

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

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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 conducted 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 maintenance of a school system for the children of resident personnel), are nevertheless essential to procuring the performance of the primary Federal function.¹

¹For more detailed information as to the extent of the Federal Government's real property holdings within the States, the activities performed on these properties, and the number of persons resident on them, see part I of the *Report of the Interdepartmental Committee for the Study of Juris-*

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 persons, 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 State 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 extents, 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,² 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 State involved, for various Federal purposes.* It is the latter part

diction over Federal Areas within the States, hereinafter referred to as report, part I.

² Article I, section 8, clause 17:

“The Congress shall have Power * * * 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 Congress, become the Seat of the Government of the United States, 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;—”

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 those 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 State 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 now has come into considerable use, whereby in a general or special statute a State makes a cession of 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, from 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 some thousands of areas have become Federal islands, sometimes called "enclaves," in many respects foreign to the States in 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 renders unavailable to the residents of the affected 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 authority little exercised.*—States do not have authority to legislate for areas under the exclusive legislative jurisdiction of

the United States, but the 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,³ 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 compensation⁴ and unemployment compensation⁵ 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.⁶ 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;⁷ it has allowed taxation of leasehold interests in Federal property including property located on Federal enclaves;⁸ and it has retroceded to the States

³ Section 13 of title 18, United States Code, enacted into law June 25, 1948, is the latest in a series of somewhat similar statutes. However, earlier statutes adopted State law existing at the time of enactment of the particular Assimilative Crimes Act, so that later amendments of law by the States were ineffective in Federal areas.

⁴ Act of June 25, 1936, 49 Stat. 1938, 40 U. S. C. 290.

⁵ 26 U. S. C. 1606 (d).

⁶ Act of Feb. 1, 1928, 45 Stat. 54, 16 U. S. C. 457.

⁷ 4 U. S. C. 104-110, as amended.

⁸ Act of Aug. 5, 1947, 61 Stat. 775, formerly 10 U. S. C. 1270d, 5 U. S. C. 626s-6, 34 U. S. C. 522c, but recodified in 1956 as 10 U. S. C. 2667 (e), as positive law; and see *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253 (1956).

jurisdiction pertaining to the administration of estates of residents of Veterans' Administration facilities.⁹ 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 takes over territory of another the laws of the original 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 persons on these enclaves may be controlled by legal concepts 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 States 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,

⁹ Act of June 25, 1938, 52 Stat. 1192, 38 U. S. C. 16-16j.

coroners, and law enforcement inspectors concerned with matters related 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 schools 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.¹⁰ No provision, however, has been made to enable residents to have access to State institutions of higher learning 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.

¹⁰ Report, part I, p. 55.

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 privileges 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 in 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 limitation is 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.¹¹ 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.¹²

¹¹ Portion of the act of September 11, 1841, which became section 355 of the Revised Statutes of the United States (33 U. S. C. 733, 34 U. S. C. 520, 40 U. S. C. 255, 50 U. S. C. 175), as codified prior to amendment of February 1, 1940 (quoted from 40 U. S. C. 255) :

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

¹² Portion of section 355 of the Revised Statutes of the United States, as amended by the act of February 1, 1940, 54 Stat. 19 (33 U. S. C. 733, 40 U. S. C. 255, 50 U. S. C. 175) :

* * * * *

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or

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 State 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 statutes¹³ has created an almost infinite number of jurisdictional situations.

JURISDICTIONAL 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.

control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands, hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.”

¹³ *Report*, part I, pp. 28–32, 127–225.

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 “proprietary interest only” is applied in those instances where the Federal Government has acquired some right or 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 under various provisions of the Constitution, has many powers and immunities with respect to areas in which it acquires an interest 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 IN FEDERALLY OWNED AREAS: *To carry out constitutional duties.*—The fact that the United States has only a “proprietary 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 8, clause 18, of the Constitution,¹⁴ 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 Property belonging to the United States; * * *.” The power 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 Government’s freedom to use its real property in such manner as it may deem necessary in carrying out 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 been termed the Federal supremacy clause of the Constitution, article VI, clause 2.¹⁵

¹⁴ Article I, section 8, clause 18:

“The Congress shall have Power * * * 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.”

¹⁵ Article VI, clause 2: “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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

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.¹⁶ They are not purported to deal with the law applicable to Territories or to Indian lands, as to which 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.

¹⁶ See also Twitty, *The Respective Powers of the Federal and Local Governments within Lands Owned or Occupied by the United States* (G. P. O., 1944), and Laurent, *Federal Areas within the Exterior Boundaries of the States*, 17 Tenn. L. Rev. 328 (1942).

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.”¹ On the next day, June 21, 1783:

The mutinous soldiers presented themselves, drawn up in the street before 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. Clair, 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.

* * * * *

¹ Elliot, *Madison Papers containing Debates on the Confederation and Constitution*, vol. 5, p. 92 (Washington, D. C., 1845). See also: Hart, *Epochs of American History—Formation of the Union—1750–1829*, p. 106; Washington, *The National Capital*, S. Doc. No. 332, 71st Cong., 3d Sess., p. 4; *Journals of the Continental Congress, 1774–1789*, vol. xxv, p. 973 (Library of Congress, G. P. O., 1922); Morris, *Alexander Hamilton and the Founding of the Nation*, p. 66 *et. seq.* (1957).

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.²

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-

² Elliot, *op. cit.*, pp. 93-94.

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.³

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.

³ See Journals of Congress, vol. 8, p. 295. See also report of a committee of the Continental Congress on "exclusive jurisdiction" considered on Sept. 22, 1783, and undated Madison and Lee motions, in *Journals of the Continental Congress* (G. P. O., 1922), vol. xxv, pp. 603-604. But the possibility of extending some special jurisdiction for the area which was to be the seat of the national government had occurred, before the Philadelphia incident, with respect to at least three areas which were offered for this purpose, in New York, Maryland, and Virginia. Bryan, *A History of the National Capital* 4-5, 15-16 (1914).

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.”⁴ 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.⁵ 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

⁴For the text of these two provisions in Pinckney's draft, see Elliot, *op. cit.*, vol. 5, p. 130.

⁵See Elliot, *op. cit.*, vol. 5, p. 374.

which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation.”⁶

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 authorize 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.⁷

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.⁸

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

⁶See Elliot, *op. cit.*, vol. 5, p. 409.

⁷Elliot, *op. cit.*, vol. 5, pp. 439-440.

⁸Elliot, *op. cit.*, vol. 5, p. 440.

of the legislature, become the seat of government of the United States; and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.⁹

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, *nem. 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.¹⁰

⁹ Elliot, *op. cit.*, vol. 5, pp. 510-511.

¹⁰ Elliot, *op. cit.*, vol. 5, pp. 511-512.

On September 12, 1787,¹¹ 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 18,¹² and the supremacy clause in article VI,¹³ 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 the possibility that a State might be destroyed by the purchase 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-

¹¹ Elliot, *op. cit.*, vol. 5, p. 535.

¹² The "necessary and proper" clause, set forth in footnote 14 (p. 12).

¹³ See footnote 15 (p. 12), for the text of this clause.

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; ¹⁴ 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 bring 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-

¹⁴ The allusion is presumably to the Philadelphia incident of 1783.

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 areas 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 America, 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. * * * ¹⁵

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 member 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-

¹⁵ Elliot, *op. cit.*, vol. 4, pp. 219–220.

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.¹⁶

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.¹⁷ 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.¹⁸ 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, bring home this question to ourselves. Is it probable that the members from Georgia, New Hampshire, & c., will concur to sacrifice

¹⁶ Elliot, *op. cit.*, vol. 3, p. 89.

¹⁷ Elliot, *op. cit.*, vol. 3, pp. 436–438.

¹⁸ Elliot, *op. cit.*, vol. 3, pp. 431–432.

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 general 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.¹⁹

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

¹⁹ Elliot, *op. cit.*, vol. 3, pp. 432-433.

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.²⁰

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.

²⁰ Elliot, *op. cit.*, vol. 3, pp. 435-436.

Federal legislation prior to 1885.—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 lighthouses, 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."²¹ 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,²² and it subsequently became a general requirement.²³

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 jurisdictional requirements. 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

²¹ 1 Stat. 53, 1st Cong., 1st Sess., ch. 9, approved August 7, 1789. For summary of State acts and attitudes responsive to this statute, see *History of the Formation of the Union under the Constitution*, U. S. Constitution Sesquicentennial Commission (G. P. O., 1941), pp. 451-453.

²² See 1 Stat. 452 (1796); 1 Stat. 540 (1798); 1 Stat. 553 (1798); 1 Stat. 607 (1798); 2 Stat. 57 (1800); 2 Stat. 88 (1801); 2 Stat. 125 (1801); 2 Stat. 150 (1802); 2 Stat. 228 (1803); 2 Stat. 270 (1804); 2 Stat. 294 (1804); 2 Stat. 349 (1806); 2 Stat. 406 (1806); 2 Stat. 414 (1807); 2 Stat. 476 (1808); 2 Stat. 611 (1810); 2 Stat. 659 (1811); 3 Stat. 316 (1816); 3 Stat. 360 (1817); 3 Stat. 598 (1820); 3 Stat. 643 (1821); 3 Stat. 698 (1822); 3 Stat. 780 (1823).

²³ R. S. 4661 provides that, "No light-house, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States." See also sec. 7, act of May 15, 1820, 3 Stat. 598, 600.

state, in which the same is intended to be erected," and legislation in 1826 authorizing the acquisition of land for purposes of an arsenal.²⁴ Express jurisdictional 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,²⁵ the erection of docks,²⁶ the establishment of Navy hospitals,²⁷ the exchange of one parcel of property for another for purposes of a fortification,²⁸ and the establishment of an arsenal at Plattsburg, New York.²⁹ 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.³⁰

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.

²⁴ See 1 Stat. 352 (1794); 4 Stat. 178 (1826).

²⁵ See 1 Stat. 129 (1790).

²⁶ See 1 Stat. 622 (1799).

²⁷ See 2 Stat. 650 (1811).

²⁸ See 2 Stat. 496 (1808).

²⁹ See 3 Stat. 205 (1815).

³⁰ See 4 Stat. 127 (1825); 4 Stat. 179 (1826); 4 Stat. 241 (1827); 4 Stat. 641, 642 (1833); 4 Stat. 673 (1834); 5 Stat. 47 (1836); 5 Stat. 148 (1837).

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 any 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 future such purchases. Objections were raised in the course of the debates concerning this 1828 statute as to the efficacy of the exercise by the United States of legislative 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 follows:

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

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 well 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.³¹

The legislation was nevertheless enacted, and a provision thereof has existed as section 1838 of the Revised Statutes of the United States.³² 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. 355,³³ 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.³⁴ 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-

³¹ Cong. Deb. (part 2) 2052-2053 (1828).

³² R. S. 1838 read as follows: "The President of the United States is authorized to procure the assent of the legislature of any State, within which any purchase of land has been made for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, without such consent having been obtained." This language has been enacted into positive law as section 103 of title 4 of U. S. C., 1952 Ed.

³³ The text of R. S. 355 prior to its amendment in 1940 is quoted in footnote 11 (p. 9).

³⁴ Cong. Globe, 27th Cong., 1st Sess. 440 (1841).

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 do 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. 306, 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.³⁵ The enactment of this retrocession statute was preceded by extensive debates in the Senate.³⁶ 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.³⁷ The

³⁵ Act of January 21, 1871, 16 Stat. 399.

³⁶ Cong. Globe, 41st Cong., 3d Sess. 512-524, 541-548 (1870-1871).

³⁷ In the latter matter, the senators appear not to have taken cognizance of article I, section 8, clause 14, of the Constitution, which authorizes the Congress, "To make Rules for the Government and Regulation of the land

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 in 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 by the Senator, or to punish any violation of military law or discipline; but is it necessary that this Government should have jurisdiction to punish a man who happens to stroll upon the ground and commit a larceny, or that it shall 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. * * * ³⁸

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

and naval Forces," or of clause 16 of the same section, which authorizes it, "To provide for organizing, arming, and disciplining, the Militia, * * *."

³⁸ Cong. Globe, 41st Cong., 3d Sess. 546 (1870-1871).

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 light-houses, 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.³⁹

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

³⁹ Act of March 2, 1795, ch. 40, 1 Stat. 426, read substantially as indicated in the text, above. In codification into the Revised Statutes (R. S. 4662), the provision was made applicable to any "site of a light-house, or other structure or work of the Light-House Establishment." Subsequently, in codification into title 33 (section 728) of the United States Code, the provision had deleted from it the words, "of the Light-House Establishment," following the words "or other structure or work," so that it now appears in the code as follows: "A cession by a State of jurisdiction over a place selected as the site of a lighthouse, or other structure or work, shall be deemed sufficient within section 727 of this title [R. S. 4661], notwithstanding it contains a reservation that process issued under authority of such State may continue to be served within such place. And notwithstanding any such cession of jurisdiction contains no such reservation, all process may be served and executed within the place ceded, in the same manner as if no cession had been made."

It would appear that, notwithstanding the apparent broad application of the provision as it is set out in the United States Code, the provision actually is applicable only to light-houses and other structures and works formerly under the Light-House Establishment, since title 33 of the code is not positive law.

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,⁴⁰ 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.⁴¹

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,⁴² 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,

⁴⁰ 1 Stat. 112 (1790).

⁴¹ 4 Stat. 115 (1825). Because the Assimilative Crimes Act adopted only the laws in effect at the time of its enactment, it was reenacted in 1866 (14 Stat. 12) and 1898 (30 Stat. 717), and revised at various subsequent dates, as will hereinafter appear.

⁴² See footnote 35 (p. 33), and related textual matter.

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].⁴³

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.⁴⁴

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.⁴⁵

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). Where jurisdiction has been acquired by the United States, "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.

⁴³ The text of the Virginia cession statute is republished in the District of Columbia Code, 1951 ed., p. XXII.

⁴⁴ Act of July 16, 1790, 1 Stat. 130, ch. 28, 1st Cong., 2d Sess.

⁴⁵ The subjects covered by these cases will receive detailed discussion *infra*.

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, dockyards, 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 on 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 17.⁴⁶ 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 navy 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 chooses, purchase land within a State without the latter's consent, but, if it does so, it does not have any legislative jurisdiction over the area 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 in connection with matters relating to the civil rights of residents of areas of exclusive legislative 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. * * *

⁴⁶ *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885).

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.

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 legislative 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 constitutional 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 met 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 from 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.¹

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 a second method not specified in the Constitution of securing legislative jurisdiction in

¹ The cession method given judicial sanction in this case has been recognized in numerous subsequent decisions, *e. g.*: *Benson v. United States*, 146 U. S. 325 (1892); *Battle v. United States*, 209 U. S. 36 (1908); *Standard Oil Co. of California v. California*, 291 U. S. 242 (1934); *Collins v. Yosemite Park Co.*, 304 U. S. 518 (1938); *Bowen v. Johnston*, 306 U. S. 19 (1939).

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.² In view of these developments, 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.* 428 (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 at the time 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

² *E. g.*: *Wyoming* (act of July 10, 1890, 26 Stat. 222, ch. 664, 51st Cong., 1st Sess.); *Oklahoma* (act of June 16, 1906, 34 Stat. 267, 272, ch. 3335, 59th Cong., 1st Sess.); see 17 *Tenn. L. Rev.* 328 (1942); and see *Scott v. United States*, 1 Wyo. 40 (1871), and *contra*, *Franklin v. United States*, 1 Colo. 35 (1867); *Reynolds v. People*, 1 Colo. 179 (1869); *Burgess v. Territory of Montana*, 8 Mont. 57, 19 Pac. 558 (1888), as to the status of federally owned lands in a Territory.

with respect to the use, protection, and disposition of its property.³

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.⁴ As was indicated in chapter II, the consent requirement of article I, section 8, clause 17, was

³ *Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); *Springfield v. Kenney*, 62 Ohio L. Abst. 123, 104 N. E. 2d 65 (1951); *Renner v. Bennett*, 21 Ohio St. 431 (1871); *Ottinger Bros. v. Clark*, 191 Okla. 488, 131 P. 2d 94 (1942); *Beaufort County v. Jasper County*, 220 S. C. 469, 68 S. E. 2d 421 (1951); *State v. Shepard*, 239 Wis. 345, 300 N. W. 905 (1941); 7 *Ops. A. G.* 571 (1855). See also chapters V, VI, VII, and IX, *infra*.

⁴ See *report*, part I, p. 231. This constitutional provision relates only to the transfer of jurisdiction; the consent of the State is unnecessary to the acquisition of title to land within its boundaries by the United States. *United States v. Mayor and Council of City of Hoboken, N. J.*, 29 F. 2d 932 (D. N. J., 1928); *Op. A. G., Cal.*, No. LB 164/189 (Feb. 28, 1938); 38 *Ops. A. G.* 341 (1935). And the consent of the State is legally effective to transfer jurisdiction even though not given until after the purchase by the United States. *Ex parte Hebard*, 11 Fed. Cas. 1010, No. 6312 (C. C. D. Kan., 1877); *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916); 13 *Ops. A. G.* 411 (1871); 15 *Ops. A. G.* 480 (1878); *cf. St. Louis-San Francisco Ry. v. Satterfield*, 27 F. 2d 586 (C. A. 8, 1928). No particular phraseology is necessary to express such consent. 39 *Ops. A. G.* 99 (1937); *cf. McConnell v. Wilcox*, 2 Ill. 344, 357 (1837). But a consent statute of general application will not be given retroactive effect. *St. Louis-San Francisco Ry. v. Satterfield, supra*. The legislature of a State has unlimited power to transfer jurisdiction to the United States except as it may be restricted by State or Federal constitutions. *United States v. Crary*, 1 F. Supp. 406 (W. D. Va., 1932). Consent must be given by a State legislature, not by a constitutional convention. 12 *Ops. A. G.* 428 (1868).

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 reserve 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 voters of the Territory, or by a majority of the Territorial legislature, is statehood granted.⁵

⁵ While the Federal Government may acquire exclusive jurisdiction by purchase of land with the State's consent, by cession from the State, or by reservation in the enabling act granting statehood, such jurisdiction cannot be acquired by mere occupancy for the State's protection or tortiously or by disseisin of the State. *People v. Godfrey*, 17 Johns. 225 (N. Y., 1819).

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.⁶ 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. 355.⁷ 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 course 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-

⁶ *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885); *Mason Co. v. Tax Commission*, 302 U. S. 186, 207 (1937); *Atkinson v. State Tax Comm'n*, 303 U. S. 20, 23 (1938).

⁷ The text of this amendment is set forth in footnote 12 (p. 9). In *People v. Brown*, 69 Cal. App. 2d 602, 159 P. 2d 686 (1945), which was decided subsequent to the enactment of this amendment, it was held that the United States must accept exclusive jurisdiction before the State will recognize same; and until the United States does so there is a conclusive presumption against such acceptance. However, this amendment is not applicable to land acquired by the Federal Government prior to its enactment. *Markham v. United States*, 215 F. 2d 56 (C. A. 4, 1954), *cert. den.*, 348 U. S. 939. In the absence, in the State statute proffering jurisdiction, of specification of a manner for acceptance of such jurisdiction, a letter of acceptance from the proper Federal agency is the operative document. 1 *Ops. A. G. Cal.* 76 (Jan. 27, 1943). It has been held that such acceptance may be in general terms, without specific identification of the tracts of land involved. 1 *Ops. A. G. Cal.* 410 (Apr. 28, 1943).

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 coöperated 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.⁸ 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

⁸ *Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); *People v. Lent*, 2 Wheel. 548 (N. Y., 1819); *Gill v. State*, 141 Tenn. 379, 210 S. W. 637 (1919); *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765 (1875); *O'Pry Heating & Plumbing Co. v. State*, 241 Ala. 507, 3 So. 2d 316 (1941). Cf. *Herken v. Glynn*, 151 Kan. 855, 101 P. 2d 946 (1940).

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 *Fort 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.⁹ In some instances, however, the courts have indicated the existence of affirmative grounds supporting Federal acceptance of such transfers.¹⁰ 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

⁹ *Benson v. United States*, 146 U. S. 325 (1892); *United States v. Holt*, 168 Fed. 141 (C. C. W. D. Wash., 1909), *aff’d.*, *sub nom. Holt v. United States*, 218 U. S. 245; *Robbins v. United States*, 284 Fed. 39 (C. A. 8, 1922); *United States v. Watkins*, 22 F. 2d 437 (N. D. Cal., 1927); *Pound v. Gaulding*, 237 Ala. 387, 187 So. 468 (1939); *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928), *app. dismissed*, 278 U. S. 662; *Lowe v. Lowe*, *infra*; *State v. Seymour*, 78 Miss. 134, 28 So. 799 (1900); *La Duke v. Melin*, 45 N. D. 349, 177 N. W. 673 (1920). Courts have taken judicial notice of transfers of legislative jurisdiction (see p. 80 *et seq.*, *infra*).

¹⁰ In *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729 (1926), the view was expressed that acceptance might be evidenced by the purchase of the property, and the opinion was stated in *Eo parte Hebard*, 11 Fed. Cas. 1010, No. 6,312 (C. C. D. Kan., 1877), that user constitutes acceptance. For other cases, indicating that the conduct of the United States supports the position that the United States has become vested with exclusive jurisdiction, see *In re Ladd*, 74 Fed. 31 (C. C. D. Neb., 1896); *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916).

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 constitutional 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 is self-executing, and acceptance by the United States of the “benefits” of a State consent statute was not mentioned as an essential ingredient to the transfer of legislative jurisdiction under 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 has been settled that where lands for such a purpose [one of those mentioned in 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 italicized portions of the quoted excerpts 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.¹¹

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-

¹¹ *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903); *Commonwealth v. King*, 252 Ky. 699, 68 S. W. 2d 45 (1934); *Commonwealth v. Clary*, 8 Mass. 72 (1811); *Brooks Hardware Co. v. Greer*, 111 Me. 78, 87 Atl. 889 (1911); *Baker v. State*, 47 Tex. Cr. App. 482, 83 S. W. 1122 (1904); *Curry v. State*, 111 Tex. Cr. App. 264, 12 S. W. 2d 796 (1928); *State ex. rel. Jones v. Mack*, 23 Nev. 359, 47 Pac. 763 (1897).

pels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. * * *¹²

What constitutes dissent.—Only in a few instances have the courts indicated what may constitute a “dissent” (see *Fort Leavenworth R. R. v. Lowe*, *supra*) by the Federal Government from a State’s proffer of legislative jurisdiction.¹³ In *Mason Co. v. Tax Comm’n*, *supra*, the court concluded that a validation by Congress of contracts entered into by Federal administrative officials granting to State officials certain authority with respect to schools, police protection, etc., reflected a Congressional intent not to accept the legislative jurisdiction offered to the Federal Government by the State by the latter’s enactment of a consent statute. In a State case (*International Business Machines Corporation v. Ott*, 230 La. 666, 89 So. 2d 193 (1956)), use by the Federal installation of similar State services, with no indication of Congressional knowledge in the matter, was held to have negated Federal acceptance of jurisdiction proffered under a general consent and cession statute of the State. It may be noted that extension of this

¹² See also *State v. Blair*, 238 Ala. 377, 191 So. 237 (1939), wherein it was held that a subsequent request by a Federal officer for a deed of cession did not overcome the presumption that jurisdiction passed with Federal acquisition of land, under a consent statute.

¹³ In legislation relating to the acquisition of land, Congress has in certain acts expressly rejected jurisdiction where it was not desired. For example, the Weeks Forestry Act (*report*, part I, p. 234), which relates to the acquisition of land for national forest purposes, provides that the State shall not, by reason of the establishment of the national forest, “* * * lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.” See *State v. Allman*, 167 Tenn. 240, 68 S. W. 2d 478 (1934), *cert. den.*, *sub nom. Van Deventer v. Tennessee*, 293 U. S. 581; *Wilson v. Cook*, 327 U. S. 474 (1946); and citations in footnote 30 (p. 114). To the same effect are the Migratory Bird Conservation Act and other Federal statutes (*report*, part I, pp. 233–238). The Attorney General of California has held that whether there has been a Federal acceptance (or dissent), prior to February 1, 1940, should be determined from all the facts. 1 *Ops. A. G. Cal.* 397 (Apr. 21, 1943).

decision would put in doubt the status of many, if not most, Federal areas now considered to be under the legislative jurisdiction of the United States.¹⁴ In *Atkinson v. State Tax Commission*, 303 U. S. 20 (1938), the court indicated that the enforcement of the Oregon workmen's compensation law in the Federal area was incompatible with exclusive Federal legislative jurisdiction, and, since the Federal Government did not seek to prevent the enforcement of this law, the presumption of Federal acceptance of legislative jurisdiction was effectively rebutted.¹⁵

NECESSITY OF STATE ASSENT TO RETRANSFER OF JURISDICTION TO STATE: *In general.*—In three decisions by State courts,¹⁶ it was concluded that a Federal retrocession of legislative jurisdiction is effective without the consent of the State to such retrocession. In *Renner v. Bennett*, 21 Ohio St. 431 (1871), it was held that the Federal retrocession of legislative jurisdiction over the soldiers' home involved in *Sinks v. Reese*, *supra*, p. 33, did not require the consent of the State, and that such retrocession was effective notwithstanding the rejection by the Ohio legislature of a resolution accepting the retrocession. The Ohio Supreme Court expressed the opinion that the resolution was defeated because it was the view of the legislature that acceptance was not necessary, and the Ohio court indicated its agreement with this view. It should be noted that this decision was rendered prior to the decision in *Fort Leavenworth R. R. v. Lowe*, *supra*, in which the United States Supreme Court

¹⁴ See report, part I, p. 49 *et seq.*

¹⁵ *Cf. Seerman v. Lustig & Weil, Inc.*, 252 App. Div. 906, 299 N. Y. Supp. 920 (1937), where an award under a State workmen's compensation act for an injury received on an exclusive Federal jurisdiction area was sustained on the ground that the employer in its contract with the United States bound itself to provide adequate workmen's compensation, there then being no Federal statute which gave employees the benefit of workmen's compensation. See also p. 207 *et seq.*, *infra*.

¹⁶ *Renner v. Bennett*, 21 Ohio St. 431 (1871); *Ottinger Bros. v. Clark*, 191 Okla. 488, 131 P. 2d 94 (1942); *McDonnell & Murphy v. Lunday*, 191 Okla. 611, 132 P. 2d 322 (1942).

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 Federal retrocession of jurisdiction, the reasoning leading to its conclusion that Federal consent is essential to a State cession of legislative jurisdiction would, if applied to Federal retrocessions 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. Satterfield*, *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.¹⁷

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

¹⁷ *Davis v. Howard*, 306 Ky. 149, 206 S. W. 2d 467 (1947).

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.¹⁸

DEVELOPMENT OF RESERVATIONS IN CONSENT AND CESSION 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 by 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.¹⁹ 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 consistently held that the consent required by clause 17 to transfer exclusive legislative jurisdiction to 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

¹⁸ This problem is more fully treated in the succeeding chapter, on termination of legislative jurisdiction.

¹⁹ See footnote 11 (p. 9), for the text of former R. S. 355. The Comptroller of the Treasury ruled that this law did not prohibit payment of the purchase price for land prior to State consent. 3 *Comp. Dec.* 530 (1897).

the requisite consent of the State to a proposed purchase.²⁰ 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.²¹

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.²² And statutes consenting to the purchase of land by the United States which provided that the State should retain concurrent jurisdiction for the trial and punishment of offenses against the laws of the State did not satisfy the requirements of section 355 of the Revised Statutes.²³ State 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,²⁴ (2) the right to punish offenses against State laws committed on sites for United States buildings²⁵ or (3) civil and criminal jurisdiction over persons in territory ceded to the United States for Federal buildings²⁶ 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

²⁰ 7 *Ops. A. G.* 628 (1856), (and see *Reddall v. Bryan*, 14 Md. 444 (1859), *app. dism.*, 24 How. 420 (1860)); 24 *Ops. A. G.* 617 (1903).

²¹ 26 *Ops. A. G.* 289 (1907), 10 *Ops. A. G.* 34 (1861).

²² 20 *Ops. A. G.* 242 (1891), 298 (1892). A cession conditioned by the retention of criminal jurisdiction had been held to be inadequate to transfer exclusive jurisdiction. 8 *Ops. A. G.* 418 (1857). See *United States v. Watkins*, 22 F. 2d 437 (N. D. Cal., 1927).

²³ 20 *Ops. A. G.* 242 (1891); *id.* p. 298 (1892); *id.* p. 611 (1893).

²⁴ 31 *Ops. A. G.* 265 (1918); *id.* p. 294 (1918); *cf. United States v. Andem*, 158 Fed. 996 (D. N. J., 1908).

²⁵ 31 *Ops. A. G.* 263 (1918).

²⁶ *Id.* p. 282 (1918).

health laws are inconsistent with exclusive jurisdiction;²⁷ 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. 355.²⁸

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,²⁹ 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 civil process, including the right to arrest criminals 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. Thus, 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 the possibility of concurrent

²⁷ 38 *Ops. A. G.*, 341 (1935).

²⁸ 39 *Ops. A. G.* 285, 291 (1939).

²⁹ *Op. A. G., Ill.*, No. 8685 (February 19, 1919).

or partial jurisdiction.³⁰ Moreover, the considerations³¹ 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

³⁰ In *Commonwealth v. Young*, 1 Journ. Juris. (Hall's, Phila.) 47 (Pa., 1818), it was suggested that a concurrent jurisdiction was an impossibility.

³¹ Although Madison did indicate a possibility for State retention of civil rights for residents of Federal areas by stipulations at the time the States made cessions, see p. 23, *supra*.

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.³²

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. Unzeuta*, 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-

³² In *Commonwealth v. King*, 252 Ky. 699, 68 S. W. 2d 45 (1934), the State court said that the consent of the legislature may be conditioned. Cf. *Curry v. State*, 111 Tex. Cr. App. 264, 12 S. W. 2d 796 (1928). In *Opinion of the Justices*, 1 Metc. 580 (Mass., 1841), the court expressly reserved opinion on the subject.

erty 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.³³

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. Dravo Contracting Co.*, 302 U. S. 134 (1937), sustained the validity of a reservation by the State of West Virginia, in a consent statute, 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.

³³ In many instances, both cession and consent are present and either is effective to transfer jurisdiction. In view of the constitutional basis for exclusive jurisdiction, the courts, in decisions rendered prior to the judicial breaking down of certain differences between transfers of jurisdiction by "consent" and "cession" in the *Dravo* case, *supra*, have regarded the combined provisions as a "consent." *Martin v. House*, 39 Fed. 694 (C. C. E. D. Ark., 1888); *Kelly v. United States*, 27 Fed. 616 (C. C. D. Me., 1885); *State v. Kelly*, 76 Me. 331 (1884); *Foley v. Shriver*, 81 Va. 568 (1886). Cf. *United States v. Davis*, 25 Fed. Cas. 781, No. 14,930 (C. C. D. Mass., 1829).

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 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.

* * * * *

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 might not be retained, and it is highly unlikely that after sustaining a degree of legislative jurisdiction less than exclusive in *Fort Leavenworth R. R. v. Lowe*, *supra*, and *James v. Dravo 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 States.—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 *Dravo* 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."³⁴

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

³⁴ See also *St. Louis-San Francisco Ry. v. Satterfield*, 27 F. 2d 586 (C. A. 8, 1928); *Valverde v. Valverde*, 121 Fla. 576, 164 So. 287 (1935); *Chicago, R. I. & P. Ry. v. Satterfield*, 135 Okla. 183, 185, 275 Pac. 303, 305, 306 (1929); *Rainier Nat. Park Co. v. Martin*, 18 F. Supp. 481 (W. D. Wash., 1937), *aff'd.*, 23 F. Supp. 60, *aff'd.*, 302 U. S. 661; *State v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937), 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577; *cf. Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); *Buttery v. Robbins*, 177 Va. 368, 14 S. E. 2d 544 (1941); 38 *Ops. A. G.* 216 (1935); 24 *Calif. L. Rev.* 573 (1938).

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)). 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,³⁵ 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

³⁵ See report, part I, p. 81 *et seq.* For construction of statutes making reservations see also *infra* pp. 117 *et seq.* (service of process in general), 147 (service of civil process), and 187 *et seq.* (in general).

Federal Government, and, if the rule of *ejusdem generis* is applied, places which, though purchased by the Federal Government, are for use for purposes not enumerated in the clause.³⁶

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); *St. 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. *United 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

³⁶ In *Wills v. State*, 3 Heisk. 141 (Tenn., 1871), where grounds occupied only temporarily by Government soldiers, workers, etc., in connection with the establishment of a national cemetery, were held to be within the exclusive jurisdiction of the United States because of the broad designation of lands and buildings contained in the statute ceding jurisdiction, this constitutional objection was not raised. And in *Six Cos., Inc. v. De Vinney*, 2 F. Supp. 693 (D. Nev., 1933), it was held that the consent and cession statute of Nevada, patterned on the language of clause 17, did not cover 100 square miles of territory adjacent to the Boulder Canyon Project which would be useful only during the construction of the dam. See also *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939).

Where, under State law, a fee interest in land extends to the center of abutting streets, the jurisdiction of the Federal Government extends to the center of the street. *Op. J. A. G., Army*, 600.931 (June 7, 1937); *cf. State v. Chin Ping*, 91 Ore. 593, 176 Pac. 188 (1918). But it has been the practice of the Department of the Treasury to exclude in conveyances of land made to it any and all interest in sidewalk and street space. *Op. Sol. Dept. of the Treasury*, CWM No. 14045 (July 12, 1913). A deed of land to the high water mark served to transfer to the United States title and jurisdiction to the low water mark, in view of a general State law carrying grants by a water boundary to low water mark. *French v. Bankhead*, 52 Va. 136 (1854).

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,³⁷ as well as acquisitions pursuant to negotiated agreements. See *James v. Dravo Contracting Co.*, supra; *Mason Co. v. Tax Comm'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).³⁸ 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.*

³⁷ Many State legislatures assume that a consent to condemnation has the same effect as an assent to purchase, for the statutes usually consent to both (report, part I, pp. 127-225), and, to be sure, the reasons for vesting exclusive jurisdiction in the Federal Government would seem equally applicable regardless of which method is used.

A cession of exclusive jurisdiction does not constitute a waiver of any rights to compensation that may arise upon the taking of the land. *United States v. Prince William County*, 9 F. Supp. 219, 221 (E. D. Va., 1934) aff'd., 79 F. 2d 1007 (C. A. 4, 1935), cert. den., 297 U. S. 714; such a cession affects merely political status, not title. *United States v. Schwalby*, supra.

³⁸ But cf. *Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); *State ex rel. Bussell v. Callvert*, 33 Wash. 380, 74 Pac. 573 (1903).

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

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.³⁹

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"⁴⁰ have been construed as including structures not of a military character and any buildings or works necessary for governmental purposes. 28 *Ops. A. G.* 185 (1935).⁴¹ Thus, post offices, courthouses and customs houses all have been held to constitute "needful Buildings."⁴² The term "needful Buildings" in

³⁹ In *Scribner v. Wikstrom*, 93 N. H. 17, 34 A. 2d 658 (1943), it was held that title (and jurisdiction, under a consent statute) did not pass to the United States in a condemnation action upon a taking under 33 U. S. C. 594, since compensation had not then been ascertained or paid. The court distinguished 33 U. S. C. 594 from 40 U. S. C. 258a, which makes specific provision for transfer of title, and acknowledged that the first statute had not been uniformly construed.

⁴⁰ The opinion in *Newcomb v. Rockport*, 183 Mass. 74, 66 N. E. 587 (1903), involving cessions of jurisdiction as to certain lighthouses, contains a discussion of the interpretation to be given "other needful Buildings."

⁴¹ However, in *New Orleans v. United States*, 10 Pet. 662 (1836), it was suggested that the Federal Government could exercise legislative jurisdiction only over forts or other military works. See also *United States v. Bevens*, 3 Wheat. 336 (1818); *Valley County v. Thomas*, *supra*; *In re Kelly*, 71 Fed. 545, 549 (C. C. E. D. Wis., 1895); *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765 (1875). And in *Tagge v. Gulzow*, 132 Neb. 276, 271 N. W. 803 (1937), it was decided that land acquired for settlement as a farmstead project was not within the purview of clause 17.

⁴² *Battle v. United States*, 209 U. S. 36 (1908); *United States v. Barney*, 24 Fed. Cas. 1011, No. 14,524 (C. C. S. D. N. Y., 1866); *Martin v. House*, 39 Fed. 694 (C. C. E. D. Ark., 1888); *Bannon v. Burnes*, 39 Fed. 892 (C. C. W. D. Mo., 1889); *United States v. Andem*, 158 Fed. 996 (D. N. J., 1908); *United States v. Pierce County*, 193 Fed. 529 (W. D. Wash., 1912); *Brown v. United States*, 257 Fed. 46 (C. A. 5, 1919), *rev'd. on other grounds*, 256 U. S. 335 (1921); *Sharon v. Hill*, 24 Fed. 726 (C. C. D. Cal., 1885), *app. dism.*, 131 U. S. 438; *Fagan v. Chicago*, 84 Ill. 227, 234 (1876); *State ex rel. Jones v. Mack*, 23 Nev. 359, 47 Pac. 763 (1897), ("cession" treated like a "consent"); *Dibble v. Clapp*, 31 How. Pr. 420 (Buffalo Super. Ct., 1866); *People v. Marra*, 4 N. Y. Cr. Rep. 304 (1886); *People v. Vendome Service, Inc.*, 12

clause 17 has also been held to include national cemeteries,⁴³ penitentiaries,⁴⁴ steamship piers,⁴⁵ waters adjoining Federal lands,⁴⁶ aeroplane stations,⁴⁷ Indian schools,⁴⁸ canal locks and dams,⁴⁹ National Homes for Disabled Volunteer Soldiers,⁵⁰ res-

N. Y. S. 2d 183, *aff'd.*, 284 N. Y. 738, 31 N. E. 2d 508 (1940); *State v. DeBerry*, 224 N. C. 834, 32 S. E. 2d 617 (1945). *The New York Post Office Site*, 10 *Ops. A. G.* 34 (1861).

⁴³ 13 *Ops. A. G.* 131 (1869); *Willis v. State*, 3 Heisk. 141 (Tenn., 1871).

⁴⁴ *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916).

⁴⁵ *United States v. Mayor & Council of City of Hoboken, N. J.*, 29 F. 2d 932 (D. N. J., 1928).

⁴⁶ *Ex parte Tatem*, 23 Fed. Cas. 708, No. 13,759 (E. D. Va., 1877); *United States v. Carter*, 84 Fed. 622 (C. C. S. D. N. Y., 1897); but *cf. Hamburg American Steamship Co. v. Grube*, 196 U. S. 407 (1905); *Winston Bros. v. Galloway*, 168 Ore. 109, 121 P. 2d 457 (1942); and *Middleton v. La Compagnie Generale Transatlantique*, 100 Fed. 866 (C. A. 2, 1900), *cert. den.*, 177 U. S. 649.

⁴⁷ *United States v. Buffalo*, 54 F. 2d 471 (C. A. 2, 1931), *cert. den.*, 285 U. S. 550 (1932); 38 *Ops. A. G.* 185 (1935).

⁴⁸ *United States v. Wurtzburger*, 276 Fed. 753 (D. Ore., 1921); *School District v. Steele*, 46 S. D. 589, 195 N. W. 448 (1923).

⁴⁹ *James v. Dravo Contracting Co.*, 302 U. S. 134, 142-143 (1937); *Mason Co. v. Tax Comm'n*, 302 U. S. 186, 203 (1937); *State ex rel. Board of Commissioners v. Bruce*, 104 Mont. 500, 77 P. 2d 403, 408 (1938), *aff'd.*, 305 U. S. 577 (but see *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939)); *United States v. Tucker*, 122 Fed. 518, 522 (W. D. Ky., 1903); *cf. Oscar Daniels Co. v. Sault Ste. Marie*, 208 Mich. 363, 175 N. W. 160 (1919), (a cession statute); 20 *Ops. A. G.* 611 (1893), (lock-tender's house); *Scribner v. Wikstrom*, 93 N. H. 17, 34 A. 2d 658 (1943); but in *Ohio River Contract Co. v. Gordon*, 244 U. S. 68, 71 (1917), the court expressly refused to pass on the question; in an earlier instance the Comptroller of the Treasury had held these not to be within the purview of R. S. 355 (6 *Comp. Dec.* 843 (1900)). See also *Henry Bickle Co. v. Wright's Administratrix*, 180 Ky. 181, 202 S. W. 672 (1918).

⁵⁰ *State v. Intoxicating Liquors*, 78 Me. 401, 6 Atl. 4 (1886); *Sinks v. Reese*, *supra* ("cession" regarded as "consent"), cited with approval in *Surplus Trading Co. v. Cook*, 281 U. S. 647, 654-55 (1930); *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S. W. 299 (1906); *Foley v. Shriver*, 81 Va. 568 (1886), (but holding based on alternative ground). *Contra: In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765 (1875), ("cession" treated like "consent"). *Cf. In re Kelly*, 71 Fed. 545, 549 (C. C. E. D. Wis., 1895), where the court expressed the view that the consent provision of the Constitution is applicable only to objects specified therein, and cannot be held to operate, *ipso facto*, for objects not expressly included therein ("cession" regarded as a "consent"). See also *Brooks Hardware Co. v. Greer*, 111 Me. 78, 87 Atl. 889 (1911).

ervoirs and aqueducts,⁵¹ and a relocation center.⁵² 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*, it could be plausibly contended that "needful buildings" are those of the same sort as forts, magazines, arsenals and dock-yards, that is, structures for military purposes. And it may be that the thought of such "strongholds" was uppermost in the minds of the framers. Elliot's Debates, Vol. 5, pp. 130, 440, 511; Cf. Story on the Constitution,

⁵¹ 26 *Ops. A. G.* 289, 297 (1907); In *State ex rel. Board of Commissioners v. Bruce*, *supra*, it was unsuccessfully contended that since buildings were erected only on part of an area which had been acquired with the State's consent, exclusive jurisdiction occurred only over a correspondingly small area. In *Valley County v. Thomas*, *supra*, it was decided with respect to the same lands as were involved in the *Bruce* case that neither a lake nor an earth dam were buildings, and that buildings erected incident to the construction of the dam did not serve to transfer jurisdiction under a consent and cession statute worded similarly to the "needful Buildings" phrase of clause 17. See also *Benson v. United States*, *supra*.

⁵² *Lynch v. Hammock*, 204 Ark. 911, 165 S. W. 2d 369 (1942).

Vol. 2, § 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 theretofore 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,⁵³ 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.⁵⁴ *United States v. Davis*, 25 Fed. Cas. 781, No. 14,930 (C. C. D. Mass., 1829); *Ex parte Hebard*, 11 Fed. Cas. 1010, No. 6,312 (C. C. D. Kan.,

⁵³ Before the decision in the *Dravo* case, the position of the authorities was thus summarized by the Attorney General (38 *Ops. A. G.* 185 (1935)):

"The term 'other needful buildings' used in the constitutional provision and in the acts of cession of the various states has been given liberal interpretation by the courts and has been defined as the buildings or works necessary for governmental purposes and has not been limited to the class specifically designated in the constitutional provision or in the statutes."

But see *In re U. S. Housing Authority*, 26 Ohio Op. 133, 39 Ohio Abs. 371 (1943), in which the Ohio Board of Tax Appeals ruled (dictum in view of the provisions of 40 U. S. C. 421, in which the United States dissents to acceptance, and retrocedes jurisdiction over housing projects), that housing is not an essential governmental function and therefore is not within the purview of article I, section 8, clause 17.

⁵⁴ It is possible, as indicated by *Curry v. State*, 111 Tex. Cr. App. 264, 12 S. W. 2d 796 (1928), that under a State statute transfer of jurisdiction under clause 17 may be construed as dependent upon a cession.

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 court 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 State 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 796 (1928); 9 *Ops. A. G.* 263 (1858); 13 *Ops. A. G.* 411 (1871); 15 *Ops. A. G.* 480 (1878); *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.⁵⁵ 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.⁵⁶ Thus, the transfer of legislative jurisdiction pursuant to a State cession statute has

⁵⁵ In *Oscar Daniels Co. v. Sault Ste. Marie*, *supra*, the trial court, an excerpt from the opinion of which appears in 178 N. W. at p. 162, expressed the view, not affected by a reversal of its decision, that in the case of a State cession statute the Federal Government acquires jurisdiction solely from the cession and not from the Constitution.

⁵⁶ *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903); *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655 (1919).

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. McGlenn*, 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. McGlenn*, *supra*; *United States v. Unzeuta*, *supra*. Similarly, a privately operated hotel or bath house leased from the Federal Government and located on 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);⁵⁷ *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358 (1939); *Superior Bath House Co. v. McCarroll*, 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

⁵⁷ This is the strongest case in support of the proposition that the constitutional enumeration of purposes is applicable to cessions, but in *Collins v. Yosemite Park Co.*, 304 U. S. 518, 529 (1938), the court states that the question was not decided in the *Arlington Hotel* case.

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 purposes 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 practicalities 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, though 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 arrangements of the State and National Governments 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 borders of states by eminent domain and without their consent, the respective sovereignties should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. * * *

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.⁵⁸ 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: postoffices, 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); *Sauer v. Steinbauer*, 14 Wis. 70 (1861); lighthouses: *Newcomb v. Rockport*, 183

⁵⁸ Even earlier a Federal court had expressed the view that a State may cede jurisdiction to the Federal Government for any of the Government's purposes. *Robbins v. United States*, 284 Fed. 39 (C. A. 8, 1922). But in 1937 the Attorney General of California held that California's statute transferring jurisdiction was ineffectual as to national parks because the Federal Government could not accept jurisdiction over an area to be used for other than a "constitutional purpose." *Op. A. G., Cal.*, No. NS409 (June 30, 1937).

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. dismiss.*, 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 (1935); waters contiguous to navy yard: *Ex parte Tatem*, 23 Fed. Cas. 708, No. 13,759 (E. D. Va., 1877).⁵⁹

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.⁶⁰ Such provisions have been variously held to constitute conditions precedent to a transfer of jurisdiction, or as

⁵⁹ *Cf. Hamburg American Steamship Co. v. Grube*, 196 U. S. 407 (1905).

⁶⁰ See report, part I, p. 28 *et seq.*

pertaining to matters of form noncompliance with which will not defeat an otherwise proper transfer.⁶¹ 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: Conflict 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. 16 (1895), the court

⁶¹ *Brown v. United States*, 257 Fed. 46 (C. A. 5, 1919), *rev'd on other grounds*, 256 U. S. 335; *United States v. Watkins*, 22 F. 2d 437 (N. D. Cal., 1927); *Six Cos. Inc. v. De Vinney*, 2 F. Supp. 693 (D. Nev., 1933); *State ex rel. Board of Commissioners v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937), 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577, *contra: Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); *State v. Mendez*, 57 Nev. 192, 61 P. 2d 300 (1936); *Pothier v. Rodman*, 291 Fed. 311 (C. A. 1, 1923), *rev'd on other grounds*, 264 U. S. 399 (1924); *Gill v. State*, 141 Tenn. 379, 210 S. W. 637 (1919); *Buttery v. Robbins*, 177 Va. 368, 14 S. E. 2d 544 (1941); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916); *People v. Vendome Service, Inc.*, 12 N. Y. S. 2d 183, *aff'd.*, 284 N. Y. 738, 31 N. E. 2d 508 (1940); *State ex rel. Grays Harbor Const. Co. v. Dept. of Labor & Industries*, 167 Wash. 507, 10 P. 2d 213 (1932); *State v. Rainier National Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937). *Op. A. G., Cal.*, No. NS3188 (Jan. 16, 1941), (filing of plat required by statute held condition precedent), *cf. 23 Ops. A. G. Cal.* 14 (Jan 8, 1954).

took the view that Federal jurisdiction involves a question of fact and that the courts would not take judicial notice of such questions.⁶²

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 denial by 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

⁶² See also: *Webb v. J. G. White Engineering Corp.*, 204 Ala. 429, 85 So. 729 (1920); *People v. Godfrey*, 17 Johns. 225 (N. Y., 1819); *People v. Brown*, 69 Cal. App. 2d 602, 159 P. 2d 686 (1945); *People v. Kobryn*, 294 N. Y. 192, 61 N. E. 2d 441 (1945); *Kitchens v. Duffield*, 83 Ohio App. 41, 76 N. E. 2d 101 (1947), *aff'd.*, 149 Ohio St. 500, 79 N. E. 2d 906 (1948); *Gill v. State*, 141 Tenn. 379, 210 S. W. 637 (1919); *Nikis v. Commonwealth*, 144 Va. 618, 131 S. E. 236 (1926); *Buttery v. Robbins*, 177 Va. 368, 14 S. E. 2d 544 (1941). In *People v. Hillman*, 246 N. Y. 467, 159 N. E. 400 (1927), it was held that where the limits of States' political dominion depend solely on the construction of deeds and statutes a question of law is presented. In *Henry Bickel Co. v. Wright's Administratrix*, 180 Ky. 181, 202 S. W. 672 (1918), the court stated a view that jurisdiction in the State would be presumed unless established to be in the Federal Government as a matter of fact. To the same effect was the holding in *State v. Mendez*, 57 Nev. 192, 61 P. 2d 300 (1936). In *Allen v. Industrial Acc. Com.*, 3 Cal. 2d 214, 43 P. 2d 787 (1935), the court held that judicial notice should be taken of records establishing the exclusive Federal jurisdiction status of an area. In *Holt v. United States*, 218 U. S. 245 (1910), the Supreme Court queried whether *de facto* Federal exercise of authority was not sufficient to establish its possession of exclusive jurisdiction, and in *Colorado v. Toll*, 268 U. S. 228 (1925), the court remanded a case for ascertainment of further facts in the absence of proof of a State cession of jurisdiction. On the basis of *Holt v. United States*, *supra*, the court stated in *Hudspeth v. United States*, 223 F. 2d 848 (C. A. 5, 1955), that if a place were sufficiently described the court would take judicial notice of facts which vest the United States with jurisdiction. It was held to the same effect in *Brown v. United States*, 257 Fed. 46 (C. A. 5, 1919), *rev'd on other grounds*, 256 U. S. 335 (1921), and in *Krull v. United States*, 240 F. 2d 122 (C. A. 5, 1957). See also p. 49 *et seq.*, *supra*.

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.⁶³

⁶³ *Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); *United States v. Tully*, 140 Fed. 899 (C. C. D. Mont., 1905); *Op. J. A. G., Army*, 1949/1729 (Mar. 10, 1949).

Termination of Legislative Jurisdiction

UNILATERAL RETROCESSION OR RECAPTURE OF JURISDICTION: *Retrocession*.—There has been discussed in the preceding chapter¹ 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 a 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.² A similar rule must apply, for lack of any basis on which to rest any different legal reasoning, where Federal legislative jurisdiction over an area is derived from a reservation of such jurisdiction by the Federal Government at the time the State was admitted into the Union, or where it is derived

¹ See p. 54, *supra*.

² See also: *United States v. Unzeuta*, 281 U. S. 138 (1930); *Rogers v. Squier*, 157 F. 2d 948 (C. A. 9, 1946), *cert. den.*, 330 U. S. 840; *In re Ladd*, 74 Fed. 31 (C. C. D. Neb., 1896); *State v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937), 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577, overruled on other grounds by *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); *Buttery v. Robbins*, 177 Va. 368, 14 S. E. 2d 544 (1941).

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 FEDERAL 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 two 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 in 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,³ had expressed the view in 1819 that the Federal Government was required by clause 17 to assume jurisdiction over areas within the purview of the clause which were acquired by it. The debate⁴ 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,⁵ 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."⁶

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.

³ *Supra*, p. 59.

⁴ Cong. Globe, 41st Cong., 3d Sess. 512-524, 541-548 (1871).

⁵ *Sinks v. Reese*, 19 Ohio St. 306 (1869).

⁶ Cong. Globe, 41st Cong., *supra*, at p. 517.

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.⁷

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.⁸

⁷ *Id.* at p. 516.

⁸ *Id.* at p. 541.

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.¹⁰ The Supreme Court of the State of Ohio, in another contested election case,¹¹ 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

⁹ *Id.* at pp. 545-546.

¹⁰ Act of January 21, 1871, 16 Stat. 399.

¹¹ *Renner v. Bennett*, 21 Ohio St. 431 (1871).

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 statute¹² 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.¹³ An additional such retrocession statute, involving a home in Kansas, was enacted in 1901.¹⁴

Construction of retrocession statutes.—It has been held that statutes retroceding jurisdiction to a State must be strictly construed.¹⁵ This view was not followed, on the other hand, in *Offutt Housing Company v. Sarpy County*, 351 U. S. 253 (1956). There, the Supreme Court said (p. 260):

* * * We could regard Art. I, § 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-

¹² Act of July 7, 1898, 30 Stat. 668.

¹³ *State ex rel. Cashman, et al. v. Board of Commissioners of Grant County*, 153 Ind. 302, 54 N. E. 809 (1899).

¹⁴ Act of Mar. 3, 1901, 31 Stat. 1175.

¹⁵ *Oklahoma City v. Sanders*, 94 F. 2d 323, 328 (C. A. 10, 1938). See also p. 188, *infra*, for rule on construction of State statutes making reservations.

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 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.

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.¹⁶

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

¹⁶ *Infra*, p. 245, *et seq.*

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.¹⁷ 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 report¹⁸ 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, and 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 noted¹⁹ 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 1871 bill much was said, pro and con, concerning the "right" of the inhabitants of the disabled soldiers' home to vote.²⁰

Other statutes of "special" application have been passed which involved additional fields of civil rights. One such statute is the act of March 4, 1921.²¹ 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 report²² 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.

¹⁷ *Supra*, at pp. 87, 88.

¹⁸ Cong. Globe, 41st Cong., 3d Sess. 517 *et seq.* (1871).

¹⁹ 41 Stat. 1439.

²⁰ H. Rept. No. 1311, 66th Cong., 3d Sess. 7777 (1921).

¹⁷ Act of July 9, 1846, 9 Stat. 35.

¹⁸ H. Rept. No. 325, 20th Cong., 1st Sess. 489 (1846).

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, 1949,²³ 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.²⁴ The House bill was finally enacted. The following extract from the Senate report²⁵ 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.²⁶ 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 1954²⁷ 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,²⁸ and the other the Administrator of Veterans' Affairs,²⁹ 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 the 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,³⁰ notwithstanding that apparently all the "special" statutes enacted to provide State authority for policing highways have involved military installations.

²⁷ Act of Aug. 30, 1954, 68 Stat. 961, retroceding jurisdiction over housing area.

²⁸ Act of May 9, 1941, 55 Stat. 183, 43 U. S. C. 931a.

²⁹ Act of May 31, 1947, 61 Stat. 124, 38 U. S. C. 11i; see also *Hearings before the Committee on Veterans' Affairs*, H. of R., March 25, 1947, 80th Cong., 1st Sess., on H. R. 1844; H. Rept. No. 187, 80th Cong., 1st Sess. 11118 (1947); and S. Rept. No. 177, 80th Cong., 1st Sess. 11115 (1947).

³⁰ H. R. 7111, 83d Cong., 2d Sess. (1954), and S. 1260, 84th Cong., 1st Sess. (1955).

²³ 63 Stat. 11.

²⁴ H. R. 54, 81st Cong., 1st Sess.; S. 152, 81st Cong., 1st Sess.

²⁵ S. Rept. No. 76, 81st Cong., 1st Sess. 11291 (1949).

²⁶ Ed. note: *Arledge v. Mabry*, 52 N. M. 303, 197 P. 2d 884 (1948); *Chaney v. Chaney*, 53 N. M. 66, 201 P. 2d 782 (1949).

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.³¹ On February 13, 1931, the Secretary of War, exercising a congressional delegation of authority,³² 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 statute³³ related to another approach to the Golden Gate Bridge. Statutes enacted thereafter have related to highways occupying areas at Vancouver Barracks Military Reservation, Washington,³⁴ Fort Devens Military Reservation, Massachusetts,³⁵ Fort Bragg, North Carolina,³⁶ Fort Sill, Oklahoma,³⁷ Fort Belvoir, Virginia,³⁸ and Wright-Patterson Air Force Base, Ohio.³⁹

³¹ Act of February 11, 1936, 49 Stat. 1108.

³² Act of July 5, 1884, 23 Stat. 104, formerly 10 U. S. C. 1348, 43 U. S. C. 933, now re-enacted as sections 4777 and 9777 of title 10 (positive law) U. S. Code.

³³ Act of July 26, 1939, 53 Stat. 1120.

³⁴ Act of July 30, 1941, 55 Stat. 608; see also H. Rept. No. 887, 77th Cong., 1st Sess. 10555 (1941), and S. Rept. No. 563, 77th Cong., 1st Sess. 10545 (1941).

³⁵ Act of May 23, 1950, 64 Stat. 187, and act of June 15, 1955, 69 Stat. 132; see also S. Rept. No. 1433, 81st Cong., 2d Sess. 11367 (1950).

³⁶ Act of April 15, 1952, 66 Stat. 60; see also H. Rept. No. 1385, 82d Cong., 2d Sess. 11575 (1952), and S. Rept. No. 1397, 82d Cong., 2d Sess. 11567 (1952).

³⁷ Act of May 27, 1953, 67 Stat. 39; see also H. Rept. No. 349, 83d Cong., 1st Sess. 11665 (1953), and S. Rept. No. 166, 83d Cong., 1st Sess. 11659 (1953).

³⁸ Act of May 27, 1953, 67 Stat. 37; see also H. Rept. No. 347, 83d Cong., 1st Sess. 11665 (1953), and S. Rept. No. 165, 83d Cong., 1st Sess. 11659 (1953).

³⁹ Act of Feb. 27, 1954, 68 Stat. 18; see also *Report of Hearing before a Subcommittee of the Committee on Armed Services, United States Senate*,

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 1869,⁴⁰ 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 statute⁴¹ 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 statute⁴² 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 statute⁴³ retroceding to the Commonwealth of Massachusetts jurisdiction over a bridge in Springfield. The reason for this retrocession was that, while

83d Cong., 2d Sess., titled "*Miscellaneous Bills*," including S. 2689, pp. 1-5 (Feb. 2, 1954).

⁴⁰ Act of Feb. 22, 1869, 15 Stat. 274; see also Cong. Globe, 40th Cong., 3d Sess. 1201-1202 (1869).

⁴¹ Public Resolution No. 57, Oct. 22, 1914, 38 Stat. 783; see also H. Rept. No. 1167, 63d Cong., 2d Sess. 6560 (1914), and S. Rept. No. 803, 63d Cong., 2d Sess. 6553 (1914).

⁴² Act of Feb. 23, 1927, 44 Stat. 1176; see also S. Rept. No. 598, 79th Cong., 1st Sess., p. 7 (letter Dec. 9, 1943, of National Capital Park and Planning Commission), 10927 (1945).

⁴³ Act of July 27, 1939, 53 Stat. 1127; see also H. Rept. No. 973, 76th Cong., 1st Sess. 10300 (1939), S. Rept. No. 804, 76th Cong., 1st Sess. 10294 (1939), and 84 Cong. Rec. 8727 and 9379 (1939).

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 statute⁴⁴ 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.⁴⁵ That statute was enacted, it seems, simply because the United States had no further requirement for jurisdiction over the area involved.⁴⁶

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.⁴⁷ 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.⁴⁸

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

⁴⁴ Act of Oct. 31, 1945, 59 Stat. 552; see also H. Rept. No. 595, 79th Cong., 1st Sess. 10933 (1945); and S. Rept. No. 598, 79th Cong., 1st Sess. 10927 (1945).

⁴⁵ Act of May 21, 1952, 66 Stat. 81.

⁴⁶ H. Rept. No. 1075, 82d Cong., 1st Sess. 11499 (1951), and S. Rept. No. 1504, 82d Cong., 2d Sess. 11567 (1952).

⁴⁷ See report, part I, pp. 28–32, 127 *et seq.*

⁴⁸ 7 *Ops. A. G.* 628 (1856); 8 *Ops. A. G.* 387 (1857); 13 *Ops. A. G.* 418 (1871); 39 *Ops. A. G.* 155 (1938).

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 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):⁴⁹

⁴⁹ *Lotterle v. Murphy*, 67 Hun 76, 21 N. Y. Supp. 1120 (N. Y., 1893), was based on *Palmer v. Barrett*, and it was held to the same general effect in *People v. Vendome Service, Inc.*, 12 N. Y. S. 2d 183, *aff’d.*, 284 N. Y. 738, 31 N. E. 2d 508 (1940).

* * * 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 therein specified. Assuming, without deciding, that, if the cession of jurisdiction to the United States had been free from condition or limitation, the land should be treated and considered as within the sole 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

reverted to the State of New York.⁸⁰ 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*, 114 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):

⁸⁰ See *Fay v. Locke*, 201 Mass. 387, 87 N. E. 753 (1909); *La Duke v. Melin*, 45 N. D. 349, 177 N. W. 673 (1920).

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, § 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.⁵¹

⁵¹ See also *Bancroft Inv. Corporation v. Jacksonville*, 157 Fla. 546, 27 So.

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,⁵² 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 on 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.

2d 162 (1946), wherein the matter of reversion of legislative jurisdiction to the State apparently was involved although not specifically discussed. The Comptroller General has ruled that payments in lieu of taxes might be made under the Lanham Act on an area, transferred from the War Dept. to the Housing and Home Finance Agency for use for Lanham Act housing, notwithstanding that the War Department had procured jurisdiction over the area, since upon the transfer the land was held under the Lanham Act, which reserves jurisdiction to the States, and the area had received full services from the State and local governments. *Comp. Gen. Dec.*, No. B-111783 (Dec. 11, 1952).

⁵² See *State v. Lohnes*, 69 N. W. 2d 508 (Sup. Ct. N. D., 1955).

An early Federal statute⁵³ 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,⁵⁴ 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

⁵³ Act of March 3, 1819, 3 Stat. 520.

⁵⁴ Federal Property and Administrative Services Act of 1949 (act of June 30, 1949, 63 Stat. 377), sec. 203, as amended, 40 U. S. C. 484.

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 *Benson* case was followed in *Arlington Hotel Co. v. Fant*, 278 U. S. 439 (1929),⁵⁵ 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) constituting a right-of-way over a Federal enclave. The same rule has been applied in other cases.⁵⁶

The reluctance of the court to ignore jurisdictional 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

⁵⁵ See also *Williams v. Arlington Hotel Co.*, 22 F. 2d 669 (C. A. 8, 1927).

⁵⁶ *Chicago, etc. Ry. v. McGlenn*, 114 U. S. 542 (1885); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916); *United States v. Holt*, 168 Fed. 141 (C. C. W. D. Wash., 1909), *aff'd. sub nom. Holt v. United States*, 218 U. S. 245; *Commonwealth v. King*, 252 Ky. 699, 68 S. W. 2d 45 (1934); and see also *State v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937); 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577; *rev'd. on other grounds, Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939).

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, though 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 area, 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.⁵⁷

⁵⁷ See *Commonwealth v. King*, 252 Ky. 699, 68 S. W. 2d 45 (1934), where in the absence of a reverter clause land leased to a bank was held to remain under the exclusive legislative jurisdiction of the United States; *cf. Springfield v. United States*, 99 F. 2d 860 (C. A. 1, 1938), *cert. den.*, 306 U. S. 650, where it was indicated that jurisdiction reverted to the States under similar circumstances; and *State v. Oliver*, 162 Tenn. 100, 35 S. W. 2d 396 (1931).

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. Unzeuta*, 281 U. S. 138 (1930); *United States v. Watkins*, 22 F. 2d 437 (N. D. Cal., 1927).¹ That the States can neither define nor punish for crimes in such areas² is made clear in the

¹ *Battle v. United States*, 209 U. S. 36 (1908); *Ex parte Tatem*, 23 Fed. Cas. 708, No. 13,759 (E. D. Va., 1877); *Kelly v. United States*, 27 Fed. 616 (C. C. D. Me., 1885); *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903); *United States v. Holt*, 168 Fed. 141 (C. C. W. D. Wash., 1909), *aff'd.*, *sub nom. Holt v. United States*, 218 U. S. 245; *Bowen v. United States*, 134 F. 2d 845 (C. A. 5, 1943), *cert. den.*, 319 U. S. 764; *Mannix v. United States*, 140 F. 2d 250 (C. A. 4, 1944); *England v. United States*, 174 F. 2d 466 (C. A. 5, 1949); 22 *Calif. L. Rev.* 152 (1934).

The Attorney General of Missouri has held that the State is divested, by its statute giving general consent to Federal acquisition of land, of jurisdiction over violations of criminal law occurring on an area acquired by the Federal Government. *Ops. A. G., Mo.* (Jan. 19, 1953, and Feb. 20, 1953). The Attorney General of Illinois has held to the same effect, *Op. A. G., Ill.*, No. 469 (Oct. 9, 1946), as has the Attorney General of Florida, *Ops. A. G., Fla.*, No. 044-210 (July 21, 1944), No. 046-442 (Oct. 18, 1946), and No. 053-203 (Aug. 19, 1953), and the Attorney General of Utah, *Op. A. G., Utah*, No. 1291. These opinions all assume Federal acceptance of the proffered jurisdiction. The date of Federal acceptance of jurisdiction, not the date of Federal acquisition of title to the land, is the date when State criminal jurisdiction terminates. *Op. A. G., Cal.*, No. NS4842 (Apr. 9, 1943).

² *Commonwealth v. King*, 252 Ky. 699, 68 S. W. 2d 45 (1934); *State v. DeBerry*, 224 N. C. 834, 32 S. E. 2d 617 (1945); *People v. Hillman*, 246 N. Y. 467, 159 N. E. 400 (1927); *People v. Kraus*, 212 App. Div. 397, 207 N. Y. Supp. 87 (1924); *State v. Kelly*, 76 Me. 331 (1884); *State v. Tully*, 31 Mont. 365, 78 Pac. 760 (1904); *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928), *app. dism.*, 278 U. S. 662; *Baker v. State*, 47 Tex. Cr. App. 482, 83 S. W. 1122 (1904); *State v. Morris*, 76 N. J. L. 222, 68 Atl. 1103 (1908); *People v. Marra*, 4 N. Y. Cr. Rep. 304 (1886); *Lasher v. State*, 30 Tex. Cr. App. 387,

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 by reason of acts done at places 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 lands over which legislative jurisdiction has been vested in the Government, as well as to federally owned lands. *United States v. Unzeuta*, *supra*; see also *Petersen v. United States*, 191 F. 2d 154 (C. A. 9, 1951), *cert. den.*, 342 U. S. 885.³ Indeed, the Federal Government's power derived from exclusive legislative jurisdiction over an area may extend beyond

17 S. W. 1064 (1891); *Op. A. G., Pa.* (July 15, 1940); but *cf. Exum v. State*, 90 Tenn. 501, 17 S. W. 107 (1891); *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765 (1875); *County of Allegheny v. McClung*, 53 Pa. 482 (1867).

However, the Attorney General of Ohio has ruled that motor vehicle accidents occurring on federally owned lands within the State, whether or not the Federal Government had acquired exclusive jurisdiction over such lands, must be reported to the Registrar of Motor Vehicles in compliance with State law. *Op. A. G., Ohio*, No. 4704 (1955). On the other hand, he has ruled that where the State has, under Federal permit, constructed a highway through exclusive Federal jurisdiction lands, only Federal authorities may enforce traffic laws on such highway. *Id.* No. 1877 (1952), p. 720. See also p. 185, *infra*.

³ It has been held that an owner of an area within a national park under the exclusive legislative jurisdiction of the United States may not kill or take game contrary to Federal regulation, even on his own land. *Ops. Sol., Dept. of the Interior*, M-27284 (1932), and M-28689 (1938). See also *United States v. Ames*, 24 Fed. Cas. 784, No. 14,441 (C. C. D. Mass., 1845); *Stoutenburgh v. Hennick*, 129 U. S. 141, 147 (1889); and see p. 184, *infra*, re enforcement of State game laws.

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,⁴ 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.⁵ 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.,

⁴ *E. g.*: Espionage, sabotage, interference with the mails, destruction of Federal property, frauds on the Federal Government, etc.

⁵ *Adams v. United States*, 319 U. S. 312 (1943); *United States v. Hopkins*, 26 Fed. Cas. 371, No. 15,387a (C. C. D. Ga., 1830); *United States v. Bateman*, 34 Fed. 86 (C. C. N. D. Cal., 1888); *United States v. Penn*, 48 Fed. 669 (C. C. E. D. Va., 1880); *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis., 1895); *Pothier v. Rodman*, 291 Fed. 311 (C. A. 1, 1923), *rev'd. on other grounds*, 264 U. S. 399 (1924); *Ex parte Sloan*, 22 Fed. Cas. 324, No. 12,944 (D. Nev., 1877); *United States v. San Francisco Bridge Co.*, 88 Fed. 891 (N. D. Cal., 1898); *United States v. Lewis*, 253 Fed. 469 (S. D. Cal., 1918); *State v. Chin Ping*, 91 Ore. 593, 176 Pac. 188 (1918); *Sandel v. State*, 158 Tex. Cr. R. 101, 253 S. W. 2d 283 (1952).

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.⁶ 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 bring 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,⁷ and ordinarily one cannot enforce the laws of the other.

⁶ *State v. Tully*, 31 Mont. 365, 78 Pac. 760 (1904).

⁷ *The Antelope*, 10 Wheat. 66, 123 (1825).

State and local police have no authority to enter an exclusive Federal area to make investigations,⁸ or arrests,⁹ for crimes committed within such areas since Federal, not State, offenses are involved.¹⁰ 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,¹¹ as police protection by a municipality to such an area would be inconsistent with Federal exclusive jurisdiction.¹²

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.¹³ In general, where a crime has been committed in an area over which the United States and a State have concurrent criminal jurisdiction, both governments may try the accused without violating the double jeopardy clause of the Fifth Amendment.¹⁴ *Grafton v. United States*, 206 U. S.

⁸ See also p. 111 *et seq.*, *infra*.

⁹ *Op. A. G., Tex.*, No. 0-4211. But where California fish and game deputies were deputized by the Federal Government to enforce Federal fish and game laws, they might make arrests under such laws on areas under Federal jurisdiction, for trials to be held in Federal courts. *Op. A. G., Cal.*, No. 10,034 (July 1, 1935). See also footnotes 20 and 24, *infra*, and related textual matter.

¹⁰ With respect to investigations and arrests within such areas for crimes committed outside the areas, see p. 122, *infra*.

¹¹ *Op. J. A. G., Army*, 680.2 (June 7, 1938).

¹² *Id.* 1948/9016 (Dec. 23, 1948); *id.* 1948/8751 (Dec. 7, 1948); *id.* May 26, 1926).

¹³ *Report*, part I, p. 28 *et seq.*, and see 17 *Tenn. L. Rev.* 342 (1942).

¹⁴ In State prosecutions admission of evidence would be under State rules, including the Massachusetts rule (effective in a large number of States), permitting admission of evidence illegally seized. *Commonwealth v. Dana*, 2 Metc. 329 (Mass., 1841); see also 8 *Wigmore on Evidence*, 5 (sec. 2183).

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).¹⁵ 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.

¹⁵ See also: *Sexton v. California*, 189 U. S. 319 (1903); *Pettibone v. United States*, 148 U. S. 197 (1893); *Cross v. North Carolina*, 132 U. S. 131 (1899); *Vandell v. United States*, 6 F. 2d 188 (C. A. 2, 1925); *McKelvey v. United States*, 260 U. S. 353 (1922); *Moore v. Illinois*, 14 How. 13 (1852); *Jolley v. United States*, 232 F. 2d 83 (C. A. 5, 1956); 6 *Ops. A. G.* 413, 414 (1854); *id.* 506 (1854); but *cf.* *United States v. Mason*, 213 U. S. 115 (1909).

Other courts have held similarly.¹⁶ There appears to be some doubt concerning the status of a court-martial as a court, within the meaning of the Judicial Code,¹⁷ 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 breaches 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.¹⁸ 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 statute¹⁹ 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

¹⁶ *Gould v. Hayes*, 19 Ala. 438 (1851); *Ex parte Robinson*, 20 Fed. Cas. 969, No. 11,935 (C. C. S. D. Ohio, 1855); *Taylor v. Fort Wayne*, 47 Ind. 274 (1874); *Wabash Railroad v. Adelbert College*, 208 U. S. 38 (1908); *Toucey v. New York Life Insurance Co.*, 314 U. S. 118 (1941); *Gillis v. Keystone Mut. Casualty Co.*, 172 F. 2d 826 (C. A. 6, 1949), *cert. den.*, 338 U. S. 822. See also: 6 *Ops A. G.* 413, 414 (1854); *id.* 506 (1854).

¹⁷ See: *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955).

¹⁸ Sec. 103, act of June 1, 1948, 62 Stat. 281, as amended, 40 U. S. C. 318.

¹⁹ Sec. 103, act of June 1, 1948, 62 Stat. 281, as amended, 40 U. S. C. 318b.

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,²⁰ without necessary security clearances.²¹

Civilian Federal employees may be assigned to guard duty on Federal installations, but there is no Federal statute (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 protect the property of the Government. For both these purposes they may use reasonable force, and for the latter purpose they may bear arms irrespective of State law against bearing arms.²² 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

²⁰ At least one municipality has indicated that it was deterred from furnishing police services in a Federal enclave because police officers injured in rendering such services might not be covered by State compensation laws, aside from the legal limitations on the activities of local police officers in such enclaves and suits which might consequently arise. HEW, Report of Public Health Service Hospital, Norfolk, Va.

On the other hand, it was ruled that the Secretary of War was not authorized to accept the offer of a municipality to police a portion of a road over which the United States had exclusive jurisdiction. *Op. J. A. G., Army*, 680.2 (June 7, 1938).

See also chapter IX, *infra*, p. 277 *et seq.*

²¹ Letter dated Aug. 24, 1955, from J. Reuel Armstrong, Solicitor, Department of the Interior, to Perry W. Morton, Assistant Attorney General, Chairman, Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States.

²² *Ops. J. A. G., Navy*, JAG: J: JL: ac (Dec. 22, 1942); *id.* JAG: II: JCR (Jan. 17, 1950). But appropriate authority must be had to carry arms. *e. g.* 18 U. S. C. 3050, 3052, 3053, 3056.

more authority than other private individuals so far as making arrests is concerned.²³

State and local officers may, by special Federal statute,²⁴ 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 matters²⁵ or with respect to a specified category of matters,²⁶ 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 matters²⁷ 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

²³ *Id.* JAG: II: RT: eo (Dec. 2, 1948).

²⁴ Sec. 288, act of June 27, 1952, 66 Stat. 234, 8 U. S. C. 1358.

²⁵ *E. g.*—Iowa: "This state * * * reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon [on land acquired by the United States, as to which the State authorizes Federal exercise of jurisdiction] * * *." Code of Iowa, 1954, title 1, chapter 1, section 1.4 (*report*, part I, p. 149).

²⁶ *E. g.*—Virginia: "* * * There is further expressly reserved in the Commonwealth the jurisdiction and power * * * to license and regulate, or to prohibit, the sale of intoxicating liquors on any such lands * * *." Code of Virginia, 1950, Ann., title 7, chapter 3, section 7-19 (*report*, part I, p. 213).

²⁷ *E. g.*—Minnesota: "Except as otherwise expressly provided, the jurisdiction of the United States over any land or other property within this state * * * is concurrent with and subject to the jurisdiction and right of the state * * * to punish offenses against its laws committed therein * * *." Minnesota Statutes Annotated, section 1.041 (*report*, part I, p. 164).

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.²⁸ And as to many areas owned by the Federal Government for its various purposes it has not acquired legislative jurisdiction.²⁹ 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 proprietary status only.³⁰

The Federal Government may not prosecute for ordinary crimes committed in such areas.³¹ Federal civilians who may

²⁸ *Brooke v. State*, 155 Ala. 78, 46 So. 491 (1908); *Op. A. G., Fla.* (Oct. 18, 1946), 046-442; *Clay v. State*, 4 Kan. 49 (1866); *People v. Hammond*, 1 Ill. 2d 65, 115 N. E. 2d 331 (1953), *cert. den.*, 346 U. S. 940; *Commonwealth v. Trott*, 331 Mass. 491, 120 N. E. 2d 289 (1954); *People v. Burke*, 161 Mich. 397, 126 N. W. 446 (1910); *In re Van Dyke*, 276 Mich. 32, 267 N. W. 778 (1936), *cert. den.*, 299 U. S. 608; *People v. Lane*, 1 Edmonds' Select Cases 116 (N. Y., 1834-53); *People v. Kobryn*, 294 N. Y. 192, 61 N. E. 2d 441 (1945); *People v. Bondman*, 291 N. Y. Supp. 213 (1936); *Commonwealth v. Cain*, 1 Legal Op. (Seig & Morgan, Harrisburg, Pa.) 25 (Ct. of Quarter Sessions, Cumberland County, Pa., 1870); *Commonwealth v. Hutchinson*, 2 Parsons Eq. Cas. 384 (Pa., 1848); *Gill v. State*, 141 Tenn. 379, 210 S. W. 637 (1919); *Curry v. State*, 111 Tex. Cr. App. 264, 12 S. W. 2d 796 (1928); *Nikis v. Commonwealth*, 144 Va. 618, 131 S. E. 236 (1926); *Waltrip v. Commonwealth*, 189 Va. 365, 53 S. E. 2d 14 (1949); and see 7 N. C. L. Rev. 299 (1928-29); *Bowen v. Johnston*, 306 U. S. 19 (1939); *Ex parte Sloan*, 22 Fed. Cas. 324, No. 12,944 (D. Nev., 1877).

²⁹ *Report*, part I, p. 81 *et seq.*

³⁰ *Report*, part I, p. 101; and see p. 53, *supra*. See also: *Garrison v. State*, 22 Ala. App. 444, 116 So. 706 (1928); *Hagood v. State*, 23 Ala. App. 138, 122 So. 299 (1929); *Oldham v. State*, 37 Ala. App. 251, 67 So. 2d 52 (1953), *cert. den.*, 259 Ala. 507, 67 So. 2d 55; *Op. A. G., Ill.*, No. 102 (Dec. 29, 1941).

³¹ *United States v. Tully*, 140 Fed. 899 (C. C. D. Mont., 1905). California may enforce its Fish and Game Code on lands acquired by the Federal Government under the Migratory Bird Conservation Act in view of the provisions of that act that the jurisdiction of the State shall not be affected. *Op. A. G., Cal.*, No. NS2238 (Dec. 30, 1939).

be appointed as guards in the areas do not have police powers, but possess only the powers of arrest normally had by any citizen³² unless they receive appointments as State or local police officers.³³

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*, 37 Pa. 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.³⁴ It has been held, however, that even where acts are done wholly on Federal 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.*, 107 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

³² See pp. 112-113, *supra*.

³³ Memo 8/2/35 from General Solicitor, T. V. A., to Director, Personnel Division, T. V. A.

³⁴ For a discussion of the two last mentioned cases see chapter VII, *infra*, p. 169 *et seq.*

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.³⁵

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 and 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 the 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):

³⁵ *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383 (1944); *State v. Coughlin*, 78 Me. 401 (1886); see also *Mitchell v. Tibbets*, 17 Pick. 298 (Mass., 1836); and see other authorities cited on p. 183 *et seq.*, *infra*.

The mere fact that he was territorially within the confines of a Government reservation at the time the warrant was served upon him did not render him immune from arrest upon a state warrant. Such 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.³⁶ At an early date,³⁷ 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.³⁸ 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

³⁶ See *supra*, pp. 25, 26; *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885); *Commonwealth v. Clary*, 8 Mass. 72 (1811).

³⁷ 1 Stat. 426 (1795), see p. 35, *supra*.

³⁸ See *report*, part I, p. 127 *et seq.*; for probable consequences of absence of a reservation, see p. 187, *infra*. The Attorney General of California has noted that the numerous statutes of the State ceding jurisdiction to the United States all contain reservations of the right to serve process. *Op. A. G., Cal.*, No. LB 219/57a (June 19, 1942).

its process, both criminal and civil, within such territory.³⁹

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. 781, No. 14,930 (C. C. D. Mass., 1829); *United States v. Cornell*, 25 Fed. Cas. 646, No. 14,867 (C. C. D. R. I., 1819).⁴⁰ Indeed, it has been said that process served under a reservation becomes, *quoad hoc*, process of the United States,⁴¹ and that when a State officer acts to execute process on a Federal enclave he acts under the authority of the United States,⁴² but these statements appear inconsistent with the generally prevailing view of reservations to serve process as retentions by the State of its sovereign authority. Even, as is often the case, where a State retains “concurrent jurisdiction,” to serve civil

³⁹ Utah Code Annotated, 1953, title 63, chapter 8, section 1.

⁴⁰ See also: *United States v. Knapp*, 26 Fed. Cas. 792, No. 15,538 (S. D. N. Y., 1849); *United States v. Meagher*, 37 Fed. 875 (C. C. W. D. Tex., 1888); *Northwestern Cas. & Sur. Co. v. Conaway*, 210 Iowa 126, 230 N. W. 548 (1930); *In re Ladd*, 74 Fed. 31 (C. C. D. Neb., 1896); *People v. Kraus*, 212 App. Div. 397, 207 N. Y. Supp. 87 (1924); *People v. Hillman*, 246 N. Y. 467, 159 N. E. 400 (1927); *Commonwealth v. Clary*, 8 Mass. 72 (1811); *Willis v. Oscar Daniels Co.*, 200 Mich. 19, 166 N. W. 496 (1918); *Foley v. Shriver*, 81 Va. 568 (1886); 6 *Ops. A. G.* 577 (1854); 7 *Ops. A. G.* 628 (1856); 38 *Ops. A. G.* 341 (1935); 39 *Ops. A. G.* 155 (1938); 24 *Calif. L. Rev.* 573 (1936); *Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Underhill v. State*, 31 Okla. Crim. App. 149, 237 P. 628 (1925); but *cf. County of Cherry v. Thatcher*, 32 Neb. 350, 49 N. W. 351 (1891).

⁴¹ Story, *Commentaries on the Constitution*, 5th ed., vol. II, sec. 1225.

⁴² Rawle, *A View of the Constitution*, ch. 27, p. 238 (2d ed., 1829).

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).⁴³ 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 ceded. The question was raised as to whether there had 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-

⁴³ See also: *Mitchell v. Tibbetts*, 17 Pick. 298 (Mass., 1836); *Opinion of the Justices*, 1 Metc. 580 (Mass., 1841); *Op. J. A. G., Navy* (July 15, 1936); *id.* JAG: NR103/N1-13 (Dec. 7, 1938); *id.* JAG: 5267-1116:2 (Jan. 24, 1923); *People v. Kraus*, 212 App. Div. 397, 207 N. Y. Supp. 87 (1924); *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928), *app. dismissed*, 278 U. S. 662; *State ex rel. Jones v. Mack*, 23 Nev. 359, 47 Pac. 763 (1897); *State v. Coughlin*, 78 Me. 401 (1886); *State v. Seymour*, 78 Miss. 134, 28 So. 799 (1900); *Underhill v. State*, 31 Okla. Crim. App. 149, 237 Pac. 628 (1925); *United States v. Meagher*, 37 Fed. 875 (C. C. W. D. Tex., 1888); *Foley v. Shriver*, 81 Va. 568 (1886).

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 a 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*, 157 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; ⁴⁴ but at least on five occasions ⁴⁵ 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 ⁴⁶ 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 the 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 purpose which the State reservations to serve criminal and civil process were intended to carry out,⁴⁷ such reservations include the right to execute a warrant of arrest, including a warrant issued on a request for extradition.⁴⁸ Such warrants are a form of legal process.⁴⁹ However, various Federal instrumentalities have regulations governing the manner in which such process shall be served,⁵⁰ and even in the absence of formal regulations on the subject, the service of process may

⁴⁷ See *supra*, pp. 25-27.

⁴⁸ *Cockburn v. Willman*, 301 Mo. 575, 257 S. W. 458 (1923). And in some States, such as Maryland, a warrant may issue for the arrest of an out-of-State fugitive prior to the receipt of a request for extradition. *Memo Gen. Counsel, Dept. of Health, Education, and Welfare*, to National Institutes of Health (May 16, 1955).

⁴⁹ *Randolph v. Commonwealth*, 145 Va. 883, 134 S. E. 544 (1926); see also *Tubbs v. Tukey*, 3 Cushing (Mass.) 438, 50 Am. Dec. 744 (1849).

⁵⁰ *E. g.*: Art. 14 (a) of the Uniform Code of Military Justice (10 U. S. C. 814) provides, "Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial." For regulations issued pursuant to this authority, see: *Manual for Courts-Martial, United States, 1951* (p. 16, par. 12); *Supplemental Regulations, Navy, 1955 Naval Supp. to MCM 1951, sec. 0701 et seq.*; *Supplemental Regulations, Army, AR 600-320, par. 6.*

It has been held that, whatever the status of (now superseded) naval regulations which required the permission of a commanding officer for the service of process upon a subordinate, a right to serve process reserved by a State permitted service of (civil) process with the permission of the commanding officer of the Navy Yard within which service was made, notwithstanding lack of permission from the commanding officer of the vessel to which the person upon whom service was made was attached. *Manlove v. McDermott*, 308 Pa. 384, 162 Atl. 278 (1932).

⁴⁴ *United States v. Watkins*, 22 F. 2d 437 (N. D. Cal., 1927).

⁴⁵ 8 *Ops. A. G.* 418 (1857); 20 *Ops. A. G.* 611 (1893); 24 *Ops. A. G.* 617 (1903); 31 *Ops. A. G.* 263 (1918); 31 *Ops. A. G.* 282 (1918).

⁴⁶ 38 *Ops. A. G.* 341 (1935).

not be accomplished in a manner such as to constitute an interference with an instrumentality of the Federal Government.⁵¹

Arrest without warrant not deemed service of process.—It has been held⁵² 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 arrests might, of course, be made.⁵³ State officials may enter an exclusive Federal jurisdiction area, to make an investigation related to an offense committed off the area, only in a manner such as will not interfere with an instrumentality of the Federal Government, and in accordance with any Federal regulations for this purpose.⁵⁴

Coroner's inquest.—Various authorities have held that a State cannot render coroner service in an area under exclusive Federal jurisdiction,⁵⁵ 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.

⁵¹ See: *Johnson v. Maryland*, 254 U. S. 51 (1920); *Jacobson v. Massachusetts*, 197 U. S. 11 (1905); *Lima v. Lawler*, 63 F. Supp. 446 (E. D. Va., 1945). To the same effect as *Lima v. Lawler* is *Op. J. A. G., Navy*, File No. QL/A3-1 (370519), (Aug. 10 and 27, 1937). A person in the military service who is charged with the commission of an offense under State law may, if he is not being held in custody under the Articles of War, be taken into custody by the sheriff by presenting a warrant to the commanding officer of the installation. *Op. A. G., Ill.*, No. 11752 (Feb. 9, 1924). The State does not have an unlimited right to enter a military reservation for service of process. *Op. A. G., Utah*, No. 55-067.

⁵² *Op. J. A. G., Navy* (Jan. 12, 1923); *Op. J. A. G., Navy*, JAG: II: FW: nb (July 15, 1946); *Op. A. G., Me.* (Dec. 9, 1954). In *Bennett v. Ahrens*, 57 F. 2d 948 (C. A. 7, 1932), where there was overruled an objection to an arrest on Federal property, it had not been established that the property was under exclusive Federal jurisdiction.

⁵³ *Op. A. G., Ill.*, 8685 (1919); *Op. A. G., Ill.*, 9885 (1920).

⁵⁴ *Op. J. A. G., Navy*, JAG: 5267-1116: 2 (Jan. 24, 1923); 7 *Court-Martial Orders* 43 (1946). It has also been held that a State officer in pursuit of an individual for violation of a State law should endeavor to obtain the consent of the installation commander prior to entering a Federal installation to make an arrest. *Op. Deputy A. G., Me.* (August 12, 1954).

⁵⁵ See p. 181, footnote 10, *infra*.

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 in 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 seem, 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.⁵⁶

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

⁵⁶ But see *In re Kernan*, 247 App. Div. 664, 288 N. Y. Supp. 329, *aff'd.*, 272 N. Y. 560, 4 N. E. 2d 737 (1936).

he is so restrained under state process to answer for an alleged crime against the state. Rev. St. § 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 petitioner 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 not 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). Presumably 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 1790.⁵⁷ 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 in 1816 "to extend the judicial system of the United States."⁵⁸ 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 places 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. * * *⁵⁹

⁵⁷ 1 Stat. 112, April 30, 1790. This statute, it was held in *Franklin v. United States*, 1 Colo. 35 (1867), was not applicable in a Territory, a Territory not being under the "sole and exclusive jurisdiction of the United States" within the meaning of the statute.

⁵⁸ *Life and Letters of Joseph Story*, 1851, vol. 1, p. 297.

⁵⁹ Rapes (18 U. S. C. 2031), arsons (18 U. S. C. 81), batteries (18 U. S. C. 113), and certain other crimes now are punishable under modern derivatives of the Federal Crimes Act of 1790 set out in the United States Code (see 18 U. S. C. 114, 661, 662, 1025, 1111, 1112, 1113, 1363, 2032, 2111, 2192, and 2993).

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.⁶⁰

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.⁶¹ 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*):

⁶⁰ *United States v. Hudson and Goodwin*, 7 Cranch 32 (1812); but since the Federal statute which provided punishment for murder on an exclusive Federal jurisdiction area did not define the crime, it was held proper to look to the common law for a definition. *United States v. King*, 34 Fed. 302 (C. C. E. D. N. Y., 1888); *United States v. Lewis*, 111 Fed. 630 (C. C. W. D. Tex., 1901).

⁶¹ For a discussion of assimilative crimes acts, see also note, 70 *Harv. L. Rev.* 685 (1957).

* * * 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 crimes 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 any 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*,⁶² 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 State 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.⁶³

⁶² 25 Fed. Cas. 781, No. 14,930 (C. C. D. Mass., 1829).

⁶³ In *United States v. Tucker*, 122 Fed. 518 (W. D. Ky., 1903), it was held that re-enactment of the assimilative crimes statute obviated requirement

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 repealed 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). This did not change the fundamental object of the existing act, although it effected a change in phraseology. The constitutionality of the 1898 act was sustained in *Franklin v. United States*, 216 U. S. 559 (1910), *writ of error dismissed*, 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-

for ascertaining the state of the criminal law at the time (1825) of its original enactment.

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

The following statements were made by Chief Justice White in *United States 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 re-enacted on three occasions:

1. Act of June 15, 1933, 48 Stat. 152, adopting State laws in effect on June 1, 1933.⁶⁴
2. Act of June 20, 1935, 49 Stat. 394, adopting State laws in effect on April 1, 1935.⁶⁵
3. Act of June 6, 1940, 54 Stat. 234, adopting State laws in effect on February 1, 1940.⁶⁶

⁶⁴ See also H. Rept. No. 56, 73d Cong., 1st Sess.

⁶⁵ See also H. Rept. No. 1022, 74th Cong., 1st Sess.

⁶⁶ See also H. Rept. No. 1584, 78th Cong., 3d Sess.; and 77 Cong. Rec. 5531-5532.

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.⁶⁷ 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.

⁶⁷ 62 Stat. 686.

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*, read, "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.⁶⁸

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.⁶⁹

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.⁷⁰ 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

⁶⁸ *Cf.* sec. 4 of the Outer Continental Shelf Lands Act (act of Aug. 7, 1953, 67 Stat. 462, 43 U. S. C. 1333), which adopts laws of adjacent States effective on the effective date of the act as the Federal laws for the areas there involved. In the case of *United States v. Sharpnack*, 352 U. S. 962 (1957), arising in the Western District of Texas, in which the Supreme Court of the United States noted probable jurisdiction on Jan. 14, 1957, there has been raised the question whether an unconstitutional delegation of legislative power is involved in the present Assimilative Crimes Act. See also 70 *Harv. L. Rev.* 685 (1957).

⁶⁹ *Puerto Rico v. Shell Co.*, 302 U. S. 253 (1937).

⁷⁰ *United States v. Press Publishing Company*, 219 U. S. 1 (1911); see also *United States v. Dolan*, 25 Fed. Cas. 887, No. 14,978 (C. C. E. D. N. Y., 1865).

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 to be enlarged by the application to it of a State's 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. § 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 defined in Federal statutory law, and since the authority to define them by regulations is limited to a few Federal administrators,⁷¹ their commission usually can be punished only under the Assimilative Crimes Act.⁷² The act also has been invoked to cover a number of serious offenses defined by State, but not Federal law.⁷³

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:

⁷¹ *Report*, part I, p. 52, and see *infra*, p. 137 *et seq.*

⁷² *E. g.*: reckless driving: *United States v. Watson*, 80 F. Supp. 649 (E. D. Va., 1948); possession of slot machines: *United States v. Sosseur*, 181 F. 2d 873 (C. A. 7, 1950).

⁷³ *E. g.*: Burglary: *Dunaway v. United States*, 170 F. 2d 11 (C. A. 10, 1948); sodomy: *United States v. Gill*, 204 F. 2d 740 (C. A. 7, 1953); embezzlement: *United States v. Titus*, 64 F. Supp. 55 (D. N. J., 1946); criminal syndicalism: *Burns v. United States*, 274 U. S. 328 (1927).

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.⁷⁴ 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 Service⁷⁵ (16 U. S. C. 3); the Secretary of Agriculture is authorized to make regulations for the use and preservation of national forests (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. 318a); 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*

⁷⁴ See chapter IX, *infra*, p. 249.

⁷⁵ In *Robbins v. United States*, 284 Fed. 39 (C. A. 8, 1922), there were upheld such regulations issued by the Secretary of the Interior; in *Colorado v. Toll*, 268 U. S. 228, 231 (1925), it was stated that the *Robbins* decision was based on Federal possession of legislative jurisdiction.

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.⁷⁶

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

⁷⁶ However, the Criminal Division, U. S. Dept. of Justice, has ruled that military regulations purporting to sanction bingo and similar games would be ineffective to prevent the adoption of State laws prohibiting gambling (Letter dated Apr. 29, 1955, from Asst. Atty. Gen., Crim. Div., to Secy. of Defense). The Judge Advocate General of the Navy has held that the Assimilative Crimes Act adopted State statutes and thereby prohibited the operation of punch boards (*Op. J. A. G., Navy, JAG: II: 1: JGMR: mac* (Feb. 17, 1955)), and slot machines (*ibid., JAG: II: NLM: jlr* (July 5, 1949)), on exclusive Federal jurisdiction areas. (See also 15 U. S. C. 1175; and *United States v. Sosseur*, 181 F. 2d 873 (C. A. 7, 1950).)

reason that the Assimilative Crimes Act did not apply to federalize such statutes. Several cases⁷⁷ 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

⁷⁷ *Collins v. Yosemite Park Co.*, 304 U. S. 518 (1938); *Petersen v. United States*, 191 F. 2d 154 (C. A. 9, 1951), *cert. den.*, 342 U. S. 885; *Crater Lake Nat. Park Co. v. Oregon Liquor Control Com'n*, 26 F. Supp. 363 (D. Ore., 1939); *Birmingham v. Thompson*, 200 F. 2d 505 (C. A. 5, 1912); *Johnson v. Yellow Cab Transit Co.*, 321 U. S. 383 (1944).

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 of an 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 course) which sought to impose the provisions of a building code, particularly the requirement for a building permit and 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 to an area under exclusive Federal jurisdiction. In connection with a collateral matter, as to whether a Federal court properly ordered a surrender of the liquor by 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 thereby 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 well 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.⁷⁸

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, thus 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. 3401.

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,⁷⁹ a national memorial park,⁸⁰ or a national wildlife refuge,⁸¹ because of the fact that the United States held the particular lands in a proprietorial interest status, 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

⁷⁸ See p. 161 *et seq.*, *infra*, for a related discussion of adoption under the international law rule of State statutes requiring administrative action.

⁷⁹ Memo Aug. 23, 1945, from Acting Director, National Park Service, Department of the Interior, to Regional Director, National Park Service, Department of the Interior.

⁸⁰ Memo Sept. 24, 1948, from Acting Assistant Director, National Park Service, Department of the Interior, to Regional Director, Region 2, National Park Service, Department of the Interior.

⁸¹ Letter dated Sept. 1, 1954, from Director, Fish and Wildlife Service, Department of the Interior, to United States Commissioner, St. Joseph, Missouri.

“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 3. 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.”⁸² 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.⁸³

⁸² Memo June 12, 1951, from Regional Counsel, Region Three, National Park Service, Department of the Interior, to Regional Director, Region Three, National Park Service, Department of the Interior.

Letter dated Dec. 27, 1951, from Regional Counsel, Region 3, National Park Service, Department of the Interior, to Chief Judge, Court of Appeals for the Third Circuit, Wilmington, Del.

⁸³ Memo Sept. 24, 1948, from Acting Assistant Director, National Park Service, Department of the Interior, to Regional Director, Region 2, National Park Service, Department of the Interior.

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 proprietary interest only. In the Committee's conclusions and recommendations,⁸⁴ it was recommended that the powers of commissioners also extend to any place "* * *" which is under the charge and control of the United States."

⁸⁴ *Report*, part I, p. 75.

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,¹ are applicable in such area, to the exclusion of State laws.² 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

¹ See chapter V, p. 105 *et seq.*, *supra*.

² A suit by a State against a Federal officer exercising authority, without joining his superiors or the United States as defendants, held proper for test of question whether State ceded authority for exercise by the United States. *Colorado v. Toll*, 268 U. S. 228 (1925).

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 3) an extensive criminal code ending with the provision (§ 5391) that where an offense is not specially provided for by any law of the 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.³

The civil authority of a State is extinguished over privately owned areas⁴ and privately operated areas⁵ to the same extent as over federally owned and operated areas⁶ when such areas are placed under the exclusive legislative jurisdiction of the United States.⁷

³ See also *Western Union Tel. Co. v. Brown*, 234 U. S. 542 (1914).

⁴ *Petersen v. United States*, 191 F. 2d 154 (C. A. 9, 1951), cert. den., 342 U. S. 885; and it has been held that an owner of an area within a national park under the exclusive jurisdiction of the United States may not kill game contrary to Federal regulation, even on his own land. *Op. Sol., Dept. of the Interior*, M-27284 (Dec. 27, 1932).

⁵ *Chicago, Rock Island & Pacific Ry. v. McGlenn*, 114 U. S. 542 (1885); *Arlington Hotel Company v. Fant*, 278 U. S. 439 (1929).

⁶ *United States v. Amcs*, 24 Fed. Cas. 784, No. 14,441 (C. C. D. Mass., 1845).

⁷ The authority that Federal agencies may exercise in exclusive Federal jurisdiction areas which are under their supervision has been the subject of many opinions and legal memoranda by chief law officers of a number of such agencies. However, the questions of law discussed in such writings

State reservations of authority.—State reservation of authority to serve process in an area is not inconsistent with Federal exercise of exclusive jurisdiction over the area.⁸ 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,⁹ and, it would seem,¹⁰ 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 statute 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.¹¹ 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-

involve essentially the powers available to the agencies, as distinguished from those available to the United States Government (including the Congress), and except as the opinions or memoranda directly concern matters of legislative jurisdiction they will not be referred to in this work.

⁸ See p. 118 *et seq.*, *supra*, and p. 187, *infra*.

⁹ *Op. J. A. G., Navy*, 5267-1116: 3 (Mar. 26, 1923); see also *Foley v. Shriver*, 81 Va. 568 (1886); but in *Sauer v. Steinbauer*, 14 Wis. 70 (1861), an order of a State court directing sale of property of a judgment debtor was held to be process and its execution on an area under Federal legislative jurisdiction was upheld under a State reservation of the right of service or execution of process on the area. Further, the Judge Advocate General of the Navy has more recently reversed his position as to private property: *Op. J. A. G., Navy*, JAG: II: WRN: mnc (Sept. 27, 1955). Also upholding the attachment of private property as service of process are: 14 Ops. A. G. 426 (1874), and *Op. J. A. G., Army*, JAG 680.2 (Feb. 25, 1939).

¹⁰ See p. 123 *et seq.*, *supra*.

¹¹ *Knott Corp. v. Furman*, 163 F. 2d 199 (C. A. 4, 1947), cert. den., 332 U. S. 809; but see *Hercules Powder Co. v. Ruben*, 188 Va. 694, 51 S. E. 2d 149 (1949); *Neidig v. Century Sprinkler Corp.*, 60 Dauph. 585 (Pa. C. P., 1950); see also *Brooks Hardware Co. v. Greer*, 111 Me. 78, 87 Atl. 889 (1911); *Camden v. Harris*, 109 F. Supp. 311 (W. D. Ark., 1953); *Ohio River Contract Co. v. Gordon*, 244 U. S. 68 (1917); *United Services Automobile Ass'n v. Harman*, 151 S. W. 2d 609 (Tex., 1941), cert. den., 315 U. S. 807.

ess.¹² 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,¹³ 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 in a subsequent chapter.¹⁴

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,¹⁵ 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.¹⁶

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 introduced by the same senator and

¹² *Maurice v. Worden*, 52 Md. 283 (1879).

¹³ See p. 60 *et seq.*, *supra*.

¹⁴ See chapter VII, *infra*.

¹⁵ See chapter V, *supra*.

¹⁶ Act of February 1, 1928, 45 Stat. 54, 16 U. S. C. 457; and see *Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940); *Misner v. Cleveland Wrecking Company of Cincinnati, et al.*, 25 F. Supp. 763 (W. D. Mo., 1938); *Whitmore v. French*, 37 Cal. 2d 744, 235 P. 2d 3 (1951); *Kitchens v. Duffield*, 83 Ohio App. 41, 76 N. E. 2d 101 (1947), *aff'd.*, 149 Ohio St. 500, 79 N. E. 2d 906 (1948); *Puleo v. H. E. Moss & Co.*, 159 F. 2d 842 (C. A. 2, 1947), (admiralty jurisdiction).

passed by the Senate, without the filing of a report and without debate, in the three succeeding Congresses.¹⁷ However, not until a fifth bill was presented by the senator (S. 1798, 70th Cong., 1st Sess.) did favorable action ensue in the House,¹⁸ 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:¹⁹

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 jurisdictions, 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 a case within a district which is within the exclusive jurisdic-

¹⁷ S. 258, 67th Cong., 1st Sess., 61 Cong. Rec. 2131; S. 314, 68th Cong., 1st Sess., 65 Cong. Rec. 4138; and S. 104, 69th Cong., 1st Sess., 67 Cong. Rec. 4759.

¹⁸ H. Rept. 369, 70th Cong., 1st Sess., passed House (without debate), 69 Cong. Rec. 2039.

¹⁹ 58 Cong. Rec. 2052.

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.²⁰

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:²¹

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

²⁰ Liability does attach to the Federal Government under this act at the present time, pursuant to the provisions of the Federal Tort Claims Act (28 U. S. C. 1346 (b) *et seq.*, and 2671 *et seq.*).

²¹ 69 Cong. Rec. 1486.

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 places, within the exclusive jurisdiction of the United States, there would be no right of recovery on the 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. ROBINSON of Arkansas. This act would make the State law applicable?

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)²² 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,²³ 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,²⁴ requires State consent, and no consent is provided for under this statute,

²² H. Rept. No. 369, 70th Cong., 1st Sess. (8835).

²³ See *report*, part I, p. 242.

²⁴ P. 54 *et seq.*, *supra*.

unlike the case with respect to Federal statutes providing for application of State laws relating to workmen's compensation, unemployment compensation, and other matters,²⁵ 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 that 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.²⁶ 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

²⁵ See p. 190 *et seq.*, *infra*.

²⁶ In *Murray v. Gerrick & Co., et al.*, which is more fully discussed in the text, *infra*, the Supreme Court said (291 U. S. 315, 319) that the 1928 statute gave an individual no right to sue if he survived his injury. The issue was not before the court, however. See also *Pound v. Gaulding*, 237 Ala. 387, 187 So. 468 (1939), wherein a former State employers' liability act was applied under the international law rule, discussed *infra*, in the case of an injury, which suggests a view in the court that the 1928 statute was not applicable to injuries. On the other hand, in at least three State cases (*Whitmore v. French*, 37 Cal. 2d 744, 235 P. 2d 3 (1951), *State v. Rainier National Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937), and *Kitchens v. Duffield*, 83 Ohio App. 41, 76 N. E. 2d 101, *aff'd.*, 149 Ohio St. 500, 79 N. E. 2d 906 (1948)), the courts assumed that the 1928 statute applied to personal injuries as well as deaths.

law. *Murray v. Gerrick & Co., et al.*, 291 U. S. 315 (1934).²⁷ 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

²⁷ See also: *State v. Rainier National Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937); *Employers' Liability Assur. Corp. v. DiLeo*, 298 Mass. 401, 10 N. E. 2d 251 (1937); *Utley v. Phelan*, 168 Okla. 411, 33 P. 2d 498 (1934); *Utley v. State Industrial Comm.*, 176 Okla. 255, 55 P. 2d 762 (1936); *Utley v. State Industrial Comm.*, 176 Okla. 257, 55 P. 2d 764 (1936); *Pound v. Gauding*, 237 Ala. 387, 187 So. 468 (1939); *Martin v. Clinton Const. Co.*, 41 Cal. App. 2d 35, 105 P. 2d 1029 (1940).

the United States. The issue was not presented, however, whether a State statute enacted after the 1928 Federal statute would apply.²⁸

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,²⁹ 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,³⁰ 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,³¹ 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.³²

²⁸ In *Kitchens v. Duffield*, 83 Ohio App. 41, 76 N. E. 2d 101 (1947), *aff'd.*, 149 Ohio St. 500, 79 N. E. 2d 906 (1948), this question was answered in the affirmative.

²⁹ Unemployment compensation: 26 U. S. C. 3305; workmen's compensation: act of June 25, 1936, 49 Stat. 1938, 40 U. S. C. 290; both are further discussed in chapter VII, *infra*.

³⁰ See p. 190 *et seq.*, *infra*.

³¹ See p. 124 *et seq.*, *supra*.

³² A single possible exception to this suggestion is a statement by Kent (1 *Commentaries*, Kent (7th Ed., 1851), footnote c to marginal p. 431), that "if Congress have not provided any adequate and exclusive remedy for

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 reservation³³ 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

injuries to public property, then the common law or laws of the states apply." But Kent may have been referring to the application of criminal, rather than civil, law, following an apparently isolated decision (*People v. Lent*, 2 Wheel. 548 (N. Y., 1819)) holding to the same effect.

³³ Transfer of jurisdiction was effective as to railroad right-of-way as well as to rest of reservation. *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885).

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, § 14.

The rule thus defined by the court had been applied previously to foreign territories acquired by the United States³⁴ (*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;³⁵ adoption of the international

³⁴ "Law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty * * *." III Beale, *Cases on Conflict of Laws*, Summary, sec. 9 (1902). "This principle has been recognized by American tribunals in its application to laws protecting the private rights of the inhabitants of the territory concerned." I Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, sec. 122 (2d Rev. Ed., 1945).

³⁵ *E. g.*: *Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940); *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604 (C. C. E. D. Va., 1893); *Seerman v. Lustig & Weil, Inc.*, 252 App. Div. 906, 299 N. Y. Supp. 920 (1937); *In re Chavez, et al.*, 149 Fed. 73 (C. A. 8, 1906); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916); *Williams v. Arlington Hotel Co.*, 22 F. 2d 669 (C. A. 8, 1927); *Danielson v. Donnoprav*, 57 F. 2d 565 (D. Wyo., 1932), but it appears that the act of February 1, 1928, 45 Stat. 54 (see p. 148, *supra*),

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 jurisdictional 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

rather than the international law rule, was for application here; *Coffman v. Cleveland Wrecking Co. of Cincinnati*, 24 F. Supp. 581 (W. D. Mo., 1938); *Hoffman, et al. v. Leavenworth Light, Heat & Power Co.*, 91 Kan. 450, 138 Pac. 632 (1914); *Craig v. Craig*, 143 Kan. 624, 56 P. 2d 464 (1936); *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); *State v. Rainier National Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937); *State ex rel. Grays Harbor Const. Co. v. Dept. of Labor & Industries*, 167 Wash. 507, 10 P. 2d 213 (1932). but it appears that the court here upheld State administration of a law—*cf. Atkinson v. State Tax Commission*, 303 U. S. 20 (1938); *Employers' Liability Assur. Corp. v. DiLeo*, 298 Mass. 401, 10 N. E. 2d 251 (1937); and *Willis v. Oscar Daniels Co.*, 200 Mich. 19, 166 N. W. 496 (1918). And in *United States v. Chicago, R. I. & P. Ry.*, 171 F. 2d 377 (C. A. 10, 1948) the court chose, without explanation, to apply "Federal common law" (see footnote 1 in *St. Louis-San Francisco Ry. v. United States*, 187 F. 2d 925 (C. A. 5, 1951)), instead of law applicable under the international law rule, in a case under the Federal Tort Claims Act. See also *Dicks v. Dicks*, 177 Ga. 379, 170 S. E. 245 (1933).

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 as 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 the area involved, although Arkansas, like most or all States, had subsequently modified this rule by statute so as to require a showing of negligence.³⁶ 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.³⁷

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 invalidate 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-

³⁶ See also: *Stewart & Co. v. Sudrakula*, 309 U. S. 94 (1940); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash., 1916); *Williams v. United States*, 145 F. Supp. 4 (W. D. Wis., 1956); *School District No. 20 v. Steele, et al.*, 46 S. D. 589, 195 N. W. 448 (1923); *Employers' Liability Assur. Corp. v. DiLeo*, 298 Mass. 401, 10 N. E. 2d 251 (1937); *McCarthy v. R. G. Packard Co.*, 105 App. Div. 436, 94 N. Y. Supp. 203 (1905), *aff'd.*, 182 N. Y. 555, 75 N. E. 1130; *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); *Henry Bickel Co. v. Wright's Administratrix*, 180 Ky. 181, 202 S. W. 672 (1918); *Willis v. Oscar Daniels Co.*, 200 Mich. 19, 166 N. W. 496 (1918); *Utley v. State Industrial Comm.*, 176 Okla., 255, 55 P. 2d 762 (1936); *Utley v. State Industrial Comm.*, 176 Okla. 257, 55 P. 2d 764 (1936); *State v. Rainier National Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937); *Op. A. G., Fla.*, No. 054-105 (1954).

³⁷ See also report, part I, p. 11.

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.³⁸

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

³⁸ Cf. *Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania*, 318 U. S. 261 (1943), wherein the Supreme Court suggested that Federal legislation could eliminate the applicability to contractors with the Government of State laws setting minimum prices for milk notwithstanding that the Federal Government did not have exclusive legislative jurisdiction over the area on which the Federal installation was situated.

reservation, no other citizen can complain of non-performance or hold 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 the 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 inappropriate. 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 held in *Collins v. Yosemite Park Company* that the sections of a Cali-

ifornia 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.³⁹ 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 or Federal administration of laws in various other fields.⁴⁰

³⁹ See p. 138 *et seq.*, *supra*, for related discussion whether State regulatory statutes are adopted under the Assimilative Crimes Act, and p. 169 *et seq.*, *infra*, for discussion of relation of the States to Federal enclaves. The Attorney General of California has held that the regulatory provisions of the State workmen's compensation laws did not continue in force in a Federal enclave upon the creation of such enclave, a question of State administration of such provisions being involved. 24 *Ops. A. G. Cal.* 103 (Sept. 13, 1954).

⁴⁰ *E. g.*: marriage—see 101 *U. of Pa. L. Rev.* 124, 131 *et seq.* (1952-1953); 22 *Calif. L. Rev.* 152, 168 (1933); *Ops. J. A. G., Army*—250 and 938 (1912), (State has no power to license or regulate marriage ceremonies on Federal enclaves, but such marriages should be entered into in accordance with State laws so as to be made a matter of public record); *id.* 13754 (1943), (marriages solemnized in a Federal enclave are valid provided the statutes of the State from which the license was obtained contain no contrary provi-

(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 inapplicable 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.⁴¹ There are similarly no cases holding State law applicable notwithstanding such inconsistency. The rule, as it was defined in the *McGlenn* 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.⁴²

ston); *id. Digest*, 1912-1930, p. 227 (May 23, 1918), (a chaplain has no legal authority to perform marriages except as obtained in conformity with local law where the ceremonies are to be performed); *Op. A. G., N. Mex.*, 1094 (Aug. 17, 1913), (laws relating to marriage continue effective in Federal enclaves, under the international law rule). While practical problems have arisen and questions been raised concerning such matters as notarization of documents, and licensing and inspection of activities affecting public health or safety, on Federal enclaves, under the international law rule, no legal opinion or court decision dealing with such matters has been located except as indicated in chapter VII, *infra*.

⁴¹ The case of *Petersen v. United States*, 191 F. 2d 154 (C. A. 9, 1951), *cert. den.*, 342 U. S. 885, and other similar cases, seem not in point in that they involve an attempted State exercise of authority in an exclusive Federal jurisdiction area, although there may have been involved an inconsistent Federal law.

⁴² See p. 135 *et seq.*, *supra*.

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 that 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 under 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 seem 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 the 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. The 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 laws, 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 *McGlenn* 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. 364 (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 *McGlenn* case, *supra*, occurred in a State court (it involved a transitory action).⁴³

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).⁴⁴ Indeed, unless there is involved one of

⁴³ See also *Misner v. Cleveland Wrecking Co. of Cincinnati, et al.*, 25 F. Supp. 763 (W. D. Mo., 1938) which, however, was concerned with the construction of the Federal statute relating to death or injury of a person by wrongful act or neglect of another (see p. 148, *supra*), and see *Mater v. Holley*, 200 F. 2d 123 (C. A. 5, 1952); *Olsen v. McPartlin*, 105 F. Supp. 561 (D. Minn., 1952).

⁴⁴ See also: *Chicago, Rock Island & Pacific Ry. v. McGlenn, supra*; *Arlington Hotel Co. v. Fant*, 278 U. S. 439 (1929); *Danielson v. Donnoprav, supra*;

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.⁴⁵ But State authority to serve process in exclusive Federal jurisdiction areas is limited to process relating to activities occurring outside of the areas,⁴⁶ although a number of States now reserve broader authority relating to service of process,⁴⁷ 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.⁴⁸ In such a case it appears that no remedy whatever exists, even with

Armstrong v. Foote, 11 Abb. Pr. 384 (Brooklyn City Ct., 1860); *Delamater v. Folz*, 50 Hun 528, 3 N. Y. Supp. 711 (Sup. Ct., 1889); *Madden v. Arnold*, 22 App. Div. 240, 47 N. Y. Supp. 757 (1897), *aff'd.*, 162 N. Y. 638, 57 N. E. 1116; *McCarthy v. R. G. Packard Co.*, 105 App. Div. 436, 94 N. Y. Supp. 203 (1905), *aff'd.*, 182 N. Y. 555, 75 N. E. 1130; *Norfolk & P. B. L. R. v. Parker*, 152 Va. 484, 147 S. E. 461 (1929); but *cf. Webb v. J. G. White Engineering Corp.*, 204 Ala. 429, 85 So. 729 (1920), where it was held that Congress had pre-empted, through the Federal Employees' Compensation Act of 1916, the remedy available for injury to employees of one of its contractors. See also 32 *Am. L. Rev.* 78 (1898); 22 *Va. L. Rev.* 791 (1936), and 38 *Col. L. Rev.* 128, 139 (1938).

⁴⁵ 28 U. S. C. 1331; 28 U. S. C. 1441; and see *Jewell v. Cleveland Wrecking Co.*, 28 F. Supp. 364 (W. D. Mo., 1938).

⁴⁶ See p. 10, *supra*.

⁴⁷ *Report*, part I, p. 127 *et seq.*, and see *Goldberger Const. Corp. v. Rappoli Co., Inc.*, 169 Misc. 40, 6 N. Y. S. 2d 472 (1938), *aff'd.*, 255 App. Div. 769, 7 N. Y. S. 2d 571 (1938).

⁴⁸ See *Buttery v. Robbins*, 177 Va. 368, 14 S. E. 2d 544 (1941); *Ohio River Contract Co. v. Gordon*, *supra*. In *Knott Corporation v. Furman*, 163 F. 2d 199 (C. A. 4, 1947), *cert. den.*, 322 U. S. 826, it was held that the doing of business by a corporation upon an exclusive Federal jurisdiction area within the boundaries of a State constituted the doing of business within the State for the purpose of a State statute designating the Secretary of the Commonwealth as an agent of foreign corporations doing business within the State for service of process; but see cases *contra* cited in footnote 11, *supra* (p. 147).

respect to a transitory cause of action, where the matter in controversy does not involve the Federal jurisdictional amount.

A local action, as distinguished from a transitory action, having rise in an exclusive Federal jurisdiction area, generally is held as not cognizable in State courts.⁴⁹ 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,⁵⁰ 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).⁵¹

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.

⁴⁹ *Woodfin v. Phoebus*, 30 Fed. 289 (C. C. E. D. Va., 1887); *Martin v. House*, 39 Fed. 694 (C. C. E. D. Ark., 1888); *United States v. McIntosh*, 57 F. 2d 573, & 2 Fed. Supp. 244 (E. D. Va., 1932), *app. dism.*, 70 F. 2d 507 (C. A. 4, 1934), *cert. den.*, 293 U. S. 586; *In re Town of Highlands*, 48 N. Y. St. Rep. 795, 22 N. Y. Supp. 137 (Sup. Ct., 1892); *Dibble v. Clapp*, 31 How. Pr. 420 (Buffalo Super. Ct., 1886); but *cf. Lotterle v. Murphy*, 67 Hun 76, 21 N. Y. Supp. 1120 (Sup. Ct., 1893); see also 38 *Col. L. Rev.* 128 (1938).

⁵⁰ See p. 225 *et seq.*, *infra*.

⁵¹ See also *McLaughlin v. Bank of Potomac*, 48 Va. (Grat.) 68 (1850).

Relation of States 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 acquiring such jurisdiction,¹ 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.² All the powers of government with respect to the area are vested in the United States. *Pollard v. Hagan*, 3 How. 212, 223 (1845).

Exclusion of State authority illustrated.—A classic illustration of the exclusion of State authority from areas of exclusive legislative jurisdiction is to be found in two cases which were decided by the United States Supreme Court on the same day, *Penn Dairies, Inc. 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), *reh. den.*, 318 U. S. 801. In each of these cases the State officials had sought to enforce regulations governing the price of milk sold to the Army. In the California case, the milk was delivered by the dealer to an area of exclusive Federal jurisdiction; in the Pennsylvania case, the United States had

¹ See chapter III, p. 41 *et seq.*, *supra*.

² See pp. 105 *et seq.*, and 145 *et seq.*, *supra*; but a municipality is not prevented from annexing, pursuant to State-granted authority, an area which is under exclusive Federal jurisdiction, and imposing therein a State (municipal) tax authorized for imposition by Federal law, the annexation being not inconsistent with Federal exercise of exclusive jurisdiction. *Howard v. Commissioners*, 344 U. S. 624 (1953).

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, § 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 that 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.

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. I, § 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause.³

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

³ In *Consolidated Milk Producers v. Parker*, 19 Cal. 2d 815, 123 P. 2d 440 (1942), the court held a sale of milk within an exclusive Federal jurisdiction area not subject to State price regulation. The Attorney General of California ruled similarly even earlier. *Op. A. G., Cal.*, No. NS1905 (Aug. 26, 1939). But in *Commonwealth v. Rohrer*, 37 Pa. D. & C. 410 (1937), which involved similar facts, the court held that while the State has no jurisdiction with respect to crime committed wholly within an exclusive Federal area it does have jurisdiction over a crime, the essential elements of which were committed within the State, even though other elements thereof were committed in the ceded territory.

We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 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.⁴

⁴ In *Paterson Milk and Cream Co., Inc. v. Milk Control Board*, 118 N. J. L. 383, 192 Atl. 838 (1937), milk was sold to the United States Government but the jurisdictional status of the reservation was not indicated. Without considering the status of the Government land, the court held that the fact that it was the United States to which a dealer sold milk below the fixed price would be no justification for disregard of the reasonable regulations of the board. To the same effect is *Milk Control Board v. Gosselin's Dairy, Inc.*, 301 Mass. 174, 16 N. E. 2d 641 (1938). It may be noted that the Comptroller General, before and since the decision of the Supreme Court in the *Penn Dairies* case, has held that bids may not be rejected because they are below the minimum price fixed by State law, and that a contractor is obligated to furnish milk and cream at the bid price, or is liable for any excess cost in case of default, notwithstanding his violation of State law. 17 *Comp. Gen.* 287 (1937); *Comp. Gen. Dec.*, No. A-89192 (Jan. 31, 1939); *id.* B-67786 (Aug. 26, 1947).

In each of the *Dairy* cases there were dissents. A dissent in the *Pennsylvania* case was 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 judicial 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,⁵ since it would

⁵ See p. 156 *et seq.*, *supra*.

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 to 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* cases 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* cases 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.⁶

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.⁷ The leading case on this mat-

⁶ See pp. 105 *et seq.*, and 145 *et seq.*, *supra*. Following the decisions in the *Dairy* cases, the Judge Advocate General of the Navy expressed the view that sales of milk to the Federal Government in an area where by State law concurrent jurisdiction only may be acquired might subject a milk dealer to prosecution in the State court if not in accord with local milk control laws. *Op. J. A. G., Navy*, JAG: II: 1: REC: mto (August 14, 1952).

⁷ There should be distinguished, in this regard, cases wherein a court has allowed a tax on the basis that exclusive jurisdiction had not been transferred to the Federal Government. See p. 53 *et seq.*, *supra*. And in *Murphy Corp. v. Fontenot*, 225 La. 379, 73 So. 2d 180 (1954), *cert. den.*, 348 U. S. 831, taxation was allowed on a theory that a change in use for which land had been acquired terminated or suspended exclusive Federal jurisdiction. But in *Mississippi River Fuel Corporation v. Fontenot*, 234 F. 2d 898 (C. A. 5, 1956), *cert. den.*, 352 U. S. 916, imposition of a State tax on severance of gas and oil was allowed on such products severed, by a lessee, from land under exclusive Federal jurisdiction, on the ground that a provision of the lessee's contract with the Federal Government "to pay all taxes lawfully assessed and levied" was effective to prevent avoidance of a non-discriminatory tax such as that which was involved. This case appears novel in attributing to the Executive branch authority to retrocede a measure of legislative jurisdiction unconditionally acquired by the Federal Government.

The Attorney General of Kentucky has ruled that property owned by a public utility company and located in an exclusive Federal jurisdiction area within the State should be included in the franchise assessment of the company, on the grounds that the applicable cession statute in terms excluded from taxation only federally owned property on such area, and that the situs of the general offices of the company within the State made all its property, wherever located, taxable. *Op. A. G., Ky.* (Aug. 21, 1953). The Attorney General of Wyoming has ruled that an insurance company qualified to do business within the State must pay a tax on all premiums collected on risks within the State, including risks located on exclusive Federal jurisdiction areas within the State. *Op. A. G., Wyo.* (June 13, 1949). The Attorney General of California has ruled that an insurance company doing business under a State license may not accept a bail bond negotiated in an exclusive jurisdiction area unless it is negotiated by a person licensed by the State, in view of a provision of the California code prohibiting such companies from doing business except through licensed solicitors. *Op. A. G., Cal.*, No. NS4349 (July 7, 1942).

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., 1836); *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

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.⁸ The Supreme Court said (p. 244):

* Other decisions denying State taxing power: *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F. 2d 644 (C. A. 9, 1929), *cert. den.*, 280 U. S. 555 (1929), (personal property tax); *State v. Blair*, 238 Ala. 377, 191 So. 237 (1939), (gasoline excise tax, but the same tax held applicable to withdrawals of gasoline within the State for transportation to an exclusive Federal jurisdiction area: *Pan American Petroleum Corp. v. Alabama*, 67 F. 2d 590 (C. A. 5, 1933)); *O'Pry Heating & Plumbing Co. v. State*, 241 Ala. 507, 3 So. 2d 316 (1941), (tax on privilege of doing business); *Op. A. G., Cal.*, LB 101/381 (Feb. 17, 1930), *id.* LB 107/450 (Jan. 10, 1931), (personal property taxes); *id.* No. 10328 (Nov. 19, 1935), (property tax on motor vehicles); *Op. A. G., Conn.* (Aug. 3, 1944), (old age assistance tax); *Op. A. G., Fla.*, 049-146 (Apr. 4, 1949), (personal property tax); *Moline Water Power Co. v. Cox*, 252 Ill. 348, 96 N. E. 1044 (1911), (real property tax on water power); *Op. A. G. Kan.* (May 4, 1953), (tax on leasehold or similar interest privately held for industrial purposes); *Hardin County Board of Supervisors v. Kentucky Limousines*, 293 S. W. 2d 239 (Ky., 1956), (*ad valorem* tax on autos as personal property); *Opinion of the Justices*, 1 Metc. 580 (Mass., 1841), (poll or property taxes, *cf. United States v. Cordy*, 58 F. 2d 1013 (D. Md., 1932), where sales tax held inapplicable because of the terms of the statute); *Op. A. G., Mo.* (Nov. 5, 1937), (tax on athletic show, contrary view reached in *Op. A. G., Mo.* (May 29, 1941), where no exclusive Federal jurisdiction involved); *State ex rel. Board of Commissioners v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937), and 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577 (personal property tax), but see *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939), *cf. County of Cherry v. Thacher*, 32 Neb. 350, 49 N. W. 351 (1891), (personal property tax upheld on ground that legislature had not parted with jurisdiction for such taxation, although no taxation reservation contained in cession statute); *Matter of Grant*, 83 Misc. 257, 144 N. Y. Supp. 567 (Sur. Ct., 1913), *aff'd.*, 166 App. Div. 921, 151 N. Y. Supp. 1119 (Sup. Ct. 1st Dept., 1915), (inheritance tax); *Op. A. G., Ohio*, No. 3042 (1925), p. 783 (tax on property); *Winston Bros. Co. v. State Tax Commission*, 156 Ore. 505, 62 P. 2d 7 (1936), *cert. den.*, 301 U. S. 689, *partially rev'd. in Winston Bros. Co. v. Galloway*, 168 Ore. 109, 121 P. 2d 457 (1942), (tax on privilege of a foreign corporation to do business); *Atkinson v. State Tax Comm'n*, 156 Ore. 461, 62 P. 2d 13 (1936), (tax on privilege of a foreign corporation to do business), *rev'd. on reh.*, and reversal *affirmed* in 303 U. S. 20 (1938), on the ground that the United States had not acquired exclusive jurisdiction; *Op. A. G., Texas*, R-2801 (tax on leased computers); *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655 (1919), (personal property tax); a

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 power 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,⁹ and in *Winston Bros. Co. v. Galloway*, 168 Ore. 109, 121 P. 2d 457 (1942), there 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.¹⁰ Thus, in *In re Ladd*,

State has no authority to collect poll and road taxes from either civilian or military residents of areas of exclusive legislative jurisdiction. *Op. J. A. G., Navy*, KP59N1-13 (360210), (November 3, 1936).

⁹ A contractor performing a contract for the erection of a Government post office on Government land who used the adjoining sidewalk to the exclusion of the public was transacting business in the State, and was subject to the contractor's license tax levied by the State. *Sollitt & Sons Construction Company v. Commonwealth*, 161 Va. 854, 172 S. E. 290 (1934), *app. dism. for want of a substantial Federal question*, 292 U. S. 599.

¹⁰ A State has no authority to require that a vessel carrying stone from one State to an area under exclusive Federal jurisdiction in another be weighed and marked in a specified manner (*Mitchell v. Tibbetts*, 17 Pick. 298 (Mass., 1836)), or to prevent the deposit of stone or other materials on an area under exclusive Federal jurisdiction (9 *Ops. A. G.* 319 (1859)).

In *Hughes Transp., Inc. v. United States*, 128 C. Cls. 221, 121 F. Supp. 212 (1954), (but *rehearing granted*, 132 C. Cls. 804 (1955)), it was found that transportation of goods between two Federal enclaves within the boundaries

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*,

of a single State constituted intrastate transportation, and as such was subject to State rate regulation. In *United States v. Public Utilities Comm. of Cal.*, 141 F. Supp. 168 (N. D. Cal., 1956), (*notice of appeal to U. S. Supreme Court filed*, and *probable jurisdiction noted* by the court on Dec. 3, 1956), the District Court, on June 5, 1956, entered a judgment enjoining rate regulation by the State in such cases, but its judgment extended to prevent regulation of rates as to any Federal contracts of transportation, based on Federal supremacy. But see *Motor Transport Co. v. McCannless*, 182 Tenn. 659, 189 S. W. 2d 200 (1945), and discussion on p. 299, *infra*.

State laws prohibiting the carrying of weapons have no application within naval reservations which are under the exclusive jurisdiction of the United States. *Op. J. A. G., Navy*, NY4/L9-2 (401018), (Nov. 1, 1940).

A State statute relating to horse racing is not applicable in an exclusive Federal jurisdiction area (*Op. A. G., Fla.* (Nov. 27, 1935)), nor is a State law regulating the sale of eggs (*id.* (Apr. 22, 1940), 0-792).

Laws of a State requiring the reporting of fires are not applicable to a military reservation over which the United States has exclusive legislative jurisdiction. *Op. J. A. G., Army*, 000.71 (Mar. 16, 1926).

A State fair trade act was held inapplicable in an exclusive Federal jurisdiction area. *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, 2 Ill. App. 2d 543, 120 N. E. 2d 362 (1954). (So construed by Atty. Gen. of Illinois, and so interpreted in *Sunbeam Corp. v. Horn*, 149 F. Supp. 423 (S. D. Ohio, 1955)).

No State has the authority to insist upon furnishing coroner service or making investigations as to the cause of death occurring on an exclusive Federal jurisdiction area, or to prohibit the shipment of an unembalmed body from such area into the State. *Memo Oct. 4, 1951, from Director, National Park Service, Department of the Interior, to Regional Director, Region Two, National Park Service, Department of the Interior.* To same general effect: 1 *Ops. A. G. Cal.* 176 (Mar. 18, 1943); *Op. A. G., Ill.*, No. 98 (Nov. 12, 1941); *Op. A. G., Tex.*, No. V. 380; *Ops. J. A. G., Navy*, JAG: II: 1: REC: win (Sept. 21, 1953); JG: 6769-21 (July 19, 1911); JG: 26250-331 (Feb. 24, 1912); JG: 26283-988.5 (Feb. 18, 1916). It is not necessary for a State permit to be issued by the State of Wyoming for shipment of a body from an exclusive Federal jurisdiction area in Wyoming to a point without the State. *Op. Dep. A. G., Wyo.* (Oct. 4, 1949). See also *County of Allegheny v. McClung*, 53 Pa. 482 (1867).

Insurance license and regulation laws of California are not applicable to persons doing business in Federal enclaves within the State. *Op. A. G. Cal.*, LB286/906 (Apr. 1, 1952), overruling earlier opinions (1 *Ops. A. G. Cal.* 464 (May 21, 1943); 6 *Ops. A. G. Cal.* 57 (Aug. 8, 1945)).

State laws respecting segregation of the races are inapplicable to recreational facilities operated by the Tennessee Valley Authority at reservoirs

208 N. Y. 269, 101 N. E. 891 (1913).¹¹ 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).¹² 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. *Petersen v. United States*, 191 F. 2d 154 (C. A. 9, 1951), *cert. den.*, 342 U. S. 885.

under the exclusive jurisdiction of the United States. *Memo Apr. 5, 1949 from General Counsel to Manager of Reservoir and Community Relations, Tennessee Valley Authority*. See also *Air Terminal Services, Inc. v. Rentzel*, 81 F. Supp. 611 (E. D. Va., 1949), and *Nash v. Air Terminal Services, Inc.*, 85 F. Supp. 545 (E. D. Va., 1949). Such segregation laws are inapplicable either to patients or personnel of Army treatment facilities irrespective of the jurisdictional status of the installation. *Op. J. A. G., Army*, 1943/19368 (Dec. 23, 1943).

¹¹ But in *State v. Mimms*, 43 N. M. 318, 92 P. 2d 993 (1939), *cert. den.*, 308 U. S. 626 (1940), the State court held that, notwithstanding the transfer of exclusive jurisdiction from the State to the United States (but it is not clear that any transfer occurred), the State's jurisdiction "to tax and regulate the liquor industry within its boundaries will not be presumed to have been legislated away" unless such cession can be clearly found in the statute. The Attorney General of Texas has held, however, that a license to sell beer was necessary only absent a showing of transfer to Federal Government of jurisdiction over the place of sale. *Op. A. G., Tex.*, No. 0-3903.

¹² This ruling has been followed by several Federal Departments. *E. g.*: the Department of the Navy has held that the provisions of the Virginia Beverage Control Act do not apply to sales on lands under the exclusive jurisdiction of the United States. *Op. J. A. G., Navy*, JAG: II: 1: RLB: imz (Nov. 5, 1952). The Department of the Army has expressed the view that State law pertaining to the methods of dispensing liquor and the various restrictions placed on tavern keepers have no application on areas over which the United States exercises exclusive jurisdiction. *Op. J. A. G., Army*, 414.1 (May 17, 1940). The Department of the Interior has expressed the opinion that a State license is not required for sales either on Government-owned or private land within the boundaries of a national park under exclusive Federal jurisdiction. *Undated memo from Acting Director to Regional Director, Region 2, National Park Service, Department of the Interior*. A business privilege tax, being in the nature of a license to do business, may not be imposed by the State on persons doing business in a Federal enclave notwithstanding State reservation of the power of taxation. *Op. A. G., Cal.*, No. 10,467 (Jan. 14, 1936).

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);¹³ 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.¹⁴ State and local governments cannot enforce ordinances relating to licenses, bonds, inspections, etc., with respect to construction in areas under exclusive

¹³ On the basis of this ruling of the Supreme Court the Department of the Army has taken the position that a State has no authority to prohibit the importation of liquors destined for military reservations, *Op. J. A. G., Army*, 1954/5868 (July 12, 1954), or to require that the liquors so consigned be channelled through State warehouses and subjected to taxes and other charges, *id.* 1953/7206 (Sept. 15, 1953); and the Department of the Navy has expressed the view that shipment of alcoholic beverages from outside a State to an officers' club on a naval reservation within the State under the exclusive jurisdiction of the United States is not an importation into the State. *Op. J. A. G., Navy*, L14-1 (410108), (May 5, 1941).

The Attorney General of Missouri has ruled that the State has no right to tax or regulate liquors imported into an exclusive legislative jurisdiction area. *Ops. A. G., Mo.* (Apr. 26, 1936; Jan. 15, 1940; and June 12, 1942). The Attorney General of Connecticut has ruled similarly, *Op. A. G., Conn.* (Oct. 26, 1937); as has the Attorney General of Ohio, *Op. A. G., Ohio*, No. 1320 (1937), p. 2255; *id.* No. 3838 (1954), p. 265.

¹⁴ See p. 161 *et seq.*, *supra*.

Federal jurisdiction. *Oklahoma City, et al. v. Sanders*, 94 F. 2d 323 (C. A. 10, 1953); *Op. A. G., N. M.*, No. 5340 (Mar. 6, 1951); *id.* No. 5348 (Mar. 29, 1951);¹⁵ see also *Birmingham v. Thompson*, 200 F. 2d 505 (C. A. 5, 1952). Other State and local licensing provisions are also inapplicable in such areas.¹⁶ 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. 679.¹⁷

¹⁵ A contrary decision would have given States a greater authority in areas under Federal legislative jurisdiction than they have in federally owned areas as to which the Federal Government has merely a proprietary interest. See chapter IX, *infra*.

¹⁶ A physician who is engaged to render care and medical attention to those constructing a Federal building upon property over which the United States has exclusive jurisdiction is not subject to State law relating to the practice of medicine and surgery. *Lynch v. Hammock*, 204 Ark. 911, 165 S. W. 2d 369 (1942). To the same effect, but involving the practice of massage, is *Ladwig v. Nance*, 223 Ark. 559, 267 S. W. 2d 314 (1954). It has also been held that an optician maintaining his office in a post exchange on a Federal enclave may not be required by the State to obtain a State license. *Op. A. G., Cal.*, No. 3714 (Aug. 14, 1941).

The Judge Advocate General of the Army has expressed the view that generally State licensing laws have no application to persons doing business on a reservation over which the United States has exclusive jurisdiction. *Op. J. A. G., Army*, 004.6 (June 27, 1942).

Neither State nor local authorities may enforce health laws and regulations upon exclusive Federal jurisdiction areas, *Op. A. G., Ohio*, No. 3704 (1941), p. 319; nor may a State regulate the sale of securities in such areas, *Op. A. G., Fla.*, No. 054-109 (May 4, 1954). But the Attorney General of Utah has ruled that State sanitation regulations may be enforced, where the State has retained concurrent jurisdiction, unless they are in conflict with Federal law. *Op. A. G., Utah* (Nov. 13, 1945).

¹⁷ The Judge Advocate General of the Navy before the decision in this case reasoned to a similar view. *Op. J. A. G., Navy*, NR 103/N1-13 (381028), (Dec. 7, 1938).

The Attorney General of Pennsylvania has held that the State has no jurisdiction to arrest or prosecute for violations of its fishing laws committed on areas over which the United States has exclusive legislative jurisdiction. *Op. Dep. A. G., Pa.*, 39 Pa. D. & C. 134 (July 15, 1940). The Attorney General of Ohio has ruled similarly. *Op. A. G., Ohio*, No. 2890 (1940), p. 923. Where the State has retained concurrent jurisdiction, such laws may be enforced by State officials. *Op. A. G., Utah*, No. 54-060. And, of course, this is true where the Federal Government has not acquired any

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, 1928), 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).¹⁸

legislative jurisdiction. *Op. A. G., Cal.*, No. 10,715 (May 22, 1936); *id.* No. NS 2238 (Dec. 30, 1939).

¹⁸ A State auto license tax which is a tax for the privilege of using State highways held applicable to residents of Federal enclaves, *Op. A. G., Cal.*, No. 10,417 (Jan. 20, 1936). A resident of an exclusive Federal jurisdiction area may not drive an automobile upon State highways outside of the area without a license; but upon proof of such residence he may be issued a license, notwithstanding that his car has not been returned for taxation. *Op. A. G., Ohio*, No. 3042 (1925), p. 783. See also footnote 2, p. 106, *supra*, and matter on p. 293, *et seq., infra*.

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.¹⁹ 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.²⁰

The Comptroller General has indicated that his views relating to fire-fighting extend to other 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 fire-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.

¹⁹ 24 *Comp. Gen. 599* (1945); 26 *Comp. Gen. 382* (1946); 30 *Comp. Gen. 376* (1951); see also *Comp. Gen. Dec. B-126228* (Jan. 6, 1956); *id. B-105602* (Dec. 17, 1951); *id. B-28369* (Sept. 22, 1942).

²⁰ See discussion in chapter 8, *infra*, particularly p. 238 *et seq.*, *infra*, of a concept of extraterritoriality of areas which are under exclusive Federal jurisdiction as it relates to the status of residents of such areas.

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)).²¹

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.²²

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)²³ of the right to serve process in an area is not inconsistent with Federal exercise of exclusive jurisdiction over the area.²⁴ In each of the instances in which the consistency with exclusive Federal jurisdiction of a State's right to serve 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 or a Federal statutory authorization covering the matter a State would have no greater authority to serve process

²¹ See also *report*, part I, p. 50 *et seq.* And the Attorney General of Ohio has ruled that a federally owned area (used by the State under a license agreement) was entitled to the same degree of fire protection as accorded any other areas of the township in which it was located. *Op. A. G., Ohio*, No. 3374 (1953) p. 733.

²² Act of May 27, 1955, 69 Stat. 66, 42 U. S. C. 1856 *et seq.*; see also 32 *Comp. Gen. 91* (1952). Expenditure, from a general appropriation, of funds for purchase of membership in a voluntary fire organization has been authorized where obligation to furnish protection does not otherwise devolve on organization. 34 *Comp. Gen. 195* (1954).

²³ See p. 35, *supra*.

²⁴ See p. 118, *et seq.*, *supra*.

in an area of exclusive Federal jurisdiction than it does in an area beyond its boundaries.²⁵ It has been so held by the Attorney General.²⁶

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 of jurisdiction.²⁷

There is now firmly established the legal and constitutional propriety of reservations of jurisdiction in State consent²⁸ and cession²⁹ statutes. Subject to only one general limitation, a State has unlimited discretion in determining the character and scope of the reservations 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.³⁰

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-

²⁵ Having reserved or been granted the right to serve process, however, a State must be given access to areas under Federal jurisdiction for the purpose of effecting such service by its officials, subject at most to reasonable Federal regulations designed to prevent interference with Federal functions conducted on such areas. *Op. J. A. G., Navy*, JAG:J:JAL; amp (Aug. 5, 1943); *id.* LL/A17-8 (370817), (Aug. 28, 1937). To the same effect is a decision of the Judge Advocate General of the Army. *Op. A. G., Army*, 1950/4487 (Aug. 17, 1950).

²⁶ 23 *Ops. A. G.* 254 (1900). See also *People of the State of California v. United States*, 235 F. 2d 647, 655, 661 (C. A. 9, 1956).

²⁷ *Report*, part I, p. 28 *et seq.*, and p. 127 *et seq.*

²⁸ P. 62 *et seq.*, *supra*.

²⁹ P. 60 *et seq.*, *supra*.

³⁰ P. 64, *supra*.

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 reservations 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 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.³¹ Only those matters expressly mentioned as reserved will remain subject to the jurisdiction of the State.³²

³¹ See also *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis., 1895); *Six Cos., Inc. v. De Vinney*, 2 F. Supp. 693 (D. Nev., 1933); *People v. Godfrey*, 17 Johns. 225 (N. Y., 1819); *Oscar Daniels Co. v. Sault Ste. Marie*, 208 Mich. 363, 175 N. W. 160 (1919); *State v. Mendez*, 57 Nev. 192, 61 P. 2d 300 (1936); *Ryan v. State*, 188 Wash. 115, 61 P. 2d 1276 (1936), *aff'd.*, *sub nom. Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937), but see *State ex rel. Board of Commissioners v. Bruce*, 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd.*, 305 U. S. 577, and *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); *Standard Oil Co. of California v. Johnson*, 10 Cal. 2d 758, 76 P. 2d 1184 (1938); *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358 (1939); *Superior Bath House Co. v. McCarroll*, 312 U. S. 176 (1941); *Collins v. Yosemite Park Co.*, 304 U. S. 518 (1938). See also p. 88, *supra*.

³² State tax laws are enforceable as to private persons and property on areas under the partial legislative jurisdiction of the United States if the reservation of State jurisdiction includes the power to tax. *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525 (1885); *Rainier Nat. Park Co. v. Martin*, 18 F. Supp. 481 (W. D. Wash., 1937), *aff'd.*, 23 F. Supp. 60, *aff'd.*, 302 U. S. 661 (1938); *Yosemite Park & Curry Co. v. Johnson*, 10 Cal. 2d 770, 76 P. 2d 1191 (1938). See also pp. 57 *et seq.*, 117 *et seq.*, & 147, *supra*, for discussions of reservations.

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 legislative 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-called "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);³³ 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).³⁴ Congress has also enacted a statute retroceding to the States jurisdiction pertaining to the administration of estates of decedent residents of Veterans' Administration facilities,³⁵ 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.³⁶

Lea Act.—A 1936 statute,³⁷ 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

³³ Formerly 10 U. S. C. 1270 (d), but in 1956 re-enacted as 10 U. S. C. 2637 (e).

³⁴ For the full texts of these statutes, see *report*, part I, pp. 238-244.

³⁵ 38 U. S. C. 16-16j, see p. 235, *infra*.

³⁶ For illustrations of such statutes reference may be had to provisions contained in chapter I of title 16, U. S. C., fixing the jurisdictional status of various national parks.

³⁷ Act of June 16, 1936, 49 Stat. 1521, 4 U. S. C. 104.

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.³⁸ 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 1940,³⁹ 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. 780.⁴⁰ Sales to Government contractors are taxable under the act,⁴¹ but not sales to Army post exchanges, which are arms of the

³⁸ 80 Cong. Rec. 6913 (1936).

³⁹ See p. 200, *infra*.

⁴⁰ See also *Minnesota v. Keeley*, 126 F. 2d 863 (C. A. 8, 1942), reversing *Minnesota v. Ristine*, 36 F. Supp. 3 (D. Minn., 1940), and *cf. State v. Yellowstone Park Co.*, 57 Wyo. 502, 121 P. 2d 170 (1942), *cert. den.*, 316 U. S. 689; the first cited case approved, and the last disapproved, taxes based on use rather than sales *under the original form of this statute* prior to its amendment by the Buck Act (see p. 200, *infra*).

⁴¹ *Texas Co. v. Stiefried*, 60 Wyo. 142, 147 P. 2d 837 (1944), *reh. den.*, 60 Wyo. 174, 150 P. 2d 99.

Federal Government and partake of its immunities under this act.⁴²

Buck Act.—Four years later, in 1940, Congress enacted a retrocession statute of wide effect. This law,⁴³ 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 sales 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 the aspects of the statute finally enacted, except the features 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.⁴⁴ The intent behind the House bill, passed during the first session of the 76th Congress, as stated in the report⁴⁵ 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

⁴² See *Standard Oil Co. v. Johnson*, 316 U. S. 481 (1942), and other cases cited in footnote 48 (p. 198), *infra*.

⁴³ Act of Oct. 9, 1940, 54 Stat. 1059, 4 U. S. C. 105-110.

⁴⁴ Hearing before a Subcommittee of the Committee on Finance, United States Senate, 76th Cong., 3d Sess., on H. R. 6687 (Apr. 23, 1940).

⁴⁵ H. Rept. No. 1267, 76th Cong., 1st Sess. 10301 (1939).

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 over 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, ship-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 States 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 report⁴⁶ 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.

⁴⁶ S. Rept. No. 1025, 76th Cong., 3d Sess. 10429 (1940).

This section will remove the right to claim an exemption because of the exclusive Federal jurisdiction over the area in both of 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 transactions occurring on or services 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 his income from transactions occurring or services 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 of the United States when such 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.⁴⁷ 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;

⁴⁷Hearing before a Subcommittee of the Committee on Finance, United States Senate, 76th Cong., 3d Sess., on H. R. 6687 (Apr. 23, 1940), pp. 24, 28-31. See also letter from Representative Carl Vinson, *id.* pp. 47-48.

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 State 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.⁴⁸ 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.

⁴⁸ In *Standard Oil Co. v. Johnson*, 316 U. S. 481 (1942), it was held (p. 485) that "post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." A similar holding in *United States v. Query*, 37 F. Supp. 972 (E. D. S. C., 1941), *aff'd.*, 121 F. 2d 631 (C. A. 4, 1941), *cert. den.*, 314 U. S. 685 (but see 316 U. S. 486), is applicable also to ships' stores and officers' and non-commissioned officers' clubs, because of a stipulation entered into in that case, according to a letter from the Secretary of the Navy to the Secretary of the Treasury dated Nov. 28, 1955 (see also: *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35 (W. D. Ky., 1941); *Edelstein v. South Post Officers Club*, 118 F. Supp. 40 (E. D. Va., 1951); *Maynard & Child, Inc. v. Shearer*, 290 S. W. 2d 790 (Ky., 1956); *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E. D. Ill., 1955); and *Roger v. Elrod*, 125 F. Supp. 62 (D. Alaska, 1954); *cf. Valeni v. United States*, 125 F. Supp. 630 (E. D. N. Y., 1949), and *Pan American Petroleum Corp. v. Alabama*, 67 F. 2d 590 (C. A. 5, 1933)). The Attorney General of Missouri has applied the decision in the *Standard Oil Co.* case, *Op. A. G., Mo.* (July 12, 1942), as has the Attorney General of Ohio, *Op. A. G., Ohio*, No. 3362 (1941), p. 17, and the Attorney General of Connecticut earlier applied the decision in the *Pan American Petroleum Corp.* case, *Op. A. G., Conn.* (Dec. 30, 1940). The Attorney General of Wyoming has ruled that the Army Motion Picture Service is exempt from State taxation as a Federal instrumentality. *Op. A. G., Wyo.* (July 8, 1947). The Judge Advocate General of the Navy has ruled that Navy commissaries similarly are Federal instrumentalities. *Op. J. A. G., Navy*, JAG: II: 1: JFG: w/n (Dec. 30, 1952).

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.⁴⁹ 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, dockyards, 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.⁵⁰

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:

⁴⁹ Hearing before a Subcommittee of the Committee on Finance, United States Senate, 76th Cong., 3d Sess., on H. R. 6687 (Apr. 23, 1940), pp. 24-25.

⁵⁰ *Id.* at p. 51.

Section 4 of the committee amendment was inserted to make certain that the criminal jurisdiction of Federal courts with respect to Federal areas 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 (Lea) 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 services performed in such area"⁵¹ * * * to the same extent and with the same effect as though such area was not a Federal area."⁵² 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-

⁵¹The area involved in this case was a Government ordnance plant tract over which the United States exercised exclusive jurisdiction and which was annexed by the city without objection by the United States. The court held that notwithstanding the acquisition of the property by the United States with the consent of the State the area could be annexed by the city, since it remained a part of the county and State. To the same effect is the previous ruling in *Wichita Falls v. Bowen*, 143 Tex. 45, 182 S. W. 2d 695 (1944), where the court held that a military base over which the United States has exclusive jurisdiction is a part of the city, just as much as it is a part of the State, even though control over it is curtailed while under the jurisdiction of the United States; see also *County of Norfolk v. Portsmouth*, 186 Va. 1032, 45 S. E. 2d 136 (1947).

⁵²The Judge Advocate General of the Army has had occasion to hold to the same general effect—that the failure of a State to reserve any rights to tax in its cession of jurisdiction to the United States has no effect on the right to tax under the Buck Act. *Op. J. A. G., Army*, 1953/9148 (Jan. 15, 1954), and *id.* 1944/1555 (Feb. 7, 1944).

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, 206 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.⁵³

⁵³ The Judge Advocate General of the Navy has ruled, however, that a license tax required by a State for the privilege of selling alcoholic beverages

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. 741.⁵⁴ 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

ages in a Federal area of exclusive jurisdiction is not a "sales or use tax" within the definition of the Buck Act, and the imposition of such a tax is not authorized. *Op. J. A. G., Navy*, JAG: II: JCR: ecw (June 22, 1950).

The Chief Counsel of the National Park Service has ruled that State and county privilege taxes are inapplicable to a concessionaire on an exclusive Federal jurisdiction area in Tennessee, on the ground that such taxes are not within the purview of existing congressional authorization. *Memo* dated Jan. 20, 1954, to Regional Director, Region 1, Nat'l Park Service, Dept. of Interior. The Attorney General of Utah has held that a corporation doing business as a restaurant on an area under exclusive Federal jurisdiction is subject to State sales, use, and income taxes. *Op. A. G., Utah*, No. 51-163. The Attorney General of California has held that under the Buck Act sales by operators, who are not Federal instrumentalities, of vending stands within Federal enclaves are subject to sales taxes. *Op. A. G., Cal.*, No. NS3156 (Dec. 21, 1940). So also subject are sales of liquor consummated by delivery within the enclave. *Id.* NS3578 (June 12, 1941).

⁵⁴ See 17 *Temple U. L. Q.* 275 (1943) for a note on this case. The case was followed in *Philadelphia v. Cline*, 158 Pa. Super. Ct. 179, 44 A. 2d 610 (1945), *cert. den.*, 328 U. S. 848.

1949,⁵⁵ 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 1947,⁵⁶ 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 to a number of conflicting court decisions,⁵⁷ and other at least seemingly inconsistent interpre-

⁵⁵ Act of Aug. 8, 1949, 63 Stat. 576, as amended, 12 U. S. C. 1748.

⁵⁶ Act of Aug. 5, 1947, 61 Stat. 774, 10 U. S. C. 1270 (d), the pertinent provision of which appears, in revised form, as section 2667 (e) of title 10, U. S. C., as recodified in 1956.

⁵⁷ *Gay v. Jemison*, 52 So. 2d 137 (Fla., 1951); *Tampa Bay Garden Apartments v. Gay*, 55 So. 2d 739 (Fla., 1951); *Squantum Gardens v. Assessors of Quincy*, 140 N. E. 2d 482 (Mass., 1957); *Meade Heights v. State Tax Commission*, 202 Md. 20, 95 A. 2d 280 (1953); *Bragg Development Co. v. Braxton*, 239 N. C. 427, 79 S. E. 2d 918 (1954); *Dayton Development Fort Hamilton Corp. v. Boyland*, 133 N. Y. S. 2d 831 (Sup. Ct., 1954) *aff'd.*, 1 App. Div. 2d 979, 151 N. Y. S. 2d 928, *app. pending*, 137 N. E. 2d 457 (1956); *Conley Housing Corp. v. Coleman*, 211 Ga. 835, 89 S. E. 2d 482 (1955); *De Luz Homes, Inc. v. County of San Diego*, 45 Cal. 2d 546, 290 P. 2d 544 (1955); *Fairfield Gardens v. County of Solano*, 45 Cal. 2d 575, 290 P. 2d 562 (1955); *Victor Valley Housing Corp. v. County of San Bernardino*, 45 Cal. 2d 580, 290 P. 2d 565 (1955); *El Toro Dev. Co. v. County of Orange*, 45 Cal. 2d 586, 290 P. 2d 569 (1955); *County of Prince William v. Thomason Park*, 197 Va. 861, 91 S. E. 2d 441 (1956).

tations.⁵⁸ 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).⁵⁹ 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, § 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

⁵⁸ Opinions of State Attorneys General on this subject are complicated by variations in State statutes defining properties on which taxes may be levied. Held that Wherry housing was subject to taxation under pertinent State statute: *Op. A. G., Ill.*, p. 78, No. 23 (May 7, 1953); *Op. A. G., Kan.* (Feb. 7, 1952); *Op. A. G., Utah*, No. 52-079; *id.* No. 53-178; *id.* No. 55-035; such housing held not subject to taxation: *Op. A. G., Conn.* (Oct. 15, 1952); *Op. A. G., Ind.*, No. 37 (1952), p. 163; *Op. A. G., N. Mex.*, No. 5463 (Dec. 10, 1951); *Op. Asst. A. G., Wyo.* (Sept. 29, 1955).

⁵⁹ See also *Fort Dix Apartments Corp. v. Borough of Wrightstown*, 225 F. 2d 473 (C. A. 3, 1955), *cert. den.*, 351 U. S. 962; *Brookley Manor v. State*, 90 So. 2d 161 (Ala., 1956); *Bragg Investment Co. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341 (1957).

and unambiguous legislative enactment. We have not heretofore 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 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 to the language of the 1947 statute. Otherwise, it may be noted, in the light 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 statute⁶⁰ permitting the application of State workmen's compensation laws to Federal areas. Both House and Senate reports⁶¹ 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 the several States jurisdiction and authority to enter upon and enforce their State workmen's 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

⁶⁰ Act of June 25, 1936, 49 Stat. 1938, 40 U. S. C. 200.

⁶¹ H. Rept. No. 2656, 74th Cong., 2nd Sess. 9994 (1936); S. Rept. No. 2294, 74th Cong., 2nd Sess. 9989 (1936).

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 Federal 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., tit. 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 concurred⁶² in the amendments, with no objections and with only a general explanation of their purpose⁶³ 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,⁶⁴ 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.

⁶² 80 Cong. Rec. 9180-1, 9643 (1936).

⁶³ *Id.* at p. 8842.

⁶⁴ See p. 148 *et seq.*, *supra*. In *Alexander v. Movietonews, Inc.*, 273 N. Y. 511, 6 N. E. 2d 604 (1937), *cert. den.*, 301 U. S. 702; *Loney v. State Industrial Accident Board*, 87 Mont. 191, 286 Pac. 408 (1930); *Lynch's Case*, 281 Mass. 454, 183 N. E. 834 (1933); *Seerman v. Lustig & Weil, Inc.*, 252 App. Div. 906, 299 N. Y. Supp. 920 (1937); and *Walsh v. Apartment Engineering & Contracting Co.*, 267 N. Y. Supp. 872 (App. Div., 3d Dept., 1933), State workmen's compensation laws were held applicable to injuries suffered on exclusive Federal jurisdiction areas because of a nexus between

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;⁶⁵ 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. 799.⁶⁶ The statute was not applicable to causes of action arising before its passage, however.⁶⁷ State workmen's compensation laws are authorized by this statute to be applied to employees of contractors engaged in work for the Federal Government.⁶⁸ The statute does not, however, permit application of State laws to persons covered by provisions of the Federal Employees' Compensation Law,⁶⁹ or, it has been held, to employees of Federal instrumentalities.⁷⁰

the State and the contract of employment or parties to the contract. In *Allen v. Ind. Acc. Com.*, 3 Cal. 2d 214, 43 P. 2d 787 (1935), *Hand v. Apartment Engineering & Construction Co., Inc.*, 246 App. Div. 874, 285 N. Y. Supp. 67 (1936), and *Employers' Liability Assur. Corp. v. DiLeo*, 298 Mass. 401, 10 N. E. 2d 251 (1937), application of a State statute to an exclusive Federal jurisdiction area was denied. It should be noted that such application, notwithstanding existence of a nexus, substitutes State law for a remedy otherwise available under Federal law. However, the Supreme Court has given approval to such extraterritorial application of State workmen's compensation laws. *Alaska Packers Assn. v. Comm'n.*, 294 U. S. 532 (1935); *Steinmetz v. Snead & Co.*, 123 N. J. L. 497, 9 A. 2d 801 (1939), *aff'd.*, 311 U. S. 605. See also 8 *So. Calif. L. Rev.* 61 (1935).

⁶⁵ See *State v. Rainier Nat'l Park Co.*, 192 Wash. 592, 74 P. 2d 464 (1937).

⁶⁶ See also *Ottinger Bros. v. Clark*, 191 Okla. 488, 131 P. 2d 94 (1942); *McDonnell & Murphy v. Lunday*, 191 Okla. 611, 132 P. 2d 322 (1942); 12 *Geo. Wash. L. Rev.* 80 (1943).

⁶⁷ *Employers' Liability Assur. Corp. v. DiLeo*, 298 Mass. 401, 10 N. E. 2d 251 (1937).

⁶⁸ *Young v. G. L. Tarlton, Contractor, Inc.*, 204 Ark. 283, 162 S. W. 2d 477 (1942).

⁶⁹ *Breeding v. Tennessee Valley Authority*, 243 Ala. 240, 9 So. 2d 6 (1942); *Posey v. Tennessee Valley Authority*, 93 F. 2d 726 (C. A. 5, 1937).

⁷⁰ *Op. J. A. G., Navy*, P3-2/P7 (350924-5), (May 18, 1938); *Op. J. A. G., Army*, 1949/8889 (Feb. 15, 1950); 1949/5319 (Aug. 3, 1949); 1944/6234 (July 5, 1944).

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 1939:⁷¹

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. *Buckstaff 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 report⁷² 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 report⁷³ is identical. Although extensive hear-

⁷¹ Act of Aug. 10, 1939, 53 Stat. 1392, 26 U. S. C. 3305 (formerly 1606), (d).

⁷² H. Rept. No. 728, 76th Cong., 1st Sess. 10298 (1939) (p. 72).

⁷³ S. Rept. No. 734, 76th Cong., 1st Sess. 10294 (1939).

ings⁷⁴ 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.⁷⁵ 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.⁷⁶

This quotation indicates that the 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 broadened apparently on the basis that if State social security 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.⁷⁷ And post exchanges, ships' service stores, officers' messes and similar entities are required to pay the unem-

ployment taxes, it has been held,⁷⁸ although they are Government instrumentalities,⁷⁹ on the ground that they do not come within an exception for "wholly owned" instrumentalities.

⁷⁸ *Op. J. A. G., Navy* L14-1/L6-2 (+11205), (Feb. 3, 1942); *id.* NPI/N4-5 (4111114), (Jan. 29, 1942).

⁷⁹ See footnote 48 (p. 198), *supra*.

⁷⁴ Hearings before Committee on Ways and Means, House of Representatives, 76th Cong., 1st Sess. (Feb., Mar., and Apr., 1939).

⁷⁵ *Id.* at p. 14.

⁷⁶ *Id.* at p. 2376.

⁷⁷ *Op. J. A. G., Army*, 1943/4064 (Mar. 29, 1943).

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,¹ and such persons are relieved of all their obligations to the State.² 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 *privileges*, 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.

¹ Criminal matters—see p. 105 *et seq.*; civil matters—see p. 145 *et seq.*; in general—see p. 169 *et seq.*

² See p. 185 *et seq.*, *supra*; but it should be noted that the Federal Government has retroceded to the States authority to collect most taxes, and authority with respect to certain other matters, see p. 190 *et seq.*, *supra*.

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, § 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 the 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.

* * * * *

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):³

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, than 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 next 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 (1903). 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.⁴ Where the courts have found that

³ See 17 *Tenn. L. Rev.* 328, 352 (1942) and 14 *Wash. L. Rev.* (pt. 1) 1, 18 (1939), for comment on this matter.

⁴ *Hufford v. Herrold*, 189 Iowa 853, 179 N. W. 53 (1920); *School Dist. No. 20 v. Steele*, 46 S. D. 589, 195 N. W. 448 (1923); *Rockwell v. Independent School District*, 48 S. D. 137, 202 N. W. 478 (1925); *Tagge v. Gulzow*, 132 Neb. 276, 271 N. W. 803 (1937); *Rolland v. School District*, 132 Neb. 281,

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 found that legislative jurisdiction over an area has been vested in the United States, they have 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.⁵

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

271 N. W. 805 (1937), (for comment on this case see 17 *Neb. L. Bul.* 86, and 38 *Colo. L. Rev.* 128, 140); *In re Annexation of Reno Quartermaster Depot*, 180 Okla. 274, 69 P. 2d 659 (1937); *State ex rel. Moore v. Board of Education of Euclid City School Dist.*, 41 Ohio Abs. 161, 57 N. E. 2d 118 (1944); *McGwinn v. Board of Education*, 33 Ohio Op. 433, 69 N. E. 2d 391 (1945), *aff'd.*, 78 Ohio App. 405, 69 N. E. 2d 381 (1946), *app. dism'd.*, 147 Ohio St. 259, 70 N. E. 2d 776; *Miller v. Hickory Grove School Bd.*, 162 Kan. 528, 178 P. 2d 214 (1947); *Independent School Dist. v. Central Education Agency*, 247 S. W. 2d 597 (1952), *aff'd.*, 152 Tex. 56, 254 S. W. 2d 357 (1953); and *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 100 A. 2d 621 (1953).

⁵ But see p. 238 *et seq.*, *infra*. And the Attorney General of Illinois has ruled that children residing at Ft. Sheridan (an exclusive Federal jurisdiction area) are entitled to the benefits of the school system of Illinois, *Op. A. G., Ill.*, p. 363, No. 2722 (July 22, 1930), apparently overruling an earlier inconsistent decision (*id.* p. 491, No. 1284 (1927)). But the Attorney General of Indiana has held under similar circumstances that such children may not attend without payment of tuition. *Op. A. G., Ind.*, p. 411, No. 66 (1948). Other State Attorneys General have held that children residing on federally owned areas are not entitled to treatment as State residents in relation to public school education where the areas are under exclusive Federal jurisdiction: *Op. A. G., N. J.*, No. 37 (Nov. 26, 1951); 50 *Ops. A. G., Md.*, 129; 27 *id.* 116 (1942); but that they are entitled to treatment as State residents for this purpose where the Federal Government does not have exclusive legislative jurisdiction: 5 *id.* 136; *Op. A. G., N. M.*, Sept. 2, 1914; *Op. A. G., Ohio*, p. 193, No. 479 (1949).

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. 2756b, 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 jurisdictional status of the Federal area which is involved.⁶

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,⁷

⁶ Act of Sept. 30, 1950, 64 Stat. 1100, as amended, 20 U. S. C. and Supp. 236 *et seq.* (see H. Rept. 2287, 81st Cong., 2d Sess.); and act of Sept. 23, 1950, 64 Stat. 967, as amended, 20 U. S. C. Supp. 271 *et seq.* (see H. Rept. 2810, 81st Cong., 2d Sess.); and see report prepared by Legislative Reference Service, Library of Congress, for the Senate Committee on Appropriations, 81st Cong., 1st Sess., *Education of Children Living on Federal Reservations and in Localities Particularly Affected by Federal Activities* (G. P. O., 1949); and report prepared as Staff Study Number 17 for the Advisory Committee on Education, *Education of Children on Federal Reservations* (G. P. O., 1939). See also *report*, pt. I, p. 55 *et seq.*

⁷ The case of *Custis v. Lane*, 17 Va. 579 (1813), which involved denial of a right to vote to a resident of that portion of Virginia ceded for establishment of the seat of the Federal Government, antedated the *Opinion of the Justices* by some years, but this earlier case has failed to receive much judicial attention. Decisions contrary to these two appear to have been rendered only in *Arapajolu v. McMenamin*, and *Adams v. Londeree*, discussed at p. 222, *et seq.*, *infra*; and see 34 A. L. R. 2d 1185 *et seq.*

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,⁸ 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).⁹ 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

⁸ See p. 216 *supra*, for a quotation of the pertinent language of the opinion.

⁹ Noted in 2 A. L. R. 397, and 34 A. L. R. 2d 1199.

non-residents, and that all votes of residents of the area should therefore be rejected.¹⁰

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.¹¹ 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,¹² although in similar instances the courts have held that residence on a Federal area can constitute a residence for voting purposes.¹³ The courts have generally ruled that residents of a federally owned area may qualify as voters where the Federal Government has never

¹⁰ For developments in the aftermath of *Sinks v. Reese*, see p. 85 *et seq.*, *supra*.

¹¹ *In re Town of Highlands*, 48 N. Y. St. Rept. 795, 22 N. Y. Supp. 137 (Sup. Ct., 1892), (see also *Reilly v. Lamar, Beall and Smith*, 2 Cranch 344 (1805)); *McMahon v. Polk*, 10 S. D. 296, 73 N. W. 77 (1897); *State ex rel. Lyle v. Willet*, 117 Tenn. 334, 97 S. W. 299 (1906); *Herken v. Glynn*, 151 Kan. 855, 101 P. 2d 946 (1940), (in the opinion in this case it was stated (151 Kan. at p. 864), "No case has been found where it has been held that residents on lands ceded by a state to the United States retained or acquired a right to vote as residents of the ceding state." This statement continues true today with but two exceptions which will be discussed in the text, *infra*); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 128 P. 2d 999 (1942); *State ex rel. Wendt v. Smith*, 63 Ohio Abs. 31, 103 N. E. 2d 822 (1951); *Arlidge v. Mabry*, 52 N. M. 303, 197 P. 2d 884 (1948); see also *Dibble v. Clapp*, 31 How. Pr. 420 (Buffalo (N. Y.) Super. Ct., 1866).

¹² *Merrill v. Shearston*, 73 Col. 230, 214 Pac. 540 (1923), (noted: 34 A. L. R. 2d 1198); *Kemp v. Heebner*, 77 Col. 177, 234 P. 1068 (1925), (noted: 34 A. L. R. 2d 1198); *Application for the Removal of Names from Registry List*, 133 Misc. 38, 231 N. Y. Supp. 396 (1928), (noted: 34 A. L. R. 2d 1201).

¹³ *Cory v. Spencer*, 67 Kan. 648, 73 Pac. 920 (1903); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 128 P. 2d 999 (1942); see also *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127 (1895); *Schultz, et al. v. Lewallen, et al.*, 188 Tenn. 206, 217 S. W. 2d 944 (1948); and see cases cited in footnotes 14, 15 & 16, *infra*.

acquired legislative jurisdiction over the area,¹⁴ where legislative jurisdiction formerly held by the Federal Government has been retroceded by act of Congress,¹⁵ or where Federal legislative jurisdiction has terminated for some other reason.¹⁶ 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.¹⁷

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

¹⁴ *State v. Denoyer*, 6 N. D. 586, 72 N. W. 1014 (1897); *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002 (1901); *State v. Mountrail County*, 28 N. D. 389, 149 N. W. 120 (1914); *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 128 P. 2d 999 (1942); *Johnson v. Morrill*, 30 Cal. 2d 446, 126 P. 2d 873 (1942). See also H. Rept. No. 43, 42d Cong., 2d Sess. 1528 (1872), or p. 89, H. Misc. Doc. No. 52, 45th Cong., 2d Sess. 1819 (1878).

¹⁵ *Renner v. Bennett*, 21 Ohio St. 431 (1871), (noted: 34 A. L. R. 2d 1202); *State ex rel. Cashman v. Board of Commissioners of Grant County*, 153 Ind. 302, 54 N. E. 809 (1899).

¹⁶ *Stephens v. Nacey*, 49 Mont. 230, 141 Pac. 649 (1914), (jurisdiction had by Federal Government over Indian lands held to have been extinguished by extinguishment of Indian title); *La Duke v. Melin*, 45 N. D. 349, 177 N. W. 673 (1920), (jurisdiction had by Federal Government over military reservations held to have been terminated as to an area by abandonment of its use as a military reservation); *Hammond v. Brinkman*, 173 Kan. 406, 246 P. 2d 345 (1952), (transfer of area over which jurisdiction had by Federal Government to use as housing area under Lanham Act held to restore civil rights to residents).

¹⁷ *Op. A. G., Cal.*, No. LB 129/788 (Dec. 20, 1933); *id.* LB 158/290 (June 25, 1937); *id.* No. NS4278 (May 4, 1942); 3 *Ops. A. G., Cal.* 136 (Mar. 2, 1944); *Op. A. G., Cal.*, No. LB 220/683 (Aug. 11, 1942); *Op. A. G., Fla.*, 052-250 (Aug. 13, 1952); *Op. A. G., Ill.*, p. 144, No. 3820 (Mar. 2, 1932); *id.* p. 226, No. 3898 (Mar. 31, 1932); *Op. A. G., Ind.*, p. 142, No. 35 (1944); 10 *Ops. A. G., Md.* 107, 120; 17 *id.* 139; 21 *id.* 347; 23 *id.* 224; *Op. A. G., Ohio*, p. 594, No. 7201 (1944); *id.* p. 266, No. 1705 (1950). But the Attorney General of Utah has ruled that persons may not qualify as voters by residence on an area as to which the State retained concurrent jurisdiction. *Op. A. G., Utah* (Oct. 29, 1954), overruling earlier opinion, No. 52-089.

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.¹⁸ In *Arledge v. Mabry*, the court suggested, the retrocessions had not been considered¹⁹ and the case had been decided (erroneously) on the basis that the United States still had and exercised exclusive jurisdiction. The court concluded (249 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.²⁰

¹⁸ For discussion of these and certain other retrocessions, see p. 190 *et seq.*, *supra*.

¹⁹ But the opinion in *Arledge v. Mabry* demonstrates that the court was aware of the exercise of authority by the State pursuant to such retrocessions (197 P. 2d 884, 889).

²⁰ The court commended an opinion of the Attorney General of California holding to the same effect (*Op. No. 52-183, 20 Ops. A. G., Cal. 127*). In an earlier opinion, which apparently had been superseded by several mentioned in footnote 17, *supra*, the Attorney General had held that residence

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.²¹

While *Arapajolu v. McMnamin* 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 from Federal agencies indicate that residents of such areas under their supervision in many instances are permitted to vote²² and a few States have by statute granted voting rights to such residents (*e. g.*, California, Nevada (in some instances), New Mex-

within a Federal enclave did not of itself disqualify a person from voting. *Op. A. G., Cal.*, No. LB 64/106.

²¹ In neither of the opinions in this case was note taken of the decisions in *Palmer v. Barrett, Crook, Horner & Co. v. Old Point Comfort Hotel Co.* or *S. R. A., Inc. v. Minnesota* (see p. 96 *et seq.*, *supra*), which might be applied to support the court's decision in the instant case in view of the Federal Government's lease of the premises here for private residential purposes.

²² See report, part I, appendix A, p. 81 *et seq.*

ico, and Ohio (in case of employees and inmates of disabled soldiers' homes)).²³ On the other hand, one State has a constitutional prohibition against voting by such persons,²⁴ 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.²⁵

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.²⁶

The case of *Chaney v. Chaney*, 53 N. M. 66, 201 P. 2d 782

²³ *Ibid.*, appendix B, p. 127 *et seq.*

²⁴ Rhode Island: *Constitution*, art. II, sec. 5.

²⁵ See report, part I, appendix A, p. 81 *et seq.*

²⁶ See notes: 40 *Harv. L. Rev.* 130 (1926-27); 11 *Minn. L. Rev.* 74 (1926); 36 *Yale L. J.* 146 (1926-27); see also: 12 *Geo. Wash. L. Rev.* 80, 82 (1943-44); 22 *Calif. L. Rev.* 152, 167 (1934).

(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 an actual resident, in good faith, of the state for one (1) year next preceding the filing of his or her complaint * * *." ²⁷ The court, applying *Arledge v. Mabry*,²⁸ 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 *Chaney* 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.²⁹ 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.³⁰ One such case is *Pendleton v. Pendleton*, 109 Kan. 600, 201 Pac. 62 (1921), where the court deemed it unnecessary to discuss the impact of the exclusive Federal jurisdiction status of Fort Riley, Kansas, upon the right of a resident of the post to get a divorce. Another is *Dicks v. Dicks*, 177 Ga. 379, 170 S. E. 245

²⁷ Sec. 25-704, N. Mex. Stat. (1941) Ann.

²⁸ See footnote 11, *supra*.

²⁹ It may be noted (see *Valverde v. Valverde*, 121 Fla. 576, 164 So. 287 (1935)), that venue in a suit merely for maintenance may be based on grounds different from those deemed necessary for venue in a divorce action.

³⁰ See 21 A. L. R. 2d 1163 *et seq.*, and Schouler, *Marriage, Divorce, Separation and Domestic Relations*, vol. II, p. 1750 *et seq.*, for discussions of divorce domicile of military personnel.

(1933), where the court suggested the existence of substantive divorce law as to Fort Benning, Georgia, under the international law rule,³¹ 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.³² Similar statutes have been enacted in a few other States.³³

The case of *Craig v. Craig*, 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 *Craig* 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.³⁴

The *Dicks* case similarly has as a sequel the case of *Darbie v.*

³¹ See p. 156 *et seq.*, *supra*.

³² *Maryland*: art. 16, par. 39, Md. Ann. Code Gen. Laws (1947); *New Mexico*: Sec. 25-704, N. Mex. Stat. Ann. (1941), as amended by ch. 107, sec. 1, 1951 sess. laws; *Kansas*: R. S. (1933 Supp.) 60-1502; *Georgia*: sec. 30-107, Code of Ga. Ann., and see amendment to Ga. Constitution, set out as sec. 2-4901, Code of Ga., Ann.

³³ *E. g. Florida*: Fla. Stat. Ann. 46.12, and see *Mills v. Mills*, 153 Fla. 746, 15 So. 2d 763 (1943); *Nebraska*: R. S. Neb., Supp., 1955, 42-303.

³⁴ See p. 156 *et seq.*, *supra*, for discussion of the international law rule, which apparently was applied here.

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.³⁵ 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.³⁶ 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

³⁵ Another result of the *Chaney* decision, and of a previous New Mexico decision, *Arlidge v. Mabry*, 52 N. M. 303, 197 P. 2d 884 (1948), which denied residents of an exclusive Federal jurisdiction area the privilege of voting, was to influence the Atomic Energy Commission against acquiring or retaining exclusive Federal legislative jurisdiction over areas under its supervision (see p. 92 *et seq.*, *supra*, and see also *report*, pt. I, p. 65 *et seq.*)

³⁶ In *Wilson v. Wilson*, 58 N. M. 411, 272 P. 2d 319 (1954), it was decided this amendment did not contravene provisions of the New Mexico constitution.

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.³⁷ It may well occur, however, that such a person has no identifiable domicile outside an exclusive jurisdiction area.³⁸ Federal courts, other than those for the District of Columbia, and for Territories, have no jurisdiction over divorce.³⁹ 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 jurisdiction.

³⁷ See *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927), where absence of an Army officer from a State for 30 years, with only occasional visits, was held not to have terminated domicile or venue for divorce in the State; see also *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595 (1895); *Radford v. Radford*, 26 Ky. L. 652, 82 S. W. 391 (1904); *Gallagher v. Gallagher*, 214 S. W. 516 (Tex. Civ. App., 1919); *Gearing v. Gearing*, 90 Pa. Super. Ct. 192 (1927); *DeNicola v. DeNicola*, 132 Conn. 185, 43 A. 2d 71 (1945); and in general, Kennan, *The Law of Divorce* (1934); and 21 A. L. R. 2d 1180.

³⁸ See *Pendleton v. Pendleton*, 109 Kan. 600, 201 Pac. 62 (1921), and see footnote 52, *infra*.

³⁹ *Simms v. Simms*, 175 U. S. 162 (1899); see also *Barber v. Barber*, 21 How. 582 (1858); *De La Rama v. De La Rama*, 201 U. S. 303 (1905); *Popovici v. Agler*, 280 U. S. 379 (1930); *Haddock v. Haddock*, 201 U. S. 562 (1906); *In re Burrus*, 136 U. S. 586 (1890).

tion.⁴⁰ 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 have legal guardians of their property; that they 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),⁴¹ 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),⁴² a New York court held that the State's courts could determine, by habeas corpus proceedings, the right to custody of an infant

⁴⁰ *Williams v. North Carolina*, 325 U. S. 226 (1945); see also 27 *Rocky Mt. L. Rev.* 353 (1955); 65 *Harv. L. Rev.* 193 (1951); *Wash. U. L. Q.* 53 (1952); 39 *Corn. L. Q.* 293 (1953-54); 34 *Mich. L. Rev.* 749 (1936).

⁴¹ See: 22 *Calif. L. Rev.* 167 (1934); 40 *Harv. L. Rev.* 131 (1926); 58 *Yale L. J.* 1406 (1949); 38 *Col. L. Rev.* 136 (1938).

⁴² *Aff'd.*, 272 N. Y. 560, 4 N. E. 2d 737 (1936). For discussion of the *Kernan* decision, see 50 *Harv. L. Rev.* 688 (1937); see also note in 4 *A. L. R.* 2d 16

who lived with a parent on an area under exclusive Federal jurisdiction.⁴³ 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.⁴⁴ 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 theory that State courts have jurisdiction over non-resident as well as resident lunatics found within the State,⁴⁵ 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 proceeding⁴⁶ 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

⁴³ For discussion of writ of habeas corpus in relation to exclusive Federal jurisdiction areas, generally, see p. 123 *et seq.*, *supra*.

⁴⁴ For discussion of the international law rule see p. 156 *et seq.*, *supra*.

⁴⁵ See *Bliss v. Bliss*, 133 Md. 61, 104 Atl. 467 (1918), discussed at p. 234 *infra*.

⁴⁶ Including: divorce; establishment of wills; settlement of decedents' estates; appointment of guardians for minors; adoption and custody of children; appointment of committees for incompetents and insane persons; adjudication, commitment, and confinement of insane persons; and the incidental supervision and control of property of persons who may be involved in such proceedings.

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,⁴⁷ but in a subsequent similar instance, where Federal legislative jurisdiction was a factor, he held that the State did not have probate jurisdiction.⁴⁸ 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 committed to the opposite view. In a formal 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,⁴⁹ and in several opinions⁵⁰ 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

has held,⁵¹ 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 person 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.⁵² 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.⁵³ 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 statutes granting such relief.

⁴⁷ *Op. J. A. G., Navy*, JAG:26250-752:3 (Feb. 11, 1916).

⁴⁸ See *Pendleton v. Pendleton*, 109 Kan. 600, 201 Pac. 62 (1921); and *Matter of Grant*, 83 Misc. 257, 144 N. Y. Supp. 567 (1913), *aff'd.*, 166 App. Div. 921, 151 N. Y. Supp. 1119 (1915); I Beale, *The Conflict of Laws* 101 (1935).

⁴⁹ *E. g. Florida*: Fla. Stat. Ann. 46.12 (any person in Federal service, and husband or wife of such a person, living within borders of the State, deemed prima facie resident of State for purpose of maintaining any suit in chancery or action at law); *California*: I Deering's Cal. Codes, Govt. Code, title I, div. 1, chap. 1, sec. 126 (e), (all civil and political rights reserved for residents of Federal areas); *Nevada*: Nev. Comp. Laws, Supp., sec. 2896.12 (jurisdiction reserved as to all cases arising under the civil (and criminal) laws of the State, and all civil and political rights reserved for residents of Federal areas); *Virginia*: Code of Va., 1950, Ann., title 7, ch. 3, sec. 7-21 (jurisdiction reserved as to civil (and criminal) matters arising on lands acquired for certain Federal purposes, lands to be deemed a part of city or county in which situated); *Tennessee*: Williams Tenn. Code, Ann., 1934, part III, title 2, ch. 15A, sec. 9572.18 (resident of Federal territory within the State for one year may petition for adoption of child); *Maryland*: Md. Code, 1939, art. 16, sec. 79 (residents of exclusive Federal jurisdiction areas to be considered residents of State, and of county in which area is situated, for the purposes of jurisdiction in applications for adoption of infants (see 7 *Md. L. Rev.* 289 (1943) for discussion of this statute)); see also footnotes 32 and 33, *supra*, for statutes relating to divorce.

⁴⁹ 19 *Ops. A. G.* 176 (1888).

⁴⁹ 19 *Ops. A. G.* 247 (1889).

⁵⁰ C. 16153 (Apr. 8, 1904), *Dig. Op. J. A. G., Army* (1912), p. 939.

⁵⁰ *Ops. J. A. G., Army*: 1943/7229; 1944/10235; 1944/15536; 1945/10785.

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.⁵⁴ 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 inquirendo 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."⁵⁵ 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 care or treatment, furnishes an example of State statutes which do not specify a

⁵⁴ See illustrative cases regarding adoption procedures at 170 *A. L. R.* 403, note 1.

⁵⁵ In general it is held, however, in consonance with State statutory provisions, that residence of the alleged insane person within the county or other territorial jurisdiction of the court is prerequisite to his adjudication and commitment as insane and appointment of a guardian over his person. *In re Beechwood*, 142 Misc. 400, 254 N. Y. Supp. 473 (1931); *Henry v. Edde*, 148 Kan. 70, 79 P. 2d 888 (1938); *Federal Trust Co. v. Allen*, 110 Kan. 484, 204 Pac. 747 (1922); see also 44 *C. J. S.* 59. There has been indicated to the Interdepartmental Committee the existence of a practice of releasing mentally afflicted persons from exclusive Federal jurisdiction areas and notifying local police that a mental case is roaming the streets unattended, and, alternatively, of bringing such persons to the nearest State courthouse, thereby actuating the machinery of the State to adjudication as insane, and commitment, of persons who otherwise would be beyond the reach of appropriate judicial process and necessary medical attention.

requirement for domicile or residence within the State for eligibility for probate relief.⁵⁶

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."⁵⁷

Several Federal agencies have been granted congressional authority enabling disposition of the personal assets of patients and members of their establishments.⁵⁸ This has curtailed

⁵⁶ The Uniform Veterans Guardianship Act was approved by the National Conference of Commissioners on Uniform State Laws in 1928, and a revision was adopted by the Conference in 1942.

⁵⁷ See *report*, part I, p. 50, and supporting data in appendix A of part I, verifying the accuracy of this belief.

⁵⁸ *E. g.*—*Veterans' Administration*: 38 U. S. C. 16-16j (providing for disposition of personal assets of veteran patients and members who die in Veterans' Administration facilities, and retroceding jurisdiction pertaining to the administration of estates of decedents to the respective States) and 38 U. S. C. 17-17j (providing for vesting by the United States of undisposed personal property of deceased veteran patients—see *United States v. Gallagher*, 97 F. Supp. 1014 (S. D. Cal., 1951); *In re Witte's Estate*, 174 Kan. 360, 255 P. 2d 1039 (1953); *In re Gonsky's Estate*, 79 N. D. 123, 55 N. W. 2d 60 (1952); *In re Hendrix' Estate*, 77 Cal. App. 2d 647; 176 P. 2d 398 (1947); *United States v. Essex Trust Co.*, 44 F. Supp. 476 (D. Mass., 1942); *United States v. Stevens*, 302 U. S. 623 (1938); 11 Comp. Gen. 205 (1931); *Public Health Service of the Department of Health, Education, and Welfare*: 42 U. S. C. 248d (enabling the Surgeon General, pursuant to regulations (see

what otherwise would constitute numerous and pressing problems. However, notwithstanding the holdings in the *Divine*, *Kernan*, and *Shea* cases, and in several divorce proceedings⁵⁹ 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.⁶⁰ And because of the possibility that relief procured in a State court may be subject to collateral attack in 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 was 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

42 C. F. R. 35.41 *et seq.*), to provide for the disposal of money and effects, in the custody of hospitals or stations, of deceased patients); *Department of the Navy*: 10 U. S. C. 6522 (authorizing sale of personal property of deceased naval personnel not claimed by heirs or next of kin within two years to be sold, and covering proceeds, together with any money held in custody, into the Treasury); *Army and Air Force*: 10 U. S. C. 4712, 4713, 9712, 9713 (prescribing disposition of effects of decedent who was subject to court martial jurisdiction); several departments: 37 U. S. C. 361 *et seq.* (providing for settlement with personal representative of the amount due a decedent for pay and allowances or other items—see 1 *Miami L. Q.* 57 (1947)); *Secretaries of Treasury, Army, Navy, and Air Force*: 10 U. S. C. 2575 (providing for disposition of abandoned or unclaimed personal property).

⁵⁹ See p. 227 *et seq.*, *supra*.

⁶⁰ *Wills*: *Ellis v. Davis*, 109 U. S. 485 (1883); *Farrell v. O'Brien*, 199 U. S. 89 (1905); *Sutton v. English*, 246 U. S. 199 (1918); see also 21 *C. J.* 121; 25 *C. J.* 695; 43 *Harv. L. Rev.* 462 (1929-1930); 38 *Col. L. Rev.* 136 (1938). Domestic relations: *In re Burrus*, 136 U. S. 586 (1890).

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.⁶¹

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.⁶² 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),⁶³ when legislative jurisdiction over

⁶¹ *Bank of Phoebus v. Byrum*, 110 Va. 708, 67 S. E. 349 (1910).

⁶² *Commonwealth v. Clary*, 8 Mass. 72 (1811); *Mitchell v. Tibbets*, 17 Pick. 298 (Mass., 1836); *Foley v. Shriver*, 81 Va. 568 (1886); 6 *Ops. A. G.* 577 (1854); *Op. Sol., U. S. Dept. of the Interior*, M-33356 (Oct. 5, 1943); *Op. A. G., Mass.* (Aug. 30, 1922); *Op. A. G., N. J.* (Nov. 26, 1951); *Op. A. G., Ohio*, No. 94 (1933), p. 91; *Op. A. G., Wis.* (May 8, 1951), to Dist. Atty. of Monroe County; 1 *Kent's Commentaries*, marginal paging 431; *Story, Constitution of the United States*, sec. 1227; see also *United States v. Cornell*, 25 Fed. Cas. 646, No. 14867 (C. C. D. R. I., 1819); *United States v. Cordy*, 58 F. 2d 1013 (D. Md., 1932); *Ryan v. State*, 188 Wash. 115, 61 P. 2d 1276 (1936), *aff'd.*, *sub nom. Mason Co. v. Tax Comm'n*, 302 U. S. 186 (1937); see also *State v. Mimms*, 43 N. M. 318, 92 P. 2d 993 (1939), *cert. den.*, 308 U. S. 626 (1940).

⁶³ See *report*, part I, pp. 132 and 178.

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.⁶⁴ It appears, however, that such discriminations are not uniformly practiced by State and local officials,⁶⁵ 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 rights or privileges commonly accorded State residents do 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. Tibbetts*, 17 Pick. 298 (Mass., 1836), 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*,⁶⁶ where the Supreme Court of Ohio invalidated a proviso in a State consent statute reserving

⁶⁴ Letter dated Aug. 24, 1955, from Solicitor, Dept. of the Interior, to Chmn., Interdepartmental Committee.

⁶⁵ See report, part I, p. 56 *et seq.*, and supporting data in appendix A.

⁶⁶ See also p. 220, *supra*. For further discussion of effects of Federal exercise of legislative jurisdiction on residents of affected areas see 44 *Yale L. J.* 1324, 1360 (1935).

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 relieved 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

not gone unquestioned. In *Woodfin v. Phoebus*, 30 Fed. 289 (C. C. E. D. Va., 1887), the court said (pp. 296-297):⁶⁷

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 there. It does not follow, however, from this immunity of the place from the state's 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-

⁶⁷ See also dissenting opinion in *Herken v. Glynn*, 151 Kan. 855, 101 P. 2d 946 (1940).

poses, 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 uses, 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.⁶⁸ The court said (p. 626):

⁶⁸ See also *Wichita Falls v. Bowen*, 143 Tex. 45, 182 S. W. 2d 695 (1944); *County of Norfolk v. Portsmouth*, 186 Va. 1032, 45 S. E. 2d 136 (1947); *State v. Kelly*, 76 Me. 331 (1884); *Hughes Transp., Inc. v. United States*, 128

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 States, 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 seem to make untenable the premise of extraterritoriality upon which most of the deci-

C. Cls. 221, 121 F. Supp. 212 (1954), *reh. granted*, 132 C. Cls. 804 (1955); *Motor Transport Co. v. McCantless*, 182 Tenn. 659, 189 S. W. 2d 200 (1945); *Grayburg Oil Co. v. State*, 286 S. W. 489 (Ct. Civ. App., Tex., 1926), *aff'd.*, 3 S. W. 2d 427, *rev'd.*, on ground that sales to U. S. exempt from taxation, 278 U. S. 582; *McKesson & Robbins v. Collins*, 18 Cal. App. 2d 648, 64 P. 2d 469 (1937); and cases cited in footnote 11, p. 147, *supra*.

sions denying civil and 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,⁶⁹ it can be 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,⁷⁰ 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 is 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

⁶⁹ *E. g.*, *Commonwealth v. Clary*, *supra*, and *Opinion of the Justices*, *supra*.

⁷⁰ See p. 25, *supra*.

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.⁷¹

Present lack of Federal exclusivity.—That period is past, however, and numerous States now are reserving partial jurisdiction.⁷² 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.⁷³ Consequently, and notwithstanding the definition given the term "exclusive legislative jurisdiction" for the purposes of this work,⁷⁴ 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.⁷⁵

⁷¹ See p. 59 *et seq.*, *supra*.

⁷² See *report*, part I, p. 127 *et seq.*

⁷³ See p. 190 *et seq.*, *supra*.

⁷⁴ See p. 10, *supra*.

⁷⁵ This fact would seem not only to weaken present application of the incompatibility theory but also to invite questions, under the 14th Amendment to the Federal Constitution, as to the eligibility for State citizenship of

Rejection of past concepts.—In *Arapajolu v. McMenamin*, discussed above,⁷⁶ 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 met 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 could any attempted express cession of such rights to the United States be effective.⁷⁷

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

persons domiciled on such areas and concerning their entitlement to rights and privileges as residents of the State (*quaere*: may a person be a "resident" for purposes of taxation and not for other purposes?).

⁷⁶ See p. 222, *supra*.

⁷⁷ In *Adams v. Londeree* (see p. 224, *supra*), the Supreme Court of West Virginia based judicial recognition of certain civil rights of residents of an area under Federal legislative jurisdiction solely on a ground approximating this, but without actually discussing any possible evolution in this concept of extraterritoriality of such areas.

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. §§ 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. § 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."⁷⁸

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.⁷⁹ A holding to the same effect was had in *Davis v. Howard*, 306 Ky. 149, 206 S. W. 2d 467 (1947).

⁷⁸ The legislative histories of such statutes (see p. 190, *et seq.*, *supra*), cast little direct light on this subject.

⁷⁹ While in this case the court rejected the principle of extraterritoriality, and also held the Federal employee entitled to all benefits of facilities of the taxing municipality in upholding the constitutionality of the tax under the Fourteenth Amendment to the Constitution, the same court in *Schwartz v. O'Hara Township School Dist.*, *supra*, apparently reverted to the extraterritoriality doctrine and upheld the denial to residents of a Federal enclave of a right to attend public schools, indicating some influence by the fact that persons involved in the latter case were not actually taxed (but *quaere*: may a State accept a retrocession under the Buck Act and similar statutes on a regional basis?).

Interpretation of such statutes as Federal retrocessions 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.⁸⁰

Summary of contradictory theories on rights of residents.—*Arledge v. Mabry* and *Schwartz v. O'Hara Township School District*, it may be said, represent cases maintaining strictly the principle of *stare 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 State 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

⁸⁰ On the other hand, in the opinion in *Offutt Housing Company v. Sarpy County* (see p. 205, *supra*), in holding that language in the Military Leasing Act of 1947 permitting State taxation of Federal property leased to private parties extended to lands subject to the Federal power of "exclusive Legislation," the court said: "We do not hold that Congress has relinquished 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 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,⁸¹ 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, and 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.⁸²

⁸¹ See p. 60 *et seq.*, *supra*.

⁸² *Callan v. Wilson*, 127 U. S. 540 (1888); *O'Donoghue v. United States*, 289 U. S. 516 (1933); *Willson v. McDonnell*, 265 Fed. 432 (C. A. D. C., 1919).

Areas Not Under Legislative Jurisdiction¹

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 its sphere of action. This would seem to result necessarily from 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 left to mere reason: the people have, in express

¹This and the succeeding chapter are included in this text of the law of legislative jurisdiction for the purpose of clarifying certain powers and immunities possessed by the Federal Government with respect to its real property, and operations which may be conducted on such property, not arising from Federal possession of legislative jurisdiction over the property. The broad scope of this subject, and requirements for brevity here, preclude comprehensive treatment of the subject in this work. References largely will be limited to principal and controlling decisions affecting broad legal concepts except as to matters in which most widespread interest has been indicated. In any case, further authorities should be sought in resolving specific questions of law which may arise.

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,"² 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,³ 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.

² Art. VI, cl. 2, of the Constitution, set out in major part in the margin of p. 12, *supra*.

³ For examples, see p. 12, *supra*.

This doctrine of implied powers was based on the "necessary and proper clause."⁴

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.⁵ 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.⁶

⁴ Art. I, sec. 8, cl. 18, of the Constitution, set out in the margin of p. 12, *supra*.

⁵ Sovereign immunity of the Federal Government, in the use of its property, from interference by a State, emanates from the Constitution itself and does not depend upon State surrender of jurisdiction (*Op. J. A. G., Navy, JAG: II: 1: VAVR: mac* (Mar. 24, 1955)).

⁶ The last sentence of this excerpt has, in effect, been overruled by subsequent decisions of the Supreme Court. The situation hypothesized by the last sentence cannot, it has since been held, constitutionally exist, and the sentence fails to take into account other constitutional powers of Congress which effectively serve to limit State control over federally owned lands. See *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886), and *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917), both of which

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

are discussed *infra*. Nevertheless, the States have considerable authority with respect to Federal lands over which the Federal Government does not have exclusive legislative jurisdiction. So, the police power of a State may extend in certain respects over the public domain. *Omaechevarria v. Idaho*, 246 U. S. 343 (1917); and the Attorney General of Ohio has held that a State fire marshal can make inspections in a federally owned housing development. *Op. A. G., Ohio*, No. 189 (1945), p. 170.

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 and 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.⁷

In addition to these sources of constitutional power of the Federal Government, which have consequent limitations on State authority, article IV, section 3, clause 2,⁸ 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 purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and

⁷ In the case *In re Turner*, 119 Fed. 231 (C. C. S. D. Iowa, 1902), it was held that an injunction could not issue to prevent a Federal officer from carrying out his official duties.

⁸ This clause reads:

"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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

The clause does not give the United States jurisdiction over its property within the United States, such as the public lands, in the legislative jurisdiction sense of art. I, sec. 8, cl. 17. *Op. Sol., Dept. of Agriculture*, No. 10906-10910 (May 6, 1924); *Pollard v. Hagan*, 3 How. 212 (1845).

to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (Art. IV, § 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. 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. * * *⁹

⁹ 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. *Op. Sol., Dept. of Agriculture*, No. 728 (Aug. 27, 1938).

In the absence of Federal legislative jurisdiction over an area, State laws remain fully effective in such area so long as such effectiveness is not inconsistent with the Federal Government's use of its property. *Op. J. A. G., Navy*, A16-1/N4-1 (400927) (Aug. 20, 1941).

The United States has only proprietorial jurisdiction over Bandolier National Monument, but the State of New Mexico cannot interfere with the protection, use, or control of the lands by the United States. *Memo from Acting Director, National Park Service*, to Regional Director, Region 3 (Nov. 6, 1946).

Since North Carolina has not ceded to the United States jurisdiction over that part of Blue Ridge Parkway in the State, State officers may make arrests for infractions of State laws, but the United States may establish such regulations as necessary to protect the parkway and regulate its use for the purposes for which it is dedicated. *Letter from Chief Counsel, National Park Service*, to Justice of the Peace, Celo, N. C. (Jan. 11, 1954).

There has been no cession of jurisdiction to the United States with respect to Grand Canyon National Park or Colorado or Bandolier National

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 rights 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 injury 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

Monuments, and the State laws are in force throughout these areas insofar as they do not interfere with the protection, use, and control of them by the United States. *Memo from Director, National Park Service, Dept. of the Interior*, to Regional Director, Region 3 (Dec. 4, 1944).

Prehistoric ruins in Arizona on land forming part of the public domain (no exclusive Federal jurisdiction) are property of the United States, and articles found there are property of the United States; hence the State has no proprietary or sovereign right to interfere under a State statute with the disposition of such articles provided for by a Federal statute. 35 *Ops. A. G.* 286 (1927).

The Attorney General of Ohio has held that where the Federal Government acquired only a proprietorial interest in lands, for forest purposes, with a reservation by third parties of the right to remove minerals, the State may control the manner of a strip mining operation so long as this does not interfere with Federal authority under art. IV, sec. 3, cl. 2, of the Constitution (*Op. A. G., Ohio*, No. 790, p. 541 (1951)); but the State has no authority to require a license or payment of a license fee for mining on Federal land (*id.* No. 152, p. 23 (1951)).

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, bushes, 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.¹⁰

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),¹¹ 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

¹⁰ It cannot be contended that the United States does not have the right to protect its own property from damage, particularly lands acquired for a bird refuge, which cannot be so used unless other wildlife is controlled. *Memo, Chief Counsel, Fish and Wildlife Service, Dept. of the Interior* (Nov. 20, 1940).

¹¹ See also *United States v. Alford*, 274 U. S. 264 (1927).

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 preëemption 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, and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon 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 treating it as prohibiting all "enclosures" of public lands, by whatever means, that the act becomes of any avail. * * * The general Government doubtless has a power over its own property analogous to the police 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, though 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. *Camfield 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 States is not limited to that derived from legislative jurisdiction over such lands 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 states have taxed the lands on which our custom houses and other public 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 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):

* * * 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 to the 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.¹² 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

¹² An appropriation to pay taxes related to the judgment in the *Roach* case was made by the act of Sept. 30, 1850, 9 Stat. 523, 541. In acrimonious congressional debate upon the appropriation bill (Cong. Globe, 31st Cong., 1st Sess. 1644 (1850)), the moral right to tax the Federal mint was questioned. Later debate in the Congress indicates that the judgment in the *Roach* case was annulled by the Pennsylvania legislature. Cong. Globe, 31st Cong., 2d Sess. 394, 399 (1851).

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 for a custom-house, and had always been used for 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, § 5,¹³ provided that the property of the United States should be exempted from taxation, the question has never been renewed.¹⁴

¹³ The reference obviously is to a Maine statute of Apr. 5, 1845.

¹⁴ These cases probably occasioned the enactment of the provisions, inserted during a period beginning in 1850 into various Federal statutes authorizing construction of Federal buildings, which conditioned construction upon State exemption of the buildings from taxation. *E. g.*, act of Sept. 30, 1850, 9 Stat. 523, 540; act of Mar. 3, 1851, 9 Stat. 598, 609; act of July 3, 1852, 10 Stat. 11, 12; act of Aug. 31, 1852, 10 Stat. 76, 87, 88. Of special interest is the fact of the inclusion, in the act of July 3, 1852, *supra*, of a specification that the condition for State waiver of taxation should not be construed as implying an admission of the existence of any such taxation power in the State.

In 1806 the Attorney General of the United States indicated that there was no power in a city to tax Federal property, and that no attempt to impose such a tax had ever before been made. 1 *Ops. A. G.* 157.¹⁵ The confused state of the law on this subject at a somewhat later time led the Attorney General, in 5 *Ops. A. G.* 316 (1851), to say that, "it would be worse than idle for me to venture an opinion" as to whether a State might tax lands owned by the Federal Government and over which the latter had not acquired exclusive legislative jurisdiction. But in 1859 (9 *Ops. A. G.* 291) he ruled that a city had no power to tax property of the United States within its limits. However, in *Nathan v. Louisiana*, 8 How. 73 (1850), Justice McLean, in sustaining the validity of a State tax on all money or exchange brokers, observed (p. 82):

The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State.

Although the question as to the constitutional power of a State to tax federally owned lands remained confused until 1886, in a number of State cases decided before that time it was held that federally owned property was exempt from State taxation.¹⁶

¹⁵ Set out also in 117 U. S. 163, and there characterized as "the earliest legal opinion upon the question."

¹⁶ Two California cases, *People v. McCreery*, 34 Cal. 432, 456 (1868); and *People v. Austin*, 47 Cal. 353, 361 (1874), which superseded the earlier California decisions referred to above indicating the contrary view; *West Hartford v. Board of Water Commissioners*, 44 Conn. 360 (1877), (dictum); *Chicago, Rock Island & Pacific Ry. v. Davenport*, 51 Iowa 451, 1 N. W. 720 (1879); *Fagan v. Chicago*, 84 Ill. 227 (1876); *People v. United States*, 93 Ill. 30 (1879); *Western Union Telegraph Company v. Richmond*, 67 Va. 1, 30 (1875); *Andrews v. Auditor*, 69 Va. 115, 124 (1877).

The long and tortuous history of the issue as to whether federally owned land not subject to exclusive Federal legislative jurisdiction might be taxed by a State came finally to an end when the United States Supreme Court, in 1886, rendered a comprehensive opinion on this subject which at no time since, as to the issue in question, has been qualified or made subject to exceptions by the court. In the case in which that opinion was rendered, *Van Brocklin v. Tennessee*, 117 U. S. 151, 176 (1886), the question presented was whether a State may tax lands which the Federal Government had acquired as a result of a tax sale.¹⁷ The court observed that the Federal Government is capable of attaining the objects for which it was created, and to do so by means which are necessary for their attainment. Thus, the Federal Government may acquire real property whenever such property is needed for its use in the execution of its powers, whether for fortifications, lighthouses, customhouses, barracks or hospitals, or for any other of the many purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will by the Federal Government in the exercise of its power of eminent domain upon making just compensation.

¹⁷ This case was the basis of the decision in *United States v. Woodworth*, 170 F. 2d 1019 (C. A. 2, 1948), (one of many such decisions), in which the court held that land held by the Federal Government is not subject to State taxation, without consent manifested by congressional enactment. The court here held that the exemption applies even where the tax was levied before Federal acquisition of the property if such tax had not previously become a lien. To the same effect is *Comp. Gen. Dec.*, No. B-91662 (Jan. 26, 1950).

The inchoate tax lien on real property in Alabama is not objectionable under the Federal Constitution as applied to a purchaser who bought on or after the tax day and before the amount of the tax had been fixed by levy and assessment; and the fact that the purchaser was the United States did not invalidate the lien. However, such a lien can not be enforced against the United States without its consent, since a judicial proceeding against property in which the United States has an interest is a suit against the United States. *United States v. Alabama*, 313 U. S. 274 (1941). To the same effect are *Op. Sol., Dept. of the Interior*, No. M-33569 (Mar. 7, 1944); *Op. A. G., Ill.*, p. 172, No. 1109 (July 11, 1953).

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 United 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 an 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 this 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 taxed 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.¹⁸

¹⁸ Federal property becomes exempt from taxation the moment title vests in the United States. *Op. A. G., Ill.*, p. 744, No. 10098 (1920).

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 from 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 (Farm 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.¹⁹ Such authorizations by the

¹⁹ *Hearings before Committee on Government Operations, United States Senate*, on S. 826, S. 1566, etc., 84th Cong., 2d Sess., part II, p. 339 *et seq.* (Apr. 19 and 20, 1956).

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.²⁰

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. Price County*, *supra*; *Mullen Benevolent Corp. v. United States*, 290 U. S. 89 (1933); *United States v. Anderson Cottonwood Irr. Dist.*, 19 F. Supp. 740 (N. D. Cal., 1937).²¹ Such immu-

²⁰ See also act of Mar. 3, 1851, 9 Stat. 598, 615; act of Aug. 31, 1852, 10 Stat. 76, 83.

²¹ It has been held that neither the property nor activities of the United States can be taxed by a State or any of its political subdivisions, and this rule applies with equal force where the tax is a special tax or assessment for local improvements, the basis being that the assessment is an involuntary exaction and as such is a tax which the United States may not be required to pay. *Comp. Gen. Dec.*, No. B-24813 (Jan. 26, 1944). This is true, it has been held, even where the improvement is of direct benefit to the Federal property (sewer) : 4 *Comp. Dec.* 116 (1897) ; (street) : 27 *Comp. Gen.* 20 (1947) ; 29 *Comp. Gen.* 18 (1949).

The Comptroller General has held that an assessment by an irrigation district, under authority of State law, of an operation charge separate from the cost of water that might be furnished, levied against land of the United States in common with other landholders, is an involuntary exaction and as such is a tax which the United States may not be required to pay. *Comp. Gen. Dec.*, No. B-47822 (Mar. 14, 1945) ; *id.* No. 122372 (Mar. 15, 1955) ; *id.* No. 47822 (Sept. 25, 1946). See also 9 *Comp. Dec.* 181 (1902).

He has also held that charges for water, garbage collection, sewage service, etc., may be assessed against the United States by a municipality when based, by statute, on the quantity of water or service furnished, but such charges may not be assessed, even under contract, when the assessment is as a general tax rather than on the basis of quantity furnished. 31 *Comp. Gen.* 405 (1952) ; 15 *Comp. Gen.* 380 (1935) ; 20 *Comp. Gen.* 206

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 to the 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 serious incumbrance upon the lands, and its subsequent

(1940); *Comp. Gen. Dec.*, No. B-67434 (July 25, 1947); *id.* B-89424 (Jan. 26, 1950); *id.* B-105117 (Mar. 16, 1953).

The imposition upon the United States of a toll or charge for use of harbor facilities which are under the control of a State is not a tax, but a charge for services, and is proper. 23 *Ops A. G.* 299 (1900).

enforcement would accomplish indirectly the collection of a tax against the United States which could not be directly imposed. * * *²²

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 not, 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.²³

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 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 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.

²² Of historical interest is the act of June 10, 1852, 10 Stat. 10, wherein the Congress specifically authorized a State to impose taxes upon lands within such State from and after the date of sale of such lands by the United States.

²³ *E. g.*: *United States v. Railroad Bridge Co.*, 27 Fed. Cas. 686, No. 16,114 (C. C. N. D. Ill., 1855); *Union Pacific Ry. v. B. & M. R. R.*, 3 Fed. 106 (C. C. D. Neb., 1880); *Illinois Central R. R. v. Chicago, B. & N. R. R.*, 26 Fed. 477, 478 (C. C. N. D. Ill., 1886); *Simonson v. Thompson*, 25 Minn. 450 (1879); see also *United States v. Chicago*, 7 How. 185, 194 (1849).

To this we cannot assent. Not only does the Constitution (Art. IV, § 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 state 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], save as they may have been adopted or made applicable by Congress.

The same result would follow 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 States 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,²⁴ it is not essential to the acquisition by the Federal Government of real property within the State.²⁵ The Federal Government may obtain such

²⁴ See chapter III (p. 46), *supra*.

²⁵ *Op. Sol., Dept. of Agriculture*, No. 1152 (Feb. 17, 1939). Acquiescence to acquisition of property is necessary only when required by the act of Congress authorizing the acquisition. *Id.* No. 13601-13602 (July 3, 1934). *E. g.*, 16 U. S. C. 516; but Federal acquisition of legislative jurisdiction

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,

is not contemplated as a consequence of an acquiescence under this statute relating to national forests. *Id.* No. 728 (Aug. 27, 1938).

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 any State legislation interfering with the 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. 436 (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 powers 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 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-

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, § 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).²⁶ 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. * * *

²⁶ Reclamation of arid lands is also supportable by the welfare clause of the Constitution, the Supreme Court has indicated. *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 738 (1950).

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,²⁷ notwithstanding that State laws may continue effective.²⁸ 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, § 3, Art. IV, that "Congress shall have power to dis-

²⁷ The right of the United States to protect its property at the Forest Products Laboratory, Madison, Wis., does not depend on the acquisition of jurisdiction. *Op. Sol., Dept. of Agriculture*, No. 4069 (Apr. 8, 1942).

²⁸ The United States does not have either exclusive or concurrent legislative jurisdiction over the national forests and does not need such jurisdiction to protect them. *Op. Sol., Dept. of Agriculture*, No. 4658 (Apr. 27, 1943).

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 in equity. This claim answers itself.²⁹

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-

²⁹ See also *Shannon v. United States*, 160 Fed. 870 (C. A. 9, 1908), in which the same conclusion was reached on similar facts.

tain of its lands in 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,³⁰ and has provided,³¹ 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

³⁰ The power of the Congress to legislate with respect to the use and occupancy of defense housing projects of the Farm Security Administration, and to define crimes with respect thereto, is not dependent on Federal possession of legislative jurisdiction, but is derived from art. IV, sec. 3, cl. 2. *Op. Sol., Dept. of Agriculture*, No. 3645 (Oct. 17, 1941).

As sovereign proprietor the United States has full authority to protect lands over which it does not have exclusive legislative jurisdiction and to punish for violations of its laws with respect thereto. *Op. Sol., Dept. of Agriculture*, No. 10906-10910 (May 6, 1924).

³¹ *E. g.*, see 18 U. S. C. 1851 *et seq.*, and 1361.

public domain. *United States v. Alford*, 274 U. S. 264 (1927).

Operations.—The Federal Government has undisputed authority³² 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.^{32a} 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.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,³⁴ evicting of trespassers,³⁵ etc.), regardless of the

³² Under the "necessary and proper" clause (art. I, sec. 8, cl. 18, of the Constitution); see p. 12, *supra*.

^{32a} See also chapter X, *infra*.

³³ *E. g.*, see 18 U. S. C. 793 *et seq.*

³⁴ The right to exclude civilians from military reservations under such reasonable rules and regulations as the local commander may prescribe is not dependent upon the jurisdictional status of the particular area involved. *Op. J. A. G., Army*, 1946/3760 (May 23, 1946).

The authority of the Army to restrict or control the solicitation of life insurance on military reservations is not dependent on the jurisdictional status of the reservation. *Op. J. A. G., Army*, 004.6 (June 27, 1942).

Irrespective of the jurisdictional status of a reservation, the proper administration of such reservation and the effectuation of Federal purposes thereon may require the exclusion of State or local officials who ordinarily would be entitled to perform their functions on the reservation. *Op. J. A. G., Army*, 1948/8924 (Dec. 15, 1948).

There is no legal objection to allowing access to military reservations to State enforcement officials in order that they may inspect agricultural products to ascertain whether there has been compliance with State inspection, grading, etc., laws. *Ops. J. A. G., Army*, 012.31 (May 20, 1940, and Apr. 26, 1940).

³⁵ An officer in command of a military post has the right to protect it

jurisdictional status of such areas, as may be necessary for the proper carrying out of the functions.³⁶

AGENCY RULES AND REGULATIONS: Beyond the acts and omissions defined as criminal by statutes, certain agencies of the Federal Government³⁷ 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

from injury at the hands of trespassers, but without inflicting unnecessary or wanton harm to persons or property. 9 *Ops. A. G.* 476 (1860).

³⁶ It does not appear that the authority of Federal officials to take security measures has ever been disputed in litigation, and the existence of the authority is clear in the light of judicial decisions referred to elsewhere in this chapter upholding the control of Federal functions and Federal lands by the Federal Government and its instrumentalities free from interference from State governments or other sources. See *Op. J. A. G., Navy*, JAG: II: 1: VAvR: mac (Mar. 24, 1955); *id.*, JAG: II: 1: VAvR: gjg (Apr. 13, 1955), see also *report*, part I, p. 46 *et seq.* On the general subject of criminal jurisdiction see chapter V, p. 105 *et seq.*, *supra*.

³⁷ *E. g.*, General Services Administration (40 U. S. C. 318 *et seq.*), (but penalty is authorized to be prescribed by Administrator, within limits set by statute, and the authority of special policemen is restricted to Federal property over which the United States has acquired exclusive or concurrent jurisdiction); National Park Service and Fish and Wildlife Service of the Department of the Interior (16 U. S. C. 3, 10, 10a and 715i); Secretary of the Army (16 U. S. C. 9a); Forest Service of the Department of Agriculture (7 U. S. C. 1011 (f), 16 U. S. C. 551 and 559, and 18 U. S. C. 1863). For additional discussion of this subject see p. 137, *supra*. See also 22 *Ops. A. G.* 512 (1899), wherein limitations on arrest authority of forest rangers were indicated and legislation suggested, and 30 *Ops. A. G.* 465 (1915), confirming the authority of employees of Gettysburg National Park to make arrests under a statute enacted apparently pursuant to the suggestion of the Attorney General.

or regulations issued by the officer in charge of a Federal area,³⁸ 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 using 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

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.³⁹

³⁹ Prior to the *Grimaud* decision, the courts had been divided on the question of the right of Congress to authorize agency heads to issue rules and regulations for the use and protection of property. Such rules were sustained for civil purposes in *Dastervignes v. United States*, 122 Fed. 30 (C. A. 9, 1903); *United States v. Shannon*, 151 Fed. 863 (C. C. D. Mont., 1907), *aff'd.*, 160 Fed. 870 (C. A. 9, 1908). They were held valid in criminal prosecutions in *United States v. Domingo*, 152 Fed. 566 (D. Idaho, 1907); *United States v. Deguirro*, 152 Fed. 568 (N. D. Cal., 1906); *United States v. Bale*, 156 Fed. 687 (D. S. D., 1907); *United States v. Rizzinelli*, 182 Fed. 675 (D. Idaho, 1910). However, the regulations were not upheld in *United States v. Blasingame*, 116 Fed. 654 (S. D. Cal., 1900); *United States v. Matthews*, 146 Fed. 306 (E. D. Wash., 1906). At first they were not upheld, and then the case was reversed, in *Dent v. United States*, 8 Ariz. 138, 71 Pac. 920 (1903), *rev'd.*, 8 Ariz. 413, 76 Pac. 455.

Although the United States exercises only a proprietorial jurisdiction over the Grand Canyon National Park, because of the authority of Congress to work out "needful Rules and Regulations respecting the * * * Property belonging to the United States," regulations can be issued which put the United States on a different footing from other proprietors. *Memo from Acting Director, National Park Service, Dept. of the Interior, to the Regional Director, Region 3* (Feb. 20, 1947).

In *United States v. Gilbert*, 58 F. 2d 1031 (M. D. Pa., 1932), there was upheld the authority of the Secretary of War to make regulations governing the licensing of guides in Gettysburg National Military Park.

While there has been no cession of police jurisdiction to the United States over the Natchez Trace Parkway in Alabama, Tennessee and Mississippi, Federal criminal statutes and National Park Service regulations relating to the protection and regulation of the use of Federal property

³⁸ The Judge Advocate General of the Navy has noted (with respect to naval areas) that authority to make regulations and prescribe penalties is needed. *Op. J. A. G., Navy*, JAG:II:JCR (Jan. 17, 1950).

And it has been held that rules and regulations issued pursuant to congressional authority supersede conflicting State law.⁴⁰

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

are applicable under article IV, section 3, clause 2, of the Constitution. *Op. Sol., Dept of the Interior*, No. M-32076 (June 18, 1943).

It has been held that regulations of the Secretary of the Interior, promulgated under a statute, governing traffic on highways within national parks, are authorized by article IV, section 3, of the Constitution, entitling the Government to make all needful regulations respecting its property. *Robbins v. United States*, 284 Fed. 39 (C. A. 8, 1922). It would seem that the *Robbins* case does not control where the highways are neither the property of the United States nor under its legislative jurisdiction. *Colorado v. Toll*, 268 U. S. 228 (1925).

The existing rules and regulations governing the administration of the National Park Service exclude from operation in the national parks, except over State highways over which the States have retained jurisdiction, cars operated under the Drivurself System, rented under a temporary sales agreement or other methods intended to evade such regulations. 35 *Ops. A. G.* 305 (1927).

⁴⁰The rules and regulations of the Secretary of Agriculture for the protection of land utilization projects supersede conflicting State law requiring a legal and sufficient fence as a condition to the recovery of damages caused by trespassing livestock; and the Government may abate the unlawful occupancy of or trespass upon Government land. *Op. Sol., Dept. of Agriculture*, No. 1693 (Sept. 7, 1939). To the same effect see *United States v. Thompson*, 41 F. Supp. 13 (E. D. Wash., 1941).

Although the State of Arizona has the power to require that motor vehicles which are operated on State highways comply with its motor vehicle license law, the Secretary of the Interior has power to make regulations, with respect to highways constructed and maintained by his Department, to carry out the purposes for which Grand Canyon National Park was established, and any State regulations inconsistent with the Secretary's regulations would be superseded. 36 *Ops. A. G.* 527 (1932).

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 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.*, 36 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.⁴¹

⁴¹"* * * the United States may perform its functions without con-

The Congress, by section 1 (b) of the Lanham Act (42 U. S. C. 1521 (b)), had expressly authorized construction of

forming to the police regulations of a State." *Arizona v. California*, 283 U. S. 423, 451 (1931).

Local building construction laws cannot be applied to construction of buildings for the Army, irrespective of the jurisdictional status of the reservation involved. *Op. J. A. G., Army*, 1942/4225 (Sept. 14, 1942); *id.* 412.2 (Nov. 29, 1940).

The State of New York, acting through the Department of Docks of the City of New York, cannot require the Federal Government, acting through the Navy Department, to submit plans for proposed construction work on tidelands in New York harbor as would be required from an individual or corporation. *Op. J. A. G., Navy*, ND 3/N1-13 (420, 320), (May 19, 1942).

Since the United States does not exercise exclusive jurisdiction over Boulder City, Nevada, the State and its political subdivision, Clark County, may enforce local building codes with respect to non-Governmental structures; but the United States may engage in its own building activities without conforming to State regulations. *Memo from Regional Counsel, Region 3, Bureau of Reclamation, Dept. of the Interior*, to Director of Power, Boulder City, Nevada (Sept. 25, 1951).

An Illinois statute requiring that construction plans for swimming pools be approved by the State Department of Public Health, and that the work may proceed only after a permit has been issued by the Department, need not be complied with by the United States (however, a bathing beach was the immediate concern of this opinion). *Op. Sol., Dept. of Agriculture*, No. 1781 (Oct. 13, 1939).

No matter whether the United States has exclusive or proprietorial jurisdiction over lands upon which substations of the Bonneville Power Administration are to be built, neither the United States nor its contractors need obtain building permits for such construction. The police regulations of a State cannot interfere with the functions of the Federal Government. A State or municipal requirement of a building permit would be an undue interference with the Federal purpose for which the land was acquired. *Memo from Review Counsel, Bonneville Power Administration, Dept. of the Interior*, to Chief, Branch of Design and Construction (Apr. 18, 1951).

Attempted regulation by a State of construction and operation of a naval magazine, which was being operated for the Navy by a private contractor, is prohibited by the Federal supremacy clause of the Constitution. *Op. J. A. G., Navy*, JAG: II: HJD: amp (June 5, 1944).

Contractors are not required to obtain village building permits for the construction of a naval ordnance plant required for the purpose of national defense where the cost of such permits would be paid by the Federal Government. *Op. J. A. G., Navy*, JAG: P: CCW: amp., SO 4950 (May 20, 1942).

A claim for the fee paid by a contractor to the State of Oregon for required inspection of liquid gas installation which the contractor pro-

vided for Government use may be allowed, where the Oregon statute provides for such fees to be levied on the owner of the equipment and where the contract provided that the United States should pay all taxes, etc., levied on the contractor's property in the possession of the Government, since the fee is not a tax on the United States but is a part of the contract price. *Comp. Gen. Dec.*, No. B-108379 (Sept. 16, 1952).

Under a lump-sum contract for construction of a Government hospital which provides in the specifications that the contractor shall procure all necessary permits and licenses at his own expense, but which contains no provision for an adjustment in the contract price in the event of a subsequent determination that permit fees are not payable, the Government may not deduct from the contract price the building permit fee which the contractor lawfully avoided paying to the municipality where the hospital was constructed. 34 *Comp. Gen.* 31 (1954).

⁴²Where the United States owns property in a State without having acquired exclusive jurisdiction over such property, such property remains subject to the laws of the State, except insofar as such laws interfere with the use of the property by the United States; and the enforcement of a ruling of the State Board of Health forbidding the location of cabins or camp sites within one and one-half miles of the shore line of a lake would interfere with the use to which the property may be put and the United States is not bound thereby. *Op. Sol., Dept. of Agriculture*, No. 726 (Aug. 26, 1938).

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, through 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.⁴² 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 Atl. 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. *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962; 2 Willoughby, *United States Constitutional Law*, §§ 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 performance of his contract. *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187 (1956).⁴³ 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

⁴³The Attorney General of the United States suggested, in 1876, in considering an injunction issued by a State court against a Federal contractor's receiving an installment of pay for his work, that no process issued under the authority of a State Government can obstruct, directly or indirectly, the operations of the Federal Government. 15 *Ops. A. G.* 524 (1876).

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 persons and companies contracting 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.⁴⁴ 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,⁴⁵ 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.

⁴⁴However, it has been held that local "Sunday Laws" can have no application to contracts with the Government, irrespective of the jurisdictional status of the site of their consummation. *Op. J. A. G., Army*, 1943/13467 (Oct. 2, 1943); *id.* 230.451 (July 6, 1942).

⁴⁵See p. 156 *et seq.*, *supra*.

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),⁴⁶ 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, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 2, could declare state regulations like the present inapplicable to sales to the government. * * *⁴⁷

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, Inc. 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.

⁴⁶ For a discussion of this case see p. 169 *et seq.*, *supra*.

⁴⁷ See also discussion of tax liabilities of Federal contractors, p. 313 *et seq.*, *infra*.