired by the United States, and the State had ceded jurisdiction over the land, reserving the

right to serve civil and criminal process thereon and the right of occupancy of the highways. The latter reservation, the court said, should not be construed as a reservation of political dominion and legislative authority over the highways but meant merely that the State reserved the right to appropriate for highway purposes the customary proportion of land embraced in the tract.

Warrant of arrest deemed process.--By the very nature of the purposes which the State reservations to serve criminal and civil process were intended to carry out, such reservations include the right to execute a warrant of arrest, including a warrant issued on a request for extradition. Such warrants are a form of legal process. However, various Federal instrumentalities have regulations governing the manner in which such process shall be served, and even in the absence of formal regulations on the subject, the service of process may

not be accomplished in manner such as to constitute an interference with an instrumentality of the Federal Government.

Arrest without warrant not deemed service of process.--It has been held that an arrest without a warrant may not be effected by a State police officer in an area under exclusive Federal jurisdiction, for a crime committed off the area, since such an arrest does not involve service of process. A reservation to make such arrest might, of course, be made. State officials may enter an exclusive Federal jurisdiction area, to make an investigation related to an offense committed off the area, only in manner such as will not interfere with an instrumentality of the Federal Government, and in accordance with any Federal regulations for this purpose.

Coroner's inquest.--Various authorities have held that a State cannot render coroner service in an area under exclusive Federal jurisdiction, but in an early case (County of Allegheny v. McClung, 53 Pa. 482 (1867)), it was suggested that a coroner's inquest might constitute criminal process.

Writ of habeas corpus.--In three early cases a reservation of the right to serve process was construed as giving authority to a State to serve a writ of habeas corpus upon a federal military officer with respect to his alleged illegal detention, under color of Federal authority, of a person upon a Federal enclave (State v. Dimick, 12 N.H. 194 (1841); In re Carlton, 7 Cow. 471 (N.Y., 1827); and Commonwealth v. Cushing, 11 Mass. 67 (1814))> The lack of jurisdiction is State courts to inquire by habeas corpus into the propriety of the confinement of persons held under the authority or color of authority of the United States has since been firmly fixed and confirmed. Ableman v. Booth, 21 How. 506 (1859), In re Tarble, 13 Wall. 397 (1871), Johnson v. Eisentrager, 339 U.S. 763 (1950). Nor, it would seen, may a writ of habeas corpus out of a State court in any case lie under the usual State reservation to serve process with reference to a person held in an area under exclusive Federal jurisdiction, although his holding be not under Federal authority (e.g., the holding of a child by an adult claiming parental authority), since such a reservation permits service only with respect to matters arising outside the exclusive jurisdiction area. It has been held, on the other hand, that a writ of habeas corpus properly might issue from a Federal court to discharge from the custody of a State official a prisoner held for a crime indicated to have been committed in an area which, while within the State, was under the exclusive legislative jurisdiction of the United States. Ex parte Tatem, 23 Fed. Cas. 708, No. 13,759 (E.D.Va., 1877). The court issued the writ reluctantly in the Tatem case, however, and in In re Bradley, 96 Fed. 969 (C.C.S.D.Cal., 1898), the court said (p. 970):

> Unquestionably, the circuit and district courts of the United States may, on habeas corpus, discharge from custody one who is restrained of his liberty in violation of the constitution of the United States, even though

> he is so restrained under state process to answer for an alleged crime against the state. Rev. St. Sec. 753. This power, however, in the federal judiciary, "to arrest the arm of the state authorities, and to discharge a person held by them, is one of great delicacy" (Ex parte Thompson, 23 Fed. Cas. p. 1016), and ought not to be exercised in any case where suitable relief can be had through the regular procedure of the state tribunals * * *.

The court said further (p. 971):

> Assuming--without, however, deciding--that the allegations of the petition, in the case at bar, show, that the imprisonment of the petition is without due process of law, and violative of the federal constitution, they do not, as held in Ex parte Royall, supra, "suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised," as to the lack of jurisdiction in the state government over the land or place in question.

The Supreme Court has ruled that whether the United States had exclusive legislative jurisdiction over land where an alleged crime was committed is to be determined by the court to which the indictment was returned,, and no by writ of habeas corpus in connection with proceedings for the removal of the accused from another jurisdiction for trial. Rodman v. Pothier, 264 U.S. 399 (1924). Presumable this rule would apply to extradition as well as to removal proceedings.

FEDERAL CRIMES ACT OF 1790: Effects limited.--Among the problems which early resulted from the creation of Federal enclaves was that of the administration of criminal law over these areas. Once these areas were withdrawn from State jurisdiction, in the absence of congressional legislation they were left without criminal law. Congress, in order to correct this situ-

ation, passed the first Federal Crimes Act, in 1790. However, this act defined only the more serious crimes, such as murder, manslaughter, maiming, etc., punishing their commission in areas under the "sole and exclusive jurisdiction of the United States." Persons who committed other offenses in these areas escaped unpunished.

The gravity of the situation was indicated by Joseph Story in his comment on a bill which he wrote inn 1816 "to extend the judicial system of the United States." He stated, in part, as follows:

> * * * Few, very few of the practical crimes, (if I may so say,) are now punishable by statutes, and if the courts have no general common law jurisdiction (which is a vexed question,) they are wholly dispunishable. The State Courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes, may in these p;aces be now committed with impunity. Surely, in naval yards, arsenals, forts, and dockyards, and on the high seas, a common law jurisdiction is indispensable. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the Government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress have power to provide for all crimes against the United States, is incontestable. * * *

These Federal areas within the States over which Congress had exclusive jurisdiction had become, it would seem from Story's comment, a criminals' paradise. The act of 1790, supra, defining and punishing for certain crimes on such areas left many grossly reprehensible acts undefined and unpunished, the States no longer had jurisdiction over these areas, and the Federal courts had no common law jurisdiction.

ASSIMILATIVE CRIMES STATUTES: Assimilative Crimes Act of 1825.-- In order, therefore, to provide a system of criminal law for ceded areas, Congress, in 1825, passed the first assimilative crimes statute. This was section 3 of the act of March 3, 1825, 4 Stat. 115, which provided:

> AND BE IT FURTHER ENACTED, That, if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

Mr. Webster, who sponsored this bill,is indicated to have explained the purpose of its third section as follows (register of Debates in Congress, 18th Cong., 2d Sess., Jan. 24, 1825, Gales & Seaton, Vol. I, p. 338):

> * * * it must be obvious, that, where the jurisdiction of a small place, containing only a few hundreds of people, (a navy yard for instance,) was ceded to the United States, some provision was required for the punishment of offences; and as, from the use to which the place was to be put, some crime were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, &c. might be. He [Webster] was persuaded that the people would not view it as an hardship, that the great class of minor offences should continue to be punished in the same manner as they had been before the cession.

In United States v. Davis, decided in 1829, the court stated the purpose of the act of 1825, at page 784:

> The object of the act of 1825 was to provide for the punishment of offences committed in places under the jurisdiction of the United States, where the offence was not before punishable by the courts of the United States under the actual circumstances of its commission. * * *

The act of 1825 was construed by the Supreme Court in United States v. Paul, 6 Pet. 141 (1832). An act of 1829 of the New York legislature was held not to apply under the Assimilative Crimes Act to the West Point Military Reservation, situated in the State of New York. Chief Justice Marshall ruled that the act of 1825 was to be limited to the adoption of States laws in effect at the time of its enactment. Any State laws enacted after March 3, 1825, could not be adopted by the act and would therefore be of no effect in a Federal enclave. It appeared, therefore, that the assimilative crimes statute would have to be re-enacted periodically in order to keep the criminal laws of Federal enclaves abreast with State criminal laws.

In United States v. Barney, 24 Fed. Cas. 1011, No. 14,524 (C.C.S.D.N.Y., 1866), the court held that the act of 1825 applied only to those places which were under the exclusive jurisdiction of the United States at the time the act was passed. Therefore, the act would not apply to any areas ceded to the Federal Government by the States after March 3, 1825. It was similarly apparent then that any areas ceded by the States to the Federal Government after the date of the act of 1825 were left without criminal law except as to those few offenses defined in the Federal Crimes Act of 1790, supra.

Assimilative Crimes Act of 1866.--The Paul case limited the act as to time, and the Barney case as to place. The Congress completely remedied the situation brought about by the Barney case, and alleviated the problems raised by the Paul case, by the act of April 5, 1866 (14 Stat. 12, 13), re-enacting an Assimilative Crimes Act. This law extended the act to "any place which has been or shall hereafter be ceded" to the United States. It also spelled out what had in any event probably been the law--that no subsequent repeal of any State penal law should affect any prosecution for such offense in any United States court. Accordingly, though a State penal law was re-pealed that law still remained as part of the Federal criminal code for the Federal area.

Re-enactments of Assimilative crimes Act, 1898-1940.--The next re-enactment of the Assimilative Crimes Act came on July 7, 1898 (30 Stat. 717). The constitutionality of the 1898 act was sustained in Franklin v. United States, 216 U.S. 559 (1910), writ of error dism., 220 U.S. 624. This case held that the act did not delegate to the States authority in any way to change the criminal laws applicable to places over which the United States had jurisdiction, adopting only the State law in exist-

ence at the time the 1898 act was enacted, and that the act was not an unconstitutional delegation of authority be Congress.

The following statements were made by Chief Justice White in United v. Press Publishing Company, 219 U.S. 1 (1911), referring to the 1898 statute (page 9):

> It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are "not provided for by any law of the United States," and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the

> several States are left to be punished under the applicable state statutes. When these results of the statute are borne in mind it becomes manifest that Congress, in adopting it, sedulously considered the two-fold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United States, adopted and wrote in the state law, with the single difference that the offense,

> although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the State. * * *

The Assimilative Crimes Act of 1898 became section 289 of the Criminal Code by the act of March 4, 1909 (35 Stat. 1088). In referring to section 289 the court, in Puerto Rico v. Shell Co., 302 U.S. 253 (1937), said (page 266):

> Prosecutions under that section, however, are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference.

The constitutionality of the act was upheld in Washington, P. and C. Ry. v. Magruder, 198 F. 218 (D.Md., 1912). The court said (p. 222):

> Congress may not empower a state Legislature to create offenses against the United States or to fix their punishment. Congress may lawfully declare the criminal law of a state as it exists at the time Congress speaks shall be the law of the United States in force on particular portions of the territory of the United States subject to the latter's exclusive criminal jurisdiction. * * *

Section 289 of the Criminal Code was subsequently reenacted on three occasions:

> 1. Act of June 15, 1933, 48 Stat. 152, adopting State laws in effect on June 1, 1933. 2. Act of June 20, 1935, 49 Stat. 394, adopting State laws in effect on April 1, 1935. 3. Act of June 6, 1940, 54 Stat. 234, adopting State laws in effect on February 1, 1940.

Subsequently the act of June 11, 1940 (54 Stat. 304), extended the scope and operation of the assimilative crimes statute by amending section 272 of the Criminal Code so that the criminal statutes set forth in chapter 11, title 18, United States Code, including the assimilative crimes statute, applied to lands under the concurrent as well as the exclusive jurisdiction of the United States.

Assimilative Crimes Act of 1948.--The present assimilative crimes statute was enacted on June 25, 1948, in the revision and codification into positive law of title 18 of the United States Code. It now constitutes section 13 of title 18 of the Code, and reads as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 7 of title 18, United States Code, referred to in section 13, merely defines the term "special maritime and territorial jurisdiction of the United States," in pertinent part as follows:

> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The language of the present assimilative crimes statute, it may be noted, does away with the requirement for further periodic re-enactment of the law to keep abreast with changes in State penal laws. The words "by the laws thereof in force at the time of such act or omission" make such re-enactments unnecessary. The previously existing section 289 of the Criminal Code, through its several re-enactments, supra, need, "by the laws thereof, now in force." Accordingly, under the language of the present statute the State law in force at the time of the act or omission governs if there was no pertinent Federal law. All changes, modifications and repeals of State penal laws are adopted by the Federal Criminal Code, keeping the act up to date at all times.

INTERPRETATIONS OF ASSIMILATIVE CRIMES ACT: Adopts State law.--It is emphasized that the Assimilative Crimes Act adopts the State law. The Federal courts apply not State penal laws, but Federal criminal laws which have been adopted by reference.

Operates only when offense is not otherwise defined.--The Assimilative Crimes Act operates only when the Federal Criminal Code has not defined a certain offense or provided for its punishment. Furthermore, when an offense has been defined and prohibited by the Federal code the assimilative crimes statute cannot be used to redefine and enlarge or narrow the scope of the Federal offense. The law applicable in this

matter is clearly set out in Williams v. United States, 327 U.S. 711 (1946), (p. 717):

> We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of congress defining adultery and (2) the offense known to arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the congressional definition must give way to the State definition. * * * The interesting legislative history of the Assimilative Crimes Act discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition of it. It has not even been suggested that a conflicting State definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting State definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code.

The Assimilative Crimes Act has a certain purpose to fulfill and its application should be strictly limited to that purpose. On the other hand, it has been applied when there has been the slightest gap in Federal law. In Ex parte Hart, 157 Fed. 130 (D.Ore, 1907) the court, in interpreting the act of July 7, 1898, said (p. 133):

> When, therefore, section 2 declares that when any offense is committed in any place, the punishment for which is not provided for by any law of the United States, it comprehends offenses created by Congress where no punishment is prescribed, as well as offenses created by state law, where none such is inhibited by Congress. So that the latter section is as comprehensive and far-reaching as the former, and is in practical effect the same legislation.

Includes common law.--It has also been held that the

Assimilative Crimes Act adopted not only the statutory laws of a State, but also the common law of the State as to criminal offenses. United States v. Wright, 28 Fed. Cas. 791, No. 16,774 (D. Mass., 1871).

Excludes statute of limitations.--The Assimilative Crimes Act does not, however, incorporate into the Federal law the general statute of limitations of a State relating to crimes; question on this matter arose in United States v. Andem, 158 Fed. 996 (D.N.J., 1908), where the court held that the Federal statute of limitations would apply, the State statute of limitations being a different statute from that which defined the offense.

Excludes law on sufficiency of indictments.--In McCoy v. Pescor, 145 F.2d 260 (C.A. 8, 1944), cert. den., 324 U.S. 868 (1945), question arose as to the sufficiency of Federal indictments under a Texas statute adopted by the Assimilative Crimes Act. The court held (p. 262):

> Petitioner argues that the question here is controlled by the decisions of the Texas courts regarding the sufficiency of indictments under the adopted Texas statute. * * * The Texas decisions, however, are not controlling. Prosecutions under 18 U.S.C.A. Sec. 468, "are not to enforce the laws of the state, territory, or district,

> but to enforce the federal law, the details of which, instead of being recited, are adopted by reference." * * *

This is amplified in a discussion concerning the Assimilative Crimes Act in 22 Calif.L.Rev. 152 (1934).

Offenses included.--The overwhelming majority of offenses committed by civilians on areas under the exclusive criminal jurisdiction of the United States are petty misdemeanors (e.g., traffic violations,drunkenness). Since these are not define them by regulations is limited to a few Federal administrators, their commission usually can be punished only under the Assimilative Crimes Act. The act also has invoked to cover a number of serious offenses defined by State, but not Federal law.

Offenses not included.--The Assimilative Crimes act will not operate to adopt any State penal statutes which are in conflict with Federal policy as expressed by acts of Congress or by valid administrative regulations. In Air Terminal Services, Inc. v. Rentzel, 81 F.Supp. 611 (E.D.Va., 1949), a Virginia statute provided for segregation of white and colored races in places of public assemblage and entertainment. A regulation of the Civil Aeronautics Administrator prohibited segregation at the Washington National airport located in Virginia. The airport was under the exclusive criminal jurisdiction of the United States. The question presented was whether the Virginia statute was adopted by the Assimilative Crimes Act, thus rendering the Administrator's regulation invalid. The court held, at page 612:

> The fundamental purpose of the assimilative crimes act was to provide each Federal reservation a criminal code for its local government; it was intended "to use local statutes to fill in gaps in the federal Criminal Code." It is not to be allowed to override other "federal policies as expressed by Acts of Congress" or by valid administrative orders, Johnson v. Yellow Cab Co., 321 U.S. 383, * * * and one of those ""federal policies" has been the avoidance of race distinction in Federal matters. Hurd v. Hodge, 334 U.S. 24, 34, 68 S.Ct. 847. The regulation of the Administrator, who was authorized by statute, Act of June 29, 1940, 54 Stat. 686, to promulgate rules for the Airport, is but an additional declaration and effectuation of that policy, and therefore its issuance is not barred by the assimilative crimes statute.

In Nash v. Air Terminal Services, Inc., 85 F.Supp. 545 (E.D.Va., 1949), decided on the basis of facts existing before the Administrator's regulation was issued, it was held that the Virginia segregation statute had been adopted by the Assimilative Crimes Act, and did apply to the National Airport. However, it was held that once the regulation was promulgated the State statute was no longer enforceable at the airport. The court said (p. 548):

> Too, the court is of the opinion that the Virginia statute already cited was then applicable to the restaurants and compelled under criminal penalties the separation of the races. The latter became a requirement of the federal law prevailing on the airport, by virtue of the Assimilative Crimes Act, supra, and continued in force until the promulgation, on December 27, 1948, by the Administrator of Civil Aeronautics of his regulation expressing a different policy. * * *

When lands are acquired by the United States in a State for a Federal purpose, such as the erection of forts, arsenals or other public buildings, these lands are free, regardless of their

legislative jurisdictional status, from such interference of the State as would destroy or impair the effective use of the land for the Federal purpose. Such is the law with reference to all instrumentalities created by the Federal Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of its delegated powers. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); James v. Dravo Contracting Company, 302 U.S. 134 (1937).

In providing for the carrying out of the functions and purposes of the Federal government, Congress on numerous occasions has authorized administrative officers or boards to adopt regulations to effect the will of Congress as expressed by Federal statutes. For example, the Secretary of the Interior is authorized to make rules and regulations for the management of parks, monuments and reservations under the jurisdiction of the National Park Service (16 U.S.C. 551); the Administrator of General Services is authorized to make regulations governing the use of Federal property under his

control (40 U.S.C. 31a); and the head of each Department of the Government is authorized to prescribe regulations, not inconsistent with laws, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it (5 U.S.C. 22). The law is well settled that any such regulation must meet two fundamental tests: (1) it must be reasonable and appropriate (Manhattan Co. v. Commissioner, 297 U.S. 129, 134 (1936); International Ry. v. Davidson, 257 U.S. 506, 514 (1922); Commissioner of Internal

Revenue v. Clark, 202 F.2d 94, 98 (C.A. 7, 1953); Krill v. Arma Corporation, 76 F.Supp. 14 17 (E.D.N.Y., 1948)), and (2) it must be consistent not only with the statutory source of authority, but with the other Federal statutes and policies (Manhattan Co. v. Commissioner, supra; International Ry. v. Davidson, supra; Johnson v. Keating, 17 F.2d 50, 52 (C.A. 1, 1926); In re Merchant Mariners Documents, 91 F.Supp. 426, 429 (N.D.Cal., 1949); Peoples Bank v. Eccles, 161 F.2d 636, 640 (D.C.App., 1947), rev'd. on other grounds, 333 U.S. 426 (1948)).

It may be assumed that a Federal regulation in conflict with a State law will nevertheless fail to prevent the adoption of the State law under the Assimilative Crimes Act, or to terminate the effectiveness of the law, unless the regulation meets the fundamental tests indicated above. However, there appear to be no judicial decisions other than the Rentzel and Nash cases, supra, which both indicated a regulation to be valid that touch upon the subject. No reported judicial decision appears to exist upholding the effectiveness, under the Assimilative Crimes Act, of a primarily regulatory statute containing criminal provisions. Liquor licensing laws, zoning laws, building codes, and laws controlling insurance solicitation, when these provide criminal penalties for violations, are such as are under consideration.

On the other hand, no judicial decision has been discovered in which it has been held that a regulatory statute of the State which was the former sovereign was ineffective in an area under the exclusive jurisdiction of the Federal Government for the

reason that the Assimilative Crimes Act did not apply to federalize such statutes. Several cases have from time to time been cited in support of the theory that the act does not apply to criminal provisions of regulatory State statutes, but in each case the decision of the court actually was based on other grounds, whatever the dicta in which the court may have indulged.

Collins v. Yosemite Park Co., 304 U.S. 518 (1938), involved an attempt by a State body to license and control importation and sale of liquor in an area under partial (denominated "exclusive" in the opinion) Federal jurisdiction, where a right to impose taxes had been reserved by the State. While the court found unenforceable by the State the regulatory provisions of State law attempted to be enforced, it seems clear that it did so on the ground that the State's reservation to tax did not reserve to it authority to

regulate, taxation and regulation being essentially different; there was no question involved as to whether the same regulatory statutes might have been enforced as Federal law by a Federal agency under the Assimilative Crimes Act.

Petersen v. United States, 191 F.2d 154 (C.A. 9, 1951), cert. den., 342 U.S. 885, decided that legislative jurisdiction had been transferred from a State to the United States with respect to a privately owned area within a national park, and on this basis the court held invalid a license issued by the State, contrary to Federal policy, for sale of liquor on the area. As in the Collins case, this was a disapproval of a State attempt to exercise State authority in a matter jurisdiction over which had been ceded to the Federal Government.

In Crater Lake Nat. Park Co. v. Oregon Liquor Control Com'n, 26 F.Supp. 363 (D.Ore., 1939), the court interpreted the Collins case as holding that "the regulatory features of the

California Liquor Act are not applicable to Yosemite National Park," and called attention to the similarity in the facts involved in the two cases. But in the Crater Lake Nat. Park Co. case there was raised for the first time, by motion for issuance injunction, the question whether the Assimilative crimes Act effects the federalization of regulatory provisions of State law; this question the court did not answer, holding that its resolution should occur through a criminal proceeding and that there was no ground for injunctive relief.

The case of Birmingham v. Thompson, 200 F.2d 505 (C.A. 5, 1952), like the Collins and Petersen cases, resulted in a court's disapproval of a State's attempt to exercise State regulatory authority in a matter jurisdiction as to which had been transferred to the Federal Government. Here it was a municipality (under State-derived authority, of cause) which sought to impose the provisions of a building code, particularly the requirement for a build its incidental fee, upon a Federal contractor, and the court held that a State reservation of taxing power did not extend to permit State control of building. Again, there was involved no question as to whether the Assimilative Crimes Act federalized State regulatory statutes.

In the case of Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944), there was involved a State seizure of liquor in transit through State territory to an area under exclusive Federal jurisdiction. The court's decision invalidating the seizure was based on the fact that no State law purported to prohibit or regulate a shipment into or through the State, there was raised the question whether the Assimilative Crimes Act effected an adoption of State law in the Federal enclave, which might have had the effect of making illegal the transactions involved. The court made clear that it was avoiding this question (p. 391):

> Were we to decide that the assimilative crimes statute is not applicable to this shipment of liquors, we would, in effect, be construing a federal criminal statute against the United States

> in a proceeding in which the United States has never been represented. And, on the other hand, should we decide the statute outlaws the shipment, such a decision would be equivalent to a holding that more than 200 Army Officers, sworn to support the Constitution, had participated in a conspiracy to violate federal law. Not only that, it would for practical purposes be accepted as an authoritative determination that all army reservations in the State of Oklahoma must conduct their activities in accordance with numerous Oklahoma liquor regulations, some of which, at least, are of doubtful adaptability. And all of this would be decided in a case wherein neither the Army Officers nor the War Department nor the Attorney General of the United States have been represented, and upon a record consisting of stipulations between a private carrier and the legal representatives of Oklahoma.

While two justices of the Supreme Court rendered a minority opinion expressing the view that the Assimilative Crimes Act adopted State regulatory statutes for the Federal enclave and made illegal the transactions involved, the majority opinion cannot hereby be construed, in view of the plain language with which it expresses the court's avoidance of a ruling on the question, as holding that the Assimilative Crimes Act does not adopt regulatory statutes.

The absence of decisions on the point whether the Assimilative Crimes Act is applicable to regulatory statutes containing criminal provisions may will long continue, in the general absence of Federal machinery to administer and enforce such statutes. In any event, it seems clear that portions of such statutes providing for administrative machinery are inapplicable in Federal enclaves; and in numerous instances

such portions will, in falling, bring down penal provisions from which they are inseparable.

UNITED STATES COMMISSIONERS ACT OF 1940: The act of October 9, 1940 (now 18 U.S.C. 3401), granted to United States commissioners the authority to make final disposition of petty offenses committed on lands under the exclusive or concurrent jurisdiction of the United States, this providing an expeditious method of disposing of many cases instituted under the assimilative crimes statute. By 28 U.S.C. 632, national park commissioners (see 28 U.S.C. 631), have had extended to them the jurisdiction and powers had by United States commissioners under 18 U.S.C. 43001.

The view has been expressed that under this act United States commissioners are not authorized to try persons charged with petty offenses committed within a national monument, a national memorial park, or a national wildlife refuge, because of the fact that United States held the particular lands in a proprietorial interest statue, in accordance with its usual practice respecting lands held for these purposes, and the act authorizes specially designated commissioners to act only with respect to lands over which the United States exercises either exclusive or concurrent jurisdiction.

It is interesting to note that the act of October 9, 1940 (54 Stat. 1058), of which the present code section is a re-enactment by the act of June 25, 1948, was introduced as H.R. 1999, 76th Congress. A similar bill (H.R. 4011) without the phraseology

"or over which the United States has concurrent jurisdiction" was passed by the House of Representatives in the 75th Congress. When the bill was reintroduced in the 76th Congress, the above-quoted words were included at the special request of the National Park Service, since only a small number of national park areas were under the exclusive jurisdiction of the United States, and without some language to provide for the trial jurisdiction of commissioners over petty offenses committed in the other areas the benefits of the proposed legislation could not be realized in many national parks.

The words "concurrent jurisdiction" were suggested because they were understood as including partial (or proprietorial) jurisdiction and as consisting essentially of that jurisdiction of the Federal Government which is provided by the Constitution, article IV, section 8. In fact, for a number of years, a proprietorial interest status as exercised over permanent reservations by the United States was understood among attorneys in the Department of the Interior as "concurrent jurisdiction." This construction has never been placed on the term "concurrent jurisdiction" either by the courts or by Government agencies generally, and at least in recent years the Department of the Interior has not so interpreted the term.

In this connection, it should be noted that the Department of the Interior in the past considered obtaining, in collaboration with other interested Federal agencies, legislation which would authorize United States commissioners to try petty offenses against the United States, regardless of the status of the jurisdiction over the Federal area involved.

The Committee has given consideration to broadening the powers of United States commissioners by authorizing them to act additionally on lands over which the Government has a proprietorial interest only. In the Committee's conclusions and recommendations, it was recommended that the powers of commissioners also extend to any place "* * * which is under the charge and control of the United States."

CHAPTER VI

CIVIL JURISDICTION

RIGHT OF DEFINING CIVIL LAW LODGED IN FEDERAL GOVERNMENT: In general.--Once an area has been brought under the exclusive legislative jurisdiction of the Federal Government, in general only Federal civil laws, as well as Federal criminal laws, are applicable in such area, to the exclusion of State laws. In Western Union Tel. co. v. Chiles, 214 U.S. 274 (1909), suit had been brought under a law of the State of Virginia imposing a statutory civil penalty for

nondelivery of a telegram, the telegram in this instance having been addressed to the Norfolk Navy Yard. The court said (p. 278):

> It is apparent from the history of the establishment of the Norfolk Navy Yard, already given, that it is one of the places where the Congress possesses exclusive legislative power. It follows that the laws of the State of Virginia, with the exception referred to in the acts of Assembly, [right to execute civil and criminal process] cannot be allowed any operation or effect within the limits of the yard. The exclusive power of legislation necessarily includes the exclusive jurisdiction. The subject is so fully discussed by Mr. Justice Field, delivering the opinion of the court in Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, that we need do no more than refer to that case and the cases cited in the opinion. It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those

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> places where the power of exclusive legislation is vested in the congress by the Constitution. Congress already, with the design that the places under the exclusive jurisdiction of the United States shall not be freed from the restraints of the law, has enacted for them (Revised Statutes, LXX, chapter #) an extensive criminal code ending with the provision (Sec. 5391) that where an offense is not specially provided for by any law United States, it shall be prosecuted in the courts of the United States and receive the same punishment prescribed by the laws of the State in which the place is situated for like offenses committed within its jurisdiction. We do not mean to suggest that the statute before us creates a crime in the technical sense. If it is desirable that penalties should be inflicted for a default in the delivery of a telegram occurring within the jurisdiction of the United States, Congress only has the power to establish them.

The civil authority of a State is extinguished over privately owned areas and privately operated areas to the same extent as over federally owned and operated areas when such areas are placed under the exclusive legislative jurisdiction of the United States.

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State reservation of authority.--State reservation of authority to serve process in an area is not inconsistent with Federal exercise of exclusive jurisdiction over the area. It has been held, however, that a reservation of the right to serve process does not permit a State to serve a writ of attachment against either public or private property located on an area under exclusive Federal jurisdiction, and, it would seem, it does not permit State service of a writ of habeas corpus with respect to a person held on such an area. It has also been held, on the other hand, that a reservation to serve process enables service, under a statue appointing the Secretary of

State to receive service for foreign corporations doing business within the State, upon a corporation doing business within the boundaries of the State only upon an exclusive Federal jurisdiction area. And residence of a person on an exclusive Federal jurisdiction area does not toll application of the State statute of limitations where there has been a reservation of the right to serve proc-

ess. While a State may reserve various authority of a civil character other than the right to serve process in transferring legislative jurisdiction over an area to the Federal Government, such reservations result in Federal possession of something less than exclusive jurisdiction, and the rights of States with respect to the exercise of reserved authority in a Federal area will be discussed a subsequent chapter.

Congressional exercise of right.--statute relating to death or injury by wrongful act.--While the Congress has, through the Assimilative Crimes Act and Federal law defining various specific crimes, established a comprehensive system of Federal laws for the punishment of crimes committed in areas over which it has legislative jurisdiction, it has not made similar provision for civil laws in such areas. Indeed, the only legislative action of the Federal Government toward providing Federal civil law in these areas has been the adoption (in the general manner accomplished by the Assimilative Crimes Act), for areas under the exclusive legislative jurisdiction of the United States, of the laws of the several States relating to right of action for the death or injury of a person by the wrongful act or neglect of another. The act of February 1, 1928, has a history relating back to 1919. In that year Senator Walsh of Montana first introduced a bill (S. 206, 66th Cong., 1st Sess.), which was debated and passed by the Senate, but on which the House took no action, having substantially the language of the statute finally enacted. Nearly identical bills were introduce by the same senator and

passed by the Senate, without the filing of a report and without debate, in the three succeeding Congresses. However, not until a fifth bill was presented by the senator (S. 1798, 70th Cong., 1st Sess.) did favorable action ensue in the House, as well as in the Senate, and the bill became law. On but two occasions were these bills debated. When the first bill (S. 206, 66th Cong., 1st Sess.) came up for consideration, on June 30, 1919, Senator Walsh said with respect to it:

> The acts creating the various national parks give to the United States exclusive jurisdiction over those territories, so that a question has frequently arisen as to whether, in case one suffers death by the default or willful act of another within those jurisdiction, there is any law whatever under which the dependents of the deceased may recover against the person answerable for his death. For instance, in the Yellowstone National Park quite a number of deaths have occurred in

connection with the transportation of passengers through the park, and a very serious question arises as to whether, in a case of that character, there is any law whatever under which the widow of a man who was killed by the neglect, for instance, of the transportation company handling the passengers in the park could recover.

The purpose of this proposed statute is to give a right of action in all such cases exactly the same as is given by the law of the State within which the reservation or other place within the exclusive jurisdiction of the United States may be located.

* * * * *

This is merely to give the same right of action in case within a district which is within the exclusive jurisdic-

tion of the United States as is given by the law of the State within which it is located should the occurrence happen outside of the region within the exclusive jurisdiction of the United States.

Senator Smoot interjected:

I understand from the Senator's statement what is desired to be accomplished, but I was wondering whether it was a wise thing to do that at this time. An act of Congress authorizes the payment of a certain amount of money to the widow or the heirs of an employee killed or injured in the public service. It is true that those amounts are usually paid by special bills by way of claims against the Government when there is no objection to them. I do not know just how this bill, if enacted into law, will affect the existing law.

To which Senator Walsh replied:

Let me say to the Senator that we are required to take care of the cases to which he has referred, because they touch the rights of persons in the employ of the United States, and their cause of action is against the United States. This bill does not touch cases of that kind at all. It merely touches cases of injury inflicted by some one other than the Government. Under this bill the Government will be in no wise liable at all.

During Senate consideration of the fifth of the series of bills (S. 1798, 70th Cong., 1st Sess.), on January 14, 1928, the following discussion was had:

Mr. WALSH of Montana. A similar bill has passed the Senate many times, at least three or four, but for some reason or other it has not succeeded in securing the approbation of the House. It is intended practically to

make the application of what is known as Lord Campbell's Act to

places within the exclusive jurisdiction of the United States.

Practically every State now has given a right of action to the legal representatives of the dependent relatives of one who has suffered a death by reason of the neglect or wrongful act of another, there being no such recovery, it will be recalled, at common law.

There are a great many places in the United States under the exclusive jurisdiction of the United States--the national parks, for instance. If a death should occur within those, within the exclusive jurisdiction of the United States, there would be no right of recovery on he part of the representatives or dependents of the person who thus suffered death as a result of the wrongful act or neglect of another.

In the State of the Senator I suppose a right of action is given by the act of the Legislature of the State of Arkansas to the representatives of one who thus suffers, but if the death occur within the Hot Springs Reservation, being entirely within the jurisdiction of the United States, no recovery could be had, because recovery can be had there only by virtue of the laws of Congress. The same applies to the Yellowstone National Park in Wyoming and the Glacier National Park in Montana.

Mr. WALSH of Montana. It would; so that if under the law of Arkansas a right of recovery could be had if the death occurred outside of the national park, the same right of action would exist if it occurred in the national park.

Mr. BRUCE. In other words, as I understand it, it is intended to meet the common-law principle that a personal action dies with the death of the person?

Mr. WALSH of Montana. Exactly.

Only a single written report was submitted (by the House Committee on the Judiciary, on S. 1798) on any of the bills related to the act of February 1, 1928. In this it was stated:

This bill has passed the senate on three or four occasions, but has never been reached for action in the House. This bill gives a right of action in the case of death of any person by neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States within the exterior boundaries of any State.

It provides that a right of action shall exist as though the place were under the jurisdiction of the State and that the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which the national park or other Government reservation may be. Under the common law no right of action survived to the legal representatives in case of death of a person by wrongful act or neglect of another. This was remedied in England by what is known as Lord Campbell's Act, and the states have almost without exception passed legislation

> giving a right of action to the legal representatives or dependent relatives of one who has suffered death by reason of the wrongful act of another. This bill will provide a similar remedy for places under the exclusive jurisdiction of the United States.

It may be noted that neither the language of the 1928 act, nor the legislative history of the act, set out above, cast much light on whether the act constitutes a retrocession of a measure of jurisdiction to the States, or an adoption of State law as Federal law. But a retrocession, it has been seen, requires State consent, and no consent is provided for under this statute,

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unlike the case with repeat to Federal statutes providing for application of State laws relating to workmen's compensation, unemployment compensation, and other matters, where the Federal statute cannot be implemented without some action by the State. It is largely on this basis that the 1928 statute is here classified as a Federal adoption of State law, rather than a retrocession. It may also be noted hat the debate on the bills, and the House report, set out in pertinent part above, indicate that the purpose of the bill was to furnish a remedy to survivors in the nature of that provided by Lord Campbell's Act, and no reference is made to language in the title of the bill, and in its text, suggesting that the bill applied to personal injuries, as well as deaths, by wrongful act. While the question whether the act applies to personal injuries, as well as deaths, appears not to have been squarely presented to the courts, for purposes of convenience, only, the act is herein referred to as providing a remedy in both cases. In any event, however, it would clearly seem not to apply to cases of damage to personal or real property.

The statute adopting for exclusive jurisdiction areas State laws giving a right of action for death or injury by wrongful act or neglect did not, it was held by a case which led to further Federal legislation, adopt a State's workmen's compensation

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law. Murray v. Gerrick & Co., et al., 291 U.S. 315 (1934). An argument to the contrary was answered by the court as follows (p. 318):

> * * * This argument overlooks the fact that the federal statute referred only to actions at law, whereas the state act abolished all actions at law for negligence and substituted a system by which employers contribute to a fund to which injured workmen must look for compensation. The right of action given upon default of the employer in respect of his obligation to contribute to the fund is conferred as a part of the scheme of state insurance and not otherwise. The act of Congress vested in Murray no right to sue the respondents, had he survived his injury. Nor did it authorize the State of Washington to collect assessments for its state fund from an employer conducting work in the Navy Yard. If it were held that beneficiaries may sue,

pursuant to the compensation law, we should have the incongruous situation that this law is in part effective and in part ineffective within the area under the jurisdiction of the federal government. Congress did not intend such a result. On the contrary, the purpose was only to authorize suits under a state statute abolishing the common law rule that the death of the injured person abates the action for negligence.

It was also held in the Murray case that the 1928 Federal statute served to make effective in Federal areas the law as revised from time to time by the State, not merely the law in effect as of the date of transfer of legislative jurisdiction to

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the United States. The issue was not presented, however, whether a State statute enacted after the 1928 Federal statue would apply.

State unemployment compensation and workmen's compensation laws may be made applicable in such areas by authority of the Congress. But while the application of these laws has been made possible by Federal statutes, these statutes, discussed more fully in chapter VII, infra, did not provide Federal laws covering unemployment compensation; rather, they effect a retrocession of sufficient jurisdiction to the States to enable them to enforce and administer in Federal enclaves their State laws relating to unemployment compensation and workmen's compensation. The Federal Government has similarly granted powers to the States for exercise in Federal enclaves with respect to taxation, and these also will be discussed in a subsequent chapter.

Early apparent absence of civil law.--A careful search of the authorities has failed to disclose recognition prior to 1885 of any civil law as existing in areas under the exclusive legislative jurisdiction of the United States. Debates and other parts of the legislative history of the Assimilative Crimes Act, indicating prevalence of a belief that in the absence of Federal statutory law providing for punishment of criminal acts such acts in exclusive jurisdiction areas could not be punished, suggest the existence in that time of a similar belief that in the absence of appropriate Federal statutes no civil law existed in such areas.

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INTERNATIONAL LAW RULE: Adopted for areas under Federal legislative jurisdiction.--In 1885 the United States Supreme Court had occasion to consider the case of Chicago, Rock Island & Pacific Ry. v. McGlinn, 114 U.S. 542, involving a cow which became a casualty on a railroad right-of way traversing fort Leavenworth reservation. At the time that the Federal Government had acquired legislative jurisdiction over the reservation a Kansas law required railroad companies whose roads were not enclosed by a fence to pay damages to the owners of all animals killed or wounded by the engines or cars of the companies without reference to the existence of any negligence. A State court had held the law applicable to the casualty involved in the McGlinn case. The United States Supreme Court, in affirming the judgment of the State court, explained as follows its reasons for so

doing (p. 546):

> It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction

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> and legislative power--and the latter is involved in the former--to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action by the new government, they are altered or repealed. American Insurance Co. v. Canter, 1 Pet. 542; Halleck, International Law, ch. 34, Sec. 14.

The rule thus defined by the court had been applied previously to foreign territories acquired by the United States (American Insurance Company v. Canter, 1 Pet. 511 (1828)), but not until the McGlinn case was it extended to areas within the States over which the Federal Government acquired exclusive legislative jurisdiction. The McGlinn case has been followed many times, of course; adoption of the international

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law rule for areas under exclusive legislative jurisdiction has filled a vacuum which would otherwise exist in the absence of Federal legislation, and furnishes a code of civil law for Federal enclaves.

Federalizes State civil law, including common law.--The rule serves to federalize not only the statutory but the common law of a State. Kniffen v. Hercules Powder Co., 164 Kan. 196, 188 P.2d 980 (1948); Kaufman v. Hopper, 220 N.Y. 184. 115 N.E. 470 (1917), see also 151 App. Div. 28, 135 N.Y.Supp. 363 (1912), aff'd., 163 App. Div. 863, 146 N. Y. Supp. 1096 (1914); Norfolk & P.B.L.R. v. Parker,

152 Va. 484, 147 S.E. 461 (1929); Henry Bickel Co. v. Wright's Administratrix, 180 Ky. 181, 202 S.W. 672 (1918). But it applies merely to the civil law, not the criminal law, of a State. In re Ladd, 74 Fed. 31 (C.C.D.Neb., 1896). See also 22 Calif. L. Rev. 152, 164 (1934).

Only laws existing at time of jurisdiction transfer federalized.--It should be noted, however, that the international law rule brings into force only the State laws in effect at the time the transfer of legislative jurisdiction occurred, and later State enactments are not effective in the Federal enclave. So, in

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Arlington Hotel Company v. Fant, 278 U.S. 439 (1929), the court charged an innkeeper on a Federal reservation at Hot Springs, Arkansas, with liability s an insurer of his guests' personal property against fire, under the common law rule, which was in effect in that State at the time legislative jurisdiction had passed to the United States over he area involved, although Arkansas, like most or all States, had subsequently modified this rule by statute so as to require a showing of negligence. The non-applicability to areas under exclusive Federal legislative jurisdiction of State statutes enacted subsequent to the transfer of jurisdiction to the Federal Government has the effect that the civil law applicable in such areas gradually becomes obsolete, as demonstrated by the Arlington Hotel Co. case, since the Federal Government has not legislated for such areas except in the minor particulars already mentioned.

CIRCUMSTANCES WHEREIN FORMER STATE LAWS INOPERATIVE: (A). By action of the Federal Government.--That an act of Congress may constitute the "direct action of the new government" mentioned in the McGlinn case which will in validate former State laws in an area over which exclusive legislative jurisdiction has been transferred to the Federal Government apparently has not been the subject of litigation, undoubtedly because the matter is so fundamental and self-evi-

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dent. In Webb v. J.G. White Engineering Corp., 204 Ala. 429, 85 So. 729 (1920), State laws relating to recovery for injury were held inapplicable to an employee of a Federal contractor on an exclusive Federal jurisdiction area on the ground that Federal legislation had pre-empted the field. It is not clear whether the same result would have obtained in the absence of exclusive jurisdiction in the Federal Government over the area in which the injury occurred. The "direct action of the new government" apparently may be action of the Executive branch as well as of the Congress. In the case of Anderson v. Chicago and Northwestern R.R., 102 Neb. 578, 168 N.W. 196 (1918), the facts were almost precisely as in the McGlinn case. However, the War Department had ordered the railroad not to fence the railroad right-of-way on the ground that such fencing would interfere with the drilling and maneuver of troops. The defendant railroad was held not liable in the absence of a showing of negligence. The court said (102 Neb. 584):

> The war department has decided that the fencing of the right of way would impair the effectiveness of the territory for the purpose for which the cession was made. That department possesses peculiar and technical skill and knowledge of the needs of the nation in the training of its defenders, and of the necessary conditions to make the ceded territory fit for the purpose for which it was acquired. It is not for the state or its citizens to interfere with the purposes for which control of the territory was ceded, and, when the defendant was forbidden to erect the fences by that department of the United States government lawfully in control of the

> reservation, no other citizen can complain of non-performance of held defendant guilty of a violation of law.

(b) Where activity by State officials required.--An apparent exception to the international law rule is concerned with State laws which require administrative activity on the part of State officials. In Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940), the question was presented as to whether certain safety requirements prescribed by the New York Labor Law applied to a post office building which was being constructed in an area over which the Federal Government had exclusive legislative jurisdiction. An employee of a contractor engaged in the construction of the New York City Post Office fell from the building and was killed. His administratrix, in an action of tort against the contractor, narrowed the scope of the charges of negligence until there finally was alleged only the violation of a subsection of the New York Labor Law which required the planking of floor beams. The Supreme Court of the United States, in upholding a judgment for the administratrix based upon a finding that the Labor Law was applicable, said (pp. 101-103):

> It is urged that the provisions of the Labor Law contain numerous administrative and other provisions which cannot be relevant to federal territory. The Labor Law does have a number of articles. Obviously much of their language is directed at situations that cannot arise in the territory. With the domestication in the excised area of the entire applicable body of state municipal law much of the state law must necessarily be appropriate. Some sections authorize quasi-judicial proceedings or administrative action and may well have no validity in the federal area. It is not a question here of the exercise of state administrative authority in federal territory. We do not agree, however, that because the Labor Law is not applicable as a whole, it follows that none of its sections are. We have in Collins v. Yosemite Park Company that the sections of a Cali-

> fornia statute which levied excises on sales of liquor in Yosemite National Park were enforceable in the Park, while sections of the same statute providing regulation of the Park liquor traffic through licenses were unenforceable.

In view of the decisions in the Sadrakula and Gerrick cases, the conclusion is inescapable that State laws which contemplate or require administrative action are not effective under the international law rule. Clearly, the States receive no authority to operate administrative machinery within areas under exclusive Federal legislative jurisdiction through the adoption of State law as Federal law for the areas. Therefore, adoption as Federal law of a State law requiring administrative action would be of little effect unless the Federal Government also established administrative machinery paralleling that of the State. Instead of providing for the execution of such State laws as Federal law, the Federal Government has authorized the States to extend the application of certain such laws to areas of exclusive Federal legislative jurisdiction. Thus, as has been indicated, the States have been authorized to extend their workmen's compensation and unemployment compensation laws to such Federal areas. However, little or no provision has been made for either State of Federal administration of laws in various other fields.

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(c) Inconsistency with Federal law.--In Hill v. Ring Construction Co., et al., 19 F.Supp. 434 (W.D.Mo., 1937), which involved a contract question, the court refused to give effect under the international law rule to a statute which had been in effect in the State involved at the time legislative jurisdiction was transferred to the federal Government. This statute provided that thirteen and one-half cubic feet (rather than the mathematically provable 27 cubic feet) constituted a cubic yard. In refusing to apply the statute, the court stated it was inconsistent with the "national common law" which, according to the court, provides that "two added to two were always four and a cubic yard was a cubic yard." The court makes clear, however, that it strained to this conclusion. There appears to be no reported decision except that in the Hill case, supra, wherein a State civil law has been declared in applicable as Federal law under the international law rule in an area under exclusive Federal jurisdiction because of its inconsistency with other law of the new Federal sovereign. There are similarly no cases holding State law applicable notwithstanding such inconsistency. The rule, as it was definition the McGlinn case, is very clear on this subject, however, and State civil laws inconsistent with Federal laws would fall under the international law rule as State criminal laws inconsistent with Federal laws fall under the Assimilative Crimes Act.

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INTERNATIONAL LAW RULE IN RETROCESSION OF CONCURRENT JURISDICTION: A question which has not as yet been considered by the courts is the extent to which, if to any, the international law rule is applicable to areas which had been subject to exclusive legislative jurisdiction, and over which concurrent jurisdiction has been retroceded to the State. The fact hat concurrent jurisdiction only is retroceded, would, as a matter of statutory construction, suggest that Federal law currently in effect in the area is unaffected. The applicable Federal criminal laws would not,

presumably, be repealed or suspended by a retrocession of concurrent jurisdiction, nor any other Federal statutes which were enacted for areas Federal legislative jurisdiction. Similarly, it might be argued, such retrocession of concurrent jurisdiction does not serve to repeal Federal laws which were adopted pursuant to the international law rule. While it is a seeming anomaly to have two sets of laws governing civil matters, it seems no more anomalous than to have two sets of criminal laws applicable to the same crime, and that, it has been seen, is a state of fact, to which reasonably satisfactory adjustment appears to have been made. However, an adjustment to two sets of civil laws would seen more difficult, and, indeed, perhaps it would not be entirely possible. The considerations supporting a conclusion that laws federalized under the international law rule would not survive a retrocession of concurrent jurisdiction to the State have their bases in the fact that international law rule is applied as a matter of necessity, in order to avoid a vacuum in the area which has been the subject of the jurisdictional transfer. When the need for the application of the rule no longer exists, it is logical to assume, the laws which have been adopted thereunder are no longer effective. merit of this conclusion rests on practical considerations as well as logic, and these considerations would seem to make the conclusion outweigh the contrary position, based solely on considerations of logic.

STATE AND FEDERAL VENUE DISCUSSED: The civil laws effective in an area of exclusive Federal jurisdiction are Federal law, notwithstanding their derivation from State laws, and a cause arising under such laws may be brought in or removed to a Federal district court under sections 24 or 28 of the former Judicial Code (now sections 1331 and 1441 of title 28, United States Code), giving jurisdiction to such courts of civil actions arising under the "* * * laws * * * of the United States" where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs. Steele v. Halligan, 229 Fed. 1011 (W.D.Wash., 1916). To the same effect as the holding in the Steele case, and following the decisions in the McGlinn and Arlington Hotel Co. cases, were those in Coffman v. Cleveland Wrecking Co., et al., 24 F.Supp. 581 (W.D.Mo., 1938), and in Jewell v. Cleveland Wrecking Co. of Cincinnati, et al., 28 F.Supp. 366 (W.D.Mo., 1938), rev'd. on other grounds, 111 F.2d 305 (C.A. 8, 1940). In each of these it was decided that laws of the State (Missouri) existing at the time of Federal acquisition of legislative jurisdiction over an area became "laws of the United States" within that area. However, in a related case in the same district (Jewell v. Cleveland Wrecking Co., 28 F.Supp. (W.D.Mo., 1938)), another judge appears to have rejected this view of the law on grounds not entirely clear but having their bases in the fact that the trial in the McGlinn case, supra, occurred in a State court (it involved a transitory action).

Transitory actions may be brought in State courts notwithstanding that they arise out of events occurring in an exclusive Federal jurisdiction area. Ohio River contract Co. v. Gordon, 244 U.S. 68 (1917). Indeed, unless there is involved one of

the special situations (admiralty, maritime, and prize cases, bankruptcy matters and proceedings, etc.), as to which Federal district courts are given original jurisdiction by chapter 85 of title 18, United States Code, only State courts, and not Federal district courts, may take cognizance of an action arising out of events occurring in an exclusive Federal jurisdiction area unless the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs. But State authority to serve process in exclusive Federal jurisdiction areas is limited to process relating to activities occurring outside of the areas, although a number of States now reserve broader authority relating to service of process, so that unless process can be served on the defendant outside the exclusive Federal jurisdiction area it appears that even a transitory action arising in such an area could not be maintained in a State court. In such a case it appears that no remedy whatever exists, even with

respect to a transitory cause of action, where the matter in controversy does not involve the Federal jurisdiction area, generally is held as not cognizable in State courts. So, except, as local actions may come within the purview of the limited (except in the District of Columbia) authority of Federal district courts to entertain them, no remedy is available in many types of such actions arising in Federal exclusive jurisdiction areas. Divorce actions and actions for probate of wills, it will be seen, have constituted a special problem in this respect. Local actions pending in the State courts at the time of transfer of legislative jurisdiction from a State to the Federal Government should be proceeded in to a conclusion, it has been held. Van Ness v. Bank of the United States, 13 Pet. 15 (1839).

FEDERAL STATUTES AUTHORIZING APPLICATION OF STATE LAW: As has been indicated, the federal Government has authorized the extension of State workmen's compensation and unemployment compensation laws to areas of exclusive legislative jurisdiction. In addition, the States have been authorized to extend certain of their tax laws to such areas. As a consequence, areas of exclusive legislative jurisdiction are as completely subject to certain State laws as areas in which the Federal Government has only a proprietorial interest. The operation and effect of the extension of these State laws is considered more fully in chapter VII.

CHAPTER VII

RELATION OF STATE TO FEDERAL ENCLAVES

EXCLUSIVE FEDERAL JURISDICTION: States basically without authority.--When the Federal Government has acquired exclusive

legislative jurisdiction over an area, by any of the three methods of acquired such jurisdiction, it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area.

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no legislative jurisdiction over the area to which the milk was delivered. In holding that California could not enforce its regulations, the court said (pp. 294-295):

> The exclusive character of the jurisdiction of the United States on Moffett Field is conceded. Article I, Sec. 8, clause 17 of the Constitution of the United States declares the Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *."
>
> When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation. The state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; * * *." It would be a denial of the federal power "to exercise exclusive Legislation." As respects such federal territory Congress has the combined powers of a general and a state government.
>
> The answer of the State and of the court below is one of confession and avoidance,--confession tat the law in fact operates to affect action by the appellant within federal territory, but avoidance of the conclusion of invalidity by the assertion that the law in essence is the regulation of conduct wholly within the state's jurisdiction.

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> The court below points out that the statute regulates only the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price--not the sale on Moffett Field--which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders. We think,

however, that it is without application here, because of the authority granted the federal government over Moffett Field.

In the light of the history of the legislation, we are constrained to find that the true purpose was to punish California's own citizens for doing in exclusively federal territory what by the law of the United States was there lawful, under the guise of penalizing preparatory conduct occurring in the State, to punish the appellant for a transaction carried on under sovereignty conferred by Art. In Sec. 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause.

In the Pennsylvania case, which involved an area not subject to exclusive legislative jurisdiction, a contrary conclusion was reached. The court said (p. 269):

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We may assume that Congress, in aid of its granted power to raise and support armies, Article I, Sec. 8, cl. 12, and with the support of the supremacy clause, Article VI, Sec. 2, could declare State regulations like the present inapplicable to sales to the government. * * * But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution. We may assume also that, in this absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. * * * But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, * * * and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation.

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In each of the Dairy case there were dissents. A dissent in the Pennsylvania case based on the ground that, in the view of the dissenting justice, Congressional policy contemplated securing milk at a price freely determined by competitive forces, and that, since the Pennsylvania regulation prevented the fruition of that policy, it was invalid. In two dissents in the California case, views were expressed which, if adopted, would require congressional action undertaking the exercise of jurisdiction over an area purchased with the consent of the State before the jurisdiction of the State would be ousted. It is emphasized that these views do not represent the state of the law. In one dissent it was said (pp. 305-306):

The "exclusive legislation" clause has not been regarded as

> absolutely exclusory, and no convincing reason has been advanced why the nature of the federal power is such that it demands that all state legislation adopted subsequent to the acquisition of an enclave must have no application in the area. * * *
>
> If Congress exercises its paramount legislative power over Moffett Field to deny California the right to do as it has sought to do here, the matter is of course at an end. But until Congress does so, it should be the aim of the federal military procurement officers to observe statutes such as this established by state action in furtherance of the public health and welfare, and otherwise so conduct their affairs as to promote public confidence and good will.

The evident suggestion in this statement that the Federal Government must exercise its exclusive jurisdiction before State jurisdiction is ousted apparently is without Federal jurisdiction precedent. Moreover, this view would, if carried to its logical conclusion, undermine the basis for the international law rule and render unnecessary the application of the rule to areas subject to exclusive legislative jurisdiction, since it would

seem that, under this view, the laws of the State governing matters on which the Federal Government had not legislated would be fully effective in such areas. Finally, in view of the opinion expressed by the majority of the Court in the Pennsylvania case that Congress could direct noncompliance with the State regulation involved in that case, the dissenting justice's suggestion that noncompliance in areas of exclusive legislative jurisdiction must be based on a similar congressional direction would, it seems, serve to nullify legal distinctions between the two types of areas.

In a second dissent in the California case, there were expressed views somewhat similar to those indicated above. The other dissenting justice stated (p. 300):

> Enough has been said to show that the doctrine of "exclusive jurisdiction" over federal enclaves is not an imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally-owned lands within a state--problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves. If Congress speaks, state power is of course determined by what Congress says. If Congress makes the law of the state in which there is a federal site as foreign there as is the law of China, then federal jurisdiction would really be exclusive. But short of such Congressional assertion of overriding authority, the phrase "exclusive jurisdiction" more often confounds than solves problems due to our federal system.

This suggestion that congressional action is an imperative to establish exclusive Federal legislative jurisdiction is, of course, subject to the same comment as is applicable to similar views expressed by the other dissenting justice. However, the second dissenting justice also deplored the varied results which are effected by different degrees of Federal jurisdiction, and

after citing some incongruities which might arise, he stated (p. 302):

> These are not far-fetched suppositions. They are the inevitable practical consequences of making decision here depend upon technicalities of "exclusive jurisdiction"--legal subtleties which may become relevant in dealing with prosecution for crime, devolution of property, liability for torts, and the like, but which as a matter of good sense surely are wholly irrelevant in defining the duty of contracting officers of the United States in making contracts in the various States of the Union, where neither Congress nor the authoritative voice of the Army has spoken. In the absence of such assertion of superior authority, state laws such as those here under consideration appear, as a matter of sound public policy, equally appropriate whether the federal territory encysted within a state be held on long or short term lease or be owned by the Government on whatever terms of cession may have been imposed.

The majority opinion in the California case anticipated the dissents and alluded to the suggestions contained in them as follows (pp. 295-296):

> We have this day held in Penn Dairies v. Milk Control Commission, ante, p. 261, that a different decision is required when the contract and the sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The conclusions may seem contradictory; but in preserving the balance between national and state power, seemingly inconsequential differences often require diverse results. This must be so, if we are to accord to various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or technical distinctions or o deal in legal refinements. Here we are bound to respect the relevant

> constitutional provision with respect to the exclusive power of Congress over federal lands. As Congress may, if it find the national interest so requires, override the state milk law of Pennsylvania as respects purchases for the Army, so it may, if not inimical to the same interest subject its purchasing officers on Moffett Field to the restrictions of the milk law of California. Until it speaks we should enforce the limits of power imposed by the provisions of the fundamental law.

The companion Dairy case are significant in a number of respects. They illustrate sharply the effects of exclusive legislative jurisdiction in curbing the authority of the States. Quite clearly, they establish that the law of the State has no application in an area of exclusive legislative jurisdiction, and that such exclusion of State authority rests on the fact of exclusive

legislative jurisdiction; it is unnecessary for Congress to speak to effect that result. Such jurisdiction serves to exclude not only the operation of State laws which constitute an interference with a Federal function, but also the application of State laws which are otherwise not objectionable on constitutional grounds.

The Dairy case are also significant in that they indicate some disposition, as on the part of the justices constituting a minority of the court in the California case, to regard exclusive legislative jurisdiction as not constituting a barrier to the application of State law absent an expression by Congress that such barrier shall exist. Such a view constitutes, it seems clear, a sharp departure from overwhelming precedent, and serves to blur the historical legal distinctions between areas of exclusive legislative jurisdiction and areas in which the Federal Government has only a proprietorial interest.

The views of the majority of the Supreme Court in the California case are in accord with other decisions which have considered the effects of exclusive legislative jurisdiction on

the authority of the State with respect to the area subject to such jurisdiction.

Authority to tax excluded.--Exclusive Federal legislative jurisdiction, it seems well settled, serves to immunize from State taxation privately owned property located in an area subject to such jurisdiction.

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ter is Surplus Trading Co. v. Cook, 281 U.S. 647 (1930), wherein the Supreme Court held that Arkansas was without authority to tax privately owned personal property located on a military reservation which was purchased by the Federal Government with the consent of the legislature of the State in which it was located. The Supreme Court based its conclusion on the following proposition of law (p. 652):

> It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision [viz., article I, section 8, clause 17], to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.

In reaching its conclusion, the Supreme Court cited early cases such as Commonwealth v. Clary, 8 Mass. 72 (1811); Mitchell v. Tibbetts, 17 Pick 298 (Mass., 1839); United States v. Cornell, 25 Fed.Cas. 646, No. 14,867 (C.C.D.R.I., 1819); and Sinks v. Reese, 19 Ohio St. 306 (1869). The Supreme Court also quoted with approval the statement which was made in reliance on these same early cases in Fort Leavenworth R.R. v. Lowe, supra, at 537:

> These authorities are sufficient to support the proposition

> which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

In the Cook case the area had been purchased by the Federal Government with the consent of the legislature of the State, jurisdiction thereby passing to the United States under clause 17. In Standard Oil Company of California v. California, 291 U.S. 242 (1934), the Supreme Court held that a cession of

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exclusive legislative jurisdiction to the Federal Government by a State also served to deprive the latter of the authority to lay a license tax upon gasoline sold and delivered to an area which was the subject of the jurisdictional cession.

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> Appellant challenges the validity of the taxing act as construed by the Supreme Court. The argument is that since the State granted to the United States exclusive legislative jurisdiction over the Presidio, she is now without to impose taxes in respect of sales and deliveries made therein. This claim, we think, is well founded; * * *.

In Coleman Bros. Corporation v. City of Franklin, 58 F.Supp. 551 (D.N.H., 1945), aff'd. , 152 F.2d 527 (C.A. 1, 1945), cert. den., 328 U.S. 844, the same conclusion was reached with respect to the attempt of a city to tax the personal property used by a contractor in constructing a dam on an area of exclusive Federal legislative jurisdiction, and in Winston Bros. Co. v. Galloway, 168 Ore. 109, 121 P.2d 457 (1942), thee is distinguished the applicability of a tax on net earnings from work done by a Federal contractor on land over which the Federal Government did not have legislative jurisdiction, and that done on land over which it did have jurisdiction.

Other authority excluded.--Attempts on the part of the States to regulate other activities in areas under Federal legislative jurisdiction have met with the same fate as attempts to control milk prices and to levy taxes. Thus, in In re Ladd,

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74 Fed. 31 (C.C.D.Neb., 1896), it was held that the laws of Nebraska requiring a permit to sell liquor do not apply to areas of exclusive legislative jurisdiction. See also Farley v. Scherno,

208 N.Y. 269, 101 N.E. 891 (1913). A State cannot, without an express reservation of authority to do so, enforce in an area under Federal legislative jurisdiction the regulatory features of its Alcoholic Beverage Control Act. Collins v. Yosemite Park Co., 304 U.S. 518 (1938). Nor may a State license, under its Alcoholic Beverage Control Act, sale of liquor in an area which is within the exterior boundaries of the State but under exclusive Federal jurisdiction. Peterson v. United States, 191 F.2d 154 (C.A. 9, 1951), cert. den., 342 U.S. 885.

And, it appears, a State may not prevent, tax, or regulate the shipment of liquor from outside of the State to an area within the exterior boundaries of the State but under exclusive Federal legislative jurisdiction. Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944); see also State v. Cobaugh, 78 Me. 401 (1886); and Maynard & Child, Inc. v. Shearer, 290 S.W.2d 790 (Ky., 1956). But it has been held that a wholesaler may not make a shipment of liquor to an area within the same State which is subject to exclusive Federal jurisdiction under a license from the State to export liquor, nor to an unlicensed purchaser in the area where the wholesaler's license for domestic sales limited such sales to licensed purchasers. McKesson & Robbins v. Collins, 18 Cal. App. 2d 648, 64 P.2d 469 (1937). And an excise tax has been held applicable to liquor sold to (but not by) retailers located on Federal enclaves, where the tax is on sales by wholesalers. Op.A.G., Cal., No. 10,255 (Oct. 8, 1935).

State laws (and local ordinances) which provide for administrative action have no application to areas under exclusive Federal legislative jurisdiction. State and local governments cannot enforce ordinances relating to licenses, bonds, inspections, etc., with respect to construction in areas under exclusive

Federal jurisdiction. Oklahoma City, et al. v. Sanders, 94 F.2d 323 (C.A. 10, 1953); Op. A.G., N.M., Mo. 5340 (Mar. 6, 1951); id. No. 5348 (Mar. 29, 1951); see also Birmingham v. Thompson, 200 F.2d 505 (C.A. 5, 19522). Other State and local licensing provisions are also inapplicable in such areas. A State cannot enforce its game laws in an area where exclusive legislative jurisdiction over wildlife has been ceded to the United States. Chalk v. United States, 114 F.2d 207 (C. A. 4, 1940), cert. den., 312 U.S. 679.

None of the laws of a State imposing special duties upon its residents are applicable to residents of areas under exclusive Federal legislative jurisdiction. In one of the very earliest cases relating to exclusive Federal legislative jurisdiction, it was stated that inhabitants of such areas are not "held to pay any taxes imposed by its [i.e. the State's] authority, nor bound by any of its laws,"

and it was reasoned that it might be very inconvenient to the United States to have "their laborers, artificers, officers, and other persons employed in their service, subjected to the services required by the Commonwealth of the inhabitants of the several towns." Commonwealth v. Clary, 8 Mass. 72 (1811). A State statute requiring residents of the State to work on State roads is not applicable to residents of an area subject to exclusive Federal legislative jurisdiction. 16 Ops. A. G. 468 (1880); Pundt v. Pendleton, 167 Fed. 997 (N.D.Ga., 1909).

But in Bailey v. Smith, 40 F.2d 958 (S.D.Iowa), it was held that a resident of an exclusive Federal jurisdiction area was not exempt under a State automobile registration law which exempted persons who had complied with registration laws of the State, territory, or Federal district of their residence, the term "Federal district" being construed to apply only to the District of Columbia, and the United States Supreme Court has upheld a requirement for registration with the State under similar circumstances. Storaasli v. Minnesota, 283 U.S. 57 (1931). See also Valley County v. Thomas, 109 Mont. 345, 97 P.2d 345 (1939).

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Status of State and municipal services.--The Comptroller General of the United States consistently and on a number of occasions has disapproved proposed payment by the federal Government to a State or local government of funds for fire-fighting on a Federal installation, either for services already rendered or for services to be rendered on a contractual basis. In support of his position he has maintained that there exists a legal duty upon municipal or other fire-fighting organizations to extinguish fires within the limits of their municipal or other boundaries. He has not, in his decisions on these matters, distinguished between areas which are and those which are not under the legislative jurisdiction of the United States.

The Comptroller General has indicated that his views relating to fire-fighting extend too her similar services ordinarily rendered by or under the authority of a State. See 6 Comp. Gen. 741 (1927); Comp. Gen. Dec. B-50348 (July 6, 1945); cf. id. B-51630 (Sept. 11, 1945), where estimates and hearings made clear that an appropriation act was to cover cost of police and fire protection under agreements with municipalities. In disapproving a proposed payment to a municipality for fir-fighting services performed on a Federal installation, he said (24 Comp. Gen. 599, 603):

> * * * if a city may charge the Federal Government for the service of its fire department under the circumstances here involved, would it not follow that a charge could be made for the service of its police department, the services of its street-cleaning department and all similar service usually rendered by a city for the benefit and welfare of its inhabitants.

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No court decisions dealing directly with questions of obligation for the rendering of State and municipal services to Federal installations have been found. It would appear, however, with

respect to Federal areas over which a State exercises legislative jurisdiction, that while the furnishing of fire-fighting and similar services would be a matter for the consideration of officials of the State or a local government, the obligation to furnish them would be a concomitant of the powers exercised by those authorities within such areas (Comp. Gen. Dec. B-126228 (Jan. 6, 1956).

It may be noted that the Congress has provided authority for Federal agencies to enter into reciprocal agreements with fire-fighting organizations for mutual aid in furnishing fire protection, and, further, for Federal rendering of emergency fire-fighting assistance in the absence of a reciprocal agreement.

Service of process.--It has been held many times that the reservation by a State (or the grant to the States by the United States) of the right to serve process in an area is not inconsistent with Federal exercise of exclusive jurisdiction over the area. In each of the instances in which the consistency with exclusive Federal jurisdiction of a State's right to save process has been upheld, however, either the State had expressly reserved this right or the Congress had authorized such service. It seems entirely probable that in the absence of either a reservation of a Federal statutory authorization covering the matter a State would have no greater authority to serve process

in an area of exclusive Federal jurisdiction than it does in an area beyond its boundaries. It has bee so held by the Attorney General.

STATE RESERVATIONS OF JURISDICTION: In general.--In ceding legislative jurisdiction to the Federal Government, and also in consenting to the purchase of land by the Federal Government pursuant to article I, section 8, clause 17, of the Constitution, it is a common practice of the States to reserve varying quanta jurisdiction.

There is now firmly established the legal and constitutional propriety of reservations of jurisdiction in State consent and cession statutes. Subject to only one general limitation, a State has unlimited discretion in determining the character and scope of the reservation which it desires to include in such statutes. The sum and substance of the limitation appears to be that a State may not by a reservation enlarge its authority with respect to the area in question; or, to put it conversely, that a reservation of jurisdiction by a State may not diminish or detract from the power and authority which the Federal Government possesses in the absence of a transfer to it of legislative jurisdiction.

Reservations construed.--State reservations of jurisdiction have presented few legal problems. In no instance has a State reservation of jurisdiction been invalidated, or its scope nar-

rowed, on the ground that its effect was to enlarge the power of the State or to interfere with the functions of the Federal Government. Instead, the reported cases involving such reservations have presented questions concerning the scope of the reservation actually made. Thus, in Collins v. Yosemite Park Co., 304 U.S. 518 (1938), it was held that a reservation by a State of the right to tax the sale

of liquor does not include the right to enforce the regulatory features of the State's alcoholic beverage control act in an area in which, except inter alia the right to tax, the tax, the entire jurisdiction of the State had been ceded to the Federal Government. Similarly, in Birmingham v. Thompson, 200 F.2d 505 (C.A. 5, 1952), it was held that even though the State, in ceding jurisdiction to the Federal Government, reserved the right to tax persons in the area over which jurisdiction had been ceded, a city could not require the payment of a license fee by a contractor operating in the area where issuance of the license was coupled with a variety of regulatory provisions. The results reached in these two cases suggest that State statutes transferring jurisdiction will be construed strictly. Only those matters expressly mentioned as reserved will remain subject to the jurisdiction of the State.

AUTHORITY OF THE STATES UNDER FEDERAL STATUTES: In general.--In order to ameliorate some of the practical consequences of exclusive legislative jurisdiction, Congress has enacted legislation permitting the extension and application of certain State laws to areas under Federal legislation jurisdiction. Thus, Congress has authorized the States to extend to such areas certain State taxes on motor fuel (the so-called "Lea Act," 4 U.S.C. 104); to apply sales, use, and income taxes to such areas (the so-call "Buck Act," 4 U.S.C. 105 et seq.); to tax certain private leasehold interests on Government owned lands (the so-called "Military Leasing Act of 1947," 61 Stat. 774); and to extend to federal areas their workmen's compensation and unemployment compensation laws (26 U.S.C. 3305 (formerly 1606), subsec. (d), and act of June 25, 1936, 49 Stat. 1938, 40 U.S.C. 290, respectively). Congress has also enacted a statute retroceding to the States jurisdiction pertaining to the administration of estates of decedent residents of Veterans' Administration facilities, and, from time to time, various legislation providing for Federal exercise of less than exclusive jurisdiction in specific areas where conditions in the particular area or the character of the Federal undertaking thereon indicated the desirability of the extension of a measure of the State's jurisdiction to such areas.

Lea Act.--A 1936 statute, variously known as the Lea Act and the Hayden-Cartwright Act, amended the Federal Highway Aid Act of 1916, by providing (section 10):

> That all taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor

> vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, Licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. * * *

The legislative history of this particular section of the act is meager and appears to be limited to matter contained in the

Congressional record. It is indicated that the language of this section was sponsored by organizations of State highway and taxing officials. An amendment comprised of this language was offered by Senator Hayden, of arizona, and was read and passed by the Senate without question or debate. It is logical to assume that the amendment was inspired by the decision of the Supreme Court in the Standard Oil Company case discussed on page 178, above.

Under this section, as it was amended by the Buck Act in 1940, States are given the right to levy and collect motor vehicle fuel taxes within Federal areas, regardless of the form of such taxes, to the same extent as though such areas were not Federal, unless the fuel is for the exclusive use of the Federal Government. Sanders v. Oklahoma Tax Commission, 197 Okla. 285, 169 P.2d 748 (1946), cert. den., 329 U.S. 780. Sales to Government contractors are taxable under the act, but not sales to Army post exchanges, which are arms of the

Federal Government and partake of its immunities under this act.

Buck Act.--Four years later, in 1940, Congress enacted a retrocession statute of wide effect. This law, commonly known as the Buck Act, retroceded to the States partial jurisdiction over Federal areas so as to permit the imposition and collection of State sale and use taxes and income taxes within Federal areas. The Federal Government and its instrumentalities were excepted.

The House of Representatives passed a bill during the first session of the 76th Congress which embodied nearly all of relating to the collection of income taxes from Federal employees residing on Federal enclaves and to an amendment of the Hayden-Cartwright Act of 1936. These additional matters were added as amendments to the House bill after Senate hearings were held. The intent behind the House bill, passed during the first session of the 76th Congress, as stated in the report accompanying the bill to the floor was:

> The purpose of H.R. 6687 is to provide for uniformity in the administration of State sales and use taxes within as well as without Federal areas. It proposes to authorize the levy of State taxes with respect to or measured by sales or purchases of tangible personal property on Federal areas. The taxes would in the vast majority of cases be paid to the State by sellers whose places of business are located off the Federal areas and who make sales of property to be delivered in such areas.
>
> The application of such taxes to the gross receipts of a retailer from sales in which delivery is made to an area

> over which it is asserted the United States possesses exclusive jurisdiction is being vigorously contested even though the retailer's place of business is located off the Federal area and the negotiations leading to the sale are conducted and the contract of sale is executed at the retailer's place of business. Despite the existence of these facts, which are

generally sufficient to give rise to liability for the tax, and which, insofar as the theory of the tax is concerned, should, in the opinion of your committee, be sufficient to impose tax liability, exemption from the tax is asserted upon the ground that title to the property sold passes on the Federal area and, accordingly, the sale occurs on land which the State lacks authority.

Passage of this bill will clearly establish the authority of the State to impose its sales tax with respect to sales completed by delivery on Federal areas, and except insofar as the State tax might be a prohibited burden upon the United States would not, with the exception hereinafter noted, impose any duty upon any person residing or located upon the Federal area. Such action would merely remove any doubt which now exists concerning the authority of the State to require retailers located within the State and off the Federal areas to report and pay the tax on the gross receipts from their sales in which delivery is made to a Federal area. A minor problem presented with respect to the application of State sales taxes on Federal areas involves the responsibility for such taxes of post exchanges, shop-service stores, commissaries, licensed traders, and other similar agencies operating on Federal areas.

Congress, in the amendment of section 10 of the Hayden-Cartwright act, provided for the application of motor-vehicle fuel taxes with respect to the sales or distributions of such agencies. It would appear therefore to be entirely proper to provide for the application of sales

taxes with respect to the retail sales of tangible personal property of such agencies.

The State have been extremely generous in granting to the United States exclusive jurisdiction over Federal areas in order that any conflicts between the authority of the United States and a State might be avoided. It would appear to be an equally sound policy for the United States to prevent the avoidance of State sales taxes with respect to sales on Federal areas by specifically authorizing, except insofar as the taxes may constitute a burden upon the United States, the application of such taxes on those areas.

The House bill was amended by the Senate and therefore certain portions of this report must be read in the light of senate changes in the bill.

The report of the Senate committee on finance which considered the House bill is also most informative in regard to the intent of Congress in enacting the law. The Senate report gives the reasons for the general provision on the application of State sales and use taxes to Federal enclaves as:

Section 1 (a) of the committee amendment removes the exemption from sales or use taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the sale or use, with respect to

which such tax is levied, occurred in whole or in part within a Federal area. At the present time exemption from such taxes is claimed on the ground that the Federal Government has exclusive jurisdiction over such areas. Such an exemption may be claimed in the following types of cases: First, where the seller's place of business is within the Federal area and a transaction occurs there, and, second, where the seller's place of business is outside the Federal area but delivery is made in Federal area and payment received there.

This section will remove the right to claim an exemption because of the exclusive Federal jurisdiction over the area in both these situations. The section will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred.

This section also contains a provision granting the State or taxing authority full jurisdiction and power to levy and collect any such sale or use tax in any Federal area within such State to the same extent and with the same effect as though such area was not a federal area. This additional authorization was deemed to be necessary so as to make it clear that the State or taxing authority had power to levy or collect any such tax in any Federal area within the State by the ordinary methods employed outside such areas, such as by judgment and execution thereof against any property of the judgment-debtor.

The provision relating to the application of State income taxes to persons residing within a Federal area or receiving income from transaction occurring on or service performed in a Federal area is explained in the Senate report on the rationale that:

Section 2 (a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives performed in such area. One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary tax Act of 1939. Under that act a State is permitted to tax the compensation of officers and employees reside or are domiciled

in that State but is not permitted to tax the compensation of such officers and employees who reside within the Federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a Federal area over which the United States has exclusive jurisdiction; but his less fortunate colleague, who is also ordered there for duty and rents a house outside the

academy grounds because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption, is that under the doctrine laid down in James v. Dravo Contracting Co. (302 U.S. 134, 1937), a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transactions occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction.

This section contains, for the same reasons, a similar provision to the one contained in section 1 granting the State or taxing authority full jurisdiction and power to levy and collect any such income tax in any federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

During the 1940 Senate hearings on the House bill, representatives of the War and Navy Departments expressed opposition to certain features of the bill. Vigorous attack was made on an aspect of the original bill which would have permitted the application of State sales taxes on retail sales of tangible personal property by post exchanges, ship-service stores and

commissaries. These objections were the apparent cause of an amendment which was explained by the Senate committee as follows:

> Section 3 of the committee amendment provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. This section also provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. An authorized purchaser being a person who is permitted, under regulations of the Secretary of War or Navy, to make purchases from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, such as post exchanges, but such person is deemed to be an authorized purchaser only with respect to such purchases and is not deemed to be an authorized purchaser within the meaning of this section when he makes purchases from organizations other than those heretofore mentioned.
>
> For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations;

> but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the States income taxes by virtue of section 2 of the committee amendment.

It may be noted that post exchanges and certain other organizations attached to the armed forces have been judicially determined to be Federal instrumentalities. It should also be noted that the exemption provision of the Buck Act was amended somewhat by the act of September 3, 1954, 68 Stat. 1227.

One of the Navy officers testifying at the Senate hearing raised a question as to the effect on the Federal criminal jurisdiction over federal areas of a grant to the States of concurrent jurisdiction for tax matters. The Attorney General of the United States raised the same question in commenting on the bill by letter to the Chairman of the Senate Finance Committee:

> From the standpoint of the enforcement of the criminal law, the legislation may result in an embarrassment which is probably unintended. Criminal jurisdiction of the Federal courts is restricted to Federal reservations over which the Federal Government has exclusive jurisdiction, as well as to forts, magazines, arsenals, dock-yards, or other needful buildings (U.S.C., title 18, sec. 451, par. 3d). A question would arise as to whether, by permitting the levy of sales and personal-property taxes on Federal reservations, the Federal Government has ceded back to the States its exclusive jurisdiction over Federal reservations and has retained only concurrent jurisdiction over such areas. The result may be the loss of federal criminal jurisdiction over numerous reservations, which would be deplorable.

After considerable discussion and deliberation the issue was resolved by a Senate committee amendment to the House bill adding the following provision (54 Stat., at p. 1060):

> Section 4. The provisions of this Act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

The committee explained that:

> Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal ares over which the United States exercises exclusive jurisdiction would not be affected by permitting the States to levy and collect sales, use, and income taxes within such areas. The provisions of this section are applicable to all Federal areas over which the United States exercises jurisdiction, including such areas as may be acquired after the date of enactment of this act.

The Buck Act added certain amendments to the Hayden-Cartwright (Let) Act. The 1940 Senate committee report explained why those changes were considered necessary:

> Section 7 (a) of the committee amendment amends section 10 of the Hayden-Cartwright Act so that the authority granted to the States by such section 10 will more nearly conform to the authority granted to them under section 1 of this act. At the present time a State such as Illinois, which has a so-called gallonage tax on gasoline based upon the privilege of using the highways in that State, is prevented from levying such tax under the Hayden-Cartwright Act because it is not a tax upon the "sale" of gasoline. The amendments recommended by your committee will correct this obvious inequity and will permit the levying of any such tax which is levied "upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels."

By the Buck Act Congress took a great stride in the direction of removing the tax inequities which had resulted from the existence of Federal "islands" in the various States and, in addition, opened the way for the State and local governments to secure additional revenue.

In Howard v. Commissioners, 344 U.S. 624 (1953), the Supreme Court (by a divided court), expressed the view that the

Buck Act authorized State and local taxes measured by the income or earnings of any party "receiving income from transactions occurring or service performed in such area * * * to the same extent and with the same effect as though such area was not a Federal area." The Court of appeals of Kentucky had held that this tax was not an "income tax" within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the city of Louisville. The Supreme Court, after stating that the issue was not whether the tax in question was an income tax within the meaning of the Kentucky law, held that the tax in question was a tax "measured by, net income, gross income, or gross receipts," as authorized by the Buck Act. In a dissenting opinion, here quoted in pertinent part to clarify this important issue in this case, it was stated (p. 629):

> I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses,

professions, and occupations. Many kinds of income are excluded, e.g., divi-

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dends, interest, capital gains. The exclusions emphasize that the tax is on the privilege of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of appeals held it to be. Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

In another case in which a State claimed taxing authority under the Buck Act, a steel company which occupied a plant under lease from the Federal Government was thereby held subject to a State occupation tax under the act. Carnegie-Illinois Steel Corp. v. Alderson, 127 W.Va. 807, 34 S.E.2d 737 (1945), cert. den., 326 U.S. 764. It has also been held that a tax on gasoline received in a State, within a Federal area, was a "sales or use" tax within the purview of the act, and that by the act the Congress retroceded to States sufficient sovereignty over Federal areas within their territorial limits to enable them to levy and collect the taxes described in the act. Davis v. Howard, 306 Ky. 149, 290 S.W.2d 467 (1947). In Maynard & Child, Inc. v. Shearer, 290 S.W.2d 790 (Ky., 1956), it was held that an import tax was not such a tax as Congress had consented to be collected by its enactment of the Buck Act. In Bowers v. Oklahoma Tax Commission, 51 F.Supp. 652 (W.D. Okla., 1943), a construction contractor was held to "use" material incorporated into the work, so as to subject him to a State use tax pursuant to the Buck Act. The Attorney General of Wyoming has ruled that the State use tax was not applicable to an auto purchased out of the State for private use on an exclusive Federal jurisdiction area within the State. Op.A.G., Wyo. (Dec. 9, 1947).

There appear to be no other instances of general importance in which the character of State taxes as within the purview of the Buck Act has been questioned in the courts.

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An early, and leading, case relating to the effect of the Buck Act on State taxing authority is Kiker v. Philadelphia, 346 Pa. 624, 31 A.2d 289 (1943), cert. den., 320 U.S. 741. In that case there was interposed as a defense against application of an income tax of the city of Philadelphia, to a non-resident of the city employed in an area within the city limits but under the exclusive legislative jurisdiction of the United States, the fact that the non-resident received no quid pro quo for the tax. The court found the availability of services to be an answer to this defense. The court also appears to have overcome any difficulty, and in these matters its views apparently are sustained by the Howard case, supra, and other decisions, in objections raised to the application of the tax in a vigorous dissenting opinion in this case that (1) the city, as distinguished from the State, could not impose a tax under the Buck Act, and (2) that a State grant to the federal Government of legislative jurisdiction over an area placed such area outside the

sovereignty (and individuals and property within the area beyond the taxing power) of the State.

Military Leasing Act of 1947.--The Wherry Housing Act of

1949, in pertinent part, makes provision for arrangements whereby military areas (including, of course, such areas under the exclusive legislative jurisdiction of the United States) may be leased to private individuals for the construction of housing for rental to military personnel. The authority to lease out military areas for the construction of such housing was supplied by the Military Leasing Act of 1947, a provision of which (section 6) read as follows:

> The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.

The legislative histories of both the 1947 and the 1949 statutes are devoid of authoritative information for measuring the extent of the taxing authority granted to the States, with the result that ambiguities in the language of the statutes which shortly became apparent led a number of conflicting court decisions, and other at least seemingly inconsistent interpre-

tation. The ambiguity as to whether the federally granted tax authority with respect to leasehold interests extended to such interests located on lands under the exclusive legislative jurisdiction of the United States was resolved, however, by the decision of the Supreme Court of the United States in the case of Offutt Housing Company v. Sarpy County, 351 U.S. 253 (1956). The court stated (p. 259):

> * * * To be sure, the 1947 Act does not refer specifically to property in an area subject to the power of "exclusive Legislation" by Congress. It does, however, govern the leasing of Government property generally and its permission to tax extends generally to all lessees' interests created by virtue of the Act. The legislative history indicates a concern about loss of revenue to the States and a desire to prevent unfairness toward competitors of the private interests that might otherwise escape taxation. While the latter consideration is not necessarily applicable where military housing is involved, the former is equally relevant to leases for military housing as for any other purpose. We do not say that this is the only admissible construction of these Acts. We could regard Art. I, Sec. 8, cl. 17 as of such overriding and comprehensive scope that consent by Congress to state taxation of obviously valuable private interests located in an area subject to the power of "exclusive Legislation" is to be found only in explicit

> and unambiguous legislative enactment. We have not heretofore so regarded it, sec S.R.A., Inc. v. Minnesota. 327 U.S. 558; Baltimore Shipbuilding Co. v. Baltimore, 1095 U.S. 375, nor are we constrained by reason to treat this exercise by Congress of the "exclusive Legislation" power and the manner of construing it any differently from any other exercise by Congress of that power. This is one of cases in which Congress has seen fit not to express itself unequivocally. It has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To that end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide. Charged as we are with this function, we have concluded that the more persuasive construction of the statute, however flickering and feeble the light afforded for extracting its meaning, it that the States were to be permitted to tax private interests, like those of this petitioner, in housing projects located on areas subject to the federal power of "exclusive Legislation." We do not hold that Congress has relinquished this power over these areas. We hold only that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case.

The opinion of the Supreme Court in the Offutt case, it seems clear, was restricted to an interpretation of the statutes involved, with particular reference tot he language of the quoted portion of the opinion any Federal statute authorizing a State to exercise power previously denied to it might be construed, in the absence of indication of a positive contrary legislative intent, as authorizing the exercise of such power not only outside of areas under exclusive Federal legislative jurisdiction, but also within such areas. Under this construction the States need not have awaited the enactment of the Buck Act before taxing the income of Federal employees in areas under exclu-

sive Federal legislative jurisdiction, since Congress had previously authorized State taxation of incomes of Federal employees generally.

Workmen's compensation.--In 1936 there was enacted a statute permitting the application of State workmen's compensation laws to Federal areas. Both House and Senate reports on the bill contained concise explanatory remarks concerning the reasons for the act. The House report, the more extensive of the two, sets forth the circumstances which motivated congressional action. The pertinent portions of the report are:

> The Committee on Labor, to whom was referred the bill (H.R. 12599) to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to several States jurisdiction and

authority to enter upon and enforce their State workmens' compensation, safety, and insurance laws on all property and premises belonging to the United States of America, having had the bill under consideration, report it back to the House with a recommendation that it do pass.

This bill is absolutely necessary so that protection can be given to men employed on projects as set out in the foregoing paragraph.

As a specific example, the Golden Gate Bridge, now under construction at San Francisco, which is being financed by a district consisting of several counties of the State of California, the men are almost constantly working on property belonging to the Federal Government either on the Presidio Military Reservation on

the San Francisco side of the Golden Gate, or the Fort Baker Military Reservation on the Marin County side of the Golden Gate.

A number of injuries have occurred on this project and private insurance companies with whom compensation insurance has been placed by the contractors have recently discovered two decisions--one by the Supreme Court of the United States and one by the Supreme Court of California--which seem to hold that the State Compensation Insurance Acts do not apply, leaving the workers wholly unprotected, except for their common-law right of action for personal injuries which would necessitate action being brought in the Federal courts. In many cases objection to the jurisdiction of the industrial accident commission has been raised over 1 year after the injury occurred and after the statute of limitations has run against a cause of action for personal injuries. This status of the law has made it possible for the compensation insurance companies to negotiate settlement with the workers on a basis far below what they would ordinarily be entitled. The situation existing in this locality is merely an example of the condition that exists throughout the United States wherever work is being performed on Federal property.

The Senate report very briefly states the problem in these words:

The purpose of the amended bill is to fill a conspicuous gap in the workmen's compensation field by furnishing protection against death or disability to laborers and mechanics employed by contractors or other persons on Federal property. The United States Employees' Compensation Act covers only persons directly employed by the Federal Government. There is no general General statute applying the work-

men's compensation principle to laborers and mechanics on

> Federal projects, and although the right of workmen to recover under State compensation laws for death or disability sustained on Federal property has been recognized by some of the courts, a recent decision of the United States Supreme Court (see Murray v. Gerrick, 291 U.S. 315), has thrown some doubts upon the validity of these decisions by holding that a Federal statute giving a right of recovery under State law to persons injured or killed on Federal property refers merely to actions at law. Hence, it was held that this statute (act of Feb. 1, 1928, 45 Stat. 54, U.S.C., ti. 16, sec. 457) did not extend State workmen's compensation acts to places exclusively within the jurisdiction of the Federal Government.

The bill, as passed by the House, contained provisions subjecting Federal property to State safety and insurance regulations and permitting State officers to enter Federal property for certain purposes in connection with the act. The Senate committee suggested changes and deletions in these provisions which were approved by the Senate. The House concurred in the amendments, with no objections and with only a general explanation of their purpose prior to such action.

While in some few instances State workmen's compensation laws had been held applicable in exclusive Federal jurisdiction areas under a 1928 Federal statute or under the international law rule, the case of Murray v. Gerrick & Co., 291 U.S. 315 (1934), it was noted in the legislative reports on this subject, held workmen's compensation laws inapplicable in such areas.

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The 1936 Federal statute authorized States to apply their workmen's compensation laws in these areas, but required legislative action by the States for accomplishment of this purpose; however, where a State had an appropriate law already in effect, but held in abeyance in an area because of federal possession of legislative jurisdiction over the area, Federal enactment of this statute activated the State law without the necessity of any action by the State. Capetola v. Barclay White Co., 139 F.2d 556 (C.A. 3, 1943), cert. den., 321 U.S. 799. The statute was not applicable to causes of action arising before its passage, however. State workmen's compensation laws are authorized by this statute to be applied to employees of contractors engaged in work for the Federal Government. The statute does not, however, permit application of State laws to persons covered by provisions of the Federal Employees' Compensation Law, or, it has been held, to employees of Federal instrumentalities.

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Unemployment compensation.--The provision for application of State unemployment compensation laws in Federal areas was enacted as a portion of the Social Security act Amendments of 1939:

> No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and

> power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States.

The provision probably was born out of litigation, then pending in Arkansas courts, wherein the United States Supreme Court later upheld imposition of a State unemployment compensation tax upon a person operating in an area under Federal legislative jurisdiction only upon the basis of jurisdiction to tax property retroceded to or reserved by the State with respect to such area. Buckstall Bath House Co. v. McKinley, 308 U.S. 358 (1939). Other provisions require certain Federal instrumentalities to comply with State unemployment compensation laws.

An example of the paucity of information as to congressional intent and purpose in the provisions of the Social Security Act Amendments of 1939 effecting retrocession of jurisdiction is the brief statement in the House report on this section:

> Subsection (d) authorizes the States to cover under their unemployment compensation laws services performed upon land held by the Federal Government, such as services for hotels located in national parks.

The Senate report is identical. Although extensive hear-

ings covering some 2,500 pages were held on the bill, very few references were made to the purpose of this particular section. The provision was inserted on the recommendation of the Social Security Board in its written report to the President of the United States. During the latter stages of the hearings the Chairman of the Social Security Board explained that:

> Item 8: We suggest that the States be authorized to make their unemployment compensation laws applicable to persons employed upon land held by the Federal Government, such as employees of the hotels in the National Parks. That is the same policy that the Congress has pursued in the past, in making all workmen's compensation laws applicable to such employees, such as the employees of concessionaires in the National Parks and on other Federal properties.

This quotation indicates that provision was included "to fill a conspicuous gap" in the unemployment compensation field. As it had done before, Congress followed a precedent. Here that precedent was the statute dealing with the application of workmen's compensation laws to Federal enclaves. Coverage was legislation was at all worthy it should protect as many people as possible.

Under this statute, it has been held, a Government contractor is required to make State unemployment insurance contributions with respect to persons employed by him on an area over which the United States exercises exclusive legislative jurisdiction. And post exchanges, ships' service stores, officers' messes and similar entities are required to pay the unem-

ployment taxes, it has been held, although they are Government instrumentalities, on the ground that they do not come within an exception for "wholly owned" instrumentalities.

CHAPTER VIII

RESIDENTS OF FEDERAL ENCLAVES

EFFECTS OF TRANSFERS OF LEGISLATIVE JURISDICTION: In general.--With the transfer of sovereignty, which is implicit in the transfer of exclusive legislative jurisdiction, from a State to the Federal Government, the latter succeeds to all the authority formerly held by the State with respect to persons within the area as to which jurisdiction was transferred, and such persons are relieved of all their obligations to the State. Where partial jurisdiction is transferred, the Federal Government succeeds to an exclusive right to exercise some authority formerly possessed by the State, and persons within the area are relieved of their obligations to the State under the transferred authority. And transfer of legislative jurisdiction from a State to the Federal Government has been held to affect the rights, or privilege, as well as the obligations, of persons under State law. specifically, it has been held to affect the rights of residents of areas over which jurisdiction has been transferred to receive an education in the public schools, to vote and hold public office, to sue for a divorce, and to have their persons, property, or affairs subjected to the probate or lunacy jurisdiction of State courts; it has also been interpreted as affecting the right of such residents to receive various other miscellaneous services ordinarily rendered by or under the authority of the State.

Education.--The question whether children resident upon areas under the legislative jurisdiction of the Federal Government are

entitled to a public school education, as residents of the State within the boundaries of which the area is contained, seems first to have been presented to the Supreme Judicial Court of Massachusetts in a request for an advisory opinion by the Massachusetts House of Representatives. The House sought the view of the court on the question, inter alia:

> Are persons residing on lands purchased by, or ceded to, the United States, for navy yards, arsenals, dock yards, forts, light houses, hospitals, and armories, in this Commonwealth, entitled to the benefits of the State common schools for their children, in the towns where such lands are located?

The opinion of the court (Opinion of the Justices, 1 Metc. 580 (Mass., 1841)), reads in pertinent parts as follows (pp. 581-583):

> The constitution of the United States, Art. 1, Sec. 8, provides that congress shall have power to exercise exclusive legislation in all cases whatsoever, over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings. The jurisdiction in such cases is put upon the same ground as that of district ceded to the United States for the seat of government; and, unless the consent of the several States is expressly made conditional or limited by the act of cession, the exclusive power of legislation implies an exclusive jurisdiction; because the laws of the several States no longer operate within those districts.
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> and consequently, that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory, and that persons residing

> within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated.

The court then proceeded to apply the general legal principles which it had thus defined to the specific question concerning education (p. 583):

> We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State, then that above mentioned [service of process], are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated.

The nest time the question was discussed by a court it was again in Massachusetts, in the case of Newcomb v. Rockport, 183 Mass. 74, 66 N.E. 587 (1909). There, however, while the court explored Federal possession of legislative jurisdiction as a possible defense to a suit filed to require a town to provide school facilities on two island sites of lighthouses, the court's decision adverse to the petitioners actually was based on an absence of authority in the town

to construct a school, and the possession of discretion by the town as to whether it would furnish transportation, under Massachusetts law, even conceding that the Federal Government did not have exclusive jurisdiction over the islands in question. The legal theories underlying the two Massachusetts cases mentioned above have constituted the foundation for all the several decisions on rights to public schooling of children resident on Federal lands. Where the courts have found that

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legislative jurisdiction over a federally owned area has remained in the State, they have upheld the right of children residing on the area to attend State schools on an equal basis with State children generally; where the courts have fond that legislative jurisdiction over an area has been vested in the United States, they denied the existence of any right in children residing on the area to attend public schools, on the basis, in general, that Federal acquisition of legislative jurisdiction over an area places the area outside the State or the school district, whereby the residents of the area are not residents of the State or of the school district. Further, where a school building is located on an area of exclusive Federal jurisdiction it has been held (Op.A.G., Ind., p. 259 (1943)) the local school authorities have no jurisdiction over the building, are not required to furnish school facilities for children in such building, and if they do the latter with

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money furnished by the Federal Government they are acting as Federal agents. There should be noted, however, the small number of instances in which the right of children residing in Federal areas to a public school education has been questioned in the courts. This appears to be due in considerable part to a feeling of responsibility in the States for the education of children within their boundaries, reflected in such statutes as the 1935 act of Texas (Art. 275b, Vernon's Ann. Civil Statutes), which provides for education of children on military reservations, and section 79-446 of the Revised Statutes of Nebraska (1943), which provides for admission of children of military personnel to public schools without payment of tuition. In recent years a powerful factor in curtailing potential litigation in this field has been the assumption by the Federal Government of a substantial portion of the financial burden of localities in the operation and maintenance of their schools, based on the impact which Federal activities have on local educational agencies, and without regard to the jurisdiction status of the Federal area which is involved. Voting and office holding.--The Opinion of the Justices, 1 Metc. 580 (Mass., 1841), anticipated judicial decisions concerning the right of residents of Federal enclaves to vote,

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as it anticipated decisions relating to their rights to a public school education and in several other fields. One of the questions

propounded to the court was:

> Are persons so residing [on lands under the exclusive jurisdiction of the United States] entitled to the elective franchise in such towns [towns in which such lands are located]?

After stating that persons residing in areas under exclusive Federal jurisdiction did not acquire civil and political privileges thereby, the court said (p. 584):

> We are also of the opinion that persons residing in such territory do not thereby acquire any elective franchise as inhabitants of the towns in which such territory is situated.

The question of the right of residents of a Federal enclave to vote, in a county election, came squarely before the Supreme Court of Ohio, in 1869, in the case of Sinks v. Reese, 19 Ohio St. 306 (1869). Votes cast by certain residents of an asylum for former military and naval personnel were not counted by election officials, and the failure to count them was assigned as error. The State had consented to the purchase of the lands upon which the asylum was situated, and had ceded jurisdiction over such lands.

However, the act of cession provided that nothing therein should be construed to prevent the officers, employees, and inmates of the asylum from exercising the right of suffrage. The court held that under the provisions of the Constitution of the United States and the cession act of the State of Ohio the grounds of the asylum had been detached and set off from the State, that the Constitution of the State of Ohio required that electors be residents of the State, that it was not constitutionally permissible for the general assembly of the State to confer the elective franchise upon

non-residents, and that all votes of residents of the area should therefore be rejected. The Opinion of the Justices and the decision in Sinks v. Reese have been followed, resulting in a denial of the right of suffrage to residents of areas under the legislative jurisdiction of the United States, whatever the permanency of their residence, in nearly all cases where the right of such persons to vote, through qualification by residence on the Federal area, has been questioned in the courts. In some other instances, which should be distinguished, the disqualification has been based on a lack of permanency of the residence (lack of domicile) of persons resident on a Federal area, without reference to the jurisdictional status of the area, although in similar instances the courts have held that residence on a Federal area can constitute a residence for voting purposes. The courts have generally ruled that residents of a federally owned area may qualify as voters where the Federal Government has never

acquired legislative jurisdiction over the area, where legislative jurisdiction formerly held by the Federal Government has been retroceded by act of Congress, or where Federal legislative

jurisdiction has terminated for some other reason. Attorneys General of several States have had occasion to affirm or deny, on similar grounds, the right of residents of federally owned areas to vote. In Arapajolu v. McMenamin, 113 Cal. App.2d 824, 249 P.2d 318 (1952), a group of residents, military and civilian, of various military reservations situated in California, sought in an action of mandamus to procure their registration as voters. The court recognized (249 P.2d at pp. 319-320) that it had been consistently held that when property was acquired by the

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United States with the consent of the State and consequent acquisition of legislative jurisdiction by the Federal Government the property "ceases in legal contemplation to be a part of the territory of the State and hence residence thereon is not residence within the State which will qualify the resident to be a voter therein." Reviewing the cases so holding, the court noted that all but one, Arledge v. Mabry, supra, had been decided before the United States had retroceded to the States, with respect to areas over which it had legislative jurisdiction, the right to apply State unemployment insurance acts, to tax motor fuels, to levy and collect use and sales taxes, and to levy and collect income taxes. In Arledge v. Mabry, the court suggested, the retrocession had not been considered and the case had been decided (erroneously) on the basis that the United States still had and exercised exclusive jurisdiction. The court concluded (149 P.2d 323):

> The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution.

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The several cases discussed above all related to voting, rather than office-holding, although the grounds upon which they were decided clearly would apply to either situation. The case of Adams v. Londeree, 139 W.Va. 748, 83 S.E.2d 127 (1954), on the other hand, involved directly the question whether residence upon an area under the legislative jurisdiction of the United States qualified a person to run for and hold a political office the incumbent of which was required to have status as a resident of the State. The court said (83 S.E.2d at p. 140) that "in so far as this record shows, the Federal Government has never accepted, claimed or attempted to exercise, any jurisdiction as to the right of any resident of the reservation [as to which the State had reserved only the right to serve process] to vote." Hence, the majority held, a resident of the reservation, being otherwise qualified, was entitled to vote at a

municipal, county, or State election, and to hold a municipal, county, or State office. A minority opinion filed in this case strongly criticizes the decision as contrary to judicial precedents and unsupported by any persuasive text or case authority.

While Arapajolu v. McMenamin and Adams v. Londeree apparently are the only judicial decisions recognizing the existence of a right to vote or hold office in persons by reason of their residence on what has been defined for the purposes of this text as an exclusive Federal jurisdiction area, reports form Federal agencies indicate that residents of such areas under their supervision in many instances are permitted to vote and a few States have by statute granted voting rights to such residents (e.g., California, Nevada (in some instances), New Mex-

ico, and Ohio (in case of employees and inmates of disabled soldiers' homes)). On the other hand, one State has a constitutional prohibition against voting by such persons, decisions cited above demonstrate frequent judicial denial to residents of exclusive Federal jurisdiction areas of the right to vote, and it is clear that many thousand residents of Federal areas are disenfranchised by reason of Federal possession of legislative jurisdiction over such areas.

Divorce.--The effect upon a person's right to receive a divorce of such person's residence on an area under the exclusive legislative jurisdiction of the United States was the subject of judicial decision for the first time, it appears, in the case of Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926). The statute of the State of Maryland which provided the right to file proceedings for divorce required residence of at least one of the parties in the State. The parties to this suit resided on an area in Maryland acquired by the Federal Government which was subject to a general consent and cession statute whereby the State reserved only the right to serve process, and were not indicated as being residents of Maryland unless by virtue of their residence on this area.

Reviewing judicial decisions and other authorities holding to the general effect that the inhabitants of areas under the exclusive legislative jurisdiction of the Federal Government (133 Atl. at p. 732) "cease to be inhabitants of the state and can no longer exercise any civil or political rights under the laws of the state," and that such areas themselves (ibid., p. 733) "cease to be a part of the state," the court held that residents of areas under exclusive Federal jurisdiction are not such residents of the State as would entitle them to file a bill for divorce. The case of Chaney v. Chaney, 53 N.M. 66, 201 P.2d 782

(1949), involved a suit for divorce, with the parties being persons living at Los Alamos, New Mexico, on lands acquired by the Federal Government which were subject to a general consent statute whereby the State of New Mexico reserved only the right to serve process. The State divorce statute provided that the plaintiff "must have been as actual resident, in good faith, of the state for one (1) year next

preceding the filing of his or her complaint * * *."

The court, applying Arledge v. Mabry, held concerning the area under Federal legislative jurisdiction that "such land is not deemed a part of the State of New Mexico," and that "persons living thereon do not thereby acquire legal residence in New Mexico." Accordingly, following Lowe v. Lowe, supra, it found that residence on such area did not suffice to supply the residence requirement of the State divorce statute.

The Lowe and Claney cases appear to be the only cases in which a divorce was denied because of the exclusive Federal jurisdiction status of an area upon which the parties resided. However, in a number of cases, some involving Federal enclaves, it has been held that personnel of the armed forces (and their wives) are unable, because of the temporary nature of their residence on a Government reservation to which they have been ordered, to establish on such reservation the residence or domicile required for divorce under State statutes.

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(1933), where the court suggested the existence of substantive divorce law as to Fort Benning, Georgia, under the international law rule, since the United States had exclusive legislative jurisdiction over the area, but held that there were absent in the State a domicile of the parties and a forum for applying the law. The Lowe, Chaney, Pendleton, and Dicks decisions had an influence on the enactment, in the several States involved, of amendments to their divorce laws variously providing a venue in courts of the respective States to grant divorces to persons resident on Federal areas. Similar statutes have been enacted in a few other States.

The case of Graig v. Graig, 143 Kan. 624, 56 P.2d 464 (1936), clarification denied, 144 Kan. 155, 58 P.2d 1101 (1936), brought after amendment of the Kansas law, provides a sequel to the decision in the Pendleton case. The court ruled in the Graig case that the Kansas amendment, which provided that any person who had resided for one year on a Federal military reservation within the State might bring an action for divorce in any county adjacent to the reservation, required mere "residence" for this purpose, not "actual residence" or domicile," with their connotations of permanence. The amendment, the court said in directing the entry of a decree of divorce affecting an Army officer and his wife residing on Fort Riley, provided a forum for applying the law of divorce which had existed at the time of cession of jurisdiction over the military reservation to the Federal Government. The Dicks case similarly has as a sequel the case of Darbie v.

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Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943). In the Darbie case a Georgia amendment to the same effect as the Kansas amendment was the basis for the filing of a divorce suit by an Army officer residing on Fort Benning. The divorce was denied, but apparently only because the petition was filed in a county which, although adjacent to Fort Benning, was not the county wherein the fort was situated, and therefore the filing was held not in conformity with a provision of the Georgia constitution (art. 6, ch 2-43, sec. 16) requiring such

suits to be brought in the county in which the parties reside. The Georgia constitution has been amended (see sec. 2-4901) so as to eliminate the problem encountered in the Darbie case, and, in any event, because of its basis the decision in the case casts no positive judicial light on the question whether the State has jurisdiction to furnish a forum and grant a divorce to residents of an area under exclusive Federal jurisdiction.

The case of Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954), furnishes a sequel to the Chaney case. The Crownover case was brought under the New Mexico amendment, which provides that for the purposes of the State's divorce laws military personnel continuously stationed for one year at a base in New Mexico shall be deemed residents in good faith of the State and of the county in which the base is located. The court affirmed a judgment granting a divorce to a naval officer who, while he was stationed in New Mexico, was physically absent from the State for a substantial period of time on temporary duty, holding that the "continuously stationed" requirement of the statute was met by the fact of assignment to a New Mexico base as permanent station. An

objection that "domicile" within the State (not established in the case except through proof of residence under military orders) is an essential base for the court's jurisdiction in a divorce action was met by the court with construction of the New Mexico amendment as creating a conclusive statutory presumption of domicile. The opinion rendered by the court, and a scholarly concurring opinion rendered by the chief justice (58 N.M. 609), defended the entitlement of the court's decision to full faith and credit by courts of other States. Military personnel and, indeed, civilian Federal employees and others residing on exclusive Federal jurisdiction areas may possibly retain previously established domiciles wherein would lie a venue for divorce. It may well occur, however, that such a person has no identifiable domicile outside an exclusive jurisdiction area. Federal courts, other than those for the District of Columbia, and for Territories, have no jurisdiction over divorce. A resident of an exclusive jurisdiction area therefore may have recourse only to a State court in seeking the remedy of divorce. Absent a bona fide domicile within the jurisdiction of the court of at least one of the parties, there is the distinct possibility that a divorce decree may be collaterally attacked successfully in a different jurisdic-

tion. As to persons residing on exclusive Federal jurisdiction areas, therefore, it would seem that even if there is avoided an immediate denial of a divorce decree on the precedent of the Lowe and Chaney cases, the theory of these cases may possibly be applied under the decision in Williams v. North Carolina, 325 U.S. 226 (1945), to invalidate any decree which is procured.

Probate and lunacy proceedings generally.--In the case of Lowe v. Lowe, discussed above, Chief Justice Bond, in an opinion concurring in the court's holding that it had no jurisdiction to grant a divorce to residents of an exclusive Federal jurisdiction

area, added concerning such persons (150 Md. 592, 603, 133 A. 729, 734): "and I do not see any escape from the conclusion that ownership of their personal property, left at death, cannot legally be transmitted to their legatees or next of kin, or to any one at all; that their children cannot adopt children on the reservations; that if any of them should become insane, they could not have the protection of statutory provisions for the care of the insane--and so on, through the list of personal privileges, rights, and obligations, the remedies for which are provided for residents of the state."

On the other hand, in Divine v. Unaka National Bank, 125 Tenn. 98, 140 S.W. 747 (1911), it was asserted that the power to probate the will of one who was domiciled, and who had died, on lands under the exclusive legislative jurisdiction of the United States was in the local State court. In In re Kernan, 247 App. Div. 664, 288 N.Y.Supp. 329 (1936), a New York court held that the State's courts could determine, by habeas corpus proceedings, the right to custody of an infant

who lived with a parent on an area under exclusive Federal jurisdiction. In both these cases the reasoning was to the general effect that, while the Federal Government had been granted exclusive legislative jurisdiction over the area of residence, it had not chosen to exercise jurisdiction in the field involved, and the State therefore could furnish the forum, applying substantive law under the international law rule.

In Shea v. Gehan, 70 Ga.App. 229, 28 S.E.2d 181 (1943), the Court of Appeals of Georgia decided that a county court had jurisdiction to commit a person to the United States Veterans' Administration Hospital in the county as insane, although such hospital was on land ceded to the United States and the person found to be insane was at the time a patient in the hospital and a non-resident of Georgia. The decision in this case was based on a their that State courts have jurisdiction over non-resident as well as resident lunatics found within the State, but the exclusive Federal jurisdiction status of the particular area within the boundaries of the State on which the lunatic here was located does not seem to have attracted the attention of the court. These appear to be the only judicial decisions, Federal or State, other than the divorce cases discussed above, wherein there has been a direct determination on the question of existence of jurisdiction in a State to carry on a probate proceeding on the basis of a residence within the boundaries of the State on an exclusive Federal jurisdiction area.

On one occasion, where no question of Federal legislative

jurisdiction was raised, the Attorney General of the United States held that the property of an intestate who had lived on a naval reservation should be turned over to an administrator appointed by the local court, but in a subsequent similar instance, where Federal legislative jurisdiction was a factor, he held that the State did not have probate jurisdiction. And in a letter dated April 15, 1943, to the Director of the Bureau of the Budget, the Attorney General stated:

> It is intimated in the [Veterans' Administration] Administrator's letter to you that the States probably have probate jurisdiction over Federal reservations. I am unable to concur in this suggestion. This Department is definitely opinion by one of my predecessors (19 Ops.A.G. 247) it was expressly held, after a thorough review of the authorities and all the pertinent considerations, that State courts do not have probate jurisdiction over Federal reservations. While there is one case holding the contrary (Divine v. Bank, 125 Tenn. 98), nevertheless the Attorney General's opinion must be considered binding on the Executive branch of the Federal Government unless and until the Federal courts should take an opposite view of the matter.

The Judge Advocate General of the Army has held similarly, and in several opinions he has stated that: "Generally, the power and concomitant obligation to temporarily restrain and care for persons found insane in any area rests with the Government exercising legislative jurisdiction over that area; permanent care or confinement is more logically assumed by the Government exercising general jurisdiction over the area of the person's residence." The Judge Advocate General of the Navy

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has held, to the same effect, that in view of the fact that the United States has exclusive jurisdiction over the site of the Philadelphia Navy Yard, it would be inconsistent to request assistance of State authorities to commit as insane a person who committed a homicide within the reservation.

It is evident that questions regarding the probate jurisdiction of a State court with relation to a person residing on an exclusive Federal jurisdiction area would not arise in instances where the persons is domiciled within the State as a result of factors other than mere residence on the Federal area. But it appears that some persons have no domicile except on a Federal area. Presumably in recognition of this fact, a number of States have enacted statutes variously providing a forum for the granting of some degree of probate relief to residents of Federal areas. Except as to such statutes relating to divorce, discussed earlier herein, appellate courts appear not to have had occasion to review the aspects of these statues granting such relief.

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It is evident, also, that the jurisdictional question is not likely to arise in States under the statutes of which residence or domicile is not a condition precedent to the assumption of probate jurisdiction by the courts. So, in Bliss v. Bliss, 133 Md. 61, 104 Atl. 467 (1918), it was stated (p. 471): "as the jurisdiction of the courts of equity to issue writs de lunatico unquirendo is exercised for the protection of the community, and the protection of the person and the property of the alleged lunatic, there is no reason why it should be confined to cases in which the unfortunate persons are residents of or have property in the state. It is their presence

within the limits of the state that necessitates the exercise of the power to protect their persons and the community in which they may be placed, and the jurisdiction of the court does not depend upon whether they also have property within the state. The Uniform Veterans Guardianship Act, all or some substantial part of which has been adopted by approximately 40 States, section 18 of which provides for commitment to the Veterans' Administration or other agency of the United States Government for care or treatment of persons of unsound mind or otherwise in need of confinement who are eligible for such acre or treatment, furnishes an example of State statutes which do not specify a

requirement for domicile or residence within the State for eligibility for probate relief.

A dearth of decisions on questions of the jurisdiction of State courts to act as a forum for probate relief to residents of exclusive Federal jurisdiction areas makes it similarly evident that potential legal questions relating to forum and jurisdiction usually remain submerged. So, Chief Justice Bond in his opinion in the Lowe case discussed above. stated (133 A. 729, 734): "It has been the practice in the orphans' court of Baltimore City to receive probate of wills, and to administer on the estates, of persons resident at Ft. McHenry, and it has also, I am informed, been the practice of the orphans' court of Anne Arundel county to do the same thing with respect to wills and estates of persons claiming residence within the United States Naval Academy grounds. We have no information as to the practice elsewhere, but it would seem to me inevitable that the practice of the courts generally must have been to provide such necessary incidents to life on reservations within the respective states. Several Federal agencies have been granted congressional authority enabling disposition of the personal assets of patients and members of their establishments. This has curtailed

what otherwise would constitute numerous and pressing problems. However, notwithstanding the holdings in the Divine, Kernan, and Shea cases, and in several divorce proceedings there appear to exist other serious legal and practical problems relating to procurement by or with respect to residents of exclusive federal jurisdiction areas of relief ordinarily made available by probate courts. While such relief is in instances essential, the federal courts, except those of the District of Columbia, have no probate jurisdiction. And because of the possibility that relief procured in a State court may be subject to collateral attacking a different State, it will not be clear until a decision of the Supreme Court of the United States is had on the matter whether even a decree rendered under an enabling State statute (except a statute reserving jurisdiction sufficient upon which to render the relief) must be accorded full faith and credit by other States when the residence upon which the original court based its jurisdiction upon an area under exclusive Federal jurisdiction."

Miscellaneous rights and privileges. The Opinion of the

Justices, 1 Metc. 580 (Mass., 1841)., discussed at several points above, held that residence on an exclusive Federal jurisdiction

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area, for any length of time, would not give persons so residing or their children a legal inhabitancy in the town in which such area was located for the purpose of their receiving support under the laws of the Commonwealth for the relief of the poor. Numerous miscellaneous rights and privileges, other than those hereinbefore discussed, are often reserved under the laws of the several States for residents of the respective States. Among these are the right or privilege of employment by the State or local governments, of receiving a higher education at State institutions free or at a favorable tuition, of acquiring hunting and fishing licenses at low cost, of receiving visiting nurse service or care at public hospitals, orphanages, asylums, or other institutions, of serving on juries, and of acting as an executor of a will or administrator of an estate. Different legal rules may apply, also, with respect to attachment of property of non-residents.

It has been declared by many authorities and on numerous occasions, other than in decisions heretofore cited in this chapter, that areas under the exclusive legislative jurisdiction of the United States are not a part of the State in which they are embraced and that residents of such areas consequently are not entitled to civil or political privileges, generally, as State residents. Accordingly, residents of Federal areas are subject to these additional disabilities except in the States reserving civil and political rights to such residents (California and, in certain instances, Nevada), when legislative jurisdiction over

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the areas is acquired by the Federal Government under existing State statutes. The potential impact of any widespread practice of discrimination in certain of these matters can be measured in part by the fact that there are more than 43,000 acres of privately owned lands within National Parks alone over which some major measure of jurisdiction has been transferred to the Federal Government. It appears, however, that such discriminations are not uniformly practiced by State and local officials, and no judicial decisions have been found involving litigation over matters other than education, voting and holding elective State office, divorce, and probate jurisdiction generally.

CONCEPTS AFFECTING STATUS OF RESIDENTS: Doctrine of extraterritoriality.--It may be noted that the decisions denying to residents of exclusive Federal jurisdiction areas right or privileges commonly accorded State residents of so on the basis that such areas are not a part of the State, and that residence thereon therefore does not constitute a person a resident of the State. This doctrine of extraterritoriality of such areas was enunciated in the very earliest judicial decision relating to the status of the areas and their residents, Commonwealth v. Clary, 8 Mass. 72 (1811). The decision was followed in Mitchell v. Tibetts, 17 Pick. 298 (Mass., 1936), and the two decisions were the basis of the Opinion of the

Justices, 1 Metc. 580 (Mass., 1841). Subsequent decisions to the same effect invariably cite these cases, or cases based upon them, as authority for their holdings. The views expounded by the courts in such decisions are well set out in Sinks v. Reese, where the Supreme Court of Ohio invalidated a proviso in a State consent statute reserving

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a right to vote to residents of a veterans' asylum because of a State constitutional provision which did not permit extension of voting rights to persons not resident in the State. The Ohio court said (19 Ohio St. 306, 316 (1889)):

> * * * By becoming a resident inmate of the asylum, a person though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relived from any obligation to contribute to her revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the State of Indiana or Kentucky or the District of Columbia. The constitution of Ohio requires that electors shall be residents of the State; but under the provisions of the Constitution of the United States, and by the consent and act of cession of the legislature of this State, the grounds and buildings of this asylum have been detached and set off from the State of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period. We are unanimously of the opinion that such is the law, and with it we have no quarrel; for there is something in itself unreasonable that men should be permitted to participate in the government of a community, and in the imposition of charges upon it, in whose interests they have no stake, and from whose burdens and obligations they are exempt.

Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948), (voting privilege denied) and Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A.2d 621 (1953), (public school education privilege denied) are two recent cases in which this doctrine was applied.

Contrary view of extraterritoriality.--The view that residents of areas of exclusive legislative jurisdiction are not residents or citizens of the State in which the area is situated has

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not gone unquestioned. In Woodfin v. Phoebus, 30 Fed. 289 (C.C.E.D.Va., 1887), the court said (pp. 296-297):

> Although I have thought it unnecessary to pass upon the question whether Mrs. Phoebus and her children, defendants in this suit, by residing at Fortress Monroe, were by that fact alone non-residents and not citizens of Virginia, yet I may as well say, Obiter, that I do not think that such is the result of that residence. Fortress Monroe is not a part of Virginia as to the right of the state to exercise any of the powers of government

within its limits. It is dehors the state as to any such exercise of the rights of sovereignty, that inhabitants there, especially the widow and minor children of a deceased person, thereby lose their political character, and cease to be citizens of the state. Geographically, Fortress Monroe is just as much a part of Virginia as the grounds around the capital of the state at Richmond,--"Fortress Monroe, Virginia," is its postal designation. Can it be contended that, because a person who may have his domicile in the custom-house at Richmond, or in that at Norfolk, or at Alexandria, or in the federal space at Yorktown, on which the monument there is built, or in that in Westmoreland county, in which the stone in honor of Martha Washington is erected, loses by that fact his character of a citizen of Virginia? Would it not be a singular anomaly if such a residence within a federal jurisdiction should exempt such a person from suit in a federal court. Can it be supposed that the authors of the constitution of the United States, in using the term "citizens of different states." meant to provide that the residents of such small portions of states as should be acquired by the national government for special pur-

posses, should lose their geographical and political identity with the people of the states embracing these places, and be exempt by the fact of residence on federal territory from suit in a federal court? I doubt if it would ever be held by the supreme court of the United States that the cession of jurisdiction over places in states for national used, such as the constitution contemplates, necessarily disenfranchised the residents of them, and left them without any political status at all. In the western territories of the United States, governments are provided on the very ground that no state authority exists. In the District of Columbia, a government is provided under the control of congress. In the territories and the federal district, a condition of things exists which excludes the theory of any reservation of rights to the inhabitants of the body politic to which they had before belonged. I see no reason for insisting that persons are cut off from membership of the political family to which they had belonged by the cession to the United States of sovereign jurisdiction and power over forts and arsenals in which they had resided.

I suggest these thoughts in the form of quaere, and make what is said no part of the adjudication of the case. But see U.S. v. Cornell, 2 Mason, 60; Com. v. Clary, 8 Mass. 72; Sinks v. Reese, 19 Ohio St. 306; Foley v. Shriver, 10 Va.Law J. 419.

In Howard v. Commissioners, 344 U.S. 624 (1953), the Supreme Court had occasion to pass directly on the question of extraterritoriality of Federal enclaves, although liability of the occupants of a Federal enclave to taxation by a municipality under the Buck Act, rather than their eligibility to privileges as residents of the State, was the ultimate issue for the court's decision. The court said (p. 626):

> The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United Stated, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

The decision in the Howard case would seen to make untenable the premise of extraterritoriality upon which most of the deci-

sions denying civil political rights and privileges are squarely based.

Theory of incompatibility.--In some instances, usually where the courts have not been entirely explicit on this matter in the language of their opinions, it can be on construed that decisions denying civil or political rights to residents of exclusive Federal jurisdiction areas are based simply on a theory that exercise of such rights by the residents would be inconsistent with federal exercise of "exclusive legislation" under the Constitution.

Weaknesses in incompatibility theory.--Historical evidence supports the contrary view, namely, that article I, section 8, clause 17, of the Constitution, does not foreclose the States from extending civil rights to inhabitants of Federal areas. As was indicated in chapter II, James Madison, in response to Patrick Henry's contention that the inhabitants of areas of exclusive Federal legislative jurisdiction would be without civil rights, stated that the States, at the time they ceded jurisdiction, could safeguard these rights by making "what stipulations they please" in their cessions to the Federal Government. If a stipulation by a State safeguarding such rights in not incompatible with "exclusive legislation," it might well be argued that unilateral extension of the rights by a State after the transfer of jurisdiction is entirely permissible; for it

would seem that the possession of State rights by the residents, rather than the timing of the securing of such rights, would create any incompatibility. And objections of incompatibility with exclusive Federal jurisdiction of State extension of such rights as voting to residents of Federal enclaves would seem answerable with the words of the Supreme Court in its opinion in the Howard case, supra: "The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to

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which we must give heed." What is more, truly exclusive Federal jurisdiction, as it was known in the time of the basic decisions denying civil and political rights and privileges to residents of Federal enclaves, no longer exists except as to the District of Columbia.

Former exclusivity of Federal jurisdiction.--The basic decisions and most other decisions denying civil or political rights and privileges to residents of Federal enclaves were rendered with respect to areas as to which the States could exercise no authority other than the right to serve process, and in many of these reference is made in the opinions of the court to the fact that residents of the areas were not obliged to comply with any State law or to pay any State taxes. It will be recalled that until comparatively recent times it was thought that there could not be transferred to the Federal Government a lesser measure of jurisdiction than exclusive.

Present lack of Federal exclusivity.--That period is past, however, and numerous States now are reserving partial jurisdiction. Moreover, beginning in June 1936, by a number of statutes the Federal Government has retroceded to the States (and their political subdivisions) jurisdiction variously to tax and take other actions with respect to persons and transactions in areas under Federal legislative jurisdiction. Consequently, and notwithstanding the definition given the term "exclusive legislative jurisdiction" for the purposes of this work, there would seem at present to be no area (except the District of Columbia) in which the jurisdiction of the Federal Government is truly exclusive, and residents of such areas are liable to numerous State and local tax laws and at least some other State laws.

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Rejection of past concepts.--In Arapajolu v. McMenamin, discussed above, the Supreme Court of the State of California, taking cognizance of factors outlined above, held residents of areas over which the Federal Government had legislative jurisdiction to be residents of the State. In determining them entitled to vote as such residents, the court stated and disposed of a final argument as follows (249 P.2d 318, 323):

> Respondents argue in their brief: "The states could have reserved the right to vote at the time of the original cession where such right did not conflict with federal use of the

> property * * * but did not do so." We cannot follow the force of this argument. The State of California did not relinquish to the United States the right of citizens resident on federal lands to vote nor did the United States acquire those rights. The right to vote is personal to the citizen and depends on whether he has net the qualifications of section 1, Art. II of our Constitution. If the State retains jurisdiction over a federal area sufficient to justify a holding that it remains a part of the State of California a resident therein is a resident of the State and entitled to vote by virtue of the Constitutionally granted right. No express reservation of such rights is necessary, nor cold any attempted express cession of such rights to the United States be effective.

Interpretations of Federal grants of power as retrocession.--In asserting the existence at the present time of "jurisdiction" in the State of California over what were formerly "exclusive"

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Federal jurisdiction lands, the court said in the Arapajolu case (249 P.2d 322):

> * * * The power to collect all such taxes depends upon the existence of State jurisdiction over such federal lands and therefore may not be exercised in territory over which the United States has exclusive jurisdiction. Standard Oil Co. v. California, 291 U.S. 242. 54 S.Ct. 381, 78 L.Ed. 775. In recognition of this fact the Congress has made these recessions to the States in terms of jurisdiction, e.g. 4 U.S.C.A. Secs. 105 and 106: "and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State * * *"; 26 U.S.C.A. Sec. 1606 (d): "and any State shall have full jurisdiction and power to enforce the provisions of such law * * * as though such place were not owned, held, or possessed by the United States."

In Kiker v. Philadelphia, 346 Pa. 624, 31 A.2d 289 (1943), cert. den., 320 U.S. 741, previously discussed at page 203, above, the Supreme Court of Pennsylvania referred to the Buck Act as a "recession of jurisdiction" to the State when upholding applicability thereunder of a municipal tax to the income of a Federal employee earned in a Federal enclave. A holding to the same effect was had in Davis v. Howard, 306 Ky. 149, 206 S.W.2d 467 (1947).

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Interpretation of such statutes as Federal retrocession of partial jurisdiction to the States apparently is essential, since States seemingly would require "jurisdiction" to apply taxes generally, and the tax and other provisions of their workmen's and unemployment compensation acts, at least as to persons over whom they have no authority except as may arise from the presence of such persons on an "exclusive" Federal jurisdiction area. Thus, in Atkinson v. State Tax Commission, 303 U.S. 20 (1938), the Supreme Court held (p. 25) that the enforcement by a State of its workmen's

compensation law in a Federal area was "incompatible with the existence of exclusive legislative authority in the United States." And in S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946), it stated that the levy by Minnesota of a tax evidenced its acceptance of a retrocession of jurisdiction.

Summary of contradictory theories on rights of residents.-- Arledge v. Mabry and Schwartz v. O'Hare Township School District, it may be said, represent cases maintaining strictly the principle of star decisis on questions of exercise of State rights by residents of Federal areas. They uphold the doctrine of extraterritoriality of Federal enclaves and the theory of incompatibility between exercise of State rights by residents of Federal areas and Federal possession of jurisdiction over such areas. Under the view taken in these cases the only modifications which need to be made for modernizing the very early decisions upon which they are fundamentally based are those which patently are required for enforcing States laws the extension of which is authorized to Federal areas by Federal laws; in other words, no consequences whatever flow from a Federal retrocession of partial jurisdiction to a State other than that

the State may exercise the retroceded powers. Under this view, it would seem, residents of areas over which the Federal Government has any jurisdiction can enjoy State rights and privileges, unless reserved for the residents in the transfer of jurisdiction, only if Congress expressly retrocedes jurisdiction over such rights and privileges to the States. It may also be said, on the other hand, that Arapajolu v. McMenamin, and to some extent Adams v. Londeree, the several other cases cited in this chapter upholding the right of persons to privileges under State laws, and cases upholding the right of States to exercise governmental authority in areas as to which the Federal Government has jurisdiction, indicate at least a trend away from the old cases and to abandonment of the doctrine of extraterritoriality and the theory of incompatibility. And this trend in the judicial recognition of the existence of State civil and political rights in residents of Federal enclaves would seem to be given considerable authority first: by the decision of the Supreme Court in Howard v. Commissioners, supra, rejecting the extraterritoriality doctrine, although, like the similar decision of the Supreme Court of Pennsylvania in Kiker v. Philadelphia, the Howard decision immediately related to a State's rights over individuals in Federal enclaves rather than to individuals' rights to privileges under State law, and second: by present exercise by States of considerable tax and other jurisdiction over Federal enclaves and residents thereof, opening the way to questions of State citizenship of persons domiciled on such areas, nd of abridgment of their privileges, under the 14th Amendment. Residents of an exclusive Federal jurisdiction area, it has been held with respect to the District of Columbia, may not be deprived of the constitutional guarantees respecting life, liberty, and property.

CHAPTER IX

FEDERAL OPERATIONS FREE FROM INTERFERENCE: In general.--In M'Culloch v. Maryland, 4 Wheat. 316 (1819), Chief Justice Marshall enunciated for the Supreme Court what has become a basic principle of the constitutional law of the United States (pp. 405-406):

> If any one proposition could command the universal assent of mankind, we might expect it would be this--that the government of the Union, though limited in its powers, is supreme within necessarily form its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not lift to mere reason: the people have, in express

> terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.
>
> The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

The "supremacy clause," from which Justice Marshall quoted and on which the announced constitutional principle was based, applies not only to those powers which have been expressly delegated to the United States, but also to powers which may be implied therefrom. These implied powers were, in that same opinion, defined by Chief Justice Marshall as follows (p. 421):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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.

This doctrine of implied powers was based on the "necessary and proper clause."

Real property.--The freedom of Federal operations from State interference extends, by every rule of logic, to such operations involving use of Federal real property. So, in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), the Supreme Court said (p. 539):

> Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

The case of Ohio v. Thomas, 173 U.S. 276 (1899), aptly demonstrates the inconsequence, with respect to freedom of Federal functions from State interference, of the jurisdictional status of lands upon which such functions are being performed. In holding that a State could not enforce against Federal employees, charged with the responsibility of administering a soldiers' home, a State statute requiring the posting of notices wherever oleomargarine is served, the court said (p. 283):

> Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application.
>
> We mean by this statement to say that Federal officers who are discharging their duties in a State and who are engaged as this appellee was engaged in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.
>
> In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece

of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the State. The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to ad by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed.

In addition to these sources of constitutional power of the Federal Government, which have consequent limitations on State authority, article IV, section 3, clause 2, of the Constitution, vests in Congress certain authority with respect to any federally owned lands which it alone may exercise without interference from any source. As was stated in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), (pp. 403-405):

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purposes of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and

to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, Sec. 3, cl. 2) commit to Congress the power "to dispose of the make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. * * *

From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be

injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of right of way over them for highways, railroads, canals, ditches, telegraph lines and the like. * * * And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.* * *

That the power of Congress in these matters transcends any State laws is demonstrated by Hunt v. United States, 278 U.S. 96 (1928), wherein it was held that a State could not enforce its game laws against Federal employees who, upon

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direction of the Secretary of Agriculture, destroyed a number of wild deer in a national forest (which was not under the legislative jurisdiction of the United States), because the deer, by overbrowsing upon and killing young trees, hushes, and forage plants, were causing great damage to the land. The court said (p. 100):

> * * * That this [destruction of deer] was necessary to protect the lands of the United States within the reserves from serious injury is made clear by the evidence. The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt, Camfield v. United States, 167 U.S. 518, 525-526; Utah Power & Light Co. v. United States, 243 U.S. 389, 404; McKelvey v. United States, 260 U.S. 353, 359; United States v. Alford, 274 U.S. 264, the game laws or any other statute of the state to the contrary notwithstanding.

This power of Congress extends to preventing use of lands adjoining Federal lands in a manner such as to interfere with use of the Federal lands. This particular issue came before the Supreme Court in Camfield v. United States, 167 U.S. 518 (1897), where the court considered the applicability of an act of Congress, which prohibited the fencing of public lands, to fencing of lands adjoining public lands in a manner as to make the latter property inaccessible. The court said (pp. 524-526):

> While the lands in question are all within the State of Colorado, the Government has, with respect to its

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> own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preemption or homestead settlement; but it

would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

But the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all enclosures of public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by whatever means, that the act becomes of any avail. * * * The general Government doubtless has a power over its own property analogous to the power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular

case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, thought the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

In McKelvey v. United States, 260 U.S. 353 (1922), the Supreme Court, in sustaining another provision of the same Federal statute, prohibiting restraints upon persons entering public lands, said (p. 359):

It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. Camfied v. United States, 167 U.S. 518, 525; United States v. Grimaud, 220 U.S. 506, 521; Light v. United States, 220 U.S. 523, 536; Utah Power & Light Co. v. United States, 243 U.S. 389, 404-405. The provision now before us is but an exertion of that power. It does no more than to sanction free passage over the public lands and to make the obstruction thereof by unlawful means a punishable offense.

The opinions in M'Culloch v. Maryland, Fort Leavenworth R.R. v. Lowe, Ohio v. Thomas, Hunt v. United States, Utah Power & Light Co. v. United States, Camfield v. United States, and McKelvey v. United States clearly demonstrate that the authority of the Federal Government over its lands within the State is not limited to that derived from legislative jurisdiction over such lads of the character which has been the subject of the preceding chapters; there have been delegated to the Federal Government by the Constitution vast powers which may be exercised with respect to such lands. These powers not only permit the Government to exercise affirmative authority upon and with respect to such lands, but they also serve to prevent--and to authorize Federal legislation to prevent--interference by the States and by private persons with the Federal Government's acquisition, ownership, use, and disposition of lands for Federal purposes and with Federal activities which may be conducted on such lands.

FREEDOM OF USE OF REAL PROPERTY ILLUSTRATED: Taxation.--The freedom of the Federal Government's use of its real property from State interference, through the operation of constitutional provisions other than article I, section 8, clause 17, is illustrated by the freedom of such property from State, and State-authorized (local), taxation. Since the history of the development of such freedom from taxation reflects in considerable measure the development of freedom of Federal property, and Federal operations on such property, from State interference generally, such history is deserving of detailed consideration.

Prior to 1886, it was an open question whether federally owned real estate was in all instances exempt from State taxation. Thus, in Commonwealth v. Young, 1 Journ. Juris. (Hall's,, Phila.) 47 (Pa., 1818), it was suggested that federally owned land over which legislative jurisdiction had not been acquired was subject to all State laws, including revenue laws. In United States v. Railroad Bridge Co., 27 Fed. Cas. 686, No. 16,114 (C.C.N.D. Ill., 1855), it was suggested by Justice

McLean that the tax exemption of federally owned lands was dependent upon compacts between the United States and the State whereby the State has surrendered the right to tax; if not subject to such a compact, Justice McLean suggested, Federal lands could be subjected to State taxation. He added (p. 692):

> * * * In many instances the stats have taxed the lands on which our custom houses and other public buildings have buildings have been constructed, and such taxes have been paid by the federal government. This applies only to the lands owned by the Government as a proprietor, the jurisdiction never having been ceded by the state. The proprietorship of land in a state by the general government, cannot, it would seem, enlarge its sovereignty of restrict the sovereignty or restrict the sovereignty of the state.

Somewhat similar views were implied in two early California cases (subsequently superseded by contrary views, as indicated infra), People v. Morrison, 22 Cal. 73 (1863); People v. Shearer, 30 Cal. 645 (1866). In United States v. Weise, 28 Fed. Cas. 518, No. 16,659 (C.C.E.D.Pa., 1851), the court said (p. 518) that the authority of the State to tax property of the Federal Government "has been the subject of much discussion of late. It has been twice argued before the supreme court of the United States, but remains undecided." The court did not rule on the issue in that case, but held that such a tax could not in any event be enforced by levy, seizure, and sale of property.

In its opinion, the court did not identify the cases in which the tax issue had been twice argued before the supreme court of the United States", but left undecided. It presumably had reference, however, to the unreported cases of United States v. Portland (1849) and Roach v. Philadelphia County (1849). According to an account given of the latter case in 2 American Law Journal (N.S.) 444 (1849-1850):

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> * * * A writ of Error had been taken to the Supreme Court of Pennsylvania. By the decision of that Court the lot on which is erected the Mint of the United States was held liable to taxation for county purposes under State laws. The State of Pennsylvania had never relinquished her right of taxation, nor had she given her consent tot he purchase of the ground by the United States.--The Supreme Court of the United States affirmed the judgment of the State Court, thereby sustaining the right of the State to impose taxes upon the property, notwithstanding that it belonged to the United States.

According to a report of the same case, as recited by the Supreme Court in Van Brocklin v. Tennessee, 117 U.S. 151, 176 (1886), the treasurer of the mint had sought to recover State, county and city taxes which had been levied and paid both upon the building and land used by the mint of the United States, and the decision of the Pennsylvania Supreme Court upholding the validity of the taxes was sustained by an equal division of the United States Supreme Court. The decision of the Pennsylvania court, like that of the United States Supreme Court in this case, has not been found in any of the reports.

In the opinion in the Van Brocklin case, the Supreme Court gave the following account (at p. 175) of the case of United States v. Portland:

> The first of those cases was United States v. Portland, which, as agreed in the statement of facts upon which it was submitted to the decision of the Circuit Court

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> of the United States for the District of Maine, was an action brought by the United States against the City of Portland to recover back the amount of taxes assessed for county and city purposes, in conformity with the statutes of Maine, upon the

land, wharf and building owned by the United States in that city. The building had been erected by the United States in that purpose, and no other. The land, building and wharf were within the legislative jurisdiction of the State of Maine, and had always been so, not having been purchased by the United States with the consent of the legislature of the State. The case was heard in the Circuit Court at May term 1845, and was brought to this court upon a certificate of division of opinion between Mr. Justice Story and Judge Ware on several questions of law, the principal one of which was, whether the building, land and wharf, so owned and occupied by the United States, were legally liable to taxation; and this court, being equally divided in opinion on those questions, remanded the case to the Circuit Court for further proceedings. The action therefore failed. The legislature of Maine having meanwhile, by the statute of 1846, ch. 159, Sec. 5, provided that the property of the United States should be exempted from taxation, the question has never been renewed.

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Such acquisition may be with or without the consent of the State in which the property is situated. Moreover, the Supreme Court emphasized, the laws of the Untied States are supreme, and the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers of the Federal Government.

Taxation, the court stated, relying on M'Culloch v. Maryland, 4 Wheat. 316 (1819), is such ann interference. Moreover, the court made clear, a distinction cannot be made on the basis of the uses to which the real property of the Federal Government may be devoted (pp. 158-159):

> The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." ***

After referring to the Articles of Confederation of 1778, in which it was expressly provided that "no imposition, duties or restriction shall be laid by any State on the property of the United States," and to the fact that a similar provision was also contained in the Northwest Ordinance of 1787, the court said (pp. 159-160):

> The Constitution creating a more perfect union, and increasing the powers of the national government, expressly authorized the Congress of the United States "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;" "to exercise exclusive legislation over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;" and "to dis-

> pose of and make all needful rules and regulations respecting the territory or other property of the United States"; and declared, "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." No further provision was necessary to secure the lands or other property of the United States from taxation by the States.

The court concluded its opinion as follows (pp. 179-180):

> * * * To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States.

While citing article IV, section 3, clause 2, as one of the bases for its conclusion, the Supreme Court in the Van Brocklin opinion did not rely solely on that provision, nor did it spell out its reasons for concluding that this clause prevented State and local taxation of real estate of the United States. Four years later, the Supreme Court had occasion to give more detailed consideration to this question in Wisconsin Central R.R. v. Price County, 133 U.S. 496 (1890). In that case the court said (p. 504):

> It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from state taxation--and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes

> or for mere local and special objects--is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If

> the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with his right or obstruct its exercise. * * * [Emphasis added.]

The opinions of the Supreme Court in the Van Brocklin and Wisconsin Central R.R. cases establish an inflexible rule, with no exceptions, that property of the Federal Government may not, absent the express consent of the Government, be taxes by a State or subdivision thereof. All such property is held in a governmental capacity, and its taxation by a State or local subdivision, the Supreme Court has stated, would constitute an unconstitutional interference with Federal functions; in addition, since taxation carries with it the right to levy execution on the property in order to enforce payment of the tax on it, the taxation of such property by a State is prohibited by article IV, section 3, clause 2, of the Constitution, which vests solely in the Congress the authority to dispose of property of the United States.

State activities are exempt from Federal taxation only to the extent that they represent an exercise of governmental powers rather than engaging in business of a private nature. Ohio v. Helvering, 292 U.S. 360, 368 (1934); South Carolina v. United States, 199 U.S. 437, 458 (1905). Ohio taxing authorities thought that this rule applied conversely to allow them to tax a Federal housing project and the Ohio Supreme Court denied tax exemption. The United States Supreme Court rejected this contention in two curt sentences in Cleveland v. United States, 323 U.S. 329, 333 (1945), as follows: "And Congress may exempt property owned by the United States or its instrumentality form state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary." Thereafter the Ohio Supreme Court rejected another attempt of the taxing authorities to apply the governmental versus proprietary function distinction to the United States, holding that so long as the land is owned by the United States it is tax exempt. United States (Form Credit administration) v. Board of Tax Appeals, et al., 145 Ohio St. 257, 61 N.E. 2d 481 (1945). However, Federal ownership does not prohibit taxation of private interests in the same parcel of real property. S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946).

While federally owned property is constitutionally exempt from State and local taxation, the Congress may, of course, waive such exemption. Both at the present time and in years past Congress has authorized the payment of State and local taxes on certain federally owned real property. Thus, at the present time, approximately three million dollars per year are paid pursuant to such authorizations in addition to the so-called payments in lieu of taxes, which aggregate approximately 14 million dollars more. Such authorizations by the

Congress are not, of course, a recent innovation. Thus, specific appropriation of funds for payment of the tax on the mint of the United States in Philadelphia, involved in Roach v. Philadelphia County, supra, was made by the Congress. And in 4 Stat. 673, 675 (act of May 14, 1834), is to be found another appropriation made expressly for the purpose of paying just such taxes.

Special assessments.--Federally owned property is constitutionally exempt not only from a State's and local subdivision's general real property taxes, but it is also immune from special assessments which are levied against property owners for improvements. See Wisconsin Central R.R. v. United States, 290 U.S. 89 (1933); United States v. Anderson Cottonwood Irr. Dist., 19 F.Supp. 740 (N.D.Cal., 1937). Such immu-

nity extends not only to the Federal Government but also to its successors in interest, insofar as the special assessments relate to any improvements which were made while the Federal Government owned the property. This latter issue was so decided in Lee v. Osceola & Little River Road Improvement District, 268 U.S. 643 (1925), and in the course of its opinion the Supreme Court said (p. 645):

> It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. Van Brocklin v. State of Tennessee, 117 U.S. 151, 180. This is conceded. It is urged, however, that this rule has no application after the title has passed from the United States, and that it may then be taxed for any legitimate purposes. While this is true in reference to general taxes assessed after the United States has parted with its title, we think it clear that it is not the case where the tax is sought to be imposed for benefits accruing tot he property from improvements made while it was still owned by the United States. In the Van Brocklin Case, supra, p. 168, it was said that the United States has the exclusive right to control and dispose of its public lands, and that "no State can interfere with this right, or embarrass its exercise." Obviously, however, the United States will be hindered in the disposal of lands upon which local improvements have been made, if taxes may thereafter be assessed against the purchasers for the benefits resulting from such improvements. Such a liability for the future assessments of taxes would create a serous incumbrance upon the lands, and its subsequent

> enforcement would accomplish indirectly the collection of a tax against the United States which could not be directly imposed. * * *

Condemnation of Federal land.--Closely related to the subject of State taxation of Federal land is that of State condemnation of such land. Prior to the decision of the Supreme Court in Van Brocklin v. Tennessee, 117 U.S. 151 (1886), in which was established the proposition that the Federal Government does no, and cannot, hold property in a proprietary capacity, it was held in a number of cases that the State's power of eminent domain extended to land of the Federal Government not used or needed for a governmental purpose.

The decision in the Van Brocklin case, in its holding that the Federal Government owns all of its property in a governmental capacity, rendered untenable the underlying principles upon which these cases sustaining the State's power of eminent domain rested, and in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), the United States Supreme Court disposed of the issue squarely by stating (pp. 403-404):

> The fact position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that the lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the United States are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others.

> To this we cannot assent. Not only does the Constitution (Art. IV, Sec. 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. * * *

And, as to the issue of the State's exercise of its power of eminent domain with respect to federally owned land, the court concluded (p. 405):

> It results that laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented [viz., the right to use and occupy federally owned land], same as they may have been adopted or made applicable by Congress.

The same result would because of the Federal Government's sovereign immunity from suit. A proceeding to condemn land, in which the United States has an interest, is a suit against the United Stats which may be brought only by the consent of Congress. Minnesota v. United States, 305 U.S. 382, 386-387 (1939).

FEDERAL ACQUISITION AND DISPOSITION OF REAL PROPERTY: Acquisition.--While the acquiescence of a State is essential to acquisition by the Federal Government of legislative jurisdiction over an area within such State, it is not essential to the

acquisition by the Federal Government of real property within the States. The Federal Government may obtain such

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real property by gift, purchase, or condemnation. See Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Kohl v. United States, 91 U.S. 367 (1876). It may also obtain property of the State by exercise of its power of eminent domain, even though such property is used by the State for governmental purposes. United States v. Wayne County, 53 C.Cls. 417 (1918), aff'd., 252 U.S. 574 (1920); United States v. Carmack, 329 U.S. 230 (1946); Oklahoma v. Atkinson Co., 313 U.S. 508 (1941); United States v. Montana, 134 F.2d 194 (C.A. 9, 1943) and see also United States v. Clarksville, 224 F.2d 712 (C.A. 4, 1955).

Disposition.--By reason of article IV, section 3, clause 2, of the Constitution, Congress alone has the ultimate authority to determine under what terms and conditions property of the Federal Government may or shall be sold. In Gibson v. Chouteau, 13 Wall. 92 (1872), which involved a complex issue of a claim of title under State law as against title claimed through a patent from the Federal Government, the Supreme Court said (pp. 99-100):

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri,

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> and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers."
>
> The same principle which forbids and State legislation interfering with power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress

if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Similarly, in Bagnell v. Broderick, 13 Pet. 426 (1839_), it was held that the Congress has "the sole power to declare the dignity and effect of titles emanating from the United States" (p. 450), and in Wilcox v. Jackson, 13 Pet. 498 (1839), it was held that the question of whether title to land which once was the property of the Federal Government had passed to its assignee is to be resolved by the laws of the United States. In Irvine v. Marshall, et al., 20 How. 558 (1858), it was said (p. 563):

> * * * The fallacy of the conclusion attempted * * *, consists in the supposition, that the control of the United States over property admitted to be their own, is dependent upon locality, as to the point within the limits of a State or Territory within which that prop-

> erty may be situated. But as the control, enjoyment, or disposal of that property, must be exclusively in the United States, anywhere and everywhere within their own limits, and within the powers delegated by the Constitution, no State, and much less can a Territory, (yet remaining under the authority of the Federal Government,) interfere with the regular, the just, and necessary power of the latter. * * *

In the exercise of its powers of disposition, Congress may authorize the leasing of real property, as well as its sale. United States v. Gratiot, 14 Pet. 526 (1840). In disposing of property, Congress may also provide that it shall not become liable for the satisfaction of debts contracted prior to the issuance of a land patent. Ruddy v. Rossi, 248 U.S. 104 (1918). Congress may also provide that it shall not become liable for the satisfaction of debts contracted prior to the issuance of a land patent. Ruddy v. Rossi, 248 U.S. 104 (1918). Congress may also restrict the disposition of personal property developed by a grantee on property acquired from the United States. United States v. San Francisco, 310 U.S. 16 (1940). Under its general powers of disposition, Congress may condition the use of real property of the United States by requiring the user to transmit over its lines electric power owned by the Federal Government. Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952).

In Federal Power Commission v. Oregon, 349 U.S. 435 (1955), which basically involved interpretation of Federal statutes, it was held that a State is without authority to require a person to obtain from the State permission to construct a privately owned dam on property of the United States where such construction was instituted with the permission of the United States; the granting of such permission by the United States is an exercise of the power of disposition with which a State may not interfere. The court said (pp. 441-443):

> On its face, the Federal Power Act applies to this license as specifically as it did to the license in the First Iowa case [First Iowa Coop. v. Federal Power Commission, 328 U.S. 152].

There the jurisdiction of the Commission turned almost entirely upon the naviga-

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bility of the waters of the United States to which the license applied. Here the jurisdiction turns upon the ownership or control by the United States of the reserved lands on which the licensed project is to be located. The authority to issue licenses in relation to navigable waters of the United States springs from the Commerce Clause of the Constitution. The authority to do so in relation to public lands and reservations of the United States springs from the Property Clause--"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." Art. IV, Sec. 3.

It is clear that Congress, in the exercise of its power of disposition, may authorize actions serving to improve the marketability of the property. Thus, it may provide for the reclamation of arid lands owned by the Federal Government. United States v. Hanson, 167 Fed. 881 (C.A. 9, 1909); Kansas v. Colorado, 206 U.S. 46, 91, 92 (1907). It may also authorize the purchase of privately owned transmission lines to facilitate the sale of excess electrical energy produced by federally owned facilities. In Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), the court stated (p. 338):

> * * * The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States. * * *

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PROTECTION OF PROPERTY AND OPERATIONS OF THE GOVERNMENT: Property.--It is not essential that the Federal Government have legislative jurisdiction over real property owned by it in order to provide for its protection against trespass, unauthorized use, or destruction, notwithstanding that State laws may continue effective. Legislation having these objectives has in a number of cases been sustained on the basis of the power delegated to Congress by article IV, section 3, clause 2, of the Constitution. While this clause, it is clear from Pollard v. Hagan, 3 How. 212, 223 (1845), does not grant to Congress "municipal sovereignty" over any area within a State, it constitutes a "grant of power to the United States of control over its property." Kansas v. Colorado, 206 U.S. 46, 89 (1907).

On the basis of the power vested in Congress by article IV, section 3, clause 2, of the Constitution, the United States was granted an injunction to restrain grazing of cattle on public lands

without a permit. Light v. United States, 220 U.S. 523 (1911). In the course of its opinion, the court said (pp. 536-538):

> The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely, Stearns v. Minnesota, 179 U.S. 243. It is true that the "United States do not and cannot hold property as a monarch may for private or personal purposes." Van Brocklin v. Tennessee, 117 U.S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, Sec. 3, Art. IV, that "Congress shall have power to dis-

> pose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." Kansas v. Colorado, 206 U.S. 89.
>
> "All the public lands of the nation are held in trust for the people of the whole country." United States v. Trinidad Coal Co., 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. * * * * * * He [i.e., the defendant] could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the Reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the Reserve the Government has no remedy at law or equity. This claim answers itself.

Similarly, in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), it was held that the United States could enjoin the occupancy and use, without its permission, of cer-

tain of its lands forest reservations as sites for works employed in generating and distributing electric power, and to obtain compensation for such occupancy and use in the past. In United States v. Gear, 3 How. 120 (1845), it was held that the United States was entitled to an injunction to prevent unauthorized mining of lead on federally owned land. The Federal Government may also prevent the

extraction of oil from public lands. See United States v. Midwest Oil Co., 236 U.S. 459 (1915). In Cotton v. United States, 11 How. 229 (1850), it was held that the United States may bring a civil action of trespass for the cutting and carrying away of timber from lands owned by the United States. The United States, as the absolute owner of the Arkansas Hot Springs, has the same power a private owner would have to exclude the public from the use of the waters. Van Lear v. Eisele, 126 Fed. 823 (C.C.E.D.Ark., 1903). Indeed, the United States has prevailed in perhaps every type of action, including special remedies variously provided by State statutes to protect and conserve its lands, and resources and other matters located thereon.

The Federal Government has undisputed authority to provide, and has provided, criminal sanctions for various acts injurious, or having a reasonable potential of being injurious, to real property of the United States. Congress may provide for the punishment of theft of timber from lands of the United States. See United States v. Briggs, 9 How. 351 (1850); see also United States v. Ames, 24 Fed. Cas. 784, No. 14,441 (C.C.D. Mass., 1845). Federal criminal sanctions may be applied to any person who leaves a fire, without first extinguishing it, on private lands "near" inflammable grass on the

public domain. United States v. Alford, 274 U.S. 264 (1927).

Operations.--The Federal Government has undisputed authority to protect the proper carrying out of the functions assigned to it by the Constitution, without regard to whether the functions are carried out on land owned by the United States or by others, and without regard to the jurisdictional status of the land upon which the functions are carried out. Where such functions involve Federal use of property the Congress may, regardless of the jurisdictional status of such property, make such laws with respect to the property as may be required for effective carrying out of the functions. So, the Congress has enacted statutes prohibiting, under criminal penalties, certain dissemination of information pertaining to defense installations, (*see footnote NO. 33).

Moreover, the United States, in carrying out Federal functions, whether military or civilian, may take such measures with respect to safeguarding of Federal areas (building of fences, posting of sentries or armed guards, limiting of ingress and egress, evicting of trespassers, etc.), regardless of the

jurisdiction status of such areas, as may be necessary for the proper carrying out of the functions.

AGENCY RULES AND REGULATIONS: Beyond the acts and omissions defined as criminal by statutes, certain agencies of the Federal Government have received from the Congress authority to establish rules and regulations for the government of the land areas under their management, and penalties are provided by statute for the breach of such rules and regulations; statutory authority also exists for these agencies to confer on certain of their personnel arrest powers in excess of those ordinarily had by private citizens. However, most Federal agencies do not now have such authority. In

the absence of specific authority to make rules and regulations, criminal sanctions may not attach (regardless of the jurisdictional status of the lands involved) to violations of any such rules

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or regulations issued by the officer in charge of a area, except that members of the armed forces are subject always to the Uniform Code of Military Justice. It should be noted that civilian Federal employees in various circumstances are subject to disciplinary action and that members of the public at large may be excluded from the Federal area.

The validity of rules and regulations issued by the Secretary of Agriculture was challenged in United States v. Grimaud, 220 U.S. 506 (1911), by persons charged with driving and grazing sheep on a forest reserve without a permit. In deciding that the authority to make administrative rules was not an unconstitutional delegation of legislative power by Congress, and that the regulations of the Secretary were valid and had the force of law, the court said (p. 521):

> That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.
>
> It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted, declare, that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so suing them shall comply "with the rules and regulations covering such forest reservation." The same act makes it an offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the

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> Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U.S. 326, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilcox v. Jackson, 13 Pet. 498, 513.
>
> If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

And it been held that rules and regulations issued pursuant to congressional authority supersede conflicting State law.

CONTROL OVER FEDERAL CONSTRUCTION: Building codes and zoning.--In United States v. City of Chester, 144 F.2d 415 (C.A. 3, 1944), in which the city had attempted to require the United States Housing Authority to comply with local building regulations in the construction of war housing in an area not under Federal legislative jurisdiction, it was held (pp. 419-420):

> The authority of the Administrator to proceed with the building of the Chester project under the Lanham Act without regard to the application of the Building

> Code Ordinance of Chester is to be found in the words of Clause 2 of Article VI of the Constitution of the United States which provides that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land. The questions raised by the defendants were settled in general principle as long ago as the decision of Mr. Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L.Ed. 579, wherein it was stated, "If any one proposition could command the universal assent of mankind, we might expect it would be this--that the government of the Union, though limited in its powers, is supreme within its sphere of action. * * *."

The court added (p. 420):

> A state statute, a local enactment or regulation or a city ordinance, even if based on the valid police powers of a State, must yield in case of direct conflict with the exercise by the Government of the United States of any power it possesses under the Constitution. * * *

This decision was cited with approval and followed in Curtis v. Toledo Metropolitan Housing Authority, et al., Ohio Ops. 423, 78 N.E.2d 676 (1947); Tim v. City of Long Branch, 135 N.J.L. 549, 53 A.2d 164 (1947); and in United States v. Philadelphia, 56 F.Supp. 862 (E.D.Pa., 1944), aff'd., 147 F.2d 291 (C.A. 3, 1945), cert. den., 325 U.S. 870. The only decision to the contrary was rendered in Public Housing Administration v. Bristol Township, 146 F.Supp. 859 (E.D. Pa., 1956). Except for the last-cited decision, in which a motion to vacate is now reported to have been granted, the results reached in these cases are substantially the same as that reached in Oklahoma City v. Sanders, 94 F.2d 323 (C.A. 10, 1938), in which it was concluded that local requirements could not be enforced against a contractor constructing buildings in an area of partial jurisdiction.

The Congress, by section 1 (b) of the Lanham act (42 U.S.C. 1521 (b)), had expressly authorized construction of

the housing involved in the City of Chester case without regard to State or municipal ordinances, rules or regulations relating to plans and specifications or forms of contract. However, as the trial court indicated in the Philadelphia case (56 F.Supp. 864), such a provision was unnecessary.

The case of Tim v. City of Long Branch, supra, is the only instance which has been noted of attempted imposition, though judicial action, of zoning limitations of State or local governments on use of real property owned by the Federal Government. Other such problems have arisen, nevertheless. In a case where the Federal Government was merely a lessee of privately owned property, however, it was held that the denial by a city zoning board of an application made by the lessor for the use of a lot as a substation post office was not unconstitutional as an unlawful regulation of property of the Federal Government. Mayor and City Council of Baltimore v. Linthicum, 170 Md. 245,183 Atl. 531 (1936). The matter had been considered previously by a lower tribunal,

and the court invoked the rule of res adjudicata as to all contentions made by the property owner, including constitutional arguments. As to the contention that the application of the zoning ordinance would be an unlawful regulation of property of the United States and an unlawful interference with the mails, the court noted (183 At. 533):

> * * * it may be observed that the property is not owned by the United States; there is only a lease limited to ten years' duration, or the duration of appropriations for rentals, and the lessee has only such property rights as may be derived from the owner. * * * Any interference of the local police regulations with the mails would be, at most, an indirect one, and to pass on the objection on that ground we should have to consider the rule and the decisions on local regulations interfering only incidentally with federal powers. Convington & C.Bridge Co. v. Kentucky 154 U.S. 204, 14 S.Ct. 1087, 38 L.E.d. 962; 2 Willoughby, United States Constitutional Law, Secs. 598, 601, 602, and 605. We do not pass on it because it is foreclosed as stated.

Contractor licensing.--The United States Supreme Court has held that a State may not require that a contractor with the Federal Government secure a license from the State as a condition precedent to the of his contract. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). After citing a Federal statute requiring bids to be awarded to a responsible bidder whose bid was most advantageous to the Federal Government, and after noting that the Armed Services Procurement Regulations listed criteria for determining responsibility and that these criteria were similar to those contained in the

Arkansas law as qualifying requirements for a license to operate as a contractor, the court said (pp. 189-190):

> Mere enumeration of the similar grounds for licensing under the state statute and for finding "responsibility" under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of person and compaction with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of "responsibility" and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder. * * *

While it appears to be the weight of authority that neither a State nor a local subdivision may impose its building codes or license requirements on contractors engaged in Federal construction, it does not follow that the contractor may ignore all State law. For example, the State's laws concerning negligence would continue to be applicable, and such negligence might be predicated upon the contractor's noncompliance with a State statute relating to safety requirements. Thus, in Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940), it was held that, under the international law rule, such a State statute governed the rights of the parties to a negligence action. While this case involved an area of exclusive Federal legislative jurisdiction, that fact is not controlling on the issue concerned. Obviously the statute also would have been held applicable in the absence of legislative jurisdiction in the Federal Government.

The Supreme Court held that the application of such safety requirements would not interfere with the construction of the building. In answer to the argument that compliance with such requirements might increase the cost of the building, the court said (p. 104), that such contention "ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action."

In Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943), the Supreme Court said of a price regulation held applicable to a Federal contractor which would incidentally affect the Government (p. 269):

> * * * We may assume that Congress, in aid of its granted power to raise and support armies, Article I, Sec. 8, c. 12, and with the support of the supremacy clause, article VI, Sec. 2, could declare state regulations like the present inapplicable to sales to the government. * * *

In the same opinion, the court said also (p. 271):

> Since the Constitution has left Congress free to set aside local

taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. * * *

The views expressed by the Supreme court in this case concerning the power of Congress to create such immunity in Federal contractors were subsequently applied in Carson v. Roane-Anderson Company, 342 U.S. 232 (1952), in which it was held that Congress had immunized contractors of the Atomic Energy Commission from certain State taxes, and also

in Leslie Miller, lnc. v. Arkansas, 352 U.S. 187 (1956), in which the Supreme Court concluded that the State's regulations relating to the licensing of contractors were in conflict with the regulations established by the Department of Defense and therefore were inapplicable to a contractor with that Department.

CHAPTER X

FEDERAL OPERATIONS NOT RELATED TO LAND

STATE LAWS AND REGULATIONS RELATING TO MOTOR VEHICLES: Federally owned and operated vehicles.--In an opinion by Justice Holmes, it was concluded by the Supreme Court that a State may not constitutionally require a Federal employee to secure a driver's permit as a perquisite to the operation of a motor vehicle in the course of his federal employment. Johnson v. Maryland, 254 U.S. 51 (1920). The court said (pp. 56-67):

Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in United States v. Hart, Pat. C.C. 390. 5 Ops.Atty.Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local laws would extend to general rules that might affect incidentally the mode of carrying out the employment--as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. Commonwealth v. Closson, 229 Massachusetts, 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence. But even the most unquestionable and those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pur-

suance of the laws of the United States. In re Neagle, 135 U.S.

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> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those hat the Government has pronounced sufficient. It is the duty of the department to employ persons competent for their work and that duty it must be presumed has been performed. Keim v. United States, 177 U.S. 290, 293.

Even earlier, but on similar principles, the Comptroller of the Treasury had disallowed payment of a fee for registration of a federally owned motor vehicle. 115 Comp. Dec. 231 (1908).

In Ex parte Willman, 277 Fed. 819 (S.D.Ohio, 1921), the driver of a mail truck, on a street which was a post road, was held not to be subject to arrest, conviction, and imprisonment because the lights on his truck, which were those prescribed by the regulations of the Post Office department, did not conform to the requirements of a State statute. The court relied on Johnson v. Maryland, supra, and Ohio v. Thomas, 173 U.S. 276 (1899), in reaching its conclusion.

An apparently contrary conclusion was reached in Virginia v. Stiff, 144 F.Supp. 169 (W.D.Va., 1956), in which the question was presented as to whether State regulations as to the maximum weight of vehicles using the highways were applicable to a truck owned and operated by the Federal Government, and engaged on Federal business. In holding such

regulations to be applicable so as to subject the Government employee truck driver to a criminal penalty, the court stated that their purpose is to protect the safety of travellers and to protect the roads from unreasonable wear; that the State of Virginia authorizes the use of highways by overweight vehicles in case of emergency; and that the Department of Defense seeks permits from the State to authorize the passage of overweight vehicles. It appears that in this case no facts were presented to indicate whether there was any federally imposed requirement upon the driver to operate the overweight truck, the defense being based merely on federal ownership of the truck and the fact of its being engaged on Government business.

When Federal employees have failed to comply with local traffic regulations, the courts have generally applied the test of whether noncompliance was essential to the performance of their duties. Thus, in Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653 (1918), it was held that a mail carrier is subject to the rules and regulations made by the street and park commissioners requiring a traveller to drive on the right side of the road and in turning. In United States v. Hart, 26 Fed. Cas. 193, No. 15,316 (C.C.D.Pa., 18107), it was held that an act of Congress prohibiting the stopping of the mail is not to be so construed as to prevent the arrest of the driver of a mail carriage when he is driving through a crowded city

at such a rate as to endanger the lives of the inhabitants. In Hall v. Commonwealth, 129 Va. 738, 105 S.E. 551 (1921), it was held that the driver of a postal truck must comply with the State's speed laws. The court emphasized that no time schedules had been established by the Post Office Department which would require excessive speed.

That a Federal employee is not immune from arrest for noncompliance with State traffic regulation where performance of his duties did not necessitate such noncompliance

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is well illustrated by the following excerpt from the opinion of the court in Oklahoma v. Willingham, 143 F.Supp. 445 (E.D.Okla., 1956, (p. 448):

> The State of Oklahoma has not only the right hut the responsibility to regulate travel upon its highways. The power of the state to regulate such travel has not been surrendered to the Federal Government. An employee of the Federal Government must obey the traffic laws of the state although he may be traveling in the ordinary course of his employment. No law of the United States authorizes a rural mail carrier, while engaged in delivering mail on his route, to violate the provisions of the state those who use the highways.
>
> Guilt or innocence is not involved, but there is involved a question of whether or not the prosecution is based on an official act of the defendant. There is nothing official about how or when the defendant re-entered the lane of traffic on the highway. There is no official connection between the acts complained of and the official duties of the mail carrier. The mere fact that the defendant was on duty and delivering mail along his route does not present any federal question and administration of the work of the Post Office Department does not require a carrier, while delivering mail, to drive his car from a stopped position into the path of an approaching automobile. When he is charged with doing so, his defense is under state law and is not different from that of any other citizen.

Where, on the other hand, the Federal employee could not discharge his duties without violating State or local traffic regulations, it has been that he is immune from any liability under State or local law for such noncompliance. Thus, in Lilly v. West Virginia, 29 F.2d 61 (C.A. 4, 1928), the court

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held that a Federal prohibition agent, who struck and killed a pedestrian while pursuing a suspected criminal, was excepted from limitations of speed prescribed by a city ordinance, provided that he acted in good faith and with the acre that an ordinarily prudent person would have exercised under the circumstances, the degree of care being commensurate with the dangers. The court said (p. 64):

> The traffic ordinances of a city prescribing who shall have the

> right of way at crossings and fixing speed limits for vehicles are ordinarily binding upon officials of the federal government as upon all other citizens. Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653, L.R.A. 1918C, 939; United States v. Hart, 26 Fed. Cas. No. 15,316, page 193; Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126. Such ordinances, however, are not to be construed as applying to public officials engaged in the performance of a public duty where speed and the right of way are a necessity. The ordinance of Huntington makes no exemption in favor of firemen going to a fire or peace officers pursuing criminals, but it certainly could not have been intended that pedestrians at street intersections should have the right of way over such firemen or officers, or that firemen or officers under such circumstances should be limited to a speed of 25 miles, or required to slow down at intersections so as to have their vehicles under control. Such a construction would render the ordinances void for unreasonableness in so far as they applied to firemen or officers engaged in duties, in the performance of which speed is necessary; and we think that they should be construed as not applicable to such officers, either state or federal, under such circumstances. State v. Gorham, 110 Wash. 330, 188 P.457, 9 A.L.R. 365; Farley v. Mayor of New York City, 152 N.Y. 222, 46 N.E.D 506, 57 Am. St. Rep. 511; Hubert v. Granzow, 131 Minn. 361, 155 N.W. 204, Ann. Cas.

> 1917D, 563; State v. Burton, 41 R.I. 303, 103 A. 962, L.R.A. 1918F, 559; Edberg v. Johnson, 149 Minn. 395, 184 N.W. 12.

Similarly, in State v. Burton, 41 R.I. 303, 103 Atl. 962 (1918), it was held that a member of the United States naval reserve, driving a motor vehicle along a city street in the performance driving a motor vehicle along a city street in the performance of an urgent duty to deliver a dispatch under instructions from his superior officer, is not amenable to local law regulating the speed of motor vehicles. State laws, the court held, are subordinate to the exigencies of military operations by the Federal Government in time of war.

Closely allied to these cases relating to the applicability of State and local traffic regulations to Federal employees is the case of Bennett v. Seattle, 22 Wash.2d 455, 156 P.2d 685 (1945), in which State traffic regulations were held to have been suspended as a consequence of certain action taken by the military. Under the facts of the case, it appears that the plaintiff in a negligence action was walking on the right, instead of the left, side of the street, the latter ordinarily being required by State law. The court did not regard the State law as applicable in view of the closing of the particular street to the public by Army officers. As to the Army's action, the court said (156 P.2d 687):

> The highway was closed to general public travel in December, 1941. Public authority acquiesced in the action taken by the army officers. The appellant does not question the right and power of the officers of the army to close the part of Sixteenth avenue from east Marginal way to the bridge to public travel and to admit into the bridge to public travel and to admit into the closed area only such Buses and automobiles of employees of the Boeing plant as they deemed advisable; but it contends that,

> notwithstanding this, such part of Sixteenth avenue did not cease to be a public highway and that the statutory rules of the road still applied.
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> The action taken in closing the highway to public use did not infringe upon, or interfere with, the exercise of any prerogative of sovereignty or any governmental function of the state or its legal subdivisions. The appellant, in maintaining its streets, acts in a proprietary capacity, and it acquired no right in a statutory rule of conduct by a pedestrian on the highway that would prevent its temporary suspension when such became necessary or convenient by an exercise of a war power of the kind we are new considering.

Vehicles operated under Federal contract.--State laws which constitutionally cannot have any application to motor vehicles owned and operated by the Federal Government may, in many instances, be applicable to motor vehicles which are privately owned but which, under contract with the Federal Government, are used for many of the same purposes for which federally owned vehicles are used. A distinction must be made on the basis of ownership; the ownership may be of decisive significance.

Thus, it has been held that a State may tax vehicles which are used in operating a stage line and make constant use of the highways, notwithstanding the fact that they carry mail under a Federal contract; moreover, such tax may be measured by gross receipts, even though over on-half of the taxes income is derived from mail contracts. Alward v. Johnson, 282 U.S. 509 (1931). The Supreme Court said (p. 514):

> Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. Railroad Co. v. Peniston, 18 Wall. 5, 30; Metcalf & Eddy v. Mitchell,

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> 269 U.S. 514. The facts in Panhandle Oil Co. v. Mississippi, 277 U.S. 218, and New Jersey Bell Tel. Co. v. State Board, 280 U.S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.

In reliance on this case, it was concluded, in Crowder v. Virginia, 197 Va. 96, 87 S.E.2d 745 (1955), app. dism., 250 U.S. 957, that a carrier is not exempt from a State's gross receipts tax even though, under a contract with the Post Office Department, it was engaged in the interstate carriage of mails, under direction from the Government as to routes, schedules and termini. A contractor engaged in

transporting mail is not exempt from payment of State motor fuel taxes. Op.A.G., Ill., p. 219, No. 2583 (Apr. 21, 1930). Nor is a contractor who is engaged in work for the Federal Government on a cost-plus-a-fixed-fee basis. Id. p. 252, No. 199 (Nov. 19, 1940). In Baltimore & A.R.R. v. Lichtenberg, 176 Md. 383, 4 A.2d 734 (1939), app. dism., 308 U.S. 525, a contractor with the federal Government for the transportation of workmen to a Government project was held subject to State regulation as a common carrier. In Ex parte Marshall, 75 Fla. 97, 77 So. 869 (1918), it was held that a bus company which enters into a contract with the military to transport troops between a military camp and a city, subject to terms and conditions specified in the contract, the United States having no other interest or ownership in or control over the buses, is liable to pay a local license tax for the operation of the buses. In reliance on

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the decision in Ex parte Marshall, supra, it was held in State v. Wiles, 116 Wash. 387, 199 P. 749 (1921), that a contractor engaged in carrying mail for the United States within the State is not exempt from a State statute making it unlawful to operate motor trucks on the highways without first securing a license therefor, the fee varying according to the capacity of the truck. The court said that such a fee is not a direct tax on the property of the Federal Government or on instrumentalities used by it in the discharge of its constitutional functions, but at most an indirect and immaterial interference with the conduct of government business.

Even though title to a vehicle is not in the Federal Government, a State vehicle tax may not be levied on an automobile owned by a Federal instrumentality has been declared to be immune from State taxes. See Roberts v. Federal Land Bank of New Orleans, 189 Miss. 898, 196 So. 763 (1940). And in an early case, United States v. Barney, 24 Fed. Cas. 1014. No. 14,525 (D.Md., circa 1810), it was held that a Federal statute prohibiting the stoppage of the mails serves to prevent the enforcement, under State law, of a lien against privately owned horses used to draw mail carriages.

STATE LICENSE, INSPECTION AND RECORDING REQUIREMENTS: Licensing of Federal activities.--The case of United States v. Murray, 61 F.Supp. 415 (E.D.Mo., 1945), involved a holding that a local subdivision could not require an inspector employed by the Office of Price Administration

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to conform with local requirements covering food handlers. The court said (p. 417):

> It is fundamental that the officers, agents, and instruments of the United States are immune from the provisions of a city ordinance in the performance of their duties. This principle of law, while having exceptions not here involved, applies to the ordinance alleged to have been the basis of the defendants' conduct in this case. It is the duty of the Government and its agencies to employ persons qualified and competent for their work. That duty it must be presumed to have performed, and a

city cannot by ordinance impose further qualifications upon such officers and agents as a condition precedent to the performance and execution of duties prescribed under federal law.

Applicability of inspection laws to Federal functions.--The United States Supreme Court has held that a State's inspection laws generally are inapplicable to activities of the Federal

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Government, even though such laws may be for the protection of the general public. Mayo v. United States, 319 U.S. 441 (1943). In that case a State was held to be without consti-

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tutional power to exact an inspection fee with respect to fertilizers which the Federal Government owned and distributed within the State pursuant to provisions of the Soil Conservation and Domestic Allotment Act. The court said (pp. 447-448):

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. * * * These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal government must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. Shaw v. Gibson Zahniser Oil Corp., 276 U.S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Recording requirements.--It has also been held that the Federal Government is not required to comply with State recording requirements in order to protect its rights. In the Matter of American Boiler Works, Inc., Bankrupt, 220 F.2d 319 (C.A. 3, 1955); see also Norman Lumber Co. v. United States, 223 F.2d 868 (C.A. 4 1955). In In re Read-York, Inc., 152 F.2d 313 (C.A. 7, 1945), it was held that the failure

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of the Federal Government to record a contract for the manufacture and delivery of gliders to the Army, in compliance with Wisconsin's public policy and statutes, did not prevent title from passing to the

Federal Government, upon the making of partial payments, as against the manufacturer's trustee in bankruptcy. These results are in accord with an earlier decision by the United States Supreme Court, in United States v. Snyder, 149 U.S. 210 (1893), in which it was held that the lien imposed by Federal statute to secure the payment of a Federal tax is not subject to the requirement of a State statute that liens shall be effective only if recorded in the manner specified by the State statute. In United States v. Allegheny County, 322 U.S. 174 (1944), the court said (p. 183):

> * * * Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. * * * Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property.* * *

The courts of the State of Virginia have also recognized that State registration requirements can have no application to the Federal Government. In United States v. William R. Trigg Co., 115 Va. 272, 78 S.E. 542 (1912), the question was presented as to whether the Federal Government is required to comply with the State registry laws and have its contracts recorded in order to make effective the liens reserved in such contracts, as against those who have no prior liens. The court said (78 S.E. 544):

> This power to contract, which is an incident of the sovereignty of the United States, and is, as stated by Judge Marshall, coextensive with the duties and powers of government, carries with it complete exemption of the

> government from all obligation to comply with State registry laws, for the reason that it would grievously retard, impede, and burden the sovereign right of the government to subject it to the operation of such laws. * * *
>
> If the states had the power to interfere with the operations of the federal government by compelling compliance on its part with state laws, such as the registry statutes, then, in the language of the Supreme Court, the potential existence of the government would be at the mercy of state legislation. * * *

While State recording requirements cannot in any way be applicable to the Federal Government, and while noncompliance therewith will not serve to dilute the right of the Federal Government, it is clear that should the Federal Government decide to avail itself of State recording facilities it must pay to the State a reasonable fee therefor, but it cannot be subjected, without its consent, to State taxes which may be imposed upon such recordation. Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374 (1923). In Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939), it was held that the Maryland tax on mortgages, graded according to the amount of the loan secured and imposed in addition to the ordinary registration fee as a condition to the recordation of the instrument,

cannot be applied to a mortgage tendered for record by the Home Owners' Loan Corporation, in view of the provisions of the Home Owners' Loan act which declares the corporation to be an instrumentality of the Federal Government and which provides for its exemption from all State and municipal taxes. In the course of its opinion, the court said (pp. 32-33):

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> We assume here, as we assumed in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. McCulloch v. Maryland, 4 Wheat. 316, 421, 422; Smith v. Kansas City Title Co., 255 U.S. 180, 208, 209; Graves v. New York ex rel. O'Keefe, supra. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve." McCulloch v. Maryland, supra, p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport Case, 234 U.S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e.g., Bank v. Supervisors, 7 Wall. 26, 31; Choate v. Trapp, 224 U.S. 665, 668, 669; Smith v. Kansas City Trapp Co., supra, p. 207; Trotter v. Tennessee, 290 U.S. 354, 356; Lawrence v. Shaw, 300 U.S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing

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> and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

APPLICABILITY OF STATE CRIMINAL LAWS TO FEDERAL EMPLOYEES AND FUNCTIONS: Immunity of Federal employees.--It is well established that an employee of the Federal Government is not answerable to State authorities for acts which he was authorized by Federal laws to perform. In In re Neagle, 135 U.S. 1 (1890), it was held that the State of California had no criminal jurisdiction over an acting deputy United States marshal who committed a homicide in the course of defending a United States Supreme Court justice while the latter was in that State in the performance of his judicial functions; that

a wit of habeas corpus is an appropriate remedy for freeing such employee from the custody of State authorities; and that the Federal courts may determine the propriety of the employee's conduct under Federal law. The court said (p. 75):

> * * * To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these thins are shown, it is established that he is innocent of any crime against the laws of the State, or of any authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the

> United States was as competent to ascertain these facts as may other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. * * *

The underlying constitutional considerations prompting the conclusion that a State may not prosecute a Federal employee for acts authorized by Federal law were set forth in some detail in Tennessee v. Davis, 100 U.S. 257 (1880). In that case it was held that a State indictment of a Federal revenue agent for a homicide committed by him in the course of his duties is removable to a Federal court. In its opinion, the court said (pp. 262-263):

> Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in Martin v. Hunter (1 Wheat. 363), "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operation of the general government may at any time be arrested at the will of one of its members. The legis-

lation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledge Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

The principle that a Federal official or employee is not liable under State law for act done pursuant to Federal authorization has been applied in many instances. Thus, it has been held that a State's laws relating to homicide or assault cannot be enforced against a Federal employee who, while carrying out his duties, committed a homicide or assault in the course of making an arrest, maintaining the peace, or pursuing a fugitive. Brown v. Cain, 56 F.Supp. 56 (E.D.Pa., 1944); Castle v. Lewis, 254 Fed. 917 (C.A. 8, 1918); Ex parte Dickson, 14 F.2d 609 (N.D.N.Y., 1926); Ex parte Warner, 21 F.2d 542 (N.D.Okla., 1927); In re Fair, 100 Fed. 149 (C.C.

D. Neb., 1900); In re Laing, 127 Fed. 213 (C.C.S.D.W.Va., 1903); Kelly v. Georgia, 68 Fed. 652 (S.D.Ga., 1895); North Carolina v. Kirkpatrick, 42 Fed. 689 (C.C.W.D.N.C., 1890); United States v. Fullhart, 47 Fed. 802 (C.C.W.D.Pa., 1891); United States v. Lewis, 129 Fed. 823 (C.C.W.D.Pa., 1904), aff'd., 200 U.S. 1 (1906); United States v. Lipssett, 156 Fed. 65 (W.D. Mich., 1907).

It has likewise been held that a United States marshal cannot be subjected to arrest and imprisonment by a State for acts done pursuant to the commands of a writ issued by a Federal court. Anderson v. Elliott, 101 Fed. 609 (C.A. 4, 1900), app. dism., 22 S.Ct. 930, 46 L.Ed. 1262 (1902); Ex parte Jenkins, 13 Fed. Cas. 445, No. 7,259 (C.C.E.D.Pa., 1953). A State militia officer who, under the orders of a governor of a State, employs force to resist and prevent a United States marshal from executing process issued under a Federal decree is subject to punishment for violating the laws of the United States. United States v. Bright, 24 Fed. Cas. 1232, No. 14,647 (C.C.D.Pa., No. 15,320 (C.C.D.Md., 1845), Justice Taney held that on an indictment for obstructing the mails it is no defense that a warrant had been issued under State law in a civil suit against the mail carrier.

Obstruction of Federal functions.--It has been held in a number

of cases that State laws will not be applied to Federal employees or their activities where the application of such laws would serve to obstruct the accomplishment of legitimate Federal objectives. Thus, a State law prohibiting the carrying of arms may not be applied to a deputy United States marshal seeking to make an arrest. In re Lee, 46 Fed. 59 (D.Miss., 1891), (but this case was reversed--47 Fed. 645--on the basis of a Federal statute which limited the authority of marshals to the State for which they were appointed. Marshals now may carry firearms, nevertheless--see U.S.C. 3053). A State statute providing for the punishment of one who maliciously threatens to accuse a person of a crime in or-

der to compel him to do an act has no application to a United States pension examiner who is charged with the duty of investigating fraudulent pension claims. In re Waite, 81 Fed. 359 (N.D.Iowa, 1897), app. dism., 180 U.S. 635. Nor may a State proceed against a Federal military officer for allegedly disturbing the peace in clearing a roadway of civilians to enable a military company to proceed to a place where a National Guard recruitment program was being conducted, it has been held. In re Wulzen, 235 Fed. 362 (S.D. Ohio, 1916).

Nearly all the case cited immediately above involved the release, by a Federal court, on a writ of habeas corpus, of a prisoner from State custody. On the other hand, a prisoner held pursuant to Federal authority is beyond the reach of the pursuant to State for release by writ of habeas corpus. See Adbeman v. Booth, 21 How. 506 (1859); Tarble's Case, 13 Wall. 397 (1871). Similarly, property obtained by a United States marshal by virtue of a levy of execution under a judgment of a Federal court may not be recovered by an action for replevin in a State court. See Covell v. Heyman, 111 U.S. 176 (1884). In Ex parte Robinson, 20 Fed. Cas. 965, No. 11934 (C.C.S.D.Ohio, 1856), it was held that a Federal court may order the discharge of a Federal marshal who was held in State custody for contempt because of his refusal to produce certain persons named in a writ of habeas corpus issued by a State judge.

Liability of employees acting beyond scope of employment.--Federal officials and employees are not, of course, above the laws of the State. Whatever their exemption from State law while engaged in performing their Federal functions, this exemption does not provide an immunity from arrest for the commission of a felony not related to the carrying out of the functions. United States v. Kirby, 7 Wall. 482(1868). In In re lewis, 83 Fed. 159 (D.Wash., 1897), it was stated that a Federal officer who, in the performance of what he conceives to be his official duty, transcends his au-

thority and invades private rights, is liable to the individuals injured by his actions (however, it has been held that absent criminal intent he is not liable under the criminal laws of the State). Employment as a mail carrier does not provide the basis for an exemption from the penalty under a State statute prohibiting the carrying of concealed weapons, in the absence of a showing of

"authority from federal government empowering him as a mail carrier to carry weapons in a manner prohibited by state laws." Hathcote v. State, 55 Ark. 183, 17 S.W. 721 (1891). However, even when a soldier is subject to punishment by a State, for an act not connected with his duties as a soldier, when the punishment will serve to interfere with the performance of duties owned by him to the Federal Government a Federal court will require utmost good faith on the part of the State authorities, and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, may be inquired into by the federal courts in proceedings instituted by the soldier's commanding officer. The imposition of a sentence of sixty days for an offense which did not result in injury to person or property was held unwarranted, and the court discharged the soldier on a writ of habeas corpus. Ex parts Schlaffer, 154 Fed. 921 (S.D.Fla., 1907).

LIABILITY OF FEDERAL CONTRACTORS TO STATE TAXATION: Original immunity of Federal contractors.--In Panhandle Oil Company v. Knox, 277 U.S. 218 (1928), it was held that a State tax imposed on dealers in gasoline for the privilege of selling, and measured at so many cents per gallon of gasoline sold, is void under the Federal Constitution as applied to sales to instrumentalities of the Federal Government, such as the Coast Guard Fleet and a veterans' hospital. In Graves v. Texas Company, 298 U.S. 393 (1939), the court struck down as violative of the Constitution, when applied to sales to the Federal Government, a State tax providing that, "every distributor, refiner, retail dealer or storer of gaso-

line * * * shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline * * *". The court held that a tax on storage, or withdrawal from storage, essential to sales of gasoline to the Federal Government, is as objectionable, constitutionally, as a tax upon the sales themselves. However, even in that day it was held that a tax was not objectionable merely because the person upon whom it was imposed happened to be a contractor of a government Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).

Later view of contractors' liability.--In the decisions rendered by the Supreme Court, beginning in 1937 to date, the earlier decisions have not been followed. New tests for measuring the validity of State taxes on federal contractors were devised in James v. Dravo Contracting Co., 302 U.S. 134 (1937). One of the issues involved in that case was whether a gross sales and income tax imposed by a State on a Federal contractor doing work on a Federal dam is invalid on the ground that it lays a direct burden upon the Federal Government. In sustaining the validity of the tax, the court observed (1) that the tax is not laid upon the Federal Government, its property or officers; (2) that it is not laid upon an instrumentality of the Federal Government; and (3) that it is not laid upon the contract of the Federal Government. The decision in the Panhandle case, supra, was limited to the facts involved in that case. The fact that the State the State tax might increase the price to the Federal Government did not, the court indicated, render it

constitutionally objectionable. In answer to the argument that a State might, conceivably, increase the tax from 2% to 50%, the court said (302 U.S. 161):

> * * * The argument ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference there with through any attempted state action. * * *

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In Alabama v. King & Boozer, 314 U.S. 1 (1941), the court not only made a further departure from the doctrine of the Panhandle case, but it expressly overruled the decision in that case. Involved was a sale of lumber by King & Boozer to "cost-plus-a-fixed-fee" contractors for use by the latter in constructing an army camp for the Federal Government. The question presented for the Federal Government. The question presented for decision was whether the Alabama sales tax with which the seller was chargeable, but which he was required to collect from the buyer, infringes any constitutional immunity of the Federal Government from State taxation. In sustaining the tax, the court said (pp. 8-9):

> * * * The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Knox, supra; Graves v. Texas Co., supra, we think it no longer tenable. * * *

The court rejected the Government's contention that the legal incidence of the tax was on the Federal Government (p. 14):

> We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circum-

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> stance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the

Government in James v. Dravo Contracting Co., supra. * * *

Immunity of Federal property in possession of a contractor.--Where, however, the tax is on machinery owned by the Federal Government, or where the tax imposed by a State on a contractor of the Federal Government is based, in part, upon the value of the machinery which is owned by the Federal Government but which is installed in the contractor's plant, the tax is objectionable on constitutional grounds. Thus, in United States v. Allegheny County, 322 U.S. 174 (1944), the court, in holding such a tax to be invalid, said (pp. 182-183):

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and sport armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
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> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the intro-

> duction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * *

The court added (pp. 188-189):

> A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein,s immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

The facts in the Allegheny case were distinguished from those involved in Esso Standard Oil Co. v. Evans, 345 U.S. 496 (1953), in which the Supreme Court sustained a State tax upon the storage of gasoline; the fact that the gasoline was owned by the Federal Government did not, the court held, relieve the storage company of the obligation to pay the tax. The court said (pp. 499-500):

> This tax was imposed because Esso stored gasoline. It is not, as the Allegheny County tax was, based on the worth of the

government property. Instead, the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations;

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so it is not "on" the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since James v. Dravo Contracting Co., 302 U.S. 134, 151, this has been no fatal flaw. We must look further, and find either a stated immunity created by Congress in the exercise of a constitutional power, or one arising by implication from our constitutional system of dual government. Neither condition applies to the kind of governmental operations here involved. There is no claim of a stated immunity. And we find none implied. The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity dies n prohibit this tax.

Economic burden of State taxation on the United States.--The Supreme Courts' emphasis of the legal incidence, test, as distinguished from the rejected test of the economic consequences, is best illustrated in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954). In that case, the court held that a State tax of 2% of the gross receipts from all sales in the State could not be applied to transactions whereby private contractors procured two tractors for use in constructing a naval ammunition depot under a cost-plus-a-fixed-fee contract which provided that the contractor should act as a purchasing agent for the Federal Government and that title to the purchased articles should pass directly from the vendor to the Federal Government, with the latter being solely obligated to

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pay for the articles. The Supreme Court said (pp. 122-123):

We find that the purchaser under this contract was the United States. Thus, King & Boozer is not controlling for, thought the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States. The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown.

Nor do we think that the drafting of the contract by the Navy Department to conserve Government funds, if that was the

> purpose, changes the character of the transaction. As we have indicated, the intergovernmental submission to taxation is primarily a problem of finance and legislation. But since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself.

Legislative exemption of Federal instrumentalities.--The Supreme Court, in the first of the two excerpts quoted above from its opinion in King & Boozer, made reference to legislative exemption. Such legislative exemption of instrumentalities of the Federal Government has been sustained in two relatively recent cases. In federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941), the Supreme Court held that statutory exemption from State taxation was a good defense to a State's attempt to collect a sales tax on lumber purchased by the Federal Land Bank for repairs to a farm

which it had acquired by foreclosure. The Supreme Court said (pp. 102-103):

> Congress has constitutionally created. This conclusion follows naturally from the express grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18." Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 33, and cases cited. We have held on three occasions that Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies. Smith v. Kansas City Title & Trust Co., supra; Federal Land Bank v. Crosland, 261 U.S. 374; Pittman v. Home Owners' Loan Corp., supra. * * *

Similarly, in Carson v. Roane-Anderson Company, 342 U.S. 232 (1952), the Supreme Court held that, under the provisions of the Atomic Energy Act, Tennessee could not enforce its sales tax on sales by third persons to contractors of the Atomic Energy Commission. In sustaining the immunity provided by the Atomic Energy Act, the Supreme court said (pp.233-234):

> * * * The constitution power of Congress to protect any of its agencies from state taxation (Pittman v. Home Owners' Loan Corporation, 308 U.S. 21; Federal Land Bank v. Bismarck Co., 314 U.S. 95) has long been recognized as applying to those with whom it has made authorized contracts. See Thomson v. Pacific R. Co., 9 Wall. 579, 588-589; James v. Dravo Contracting Co., 302 U.S. 134, 160-161. Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the Government. The power stems from the power

to preserve and protect functions validly authorized (Pittman v. Home Owners' Corp., supra, p. 33)--the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress. U.S. Const., Art. I, Sec. 8, cl. 18.

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