7-21

IPHLET NO. 27–21

MILITARY ADMINISTRATIVE LAW

MILITARY ORGANIZATION

MILITARY PERSONNEL LAW

LAW OF CIVILIAN EMPLOYMENT

MILITARY ADMINISTRATIVE LAW HANDBOOK

HEADQUARTERS, DEPARTMENT OF THE ARMY

OCTOBER 1973

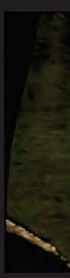
*Pam 27-21

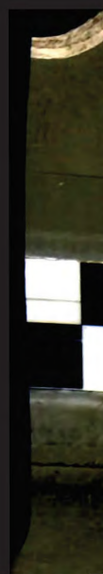
PAMPHLET
No. 27-21

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, *15 October 1978*

MILITARY ADMINISTRATIVE LAW HANDBOOK

This pamphlet supersedes DA Pamphlet 27-6, 25 October 1968; DA Pamphlet 27-11, 1 December 1966; DA Pamphlet 27-164, 8 October 1965; and DA Pamphlet 27-187, 28 December 1966.





CHAPTER 1

MILITARY ADMINISTRATIVE LAW

Section I. INTRODUCTION

1.1. ***Military Administrative Law—The Concept.*** Military administrative law is the body of statutes, regulations and judicial decisions which governs the establishment, functioning and command of military organizations. A precise definition is difficult because of the constantly changing parameters of military administrative law as new concepts are developed and old concepts are changed or eliminated. Consequently, some of the material in this handbook covers subject matter which extends beyond the traditional definition of "administrative law." Formerly, much of military administrative law was styled "military affairs."

1.2. ***Scope of the Handbook.***

a. Substantive material. The purpose of this handbook is to provide a ready reference in the major areas of military administrative law. Each chapter deals with one main topic and particular facets are covered in separate sections within the chapter.

(1) Chapter 2, *Military Organization*, gives the historical and statutory basis for the current organization, functions and missions of the Department of Defense, the Department of the Army, and The Judge Advocate General's Corps. This material was formerly in the Military Affairs pamphlet.[1]

(2) Chapter 3, *Military Personnel Law*, covers a wide range of legal problems relating to officer and enlisted personnel. It discusses personnel procurement, personnel management and administrative actions which are involved in personnel management, including line of duty, conflicts of interest and compensation. This material was formerly found in the Military Affairs pamphlet.[2]

(3) Chapter 4, *Law of Civilian Employment*, gives a general discussion of the laws relating to civilian employees of the Army and to labor-management relations and procedure.

(4) Chapter 5, *Personal Property*, discusses the principles involved in the accountability of government funds, the report of survey system and the acquisition and disposition of personalty. These topics were covered previously in the Military Affairs pamphlet.[3]

[1] Dep't of Army Pamphlet No. 27-187, *Military Affairs* (1966).

[2] *Ibid.* Material from Dep't of Army Pamphlet No. 27-6, *Principles Governing Lin: of Duty and Misconduct Determinations in the Army* (1968) have been incorporated in Section 5 and Appendix 3-A.

[3] Dep't of Army Pamphlet No. 27-187, *Military Affairs* (1966).

(5) Chapter 6, *Law of Military Installations*, has the broadest scope, discussing ownership and jurisdiction of federal installations, the applicable substantive law and the commander's powers to control and command installations. Added to these topics are several sections concerning environmental law and law problems concerning the release of information that are the concern of an installation commander. The materials in this chapter were previously found in the Military Reservations pamphlet.[4]

(6) Chapter 7, *Military Assistance to Civil Authorities*, will cover the historical background of military assistance, martial rule, use of material resources, and the legal liability of soldiers in a civil disturbance role. Previously, this topic was contained in a separate pamphlet.[5]

(7) Chapter 8, *Effective Research Aids*, will give a review of military research materials, a uniform system for military citations and a uniform system for filing opinions.[6]

b. Reference material. This handbook is structured to give the basic substantive information in the text, and textual footnotes have been kept to a minimum. Each footnote has been written to provide maximum information without resort to other materials, and the formal rules of citation have been modified. In citing Army regulations, the date given is either the date of the basic regulation or the date of the latest change which affected the page containing the paragraph cited. The change number has been omitted to avoid cumbersome footnotes.

It should be noted that reference materials cited in this handbook are those materials normally found in a staff judge advocate law library. For this reason, opinions of The Judge Advocate General have generally not been employed as references.

1.3. ***Mission of The Judge Advocate.*** Legal questions in military administrative law usually involve the interpretation of statutes and regulations and the rendering of advice to commanders and their staff officers. At Department of the Army, this is done by many of the divisions and offices of the Office of The Judge Advocate General[7] and by legal advisors for specific staff elements.[8] In the typical staff judge advocate office, opinions are generally prepared by the administrative law or military affairs section, depending on the particular office organization. The advice given commanders or their staff is not binding on them, and the author of an administrative law opinion must make clear either the statutory or regulatory basis for his advice so that the recipient can properly assess the limitation on his proposed action. This handbook is written to assist the judge advocate in fulfilling this mission.

[4] Dep't of Army Pamphlet No. 27–164, *Military Reservations* (1965).

[5] Dep't of Army Pamphlet No. 27–11, *Military Assistance to Civil Authorities* (1966).

[6] Formerly Chapter 16, Dep't of Army Pamphlet No. 27–187, *Military Affairs* (1966).

[7] For example, the Administrative Law Division, the Civilian Personnal Law Office, the Lands Office, the Regulatory Law Office and the Industrial Relations Team in the Procurement Law Division.

[8] Such as the Directorate of Military Support (DOMS).

Section III. JURISDICTION

6.7. *General.*

a. Meaning of Federal Jurisdiction. Much confusion is avoided if it is kept clearly in mind that the word "jurisdiction," when used in connection with land areas, means only *authority to legislate* within such areas.[1] Basically, an area concept is involved. When the United States exercises Federal jurisdiction over particular land, it has the power and authority to enact general, municipal legislation applying within that land. This is contrasted with other legislative authority of the Congress, which is dependent, not upon area, but upon subject matter and purpose and which must be predicated upon some specific grant in the Constitution.[2] In other words Congress cannot legislate generally throughout the United States, as this power is reserved to the States, but it can do so with respect to specific land areas over which the United States has jurisdiction.

Federal jurisdiction should be distinguished from Federal ownership of land. Federal jurisdiction is a sovereign power, whereas the ownership of land is in the nature of a proprietorial action.[3] Thus, it is possible for the United States to exercise Federal jurisdiction over land it does not own.[4] The converse situation, where the United States owns property over which it does not exercise jurisdiction, is equally possible. In fact, by far the larger quantity of real property under Federal ownership is not subject to its legislative jurisdiction.[5] Conflicts occasionally develop between the exercise of Federal jurisdiction and governmental actions related to land ownership. The principle in such cases would seem to be that the sovereign authority is supreme. Thus, where the Government leased land to a third party with a provision permitting him to sell liquor on the premises, it was not prohibited from thereafter issuing a regulation pursuant to law which

[1] See U.S. Const. art. I, § 8, cl. 17. Note that the term used is "legislation," not "jurisdiction:"

> 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. . . .

[2] Such as the power to regulate interstate commerce, the power to declare war, the power to make rules for the government and regulation of the land and naval forces. See U.S. Const. art. I, § 8.

[3] See discussion in paragraph 6.5*a*, *supra*.

[4] The District of Columbia provides an example. In *Petersen v. United States*, 191 F. 2d 154 (9th Cir.), *cert. denied sub nom California v. United States*, 342 U.S. 885 (1951), the court held that parcels of privately-owned lands in King's Canyon National Park, California, were under exclusive Federal jurisdiction. The State had ceded exclusive jurisdiction over the territory "included in those several tracts of land" set aside for the Park, and the description included the private lands.

[5] The United States does not exercise any type of legislative jurisdiction over about 95% of the land it owns. General Services Administration, Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1957, 11 (10 November 1959).

precluded such sales. A more common application of this principle is that governmental powers cannot be contracted away.[6]

The fact that the United States has legislative jurisdiction over a particular area does not establish that it has actually *legislated* with respect thereto. All that is meant is that the United States has the authority to do so. It will be found that the Federal Government has not established a comprehensive legislative scheme for areas under Federal jurisdiction. Moreover, in some important respects, it has provided that principles of state law will be applicable. These matters will be considered subsequently in this text.[7]

b. Types of Legislative Jurisdiction. The fact that the Federal Government has jurisdiction over an area does not necessarily mean that its power is complete in all respects or that State legislative authority is entirely excluded. In fact there may be any type of combination or division of Federal and State legislative authority. To determine the type of legislative jurisdiction possessed by the United States it is necessary to review the specific transaction by which the jurisdiction was acquired.[8] The following classification of jurisdiction types is helpful:[9]

(1) *Exclusive Legislative Jurisdiction.* 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 the right to serve process resulting from activities which occurred off the land involved.[10] 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 permitting it to do so.[11]

Since the acquisition of exclusive Federal jurisdiction entails many disadvantages,[12] it should be sought only when the state or local laws unduly interfere with the nature of the military operation to be performed on the property.[13]

(2) *Concurrent Legislative Jurisdiction.* The term "concurrent legislative jurisdiction" is proper in those instances where, in granting to the

---

[6] *North American Commercial Co. v. United States*, 171 U.S. 110 (1898).

[7] See discussion in paragraph 6.11, *infra*.

[8] See discussion in paragraph 6.8, *infra*.

[9] This classification is taken from the U.S. Att'y Gen., Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States 10, 11 (Part II, 1957). [Hereafter cited in this Chapter as *Report*.] It can also be found in Army Reg. No. 405–20, paras. 2, 3 (28 June 1968).

[10] See 1 Stat. 426 (1795); *United States v. Knapp*, 26 F. Cas. 792 (No. 15,538) (S.D.N.Y. 1849); *United States v. Davis*, 25 F. Cas. 781 (No. 14,930) (C.C.D. Mass. 1829); *United States v. Cornell*, 25 F. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819); *United States v. Travers*, 28 F. Cas. 204 (No. 16,537) (C.C.D. Mass. 1814). See also paragraph 6–10*d*, *infra*.

[11] See discussion in paragraph 6.11*c*, *infra*.

[12] Principally the loss of state or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile such as the attendance at state or local schools, and access to the authority of state or local courts, officials, or laws in matters relating to probate, domestic relations, notarization, and inquests. Army Reg. No. 405–20, para. 5*b*(2) (28 June 1968).

[13] Army Reg. No. 405–20, paras. 5*a*, *b*(2) (28 June 1968).

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.

While present Army policy discourages the acquisition of concurrent jurisdiction, instances in which an exception might be justified would include installations of great size, with a large population, in a remote location or, where, because of peculiar requirements stemming from Army use, the State or local government does not have the facilities to render effective service.[14]

(3) *Partial Legislative Jurisdiction.* The term "partial legislative jurisdiction" is applied in those instances wherein the Federal Government has been granted certain legislative authority over an area by the state while the latter has reserved to itself the right to exercise, alone or concurrently with the United States, other authority constituting more than the right to serve civil or criminal process in the area. In other words, either the Federal Government, or the State, or both, have some legislative authority but less than complete legislative authority. These jurisdictional interests may be determined either upon acquisition of the land or when a state cedes some jurisdiction to the United States.

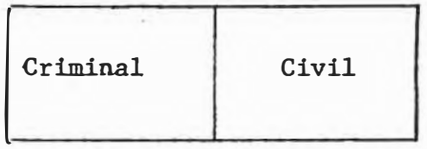
For example, Iowa grants that "the United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in the state, and may exercise jurisdiction thereover but not to the extent of limiting the provisions of the law of the State. The State reserves . . . jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances. . . ." [15] Thus, Iowa has reserved all criminal jurisdiction while otherwise granting the United States concurrent jurisdiction. Illustratively, the squares being one tract of land and the shading reflecting the ability to exercise jurisdiction over that land, the situation would be:

U.S. (partial jurisdiction) Iowa (complete jurisdiction)

Conversely, a Minnesota statute states that ". . . the jurisdiction of the United States over any land or other property within the state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state to punish offenses against its laws committed therein. . . ." [16] The United States thus has complete jurisdiction over the particular area with Minnesota reserving concurrent jurisdiction to punish criminal offenses. Illustratively, the situation would be:

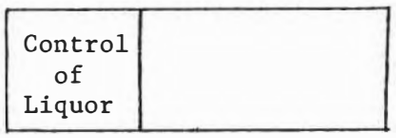
[14] Army Reg. No. 405–20, para. 5b(1) (28 June 1968).
[15] Iowa Code Ann. § 1.4 (1967).
[16] Minn. Stat. Ann. § 1.041 (1967).

U.S. (complete jurisdiction)

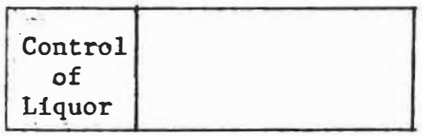


Minnesota (partial jurisdiction)

States can have partial jurisdiction in areas other than criminal law. For example, Virginia has reserved the power to exclusively "license and regulate, or to prohibit, the sale of intoxicating liquors" [17] on any lands the United States has acquired for its use. The illustration would be:



U.S. (partial jurisdiction)



Virginia (partial jurisdiction)

(4) *Proprietorial Interest Only.* The term "proprietorial interest only" is proper in those instances where the Federal Government has acquired some degree of ownership to an area in a State but has not obtained any measure of the state's legislative 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.[18] For example, the State may not impose its regulatory power directly upon the Federal Government, nor may it tax the Federal land.

c. Significance of Federal Jurisdiction. The best way to approach legal questions involving legislative jurisdiction is on a tract-by-tract basis.[19] When approached in this fashion, a determination that a certain parcel is under a particular type of Federal legislative jurisdiction may be material in a number of respects. Whether Federal or state laws, or both, apply on the area may depend on this issue. Similarly, Federal jurisdiction has a direct effect on whether Federal or state courts have jurisdiction over civil offenders. The power of the surrounding State to tax private property on the installation may be involved, as may the applicability of State civil laws generally. Of particular importance is the authority of State law enforcement officials to act within the reservation, and this depends on legislative jurisdiction. Some Army regulations and policies depend for their applicability on the jurisdictional status of the installation.[20] The

[17] Va. Code Ann. § 7.1-15 (1966).

[18] See discussion in paragraphs 6.7*a*, *supra*, and 6.12, *infra*.

[19] See discussion in paragraph 6-5*e*, *supra*.

[20] Army Reg. No. 230-60, para. 2-26*c*(1) (8 January 1971) provides: "Bingo playing will be limited solely to Army installations under exclusive United States jurisdiction, and to other Army installations where the playing of the game is allowed by the state in which located." Commercial life insurance agents must be licensed by the surrounding State if any part of the reservation is under state legislative authority. Army Reg. No. 210-8, para. 15 (30 June 1964).

real significance of legislative jurisdiction in these and other respects will be considered in detail subsequently in this text.

d. Military Installations in Territories and Possessions. The term "exclusive Federal jurisdiction" normally refers to Federal legislative authority over enclaves within the several States.[21] Jurisdiction over territories has a different Constitutional basis.[22] In a general sense the Federal Government has legislative power over all territorial areas whether on or off Federal installations and whether under public or private ownership. Territorial governments have been regarded as representatives of the Federal Government, exercising power delegated therefrom. Military installations in Puerto Rico are in a special situation insofar as jurisdiction is concerned. It has not normally been the practice for territorial governments to enact laws transferring jurisdiction to the Federal Government, as has been done by the States. The former territory of Puerto Rico was the single exception. In 1903 it enacted a territorial law ceding legislative jurisdiction over military installations and similar lands to the Federal Government and providing that "all jurisdiction over such lands by the People of Puerto Rico shall cease and determine." These or similar provisions have been continued in effect until and after the former territory became a Commonwealth in 1952. The effect of acquiring exclusive jurisdiction under these provisions is to prevent exercise of legislative authority by the Commonwealth of Puerto Rico over the areas affected.[23]

6.8. *Acquisition*

a. Methods of Acquisition. There are three methods of acquiring Federal legislative jurisdiction over areas within a State: purchase with the consent of the State; cession of jurisdiction by the State; and reservation of Federal legislative jurisdiction at the time the State is admitted to the Union.

(1) *Purchase with Consent of the State.* The earliest recognized method by which the United States could acquire legislative jurisdiction was the purchase of real property with the consent of the State in which it was located. This method is provided for by the Constitution in the following terms:

> 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. . . .[24]

This provision becomes operative when the State consents to the purchase of real property by the United States. The State need not consent to the transfer of jurisdiction as such. This is merely a legal consequence of its

[21] See discussion in Section IV, *infra.*

[22] U.S. Const. art. IV, § 3, cl. 2.

[23] *Cf. Puerto Rico v. Esso Standard Oil Co.*, 332 F. 2d 624 (1st Cir. 1964).

[24] U.S. Const. art. I, § 8, cl. 17. See discussion in paragraph 6.7*a*, *supra.* For example of a "purchase" statute, see paragraph 6.8*a*(2), *infra.*

consent to the purchase. It was once thought that the United States lacked power to acquire title to real property in a State without its consent,[25] but it is now clear that the Government can do so except that jurisdiction will not be acquired under the above Constitutional provision.[26] The requirement for state consent was deliberately inserted by the framers of the Constitution, and it is not possible for the United States unilaterally to assume Federal jurisdiction over an area within a State. The required consent must be given by the state legislature, and the Attorney General has expressed the view that the consent of a State constitutional convention is insufficient.[27] It has been held that the consent could be either before or after the purchase.[28]

The Constitutional provision applies only where the property in question has been *purchased* by the United States. In its normal sense, this term would seem to cover only those cases where the Government has bought and paid for real property on a *quid pro quo* basis. It seems settled, however, that acquisitions by condemnation are included as well,[29] and a conveyance of land to the United States for a consideration of one dollar has been regarded as a "purchase" within the meaning of the Constitutional provision.[30] There is authority to the effect that donations of land to the United States may be regarded as purchases for the stated purpose.[31] Similarly, when a State cedes title to land to the United States, the Constitutional provision has been held applicable.[32] On the other hand, the word, "purchase," does not include the lease of real property[33] or other acquisitions of less than a fee interest.[34] Further, the Federal purchase of property at a tax sale has been held insufficient to transfer jurisdiction under the consent method.[35] Does the reservation of lands from the public domain for military purposes constitute a "purchase" within the meaning of the Constitutional provision? As no acquisition of title to such lands is involved in such a transaction,[36] it is clear that Federal jurisdiction may not be acquired by this method.[37]

---

[25] See *United States v. Cornell*, 25 F. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819).

[26] *United States v. Stahl*, 27 F. Cas. 1288 (No. 16,373) (C.C.D. Kan. 1868); *United States v. Hopkins*, 26 F. Cas. 371 (No. 15,387a) (D.C.D. Ga. 1830).

[27] 12 Op. Att'y Gen. 428 (1868).

[28] *United States v. Tucker*, 122 Fed. 518 (W.D. Ky. 1903).

[29] *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937); *Holt v. United States*, 218 U.S. 245 (1910).

[30] 39 Op. Att'y Gen. 99 (1937).

[31] *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *In re Pothier*, 285 Fed. 632 (D.R.I. 1923), *aff'd*, 264 U.S. 399 (1924); *Mississippi River Fuel Corp. v. Tontenot*, 234 F. 2d 898 (5th Cir.), *cert. denied*, 352 U.S. 916 (1956) (question raised but decision based on other grounds).

[32] *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *United States v. Tucker*, 122 Fed. 518 (W.D. Ky. 1903). *But cf. Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937).

[33] *United States v. Tierney*, 28 F. Cas. 159 (No. 16,517) (C.C.S.D. Ohio 1864).

[34] *Ex parte Hebard*, 11 F. Cas. 1010 (No. 6,312) (C.C.D. Kan. 1877).

[35] *United States v. Penn*, 48 Fed. 669 (E.D. Va. 1880).

[36] See discussion in paragraph 6.4*c*, *supra*.

[37] *United States v. Unzeuta*, 281 U.S. 138 (1930); *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885).

The United States may acquire Federal jurisdiction under the quoted Constitutional provision only if the purchase of land is ". . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ." [38] There are indications of early attempts to read this purpose clause restrictively, according to the rule of *ejusdem generis*.[39] Later, however, it was held that the clause included purchases for post offices,[40] soldiers' homes,[41] national cemeteries,[42] penitentiaries,[43] steamship piers,[44] waters adjoining Federal lands,[45] aeroplane stations,[46] canal locks and dams,[47] and reservoirs and aqueducts.[48] In 1907 the Attorney General of the United States stated the principle of interpretation indicated by the court decisions as follows:

> . . . There can be no question and, so far as I am aware, none has been raised that the word "buildings" in this passage is used in a sense sufficiently broad to include public works of any kind. . . .[49]

The broadest possible interpretation of the Constitutional phrase was established by the decision of the Supreme Court in *James v. Dravo Contracting Company*.[50] With specific reference to the coverage of the term "other needful Buildings" in the Constitutional provision, the Court stated:

> . . . 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 dockyards, that is, structures for military purposes. And it may be that the thought of such "strongholds" was uppermost in the minds of the framers. Elliot's Debates, Vol. 5, pp. 130, 440, 511; Cf. Story on the Constitution, 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. . . .[51]

---

[38] This is the last portion of U.S. Const. art. I, § 8, cl. 17, quoted in note 1, *supra*.

[39] *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

[40] *United States v. Andem*, 158 Fed. 996 (D.N.J. 1908).

[41] *Re O'Connor*, 37 Wis. 379 (1875); *Sinks v. Reese*, 19 Ohio St. 306 (1869).

[42] 13 Op. Att'y Gen. 131 (1869).

[43] *Steele v. Halligan*, 229 Fed. 1011 (W.D. Wash. 1916).

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

[45] *Ex parte Tatem*, 23 F. Cas. 708 (No. 13,759) (E.D. Va. 1877).

[46] *United States v. Buffalo*, 54 F. 2d 471 (2d Cir. 1931), *cert. denied*, 285 U.S. 550 (1932).

[47] *James v. Dravo Contracting Company*, 302 U.S. 134 (1937); *Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937).

[48] 26 Op. Att'y Gen. 289, 297 (1907).

[49] *Ibid. See also* 38 Op. Att'y Gen. 185 (1935).

[50] 302 U.S. 134 (1937).

[51] *Id.*, at 142–3. Not every Federal holding is a "building." Forests, parks, ranges, wild life sanctuaries, flood control, and similar holdings, apparently would not be covered by the term. *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

(2) *Cession by the State.* The Constitution gives express recognition to only one method of acquiring Federal legislative jurisdiction: purchase with the consent of the State. The early view was that this was the only method for the transfer of jurisdiction, and that unless it was followed no transfer of jurisdiction could take place.[52] Nevertheless, various States enacted laws attempting to *cede* jurisdiction over Federal lands. The difference in content of state consent and cession statutes is illustrated by the following representative sections:

> 15–301. (25) *Cession to the United States of land for public buildings, forts, etc.*—The consent of the State is hereby given, in accordance with the 17th clause, section 8 of Article I, of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any lands in this State which have been or may hereafter be acquired for sites for customs houses, courthouses, post offices, or for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. . . .
>
> 15–302. (26) *Jurisdiction.*—Exclusive jurisdiction in and over any lands so acquired by the United States is hereby ceded to the United States for all purposes except service upon such lands of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. . . .[53]

It was not until 1885 that the Supreme Court, in *Fort Leavenworth Railroad v. Lowe*[54] sustained cession by the State as a means of transferring jurisdiction. The case involved a Kansas statute ceding to the United States legislative jurisdiction over the Fort Leavenworth Military Reservation, but reserving to the State the right to serve criminal and civil process within 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 jurisdiction, the Supreme Court stated:

> . . . 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 governments are essen-

[52] See *In re O'Connor*, 37 Wis. 379 (1875); *United States v. Railroad Bridge Co.*, 27 F. Cas. 686, 692 (No. 16,114) (C.C.N.D. Ill. 1855).

[53] Ga. Code Ann. ch. 15–3 (1971). These sections are fairly representative of consent and cession laws. See paragraph 6.9*e*, *infra*.

[54] 114 U.S. 525 (1885).

> tially 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. . . .[55]

As a result of the foregoing decision, many States passed laws ceding jurisdiction to the United States, often in combination with "consent" statutes already in existence. The significance of cession, as a means of transferring jurisdiction, is that it is not subject to the Constitutional restraints inherent in the method involving purchase with the consent of the State. It is not essential that the land be "purchased," nor is it necessary that it be intended for one of the uses specified in the Constitution. Thus it is permissible for a State to cede exclusive jurisdiction over lands reserved for military purposes from the public domain,[56] over a railroad right-of-way passing through Government lands,[57] or over privately owned land within the confines of a Federal reservation.[58] The State may cede jurisdiction over property held by the Government under lease.[59] In *Collins v. Yosemite Park Company*,[60] the Supreme Court faced squarely the question whether a State could cede jurisdiction over Federal land acquired for purposes other than those covered by the Constitution.[61] The Court noted that properties used for forests, parks, ranges, wild life sanctuaries, flood control, and similar purposes would not seem to be covered by the Constitutional provision. Nevertheless, it was held that there was no objection to "an adjustment of rights" *via* the cession method in case of lands of this nature. The specific land area involved in the case was a national park.[62]

(3) *Reservation When the State is Admitted to the Union.* A third method of retaining legislative jurisdiction in the Federal Government was

[55] *Id.*, at 540–2. The cession method has been recognized in many subsequent decisions. *Paul v. United States*, 371 U.S. 245 (1963); *Bowen v. Johnston*, 306 U.S. 19 (1939); *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938); *Standard Oil Co. of California*, 291 U.S. 242 (1934); *Battle v. United States*, 209 U.S. 36 (1908); *Benson v. United States*, 146 U.S. 325 (1892).

[56] *Benson v. United States*, 146 U.S. 325 (1892); *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885); *Chicago, R.I. & P. Ry. v. McGlinn*, 114 U.S. 542 (1885).

[57] *United States v. Unzeuta*, 281 U.S. 138 (1930); *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885); *Chicago, R.I. & P. Ry. v. McGlinn*, 114 U.S. 542 (1885).

[58] *Petersen v. United States*, 191 F. 2d 154 (9th Cir.), *cert. denied*, 342 U.S. 885 (1951).

[59] *United States v. Schuster*, 220 F. Supp. 61 (E.D. Va. 1963).

[60] 304 U.S. 518 (1938).

[61] U.S. Const. art. I, § 8, cl. 17, quoted in note 1, *supra*.

[62] *See also Bowen v. Johnston*, 306 U.S. 19 (1939).

recognized by the Supreme Court in *Fort Leavenworth Railroad v. Lowe*[63] when it stated by way of dicta:

> . . . Congress might undoubtedly . . . upon [admission of Kansas to the Union] 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.[64]

It should be noted that the United States does not acquire legislative jurisdiction by the method described; it merely retains that which it had when the former State was a territory. Congress has in various instances reserved jurisdiction over specified areas in the enabling act admitting a State to the Union.[65] This method, involving retention of Federal legislative jurisdiction, is not provided for in the Constitution; and it would appear that the restraints and limitations associated with the "consent to purchase" method have no logical applicability.[66]

b. State Reservations of Authority. In the early days, when "purchase by consent" was considered the sole means of acquiring Federal jurisdiction, it seems to have been generally doubted that a State could impose any condition upon its outright consent to purchase of lands by the United States.[67] In support of this view, it should be noted that the Constitution[68] does not, by its terms, suggest the possibility of concurrent or partial jurisdiction.[68] The idea that Federal jurisdiction might be anything but *exclusive* did not receive judicial recognition until the 1885 decision of the Supreme Court in *Fort Leavenworth Railroad v. Lowe*.[70] In that case, the Court upheld a Kansas *cession* statute which reserved not only the right to serve criminal and civil process but also the authority to tax railroad, bridge, and other corporations and their franchises and property on the military reservation. In so doing, the Court stated:

> . . . 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.[71]

---

[63] 114 U.S. 525 (1885).

[64] *Id.*, at 526. This conclusion had been suggested by earlier decisions. *Langford v. Monteith*, 102 U.S. 145 (1880); *Clay v. State*, 4 Kan. 4 (1866).

[65] See, *e.g.*, 26 Stat. 222 (1890) (Wyoming); 34 Stat. 267 (Oklahoma); 72 Stat. 339 (1958) (Alaska); 73 Stat. 4 (1959) (Hawaii).

[66] See discussion in paragrap 6.8*a*, *supra*.

[67] *United States v. Cornell*, 25 F. Cas. 646, 649 (No. 14,867) (C.C.D.R.I. 1819).

[68] U.S. Const. art. I, § 8 cl. 17, quoted at note 1, *supra*.

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

[70] 114 U.S. 525 (1885).

[71] *Id.*, at 539.

Doubts continued to be expressed concerning the right of a State to include reservations and qualifications in a *consent* statute.[72] The matter was put to rest in 1937 by the decision of the Supreme Court in *James v. Dravo Contracting Company*,[73] sustaining 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. The Court stated:

> . . . Clause 17 [of the Constitution] 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.[74]

It would appear from the above authorities that, whether a consent or a cession statute is involved, the only limitation upon the authority which the State may reserve is that it may not be "inconsistent with the free and effective use" of the property for Federal purposes.[75] States have long imposed reservations and conditions, even before the *Fort Leavenworth Railroad* and *Dravo Contracting Company* decisions. State legislative authority has been reserved to exercise concurrent jurisdiction, apply state criminal laws, tax private persons, regulate water rights, extend state suffrage laws, apply civil laws, and legislate on various other matters, within lands over which jurisdiction is transferred to the United States. It is always necessary, therefore, in ascertaining the extent of Federal jurisdiction over a particular tract to search the applicable state consent or cession law for reservations and qualifications.[76]

c. Procedural Requirements in State Statutes. A number of state consent and cession statutes provide for transfer of legislative jurisdiction to the Federal Government on condition that there be filed a deed, map, plat, or description pertaining to the land involved in the transfer, or that some other action be taken by Federal or State authorities. Some of these provisions have been held to be mere formal requirements, noncompliance with

[72] *United States v. Unzeuta*, 281 U.S. 138 (1930); *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604 (C.C.E.D. Va. 1893).

[73] 302 U.S. 134 (1937).

[74] *Id.*, at 148–9.

[75] *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885). This principle is related to the Federal immunity doctrine. See paragraph 6.12, *infra*. As a State cannot positively legislate with respect to a Federal function, it cannot supply this authority by a purported reservation of it.

[76] State constitutional provisions may affect the matter. A state statute purportedly ceding exclusive jurisdiction was held not to surrender tax authority in view of a state constitutional provision which denies to the legislature the power to surrender the sovereign right of the State to tax. *I.B.M. Corp. v. Evans*, 213 Ga. 333, 99 S.E. 2d 220 (1957). *Contra, Hardin County Bd. of Supervisors v. Kentucky Limousines*, 293 S.W. 2d 239 (Ky. 1956).

which would not vitiate the transfer of legislative jurisdiction.[77] Recently, however, the view has developed that requirements of this nature are substantive and, if not complied with, jurisdiction is not acquired by the United States. In *Paul v. United States*,[78] the Supreme Court assumed without discussion that a condition in a State cession law requiring ". . . that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated . . ." was substantive and must have been complied with by the United States to obtain jurisdiction. More recently, the United States Court of Appeals for the Fourth Circuit, in *United States v. Lovely*[79] had occasion to consider a contention that the United States lacked jurisdiction over a Federal area because it had not complied with a requirement in a cession statute that evidence of title be recorded before jurisdiction passed. Although not necessary for its decision, the following statement was made by the court with respect to this contention:

> . . . If the . . . statutes upon which Lovely relies to defeat jurisdiction . . . were the only statutes covering the subject of the cession of jurisdiction to and the vesting of jurisdiction in the federal government, we would not hesitate to declare that the court in which Lovely was convicted did not have jurisdiction because of the failure of the Government to record evidence of title and we would hold, accordingly, that the motion to vacate the judgment and sentence should have been granted. See Markham v. United States, 215 F. 2d 56 (4th Cir. 1954). . . .[80]

d. Acceptance of Jurisdiction by the United States. It has been generally accepted that a State cannot unilaterally grant legislative jurisdiction to the United States. The assent of both parties to the transaction is required.[81] By a statute enacted 1 February 1940[82] it was provided that the head of the department having control over Federal land must expressly accept jurisdiction; otherwise, it would be conclusively presumed that no Federal jurisdiction of any kind was accepted. The statute provides as follows:

> Nothwithstanding 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 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 indi-

---

[77] *Steele v. Halligan*, 229 Fed. 1011 (W.D. Wash. 1916); *State ex rel. Bd. of Comm'rs v. Bruce*, 104 Mont. 500, 69 P. 2d 97 (1937), 106 Mont. 322, 77 P. 2d 403 (1938), *aff'd*, 305 U.S. 577 (1939). *Contra, United States v. Watkins*, 22 F. 2d 437 (N.D. Calif. 1927); *Six Cos., Inc. v. De Vinney*, 2 F. Supp. 693 (D. Nev. 1933); *Valley County v. Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939); *State v. Mendez*, 57 Nev. 192, 61 P. 2d 300 (1936); *Gill v. State*, 141 Tenn. 379, 210 S.W. 637 (1919).

[78] 371 U.S. 245 (1963).

[79] 319 F. 2d 673 (4th Cir.), *cert. denied*, 375 U.S. 913 (1963).

[80] *Id.*, at 677.

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

[82] 54 Stat. 19, *amending* Rev. Stat. § 355 (1875), *as amended*, 40 U.S.C. § 255 (1970).

> cate 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.[83]

In *Adams v. United States*[84] the Supreme Court held that the United States could not obtain legislative jurisdiction without filing the express acceptance required by the statute. It is necessary that there be an express acceptance of concurrent or partial jurisdiction, as well as exclusive jurisdiction.

Before the 1940 statute requiring express acceptance of Federal jurisdiction, the principle had been established by the courts that acceptance could be implied from the circumstances. In the absence of indications to the contrary, it was held that since the transfer of jurisdiction conferred a benefit on the United States, acceptance would be presumed. This idea was later modified, the courts indicating that the question of acceptance must be given careful consideration. Although dicta, the point was discussed in *James v. Dravo Contracting Company*[85] wherein Mr. Chief Justice Hughes remarked that "a transfer of legislative jurisdiction carries with it not only benefits but obligations." [86] In *Mason Company v. Tax Commission*[87] a situation was presented which involved the acceptance of Federal jurisdiction. A state occupation tax was imposed upon a government contractor who was building a dam over navigable waters within the State. There were contracts between the Government and the contractor providing that state laws were to be followed in the area. In holding there was no implied acceptance of jurisdiction by the United States, the Court stated:

> . . . As such 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 compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. . . .
>
> The Federal intent in this instance is clearly shown. It is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress, which gives the force of law to the prior officials even if unauthorized when taken.[88]

The *Mason Company* case pointed up a growing reluctance to apply a presumption of acceptance of jurisdiction. In *Atkinson v. State Tax Commission*,[89] the Supreme Court indicated that the enforcement of the Oregon

[83] *Ibid.*

[84] 319 U.S. 312 (1943). *See also DeKalb County, Georgia v. Henry C. Beck Co.*, 382 F. 2d 992 (5th Cir. 1967).

[85] 302 U.S. 134 (1937). See *Benson v. United States*, 146 U.S. 325 (1892); *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885).

[86] 302 U.S. 134, 148 (1937).

[87] 302 U.S. 186 (1937).

[88] *Id.*, at 207–8. *Cf. Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964).

[89] 303 U.S. 20 (1938).

workmen's compensation law in a Federal area was incompatible with exclusive Federal 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.

The principle of implied acceptance of Federal jurisdiction has modern applications. The 1 February 1940 statute requiring express acceptance of jurisdiction only applies where the jurisdiction is acquired on or after that date. Numerous cases still arise where the Federal jurisdiction issue depends on acceptance before the 1940 date. In *Markham v. United States,*[90] the defendant was charged with murder allegedly committed on property which had been acquired by the United States in 1919. The State had ceded jurisdiction over the area, but the Government had not expressly accepted jurisdiction. It was contended by the defendant that Federal jurisdiction was not acquired by reason of this fact. The court made it clear that the statutory requirement for express acceptance did not apply to land acquired before the act was passed, and stated:

> . . . The provision of that section creating the presumption against acceptance of jurisdiction was added . . . to Section 355 of the Revised Statutes and applies only to lands thereafter to be acquired. . . . As the Old Army Base was acquired in 1919 the provision relied on has no application to it, and acceptance of jurisdiction over it by the United States is presumed under the law then applicable.[91]

In *Humble Pipe Line Company v. Waggoner*[92] the Supreme Court had under consideration the question whether a State could levy a tax on certain oil drilling equipment and pipe lines owned by a private company on a military reservation. Title to the reservation had been acquired from the State in 1930. The authority of the State to levy the tax in question depended on whether the United States had accepted jurisdiction. There was no express acceptance of jurisdiction. Concerning this the Court stated:

> . . . Louisiana further contends that this record shows that the Government did not intend to accept exclusive jurisdiction here. It is the established rule that a grant of jurisdiction by a State to the Federal Government need not be accepted and that a refusal to accept may be proved by evidence. . . . The State's contention is based chiefly on a statement that Barksdale Air Force Base buys public utility services from the State or a State instrumentality at its gate and pays to the State's school system a per capita charge for each child of a serviceman attending the State's schools. We think these circumstances wholly fail to show a rejection by the Government of the State's cession of exclusive jurisdiction over the base. Nor do we think it possible to find a refusal or an abandonment of exclusive federal jurisdiction from the fact that the oil and gas leases provided that the companies should "pay when due, all taxes lawfully assessed and levied under the law of the State or the United States upon improvements, oil and gas produced from the land hereunder, or other rights, property, or assets of the lessee". . . .[93]

---

[90] 215 F. 2d 56 (4th Cir. 1954), *cert. denied,* 348 U.S. 939 (1955).
[91] *Id.,* at 58.
[92] 376 U.S. 369 (1964).
[93] *Id.,* at 373–4.

The novel contention that it is possible for a "legal no-man's land" to be created where the State purportedly has relinquished jurisdiction over a reservation but there has been no acceptance by the United States was considered by the Supreme Court of Colorado in the case of *People v. Sullivan*[94] which involved an alleged theft at NORAD (North American Air Defense Command) base. The site had been acquired by condemnation in 1959, but no acceptance had been filed as required by the 1940 statute. There was a 1907 state law on the books ceding exclusive jurisdiction to the United States. On the basis of this statute, the defendants contended that the State had relinquished jurisdiction over the area, even though not accepted by the United States. In holding that the State could not thus abandon its sovereignty and that the 1907 statute was merely a tender of jurisdiction to the United States rather than a relinquishment of such, the court stated:

> [Defendants] . . . contend that the real issue is whether Colorado has *lost* criminal jurisdiction over NORAD, and not whether the United States has *acquired* such jurisdiction. They argue that the fact, if it be a fact, that the United States does not have criminal jurisdiction over NORAD, has absolutely no bearing on the ultimate issue of whether Colorado has by statute lost its jurisdiction over NORAD. It is hopefully suggested that neither the United States nor Colorado has jurisdiction to prosecute one who commits an alleged criminal act on NORAD. The incongruity of this result should not, they say, deter us from so holding. In their opinion, if this be a "gap" which creates a "no-man's land" within our state, the answer thereto is corrective legislation, not judicial construction. In their general analysis of the situation defendants are quite mistaken, as the question of whether the United States has gained exclusive jurisdiction over NORAD is by its very nature inextricably intertwined with the very related issue as to whether Colorado has lost *all* jurisdiction thereover.
>
> Colorado being a sovereign state cannot abandon its sovereignty over land situated within its four corners. . . .But . . . until the United States accepts this tender of sovereignty the State of Colorado retains its jurisdiction to the end that it may enforce its criminal laws within the geographical confines of NORAD. In other words, the fact that there is an outstanding tender of jurisdiction does not divest Colorado of jurisdiction, as Colorado retains jurisdiction unless and until this tender is accepted.[95]

e. Inconsistency Between State Consent and Cession Statutes. A problem of potential and increasing significance is present where a State has simultaneously enacted both a consent and a cession statute, one of which contains a reservation or condition which the other does not have. This is, or has been at some time, the situation in a number of States. The normal historical pattern has been for the States to have enacted unqualified consent laws transferring exclusive jurisdiction to the United States between

[94] 378 P. 2d 633 (Colo. 1963).

[95] *Id.*, at 637. Compare the related problem where the United States purports to retrocede jurisdiction which is not accepted by the State. See paragraph 6.10*b*, *infra*. The "legal no-man's land" situation can arise in other respects. In the notorious *Tully* case, a murder had been committed at Fort Missoula, Montana. The state courts and then the Federal court, in turn, discharged the accused, each interpreting the statutory scheme as depriving it of jurisdiction over the area. *Compare State v. Tully*, 31 Mont. 365, 78 Pac. 760 (1904) *with United States v. Tully*, 140 Fed. 899 (C.C.D. Mont. 1905).

1841 and 1885.[96] With the 1885 decision of the Supreme Court in *Fort Leavenworth Railroad v. Lowe*[97] statutes ceding jurisdiction to the United States became common. These cession statutes normally did not purport to repeal the earlier consent laws and often contained conditions or substantial reservations of legislative authority.[98] Additionally, it has been the practice in recent years to include or reenact both statutes in a codification of state law, usually as complementing sections.[99]

The question, stated simply, is whether a reservation or condition in the most recent of such statutes qualifies the other. On the one hand it could be viewed as an *implied amendment* of the earlier statute by the later, or it may be permissible for the United States to view each statute as providing an *entirely different* method of acquiring jurisdiction, so that it may disregard one and elect to proceed only under the other. It is apparent that the answer depends on careful interpretation of the state statutes involved.

Such a situation was presented to the Supreme Court in *Paul v. United States.*[100] The State of California had enacted both an unqualified "consent" statute and a subsequent law ceding exclusive jurisdiction over lands acquired for military purposes on condition that a description of the property and a map or plat first be filed in the proper office of record. These statutes were subsequently codified in complementing sections in a state code. The United States acquired land for military purposes in the 1940's and purported to make an express acceptance of exclusive jurisdiction, although no descriptions, maps, or plats were filed. The Supreme Court held, in effect, that the United States could elect whether to proceed under the consent or the cession statute. As it proceeded under the consent statute, exclusive jurisdiction was obtained even though the conditions provided for in the cession statute were not complied with.

The converse situation was presented in *United States v. Lovely*[101] where an 1871 state statute ceded jurisdiction over military property on condition that title be recorded and a later statute consented to the purchase of such lands without the stated condition. The property in question was acquired in 1941 and Federal jurisdiction was expressly accepted, although title to the property was not recorded. It was held by the court that jurisdiction was nonetheless acquired, because the later consent statute impliedly repealed the earlier cession law. The following language from the court's opinion explains its reasoning:

> . . . It is a universally accepted rule of statutory construction that where a later act purports to cover the whole subject covered by an earlier act, embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act but also to cover the whole subject involved and to prescribe the only rules with respect thereto, the later act operates as a repeal of the earlier act even though it makes no reference to the earlier act. . . . We are convinced that by enacting in 1908 the statutes comprising article 1. . . . The

[96] See the discussion paragraph 6.8*b*, *supra*, and *Report* 60 (Part II, 1957).
[97] 114 U.S. 525 (1885).
[98] See the discussion in paragraph 6.8*b*, *supra*.
[99] An example is provided in paragraph 6.8*a*(2), *supra*.
[100] 371 U.S. 245 (1963).
[101] 319 F. 2d 673 (4th Cir. 1963), *cert. denied*, 375 U.S. 913 (1963).

> Legislature of South Carolina intended to and did completely cover the subject of cession and vesting of federal jurisdiction over land within the state, previously covered by the statutes comprising article 4 . . . which had been in effect since 1871, and that the Legislature's intention in so doing was to substitute the former for the latter, thereby effectively repealing by implication the statute upon which Lovely so heavily relies. The superseding statute does not require the recordation of the evidence of title. . . .[102]

6.9. *Loss of Jurisdiction.*

a. Right of State to Recapture Jurisdiction. A State cannot unilaterally recapture jurisdiction which has previously been transferred by it to the Federal Government.[103] The same principle would seem to apply where the United States reserves legislative jurisdiction at the time the State is admitted to the Union. This means that the relative legislative authority of the Federal Government and the State becomes fixed at the time Federal jurisdiction is acquired over an area. The terms of the state consent or cession legislation and the Federal acceptance,[104] or the provisions of the Federal statehood act, determine the jurisdictional status of the property. Any subsequent change in the state consent or cession statute purporting to recover additional legislative authority is ineffectual. Just as the Federal Government may acquire additional Federal jurisdiction over an area only by a new consent or cession by the State, the State may recover jurisdiction from the Federal Government only by the methods described in this paragraph.

The extent to which the United States possesses Federal jurisdiction over a land area is a Federal question, properly to be decided by Federal courts.[105] Similarly, the circumstances under which the United States may or will lose legislative jurisdiction is a matter governed by Federal, rather than state, law. In *Kingwood Oil Company v. Henderson County Board of Supervisors*,[106] a situation was presented where the United States had acquired property for a military reservation in 1942 and expressly accepted exclusive jurisdiction. At this time there was in effect a state statute consenting to the acquisition in unqualified terms. A state law was enacted subsequently which provided that a conveyance of lands to private owners would be deemed to constitute a retrocession of jurisdiction. The court held that the State did not regain tax authority by reason of this provision when the Secretary of Interior entered into a mineral lease with a private party covering part of the area. The court stated:

---

[102] *Id.*, at 679–80.

[103] *United States v. Unzeuta*, 381 U.S. 138 (1930); *Yellowstone Park Transp. Co. v. Gallatin County*, 31 F. 2d 644 (9th Cir.), *cert. denied*, 280 U.S. 555 (1929).

[104] Since 1 February 1940, the United States acquires only such jurisdiction as it expressly accepts. See paragraph 6.8*d*, *supra*. Where jurisdiction is reserved at the time the State is admitted to the Union, the terms of the statehood act govern the extent of jurisdiction reserved. In the case of Alaska and Hawaii, for instance, only a form of concurrent jurisdiction was reserved with respect to military reservations. See 73 Stat. 4 (1959) (Hawaii); 72 Stat. 339 (1958) (Alaska).

[105] *Paul v. United States*, 371 U.S. 245 (1963); *Mason Co. v. Tax Comm'n*, 302 U.S. 186, 197 (1937).

[106] 367 S.W. 2d 129 (Ct. App. Ky. 1963).

> . . . [The later statute] could not operate to qualify an unlimited consent given for acquisition of land before its enactment. Nor do we conceive that the legislature of this state has power to determine what shall constitute a retrocession of jurisdiction by Congress, at least as to land previously ceded.[107]

b. Right of United States to Surrender Jurisdiction. The right of the United States to relinquish legislative jurisdiction over lands has not always been conceded. The Constitution provides for the acquisition of Federal jurisdiction, but is silent as to the surrender of this authority.[108] Justice Story expressed the view in 1819 that the Federal Government was required by the Constitutional provision to assume jurisdiction over areas within its purview.[109] The debate preceding the enactment in 1871 of a statute retroceding jurisdiction over a soldiers' home in Ohio demonstrates the conflicting views that continued to exist on this subject even at that late date.[110] Both the Senators who favored the bill and those who opposed it were desirous of finding a means of avoiding the consequences of a decision of the Supreme Court of Ohio[111] to the effect that the residents of the home could not vote because of exclusive Federal 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." [112] The bill was passed,[113] and the Supreme Court of the State of Ohio, in another contested election case,[114] thereafter upheld the right of the inmates of the home to vote. The right of the United States to surrender its legislative jurisdiction is now firmly established.[115]

c. Methods of Relinquishing Federal Jurisdiction. Federal jurisdiction may be surrendered by cession by the Federal Government to the State, by an unrestricted disposition of the property to private hands, or by reversion upon noncompliance with a reverter provision in the state consent or cession statute.

(1) *Cession by the United States.* This method is sometimes referred to as "retrocession" or "recession." It presupposes that the United States has the same rights as a sovereign State to relinquish its legislative jurisdiction by the cession method. Although this right was not always accepted, as noted above, it seems to follow by necessary implication from the decision in *Fort Leavenworth Railroad v. Lowe*[116] and has not been seriously questioned since that case.

---

[107] *Id.*, at 133.

[108] U.S. Const. art. I, § 8, cl. 17. See discussion in paragraph 6.8*a*(1), ***supra.***

[109] *United States v. Cornell*, 25 F. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819).

[110] Cong. Globe, 41st Cong., 3d Sess. 512–24, 541–8 (1871).

[111] *Sinks v. Reese*, 19 Ohio St. 306 (1869).

[112] Cong. Globe, 41st Cong., 3d Sess. 517 (1871).

[113] 16 Stat. 399 (1871).

[114] *Renner v. Bennett*, 21 Ohio St 431 (1871).

[115] *Alabama v. Texas*, 347 U.S. 272 (1954); *Phillips v. Payne*, 92 U.S. 130 (1876); *State v. Bd. of Comm'rs*, 153 Ind. 302, 54 N.E. 809 (1899). The only exception is the State of North Dakota which is precluded by its constitution from accepting a retrocession of jurisdiction. N.D. Const. § 204.

[116] 114 U.S. 525 (1885).

It has been generally assumed that Congress must authorize cession of legislative jurisdiction to a State. The courts have not passed on whether the head of a department, acting pursuant to his general authority over property under his control, could accomplish such a cession under his administrative powers.[117]

The Secretaries of the various military departments have, however, been accorded the specific power to relinquish legislative jurisdiction to a State. The Act of October 26, 1970, making relinquishment possible, states:

> Not withstanding any other provision of the law, the Secretary of a military department may, whenever he considers it desirable, relinquish to a State all or part of the legislative jurisdiction of the United States over the lands or interests under his control in that State. Relinquishment of legislative jurisdiction under this section may be accomplished, (1) by filing with the Governor of the State concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State may otherwise provide.[118]

There is no general statutory authority for other than military department heads to cede jurisdiction over property under their control. Such legislation was recommended in 1956 by the Attorney General's Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States.[119] Along with the general authority for military departmental heads there have been a number of special statutes authorizing retrocession of jurisdiction over specific installations, or parts of such installations.[120] The following enactment is quoted as an illustration of the form of these statutes:

> . . . notwithstanding any other provision of law, the Secretary of the Army may, at such times as he may deem desirable, relinquish to the Commonwealth of Massachusetts all, or such portion as he may deem desirable for relinquishment, of the jurisdiction heretofore acquired by the United States over any lands within the Fort Devens Military Reservation, Massachusetts, reserving to the United States such concurrent or partial jurisdiction as he may deem necessary. Relinquishment of jurisdiction under the authority of this Act may be made by filing with the Governor of the Commonwealth of Massachusetts a notice of such relinquishment, which shall take effect upon acceptance thereof by the Commonwealth of Massachusetts in such manner as its laws may prescribe.[121]

[117] The Secretary of the Army has authority to conduct all affairs of the Department of the Army. 10 U.S.C. § 3012 (1970). Note that heads of departments may sometimes accomplish a surrender of jurisdiction by use of general statutory authority to dispose of and lease real property. See discussion in paragraph 6.9*c*(2), *infra*.

[118] 84 Stat. 1226, 10 U.S.C. § 2683 (1970).

[119] *Report* 72 (Part I, 1956).

[120] 83 Stat. 446 (1969) (Army National Guard Facility and U.S.A.M.C. Firing Range, Vermont); 78 Stat. 336 (1964) (Ft. Devens, Mass.); 78 Stat. 619 (1964) (Ft. Leavenworth, Kan.); 76 Stat. 436 (1962) (Ft. Hancock, N.J.); 75 Stat. 398 (1961) (Ft. Sheridan, Ill.).

[121] 78 Stat. 336 (1964). *Cf.* 78 Stat. 619 (1964), which makes an outright statutory grant to Kansas of jurisdiction over certain areas surrounding Fort Leavenworth, rather than authorizing the Secretary of the Army to take such action.

Jurisdiction is most often retroceded when the land itself is conveyed to the State.[122]

As noted, there is no general statutory authority for the cession of legislative jurisdiction to the States by non-military departments or agencies. However, Congress in 1962 provided for the grant of easements to state agencies and, in connection therewith, for the relinquishment of Federal jurisdiction over granted areas. This statute is very significant, as a large part of the problems associated with exclusive Federal jurisdiction are caused by the absence of State legislative authority on highways and roadways. The statute provides in part:

> . . . In connection with the grant of such an easement, the executive agency concerned may relinquish to the State in which the affected real property is located such legislative jurisdiction as the executive agency deems necessary or desirable. Relinquishment of legislative jurisdiction under [this] authority . . . may be accomplished by filing with the Governor of the State concerned a notice of relinquishment to take effect upon acceptance thereof or by proceeding in such manner as the laws applicable to such State may provide.[123]

(2) *Unrestricted Transfer to Private Hands.* In the case of *Fort Leavenworth Railroad v. Lowe,*[124] the Supreme Court upheld the validity of a cession of jurisdiction by Kansas to the United States. In so doing, the Court stated:

> . . . [The jurisdiction] 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.[125]

The principle thus stated has been considerably narrowed by subsequent decisions of the Court. In *Benson v. United States,*[126] it was contended that jurisdiction passed to the United States only over such portions of a 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 connection, the Court said:

> . . . 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 this occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put.[127]

The views expressed by the Court in the *Benson* case have been followed in subsequent decisions. In *Arlington Hotel Company v. Fant,*[128] it

---

[122] 85 Stat. 88 (1971) (Texas); 83 Stat. 100 (1969) (Tennessee).

[123] § 1, 76 Stat. 1129, 40 U.S.C. § 319 (1970). See Army Reg. No. 405–80, para 28 (9 August 1965).

[124] 114 U.S. 525 (1885).

[125] *Id.*, at 542.

[126] 146 U.S. 325 (1892).

[127] *Id.*, at 331.

[128] 278 U.S. 439 (1929). However, Congress can consent to state taxation of the lessee as under the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949. *Offutt Housing Co. v. Saipy,* 351 U.S. 253 (1956).

was held that leasing a portion of a reservation to a private hotel operator did not result in loss of Federal jurisdiction, and in *United States v. Unzeuta,*[129] the Court decided that the United States did not lose jurisdiction over an area granted as a right-of-way across a military reservation.

It is therefore established that the grant of minor interests to private parties within a military installation does not result in loss of such Federal jurisdiction as the United States possesses. A problem occurs, however, when the United States makes an unrestricted disposal of fee title to private interests, a situation presented to the Supreme Court in *S.R.A., Inc. v. Minnesota.*[130] The United States had acquired exclusive jurisdiction over a Federal reservation and subsequently disposed of it to a private party under an installment-sales contract. The State assessed a real property tax on the interest of the purchaser, "subject to fee title remaining in the United States." The Court concluded that the State could not impose the tax unless it had recovered jurisdiction over the property. It held, in this respect, that the purchaser had obtained equitable title to the property and legislative jurisdiction had been returned to the State. The following statement from the Court's opinion explains the basis of its reasoning:

> . . . 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 non-federal hands is a relinquishment of the exclusive legislative power. Recognition has been given to this result as a rule of necessity. . . . 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 sales.[131]

The above authorities establish the principle that an unrestricted transfer of Federal property to private ownership will result in the loss of any jurisdiction the United States possesses over it. However, this appears to apply only where the Federal jurisdiction is predicated on ownership. As had been noted, it is possible for the United States to exercise jurisdiction over land it does not own.[132] The sale of a Government building in the District of Columbia, for instance, would not result in return of legislative jurisdiction to the State of Maryland under the *S.R.A.* decision. A similar

[129] 281 U.S. 138 (1930). In *Humble Pipe Line Co. v. Waggoner,* 376 U.S. 369 (1964), it was held that disposition of a mineral interest did not result in loss of Federal jurisdiction.

[130] 327 U.S. 558 (1946).

[131] *Id.,* at 563–4.

[132] Paragraph 6.6*b, supra.*

problem arises when a State cedes exclusive jurisdiction to the United States over all land within a described park area. Under the terms of the statute, Federal jurisdiction is obtained over privately owned as well as Government property in the area.[133] Would the unrestricted sale of the remaining Government property to private owners result in termination of Federal jurisdiction?

(3) *Reversion Under State Law.* Many State consent and cession laws provide that Federal jurisdiction acquired under their provisions will continue only so long as the property is used for certain specified purposes and no longer. In *Crook, Horner & Co. v. Old Point Comfort Hotel Company,*[134] the Commonwealth of Virginia had ceded exclusive jurisdiction over certain land to the United States. The statute expressly provided that, should the United States appropriate the land to any purpose other than fortifications for national defense, jurisdiction would revert to the State. The court indicated that this was the first cession statute considered by the courts which contained such a reverter clause, and held that use of the land for hotel purposes caused jurisdiction to revert to the State.

In *Palmer v. Barrett,*[135] New York had ceded exclusive jurisdiction over the Brooklyn Navy Yard to the United States on the condition that it be used for a navy yard and hospital purposes. The statute provided that the United States would retain jurisdiction "as long as the premises described shall be used for the purpose for which jurisdiction is ceded and no longer." Part of the area was subsequently leased to the City of Brooklyn for use by market wagons. The lease was terminable by the United States on 30 days' notice and provided that the City would patrol the premises, that no permanent buildings would be erected on the area, and that during the period of the lease the water tax for water consumed by the Navy Yard would be reduced to that charged 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 Supreme Court disposed of this contention as follows:

> . . . 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.*[136]

---

[133] This was the situation involved in *Petersen v. United States,* 191 F. 2d 154 (9th Cir), *cert. denied sub nom. California v. United States,* 342 U.S. 885 (1951).

[134] 54 Fed. 604 (C.C.E.D. Va. 1893).

[135] 162 U.S. 399 (1896).

[136] *Id.,* at 404 (emphasis added).

There has been no judicial clarification of the above statement and it represents the current state of the law. In addition to the obvious difficulty created by the phrase "at least suspended" employed by the Court, there are hidden problems involved in the decision. Leasing operations are largely decentralized in the Army, and representatives of the Chief of Engineers execute most leases.[137] Records are normally maintained on the local level, and there is no requirement that copies of leases be forwarded to The Judge Advocate General as in the case of fee transactions.[138] In many instances, these local records have been retired or destroyed, so that it is not always easy to determine whether a particular tract has or has not at some time been leased to private interests. When a problem involving Federal jurisdiction arises and the applicable State consent or cession statute contains a reverter provision, it is always advisable to review local source materials carefully in an attempt to determine whether the property has ever been leased.

The *Palmer* case involved an express provision for reversion of jurisdiction upon occurrence of the specified contingency. A number of state statutes describe the *purpose* for which land must be used in order to be covered by the consent or cession, but do not expressly provide for reversion of jurisdiction in event the use is later diverted to another purpose. Can a reverter provision be implied under such circumstances? The answer is not clear and must depend upon a careful interpretation of the meaning and effect of the state statute in question. The Judge Advocate General has expressed the view that the matter is largely unsettled and judicial precedent is inconclusive on the point. As a general principle, however, where Federal jurisdiction is obtained over property acquired for particular purposes, the courts will not inquire as to the actual uses to which any portion of the property may be put.[139]

Where jurisdiction is ceded to the United States "to be exercised so long as the same shall remain the property of the United States," no reversion takes place when the United States enters into a long-term lease with a third party,[140] or grants a right-of-way across the property.[141] It is evident that a reverter clause of this type is not operative where the United States disposes of interests in the property less than the fee.

d. Acceptance of Jurisdiction by the State. There is some uncertainty whether legislative jurisdiction can be returned to a State without its acceptance or consent. It has been noted earlier[142] that the United States does not acquire Federal jurisdiction without an acceptance. Somewhat the same type of question arises when the United States attempts to return legislative jurisdiction to a State. It is likely that the method by which the United States purports to relinquish jurisdiction has a bearing on this question.[143]

---

[137] Army Reg. No. No. 405-80, para. 5 (9 August 1965).
[138] See discussion in paragraph 6.2, *supra.*
[139] See *Benson v. United States,* 146 U.S. 325 (1892).
[140] *Arlington Hotel Co. v. Fant,* 278 U.S. 439 (1929).
[141] *United States v. Unzeuta,* 281 U.S. 138 (1930).
[142] Paragraph 6.8*d, supra.*
[143] See discussion in pargaraph 6.9*c, supra.*

There are court decisions to the effect that where the United States purports to *cede* its jurisdiction to a State, acceptance by the State is unnecessary.[144] It is possible that these decisions stand merely for the proposition that acceptance by the State is presumed in the absence of an affirmative rejection.[145] This would be consistent with the Federal acceptance principle prevailing before 1940.[146] On the other hand, the view can be taken that a State is powerless to reject jurisdiction ceded to it. This view finds support in the general principle that States have residual political jurisdiction, and the Federal Government only possesses such powers as are delegated to it or reserved by it.[147] It is equally possible to conclude that some acquiescence, acceptance, or consent by the State is required, and it has been said that this follows naturally from the reasoning of the Supreme Court in *Fort Leavenworth Railroad v. Lowe.*[148] In that case, the Court upheld cession as a method by which a State might transfer jurisdiction to the United States and spoke in terms of ". . . the State and general government [dealing] with each other in any way they may deem best to carry out the purposes of the Constitution. . . ." [149] If the assent of the State in some form is necessary, a problem occurs when the United States purports to surrender jurisdiction by ceding it to the State and the State rejects the proffer. There are no reported court decisions precisely on the point.

Most Federal statutes authorizing the retrocession of jurisdiction to a State contain some such provision as "this grant must be accepted by the State in such manner as its laws provide." [150] It is accepted that unless the State accepts in accordance with such a condition, jurisdiction is not transferred.[151] In *State v. Lohnes,*[152] the question was presented whether the State courts had jurisdiction over an offense committed on an Indian reservation over which exclusive Federal jurisdiction had been reserved at the time the State was admitted into the Union. A Federal statute subsequently ceded jurisdiction to the State, but there had been no acceptance. The court held that jurisdiction was not obtained by the State in view of a provision in both the original statehood act and the State constitution that the reservation of jurisdiction to the United States should be "irrevocable without the consent of the United States and the people of said State." [153]

---

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

[145] It is not always beneficial for the State to recover legislative jurisdiction, as it assumes numerous sovereign obligations by so doing. There have been instances where the State has refused to accept the proffer of jurisdiction.

[146] See discussion in paragraph 6.8*d*, *supra*.

[147] See *United States v. Tully,* 140 Fed. 899, 905 (C.C.D. Mont. 1905).

[148] 114 U.S. 525 (1885).

[149] *Id.,* at 540. It is apparent that the Court's decision is not directly in point, as it relates only to cession of jurisdiction by a State to the United States.

[150] See examples in paragraph 6.9*c*(1), *supra*.

[151] Problems arise with respect to what method of acceptance conforms with the laws of a particular State. Most States have not enacted laws dealing with acceptance of jurisdiction surrendered by the United States. Obviously a special statute would be sufficient. In the absence thereof, would the action of the Governor be sufficient?

[152] 69 N.W. 2d 508 (Sup. Ct. N.D. 1955).

[153] *Id.,* at 517.

Different considerations possibly apply where the United States surrenders legislative jurisdiction by means of an unrestricted disposal of the property to private hands or there is a reversion pursuant to the terms of the original state consent or cession statute. In *S.R.A., Inc. v. Minnesota,*[154] the Supreme Court, in holding that disposal of title to property caused a surrender of Federal jurisdiction to the State, remarked that ". . . If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of a tax on the property." [155] In other words, action by the State may be sufficient to create an implication of acceptance, "if such a step is necessary." The result is not clear if the State were to act inconsistently with the acceptance of jurisdiction, or to specifically reject it.

Much the same considerations would appear applicable where Federal jurisdiction is "at least suspended" under the principle of the *Palmer* decision.[156] It may be concluded that, "if necessary," state acceptance may be presumed from the circumstances or from the reverter clause contained in the consent or cession law. However, there is a rational difficulty with the latter alternative in cases where the reverter clause in the interim has been eliminated by a change in state law. In any event, the necessity for state acceptance or consent where Federal jurisdiction reverts under the *Palmer* principle does not appear to have been raised in reported court decisions.

e. Effect of Federal Law Permitting States to Legislate. As will be described elsewhere in this chapter,[157] Congress has enacted various statutes permitting States to exercise substantial legislative authority over lands under exclusive Federal jurisdiction. The issue in these cases is whether Federal permission of this type constitutes a return of legislative jurisdiction to the States. In *Arapajolu v. McMenamin,*[158] the Supreme Court of California held that residents on a military reservation were entitled to vote in state elections on the ground that Congress had relinquished jurisdiction over those lands by Federal enactments of the type described below. The court reasoned:

> . . . Since the decision of the United States Supreme Court in the Dravo Case it has become established law that not only can the State Legislatures reserve to their States a portion of their preexisting jurisdiction in the cases where land is acquired within their borders by the United States pursuant to cl. 17, sec. 8, Art. I of the United States Constitution, so long as such reserved jurisdiction is not inconsistent with the governmental use for which the property is acquired, but also, that the Congress may recede or return to the States any jurisdiction over such properties which is not inconsistent with such governmental use. . . . In like fashion the Congress has receded and returned to the States jurisdiction over federal lands within their borders to enforce State unemployment insurance acts . . . to tax motor fuel sold therein . . . to levy and collect State income taxes. . . . It is clear that Congress has receded to the States jurisdiction in substantial particulars over federal

[154] 327 U.S. 558 (1946).
[155] *Id.*, at 564.
[156] *Palmer v. Barrett,* 162 U.S. 399 (1896). See paragraph 6.9*c*(3), *infra.*
[157] Paragraph 6.11, *infra.*
[158] 133 Cal. 2d 824, 249 P. 2d 318 (1952).

> lands over which the United States previously had exclusive jurisdiction. It may no longer be said of those lands that they are . . . "as foreign to . . . (California) as is the state of Indiana or Kentucky, or the District of Columbia." . . . 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.[159]

The same line of reasoning was adopted by the Supreme Court recently in *Evans v. Cornman*.[160] Because persons on a federal enclave in Maryland are subject to state criminal law under the Federal Assimilative Crimes Act, state income, gasoline, sales and use taxes, state unemployment and workmen's compensation laws, vehicle registration and licensing laws and process and jurisdiction of State courts and can use State courts and State public schools, the court concluded that such persons are "treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote." [161] Therefore, it seems that when Congress by statute allows States to legislate over the enclave and the State so legislates, the State must also accord to the residents of the enclave the same privileges and rights exercised by state residents. By legislating with respect to the enclave, the State concedes that the federal land is not a foreign entity but an element of the State.

Actually it is clear that something less than a return of legislative jurisdiction to the States is involved in legislation of the described type. If it is kept in mind that "jurisdiction," in this context, means "authority to legislate," [162] it is clear that the Federal Government has not surrendered its residual jurisdiction over the land areas affected. The United States retains basic legislative authority; it merely permits the States to apply their laws on a temporary basis. Thus a Federal statute permitting States to apply their tax laws over exclusive jurisdiction lands does not surrender legislative authority, because the United States may at any time enact legislation withdrawing the permission to tax.[163] Possibly the entire question is merely a matter of semantics, depending on how the word "jurisdiction" is understood and employed.

f. Federal Policy. The policy of the Federal Government with respect to the desirability of exercising jurisdiction over military land is reflected in Department of the Army regulations.[164] As a general rule, the Department of the Army will not seek Federal jurisdiction over military land and will retrocede unnecessary jurisdiction to the States as soon as possible. Concurrent jurisdiction may only be accepted where it is found necessary

---

[159] *Id.*, at 828–9, 249 P. 2d at 321–2. A number of authorities refer to Federal legislation of the type described as "receding" jurisdiction to the States. See *Report* 190–248 (Part II, 1957). *But cf.*, the definition of "exclusive legislative jurisdiction" at *id.*, p. 10, which is identical to that stated in paragraph 6.7*b*(1), *supra*.

[160] 398 U.S. 419 (1970).

[161] *Id.*, at 424–5.

[162] Paragraph 6.7*a*, *supra*.

[163] See *Offut Housing Co. v. Saipy County*, 351 U.S. 253, 260 (1956).

[164] Army Reg. No. 405–20 (28 June 1968).

that the Federal Government furnish or augment the law enforcement otherwise provided by a State or local government. Exclusive jurisdiction may be accepted in those few instances where the peculiar nature of the military operation necessitates greater freedom from state and local law, or where the operation of state or local laws may unduly interfere with the mission of the installation.

The above policy is based on a current realization that the exercise of Federal jurisdiction over military property has substantial disadvantages. It will be found subsequently in this chapter that substantial problems are created with respect to the applicability of substantive rules of civil and criminal law by the acquisition of exclusive Federal jurisdiction. Residents may be deprived of access to civil courts and law enforcement is simpler when the area is under State legislative authority. Moreover, Federal activities are sufficiently protected from State interference by the Federal immunity principle, except possibly with respect to nonappropriated-fund operations.[165] On the other hand, certain benefits in the tax and utilities fields arise from the exercise of exclusive Federal jurisdiction. For instance, the Government's right to wholesale gas and power rates for utilities consumed in exclusive jurisdiction areas results in substantial savings.

The Army and the other military departments have more flexibility than the other Government agencies in retroceding jurisdiction to the States. By statute[166] the Secretaries of the military departments can at their discretion relinquish jurisdiction which becomes effective when accepted by the State. The other various Federal agencies and departments must seek specific authority from Congress before attempting to retrocede jurisdiction.[167] The desirability of the exercise of Federal jurisdiction by the various agencies was reviewed from 1954 through 1956 by the Attorney General's Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas within the States. The Committee concluded that Federal jurisdiction was generally undesirable and recommended legislation which would have permitted each agency to return legislative authority over its reservations to the several States.[168] Thus far, however, only military departments have been accorded the authority to retrocede such jurisdiction.[169]

[165] *Compare Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942) *with Paul v. United States*, 371 U.S. 245 (1963).

[166] Army Reg. No. 405–20, para. 4 (28 June 1968).

[167] 84 Stat. 1226, 10 U.S.C. § 2683 (1970).

[168] *Report* 69–79 (Part I, 1956). For a commentary on the need for legislation in question, see Note, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754–62 (1964).

[169] 84 Stat. 1226, 10 U.S.C. § 2683 (1970).

Section IV. THE FEDERAL ENCLAVE

6.10. *General.*

a. Introduction. An "enclave" is a tract of land or territory located within and surrounded by foreign territory.[1] Areas over which the United States exercises exclusive jurisdiction, or partial jurisdiction in some instances,[2] are considered Federal enclaves. Are such areas Federal "islands," or do they remain a part of the States where situated? The extent to which State *territoriality* should be equated to State *legislative authority* is fundamental to the basic issue raised by the Federal jurisdiction concept, and its ramifications are many.

No one thinks of the District of Columbia as remaining a part of the State of Maryland from which it originally was constituted. There is early authority to the effect that, with respect to the District and other Federal areas under exclusive jurisdiction, ". . . the national and municipal powers of government, of every description, are united in the government of the union. . . ." [3] The courts have also spoken in terms of ". . . political authority, dominion and legislative power . . ." [4] as being in the United States where it possesses exclusive jurisdiction over an area. Even the most literal view of the matter reveals that the States have been deprived of basic legislative authority over such areas.[5] A State may not indirectly apply its laws on a Federal jurisdiction area, as where it attempts to regulate the purchasing, handling, and processing of milk in State territory to insure observance of a minimum price for milk sold on a military reservation.[6] It has been held that commerce from outside a State, through its territory, and into a Federal reservation under exclusive jurisdiction is "interstate commerce." This presupposes there is no transportation into the State for delivery and use therein.[7]

The above considerations provide substantial grounds to question whether areas under exclusive Federal jurisdiction remain a part of the States where situated. In *Howard v. Commissioners*,[8] the Supreme Court had the precise question before it. A municipality had annexed an adjoining ordnance plant of the Navy, which was under exclusive Federal jurisdiction. The City then attempted to enforce a tax on earnings of employees on the installation, as it was permitted to do by Federal statutes. A basic

[1] FUNK AND WAGNALLS, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1952 ed.).

[2] See discussion in paragraph 6.7*b*, *supra*. Where the State has reserved substantial authority, such as the right to apply its criminal laws, there may still be a problem whether the area covered is *within the State* for other purposes.

[3] *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845).

[4] *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525, 526 (1885).

[5] *Paul v. United States*, 371 U.S. 245 (1963).

[6] *Pacific Coast Dairy, Inc. v. Dep't of Agriculture of Calif.*, 318 U.S. 285, *rehearing denied*, 318 U.S. 801 (1943). See *Paul v. United States*, 371 U.S. 245 (1963). In *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), the Supreme Court upheld a state tax on a milk distributor measured by gallons distributed, where some distributions were to Federal activities located on exclusive jurisdiction areas.

[7] *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944); *Collins v. Yosemite Park Co.*, 304 U.S. 518, 538 (1938); *Murphy v. Love*, 249 F.2d 783 (10th Cir. 1957).

[8] 344 U.S. 624 (1953).

question presented was whether the annexation was valid. The Court concluded as follows:

> . . . 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 his 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.[9]

A similar problem of State territoriality was presented in *First Hardin National Bank v. Fort Knox National Bank.*[10] A suit to enjoin a national bank located on an exclusive jurisdiction military reservation from establishing a branch bank outside the reservation in Hardin County was unsuccessful. The applicable Banking Act of Kentucky allowed a bank to establish a branch office in the same city or county in which the principal office was located. The sole question before the court was whether that part of Fort Knox, which was part of Hardin County at the time it was acquired by the United States with the consent of Kentucky and upon which the defendant bank was located, was a part of Hardin County as the word "county" was used in the Banking Act. In holding that it was, the court said:

> The principle has been well established that a military reservation within a state remains a geographical part of the city, county and state of which it was part at the time of acquisition by the United States.[11]

The *Howard* case should have been expected to resolve all difficulties based on the supposed extraterritoriality of Federal exclusive jurisdiction areas, but that has not been the case. The decision may be taken to stand generally for the proposition that, insofar as *Federal law* is concerned, such areas remain part of the State. But there is state law to contend with, and decisions in this area are vacillating and confusing.[12] This situation

[9] *Id.*, at 626-7.

[10] 361 F.2d 276 (6th Cir.), *cert. denied*, 385 U.S. 959 (1966).

[11] *Id.*, at 279. See *Beagle v. Motor Vehicle Accident Indem. Corp.*, 26 App. Div. 2d 313, 274 N.Y.S. 2d 60 (1966); *Alabama-Tennessee Natural Gas Co. v. City of Huntsville*, 153 So.2d 619 (Ala. 1963).

[12] *E.g., United States v. City of Bellevue*, 334 F. Supp. 881 (D. Neb. 1971) (annexation invalid under state law as sole purpose was to increase revenue base); *I.B.M. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957) (state tax on personal property on military reservation upheld as legislature lacked power under constitution to not tax property on land once owned by State).

prevails because of the apparent anomaly in the idea that exclusive jurisdiction areas remain a part of the States which, in turn, lack legislative authority over them. In other words, State territoriality is normally conceived of in terms of legislative jurisdiction.

The problem is particularly significant where residents of exclusive jurisdiction areas seek to claim the benefits of state laws relative to voting, holding office, providing for relief benefits, divorce, lunacy, probate, adoption, education, bonuses, and similar matters. These subjects will be given specific consideration subsequently in this Section. However, the problem can arise in other areas as the following illustrations will show.

State "long-arm" statutes are a particular source of confusion. In *Berube v. White Plains Iron Works, Inc.*,[13] an action for damages was filed on the basis of an incident taking place on a military reservation under exclusive jurisdiction. The defendant was a foreign corporation, not licensed to do business in the State, and its only significant commercial activity within the geographical limits of the State was its activity on the military reservation. The court held that service of process pursuant to a statute providing for substituted service on a foreign corporation "which does business in this state" was invalid. However, the same question was presented in several other cases which all reached the opposite result.[14]

In *Western Union Telegraph Co. v. Commonwealth of Virginia*[15] a state statute required all telegraph companies to report annually ". . . all real and personal property of every description in this State, owned, operated or used by it. . . ." A proceeding to enforce a fine for failure to report properties on Federal reservations was instituted. The company claimed some of these properties were under exclusive jurisdiction and, presumably, were not therefore "in this State." To this contention the court replied:

> There are some earlier cases in which it is stated that a Federal area over which the United States has exclusive jurisdiction is not within a state. . . . But under later legislation, 4 U.S.C.A. § 110(e) and more recent cases, it has been definitely settled that the ownership by the United States of the land within a State does not cause it to cease to be a part of the State, even where the United States has exclusive jurisdiction over such land.[16]

Although the Court in *Howard* referred broadly to the possibility of a State's exercise of its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government,[17] it should be noted that the state action approved in *Howard* was specifically authorized by a federal statute.[18] Later cases have reaffirmed the need for congressional consent to state taxation of

[13] 211 F. Supp. 457 (D. Me. 1962).

[14] *Swanson Painting Co. v. Painters Local Union No. 260*, 391 F.2d 523 (9th Cir. 1968); *Knott Corp. v. Furman*, 163 F.2d 199 (4th Cir.), *cert. denied*, 332 U.S. 809 (1947); *Ackerley v. Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1963); *Brennan v. Shipe*, 414 Pa. 258, 199 A.2d 467 (1964).

[15] 132 S.E.2d 407 (Va. 1963).

[16] *Id.*, at 410. Although the court cited 4 U.S.C. § 110(e) (1958), it apparently meant to refer to sections 104–10 of that Title.

[17] 344 U.S. at 627. See note 9, *supra*, and accompanying text.

[18] 4 U.S.C. §§ 104–10 (1970) (state taxation of incomes earned within Federal enclave).

property located, or activities occurring, within Federal enclaves.[19] Moreover, despite *Howard*, State courts may be able to grant only limited equitable relief in cases involving Federal enclaves. For example, in *Brittain v. Reid*,[20] a suit to enjoin the operation of a taxicab business on Fort Gordon in violation of a covenant not to compete, the Georgia Supreme Court affirmed the judgment of a lower court that the state courts were without jurisdiction to grant the relief requested since only the installation commander could issue licenses to operate taxicabs within the confines of Fort Gordon.

b. Annexation by State Political Subdivisions. In *Howard v. Commissioners*[21] the Supreme Court was presented with an argument that an adjoining municipality could not annex a military installation under exclusive jurisdiction because it was not a part of the State. The Court ruled that this was not the case and that all the annexation involved was a readjustment of political boundaries within the State. It was specifically noted that the legislative jurisdiction of the United States would not be affected. This has long been the view of The Judge Advocate General. The opinion has also been expressed that the Secretary of the Army may cooperate in annexation actions pursuant to his general administrative powers, and that no express statutory authority is necessary as would presumably be the case if a relinquishment of jurisdiction were involved. It now appears settled that state political subdivisions, such as municipalities and school districts,[22] may annex areas under exclusive or partial Federal jurisdiction.

The state agency may proceed with annexation without (or even against) the consent of the United States. The *Howard* case[23] is silent on the point. However, it would appear from the reported facts in that case that the municipality in question acted unilaterally, without any participation whatsoever on the part of military authorities in charge of the reservation. In theory, it would appear from the reasoning of the Court that a State could frame its legislation in such manner as to accomplish annexation of any military reservation without the consent of military authorities. As a practical matter, however, most state annexation statutes require the consent of, or a petition from, the owner of property as large as the normal military installation. This affords some discretion to military authorities in determining whether to consent to or oppose annexation.

The usual motive of the state agency in attempting to annex military property is to permit it to reach, and annex, private property on the other

---

[19] *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964) (State may not impose *ad valorem* tax on private personal property on Federal enclave); *Mississippi River Fuel Corp. v. Cocreham*, 382 F.2d 929 (5th Cir. 1967), *petition for rehearing denied*, 390 F.2d 34 (5th Cir.), *cert. denied*, 390 U.S. 1014 (1968) (State may not impose severance tax on oil and gas extracted under lease on air force base). ***But cf. I.B.M. v. Evans***, 213 Ga. 333, 99 S.E.2d 220 (1957).

[20] 220 Ga. 794, 171 S.E.2d 903 (1965).

[21] 344 U.S. 624 (1953).

[22] See *DuPont-Fort Lewis School District No. 7 v. Clover Park School District No. 400*, 396 P.2d 979 (Wash. 1964).

[23] *Howard v. Commissioners*, 344 U.S. 624 (1953).

side of the military installation.[24] As a practical matter, annexation is normally beneficial to the military community. Such advantages as municipal fire protection, road maintenance, purchase of utilities at municipal rates, closer and better schools, and municipal police protection, at least around the perimeter of the installation, may result from annexation. On the other hand, there are situations in which annexation is disadvantageous. Where a municipality seeks annexation of an installation for the principal purpose of expanding its municipal facilities with anticipated tax revenue from post residents,[25] with no corresponding benefit to them, annexation has been opposed.

Until recently, there was a lack of policy guidance informing installation commanders how to act upon requests for annexation originating from local state political subdivisions. This occasionally created some confusion when a request of this nature was received. Army regulations now contain detailed procedures with respect to annexation of military installations.[26] Commanders receiving annexation requests, or originating such actions themselves, are required to evaluate the specific proposal and forward it through the Chief of Engineers, The Judge Advocate General, and the Deputy Chief of Staff for Logistics to the Assistant Secretary of the Army (Installations and Logistics), for determination of the Army position. Copies of all documents evidencing annexation of a military installation will be furnished for the records of the Chief of Engineers and The Judge Advocate General.[27]

c. Rights of the Federal Enclave Resident. The laws of each State accord various rights and benefits to State residents. Are residents of exclusive jurisdiction areas to be considered residents of the State for these purposes?[28] This may be more than a mere restatement of the question whether such areas are a "part of the State," for the rights and benefits in question are provided by *state law* and the apparent extension of state law into exclusive jurisdiction areas presents a real problem. It will be seen there is much confusion in the field, and no generalized answer can be provided. Although at one time it was possible to say that state law entirely controlled the extent to which rights and benefits were available to residents of Federal jurisdiction areas, the situation has changed since the United States Supreme Court decision in *Evans v. Cornman.*[29] While the problem described can arise in a large number of situations, the subjects considered below are regarded as the most significant. In every instance, it will be necessary to inquire into the possible effect of *Cornman.*

(1) *Voting.* Prior to 1970 most courts which had considered the voting question had ruled that persons living on Federal enclaves did not

[24] State statutes normally do not permit a political subdivision to annex territory not contiguous to its boundaries.

[25] Such a purpose may raise questions about the validity of the annexation under state law. *United States v. City of Bellevue,* 344 F. Supp. 881 (D. Neb. 1971) (annexation invalid under state law as sole purpose was to increase revenue base).

[26] Army Reg. No. 405-25 (26 March 1968).

[27] Army Reg. No. 405-25, para. 7 (26 March 1968).

[28] Some such benefits are accorded temporary residents, whereas others are restricted to permanent residents or domiciliaries of the State.

[29] 398 U.S. 419 (1970).

satisfy the residence requirements of the respective state election laws.[30] In 1970, however, the United States Supreme Court held, in ***Evans v. Cornman***,[31] that the State of Maryland would be violating the equal protection clause of the Fourteenth Amendment, by denying the right to vote to persons living on the grounds of the National Institutes of Health, a Federal enclave. Noting that a classification which justifies deprivation of the right of suffrage must be supported by a compelling State interest, the Court conceded *arguendo* that a State does have a compelling interest in insuring "that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them." [32] The Court concluded, however, that residents of the Federal enclave did have such an interest in view of the Federal Assimilative Crimes Act (incorporating certain state criminal laws into the federal law applicable on the enclave),[33] the Buck Act (permitting collection of certain state taxes on Federal enclave),[34] federal statutes permitting the States to apply their unemployment laws[35] and workmen's compensation laws[36] to enclave residents and employees, the state requirement that enclave residents register their automobiles in Maryland and obtain Maryland drivers' licenses, the enclave residents' amenability to state process, the enclave resident's access to Maryland courts in divorce and child adoption proceedings, and the enrollment of the children in Maryland public schools. Thus, the Court agreed with the conclusion of the District Court that "on balance the [appellees] are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote." [37]

Even after *Cornman* it is not entirely clear whether residents of all Federal enclaves are now entitled to vote in state elections. Of the factors cited by the Court, several related to the specific relationship between Maryland and the enclave residents, while others related to possible relationships growing out of Federal statutes which *permit*, but do not require, States to apply certain of their laws to enclave residents. Thus, there remains the question whether future cases will restrict *Cornman* to its facts or will regard it as expressive of a broad principle.

(2) *Holding Office.* Since state laws usually provide that an officeholder must be a resident or a registered voter of the State, much of what

---

[30] *E.g., Langdon v. Taramillo*, 80 N.M. 255, 454 P.2d 269 (1969); ***State ex rel. Wendt v. Smith***, 63 Ohio Abs. 31, 103 N.E.2d 822 (1951); *Parker v. Corcoran*, 155 Kan. 714, 128 P.2d 999 (1942); *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S.W. 299 (1906); *In re Town of Highlands*, 48 N.Y. St. Rep. 795, 22 N.Y. Supp. 137 (Sup. Ct. 1892); *Opinion of the Justices*, 42 Mass. (1 Met.) 580 (1841). *Contra*, ***Kashman v. Board of Elections***, 54 Misc. 2d 543, 282 N.Y.S.2d 394 (1967) (dictum); ***Adams v. Londeree***, 139 W.Va. 748, 83 S.E.2d 127 (1954); *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P.2d 318 (1952).

[31] 398 U.S. 419 (1970).

[32] *Id.*, at 422.

[33] 18 U.S.C. § 13 (1970).

[34] 4 U.S.C. § 104–10 (1970).

[35] 26 U.S.C. § 3305(d) (1970).

[36] 40 U.S.C. § 290 (1970).

[37] ***Evans v. Cornman***, 398 U.S. 419, 424–5 (1970).

was said in regard to voting, above, is applicable here. In those instances in which *Evans v. Cornman* clearly requires that enclave residents be permitted to vote and in which state laws require that officeholders be registered voters, enclave residents are entitled to hold state or local office.

Even before the Supreme Court applied the equal protection clause to the problems of residency in *Cornman,* the Supreme Court of West Virginia upheld the right of a resident of a Federal enclave to run for local office in *Adams v. Londeree.*[38] Londeree, the candidate for mayor in a local municipality, was neither a serviceman nor Government employee, but resided on a Navy installation under exclusive Federal jurisdiction.[39] The State constitution provided that only qualified voters could become officeholders and, further, that, in order to vote, a person must have been a "resident of the State for one year." A petition for *mandamus* was filed to require the ballot commissioners to strike the candidate's name from the ballot, on the ground that Londeree was not a resident of the State. The court refused to grant the petition, holding that the residence requirement was satisfied. In so holding, it stated:

> As to the question posed, we have concluded that the State, in ceding the territory within the South Charleston Naval Reservation, retained sovereignty over the same to the extent that such State sovereignty does not conflict or interfere with the "power" of the Federal Government "to exercise exclusive jurisdiction" as to the uses and purposes for which the land was acquired, and that such uses and purposes have no relation to the right or privilege of persons residing thereon, with the consent of the United States, to vote in State elections. 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 to vote.
>
> . . . Further indication of the intent on the part of the State to retain some right in the territory is found in the provision [in the "consent to purchase" statute] that "The evidence of title to such land shall be recorded as in other cases." Would the State be interested in "evidence of title" to land situated completely and absolutely in some foreign jurisdiction?
>
> . . . the United States has, we think, long since refused to accept sole sovereignty of such ceded lands and has repeatedly, both through its Courts and by Act of Congress, recognized and insisted that States have retained sovereignty as to such matters as do not interfer or conflict with the use of the areas by the United States for the purpose or purposes for which the same were ceded. By so holding, the necessity of disfranchising a large number of citizens is avoided. . . .[40]

As the above excerpt shows, the court in *Londeree* seemed to view "exclusive Federal jurisdiction" as something less than an absolute concept. The State retains a sort of residual sovereignty which it may exercise so long as there is no conflict with the legislative powers exercised by the United States. While this may be a convenient way to regard the matter, there is little question that it tends to read out the word, "exclusive," and changes the concept to one of primary, or predominant, Federal jurisdiction. This approach is consistent with the United States Supreme

[38] 139 W.Va. 748, 83 S.E.2d 127 (1954).

[39] The Navy, not needing the quarters in question, has leased them to Londeree.

[40] *Adams v. Londeree,* 139 W.Va. 748, 83 S.E.2d 127, 141 (1954). There was a strong dissent in the case, based largely on the suffrage precedents noted earlier.

Court's rejection of the "fiction of a state within a state" in *Howard v. Commissioners*[41] and its refusal to resurrect it in *Evans v. Cornman.*[42]

(3) *Relief Benefits for the Poor.* State law normally limits payment of relief benefits to residents of the State.[43] In the *Opinion of the Justices,*[44] the Supreme Judicial Court of Massachusetts held that residence on an exclusive jurisdiction area would not give persons so residing, or their children, a legal inhabitancy in the town in which located for the purpose of receiving support under laws for the relief of the poor. A contrary result was reached by the Supreme Court of Colorado in the case of *County of Arapahoe v. Donoho.*[45] The statute in question provided for payment of relief benefits to residents "in the county." The County Welfare Board denied the claim of Mrs. Donoho on the ground that she did not meet this qualification, as she was a resident of a military installation under exclusive Federal jurisdiction. She then instituted legal action to enforce her claim. The court noted that relief benefits were paid for in part by Federal funds and concluded:

> Therefore, in view of the fact that "exclusive legislative" jurisdiction does not operate as an absolute prohibition against state laws but has for its purpose protection of federal sovereignty, we conclude that it does not operate to prohibit the payment of relief to a resident of Fort Logan. The conferring of a benefit required by federal law cannot be construed as an act which undermines the federal sovereignty. Indeed by paying relief in these circumstances the federal policy to recognize citizens of the United States is fostered and promoted. . . .
>
> We see no clear conflict between the terms of the state law and the exercise of necessary functions in carrying out the program, in the light of the geographical location of Fort Logan. Perhaps the most persuasive factor in evaluating the contention of possible federal interference is the federal statute, 42 U.S.C.A. § 1352(b), supra. It is illogical to suppose that the federal government would interfere with the county carrying out a program contemplated by federal statute.
>
> In the light of all the foregoing, it is amply clear that the trial court was correct in ruling that the claimant satisfied statutory requirements of residence within Arapahoe County. . . .[46]

Even though *Evans v. Cornman*[47] is not directly relevant to the subject of relief benefits, it raises the question whether a State can deny benefits to Federal enclave residents without violating the equal protection clause of the Fourteenth Amendment. In the light of *Cornman* and other

---

[41] 344 U.S. 624, 627 (1953).

[42] 398 U.S. 419, 421-2 (1970).

[43] An exception to the general rule is found in *Board of Chosen Freeholders v. McCorkle,* 98 N.J. Super. 451, 237 A.2d 640 (1968) (holding state statutes on guardianships for dependent children and hospitalization of mentally ill applicable to inhabitants of Federal enclave, because they did not require state residency).

[44] 42 Mass. (1 Met.) 580 (1841).

[45] 144 Colo. 321, 356 P.2d 267 (1960).

[46] *Id.,* at 356 P.2d 273-4. The court noted statements from *Opinion of the Justices,* note 44, *supra,* and observed they ". . . are not convincing to us in this day. . . ." This case represents another application of the theory expressed in the *Adams* case that States retain a "compatible" sovereignty over exclusive jurisdiction areas. See notes 40-42, *supra.*

[47] See note 29, *supra.*

recent Supreme Court decisions,[48] any State which attempts to deny such benefits to enclave residents is seemingly faced with a dilemma. If a State argues that the enclave is a separate territorial and a political entity over which the Federal Government exercises exclusive jurisdiction, it may be admitting that travel to and from the enclave is, in effect, interstate. Such an admission requires an inquiry into the question whether the denial of benefits will act to penalize interstate travel. An affirmative answer to this question requires application of the principle announced in *Shapiro v. Thompson*[49] that state classifications which penalize the exercise of the constitutional right to interstate travel must be justified by a "compelling governmental interest." [50] In view of the State's ability to tax certain activities in the enclave,[51] it is difficult to see what "compelling interest" requires a denial of benefits.

If, on the other hand, a State abandons the "fiction of a state within a state," [52] its legislative scheme will fall unless there is some rationality in a denial of benefits to enclave residents.[53] Yet it is that fiction which alone appears to support such a denial when the relationship between a State and the enclave residents, as described in *Cornman,* is considered.

(4) *Education of Children.* In the *Opinion of the Justices,*[54] the Supreme Judicial Court of Massachusetts considered a specific question regarding the education of children residing on exclusive jurisdiction areas in the following terms:

> . . . 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

[48] *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Dunn v. Blumestein,* 405 U.S. 330 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Levy v. Louisiana,* 391 U.S. 68 (1968). *But cf. Jefferson v. Hackney,* 406 U.S. 535 (1972); *Labine v. Vincent,* 401 U.S. 532 (1971); *Dandridge v. Williams,* 397 U.S. 471 (1970).

[49] 394 U.S. 618 (1969).

[50] *Id.,* at 634.

[51] See note 34, *supra,* and accompanying text.

[52] See note 9, *supra,* and accompanying text.

[53] The traditional test of rationality has been stated as:

> The equal protection clause of the 14th Amediment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without basis and therefore is purely arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Recently, the test of "compelling governmental interest" has been developed to deal with classifications which threaten the exercise of fundamental rights. See note 50, *supra,* and accompanying text. Recent Supreme Court decisions involving the equal protection clause in welfare and related problems have shown confusion, both in the test used and the result reached. *Compare Weber v. Aetna Casulty & Surety Co.,* 406 U.S. 164 (1972) (denial of equal protection in distinguishing between acknowledged and unacknowledged illegitimate children under workmen's compensation law) and *Lavy v. Louisiana,* 391 U.S. 68 (1968) (denial of equal protection in distinguishing between legitimate and illegitimate children under wrongful death statute) *with Jefferson v. Hackney,* 406 U.S. 535 (1972) (no denial in different treatment of AFCD recipients) and *Lobine v. Vincent,* 401 U.S. 532 (1971) (no denial in distinguishing between legitimate and illegitimate children under state intestacy law).

[54] 42 Mass. (1 Met.) 580 (1841).

> reservation of jurisdiction to the State, than [service of process], are not entitled to the benefits of the common schools for heir children, in the towns in which such lands aresituated.[55]

The principle thus stated has provided the basis for virtually all subsequent decisions dealing with the right to public schooling of children resident on Federal lands.[56] Where the courts have found that legislative jurisdiction over a federally owned area has remained in the State, they have upheld the right of children residing in the area to attend state schools on an equal basis with state children generally.[57] Where the courts have found that exclusive 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 general basis that such areas are not within the State or school district, so that residents thereof are not residents of the State or school district.[58]

It should be noted, however, that some States have enacted legislation providing for the education of children residing on military reservations.[59] Mention should also be made of so-called "Impacted Area" legislation, which provides financial assistance to local school authorities in areas where there is substantial Federal activity.[60] This has undoubtedly led state schools to accept children from Federal areas without regard to jurisdictional status. In accepting funds pursuant to this authority, a State enters into certain "assurances" to provide education for Federal children. It has been held that a binding contract is thus consummated, so that if the State attempts to withdraw from its commitment, the United States may seek an injunction to require the State to perform.[61]

There remains the question whether the situation has been altered by the United States Supreme Court's application of the equal protection clause in *Evans v. Cornman.*[62] Much of what was said concerning relief benefits above is pertinent here. However, there is one feature of public education which could alter the analysis. Since much of this education is financed by an *ad valorem* property tax, it is likely that States which desire

---

[55] *Id.*, at 42 Mass. (1 Met.) 583. *Cf. Newcomb v. Rockport*, 183 Mass. 74, 66 N.E. 587 (1903).

[56] *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 100 A.2d 621 (1953); *Independent School Dist. v. Central Education Agency*, 247 S.W.2d 597 (1952), *aff'd*, 152 Tex. 56, 254 S.W.2d 357 (1953); *Miller v. Hickory Grove School Bd.*, 162 Kan. 528, 178 P.2d 214 (1947); *McGwinn v. Bd. of Education*, 33 Ohio Op. 433, 69 N.E.2d 391 (1945), *aff'd*, 78 Ohio App. 405, 69 N.E.2d 381, *appeal dismissed*, 147 Ohio St. 259, 70 N.E.2d 776 (1946); *In re Annexation of Reno Quartermaster Depot*, 180 Okla. 274, 69 P.2d 659 (1937); *Rolland v. School Dist.*, 132 Neb. 281, 271 N.W. 805 (1937); *Rockwell v. Independent School Dist.*, 48 S.D. 137, 202 N.W. 478 (1925); *Hufford v. Herrold*, 189 Iowa 853, 179 N.W. 53 (1920).

[57] *McGwinn v. Hickory Grove School Bd.*, 162 Kan. 528, 178 P.2d 214 (1947); *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937).

[58] *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 100 A.2d 621 (1953); *School Dist. #20 v. Steele*, 46 S.D. 589, 195 N.W. 448 (1923).

[59] *E.g.*, Texas, Nebraska, and possibly others. See *Report* 219 (Part II, 1957).

[60] Act of 30 Sept. 1950, ch. 1124, 64 Stat. 1101, *as amended*, 20 U.S.C. §§ 236–44 (1970).

[61] *United States v. Sumter County School District No. 2*, 232 F. Supp. 945 (E.D.S.C. 1964).

[62] See note 29, *supra.*

to deny educational benefits to the children of enclave residents will base such denials on the ground that States are not authorized to collect *ad valorem* property taxes on Federal enclaves.[63] Thus, the States will argue that the discrimination between enclave residents and other state residents can withstand constitutional scrutiny, regardless of whether the standard of review is that of mere rationality or that of "compelling governmental interest." This argument is further supported by a recent United States Supreme Court decision which held that the *ad valorem* property tax is a valid system of state school financing.[64]

(5) *Domiciliary Legal Actions.* Under the laws of most States, courts have jurisdiction to entertain certain actions only if one or more parties is domiciled in the State, or is a resident thereof, or is present within the jurisdiction of the court.[65] The more important types of legal actions in this category are divorces, probate and guardianship proceedings, lunacy proceedings, adoption, state *habeas corpus* actions, and the like. The question arises whether residence on an exclusive Federal jurisdiction area satisfies such requirements.

Few residents of Federal areas meet jurisdictional requirements predicated on domicile, or permanent residency. Most such persons are mere temporary residents on Federal property and maintain permanent residency elsewhere.[66] Nevertheless, situations do arise where a person involved in litigation of the type in question has no domicile other than upon an area under exclusive Federal jurisdiction.[67]

Domiciliary legal actions give rise to the same questions previously noted in connection with voting, holding office, relief benefits, and education. The leading case in this area is *Lowe v. Lowe,*[68] in which the Maryland Court of Appeals held that residents of an exclusive jurisdiction area were not such residents of the State as to entitle them to file a bill for divorce.[69] The court observed that such residents 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 cease to be a part of the State. With respect to the general problem involved in domiciliary legal actions by residents of exclusive jurisdiction areas, the court stated:

[63] State taxes on motor fuel (4 U.S.C. § 104 (1970)), state sales and use taxes (4 U.S.C. § 105 (1970)), and state income taxes (4 U.S.C. § 106 (1970)) are permitted.

[64] *San Antonio Independent School District v. Rodriguez et al.*, 36 L.Ed.2d 16 (1973).

[65] There is much variance in state law on this subject. It is, of course, necessary to ascertain the residence requirements, if any, specified by the laws of the particular State involved.

[66] See *Harris v. Harris*, 205 Iowa 108, 215 N.W. 661 (1927), where the absence of an Army officer from a State for 30 years, with only occasional return visits, was held not to have terminated domicile for divorce in the State.

[67] See *Pendleton v. Pendleton*, 109 Kan. 600, 201 Pac. 62 (1921); *Matter of Grant*, 83 Misc. 257, 144 N.Y. Supp. 567 (1913).

[68] 150 Md. 592, 133 A. 729 (1926).

[69] *Accord, Chaney v. Chaney*, 53 N.M. 66, 201 P.2d 782 (1949); *Dicks v. Dicks*, 177 Ga. 379, 170 S.E. 245 (1933). *Cf. Crownover v. Crownover*, 58 N.M. 597, 274 P.2d 127 (1954); *Darbie v. Darbie*, 195 Ga. 769, 25 S.E.2d 685 (1943); *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464, *clarification denied*, 144 Kan. 155, 59 P.2d 1101 (1936). The latter three cases involved interpretation of state statutes, enacted in the interim, which extended divorce jurisdiction to residents of Federal areas.

> . . . 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. . . .[70]

The situation in general is not quite as bad as represented by the court in the *Lowe* case. There are a few cases holding that residence on an exclusive Federal jurisdiction area is sufficient to satisfy State court jurisdictional requirements.[71] A number of States have enacted statutes providing that such residence is sufficient,[72] and various Federal agencies have statutory authority enabling disposition of the personal assets of patients and members of their establishments.[73] Probably the most remedial aspect of the matter is the tendency of the courts to act realistically in the face of an obvious need and assume jurisdiction over domiciliary matters without questioning the sufficiency of residence on a Federal reservation. Thus, in the *Lowe* case, while concluding that residents of an exclusive Federal jurisdiction area could not satisfy legal requirements for divorce jurisdiction, the Maryland Court of Appeals noted a widespread practice of lower courts in the State to assume jurisdiction over probate and administration matters involving such residents. Additionally, the *Cornman* rationale, as related to relief benefits discussed above, could have some impact in changing the availability of state domiciliary legal actions for the Federal enclave resident.

(6) *Miscellaneous State Rights.* There are numerous miscellaneous rights and privileges, other than those discussed, which are usually reserved under state law for residents. Among these are the admission to practice law, medicine, and other professions; the privilege of employment by State or local governments; receiving higher education at State institutions free or at a favorable tuition; acquiring hunting and fishing licenses at lower cost; obtaining visiting nurse service or care at public hospitals, orphanages, asylums, or other institutions; serving on juries; and acting as an executor of a will or administrator of an estate. Different legal rules may also apply with respect to attachment of property of nonresidents.[74] Whether residence on an exclusive Federal jurisdiction area is sufficient for these purposes is subject to the uncertainties previously discussed. There is scant litigation involving such miscellaneous matters, however, and it is probable that most such issues are resolved by State administra-

---

[70] *Lowe v. Lowe*, 150 Md. 592, 133 A. 729, 732–3 (1926).

[71] *Shea v. Gehan*, 70 Ga. App. 229, 28 S.E.2d 181 (1943); *In re Kernan*, 247 App. Div. 664, 288 N.Y. Supp. 329 (1936); *Bliss v. Bliss*, 133 Md. 61, 104 A. 467 (1918); *Divine v. Unaka National Bank*, 125 Tenn. 98, 140 S.W. 747 (1911).

[72] *E.g.*, Md. Code Ann. art. 16, § 23 (1966); Cal. Gov't Code § 126 (West 1966); Fla. Stat. Ann. 47.081 (1969); Tenn. Code Ann. § 36–803 (Supp. 1971); Va. Code Ann. § 20–97 (Supp. 1972).

[73] 10 U.S.C. §§ 4712–13 (1970) (Army and Air Force); 10 U.S.C. § 6522 (1970) (Navy); 38 U.S.C. §§ 5220–28 (1970) (Veterans Administration); Act of 1 July 1944, ch. 373, § 321, 58 Stat. 695, *as amended*, 42 U.S.C. § 248 (1970) (Public Health Service).

[74] See *Bank of Phoebus v. Byrum*, 110 Va. 708, 67 S.E. 349 (1910).

tive agencies. Again, the possible effect of the United States Supreme Court's equal protection ruling in *Evans v. Cornman* can be argued in the same manner as the availability of relief benefits, discussed above.

d. Availability of Judicial Forums. If a cause of action arises on a military installation under exclusive Federal jurisdiction, the prospective litigant may discover a substantial problem in locating an available judicial forum in which to enforce his claim. This arises because State courts do not conceive of exclusive Federal jurisdiction areas as being within the State and county, and therefore within their venue and territorial jurisdiction. The jurisdiction of Federal district courts, on the other hand, is severely limited, being available to such a litigant only in certain types of actions where substantial sums are involved.

To consider the matter properly, it is necessary to visualize legal causes of action as either *transitory* or *local.* "Transitory" actions are those which may be enforced in any court obtaining jurisdiction over the defendant, regardless of where the cause arises. They are limited primarily to contract actions, and certain torts. "Local" actions, on the other hand, are those which must be enforced in the court having physical jurisdiction over the person or *res,* or, in some instances, having jurisdiction over the place where the cause arose. Local actions involve such matters as *in rem* domiciliary proceedings, including divorce, adoption, probate, lunacy, and the like. The laws of the forum, in any given instance, will determine whether a particular action is to be treated as transitory or local.

Transitory actions arising on exclusive jurisdiction areas normally present little problem with respect to the availability of a forum. The litigant may bring suit in any State court having jurisdiction over the adverse party.[75] As the cause of action, in such instances, may be based upon Federal, rather than state, law,[76] Federal courts are also available if the amount in controversy exceeds $10,000.[77] It is with respect to local actions arising on exclusive jurisdiction areas that the real problem arises. In general, the venue and jurisdiction of State courts do not extend to such actions.[78] In case of domiciliary local actions, further difficulties are presented as to the sufficiency of residence on such areas in satisfying jurisdictional requirements.[79] Federal courts are available in very limited circumstances, and then only when the monetary amount noted above can be satisfied. Such courts do not have jurisdiction as to many types of local actions, such as divorce actions,[80] matters strictly probate or administra-

[75] *Ohio River Contract Co. v. Gordon*, 244 U.S. 68 (1917).

[76] See discussion in paragraph 6.11, *infra.*

[77] 28 U.S.C. §§ 1331, 1441 (1970).

[78] See *Martin v. House*, 39 Fed. 694 (C.C.E.D. Ark. 1888); *Woodfin v. Phoebus*, 30 Fed. 289 (C.C.E.D. Va. 1887); *United States v. McIntosh*, 57 F.2d 573, 2 F. Supp. 244 (E.D. Va. 1932); *appeal dismissed*, 70 F.2d 507 (4th Cir.), *cert. denied*, 293 U.S. 586 (1934); *In re Town of Highlands*, 48 N.S. St. Rep. 795, 22 N.Y. Supp. 137 (Sup. Ct. 1892); *Dibble v. Clapp*, 31 How. Pr. 420 (Buffalo Super. Ct. 1866). *But cf. In re Kernan*, 247 App. Div. 664, 288 N.Y. Supp. 329, *aff'd*, 272 N.Y. 560, 4 N.E.2d 737 (1936); *Divine v. Unaka National Bank*, 125 Tenn. 98, 140 S.W. 747 (1911); *Lotterle v. Murphy*, 67 Hun. 76, 21 N.Y. Supp. 1120 (Sup. Ct. 1893).

[79] See paragraph 6.11*b*, *infra.*

[80] *Ostrom v. Ostrom*, 231 F.2d 1913 (9th Cir. 1955).

tive in nature,[81] or those involving domestic relations of husband and wife or parent and child.[82] The result is that there is no available forum for many local actions arising on exclusive and partial jurisdiction areas.

Once State courts accept jurisdiction in cases of this type, however, they normally have authority to provide an adequate remedy even though activities or persons on exclusive jurisdiction areas may be affected. For instance, where a State court in a divorce action had personal jurisdiction over the parties and ordered the respondent-serviceman not to visit his assigned quarters on a military post under exclusive jurisdiction, The Judge Advocate General concluded:

> . . . It is the opinion of this office that a state court having *in personam* jurisdiction has the power to require a defendant serviceman to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might require to be done or omitted within the limits of such territory. It is the further opinion of this office, however, that a contrary result would follow if the court's order would prevent accomplishment of an assigned duty or materially interfere with a Federal function. . . .[83]

In another instance, a local State court committed a nonconsenting psychotic dependent to an Army hospital on a military reservation under exclusive Federal jurisdiction. The Judge Advocate General expressed the view that, while such a commitment order imposes no duty on Army authorities, it does confer upon them the privilege of interfering with the patient's personal freedom. It was pointed out that if, after admission, the patient is found to be non-psychotic and not dangerous to himself or others, his further involuntary detention is unauthorized, despite the terms of the commitment order.[84]

e. Service of State Civil and Criminal Process. Virtually all state consent or cession laws transferring exclusive or partial jurisdiction to the United States reserve a right for state authorities to serve civil and criminal process on the area covered. It has long been settled that such a reservation is not inconsistent with Federal exercise of exclusive jurisdiction.[85] Where the United States has only concurrent jurisdiction or a proprietorial interest, the right of state authorities to serve process exists by virtue of the applicability of state law throughout the area.[86] Service of state process in exclusive and partial jurisdiction areas is in-

---

[81] *Looney v. Capital Bank*, 235 F.2d 436 (5th Cir.). *cert. denied*, 352 U.S. 925 (1956); *McCan v. First Nat'l Bank of Portland*, 139 F. Supp. 224 (D. Ore. 1954). *Cf.* 18 U.S.C. § 4244 (1970).

[82] *Bercovitch v. Tanburn*, 103 F. Supp. 62 (S.D.N.Y. 1952).

[83] JAGA 1962/3507, 26 Feb 1962. The rationale of this opinion is supported by *Corbett v. Nutt*, 77 U.S. 464 (1870). Note the reference to the Federal immunity, or supremacy, principle, which is considered in paragraph 6.13, *infra*.

[84] JAGA 1963/3645, 28 Feb 1963. In *Shea v. Gehan*, 70 Ga. App. 229, 28 S.E.2d 181 (1943), it was held that a county court had jurisdiction to commit a person to a veterans' hospital as insane, although the hospital was located on land under exclusive Federal jurisdiction and the person was a patient in the hospital and not a resident of Georgia.

[85] *United States v. Cornell*, 25 F. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819); *United States v. Travers*, 28 F. Cas. 204 (No. 16,537) (C.C.D. Mass. 1814).

[86] *Cockburn v. Willman*, 301 Mo. 575, 257 S.W. 458 (1923).

valid unless the right to do so has been reserved by the State, or Congress has enacted enabling legislation as it has done in some instances.[87]

A reservation to serve process within an exclusive or partial Federal jurisdiction area applies only to process arising from offenses, incidents, or activities taking place within the surrounding state area.[88] Otherwise, the process reservation would have the effect of extending substantive State law within the area. Suppose, for instance, that a transitory cause of action in contract[89] arises on a military post under exclusive jurisdiction but subject to such a state reservation. The plaintiff may be able to commence legal proceedings in a local State court, but it is possible that service of process within the installation would be invalid as the incident did not take place outside the area. Also, The Judge Advocate General of the Air Force has expressed the view that such process reservations are insufficient to cover attempted service by local state authorities of process received from another State based on incidents taking place there.[90]

Where the State has reserved or been granted the right to serve process within a Federal area, its authorities must be permitted to go upon the area for the purpose of effecting service, subject to reasonable controls designed to prevent interference with Federal functions.[91] In this respect, Army regulations currently provide as follows:

> (3) Service of civil process within the United States, its territories and possessions is as follows: . . .
>
> (c) *Process of State courts in areas of exclusive Federal jurisdiction in which the right to serve process is reserved by, or granted to, the State or States, in areas of concurrent jurisdiction, and in areas in which the United States has only a proprietorial interest.* . . . Civil officials authorized by applicable State law will be permitted, upon proper application, to enter areas subject to the right to serve process for the purpose of making service. Commanders or other Army officials in charge will assist the civil officials by making military personnel or civilian employees available for service of process, subject to reasonable limitations. This authority does not extend, however, to the levy on or the sale of personal property essential to or proper for the use of military personnel or civilian employees in the performance of their official duties.[92]

The above provision does not relate to service of criminal process involving military personnel. The delivery of military offenders to civil

[87] See Act of 2 March 1795, ch. 40, 1 Stat. 426. *See also* 23 Op. Att'y Gen. 254 (1900) and *People of the State of California v. United States*, 235 F.2d 647, 655, 661 (9th Cir. 1956). Even where service of process would otherwise be invalid under this principle, an individual may voluntarily accept service in accordance with the laws of the State issuing the process. See Army Reg. No. 27–40, para. 1–5 (15 June 1973).

[88] *United States v. Cornell*, 25 F. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819); *People v. Mouse*, 203 Cal. 782, 265 P. 944, *appeal dismissed*, 278 U.S. 614 (1928); *People v. Kraus*, 212 App. Div. 397, 207 N.Y. Supp. 87 (1924); *Lasher v. State*, 30 Tex. Cr. App. 387, 17 S.W. 1064 (1891); *Commonwealth v. Clary*, 8 Mass. 72 (1811).

[89] See discussion in paragraph 6.11c, *supra*.

[90] Op JAGAF 1955/33, 22 Jul 1955, 5 Dig. Ops. *Posts, etc.*, § 25.9. *Cf.* JAGA 1951/6857, 21 Nov 1951, 1 Dig. Ops. *Mil. Pers.*, § 3.5.

[91] See discussion in paragraph 6.14, *infra*, relative to the legality of military commanders effecting service of process.

[92] Army Reg. No. 27–40, para. 1–5 (15 June 1973).

authorities for state prosecution is governed by Article 14 of the *Uniform Code of Military Justice*,[93] which provides as follows:

> (a) 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.
>
> (b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

The applicable Army regulations[94] set forth a policy whereby military members will be delivered to civil officers on reasonable request. However, the authority exercising general court-martial jurisdiction has discretion to refuse such delivery. Among other pertinent factors, he should consider the seriousness of the offense charged, whether court-martial charges are pending against the alleged offender, whether he is serving a sentence imposed by court-martial, and whether under the existing military situation, the best interests of the service warrant his retention in the armed forces. A warrant, indictment, presentation, or similar process should accompany the request by the civil officer. Where delivery is refused by Army authorities, a report must be made to The Judge Advocate General. The regulations further provide that military personnel are to be treated as private persons with respect to extradition. It is therefore contrary to policy to transfer such personnel from a station within one State to a station in another State for the purpose of making them amenable to civilian legal proceedings.[95]

The word "process" is obscure in some of its applications. Consequently, even though a State has reserved the right to serve "process" [96] in an exclusive or partial jurisdiction area, it is not always certain whether civil officers have the authority to serve various types of actions and writs of a judicial nature. A proper approach to the matter requires research of applicable state law[97] to determine the scope and meaning of the term, "process." It may be stated generally that the term explicitly covers the writ or other formal writing, issued by authority of law, for the purpose of bringing a defendant into a court of law to answer plaintiff's demands in a civil action.[98] On the other hand, difficulties can develop in attempts to apply the term to various other items such as notices, pleadings, petitions, complaints, informations, indictments, rules, orders, decrees, executions, subpoenas, citations, bonds in criminal cases, drawings of grand juries, tax

---

[93] 10 U.S.C. § 814 (1970).

[94] Army Reg. No. 600–40, para. 6 (4 November 1971).

[95] This latter provision is designed to protect the constitutional rights of military personnel.

[96] A reservation by a State of the right to "execute" process retains no more authority in the State than a right to "serve" process. *Rogers v. Squier*, 157 F.2d 948 (9th Cir. 1946).

[97] As it existed when the process reservation was imposed? See paragraph 6.12, *infra*.

[98] See 72 C.J.S. *Process* § 1 (1951).

books, writs or orders of attachment, etc.[99] The Judge Advocate General has expressed the view that a reservation of the right to serve process includes the right to levy on personal property on a post under exclusive jurisdiction to satisfy a judgment or attachment.[100]

6.11. *Substantive Law On The Federal Enclave*

a. General. It is the purpose of this paragraph to consider how the military practitioner can ascertain the substantive rule of law applying to an act or transaction taking place on a military reservation. The problem thus stated should be contrasted with the principles relating to legislative jurisdiction previously studied in this text. Legislative jurisdiction has reference to the *authority* of the United States or a State to enact general legislation applying within a Federal area. It should not be assumed that the *actual* state of the law on a particular question conforms to this structure. There are, in fact, substantial variances, depending on the subject matter of the legal question involved and, in some cases, the use to which the land area is put. The purpose of the following discussion is to bring out the relevant factors which enter into a determination of the substantive rule of law applying in a given case.

While perhaps obvious, it should be observed that most Federal law is predicated upon some specific grant in the Constitution other than that relating to general legislative jurisdiction over Federal areas. As to subjects covered by Federal law of this nature, considerations relating to legislative jurisdiction over Federal property are immaterial. Indeed, laws of the type described usually run everywhere throughout the United States, and apply as well within state territory as upon Federal. When a question arises concerning Federal income taxation, for instance, it is resolved on the basis of Federal law, regardless of the place where the question arises.[101] The same can be said for the many questions involving Federal laws relating to the government and regulation of the land and naval forces.[102] Numerous examples could be provided involving the commerce clause,[103] the authority of Congress to protect Government property,[104] and other Constitutional provisions. The point is that when a legal question arises in a field covered by such a Federal law, its provisions are applicable regardless of the jurisdictional status of the land area. Note that state law is not necessarily excluded. If the area is under state legislative jurisdiction, state laws which do not interfere with Federal functions may also apply.[105]

Subject to the foregoing observations, it may be stated generally that state principles of law (both civil and criminal) apply throughout land

[99] *Ibid.*

[100] Army regulations now make specific provision for levies on personal property under a reserved right to serve process. See Army Reg. No. 27–40, para. 1–5 (15 June 1973).

[101] *See generally* Internal Revenue Code, Title 26, *United States Code.*

[102] *See generally* Title 10, *United States Code.*

[103] U.S. Const. art. I, § 8, cl. 3. *E.g.*, 18 U.S.C. §§ 1154, 2421 (1970).

[104] U.S. Const. art. IV, § 3. *E.g.*, 18 U.S.C. § 1361 (1970); *cf.* 18 U.S.C. § 1363 (1970).

[105] See paragraph 6.12, *infra.* Thus willful depredation of Government property may violate state criminal laws as well as Federal law. See 18 U.S.C. § 1361 (1970).

areas in which the United States has a proprietorial interest only, areas under concurrent Federal jurisdiction, and areas under partial jurisdiction to the extent covered by the reservation of state authority. This is limited by the Federal immunity principle, which precludes a State from interfering unreasonably with a Federal activity or instrumentality.[106] On the other hand, Federal law as such applies throughout tracts[107] under exclusive Federal jurisdiction, those under concurrent jurisdiction, and those under partial jurisdiction except to the extent precluded by a state reservation of authority. However, there are various Federal statutes which adopt or apply state principles of law upon such areas, as will be made apparent subsequently.

b. Conflict of Law Principles. Where a legal question arises from an act or transaction upon a military installation, conflict of law principles should be considered to insure that the law of the place of occurrence is actually pertinent.[108] If it is not, the proper body of law should be resorted to, and the law applicable upon the military installation should be disregarded. It will be found that the law of the place of execution or occurrence normally governs the validity of a contract, liability for tort, or criminality of an act. This is not always the case, however, and variances occur under the laws of many forums. For instance, in some jurisdictions, the law of the place where a contract is performed governs its validity. So-called "procedural" rules are governed by the law of the forum in all States, but there is some controversy regarding what legal principles should properly be treated as "procedural." Space limitations preclude a comprehensive consideration of the effect of conflict of law rules on the problem treated herein. In the subsequent discussion, it will be assumed that these rules have been considered and that it has been concluded that the law of the place of execution or occurrence is applicable to a given act or transaction on a military installation.

c. Civil Law—Congressional Statutory Action. The extent to which state civil law, as such, applies throughout military real property is covered in the preceding paragraph. Where the property is under exclusive or partial [109] jurisdiction, state civil law rules normally have no operation or effect.[110] The Federal Government is the supreme legislative sovereign in such cases. However, Congress has not enacted any comprehensive body of civil law to apply within these areas, and there is said to be no general body of Federal common law to fill the void.[111] As to certain legal fields and types of facilities, Federal statutes have been enacted which adopt or extend state principles of law within exclusive and partial jurisdiction areas. Determination of the law applying in a given case depends initially on whether the subject area or facility is covered by one of these statutes.

---

[106] See paragraph 6.12, *infra.*

[107] See paragraph 6.4*e*, *supra*, which points out that the only proper approach to jurisdictional questions is on a tract-by-tract basis.

[108] 15A C.J.S. *Conflict of Laws* §§ 8–13 (1957).

[109] State civil rules only apply as such within partial jurisdiction areas to the extent permitted by the reservation of authority.

[110] *Western Union Tel. Co. v. Chiles,* 214 U.S. 274, 278 (1909).

[111] *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The principal Federal statutes which adopt or extend state law upon exclusive and partial jurisdiction areas are quoted and discussed below. It should be observed that some of these statutes are in the form of a *permission* for principles of state law to extend within such areas. As noted earlier, a few authorities view these provisions as amounting to a retrocession of legislative jurisdiction.[112] Some of the statutes in question appear to adopt state principles as *Federal law*, whereas others appear to apply state law *as such* within the Federal area. This is an important distinction and should be kept in mind as each provision is reviewed.

The first statute of major importance is concerned with state wrongful death and injury laws:

> In the case of the death of any person by the 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, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.[113]

The purpose of this statute was to provide a remedy for wrongful death in the nature of that provided by "Lord Campbell's Act." [114] It now appears settled that the statute applies current principles of state law to personal injury actions as well,[115] but damages to personal or real property are not covered. In *Murray v. Joe Gerrick & Co.*[116] the Supreme Court held that the statute did not adopt a state workmen's compensation law. It is probable that state principles become Federal law pursuant to this statute,[117] but there are decisions indicating that state law as such is extended throughout exclusive jurisdiction areas. In *Brennan v. Shipe*[118] the Pennsyvlania Supreme Court decided that substituted service or process could be made on the Secretary of State on behalf of a nonresident defendant involved in a motor vehicular accident on an exclusive jurisdiction area. The court reasoned that the Pennsylvania Nonresident Motorist Act, under which the service was effected, governed the "rights of the parties," and was therefore extended over the Federal area pursuant to the quoted statute.[119]

A cooperative plan is envisioned in the area of fish and game laws, as follows:

> The Secretary of Defense shall, with respect to each military installation or facility . . . in a State or Territory . . . require that all hunting, fishing, and

[112] See paragraph 6.8*e*, *supra*.

[113] 16 U.S.C. § 457 (1970).

[114] 58 Cong. Rec. 2052 (1919) (remarks of Senator Walsh); 69 Cong. Rec. 1486 (1928) (remarks of Senator Walsh).

[115] *Ashley v. United States*, 215 F. Supp. 39 (D. Neb. 1963); *Reed v. Charizio*, 183 F. Supp. 52 (E.D. Va. 1960). *Cf. Murray v. Gerrick & Co.*, 291 U.S. 315 (1934).

[116] 291 U.S. 315 (1934)

[117] See *Reed v. Charizio*, 183 F. Scpp. 52 (E.D. Va. 1960).

[118] 414 Pa. 258, 199 A.2d 467 (1964).

[119] *Cf. Reed v. Charizio*, 183 F. Supp. 52 (E.D. Va. 1960), where in a suit in a Federal court based on diversity jurisdiction it was held that the State substituted service statute could not be employed to obtain venue in the Federal Court.

> trapping at that installation or facility be in accordance with the fish and game laws of the State or Territory in which it is located; . . . require that an appropriate license for hunting, fishing, or trapping on that installation or facility be obtained, except that with respect to members of the Armed Forces, such a license may be required only if the State or Territory authorizes the issuance of a license to a member on active duty for a period of more than thirty days . . . without regard to residence requirements, and upon terms otherwise not less favorable than the terms upon which such a license is issued to residents of that State or Territory.[120]

> The Secretary of Defense is hereby authorized to carry out a program of planning, development, maintenance and coordination of wildlife, fish and game conservation and rehabilitation in military reservations in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of Interior, and the appropriate State agency designated by the State in which the reservation is located. Such cooperative plan may stipulate the issuance of special State hunting and fishing permits to individuals and require this [sic] payment of a nominal fee therefor, which fee shall be utilized for the protection, conservation and management of fish and wildlife, including habitat improvement and related activities in accordance with the cooperative plan: *Provided*, That the Commanding Officer of the reservation or persons designated by him are authorized to enforce such special hunting and fishing permits and to collect the fees therefor, acting as agent or agents for the State if the cooperative plan so provides.[121]

The effect of the foregoing provisions is to open military reservations for hunting, fishing, and trapping by the general public. Army regulations provide the format for cooperative agreements entered into under these statutes and contain other implementing provisions.[122] The installation provost marshal is charged with enforcing all hunting, fishing, and trapping regulations issued pursuant to this authority.[123] Where the State has retained legislative jurisdiction, state laws as such are applicable upon the reservation and are enforceable by state officials.[124] The converse is true where the United States possesses exclusive legislative jurisdiction. State game laws are adopted as Federal law and become enforceable only by Federal officials.[125] It should be noted that military personnel are not required to purchase state licenses to hunt, fish, or trap on exclusive jurisdiction areas if state laws discriminate against them with respect to purchase of licenses.[126]

Workmen's compensation is another area where the Federal Government has opted to apply state law to the Federal area:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all

---

[120] 10 U.S.C. § 2671 (1970).

[121] 16 U.S.C. § 670a (1970). Cooperative plans involving migratory game provided for in 16 U.S.C. § 670b (1970).

[122] Army Reg. No. 420–74 (27 June 1966).

[123] Army Reg. No. 420–74, para. 87*a* (27 June 1966).

[124] Army Reg. No. 420–74, para. 89*a* (27 June 1966).

[125] Army Reg. No. 420–74, para. 89*d* (27 June 1966).

[126] Army Reg. No. 420–74, para. 90 (27 June 1966).

lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.[127]

Enactment of this statute was prompted by the decision of the Supreme Court in *Murray v. Joe Gerrick & Co.*[128] that the Act of 1 February 1928[129] did not apply state workmen's compensation laws on Federal areas. It should be noted that the statute presently considered actually extends state law upon the Federal area, rather than merely adopting it as Federal law.[130]

There are a number of other Federal statutes concerning the conflict of laws problem in the following areas:

(1) Unemployment Compensation.

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.[131]

(2) Health and quarantine.

The quarantines and other restraints established by the health laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by . . . the military officers commanding in any fort or station upon the seacoast. . . .[132]

(3) Motor vehicle fuel taxes.

All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to 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. . . .[133]

(4) Use and sales taxes.

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, 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; and such State or taxing authority

[127] 40 U.S.C. § 290 (1970).

[128] 291 U.S. 315 (1934).

[129] 16 U.S.C. § 457 (1970).

[130] *Capetola v. Barclay White Co.*, 139 F.2d 556 (3d Cir. 1943), *cert. denied*, 321 U.S. 799 (1944).

[131] 26 U.S.C. § 3305(d) (1970). Other provisions of section 3305 require Federal agencies to effect withholding, make contributions, and otherwise comply with state unemployment compensation laws.

[132] Rev. Stat. § 4792 (1875), *as amended*, 42 U.S.C. § 97 (1970).

[133] 4 U.S.C. § 104 (1970). Note that the taxes may be applied to sales by Federal instrumentalities.

shall have full jurisdiction and power to levy and collect any such 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. . . .[134]

(5) Income taxes.

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such 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. . . .[135]

(6) Private leasehold interests.

The interest of a lessee of property leased under this section [i.e. leased by a military department to a private party] may be taxed by State or local governments. A lease under this section shall provide that, if and to the extent that the leased property is later made axable by Sate or local governments under an act of Congress, the lease shall be renegotiated.[136]

This last statute has been the subject of litigation. In *Offutt Housing Co. v. County of Sarpy*[137] the Supreme Court held that, by virtue of this provision, a State could tax a lease entered into for the purpose of erecting Wherry Housing. This resulted in remedial legislation in 1955 which exempted certain defense housing from local taxation.[138] It has recently been held that the quoted provision of law permits state taxation of a lessee's private property located on leased land under exclusive Federal jurisdiction.[139]

While perhaps not too material for the military practitioner, it should be observed that Congress has adopted or extended state laws over various specific types of Federal facilities. Thus, Federal statutes have extended state criminal and civil jurisdiction over national parks,[140] national forests,[141] migratory-bird reservations,[142] low-cost housing projects,[143] Lanham Act housing,[144] and defense housing.[145] State principles of law, other than those relating to mineral leasing, are adopted as Federal law for the outer Continental Shelf,[146] and state water laws continue to apply on

---

[134] 4 U.S.C. § 105 (1970). This section does not authorize state taxation of sales by Federal instrumentalities. 4 U.S.C. § 107 (1970).

[135] 4 U.S.C. § 106 (1970). This section does not authorize state taxation of the income of Federal instrumentalities. 4 U.S.C. § 107 (1970). The United States has consented to state taxation of the income of Federal employees. 4 U.S.C. § 111 (1970). It has also provided for the collection of state withholding taxes from compensation paid Federal civilian personnel. 5 U.S.C. § 5517a (1970).

[136] 10 U.S.C. § 2667(e) (1970).

[137] 351 U.S. 253 (1956).

[138] Act of August 7, 1956, ch. 1029, § 511, 70 Stat. 1111.

[139] *Puerto Rico v. Esso Standard Oil Co.*, 332 F.2d 624 (1st Cir. 1964).

[140] 16 U.S.C. § 465 (1970).

[141] 30 Stat. 36, *as amended*, 16 U.S.C. § 480 (1970).

[142] 16 U.S.C. § 715g (1970).

[143] 49 Stat. 2025, *as amended*, 40 U.S.C. §421 (1970).

[144] 54 Stat. 1128, *as amended*, 42 U.S.C. § 1547 (1970).

[145] 42 U.S.C. § 1592f (1970).

[146] 43 U.S.C. § 1333 (1970).

lands acquired for power[147] and reclamation[148] projects. The significance of the above provisions is that, in case land originally acquired for one of the specified purposes is transferred to a military department or obtained under permit, state law may continue to apply while the land is used for military purposes. Whether this is so depends on an interpretation of the statutory provision involved and other developments; that is, the subsequent acquisition of exclusive jurisdiction over the property.

d. Civil Law—No Congressional Statutory Action. While coverage of the above Federal statutes adopting or extending state principles of law on exclusive and partial jurisdiction areas is fairly comprehensive, it is apparent that there are serious gaps. Torts not involving death or personal injury, for example, are not covered by these statutes; nor are many other important legal areas in which questions can arise, such as contracts, sales, agency, probate and administrative actions, guardianship, domestic relations, and parent and child.

In *Chicago, Rock Island & Pacific Railway Company v. McGlinn*,[149] the Supreme Court was presented with the question as to what law applies after the Federal Government has acquired exclusive legislative jurisdiction over an area. The plaintiff in the lower court owned a cow which strayed onto the Fort Leavenworth Military Reservation in Kansas. The defendant operated a railroad line through the post and one of its trains ran over and killed plaintiff's cow. The suit was based on an 1874 Kansas statute which made railroads liable for death of livestock unless rights-of-way had been fenced. It so happened that the United States had not acquired exclusive jurisdiction until 1875 and the question was raised whether the earlier Kansas statute continued to govern the rights of the parties. The Court held that the principle of liability stated in the 1874 state law applied in view of the absence of some affirmative action by the new sovereign. The basis for this conclusion was described as follows:

> . . . 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 government or sovereign. . . .[150]

There have been many applications of the *McGlinn* doctrine since it was enunciated by the Court. In *Arlington Hotel Co. v. Fant*,[151] an innkeeper on exclusive jurisdiction property was held liable as an insurer of a guest's property under state principles in effect when jurisdiction was acquired, although state law had been subsequently changed to require proof of negligence on an innkeeper's part. Subsequent court decisions have established the proposition that common law, as well as statutory law, principles existing at the time the United States acquires exclusive juris-

[147] 16 U.S.C. § 821 (1970).
[148] 43 U.S.C. § 383 (1970).
[149] 114 U.S. 542 (1885).
[150] *Id.*, at 546.
[151] 278 U.S. 439 (1929).

diction are adopted.[152] In the past, it has been accepted that the principles carried over become Federal law, but some doubt in this area has now arisen.[153]

There are certain practical aspects of the *McGlinn* doctrine which arise when consideration is given to the heterogeneous structure of the normal military installation.[154] The type of legislative jurisdiction exercised, as well as the date of its acquisition, varies from tract to tract. Brief research into the laws of any state jurisdiction will show that substantial changes have taken place over the years. In such fields as married women's rights, bailments, and commercial practices, these changes have been dramatic. The effect of these factors is that substantive rules of law governing a given transaction may vary from tract to tract within an installation. Furthermore, principles of law tend to become obsolete and frozen upon tracts over which exclusive jurisdiction was acquired in the more distant past. It is obvious, therefore, that practical considerations of the nature suggested provide a strong justification for present Army policy opposing retention of exclusive jurisdiction on military property.[155]

For many years it was assumed that there were three situations in which the *McGlinn* principle would not be applied to Federal enclaves: where state laws were not "intended for the protection of private rights;" [156] where state laws required enforcement by a state administrative agency;[157] and where the state laws were inconsistent with specific Federal law or policy.[158] It is doubtful that the first two exceptions have survived the United States Supreme Court's 1963 decision in *Paul v. United States.*[159] In *Paul* the court was presented with the question "whether California can enforce her minimum wholesale price regulations as respects milk sold to the United States at three military installations (Travis Air Force Base, Castle Air Force Base, and Oakland Army Terminal) located within California and used for strictly military consumption, for resale at Federal commissaries, and for consumption or resale at various

---

[152] *Kniffen v. Hercules Powder Co.*, 164 Kan. 196, 188 P.2d 980 (1948); *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); *Kaufman v. Hopper*, 220 N.Y. 184, 115 N.E. 470 (1917). But the *McGlinn* principle does not adopt the criminal law of a State. *In re Ladd*, 74 Fed. 31 (C.C.D. Neb. 1896).

[153] *Stokes v. Adair*, 265 F.2d 662 (4th Cir. 1959); *Mater v. Holley*, 200 F.2d 123 (4th Cir. 1952); *Olsen v. McPartlin*, 105 F. Supp. 561 (D. Minn. 1952). *But cf. Paul v. United States*, 371 U.S. 245 (1963).

[154] See paragraph 6.4*e*, *supra*.

[155] See paragraph 6.8*f*, *supra*.

[156] Note 150, *supra*, and accompanying text; *Thiele v. City of Chicago*, 12 Ill. 2d 218, 145 N.E.2d 637 (1957).

[157] *Stewart & Vo., v. Sadrakula*, 309 U.S. 94 (1940) (dictum).

[158] *Webb v. J. G. White Engineering Corp.*, 204 Ala. 429, 85 So. 729 (1920) (state law superseded by Federal law providing compensation for injured Federal employees). *Cf. Hill v. Ring Construction Co.*, 19 F. Supp. 434 (W.D. Mo. 1937) (state law definition of "cubic yard" not enforceable in contract interpretation because inconsistent with "national common law" definition); *Anderson v. Chicago and Northwestern R.R.*, 102 Neb. 578, 168 N.W. 196 (1918) (state statute requiring fencing of railroad rights-of-way not enforceable due to War Department directive to railroad to disregard state law).

[159] 371 U.S. 245 (1963).

military clubs and post exchanges." [160] Finding an inconsistency between the state minimum price scheme and the requirement of the Armed Services Procurement Regulation (which was, and is, applicable only to appropriated fund expenditures) [161] that "procurement shall be made on a competitive basis," [162] the court held invalid the application of the state pricing law to milk paid for with appropriated funds. However, the court stated that it would uphold the application of the state scheme to the purchase of milk for use at military clubs and post exchanges, since such milk was paid for with nonappropriated funds if, on remand, it developed that the underlying price control scheme was in effect at the time of Federal acquisition of "exclusive jurisdiction."

Clearly the dispute in *Paul* did not involve "private rights" in the sense of a dispute between two or more entities acting in their private capacities. Equally clear is the fact that the state law was enforced by a state administrative official, the Director of Agriculture of California, who was responsible for setting minimum prices. Even more surprisingly, the state law which was to be applied was the current law:

> Yet if there were price control of milk at the time of acquisition and the same basic scheme has been in effect since that time, we fail to see why the current one, albeit in the form of different regulations, would not reach those purchase and sales of milk on the Federal enclave made from nonappropriated funds.[163]

The only thing that can be said with certainty after *Paul* is that a state law which is inconsistent with a specific Federal statute or implementing regulation having the force of law is inoperative in an exclusive jurisdiction area. In view of the supremacy clause,[164] this comes as no surprise.

e. Criminal Law.

(1) *General.* As has been noted,[165] state criminal law normally extends throughout land areas in which the United States has only a proprietorial interest, areas under concurrent Federal jurisdiction, and areas under partial jurisdiction to the extent covered by the reservation of state authority. It has also been observed that Federal statutes have extended state criminal jurisdiction over various types of Federal facilities.[166] Federal criminal law, as such, applies within exclusive jurisdiction areas, those under concurrent jurisdiction, and those under partial jurisdiction to the extent not precluded by a reservation of state authority.

In contrast to the situation prevailing with respect to civil law, Congress has enacted a comprehensive body of criminal law applying on lands within the exclusive or concurrent jurisdiction of the United States.[167] Most major crimes within such areas are covered by individual provisions

[160] *Id.*, at 247.

[161] The underlying statute provides that it is applicable "to the purchase [by certain agencies] of all property . . . for which payment is to be made from appropriated funds." 10 U.S.C. § 2303 (1970).

[162] *Paul v. United States*, 371 U.S. 245, 252 (1963).

[163] *Ibid.*

[164] U.S. Const. art. VI.

[165] See paragraph 6.11*a*, *supra*.

[166] See paragraph 6.11*a*, *supra*.

[167] See 18 U.S.C. § 7 (1970).

of Title 18, *United States Code*.[168] For the most part, minor Federal offenses are not provided for in specific terms. Instead, Congress has adopted the provisions of state law as Federal substantive law. The statute which accomplishes this result is known as the "Assimilative Crimes Act" and provides:

> Whoever within or upon [areas under exclusive or concurrent jurisdiction] 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 like offense and subject to a like punishment.[169]

The significance of this statute has been described by the *Attorney General's Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States* as follows:

> . . . 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 by Federal statutory law, and since the authority to define them by regulations is limited to a few Federal administrators, their commission usually can be punished only under the Assimilative Crimes Act. The act also has been invoked to cover a number of serious offenses defined by State, but not Federal law. . . .[170]

Prosecutions under the statute are not to enforce the state law, but to enforce Federal criminal law the details of which have been adopted by reference.[171] It has been held that a former Assimilative Crimes statute adopted common law of the State as to criminal offenses, as well as statutory law of this nature.[172] In *United States v. Sharpnack*,[173] the Supreme Court held that adoption of current provisions of state criminal law in the manner effected by the statute does not constitute an unconstitutional delegation of legislative authority. The Assimilative Crimes Act does not

---

[168] *E.g.*, 18 U.S.C. § 81 (arson), § 113 (assault), § 114 (maiming), § 661 (theft), § 662 (receiving stolen property), § 1111 (murder), § 1112 (manslaughter), § 2031 (rape), § 2032 (carnal knowledge), § 2111 (robbery).

[169] 18 U.S.C. § 13 (1970). There are a number of earlier Assimilative Crimes statutes. Act of 3 March 1825, § 3, 4 Stat. 115; Act of 5 April 1866, 14 Stat. 12; Act of 7 July 1898, 30 Stat. 717; Act of 4 March 1909, § 89, 35 Stat. 1145; Act of 15 June 1933, 48 Stat. 152; Act of 20 June 1935, 49 Stat. 394; Act of 6 June 1940, 54 Stat. 234; Act of 11 June 1940, 54 Stat. 304.

[170] *Report* 135 (Part II, 1957). See paragraph 6.13*b*, *infra*, concerning the authority of Federal administrators to prescribe regulations having the effect of criminal law. For examples of serious crimes prosecuted under the Act, see *United States v. Gill*, 204 F.2d 740 (7th Cir. 1953) (sodomy); *Dunaway v. United States*, 170 F.2d 11 (10th Cir. 1948) (burglary); *United States v. Heard*, 270 F. Supp. 198 (W.D. Mo. 1967) (carrying concealed weapon); *United States v. Titus*, 64 F. Supp. 55 (D.N.J. 1946) (embezzlement); *Burns v. United States*, 274 U.S. 328 (1927) (criminal syndicalism). *But cf. Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio criminal syndicalism law unconstitutional).

[171] See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937).

[172] *United States v. Wright*, 28 F. Cas. 791 (No. 16,774) (D. Mass. 1871).

[173] 355 U.S. 286 (1958).

adopt state principles of criminal procedure, such as statutes of limitations relating to offenses[174] or laws relating to sufficiency of indictments.[175]

The Act operates only where there is no Federal statute defining a certain offense or providing for its punishment.[176] Furthermore, when an offense has been defined and prohibited by Federal law, the Assimilative Crimes Act cannot be applied to redefine and enlarge or narrow the scope of the Federal offense. In *Williams v. United States*[177] the Supreme Court considered a situation where the state "statutory rape" law made 18 the age of consent, whereas a Federal statute applying within the area defined the crime of "carnal knowledge" and made 16 the age of consent. A prosecution under the Assimilative Crimes Act was instituted on the basis of defendant's having had intercourse with a female under 18 but over 16. In holding that the Act did not adopt the provisions of state law under the circumstances, the Court stated:

> 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.[178]

Legal difficulties arise in application of the Assimilative Crimes Act to various types of state criminal laws. These difficulties are similar in many respects to the problems noted earlier with respect to application of the *McGlinn* principle in the civil-law field.[179]

(2) *Laws Impossible of Adoption.* Research into the criminal laws of any State will show various provisions which do not seem possible of adoption as Federal law within exclusive and concurrent jurisdiction areas. This usually occurs by reason of some limitation or descriptive term in the

[174] *United States v. Andem*, 158 Fed. 996 (D.N.J. 1908).

[175] *McCoy v. Pescor*, 145 F.2d 260 (8th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945).

[176] *United States v. Press Publishing Co.*, 219 U.S. 1, 9 (1911); *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970). See *United States v. Shell*, 37 C.M.R. 962 (1967). A Federal regulation having the force of law also makes the state law inapplicable. *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966).

[177] 327 U.S. 711 (1946).

[178] *Id.*, at 717. *But cf. Field v. United States*, 438 F.2d 205 (2d Cir. 1971) (prosecution under assimilated state law for maliciously shooting with intent to kill *upheld*, despite Federal statute on assault with intent to commit murder).

[179] See paragraph 6.11*d*, *supra*.

state statute. Sometimes it is obvious that the state law cannot be applied, that is, where the law provides for the crime of defacing state buildings and property. The area in which there is a significant problem in this regard has to do with traffic offenses. It will be recalled that this matter provides the most important utilization of the Assimilative Crimes Act. The problem is caused by the fact that a large number of state laws provide for offenses occurring upon a "public highway," "public highway of this State," or some similar language. The difficulty in interpretation is created by the uncertainty whether most roads within military reservations are *public* in nature and "of" or "in" the State. The issue has been presented to various lower Federal courts, which usually have permitted adoption of the state law after some conceptual struggle. The case of *United States v. Barner*[180] is representative. In that case the court held that a state law punishing driving while intoxicated "upon a highway within the jurisdiction of the State of California" was adopted under the Assimilative Crimes Act with respect to a roadway running through a military reservation.[181]

(3) *State Administrative and Regulatory Requirements.* Various state criminal statutes require implementing administrative or regulatory action by state officials to be fully effective, that is, a state official must order the erection of a stop sign or a traffic light before a law prohibiting passing the stop sign or red light is effective. If the state law makes passing a stop sign an offense, then it can be assimilated even though the stop sign was erected as a direct result of an administrative action. Such action is *ministerial* as distinguished from *legislative.* The fact that an installation commander performs the *ministerial* administrative act rather than a state official probably would not defeat assimilation. On the other hand, if a state law authorizes a state highway commission or other regulatory body to establish traffic regulations, the violations of which are crimes, and the commission establishes a regulation making it a crime to pass a stop sign, then such regulation cannot be assimilated. Attempts to assimilate such "crimes" would result in a double delegation of congressional power. Also if a state law authorizes an administrative body to fix a speed limit that varies from the statutory speed limit, an order, rule or regulation promulgated pursuant to that statutory authority cannot be assimilated into Federal law, as the administrative action is a *legislative* rather than a *ministerial* act. While it is the conclusion of this text that *ministerial* acts may be assimilated and legislative acts may not, the matter has not been authoritatively settled by the courts. The issue has been raised on various occasions, but it has consistently been avoided or left undecided.[182] It is pointed out that the problem is largely the same as that considered in connection with the effect of the *Paul* decision[183] on adop-

[180] 195 F. Supp. 103 (N.D. Cal. 1961).

[181] *See also United States v. Dreos,* 156 F. Supp. 200 (D. Md. 1957); *United States v. Watson,* 80 F. Supp. 649 (E.D. Va. 1948). But roads through Joshua Tree National Monument are not "public highways" of California for tax purposes. 42 Comp. Gen. 593 (1963).

[182] See *Johnson v. Yellow Cab Transit Co.,* 321 U.S. 383 (1944); *Collins v. Yosemite Park Co.,* 304 U.S. 518 (1938); *Petersen v. United States,* 191 F.2d 154 (9th Cir. 1951), *cert. denied,* 342 U.S. 885 (1951).

[183] *Paul v. United States,* 371 U.S. 245 (1963).

tion of state administrative provisions of civil law.[184] In fact, state public interest laws of the type involved in the decision (such as minimum price laws and possibly tax laws, fair trade laws, licenses, building and zoning requirements, or "blue" laws) normally have criminal provisions attached to insure enforcement. The *Paul* decision therefore opens the possibility that even though state administrative and regulatory provisions of criminal law may constitute a legislative act, they may be carried over as Federal law under the Assimilative Crimes Act, unless due to their very nature they are impossible of being adopted.

(4) *State Law Contrary to Regulations and Policies.* In general, state criminal law which is contrary to Federal policies and regulations is not adopted under the Assimilative Crimes Act. An illustration of this exception is provided by the cases of *Nash v. Air Terminal Services, Inc.*[185] and *Air Terminal Services, Inc. v. Rentzel,*[186] both of which were decided by the United States District Court for the Eastern District of Virginia in 1949. In the first case, the court held that Virginia segregation laws were adopted at Washington National Airport in the absence of any expression of Federal policy on the subject. Prior to the second decision, the Civil Aeronautics Authority had issued regulations prohibiting segregation in Federal airports. In view of this fact, the court in the *Rentzel* case refused to apply the provisions of the Virginia law.[187]

It should not be unqualifiedly assumed that all Federal regulations, of whatever type, will prevent the assimilation of state criminal law. In 1955, for example, the Department of Justice concluded that military regulations purporting to sanction bingo and similar games were not in conformity with general Federal policy, and therefore would be ineffective to prevent the adoption of state gambling laws.[188] The Judge Advocate General took the contrary view, that the regulations in question were sanctioned by Federal policy and statutes. Therefore, the state criminal provisions were not adopted.[189]

Mention should also be made of the conclusion in the *Paul* case[190] that only Federal statutory law could exempt milk sales by nonappropriated funds from state minimum price regulations. No consideration was given to Army regulations which were inconsistent with application of the state pricing procedures.[191] Although the *Paul* decision did not involve an application of the Assimilative Crimes Act, the principle which it did apply in adopting the civil law of the State is similar in concept and is subject to analogous limitations and exceptions.[192]

[184] See paragraph 6.11*d*, *supra*.

[185] 85 F. Supp. 545 (E.D. Va. 1949).

[186] 81 F. Supp. 611 (E.D. Va. 1949).

[187] Department of the Army policy precludes adoption of state segregation laws on an exclusive jurisdiction area. Current policies on this subject are stated in Army Reg. No. 600–21 (18 May 1965).

[188] Letter from Asst. U.S. Att'y Gen., Criminal Division, to Secretary of Defense, Apr. 29, 1955.

[189] JAGA 1955/4833, 2 Jun 1955. Current provisions regarding the playing of bingo on military reservations are considered in paragraph 6.15*b*, *infra*.

[190] *Paul v. United States*, 371 U.S. 245 (1963).

[191] Army Reg. No. 230–1, para. 1–36 (26 August 1971).

[192] See commentary in paragraph 6.11*d*, *supra*.

There is a question whether policies stated in regulations of lower Army commands are entitled to consideration in preventing adoption of state criminal law under the Assimilative Crimes Act. While there are no judicial decisions in point, post regulations probably will not be sufficient to prevent adoption of inconsistent state criminal law.

6.12. ***Federal Immunity from State Regulation.***

a. General. This paragraph will review the so-called "Federal immunity,"—sometimes called the "Federal supremacy"—doctrine, as it particularly applies to military reservations and related activities. The basic doctrine is derived from the supremacy clause of the Constitution[193] and was first enunciated by the Supreme Court of the United States in *M'Culloch v. Maryland.*[194] In that case the Court considered the constitutionality of a Maryland statute requiring a bank chartered by Congress to issue notes on stamped paper purchased from a state agency, or to pay a tax in lieu thereof. In holding that the state law was unconstitutional, the Court 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. 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 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." . . .[195]

> The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general governemnt. This is, we think, the unavoidable consequences of that supremacy which the constitution has declared. . . .[196]

The Federal immunity doctrine permeates the entire range of Federal activities, and protects them from burdensome state regulation. It should be observed that this protection applies to Federal *activities* as such, regardless of where they may be located. By way of contrast, exclusive Federal legislative jurisdiction is an *area* concept.[197] Where the United States possesses exclusive jurisdiction over a land area, the State has no power to exercise general legislative authority within it, regardless of the nature of the activity which would be affected; that is, whether it be public or private. The Federal immunity principle, therefore, serves to protect Federal activities both on and off Federal land. Virtually every type of military activity is subject to its protective influence in some degree. The

[193] U.S. Const. art. VI.
[194] 17 U.S. (4 Wheat.) 316 (1819).
[195] *Id.*, at 405–6.
[196] *Id.*, at 436
[197] See paragraph 6.7*b*(1), *supra.*

field of military procurement is particularly current in this respect.[198] Of necessity, this paragraph must be confined to a somewhat limited treatment of the subject as it relates principally to military installations and activities associated therewith.

b. Federal Ownership and Use of Land. In accordance with the immunity doctrine, state laws may not interfere with the ownership and use of real property by the Federal government.[199] The matter appears to have been first discussed by the Supreme Court in *Fort Leavenworth Railroad v. Lowe,*[200] wherein the Court stated:

> [Land owned by the United States but over which it does not exercise jurisdiction] 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.[201]

Thus, a State cannot tax land owned by the Federal Government without the latter's consent.[202] This applies in case of a special tax or assessment for local improvement, 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.[203] This is true even where the improvement is of direct benefit to the Federal property.[204] The Comptroller General has ruled 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 landholds, is an involuntary exaction and should not be paid.[205] He has also ruled that charges for water, garbage collection, or sewage service 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.[206]

The Federal immunity principle affects various other activities associated with ownership and operation of a military reservation. For instance, a State cannot condemn Federal land without the consent of the

[198] See *United States v. Boyd,* 378 U.S. 39 (1964); *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *United States v. Georgia Public Service Comm'n,* 371 U.S. 285 (1963); *Paul v. United States,* 371 U.S. 245, 248–63 (1963).

[199] However, state law can govern the type of real property interest acquired by the United States by purchase or condemnation. See paragraph 6.4*c, supra.*

[200] 114 U.S. 525 (1885).

[201] *Id.,* at 539.

[202] *Wisconsin Central R.R. v. Price County,* 133 U.S. 496, 504 (1890); *Van Brocklin v. Tennessee,* 117 U.S. 151, 176 (1886). See *United States v. Woodworth,* 170 F.2d 1019 (2d Cir. 1948), holding that the exemption applies to taxes levied before Federal acquisition if not perfected into a lien by that time. To the same effect is Ms. Comp. Gen. B–91662, 26 Jan 1950. *Cf. United States v. Alabama,* 313 U.S. 274 (1941).

[203] *Mullen Benevolent Corp. v. United States,* 290 U.S. 89 (1933); *Lee v. Osceola & Little River Road Improvement District,* 268 U.S. 643 (1925); *Wisconsin Central R.R. v. Price,* 133 U.S. 496 (1890); Ms. Comp. Gen. B–24813, 26 Jan 1944.

[204] 29 Comp. Gen. 18 (1949); 27 Comp. Gen. 20 (1947).

[205] Ms. Comp. Gen. B–122372, 15 Mar 1955; Ms. Comp. Gen. B–47822, 25 Sep 1946.

[206] 31 Comp. Gen. 405 (1952); 20 Comp. Gen. 206 (1940); 15 Comp. Gen. 380 (1935).

United States;[207] military authorities need not, as a matter of law, comply with state safety and fire laws; a State may not enforce within a Federal installation a state statute requiring the posting of notices wherever oleomargarine is served;[208] nor may a State enforce its game laws against Federal officers killing deer on Federal lands to prevent damage to plant life.[209] The killing of deer on Federal land also has been authorized and justified for environmental research reasons.[210] There was no obligation to obtain a State Permit, even though the land was not under exclusive Federal jurisdiction.[211] It has been held that Federal authorities may not be required to comply with building codes and zoning requirements.[212] Nor may a State require licensing of a Government contractor as a prerequisite to performance of his contract.[213]

With respect to real property transactions in particular, the courts have held that the Federal Government is not required to comply with state recording requirements in order to protect its rights.[214] In disposing of property, the United States may restrict its further disposition in a manner not provided for by state laws.[215] There have been instances of property disposed of by the United States subject to an absolute restraint against alienation.[216] Regardless of legality, The Judge Advocate General has recommended that provisions of this nature not be included in instruments disposing of Army real property.

It has been held that a local subdivision could not require a Federal inspector to comply with local requirements concerning food handlers.[217] This suggests a broader problem involving whether Federal authorities may be subjected to state inspection requirements of various types. In *Mayo v. United States*[218] the Supreme Court held that a State is without constitutional power to exact an inspection fee with respect to fertilizers owned by the Federal Government. In the course of its opinion the Court stated:

---

[207] *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917). 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, 386–7 (1939).

[208] *Ohio v. Thomas*, 173 U.S. 276 (1899).

[209] *Hunt v. United States*, 278 U.S. 96 (1928).

[210] *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (5th Cir. 1969).

[211] *Id.*, at 1201.

[212] *United States v. City of Chester*, 144 F.2d 415 (3d Cir. 1944); *United States v. Philadelphia*, 56 F. Supp. 862 (E.D. Pa. 1944), *aff'd*, 147 F.2d 291 (3d Cir.), *cert. denied*, 325 U.S. 870 (1945); *Curtis v. Toledo Metropolitan Housing Authority*, 36 Ohio Ops. 423, 78 N.E.2d 676 (Ohio Com. Pleas. 1947); *Tim v. City of Long Branch*, 135 N.J.L. 549, 53 A.2d 164 (1947).

[213] *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

[214] *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *United States v. Snyder*, 149 U.S. 210 (1893); *In the Matter of American Boiler Works, Inc., Bankrupt*, 220 F.2d 319 (3d Cir. 1955); *Norman Lumber Co. v. United States*, 223 F.2d 868 (4th Cir. 1955); *In re Read-York, Inc.*, 152 F.2d 313 (7th Cir. 1945).

[215] *Ruddy v. Rossi*, 248 U.S. 104 (1918). *See also Wissner v. Wissner*, 338 U.S. 655 (1950); *United States v. San Francisco*, 310 U.S. 16 (1940).

[216] Act of 14 July 1954, 68 Stat. 474; Act of 1 June 1955, 69 Stat. 70.

[217] *United States v. Murray*, 61 F. Supp. 415 (E.D. Mo. 1945).

[218] 319 U.S. 441 (1943).

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. . . . These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal government must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. . . . But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.[219]

In the celebrated *Pelton Dam* case[220] the Supreme Court held that a State is without authority to require a private concern to obtain state permission to construct a private dam on Federal property where such construction had already been authorized by the United States. The dam in question was to be located on public lands which had been reserved for use as an Indian reservation, and there was no finding that the waters involved were navigable. The Court observed that "Authorization of this project. . . is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by ohter federal legislation." [221]

A broad question involving the extent to which state water laws apply on Federal lands is suggested by the *Pelton* decision. The case stands basically for the proposition that where the United States has acted under the Federal Power Act[222] with respect to waters on *reserved* public lands, the State cannot take conflicting action under its own laws. Under the Supremacy Clause[223] a state law cannot interfere with or burden a legitimate Federal activity. By this reasoning, state water laws cannot apply in any case where their effect is to burden an activity conducted by the Federal Government. This would seem to be the case regardless of whether the property was acquired from private sources or reserved from the public domain. The extreme situation can be represented by the *Hawthorne Ammunition Depot* case[224] where the State of Nevada filed suit against the United States to prevent the Navy from drilling six wells on a large reservation (some 200,000 acres) without a permit from state authorities. The land involved had been reserved from the public domain. The court held that state water laws did not apply in view of the Federal immunity principle. However, the *Hawthorne Ammunition Depot* case is authority only that a State may not assert procedural jurisdiction over a Federal

[219] *Id.*, at 447–8. The United States is not liable for inspection fees charged by municipal authorities for controlling dangerous instrumentalities. 27 Comp. Gen. 232 (1947). State authorities have no control over gunpowder belonging to the Federal Government. 25 Op. Att'y Gen. 234 (1904). A State cannot require a registration fee in connection with the use of outboard motors on boats used by the Federal Government. 27 Comp. Gen. 273 (1947).

[220] *F.P.C. v. Oregon*, 349 U.S. 435 (1955).

[221] *Id.*, at 446.

[222] 41 Stat. 1063, *as amended*, 16 U.S.C. §§ 791a–825r (1970).

[223] U.S. Const. art. VI.

[224] *Nevada v. United States*, 165 F. Supp. 600 (D. Nev. 1958).

activity. It does not modify the obligation of the United States not to take property for public use without payment of just compensation. Should a Federal activity interfere with the enjoyment of a property interest in water, the Government would be subject to suit under the Tucker Act[225] or the McCarran Amendment.[226] Although the United States is subject to suit only in a general adjudication of water rights under the latter statute,[227] the Supreme Court has recently held that such a suit may be under a sufficiently broad state statute providing for a court adjudication after notice and joinder, and that state laws and state courts may determine whether the United States has a valid water right or is interfering with another owner's water rights.[228]

c. Motor Vehicle Operation. In *Johnson v. Maryland*[229] the Supreme Court held that a State could not constitutionally require a Federal employee to secure a driver's permit as a prerequisite to the operation of a motor vehicle in performing his Federal duties. In the course of its opinion, the Court discussed this application of the Federal immunity doctrine in the following terms:

> Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in United States v. Hart, Pet. C.C. 390. 5 Ops Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. Commonwealth v. Closson, 229 Massachusetts 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. In re Neagle, 135 U.S. 1.
>
> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.[230]

The above comment raises significant questions regarding the amenability of Federal officers and employees to state and local traffic laws and regulations. Where the person is not acting in an official capacity, it is clear

---

[225] 28 U.S.C. § 1346(f) (1970).

[226] 43 U.S.C. § 666 (1970).

[227] See *Dungan v. Runk*, 372 U.S. 609 (1963).

[228] *United States v. Dist. Court, Eagle County, Colorado*, 401 U.S. 520 (1971).

[229] 254 U.S. 51 (1920).

[230] *Id.*, at 56–7. Note that Government vehicles themselves are immune from state regulation. A State cannot require the installation of safety devices, such as mud flaps and signalling devices, on Army vehicles. Nor can a State require the installation of permanent metal frames to the underside of Army trailers or semitrailers.

that he is subject to such laws the same as any other citizen. Even while acting in the course of his employment, an employee of the United States secures no *general immunity* from state law.[231] The problem is in determining where the line should be drawn. The following general guidance on the subject is contained in current Army regulations:

> Installation commanders will impress upon service members the importance of complying with State and local traffic laws when operating motor vehicles within these jurisdictions. Military violators of civil traffic laws are not entitled to special exemption solely by virtue of their military status. When military necessity requires the movement of Government vehicles on public roads and highways [in violation of civil traffic laws], prior coordination will be effected with the appropriate civil enforcement agency.[232]

The above statement provides a concise description of the law by indicating that *military status alone* affords no exemption from civilian traffic law. It recognizes, however, that "military necessity" may dictate a requirement that such laws be breached. This is the nebulous area. When Federal employees have failed to comply with local traffic regulations, the courts have generally applied the test whether noncompliance was *essential to the performance of their duties.* Thus, a mail carrier has been held not justified in violating traffic regulations requiring a driver to drive on the right side of the road and, in turning to the left into another street, to pass to the right of and beyond the center of the intersecting street before turning.[233] In *United States v. Hart*[234] it was held that an act of Congress prohibiting the stopping of the mail is not be so construed as to prevent the arrest of the driver of a mail carriage when he is driving through a crowded city at such rate as to endager the lives of the inhabitants. Furthermore, in *Hall v. Commonwealth*[235] it was held that the driver of a postal truck must comply with the state's speed laws. The court emphasized that no time schedules had been established by the Post Office Department which would require excessive speed. It has also been held that the efficient operation and administration of the work of the Post Office Department does not require a carrier, while delivering mail, to drive his car from a stopped position into the path of an approaching automobile.[236]

By way of contrast, where the Federal employee could not discharge his duties without violating state or local traffic regulations, it has been held that he is immune from any liability under State or local law. Thus, in *Lilly v. West Virginia*[237] it was decided that a Federal prohibition agent, who struck and killed a pedestrian while pursuing a suspected criminal, was excepted from limitations of speed prescribed by a city ordinance, provided that he acted in good faith and with the care that an ordinarily prudent person would have exercised under the circumstances, the degree of care being commensurate with the danger. The following statement is taken from the court's opinion:

[231] See note 230 and quotation in accompanying text.
[232] Army Reg. No. 190–5, para. 5–2*a* (29 September 1970).
[233] *Commonwealth v. Closson,* 229 Mass. 329, 118 N.E. 653 (1918).
[234] 26 F. Cas. 193 (No. 15,316) (C.C.D. Pa. 1817).
[235] 129 Va. 738, 105 S.E. 551 (1921).
[236] *Oklahoma v. Willingham,* 143 F. Supp. 445 (E.D. Okla. 1956).
[237] 29 F.2d 61 (4th Cir. 1928).

> The traffic ordinances of a city prescribing who shall have the right of way at crossings and fixing speed limits for vehicles are ordinarily binding upon officials of the federal government as upon all other citizens. . . . Such ordinances, however, are not to be construed as applying to public officials engaged in the performance of a public duty where speed and the right of way are a necessity. The ordinance . . . makes no exemption in favor of firemen going to a fire or peace officers pursuing criminals, but it certainly could not have been intended that pedestrians at street intersections should have the right of way over such firemen or officers, or that firemen or officers under such circumstances should be limited to a speed of 25 miles, or required to slow down at intersections as to have their vehicles under control. Such a construction would render the ordinances void for unreasonableness in so far as they applied to firemen or officers engaged in duties, in the performance of which speed is necessary; and we think that they should be construed as not applicable to such officers, either state or federal, under such circumstances. . . .[238]

Similarly, in *State v. Burton*[239] it was held that a member of the United States Naval Reserve, while driving a motor vehicle along a city street in the performance of an urgent duty to deliver a dispatch under instructions from his superior officer, is not amenable to local law regulating the speed of motor vehicles. State laws, the court observed, are subordinate to the exigencies of military operations by the Federal Government in time of war.

The liability for municipal parking-meter fees in regard to Government vehicles has been the subject of some controversy. The Attorney General has expressed the view that parking fees which are specifically designated as taxes would be unconstitutional when applied to a vehicle of the United States.[240] When the parking ordinance is designed as a traffic regulation, however, it is valid and, in the absence of emergency conditions, must be obeyed by Federal drivers. If a city establishes parking meters in conjunction with municipally owned garages and parking lots and the fees from the meters are used for the maintenance of such facilities, Government vehicles are required to pay the fees unless it can be shown that the total receipts greatly exceed the cost of maintaining the meters and related facilities. The Attorney General further stated that he would provide representation for drivers of Government vehicles who are charged with parking meter violations, but would not assert the immunity of the United States unless the violation of the city ordinance was required in order for the employee to perform his Federal function.[241]

On the basis of the foregoing principles, The Judge Advocate General has expressed the view that Federal immunity should be asserted in case of an Army driver who had to make an urgent delivery in New York City and was given a ticket for double parking when he was unable to locate a parking space within a reasonable distance.

The Comptroller General of the United States takes a more stringent

---

[238] *Id.*, at 64.

[239] 41 R.I. 303, 103 A. 962 (1918).

[240] Letter from U.S. Att'y Gen. to Dep't of Army, Apr. 3, 1962, *as digested in* 99 JALS 7.

[241] *Ibid.* This appears to be a restatement of the principle noted earlier that noncompliance with the traffic regulation must be essential to performance of the Federal employee's duty.

view of the legality of imposition of parking meter fees by municipal authorities upon Government vehicles. He normally regards such levies as unconstitutional attempts to tax, while the Attorney General, as noted above, believes that the fees are merely traffic regulatory devices unless they greatly exceed the cost of maintaining the meters. The Department of the Army is bound by the ruling of the Comptroller General that reimbursement from appropriated funds for the payment of such fees is generally not authorized. Unless a driver desires to use his personal funds in payment of the fees, he should refrain from using metered parking spaces. Commanders may request local officials to provide free parking spaces for Government vehicles essential to the conduct of official business.[242]

Army regulations require litigation reports in case of proceedings arising out of the operations of the Department of the Army or otherwise of interest to it.[243] This includes proceedings against any officer, enlisted person, or civilian employee of the Department of the Army in connection with his official duties.[244] It would appear that, in connection with these procedures, the Department of Justice would assert the Federal immunity principle only where violation of a particular traffic regulation is required in order for the individual to perform his Federal function.[245]

d. Amenability to State Criminal Laws. It has long been recognized that an officer of the United States is not subject to the criminal sanctions of a State for acts done within the scope of his duties.[246] In *In re Neagle*[247] it was held that the State of California had no criminal jurisdiction over an acting deputy United States marshal who committed a homicide in the course of defending a United States Supreme Court Justice while the latter was in that State in the performance of his judicial functions; that a writ of *habeas corpus* is an appropriate remedy for freeing such employee from the custody of state authorities; and that the Federal courts may determine the propriety of the employee's conduct under Federal law. In the course of its opinion, the Court stated:

> To the objection made in argument, that the prisoner is discharged by his writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them.[248]

[242] 44 Comp. Gen. 578 (1965); 38 Comp. Gen. 258 (1958), *as digested in* 54 JALS 14.

[243] Army Reg. No. 27–40, chap. 2 (15 June 1973).

[244] Army Reg. No. 27–40, para. 2–3 (15 June 1973).

[245] See text accompanying note 240, *supra.*

[246] *In re Waite*, 81 Fed. 359 (N.D. Iowa 1897), *aff'd*, 88 Fed. 102 (8th Cir. 1898), *appeal dismissed*, 180 U.S. 635 (1901); *In re Neagle*, 135 U.S. 1, 75 (1890); *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944). This principle is also applicable to enlisted members of the armed forces. *In re Fair*, 100 Fed. 149 (C.C.D. Neb. 1900).

[247] 135 U.S. 1 (1890).

[248] *Id.*, at 75.

The principle that a Federal officer or employee is not liable under state law for acts done pursuant to Federal authorization has been applied in many instances. Thus, a state's laws relating to homicide or assault cannot be enforced against a Federal employee who, while carrying out his duties, commits a homicide or assault in the course of making an arrest, maintaining the peace, or pursuing a fugitive.[249] A state law with respect to tear gas could not be enforced against the Chief of the Executive Office of United States Marshals who, under specific orders from his superiors to assist in the execution of two federal court orders, found himself faced with a large and growing crowd of people demonstrating violently their disapproval of those orders and reasonably believed that the use of tear gas was proper.[250] In a connected case, officials of the Department of Justice who were acting under color of *federal* law could not be held *liable* under a federal civil rights statute imposing liability on any person who under color of any statute of any *state* or territory subjects anyone to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.[251] Some decisions appear to base the immunity from prosecution on a lack of jurisdiction in the state courts.[252] Others appear to recognize performance of a Federal duty as a substantive defense to state prosecution without actually denying the existence of jurisdiction in the state court.[253]

Federal statutes authorize removal to the Federal courts of criminal prosecutions initiated in state courts against Federal officers acting pursuant to any right, title, or authority claimed under any Act of Congress.[254] There is a separate provision authorizing removal of prosecutions against members of the armed forces on account of acts done under color of office or status.[255] The general purpose of these removal statutes is to protect the Federal Government and its officers from harassment by unsympathetic state courts and legislatures.[256] A Federal officer seeking removal of a prosecution under the foregoing provisions must, by direct and candid averment, exclude the possibility that the alleged criminal act was "based on acts of conduct of his not justified by his federal duty." [257]

---

[249] See *Castle v. Lewis*, 254 Fed. 917 (8th Cir. 1918); *United States v. Lewis*, 129 Fed. 823 (C.C.W.D. Pa. 1904), *aff'd* 200 U.S. 1 (1906); *In re Laing*, 127 Fed. 213 (C.C.S.D. W.Va. 1903); *In re Fair*, 100 Fed. 149 (C.C.D. Neb. 1900); *United States v. Fullhart*, 47 Fed. 802 (C.C.W.D. Pa. 1891); *North Carolina v. Kirkpatrick*, 42 Fed. 689 (C.C.W.D.N.C. 1890); *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944); *Ex parte Warner*, 21 F.2d 542 (N.D. Okla. 1927); *Ex parte Dickson*, 14 F.2d 609 (N.D.N.Y. 1927); *United States v. Lipsett*, 156 Fed. 65 (W.D. Mich. 1907); *Kelly v. Georgia*, 68 Fed. 652 (S.D. Ga. 1895).

[250] *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964).

[251] *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). See *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971).

[252] *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944); *In re Lewis*, 83 Fed. 159, 160 (D. Wash. 1897).

[253] *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906); *In re Neagle*, 135 U.S. 1, 75 (1890).

[254] 28 U.S.C. § 1442 (1970).

[255] 28 U.S.C. § 1442a (1970).

[256] *Colorado v. Symes*, 286 U.S. 510, 517 (1932); *Maryland v. Soper* (No. 1), 270 U.S. 9, 32 (1926); *Tennessee v. Davis*, 100 U.S. 257 (1880).

[257] *Colorado v. Symes*, 286 U.S. 510, 519 (1932); *Maryland v. Soper* (No. 1), 270 U.S. 9, 34 (1926).