JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES

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

PART II

A Text of the Law of Legislative Jurisdiction

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Chapter 1

Outline of Legislative Jurisdiction

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

Activities thereon varied.—The activities conducted on these properties are as varied as the holdings are extensive. They include, at one extreme, the development of nuclear weapons, and at the other, the operation of soft drink stands. Some of the activities are conducted in utmost secrecy, with only Government personnel present, and others, such as those in national parks, are designed for the enjoyment of the public, and the presence of visitors is encouraged. In many instances, the performance of these activities requires large numbers of resident personnel, military or civilian, or both, and the presence of these personnel in turn necessitates additional functions which, while not normally a distinctively Federal operation (*e. g.,* the maintenance of a school system for the children of resident personnel), are nevertheless essential to procuring the performance of the primary Federal function.[1]

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

Legal problems many.—In view of the vastness of Federal real estate holdings, the large variety of activities conducted upon them, and the presence on many areas of resident employees and other persons, it is to be expected that many legal problems will arise on or with respect to these holdings. In addition to the problems normally encountered in administering and enforcing Federal laws, complicated by occasional conflict with overlapping State laws, the ownership and operation by the Federal Government of areas within the States gives rise to a host of legal problems largely peculiar to such areas. They arise not only because of the fact of Federal ownership and operation of these properties, but also because in numerous instances the Federal Government has with respect to such properties a special jurisdiction which excludes, in varying degrees, the jurisdiction of the State over them, and which in other instances is, to varying extents, concurrent with that of the State.

FEDERAL POSSESSION OF EXCLUSIVE JURISDICTION: *By constitutional consent.*—This special jurisdiction which is often possessed by the United States stems, basically, out of article I, section 8, clause 17, of the Constitution of the United States,[2] which provides, in legal effect, that the Federal Government shall have exclusive legislative jurisdiction over such area, not exceeding 10 miles square, as may become the seat of government of the United States, *and like authority over all places acquired by the Government, with the consent of the State involved, for various Federal purposes.* It is the latter part

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

[2] Article I, section 8, clause 17:

"The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

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

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

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

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

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

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

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

Exercise as to crimes.—With respect to crimes occurring within Federal enclaves the Federal Congress has enacted the Assimilative Crimes Act,[3] which adopts for enclaves, as Federal law, the State law which is in effect at the time the crime is committed. The Federal Government also has specifically defined and provided for the punishment of a number of crimes which may occur in Federal enclaves, and in such cases the specific provision, of course, supersedes the Assimilative Crimes Act.

Exercise as to civil matters.—Federal legislation has been enacted authorizing the extension to Federal enclaves of the workmen's compensation [4] and unemployment compensation [5] laws of the States within the boundaries of which the enclaves are located. The Federal Government also has provided that State law shall apply in suits arising out of the death or injury of any person by the neglect or wrongful act of another in an enclave.[6] It has granted to the States the right to impose taxes on motor fuels sold on Government reservations, and sales, use, and income taxes on transactions or uses occurring or services performed on such reservations; [7] it has allowed taxation of leasehold interests in Federal property including property located on Federal enclaves; [8] and it has retroceded to the States

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

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

[5] 26 U. S. C. 1606 (d).

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

[7] 4 U. S. C. 104–110, as amended.

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

jurisdiction pertaining to the administration of estates of residents of Veterans' Administration facilities.[9] This is the extent of Federal legislation enacted to meet the special problems existing on areas under the exclusive legislative jurisdiction of the United States.

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

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

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

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

ACTION TO MITIGATE HARDSHIPS INCIDENT TO EXCLUSIVE JURISDICTION: *By Federal—State arrangement.*—The requirement for access of resident children to schools has been met by financial arrangements between the Federal Government and the State and local authorities; as a result, for the moment, at least, no children resident on exclusive jurisdiction areas are being denied a primary and secondary public school education.[10] No provision, however, has been made to enable residents to have access to State institutions of higher learning on the same basis as State residents.

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

[10] *Report*, part I, p. 55.

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

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

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

Early requirement, of R. S. 355, for exclusive Federal jurisdiction.—The extent of the acquisition of legislative jurisdiction by the United States was influenced to an extreme degree by the enactment, in 1841, of a Federal statute prohibiting the expenditure of public money for the erection of public works until there had been received from the appropriate State the consent to the acquisition by the United States of the site upon which the structure was to be placed.[11] The giving of such consent resulted, of course, in the transfer of legislative jurisdiction to the United States by operation of clause 17. Not until 1940 was this statute amended to make Federal acquisition of legislative jurisdiction optional rather than mandatory.[12]

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

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

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

* * * * * *

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

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

Present variety of jurisdictional situations.—Removal of the Federal statutory requirement for acquisition of exclusive legislative jurisdiction has resulted in amendment by many States of their consent and cession statutes so as to reserve to the State the right to exercise various powers and authority. The variety of the reservations in these amended statutes [13] has created an almost infinite number of jurisdictional situations.

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

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

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

Concurrent legislative jurisdiction.—The term "concurrent legislative jurisdiction" is applied in those instances wherein in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.

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

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

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

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as the power to regulate commerce with foreign nations and among the several States (art. I, sec. 8, cl. 3), to establish Post Offices and post roads (art. I, sec. 8, cl. 7), and to provide and maintain a Navy (art. I, sec. 8, cl. 13) are independent of the clause 17 authority, and carry, certainly as supplemented by article I, section 8, clause 18, of the Constitution,[14] self-sufficient power for their own execution.

To make needful rules, and necessary and proper laws, and effect of Federal supremacy clause.—There is also applicable to all federally owned land the constitutional power (art. IV, sec. 3, cl. 2) given to Congress, completely independent of the existence of any clause 17 authority, "to * * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *." The power of Congress (art. I, sec. 8, cl. 18), "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," is, of course, another important factor in the Federal Government's freedom to use its real property in such manner as it may deem necessary in carrying out Federal functions. And any impact of State or local laws upon the exercise of Federal authority under the Constitution is always subject to the limitations of what has been termed the Federal supremacy clause of the Constitution, article VI, clause 2.[15]

[14] Article I, section 8, clause 18:

"The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[15] Article VI, clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

GENERAL BOUNDARIES OF THE WORK: The following pages deal, within the bounds generally outlined above, with the law—the constitutional and statutory provisions, the court decisions, and the written opinions of legal officers, Federal and State—relating to Federal exercise, or non-exercise, of legislative jurisdiction as to areas within the several States.[16] They are not purported to deal with the law applicable to Territories or to Indian lands, as to which the law cited may, or may not, be applicable. Opinions are those of the authorities by whom they were rendered, and unless otherwise clearly indicated do not necessarily coincide with those of the Committee.

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

Chapter II

Origin and Development of Legislative Jurisdiction

ORIGIN OF ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION: *Harassment of the Continental Congress.*—While the Continental Congress was meeting in Philadelphia on June 20, 1783, soldiers from Lancaster, Pennsylvania, arrived "to obtain a settlement of accounts, which they supposed they had a better chance for at Philadelphia than at Lancaster." [1] On the next day, June 21, 1783:

> The mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. The executive council of the state, sitting under the same roof, was called on for the proper interposition. President Dickinson came in [to the hall of Congress], and explained the difficulty, under actual circumstances, of bringing out the militia of the place for the suppression of the mutiny. He thought that, without some outrages on persons or property, the militia could not be relied on. General St. Clair, then in Philadelphia, was sent for, and desired to use his interposition, in order to prevail on the troops to return to the barracks. His report gave no encouragement.
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[1] Elliot, *Madison Papers containing Debates on the Confederation and Constitution*, vol. 5, p. 92 (Washington, D. C., 1845). See also: Hart, *Epochs of American History—Formation of the Union—1750–1829*, p. 106; *Washington, The National Capital*, S. Doc. No. 332, 71st Cong., 3d Sess., p. 4; *Journals of the Continental Congress, 1774–1789*, vol. xxv, p. 973 (Library of Congress, G. P. O., 1922); Morris, *Alexander Hamilton and the Founding of the Nation*, p. 66 *et. seq.* (1957).

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

* * * * *

The [subsequent] conference with the executive [of Pennsylvania] produced nothing but a repetition of doubts concerning the disposition of the militia to act unless some actual outrage were offered to persons or property. It was even doubted whether a repetition of the insult to Congress would be a sufficient provocation.

During the deliberations of the executive, and the suspense of the committee, reports from the barracks were in constant vibration. At one moment, the mutineers were penitent and preparing submissions; the next, they were meditating more violent measures. Sometimes, the bank was their object; then the seizure of the members of Congress, with whom they imagined an indemnity for their offence might be stipulated.[2]

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

[2] Elliot, *op. cit.*, pp. 93–94.

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

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

> That buildings for the use of Congress be erected on or near the banks of the Delaware, provided a suitable district can be procured on or near the banks of the said river, for a federal town; and that the right of soil, and an exclusive or such other jurisdiction as Congress may direct, shall be vested in the United States.[3]

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

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

Debates in Constitutional Convention concerning clause 17.—Early in the deliberations of the Constitutional Convention, on May 29, 1787, Mr. Charles Pinckney, of South Carolina, submitted a draft of a proposed constitution, which authorized the national legislature to "provide such dockyards and arsenals, and erect such fortifications, as may be necessary for the United States, and to exercise exclusive jurisdiction therein." This proposed constitution authorized, in addition, the establishment of a seat of government for the United States "in which they shall have exclusive jurisdiction."[4] No further proposals concerning exclusive jurisdiction were made in the Constitutional Convention until August 18, 1787.

In the intervening period, however, a variety of considerations were advanced in the Constitutional Convention affecting the establishment of the seat of the new government, and a number of them were concerned with the problem of assuring the security and integrity of the new government against interference by any of the States. Thus, on July 26, 1787, Mason, of Virginia, urged that some provision be made in the Constitution "against choosing for the seat of the general government the city or place at which the seat of any state government might be fixed," because the establishment of the seat of government in a State capital would tend "to produce disputes concerning jurisdiction" and because the intermixture of the two legislatures would tend to give "a provincial tincture" to the national deliberations.[5] Subsequently, in the course of the debates concerning a proposed provision which, it was suggested, would have permitted the two houses of Congress to meet at places chosen by them from time to time, Madison, on August 11, 1787, urged the desirability of a permanent seat of government on the ground, among others, that "it was more necessary that the government should be in that position from

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

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

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

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

> To exercise, exclusively, legislative authority at the seat of the general government, and over a district around the same not exceeding _____ square miles, the consent of the legislature of the state or states, comprising the same, being first obtained.
>
> * * * * *
>
> To authorize the executive to procure, and hold, for the use of the United States, landed property, for the erection of forts, magazines, and other necessary buildings.[7]

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

> To fix, and permanently establish, the seat of government of the United States, in which they shall possess the exclusive right of soil and jurisdiction.[8]

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

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

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

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

[7] Elliot, *op. cit.*, vol. 5, pp. 439–440.

[8] Elliot, *op. cit.*, vol. 5, p. 440.

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

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

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

> So much of the fourth clause as related to the seat of government was agreed to, *nem. con.*
>
> On the residue, to wit, "to exercise like authority over all places purchased for forts, & c."—
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> MR. GERRY contended that this power might be made use of to enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government.
>
> MR. KING thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word "purchased," the words, "by the consent of the legislature of the state." This would certainly make the power safe.
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> MR. GOUVERNEUR MORRIS seconded the motion, which was agreed to, *nem. con.;* as was then the residue of the clause, as amended.[10]

[9] Elliot, *op. cit.*, vol. 5, pp. 510–511.
[10] Elliot, *op. cit.*, vol. 5, pp. 511–512.

On September 12, 1787,[11] the committee of eleven submitted to the Convention a final draft of the Constitution. The committee had made only minor changes in the clause agreed to by the Convention on September 5, 1787, in matters of style, and article I, section 8, clause 17, was contained in the draft in the form in which it appears in the Constitution today.

Aside from disclosing the relatively little interest manifested by the Convention in that portion of clause 17 which makes provision for securing exclusive legislative jurisdiction over areas within the States, the debates in the Constitutional Convention relating to operation of Federal areas, as reported by Madison, are notable in several other respects. Somewhat surprising is the fact that consideration apparently was not given to the powers embraced in article I, section 8, clause 18,[12] and the supremacy clause in article VI,[13] as a means for securing the integrity and independence of the geographical nerve center of the new government, and, more particularly, of other areas on which the functions of the government would in various aspects be performed. In view of the authority contained in the two last-mentioned provisions, the provision for exclusive jurisdiction appears to represent, to considerable extent, an attempt to resolve by the adoption of a legal concept a problem stemming primarily from a lack of physical power.

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

[11] Elliot, *op. cit.*, vol. 5, p. 535.
[12] The "necessary and proper" clause, set forth in footnote 14 (p. 12).
[13] See footnote 15 (p. 12), for the text of this clause.

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

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

> The indispensable necessity of complete authority at the seat of Government, carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted with impunity; [14] but a dependence of the members of the General Government on the State comprehending the seat of the Government, for protection in the exercise of their duty, might bring on the National Councils an imputation of awe or influence, equally dishonorable to the Government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the Government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the Government, as still further to abridge its necessary independence. The extent of this Federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government, which is to exercise authority over them; as a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole People of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated. The necessity of a like authority over forts, magazines, etc., established by the General Government, is not less evident. The public money expended on such places, and the public property deposited in them, require, that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.

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

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

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

> They are to have exclusive power of legislation—but how? Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people? What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself. * * * [15]

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

> He [Henry] next objects to the exclusive legislation over the district where the seat of government may be fixed. Would he submit that the representatives of this state should carry on their deliberations under the control of any other member of the Union? If any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress. If the safety of the Union were under the control of any particular state, would not foreign corruption probably prevail, in such a state, to induce it to exert its controlling influence over the members of the general government? Gentlemen cannot have forgotten the disgraceful insult which Congress received some years ago. When we also reflect that the previous cession of particular states is necessary before Congress can legislate exclusively any where, we must, instead of being alarmed at this part, heartily approve of it.[16]

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

Patrick Henry specifically raised a question as to the fate of the civil rights of inhabitants of the seat of the government, and further suggested that residents of that area might be the recipients of exclusive emoluments from Congress and might be excused from the burdens imposed on the rest of society.[17] Mason also raised the question of civil rights of the inhabitants, and, in addition, suggested that the seat of government might become a sanctuary for criminals.[18] Madison answered some of these objections as follows:

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

[16] Elliot, *op. cit.*, vol. 3, p. 89.
[17] Elliot, *op. cit.*, vol. 3, pp. 436–438.
[18] Elliot, *op. cit.*, vol. 3, pp. 431–432.

the privileges of their friends? I believe that, whatever state may become the seat of the general government, it will become the object of the jealousy and envy of the other states. Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether. How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power?

If it were at the pleasure of a particular state to control the session and deliberations, of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress? * * * We must limit our apprehensions to certain degrees of probability. The evils which they urge might result from this clause are extremely improbable; nay, almost impossible.[19]

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

> Mr. Lee strongly expatiated on the impossibility of securing any human institution from possible abuse. He thought the powers conceded in the paper on the table not so liable to be abused as the powers of the state governments. Gentlemen had suggested that the seat of government would become a sanctuary for state villains, and that, in a short time, ten miles square would subjugate a country of eight hundred miles square. This appeared to him a most improbable possibility; nay, he might call it impossibility. Were the place crowded with rogues, he asked if it would be an agreeable place of residence for the members of the general government, who were freely chosen by the people and the state governments. Would the people be so lost to honor and virtue as to select men who would willingly associate with the most abandoned characters? He thought the honorable gentleman's objections against remote possibility of abuse went to prove that government of no sort was eligible, but that a state of nature was preferable to a state of civilization. He apprehended no danger; and thought that persons bound to labor, and felons, could not take refuge in the ten miles square, or other places exclusively governed by Congress, because it would be contrary to the Constitution, and palpable usurpation, to protect them.[20]

In the ratifying conventions, no express consideration, it seems, was given to those provisions of clause 17 permitting the establishment of exclusive legislative jurisdiction over areas within the States. Attention apparently was directed solely to the establishment of exclusive legislative jurisdiction over the seat of government. However, the arguments in support of, and criticisms against, the establishment of exclusive legislative jurisdiction over the seat of government are in nearly all instances equally applicable to the establishment of such jurisdiction over areas within the States. The difference between the two cases is principally one of degree, and in this fact in all probability lies the explanation why areas within the States were not treated as a separate problem in the ratifying conventions. Because of the similarity between the two, the arguments concerning the seat of government are relevant in tracing the historical background of exclusive legislative jurisdiction over areas within the States.

[19] Elliot, *op. cit.*, vol. 3, pp. 432–433.

[20] Elliot, *op. cit.*, vol. 3, pp. 435–436.

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Federal legislation prior to 1885.—The matter of exclusive legislative jurisdiction received the attention of the first Congress in its first session. It provided that the United States, after the expiration of one year following the enactment of the act, would not defray the expenses of maintaining lighthouses, beacons, buoys and public piers unless the respective States in which they were situated should cede them to the United States, "together with the jurisdiction of the same." [21] The same act also authorized the construction of a lighthouse near the entrance of Chesapeake Bay "when ceded to the United States in the manner aforesaid, as the President of the United States shall direct." The policy of requiring cession of jurisdiction as a condition precedent to the establishment and maintenance of lighthouses was followed by other early Congresses,[22] and it subsequently became a general requirement.[23]

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

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

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

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

state, in which the same is intended to be erected," and legislation in 1826 authorizing the acquisition of land for purposes of an arsenal.[24] Express jurisdictional requirements were not, however, contained in other early acts of Congress providing for the purchase of land at West Point, New York, for purposes of fortifications and garrisons,[25] the erection of docks,[26] the establishment of Navy hospitals,[27] the exchange of one parcel of property for another for purposes of a fortification,[28] and the establishment of an arsenal at Plattsburg, New York.[29] An examination of the early Federal statutes discloses that in various other instances the consent of the State was not made a prerequisite to the acquisition of land for fortifications and a customhouse.[30]

The absence of express jurisdictional requirements in Federal statutes did not necessarily result in the United States acquiring a proprietorial interest only in properties. In numerous instances, apparently, jurisdiction over the acquired properties was ceded by the States even without an express Federal statutory requirement therefor.

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

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

[25] See 1 Stat. 129 (1790).

[26] See 1 Stat. 622 (1799).

[27] See 2 Stat. 650 (1811).

[28] See 2 Stat. 496 (1808).

[29] See 3 Stat. 205 (1815).

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

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

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

> National Government were exclusively vested with the power to provide for the common defence; and, in the exercise of this power, the right to acquire land, on which to erect fortifications, was not to be questioned. While the National Government held jurisdiction under the Constitution for all legitimate objects, the respective States had also a concurrent jurisdiction. As no inconvenience, except, perhaps, from the exercise of the right of taxation, in a few instances, under the State authorities, had hitherto been experienced from a want of exclusive jurisdiction, he was not, at this moment, prepared to give his sanction to the policy of the bill. Mr. M. said, he could see most clearly, cases might arise, where, for purposes of criminal jurisdiction, a concurrent power on the part of the State might be of vital importance. Your public fortresses may become places of refuge from State authority. Indeed, they may themselves be made the theatres where the most foul and dark deeds may be committed. The situation of your fortifications must, of necessity, be remote. In times of peace, they were often left with, perhaps, no more than a mere agent, to look to the public property remaining in them; thus rendered places too well befitting dark conspiracies and acts of blood. Their remote situation, and almost deserted condition, would retard the arm of the General Government in overtaking the offender, should crimes be committed. While no inconvenience could result from a concurrent jurisdiction on the part of the State and National tribunals, the public peace would seem to be thereby better secured. Mr. M. instanced a case of murder committed in Fort Niagara, some years ago, where, after trial and conviction in the State courts, an exception was taken to the proceedings, from an alleged exclusive jurisdiction in the courts of the United States. The question thus raised, was decided, after argument in the Supreme Court of the State

of New York, sustaining a concurrent jurisdiction in the State tribunals. Mr. M. regarded the right claimed, and exercised by the State, on that occasion, important. If important then, there were reasons, he thought, why it should not be less so now.[31]

The legislation was nevertheless enacted, and a provision thereof has existed as section 1838 of the Revised Statutes of the United States.[32] Following the enactment of this statute, Congress did not take any decisive action with respect to legislative jurisdiction until September 11, 1841, when it passed a joint resolution, which subsequently became R. S. 355,[33] requiring consent by a State to Federal acquisition of land (and therefore a cession of jurisdiction by the State by operation of article I, section 8, clause 17, of the Constitution), as a condition precedent to the expenditure of money by the Federal Government for the erection of structures on the land. As in the case of R. S. 1838, the Congressional debates do not indicate the considerations prompting the enactment of R. S. 355. There had, however, been a controversy between the United States and the State of New York concerning title to (not jurisdiction over) a tract of land on Staten Island, upon which fortifications had been maintained at Federal expense, and the same Congress which enacted the joint resolution of 1841 refused to appropriate funds for the repair of these fortifications until the question of title had been settled.[34] The 1841 joint resolution also required the Attorney General to approve the validity of title before expenditure of public funds for building on land. By these two means the Congress presumably sought to avoid a repetition of the Staten Island incident, and to avoid all conflict with States over title to land. While these suggested considerations underlying the enactment of the 1841 joint resolution are based entirely upon historical circumstances surrounding its adoption, the available records do not offer any other explanation, and there has not been discovered any means for ascertaining definitely whether Congress was aware, in enacting the joint resolution, that it was thereby requiring States to transfer jurisdiction to the Federal Government over most areas thereafter acquired by it. Debate had in the Senate in 1850 (Cong. Globe, 31st Cong., 1st sess. 70), indicates that as of that time it was not understood that the joint resolution required such transfer.

[31] Cong. Deb. (part 2) 2052–2053 (1828).

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

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

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

Thirty years after the adoption of the 1841 joint resolution, the effects of exclusive legislative jurisdiction on the civil rights of residents of areas subject to such jurisdiction were forcibly brought to the attention of Congress. In 1869, the Supreme Court of Ohio, in *Sinks* v. *Reese*, 19 Ohio St. 306, held that inmates of a soldiers' home located in an area of exclusive legislative jurisdiction in that State were not entitled to vote in State and local elections, notwithstanding the reservation of such rights in the Ohio statute transferring legislative jurisdiction to the United States. As a consequence of this decision, Congress retroceded jurisdiction over the soldiers' home to the State of Ohio.[35] The enactment of this retrocession statute was preceded by extensive debates in the Senate.[36] In the course of the debates, questions were raised as to the constitutional authority of Congress to retrocede jurisdiction which had been vested in the United States pursuant to article I, section 8, clause 17, of the Constitution, and it was also suggested that exclusive legislative jurisdiction was essential to enforce discipline on a military reservation.[37] The

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

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

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

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

> Mr. President, there might be a reason for a more extended jurisdiction in the case of an arsenal or a fort than in the case of an asylum. I admit that there is no necessity at all for exclusive jurisdiction or an extended jurisdiction in the case of an asylum. Now, take the case of a fort. Congress, of course, would require the jurisdiction necessary to punish a soldier for drunkenness, which is the case put by the Senator, or to punish any violation of military law or discipline; but is it necessary that this Government should have jurisdiction to punish a man who happens to stroll upon the ground and commit a larceny, or that it shall have jurisdiction if two of the hands engaged in plowing or gardening should get into a fight? Such cases do not come within the reasoning of the rule at all. It so happens, however, that exclusive jurisdiction has been given in those cases, but I contend that it has always been an inconvenience and was unnecessary. * * * [38]

In addition to providing for, and subsequently requiring, the acquisition of legislative jurisdiction, the early Congresses enacted legislation designed to meet, at least to an extent, some of the problems resulting from the acquisition of legislative jurisdiction. In attempting to cope with some of these problems, the efforts of some of the States antedated legislation passed by Congress for the same purposes. When granting consent pursuant to article I, section 8, clause 17, with respect to lighthouses and lighthouse sites some of the States from earliest times reserved the right to serve criminal and civil

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

[38] Cong. Globe, 41st Cong., 3d Sess. 546 (1870–1871).

process in the affected areas. Recognizing the fact of the existence of these reservations, together with the adverse consequences which would result from an inability on the part of the States to serve process in areas over which jurisdiction had passed to the Federal Government, Congress in 1795 enacted a statute providing that such reservations by a State would be deemed to be within a Federal statutory requirement that legislative jurisdiction be acquired by the United States, and, in addition, Congress provided that regardless of whether a State had reserved the right to serve process in places where lighthouses, beacons, buoys or public piers had been or were authorized to be erected or fixed as to which the State had ceded legislative jurisdiction to the United States, it would nevertheless have the right to do so.[39]

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

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

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

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

At an early date, Congress initiated a series of legislative enactments to cope with the problem of crimes within Federal areas. In 1790, it provided for the punishment of murder, larceny and certain other crimes,[40] and complete criminal sanctions were provided for by the enactment of the first Assimilative Crimes Act in 1825. This latter enactment adopted as Federal law for areas subject to exclusive legislative jurisdiction the criminal laws of the State in which a given area was located.[41]

While making provision for punishment for criminal offenses in areas subject to exclusive legislative jurisdiction, and authorizing the States to serve criminal and civil process in certain of such areas, Congress did not give corresponding attention to civil matters arising in the areas. Although Congress retroceded jurisdiction in order to restore the voting rights of residents of the soldiers' home in Ohio,[42] no other steps were taken to preserve generally the civil rights of residents of areas of exclusive legislative jurisdiction. The confident predictions in the State ratifying conventions that civil rights would be preserved by means of appropriate conditions in State consent statutes did not materialize. Only in the case of the cession of jurisdiction to the United States for the establishment of the District of Columbia was even a gesture made in a State consent statute towards preserving the rights of its citizens. Thus, in its act of cession, Virginia included the following proviso:

> *And provided also,* That the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction, in the manner provided by the article of the Constitution before recited [article I, section 8].[43]

[40] 1 Stat. 112 (1790).

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

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

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

> * * * Provided nevertheless, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.[44]

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

Early court decisions. The decisions of the courts prior to 1885 relating to matters of exclusive legislative jurisdiction are relatively few and of varying importance.[45]

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

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

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

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

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

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

In considering the application of the Assimilative Crimes Act of 1825, the United States Supreme Court held that it related only to the criminal laws of the State which were in effect at the time of its enactment and not to criminal laws subsequently enacted by the State. *United States* v. *Paul,* 6 Pet. 141 (1832). In *United States* v. *Wright,* 28 Fed. Cas. 791, No. 16,774 (D. Mass., 1871), it was held that the Assimilative Crimes Act adopted not only the statutory criminal laws of the State but also the common law of the State as to criminal offenses.

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

Article I, section 8, clause 17, it was held at an early date, does not extend to places rented by the United States. *United States* v. *Tierney,* 28 Fed. Cas. 159, No. 16,517 (C. C. S. D. Ohio, 1864). The consent specified therein must be given by the State legislature, not by a constitutional convention, it was held in an early opinion of the United States Attorney General. 12 *Ops. A. G.* 428 (1868). But, it will be seen, it was later decided that the United States may acquire exclusive legislative jurisdiction by means other than under clause 17.[46] In *Ex parte Tatem,* 23 Fed. Cas. 708, No. 13,759 (E. D. Va., 1877), it was held that the term "navy yard," as it appeared in a Virginia cession statute, "meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the navy yard." The consent provided for by article I, section 8, clause 17, of the Constitution, may be given either before or after the purchase of land by the United States. *Ex parte Hebard,* 11 Fed. Cas. 1010, No. 6312 (C. C. D. Kan., 1877). The United States may, if it so choses, purchase land within a State without the latter's consent, but, if it does so, it does not have any legislative jurisdiction over the area purchased. *United States* v. *Stahl,* 27 Fed. Cas. 1288, No. 16,373 (C. C. D. Kan., 1868).

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

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

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

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

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

Acquisition of Legislative Jurisdiction

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

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

> We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her Legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. * * *
>
> In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States.[1]

Had the doctrine thus announced in *Fort Leavenworth R. R.* v. *Lowe*, *supra*, been known at the time of the Constitutional Convention, it is not improbable that article I, section 8, clause 17, at least insofar as it applies to areas other than the seat of government, would not have been adopted. Cession as a method for transfer of jurisdiction by a State to the United States is now well established, and quite possibly has been the method of transfer in the majority of instances in which the Federal

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

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

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

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

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

an Indian tribe shall not be a part of such State or Territory, the new State government has no jurisdiction over them. The enabling acts governing the admission of several of the States provided that exclusive jurisdiction over certain areas was to be reserved to the United States.[2] In view of these developments, an earlier opinion of the United States Attorney General indicating that a State legislature, as distinguished from a State constitutional convention, had to give the consent to transfer jurisdiction specified in the Federal Constitution (12 *Ops. A. G.* 428 (1868)), would seem inapplicable to a Federal reservation of jurisdiction.

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

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

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

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

NECESSITY OF STATE ASSENT TO TRANSFER OF JURISDICTION TO FEDERAL GOVERNMENT: *Constitutional consent.*—The Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a State. Article I, section 8, clause 17, of the Constitution, provides that legislative jurisdiction may be transferred pursuant to its terms only with the consent of the legislature of the State in which is located the area subject to the jurisdictional transfer.[4] As was indicated in chapter II, the consent requirement of article I, section 8, clause 17, was

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

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

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

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

The second method not spelled out in the Constitution of vesting legislative jurisdiction in the Federal Government, namely, the reservation of legislative jurisdiction by the Federal Government at the time statehood is granted to a Territory, does not involve a transfer of legislative jurisdiction to the Federal Government by a State, since the latter never had jurisdiction over the area with respect to which legislative jurisdiction is reserved. While, under the second method of vesting legislative jurisdiction in the Federal Government, the latter may reserve such jurisdiction without inquiring as to the wishes or desires of the people of the Territory to which statehood has been granted, nevertheless, the people of the Territory involved have approved, in at least a technical sense, such reservation. Thus, the reservation of legislative jurisdiction constitutes, in the normal case, one of the terms and conditions for granting statehood, and only if all of the terms and conditions are approved by a majority of the voters of the Territory, or by a majority of the Territorial legislature, is statehood granted.[5]

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

NECESSITY OF FEDERAL ASSENT: *Express consent required by R. S. 355.*—Acquiescence, or acceptance, by the Federal Government, as well as by the State, is essential to the transfer of legislative jurisdiction to the Federal Government.[6] When legislative jurisdiction is reserved by the Federal Government at the time statehood is granted to a Territory, it is, of course, obvious that the possession of legislative jurisdiction meets with the approval of the Federal Government. When legislative jurisdiction is to be transferred by a State to the Federal Government either pursuant to article I, section 8, clause 17, of the Constitution, or by means of a State cession statute, the necessity of Federal assent to such transfer of legislative jurisdiction has been firmly established by the enactment of the February 1, 1940, amendment to R. S. 355.[7] While this amendment in terms specifies requirement for formal Federal acceptance prior to the transfer of exclusive or partial legislative jurisdiction, it also applies to the transfer of concurrent jurisdiction. The United States Supreme Court, in *Adams* v. *United States,* 319 U. S. 312 (1943), in the course of its opinion said (pp. 314-315):

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

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

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

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

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

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

Presumption in transfers by cession.—In *Fort Leavenworth R. R.* v. *Lowe, supra,* in which a transfer of legislative jurisdiction by means of a State cession statute was approved for the first time, the court said (p. 528) that although the Federal Government had not in that case requested a cession of jurisdiction, nevertheless, "as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part." See also *United States* v. *Johnston,* 58 F. Supp. 208, *aff'd.,* 146 F. 2d 268 (C. A. 9, 1944), *cert. den.,* 324 U. S. 876; 38 *Ops. A. G.* 341 (1935). A similar view has been expressed by a number of courts to transfers of jurisdiction by cession.[9] In some instances, however, the courts have indicated the existence of affirmative grounds supporting Federal acceptance of such transfers.[10] In *Yellowstone Park Transp. Co.* v. *Gallatin County,* 31 F. 2d 644 (C. A. 9, 1929), *cert. den.,* 280 U. S. 555, it was stated that acceptance by the United

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

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

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

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

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

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

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

The italicized portions of the quoted excerpts suggest that article I, section 8, clause 17, of the Constitution, may be self-executing where the conditions specified in that clause for the transfer of jurisdiction have been satisfied.[11]

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

> Even if it were assumed that the state statute should be construed to apply to the federal acquisitions here involved, we should still be met by the contention of the Government that it was not compelled to accept, and has not accepted, a transfer of exclusive jurisdiction. As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. * * *[12]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

may reject a retrocession of legislative jurisdiction may consist of cases in which, as is indicated below, changed circumstances no longer permit the Federal Government to exercise legislative jurisdiction, as for example, where the Federal Government has disposed of the property.[18]

DEVELOPMENT OF RESERVATIONS IN CONSENT AND CESSION STATUTES: *Former Federal requirement (R. S. 355) for exclusive jurisdiction.*—Under the act of September 11, 1841 (and subsequently under section 355 of the Revised Statutes of the United States, prior to its amendment by the act of February 1, 1940), the expenditure of public money for the erection of public buildings on any site or land purchased by the United States was prohibited until the State had consented to the acquisition by the United States of the site upon which the structure was to be erected.[19] An unqualified State consent, it has been seen, transfers exclusive legislative jurisdiction to the United States. But State statutes often contained conditions or reservations which resulted in a qualified consent inconsistent with the former requirements of R. S. 355. In construing State statutes during the 1841–1940 period, the Attorneys General of the United States consistently held that the consent required by clause 17 to transfer exclusive legislative jurisdiction to the United States was essential in order to meet the requirements of R. S. 355. Attorneys General expressed differing views, however, as to what constitutes such a consent.

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

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

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

the requisite consent of the State to a proposed purchase.[20] Also, the Attorney General in other opinions held that, if an act of a State legislature amounted to a "consent," then any attempted exceptions, reservations or qualifications in the act were void, since, consent being given by the legislature, the Constitution vested exclusive jurisdiction over the place, beyond the reach of both Congress and the State legislature.[21]

The view was also expressed, on the other hand, that State statutes granting the "right of exclusive legislation and concurrent jurisdiction" failed to transfer the requisite jurisdiction.[22] And statutes consenting to the purchase of land by the United States which provided that the State should retain concurrent jurisdiction for the trial and punishment of offenses against the laws of the State did not satisfy the requirements of section 355 of the Revised Statutes.[23] State statutes consenting to the purchase of lands with reservation of (1) the right to administer criminal laws on lands acquired by the United States for Federal building sites,[24] (2) the right to punish offenses against State laws committed on sites for United States buildings [25] or (3) civil and criminal jurisdiction over persons in territory ceded to the United States for Federal buildings [26] were found not compatible with the requirements of R. S. 355.

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

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

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

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

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

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

[25] 31 *Ops. A. G.* 263 (1918).

[26] *Id.* p. 282 (1918).

health laws are inconsistent with exclusive jurisdiction; [27] and statutes expressing qualified consent to acquisitions of land by the United States, it was held by the Attorney General, did not meet the requirements of R. S. 355.[28]

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

This view is compatible with an opinion of the Attorney General of Illinois,[29] who ruled that under section 355 of the Revised Statutes a State in ceding land to the United States with a transfer of exclusive jurisdiction may only reserve the right to serve criminal and civil process, including the right to arrest criminals and fugitives from justice who have committed crimes and fled to such ceded territory to the same extent as might be done if the criminal or fugitive had fled to another part of the State.

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

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

[27] 38 *Ops. A. G.*, 341 (1935).

[28] 39 *Ops. A. G.* 285, 291 (1939).

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

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or partial jurisdiction.[30] Moreover, the considerations [31] cited by Madison and others in support of clause 17 suggest that the framers of the Constitution sought to provide a method of enabling the Federal Government to obtain complete and sole jurisdiction over certain areas within the States. Whatever the merits of Justice Story's suggestion may be, however, it is clear that his views do not represent the law today.

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

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

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

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

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

but also the right to tax railroad, bridge, and other corporations, and their franchises and property in the military reservation. As a result of this reservation, the Federal Government was granted only partial legislative jurisdiction, and such limited legislative jurisdiction, provided for by a State cession statute, was held to be valid. This view has prevailed since 1885, but not until 1937 did the Supreme Court adopt a similar view as to transfers of legislative jurisdiction pursuant to article I, section 8, clause 17, of the Constitution.[32]

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

> When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings," (Const. Art. I, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this Court said in *Ft. Leavenworth Railroad Company* v. *Lowe,* 114 U. S. 525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State as would impair their effective use for the purposes for which the prop-

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

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

A distinction was thus drawn, insofar as the reservation by the State of legislative jurisdiction is concerned, between transfers of legislative jurisdiction pursuant to article I, section 8, clause 17, of the Constitution, and transfers pursuant to a State cession statute.[33]

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

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

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

The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. *Kohl* v. *United States*, 91 U. S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses. * * * The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases. Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation.

* * * * *

Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the

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

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

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

fort as a military post." In *Arlington Hotel Company* v. *Fant,* 278 U. S. 439 (1929), the Supreme Court likewise indicated (p. 451) that the State had complete discretion in determining what conditions, if any, should be attached to a cession of legislative jurisdiction, provided that it "saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction." In *United States* v. *Unzeuta,* 281 U. S. 138 (1930), the Supreme Court stated (p. 142) that in the cession statute the State "may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition." While, it will be noted, these limitations on State reservations of jurisdiction over Federal property all related to reservations in cession statutes, no basis for the application of a different rule to reservations in a consent statute would seem to exist under the decision in *James* v. *Dravo Contracting Co., supra.* And it should be further noted that the Supreme Court in the *Dravo* case implied a similar limitation as to the discretion of a State in withholding jurisdiction under a consent statute by stating (p. 149) that the reservation involved in that case "did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired." [34]

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

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

courts include the reservation of the right to tax privately owned railroad property in a military reservation (*Fort Leavenworth R. R.* v. *Lowe, supra; United States* v. *Unzeuta, supra*); to levy a gross sales tax with respect to work done in an area of legislative jurisdiction (*James* v. *Dravo Contracting Co., supra*); to tax the sale of liquor in a national park subject to legislative jurisdiction (*Collins* v. *Yosemite Park,* 304 U. S. 518 (1938)); to permit residents to exercise the right of suffrage (*Arapojolu* v. *McMenamin,* 113 Cal. App. 2d 824, 249 P. 2d 318 (1952)); and to have criminal jurisdiction as to any malicious, etc., injury to the buildings of the Government within the area over which jurisdiction had been ceded to the United States (*United States* v. *Andem,* 158 Fed. 996 (D. N. J., 1908)). And, of course, there are numerous areas, used by the Federal Government for nearly all of its many purposes, as to which the several States retain all legislative jurisdiction, solely or concurrently with the United States, or as to which they have reserved a variety of rights while granting legislative jurisdiction as to other matters to the Federal Government,[35] and as to which no question concerning the State-retained jurisdiction has been raised.

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

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

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

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

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

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

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

The term "purchased" does, however, include acquisitions by means of condemnation proceedings,[37] as well as acquisitions pursuant to negotiated agreements. See *James* v. *Dravo Contracting Co., supra; Mason Co.* v. *Tax Comm'n, supra; Holt* v. *United States*, 218 U. S. 245 (1910); *Chaney* v. *Chaney*, 53 N. M. 66, 201 P. 2d 782 (1949); *Arledge* v. *Mabry*, 52 N. M. 303, 197 P. 2d 884 (1948); *People* v. *Collins*, 105 Cal. 504, 39 Pac. 16, 17 (1895). The term also includes cessions of title by a State to the Federal Government. *United States* v. *Tucker*, 122 Fed. 518 (W. D. Ky., 1903).[38] A conveyance of land to the United States for a consideration of $1 has likewise been regarded as a purchase within the meaning of clause 17. 39 *Ops. A. G.* 99 (1937). Acquisition of property by a corporation created by a special act of Congress as an instrumentality of the United States for the purpose of operating a soldiers' home constitutes a purchase by the Federal Government for purposes of clause 17. *Sinks* v. *Reese*, supra; *People* v. *Mouse*, 203 Cal. 782, 265 Pac. 944, *app. dism., sub nom. California* v. *Mouse*, 278 U. S. 662, *cert. den.*, 278 U. S. 614 (1928); *State* v. *Intoxicating Liquors*, 78 Me. 401, 6 Atl. 4 (1886); *State ex rel.*

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

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

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

Lyle v. *Willett*, 117 Tenn. 334, 97 S. W. 299 (1906); *Foley* v. *Shriver*, 81 Va. 568 (1886). However, it has been held that a purchase by such a corporation does not constitute a purchase by the Federal Government. *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765 (1875); *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis., 1895); *Brooks Hardware Co.* v. *Greer*, 111 Me. 78, 87 Atl. 889 (1911), (question was left open); see also *Tagge* v. *Gulzow*, 132 Neb. 276, 271 N. W. 803 (1937). Since acquisitions by condemnation are construed as purchases under article I, section 8, clause 17, of the Constitution, it seems that donations would also be interpreted as purchases. See *Pothier* v. *Rodman*, 285 Fed. 632 (D. R. I., 1923), *aff'd.*, 264 U. S. 399 (1924); question raised but decision based on other grounds in *Mississippi River Fuel Corporation* v. *Fontenot*, 234 F. 2d 898 (C. A. 5, 1956), *cert. den.*, 352 U. S. 916.

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

in *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345 (1939), the Montana court came to a contrary conclusion, specifically overruling the *Bruce* cases.[39]

Term "needful Buildings" construed. The words "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," as they appear in article I, section 8, clause 17, of the Constitution, generally have not been construed according to the rule of *ejusdem generis;* the words "other needful Buildings" [40] have been construed as including structures not of a military character and any buildings or works necessary for governmental purposes. 28 *Ops. A. G.* 185 (1935).[41] Thus, post offices, courthouses and customs houses all have been held to constitute "needful Buildings." [42] The term "needful Buildings" in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ervoirs and aqueducts,[51] and a relocation center.[52] In *Nikis* v. *Commonwealth,* 144 Va. 618, 131 S. E. 236 (1926), it was held that the abutment and approaches connected with a bridge did not come within the term "buildings," but a cession statute additionally reciting consent rather than a simple consent statute was there involved.

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

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

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

> Are the locks and dams in the instant case "needful buildings" within the purview of Clause 17? The State contends that they are not. If the clause were construed according to the rule of *ejusdem generis,* it could be plausibly contended that "needful buildings" are those of the same sort as forts, magazines, arsenals and 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] 26 *Ops. A. G.* 289, 297 (1907); In *State ex rel. Board of Commissioners* v. *Bruce, supra,* it was unsuccessfully contended that since buildings were erected only on part of an area which had been acquired with the State's consent, exclusive jurisdiction occurred only over a correspondingly small area. In *Valley County* v. *Thomas, supra,* it was decided with respect to the same lands as were involved in the *Bruce* case that neither a lake nor an earth dam were buildings, and that buildings erected incident to the construction of the dam did not serve to transfer jurisdiction under a consent and cession statute worded similarly to the "needful Buildings" phrase of clause 17. See also *Benson* v. *United States, supra.*

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

In this decision, the Supreme Court expressed its sanction to the conclusion theretofore generally reached by other authorities, that the rule of *ejusdem generis* had been renounced, and that acquisition by the United States for any purpose might be held to fall within the Constitution,[53] where a structure is involved.

LIMITATIONS ON AREAS OVER WHICH JURISDICTION MAY BE ACQUIRED BY CESSION OF STATE: *Early view.*—Until the *Fort Leavenworth R. R.* case, the courts had made no distinction between consents and cessions, and had treated cessions as the "consent" referred to in the Constitution.[54] *United States* v. *Davis,* 25 Fed. Cas. 781, No. 14,930 (C. C. D. Mass., 1829); *Ex parte Hebard,* 11 Fed. Cas. 1010, No. 6,312 (C. C. D. Kan.,

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

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

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

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

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

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

Present view.—After the *Fort Leavenworth R. R.* case, it was held that either a purchase with the consent of the State or an express cession of jurisdiction could accomplish a transfer of legislative jurisdiction. *United States* v. *Tucker,* 122 Fed. 518 (W. D. Ky., 1903); *Commonwealth* v. *King,* 252 Ky. 699, 68 S. W. 2d 45 (1934); *State ex rel. Jones* v. *Mack,* 23 Nev. 359, 47 Pac. 763 (1897); *Curry* v. *State,* 111 Tex. Cr. App. 264, 12 S. W. 2d 796 (1928); 9 *Ops. A. G.* 263 (1858); 13 *Ops. A. G.* 411 (1871); 15 *Ops. A. G.* 480 (1878); *cf. United States* v. *Andem,* 158 Fed. 996 (D. N. J., 1908).

By means of a cession of legislative jurisdiction by a State, the Federal Government may acquire legislative jurisdiction not only over areas which fall within the purview of article I, section 8, clause 17, of the Constitution, but also over areas not within the scope of that clause.[55] While a State *may* cede to the Federal Government legislative jurisdiction over a "place" which was "purchased" by the Federal Government for the "Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," it is not *essential* that an area be "purchased" by the Federal Government in order to be the subject of a State cession statute.[56] Thus, the transfer of legislative jurisdiction pursuant to a State cession statute has

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

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

been sustained with respect to areas which were part of the public domain and which have been reserved from sale or other disposition. *Fort Leavenworth R. R.* v. *Lowe, supra; Chicago, Rock Island & Pacific Railway* v. *McGlinn,* 114 U. S. 542 (1885); *Benson* v. *United States,* 146 U. S. 325 (1892). It is not even essential that the Federal Government own an area in order to exercise with respect to it legislative jurisdiction ceded by a State. Thus, a privately owned railroad line running through a military reservation may be subject to Federal legislative jurisdiction as the result of a cession. *Fort Leavenworth R. R.* v. *Lowe, supra; Chicago, etc., Ry.* v. *McGlinn, supra; United States* v. *Unzeuta, supra.* Similarly, a privately operated hotel or bath house leased from the Federal Government and located on a military reservation may, as a result of a State cession statute, be subject to Federal legislative jurisdiction. *Arlington Hotel Company* v. *Fant,* 278 U. S. 439 (1929);[57] *Buckstaff Bath House Co.* v. *McKinley,* 308 U. S. 358 (1939); *Superior Bath House Co.* v. *McCarroll,* 312 U. S. 176 (1941). Legislative jurisdiction acquired pursuant to a State cession statute may extend to privately owned land within the confines of a national park. *Petersen* v. *United States,* 191 F. 2d 154 (C. A. 9, 1951), *cert. den.,* 342 U. S. 885. It will not so extend if the State's cession statute limits cession to lands owned by the Government. *Op. A. G., Cal.,* No. NS3019 (Oct. 22, 1940). In *United States* v. *Unzeuta, supra,* the extension of Federal legislative jurisdiction over a privately owned railroad right-of-way located within an area which was owned by the Federal Government and subject to the legislative jurisdiction of the Federal Government was justified as follows (pp. 143–145):

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

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

was any necessary implication creating such an exception. The proviso that the jurisdiction ceded should continue no longer than the United States shall own and occupy the reservation had reference to the future and cannot be regarded as limiting the cession of the entire reservation as it was known and described. As the right of way to be located with the approval of the Secretary of War ran across the reservation, it would appear to be impracticable for the State to attempt to police it, and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purposes to which it was devoted.

* * * * *

The mere fact that the portion of the reservation in question is actually used as a railroad right of way is not controlling on the question of jurisdiction. Rights of way for various purposes, such as for railroads, ditches, pipe lines, telegraph and telephone lines across Federal reservations, may be entirely compatible with exclusive jurisdiction ceded to the United States. * * * While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation.

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

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

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

* * * There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17. And it has been held that such a cession may be qualified. It has never been necessary, heretofore, for this Court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. It was raised but not decided in *Arlington Hotel* v. *Fant*, 278 U. S. 439, 454. It was assumed without discussion in *Yellowstone Park Transportation Co.* v. *Gallatin County*, 31 F. 2d 644.

On account of the regulatory phases of the Alcoholic Beverage Control Act of California, it is necessary to determine that question here. The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17. In *Silas Mason Co.* v. *Tax Commission of Washington*, 302 U. S. 186, we upheld in accordance with the arrangements of the State and National Governments the right of the United States to acquire private property for use in "the reclamation of arid and semiarid lands" and to hold its purchases subject to state jurisdiction. In other instances, it may be deemed important or desirable by the National Government and the State Government in which the particular property is located that exclusive jurisdiction be vested in the United States by cession or consent. No ques-

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

This quoted excerpt suggests that the Federal Government may exercise legislative jurisdiction, ceded to it by a State, over any area which it might own, acquire, or use for Federal purposes.[58] In *Bowen* v. *Johnston,* 306 U. S. 19 (1939), the Supreme Court again indicated that it was constitutionally permissible for the Federal Government to exercise over a national park area legislative jurisdiction which might be ceded to it by a State.

Specific purposes for which cessions approved.—While the *Collins* case, *supra,* indicates the current absence of limitations, with respect to use or purpose for which the Federal Government acquires land, on the authority to transfer legislative jurisdiction to that Government by cession, it is of interest to note something of the variety of specific uses and purposes for which cessions had been deemed effective: postoffices, courthouses and custom houses: *United States* v. *Andem,* 158 Fed. 996 (D. N. J., 1908); *Brown* v. *United States,* 257 Fed. 46 (C. A. 5, 1919), *rev'd. on other grounds,* 256 U. S. 335 (1921); *State ex rel. Jones* v. *Mack,* 23 Nev. 359, 47 Pac. 763 (1897), (cession statute treated as a consent); *Sauer* v. *Steinbauer,* 14 Wis. 70 (1861); lighthouses: *Newcomb* v. *Rockport,* 183 Mass. 74, 66 N. E. 587 (1903); national penitentiary: *Steele* v. *Halligan,* 229 Fed. 1011 (W. D. Wash., 1916); national home for disabled volunteer soldiers: *People* v. *Mouse,* 203 Cal. 782, 265 Pac. 944, *app. dism.,* 278 U. S. 662 (1928); bridge for military purposes: 13 *Ops. A. G.* 418 (1871); national parks: *Robbins* v. *United States,* 284 Fed. 39 (C. A. 8, 1922); *Yellowstone Park Transp. Co.* v. *Gallatin County,* 31 F. 2d 644 (C. A. 9, 1929), *cert. den.,* 280 U. S. 555; *State ex rel. Grays Harbor Construction Co.* v. *Department of Labor and Industries,* 167 Wash. 507, 10 P. 2d 213 (1932). *Cf. Via* v. *State Commission on Conservation, etc.,* 9 F. Supp. 556 (W. D. Va., 1935), *aff'd.,* 296 U. S. 549 (1935); waters contiguous to navy yard: *Ex parte Tatem,* 23 Fed. Cas. 708, No. 13,759 (E. D. Va., 1877).[59]

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

PROCEDURAL PROVISIONS IN STATE CONSENT OR CESSION STATUTES: A number of State statutes providing for transfer of legislative jurisdiction to the Federal Government contain provisions for the filing of a deed, map, plat, or description pertaining to the land involved in the transfer, or for other action by Federal or State authorities, as an incident of such transfer.[60] Such provisions have been variously held to constitute conditions precedent to a transfer of jurisdiction, or as

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

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

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

pertaining to matters of form noncompliance with which will not defeat an otherwise proper transfer.[61] It has also been held that there is a presumption of Federal compliance with State procedural requirements. *Steele* v. *Halligan,* 229 Fed. 1011 (W. D. Wash., 1916).

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

A number of States uphold the contrary view, however. In *People* v. *Collins,* 105 Cal. 504, 39 Pac. 16 (1895), the court

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

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

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

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

of such acceptance in order to establish Federal jurisdiction. In any event, whether the United States has legislative jurisdiction over an area, and the extent of any such jurisdiction, involve Federal questions, and a decision on these questions by a State court will not be binding on Federal courts.[68]

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

Chapter IV

Termination of Legislative Jurisdiction

UNILATERAL RETROCESSION OR RECAPTURE OF JURISDICTION: *Retrocession.*—There has been discussed in the preceding chapter [1] whether the United States, while continuing in ownership and possession of land, may unilaterally retrocede to the State legislative jurisdiction it has held with respect to such land. It was concluded that, while there is opinion to the contrary, by analogy to the decision in the case of *Fort Leavenworth R. R.* v. *Lowe*, 114 U. S. 525 (1885), acceptance of such retrocession by a State is essential, although it seems probable that such acceptance may be presumed in the absence of—to use the term employed in the *Fort Leavenworth R. R.* case, *supra*—a "dissent" on the part of the State.

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

[1] See p. 54, *supra*.

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