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SOME PROBLEMS CONFRONTING THE PUBLIC WORKS EMERGENCY HOUSING CORPORATION

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Once again as the result of an emergency—this time a widespread economic depression—the Federal government has ventured into the field of housing construction.[1] In the war years of 1918–1920 the United States carried on construction of housing on a wide scale through incorporated agencies, the United States Housing Corporation and the United States Shipping Board Emergency Fleet Corporation. Problems inherent in such an entrance of government into a, theretofore, field of private enterprise were either not raised or were brushed aside as permissible and necessary appurtenants of the war powers of Congress and the President. The Emergency Rent Laws,[2] it is true, evoked a furore of both protest and approbation, but that outburst against governmental control was due to the imposition of restrictions on private property and not to any objection to governmental competition. A finding that the social emergency temporarily affected housing with a public interest proved to be the solution to the difficulty. The problems of taxation, of immunity from suit, and other attempts to deny the interchangeability of these and similar federal corporations with the personality of the United States later were the subject-matter of litigation. But the concomitant problems of compliance with building restrictions, of eminent domain, of jurisdiction, civil and politieal, of voting and school privileges, of police and fire protection, and similar issues never reached the courts. War hysteria levels most objections. These and other difficulties

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[1]The pertinent part of the National Industrial Recovery Act reads as follows: "The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (d) construction, reconstruction, alteration or repair under public regulation or control of low cost housing and slum clearance projects;" NATIONAL INDUSTRIAL RECOVERY ACT, tit. II, § 202; Circular No. 1 entitled *"The Purposes, Policies, Functioning and Organization of the Emergency Administration."* (The Rules Prescribed by the President).

[2]See a note by the author in (1930) 40 YALE L. J. 820 entitled *"Delays in Eviction Actions As a Means of Unemployment Relief."*

confront the peace time activities of the present housing program, and in particular, the Public Works Emergency Housing Corporation.[3]

PUBLIC PURPOSE

Incorporated into the Emergency Relief and Construction Act of 1932 and the National Industrial Recovery Act of 1933 as an incentive to and relief of the building trades, the housing program is intended to be a model for private, state and municipal construction of low cost housing.[4] The existence of the Housing Corporation and of the housing program itself is, of course, predicated upon the construction of housing by government being a proper governmental activity. The recent case of *Blaisdell v. Home Loan and Building Association*[5] minimizes to a large degree the possibility that housing may be held not to be a valid government function, as an unemploy-

[3]The Public Works Emergency Housing Corporation (hereinafter called the Housing Corporation) was incorporated under the laws of the State of Delaware to "act as an agency of the United States of America" to construct, reconstruct, alter or repair, or to aid financially or otherwise in the...., of low cost housing and slum clearance projects." The incorporators were Sec. of Interior Ickes, Sec. of Labor Perkins and Robert D. Kohn, Director of Housing. The stock is held in trust for the United States. By an Executive Order of Nov. 29, 1933 the President designated the Housing Corporation an "agency" under the power bestowed upon him by Title II of the National Industrial Recovery Act authorizing the President to "establish such agencies" as were necessary to effectuate the purpose of the act.

The question of whether "establish such agencies" permits the incorporation of a corporation will not be discussed here. The war time acts authorized the organization of corporations. However, the Sugar Equalization Board, Inc., and U. S. Grain Corporation were formed pursuant to an act merely authorizing the President to "use any agency" for the purpose of the Food and Fuel Act. Fed. Sugar Co. v. U. S. S. E. Board, 268 Fed. 575 (S. D. N. Y. 1920); 40 STAT. 276 (1917).

The issues arising between the Housing Corporation and the Comptroller General, and the question of the necessity of compliance with governmental rules and regulations are not discussed in this article.

[4]Examples of the current attitude are addresses by Fred F. French, builder of the Knickerbocker Village project: SLUM CLEARANCE IN NEW YORK & ABROAD (1933); SLUM CLEARANCE & KNICKERBOCKER VILLAGE (1933); Mayer, *Housing: A Call to Action,* (April 18, 1934) NATION.

[5]290 U. S. 398, 54 Sup. Ct. 231 (1934).

In an address before the New York State Bar Association, Dean Charles E. Clark of the Yale Law School predicted that the Supreme Court would uphold the constitutionality of "a considerable part, at least" of the present emergency acts. *"Individualism & the Constitution,"* N. Y. TIMES, Jan. 27, 1934. See also, Clark, *A Socialistic State under The Constitution,* FORTUNE (February issue, 1934).

ment curative in times of economic stress. There is, however, a firmer basis for government construction than the existence of an economic emergency.

Aside from its emergency features, housing has been clothed with a public interest by changing social and economic conditions. Regulation of privately owned dwellings has been upheld repeatedly as a health and safety measure.[6] Zoning has even been permitted for what in reality are aesthetic reasons.[7] The desirability and need for slum clearance and low cost housing with their corresponding health benefits militate in favor of a similar conclusion, that the construction of housing by government is a devotion of public funds to a public use.

Not only must housing bear the halo of public interest; it must also be a proper function within the powers granted by the Constitution. The latter will be assumed for the purposes of this discussion. The arguments as to what if any clause or clauses of the United States Constitution permit government construction of housing are too well known and invite too lengthy discussion to dare repetition. It may merely be pointed out that the Credit clause, the Interstate Commerce clause and the much maligned General Welfare clause of the United States Constitution have all been suggested as the constitutional authorization for this and other present day federal activities. It may be, too, that, under present conditions and the trend toward federal paternalism and subsidization, the mere existence of a public interest will be deemed sufficient authority.

No cases have directly raised the issue of the legality of construction of housing by the federal government. Only a few decisions have directly answered the question of state construction and operation of housing. Two, *Opinion of Justices*[8] and *Green v. Frazier*,[9] are representative of the divergent poles of social thought.

In 1912 the Supreme Judicial Court of Massachusetts considered a statute providing for state purchase of land and construction of buildings, to "rent, manage, sell and repurchase" to provide homes

[6]Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231 (1904), *aff'd* 203 U. S. 593, 27 Sup. Ct. 781 (1906); (1906) 70 L. R. A. 704.

[7]Welsh v. Swazey, 193 Mass. 364, 79 N. E. 745 (1907), *aff'd* 214 U. S. 91, 29 Sup. Ct. 67 (1909). Nectow v. City of Cambridge, 277 U. S. 183, 48 Sup. Ct. 477 (1928). Baker, *Aesthetic Zoning Regulations* (1926) 25 MICH. L. REV. 124.

[8]211 Mass. 624, 98 N. E. 611 (1912); *cf.* Libby v. Portland, 105 Me. 370, 74 Atl. 805 (1909), 26 L. R. A. (N.S.) 141 (1910).

[9]44 N. D. 395, 176 N. W. 11 (1920), *affirmed* 253 U. S. 233, 40 Sup. Ct. 499 (1920).

for "mechanics, laborers or other wage earners" for the sake of improving the "public health by providing houses in the more thinly populated area of the state for those who might otherwise live in the most congested areas of the state." The plan was not one of pauper relief nor even essentially one of low cost housing. In an opinion, interesting for its contrast to the decision and language of the United States Supreme Court in *Blaisdell v. Minnesota* and particularly to the general trend of national affairs today, the court said:

> "The dominating design of a statute requiring the use of public funds must be the promotion of public interests and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified."
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> "It is a matter of common knowledge that thousands of inhabitants of the commonwealth who are mechanics, laborers or other wage earners have become, through industry, temperance and frugality, owners of the homes in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the state to aid others in acquiring a home whose temperment, environment or habits have heretofore prevented them from attaining a like position."
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> "It may be urged that the measure is aimed at mitigating the evils of overcrowded tenements and unhealthy slums. These evils are a proper subject for the exercise of the police power. Through the enactment of building ordinances, regulations and inspection as to housing and provision for light and air lies a broad field for the suppression of mischiefs of this kind."[10]

And, as the court quoted from the case of *Lowell v. Boston*,[11] involving the power of the City of Boston to raise funds by the sale of bonds in order to loan money to owners of real estate whose buildings had been destroyed in the Boston fire:

> "The promotion of the interest of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object . . . However certain tain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential char-

[10] *Supra* note 8, at 625, 629, N. E. at 612, 614.

[11] 111 Mass. 454, 15 Am. Rep. 39 (1873).

acter of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community and thus the public welfare may be ultimately benefited by their promotion."[12]

In *Green v. Frazier* a similar statute involving similar considerations was attacked. That statute was designed to foster home building and home ownership through state construction and resale and thereby end itinerant family life. The Supreme Court of North Dakota upheld the statute as a valid governmental enterprise. On appeal, the Supreme Court of the United States avoided a direct expression of opinion on housing being so affected with a public interest as to permit construction by a municipal body, by saying:

"The taxing power of the states is primarily vested in the Legislatures, deriving their authority from the people. When a state Legislature acts within the scope of its authority, it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this Court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. . . . In the present instance under the authority of the Constitution and laws prevailing in North Dakota the people, the Legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. . . . With this united action of people, Legislature and court, we are not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the federal Constitution have been violated. . . . Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision."[13]

But, by including the suggestion:

"unless it is clear beyond a reasonable controversy",

the court left room for the distinction of other similar legislation. It must be conceded, too, that the declaration by a court that a legislative

[12] *Id.* at 461; *supra* note 10, at 626, N. E. at 612.

[13] *Supra* note 9 at 239, Sup. Ct. at 501.

expression is conclusive means little. A finding of abuse of discretion (as in the case of lower courts or administrative officers) or of lack of sufficient facts to sustain the expression may always be found.

Possibly the eight years interval between the decisions accounts for the variation in holdings of the courts of Massachusetts and North Dakota.[14] More probably it was the influence of the Non-Partisan League and the temper of the people of North Dakota.

More recently the issue of housing construction arose in California. The municipal charter of the City of Los Angeles authorized the establishment of a Municipal Housing Commission empowered to:

> "Provide by purchase, lease, condemnation, construction or otherwise, and to improve, rent, manage, sell and repurchase lands, dwellings, apartment houses, lodging houses or tenement houses, for the purpose of improving the health, safety and welfare of the inhabitants of said city, by providing homes for those who might otherwise live in over-crowded tenements, unhealthy slums, or the most congested areas."[15]

This act was regarded by the court as a health measure designed to preserve the health of the inhabitants by warding off epidemics, and therefore constituting a public use of public funds. That private persons were thereby benefited was regarded as immaterial, the court disagreeing with the Massachusetts Court, saying:

> "The fact that in the course of administration of the affairs of the commission private persons will receive benefit, as tenants or otherwise, of houses constructed by the commission, is not sufficient to take away from the enterprise the characteristics of a public purpose."[16]

As precedent the court had the somewhat inconsistent decision of *Veterans' Welfare Board v. Jordan*,[17] holding invalid the sale of state bonds for the purpose of securing funds to purchase farms or homes, selected by the veterans, to be turned over to them on long term credits, as a violation of the Constituted provisions prohibiting the loan of the credit of the state. But the application of the funds to buying large tracts of land to be improved and subdivided and turned

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[14]As one famous jurist has said: "The life of an idea is twenty years".

In 1915 the Massachusetts Constitution was amended to authorize the State to construct houses for the purpose of "relieving congestion and providing homes for citizens" to be sold at cost. In 1917 the Constitution was again amended, terming the providing of shelter during an emergency a public function.

[15]Willmon v. Powell, 91 Cal. App. 1, 4, 266 Pac. 1029, 1030 (1931).

[16]*Id.* at 7, Pac. at 1032.

[17]189 Cal. 124, 208 Pac. 284 (1922), 22 A. L. R. 1515 (1923).

over to the veterans on long term credits was upheld as part of a policy of land settlement and as subserving a public purpose.

In a recent New Jersey case the question of whether a municipality may indulge in housing operation was raised but the issue was sidestepped as not necessary to the decision.[18] Previously the same court had said of housing in an opinion involving the use of city funds to defend eviction suits:

> "Housing can only be provided where in the ordinary commercial way or by private charity."[19]

The issue arose in a different way in Florida in the case of *Hoskins v. City of Orlando*.[20] There apparently the city attempted to lease an apartment house to be operated for investment purposes. In denying the propriety of such a transaction, the Court, nevertheless, permits an inference by saying:

> "An apartment house in operation is so remote from the purpose of municipal government that the purchase of an interest in it is not presumptively valid, but apparently invalid, and the declaration should have alleged, if it could be done, some proper municipal use intended for it."[21]

The federal government does not meet with the objection of express constitutional provisions prohibiting the loan of government credit. The sole issue is that of government's place in housing. As already indicated, the construction of housing may be upheld as an emergency measure. For that matter the elimination of congested areas and the effectuation of healthful conditions may be said to constitute a perpetual emergency. The Supreme Court has said that the expression by a legislature that a purpose is public will be conclusive. Whether this will be extended to an expression by the federal legislature is still undecided.

Eminent Domain

The first step in housing construction will necessarily be the acquisition of land. It is hoped (but with the ever present scepticism) that public opinion will exert sufficient pressure to insure little or no

[18]Simon v. O'Toole, 108 N. J. L. 32, 155 Atl. 449 (1931). A city ordinance empowering the use of city funds to purchase land and develop a park in connection with a private housing venture was upheld under the theory that the funds were for park purposes and not for housing purposes.

[19]Stell v. Jersey City, 95 N. J. L. 38, 111 Atl. 274 (1920); *cf.* Koch v. Board of Commissioners, 97 N. J. L. 61, 116 Atl. 328 (N. J. Sup. Ct. 1922); Braunstein v. Jersey City, 98 N. J. L. 478, 120 Atl. 19 (1923).

[20]51 F. (2d) 901 (C. C. A. 5th, 1931). [21]*Id.* at 904.

gouging by landowners.[22] The possibility that condemnation will be unnecessary, however, is remote. The United States Supreme Court has held that a taxpayer may not question the power of Congress to appropriate money for any purpose, in a proceeding instituted for the purpose of questioning that power.[23] But in condemnation proceedings by the United States one whose property is sought for housing purposes may raise the issues of public use and of the general power of the United States to exercise the power of eminent domain. The first problem, that of public purpose, has been discussed; the second is so well settled that the question has resolved itself mainly into a question of the most expeditious and most practical proceeding to be followed.

The right of the United States to exercise the power of eminent domain is well established. Lands may be acquired within a state by the United States by eminent domain or otherwise without the consent of the State. As the Court said in *Kohl v. United States*,[24] a case involving the acquisition of a post office site,

> "If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State government of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership."[25]

Or as later reiterated in *United States v. Gettysburg Electric Railway*[26] wherein the power of the Federal Government to condemn lands for a national park was questioned:

> "It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given, it results from the powers

[22]The Honorable Harold L. Ickes, Public Works Administrator, has been quoted as saying: "No one is going to swindle the government by charging extortionate prices for land. We will pay fair prices—no more. If the landowners' try to hold us up, you might remind them that under the National Recovery Act we have the power of eminent domain and we will condemn the land and take it if we are forced to do so. What is more, we mean business about it." COLLIER'S MAGAZINE, February 3, 1934.

[23]Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923).

[24]91 U. S. 367, 23 L. ed. 499 (1875).

[25]*Id.* at 371.

[26]160 U. S. 668, 16 Sup. Ct. 427 (1896).

that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers."[27]

The power of the Federal Government is not confined to the exercise of eminent domain itself, but includes the right to delegate that power to corporations organized for the purpose of carrying out some public purpose within the scope of Federal control. The power has been delegated to private corporations organized for profit and at the same time intended as a means for carrying out a public purpose.[28] In the case of the Housing Corporation, a corporation organized for Federal purposes and financed with Federal funds, there is no doubt of the power of Congress to delegate the power of eminent domain to the Corporation, assuming, of course, that the first premise of the validity of the Housing program itself is sustained.

The Housing Corporation may find it desirable to have the State or municipality condemn the land and transfer it to the Housing Corporation. In *Kohl v. United States,* Justice Strong explicitly approved the holding in *People v. Humphrey*[29] that the State of Michigan may not condemn land for the use of the federal government. In *People v. Humphrey,* the Court said:

> "In the first place there can be no necessity for the exercise of this right by the State for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances. In the second place, the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government under, and by means of which, it is to appropriate lands for national objects is not among the evils contemplated in the creation of the State government."[30]

A point of distinction raised in decisions in other jurisdictions is the Court's further statement that:

> "It (the Michigan statute) assumes that the taking is to be for the United States exclusively. It is not necessary for us to consider, therefore, what might be the result were the theory of the act different."[31]

A Pennsylvania court reached a conclusion similar to that of *People v. Humphrey* in eminent domain proceedings by the United

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[27]*Id.* at 681, Sup. Ct. at 429.

[28]Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891 (1894); I WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 180.

[29]23 Mich. 471 (1871).

[30]*Id.* at 476. [31]*Id.* at 478.

States under state laws of a site for a post office. That Court too concluded:

> "The primary object is the accommodation of the United States government, and the convenience and comfort of its officials. The citizens of this State have no right in said buildings not common to all other citizens of the United States, nor have they any control over them."[32]

Other jurisdictions have upheld the power of the State to condemn land for federal purposes on the theory that the State as well as the federal government derives a benefit. Thus condemnation of land for a canal to be built by the state and transferred to the United States,[33] and of a harbor by a municipality,[34] have been sustained on similar grounds. Recent decisions in Virginia,[35] North Carolina[36] and Tennessee[37] have permitted the condemnation of lands, for inclusion in a national park, on the same basis of benefit to the state, despite the fact that control was shifted to the federal government. Condemnation of land for a fort by the United States under state authorization has been permitted on the reasoning that the transfer of the land to the federal government secured the attainment of a state interest, defense of its soil.[38] If the conclusion to be drawn is that condemnation resulting in benefit to the state as well as to the federal government will be upheld, condemnation for housing purposes should be permissible. For that matter, anything beneficial to the federal government benefits its integral parts.

There is another possible method of proceeding (and the one most likely to be employed): the exercise of the power of eminent domain by the Administrator in the name of the United States and a transfer of title to the Housing Corporation. Condemnation might be secured under the Act of 1888[39] and the supplementary Act of 1931[40]

[32]Darlington v. United States, 82 Pa. 382, 384 (1878). In connection with the reverse problem, the power of the United States to condemn for state purposes, it must be noted that the Supreme Court once said: "It is nndoubtedly true that the power of appropriating private property to public uses vested in the general government...cannot be transferred to a State." Jones v. United States, 109 U. S. 513, 518, 3 Sup. Ct. 346, 350 (1883).

[33]Lancey v. King, 15 Wash. 9 (1896).

[34]State v. Milwaukee, 156 Wis. 549, 146 N. W. 775 (1914).

[35]Rudacille v. State, 155 Va. 808, 165 S. E. 829 (1931).

[36]Yarborough v. Park Commission, 196 N. C. 284, 145 S. E. 563 (1928).

[37]State v. Oliver, 162 Tenn. 100, 35 S. W. (2d) 396 (1931).

[38]Gilmer v. Lime Point, 18 Cal. 229 (1861).

[39]25 STAT. 357 (1888), 40 U. S. C. §§ 257, 258 (1926).

[40]46 STAT. 1421 (1931), 40 U. S. C. SUPP. I. § 258a (1933).

entitled "An Act to expedite the construction of Public Works' Buildings outside of the District of Columbia by enabling possession and title to sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain." The Emergency Relief and Construction Act of 1932,[41] also a form of summary proceedings, set up additional special machinery to acquire land by condemnation for the emergency construction of public building projects. Section 203 (a) of the National Industrial Recovery Act[42] provides for the application of the condemnation proceedings of the Emergency Relief and Construction Act of 1932 to the acquisition of any land or site in the construction of buildings provided for in Title II. Under Section 203 (a) "The President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, to sell any security acquired or property so constructed or acquired or to lease any such property with or without the privilege of purchasing it."

As already indicated, the exercise of eminent domain by the Federal Government cannot be seriously questioned. There is little doubt of the right of such exercise of eminent domain by the Housing Corporation. A number of procedural difficulties not here discussed are inevitable. The time element being important, the choice of the quickest procedure may be expected.

Exemption of the Housing Corporation from State and Local Building Regulations

In many localities the building codes are so antiquated and obsolete as to make the construction of certain types of buildings impossible or the cost prohibitive. It is common knowledge that in many instances bribery is the only practical solution. It may be necessary therefore for the Housing Administration to choose between the alternatives of not erecting housing in certain localities, of inducing a change in the building restrictions, or of asserting a freedom from building regulations under an extension of the doctrine of *McCulloch v. Maryland*. The first alternative is dependent upon the feasibility

[41] 47 Stat. 722 (1932), 40 U. S. C. Supp. I. § 258a note (1933).

[42] 48 Stat. 201 (1933), 40 U. S. C. Supp. I. § 401 (1933). A new condemnation bill providing for uniform procedure was recently passed in the United States Senate.

of either of the last two; the second upon the frame of mind of the local legislators.

Exemption from building regulations may be claimed on the ground that the Housing Corporation is a federal instrumentality with whose functions a state may not interfere. Several Supreme Court decisions appear to sanction the belief that the Housing Corporation is independent of local building regulations. As early as 1885 the Supreme Court announced:

> "Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purpose designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to independence and sovereign authority of the United States within the sphere of their delegated powers."[43]

The immunity of government employees from forms of police regulation in the fulfillment of government business has already been passed upon. In *Johnson v. Maryland*[44] the United States Supreme Court held that the State of Maryland could not require mail drivers to secure driver's licenses, on the theory that no state may interfere with the Federal Government or its instrumentalities in the performance of government functions. The Court said:

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient."[45]

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[43]See Fort Leavenworth v. Lowe, 114 U. S. 525, 539, 5 Sup. Ct. 995, 1002 (1885).

[44]254 U. S. 51, 41 Sup. Ct. 16 (1920); *cf.* R. I. v. Burton, 41 R. I. 303, 103 Atl. 962 (1918), L. R. A. 1918 F. 559 (dispatch driver arrested for speeding); *Re* Neagle, 135 U. S. 1, 10 Sup. Ct. 658 (1889) (federal marshal not subject to trial in state courts for killing committed in course of duties).

[45]*Id.* at 57, Sup. Ct. at 16.

Attempts have been made to distinguish this holding on the grounds that (1) the basis for state regulation being the degree of reasonable interference, only unreasonable regulation is prohibited, and (2) the statement of the Court that:

> "It may very well be that when the United States has not spoken the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment —, as for instance, a statute or ordinance regulating the mode of turning at corners of streets..."[46]

citing *Comm. v. Closson,*[47] which subjected mail drivers to traffic regulations regarding the turning at intersections. A Virginia Court insisted that mail drivers are subject to speed laws, differentiating *Johnson v. Maryland* on the theory that:

> "So far as appears from the record before us, the United States has not spoken on the subject of the speed at which it was the duty of the accused to travel in such way as to make the Virginia statute in question in any way interfere with the performance of the Federal duties of the accused."[48]

That is to say, there was no conflict between federal and state laws such as to necessitate a subordination of state laws to the power of the federal authorities. A subsequent case in a federal district court, involving application of a municipal ordinance to the driver of an improperly lighted mail truck, laid similar stress on the fact that rules of conduct had been prescribed by the drivers' superiors.[49] On this theory, too, one might distinguish *Ohio v. Thomas,*[50] holding that state pure food laws did not apply to the governor of a National Soldiers' Home, Congress having indirectly made provision in its appropriations for the purchase of oleomargarine. The language of that court, however, is strikingly definite:

> "The government is but claiming that its own officers, when discharging duties under Federal authority pursuant and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed."[51]

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[46] *Id.* at 56, Sup. Ct. at 16.

[47] 229 Mass. 329, 118 N. E. 653 (1918).

[48] Hall v. Comm., 129 Va. 738, 105 S. E. 551 (1921); State v. Wiles, 116 Wash. 387, 199 Pac. 749 (1921), 18 A. L. R. 1163 (1921).

[49] Ex parte Willman, 277 Fed. 819 (S. D. Ohio 1921).

[50] 173 U. S. 276, 19 Sup. Ct. 453 (1899).

[51] *Id.* at 283, Sup. Ct. at 455.

Again, in *United States v. Hunt*,[52] state hunting laws, i. e. police regulations, were not permitted to interfere with the authority of the United States over preserves in a National forest. Here, too, the United States had spoken through the medium of the Secretary of the Interior. Possibly this decision could be shown inapplicable as falling within Article IV Sec. 3 (2) of the United States Constitution, but no mention was made of this section by the Supreme Court although it was cited by the lower court whose opinion was affirmed. If the distinguishing factor, however, is the existence of federal regulations, the Executive Order of the President and regulations of the Secretary should be sufficient to bring the Housing Corporation within the purview of the above cases.

A case particularly in point is *Arizona v. California*.[53] There the Supreme Court held that the plans and specifications of Boulder Dam need not be submitted to the approval of the state engineer of Arizona, despite a state statute requiring such submission for approval. The court ruled:

> "The United States may perform its functions without conforming to the police regulations of a state. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the State Engineer's approval."[54]

The power to construct the dam was based upon the power of Congress over navigable waters. That power does not differ from a power to construct housing. The former power is express, the latter implied; but if, as the court in *Arizona v. California* suggested, the power exists, freedom from regulation in the one should also mean freedom from regulation in the other. Nor did the court appear to base its decision on the ground of concurrent or exclusive jurisdiction. For its holding it cited *Johnson v. Maryland* and *Hunt v. United States*.

Despite the distinctions that may be, and have been, raised, the decisions upholding the superiority of the United States appear based on the sole idca that the United States may perform its functions without conforming to the police regulations of a state. There is little difference between the basic idea of drivers' licenses, oleomargarine laws, hunting laws and dam supervision and building regulations. All are predicated upon the need for police protection and safety of the community. And yet the Supreme Court in each case

[52] 278 U. S. 96, 49 Sup. Ct. 39 (1929).
[53] 283 U. S. 423, 51 Sup. Ct. 522 (1931).
[54] *Id.* at 451, Sup. Ct. at 525.

denied the power of regulation to the state. The attitude of the Court is well exemplified by the statement made by Justice Brandeis, in referring to *Johnson v. Maryland,* that:

> "this court held that the power of Congress to establish post roads precluded the state from requiring of a post office employee using the state highway in the transportation of mail the customary evidence of competency to drive a motortruck, although the danger to public safety was obvious and it did not appear that the federal government had undertaken to deal with the matter by statute or regulation. The prohibition of state action rests, as the court pointed out there, 'not upon any consideration of degree, but upon the entire absence of power on the part of the states to touch the instrumentalities of the United States.' "[55]

Taxation-Property and Franchise and Corresponding Privileges

Inevitably the Housing Administration will encounter the problem of state and local tax assessment. From the financial viewpoint of the Housing Administration, the burden of property, franchise and special assessments is undesirable. Despite the fact that corresponding benefits are received and that as a matter of policy the good will of the community is desirable, the claim of tax exemption may be raised on the ground that property of the United States and of its instrumentalities is not subject to taxation.

The power of a state or political subdivision to tax property of the United States or of its instrumentalities has been discussed too much elsewhere to warrant further extensive analysis. The multitude of cases originating with *McCulloch v. Maryland,* and based upon the principle of federal supremacy and the idea of the power to tax being the power to destroy are too common knowledge to necessitate repetition. But some reference should be made to the series of cases, arising in the last decade, involving the taxability of federal corporations—federal, in that they were organized for purposes of the federal government—incorporated under state laws and similar in many respects to the Housing Corporation in their reason for being and in their corporate structure. These expressions of judicial opinion are indicative of the decision most likely to be reached in any future litigation.[56]

[55]Gilbert v. Minnesota, 254 U. S. 325, 341, 41 Sup. Ct. 125, 130 (1920); see Fox Film v. Doyal, 286 U. S. 123, 128, 52 Sup. Ct. 546, 547 (1932) (resting upon an "entire absence of power").

[56]In view of such decisions as Fox Film Corporation v. Doyal, *supra* note 55, Jaybird Mining Co. v. Weir, 271 U. S. 609, 46 Sup. Ct. 592 (1926) (Brandeis' dissent), and Burnet v. Coronado Oil and Gas Company, 285 U. S. 393, 52 Sup. Ct. 443 (1932) certainty is impossible.

It is not always clear whether the courts are basing their decisions on the idea of immunity of instrumentalities of the United States or on the theory that the property of the corporations is property of the United States and therefore exempt from taxation. Some courts speak in terms of *McCulloch v. Maryland;* others attempt to merge the personalities of the corporations and the United States. Yet none follow *Thomson v. Union Pacific*[57] or *Railroad Co. v. Penniston.*[58]

The most recent basis for the contention that property of the PW Housing Corporation is tax exempt, is the case of *Clallam Co., Wash., v. United States,*[59] arising on a bill by the United States to cancel taxes levied by the state and county on land and other physical property of the United States Spruce Production Corporation. This corporation was incorporated under the corporation laws of the State of Washington pursuant to an Act of Congress authorizing the creation of a corporation, with all but seven shares subscribed for by the United States and with those seven shares held by the necessary directors but controlled by the United States together with an assignment to the United States of all the dividends and property rights therein. Lands and other property were transferred by the United States to the Corporation in exchange for bonds of the Corporation. In short, as the Court concluded:

> "The Spruce Production Corporation was organized by the United States as an instrumentality in carrying on the war, all its property was conveyed to it or bought with money coming from the United States and was used by it solely as means to that end.... Whatever assets may be realized (on liquidation) will go to the United States."[60]

Immunity was claimed by the United States under the decision and reasoning of *McCulloch v. Maryland.* The state contended that, although the means of carrying on the United States Government may not be taxed, taxation of the property of the Spruce Production Corporation was not such taxation. Nevertheless, the Court flatly refused to permit taxation of the property of such a governmental agency, organized solely "for the convenience of the United States to carry out its ends."

Another Spruce Production Corporation case,[61] cited with approval

[57] 9 Wall. (U. S.) 579 (1869) (property tax upheld). This statement refers to the cases dealing with the wartime corporations.

[58] 18 Wall. (U. S.) 5 (1873); *cf.* Van Brocklin v. Anderson, 117 U. S. 151, 6 Sup. Ct. 670 (1886).

[59] 263 U. S. 341, 44 Sup. Ct. 121 (1923). [60] *Id.* at 344, Sup. Ct. at 121.

[61] U. S. Spruce Production Corp. v. Lincoln Co., 285 Fed. 388 (D. Ore., 1922).

in the *Clallam* decision, found the tax on the property of the Corporation to be a tax on the means of government. The rationale of the Court, however, was modified by its statement that, inasmuch as the property of the Corporation had been purchased with government funds appropriated for that purpose, it should be regarded as government property, or, as suggested by a New York court:

> "property of a corporation, engaged in executing a federal agency, is itself the means by which such agency is executed."[62]

Exemption from taxation has also been upheld on the theory that such corporations are *alter egos* of the United States. In *King Co. Wash. v. United States Shipping Board Emergency Fleet Corporation*[63] (hereinafter ealled the Fleet Corporation) a similarly organized corporation was involved. The Court denied the contention of the taxing authorities that the power to tax existed where legal title was in one other than the United States, saying:

> "But here, admittedly, the property is not only held by a government agency, but was acquired with public funds, and was to be used exclusively for public purposes.... To hold that it lost its public character, because the government chose to have the legal title in the name of a corporation, which it brought into existence and completely controls for its own convenience, and the entire eapital stock of which it owns, would be to sacrifice substance for form."[64]

But it must be noted that the property concerned in that case was purchased, not out of funds obtained by the sale of stock to the United States, but with moneys appropriated by Congress for that purpose after the Corporation had been organized. This fact in itself explains perhaps the Court's refusal to differentiate between legal and beneficial title. In a later case,[65] also involving the Fleet Corporation, the Court followed the King County procedure of determining taxability by the character of the owner of the beneficial title, over-ruling the lower court's finding that taxability is determined by the character of the holder of the legal title. In *United States v. Coghlan*,[66] the Court expressly refused to inquire whether the Fleet Corporation was the United States, since as a governmental agency it was immune

[62]De La Vergne Mach. Co. v. State Tax Commission, 211 App. Div. 227, 231 207 N. Y. Supp. 680, 684, (3rd Dept. 1925), *aff'd* 241 N. Y. 517, 150 N. E. 536 (1925).

[63]282 Fed. 950 (C. C. A. 9th, 1923).

[64]*Id.* at 953.

[65]U. S. S. B. E. Fleet Corp. v. Del. Co., Pa., 275 U. S. 483, 48 Sup. Ct. 21 (1927). [66]261 Fed. 425 (D. Md. 1919).

from taxation regardless of its separate identity. Regardless of their rationales, however, the federal courts have all upheld the non-taxability of the war time corporations.

It may be, too, that the Supreme Court will term housing a business and not a governmental function. In *South Carolina v. United States,*[67] the United States Supreme Court distinguished between functions strictly governmental in character and those termed proprietory in nature. *Burnet v. Coronado Oil and Gas Company*[68] was distinguished from *South Carolina v. United States* on this basis, the court saying that Oklahoma in leasing her public lands for the benefit of the public schools exercised a function strictly governmental in character and:

> "Consequently South Carolina v. United States much relied upon, is not in point."[69]

In *Indian Motorcycle Company v. United States,*[70] wherein a sales tax upon motorcycles sold to the United States was held invalid, the court again referred to *South Carolina v. United States,* saying:

> "Of course, the reasons underlying the principle mark the limits of its range. Thus, as to persons or corporations which serve as agencies of government, national or state, and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies; and, in harmony with this view, it also has been held where a State departs from her usual governmental functions and "engages in a business which is of a private nature", no immunity arises in respect of her own or her agents' operations in that business."[71]

The wartime character of the Shipping and Housing Corporation of 1917 precludes any doubt that their activities were not proper governmental functions, but the status of housing by government in times of peace is less certain.

A lower court in Pennsylvania[72] attempted to distinguish between general taxation and special assessments, suggesting that special

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[67]199 U. S. 437, 26 Sup. Ct. 110 (1904).

[68]*Supra* note 56.

[69]*Id.* at 400, Sup. Ct. at 443.

[70]283 U. S. 570, 51 Sup. Ct. 601 (1931).

[71]*Id.* at 576, Sup. Ct. at 603.

[72]City of Phila., v. U. S. Housing Corp., 82 Pa. Super. Ct. 343 (1923), *aff'd* 124 Atl. 669 (Pa. 1924); *cf.* Whittaker v. Deadwood, 23 S. D. 538, 122 N. W. 590 (1909) (federal property exempt from special assessments).

assessments are imposed for value conferred and imposing liability on a quasi-contractual theory. As the lower Court said:

> "We are dealing, not with general taxation, but with the right of the city's contractor to collect from the land for the work and labor furnished by him for the immediate benefit of the property."[73]

Apparently the Court was doubtful of the validity of its own argument for it proceeded in its opinion to discuss the question of title being in a corporation and not in the United States, distinguishing *Fagan v. City of Chicago*[74] on that basis. On appeal, this finding was confirmed with the added suggestion that lack of immunity was clearly indicated by the Act of Congress providing for the payment of claims.

The Housing Corporation may also be confronted with the requirement of paying franchise or qualification taxes, at least in those states in which it is not incorporated but is doing business as a foreign corporation. A tax upon the franchise or a tax for the privilege of doing business within the state being a tax directly upon the means of carrying on governmental functions, would seem clearly invalid. Even those courts indicating that the taxation of property may be permissible deny the power to tax the means.[75] There is language in several United States Supreme Court opinions denying the power of a state to impose franchise taxes. As early as 1877 the United States Supreme Court in denying the power of the State of Florida to grant the exclusive right of erecting telegraph lines to state companies to the exclusion of foreign companies said:

> "And undoubtedly a corporation of one state, employed in the business of the general government, may do such business in other states without obtaining a license from them."[76]

And again in 1888 in a dictum repeated in *Pembina Mining Co. v. Pennsylvania* the Court said:

> "The only limitation upon the power of the state to exclude a foreigu corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate, or foreign."[77]

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[73] *Id.* at 347.
[74] 84 Ill. 227 (1876).
[75] *Supra* notes 57 & 58.
[76] Pensacola T. & T. v. Western Union Tel. Co., 96 U. S. 1, 12 (1877).
[77] 125 U. S. 181, 190, 8 Sup. Ct. 737 (1888).

And as the Court in *De La Vergne Machine Co. v. State Tax Commission* stated in refusing to impose a state tax based upon net income:

> "If we regard the tax as being essentially a tax upon net income, it was a tax upon income accruing to the United States, and consequently invalid as a tax upon federal property. The same result follows if we regard it as a tax upon the privilege of doing business or exercising a franchise."[78]

The United States Housing Corporation of 1917 qualified in twenty states without the necessity of paying franchise taxes. As to the necessity of paying recordation and filing fees in the state of incorporation there might be more doubt. The nominal amounts generally required can hardly be regarded as a burden upon the government. The recordation fees were waived by Delaware on incorporation of the Housing Corporation.

Inasmuch as the Housing Corporation proposes to dispose of the completed structures and necessarily to receive mortgages for at least a part of the purchase price, it is concerned with the taxability of the property after sale and the priority of its lien over tax liens. The United State Supreme Court has held that the interest of the United States is paramount. In the language of the Court:

> "We conelude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens, and interest in the lots, retained and held by the Corporation as security for the unpaid purchase moneys, are expressly exeluded from such sales, and they are made, by express terms, subject to all such prior rights, liens, and interests."[79]

Possibly a different decision would have been reached had not an Act of Congress prohibited the conveyance of the property "without reserving a first lien....for the unpaid purchase money".[80] This was indicated in *Lincoln Co., Ore. v. Pacific Spruce Corporation*,[81] a

[78] *Supra* note 62 at 231, N. Y. Supp. at 684.

[79] City of New Brunswick v. U. S., 276 U. S. 547, 556, 48 Sup. Ct. 371, 373 (1928); City of Phila. v. Myers, 102 Pa. Super. Ct. 424, 157 Atl. 13 (1931); *cf.* Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, Sup. Ct. (1903) (tax on property conveyed on condition subsequent).

[80] 40 STAT. 224 (1917).

[81] 26 F. (2d) 435 (C. C. A. 9th, 1928). On the theory that no taxable interest is present until a right to a conveyance of title exists the cases are perhaps

case, in holding that where legal title was not to pass until full payment of the payment price, there was no taxable interest in the purchases.

The Report of the United States Housing Corporation[82] suggests that exemption from taxation may mean loss of the facilities and privileges and protection accorded taxpayers. The United States Housing Corporation executed contracts with the municipalities, in which its buildings were constructed, for the payment of an amount equivalent to taxes, in return for such privileges and protection. Other "government buildings" have received such privileges as a matter of courtesy. Whether police and fire protection, schooling privileges, waste and sewage facilities may be denied a non-taxpayer is problematical.

JURISDICTION

A possible means of securing tax exemption and immunity from state and local regulation is the acquisition of exclusive jurisdiction. Exclusive jurisdiction may be obtained by express cession of jurisdiction by the state.[83] Exclusive jurisdiction may also be acquired in accordance with Art. I Sec. 8 (17) of the United States Constitution reading:

> " . . . 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;"

State statutes usually provide for a general expression of consent to the purchase of lands by the United States and blanket cession of jurisdiction. A typical statute reads:

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reconcilable. The question of the taxability of the purchaser's interest is not here discussed. *Cf.* Irwin v. Wright, 258 U. S. 219, 42 Sup. Ct. 293 (1922).

In connection with the taxability of leaseholds and income derived from leases of Government property see Indian Territory Ill. Oil Co. v. Oklahoma, 240 U. S. 522, 36 Sup. Ct. 453 (1916); Choctaw C. & G. Ry. v. Mackey, 256 U. S. 531, 41 Sup. Ct. 582 (1921); Choctaw Oklahoma & Gulf Ry. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27 (1914); Susquehanna Power Company v. Tax Commission, (No. 1) 283 U. S. 291, 51 Sup. Ct. 432 (1930); (No. 2) 283 U. S. 297, 51 Sup. Ct. 434 (1930); Gillespie v. Oklahoma, 257 U. S. 501, 42 Sup. Ct. 171 (1921); Burnet v. Coronado Oil and Gas Company, 285 U. S. 393, 52 Sup. Ct. 443 (1932).

[82]REPORT OF THE U. S. HOUSING CORPORATION (1920).

[83]*Supra* note 43. Both consent and cession of jurisdiction are not necessary. U. S. v. French, 122 Fed. 518 (W. D. Ky. 1903). MILITARY RESERVATIONS, REPORT OF JUDGE ADVOCATE GENERAL (1916) (new edition being compiled).

Consent for United States to Acquire. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the consent of the State of Illinois is hereby given, in accordance with the sixteen clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state required for custom houses, court houses, post offices, arsenals, or other public buildings whatever, or for any other purpose of the Government.

Jurisdiction ceded. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the administration of the criminal laws and the service of all civil processes of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.[84]

It has been argued that the "other needful Buildings" of the Constitution refers only to buildings *eiusdem generis* with those specifically mentioned, i. e., "Forts, Magazines, Arsenals, dock-yards."[85] But the term "other needful Buildings" has been construed to include other types of government structures, such as post offices, customs houses, canals, dams, soldiers' homes.[86] State statutes, too, have extended the number of purposes for which exclusive jurisdiction may be obtained. Such phrases as "other public buildings whatever," or "any other goverument purposes" are common. Whether housing comes within the context of "needful Buildings" is, perhaps, doubtful. That it is a public purpose or purpose of the government within the meaning of the state statutes of consent or cession of jurisdiction is less doubtful.

Presumably purchase by the United States, where such a statute of consent exists, vests exclusive jurisdiction in the United States *ipso facto*. Where exclusive jurisdiction is ceded, acceptance of such exclusive jurisdiction will be presumed on the theory that the United States is benefited thereby and that benefits will always be accepted.[87]

[84]ILL. REV. STATS. (1929) c. 143.

[85]Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 Sup. Ct. 227 (1929); People v. Mouse, 259 Pac. 762 (D. Calif. 1927) (Soldiers' Home), *rev'd* 203 Cal. 782, 265 Pac. 944 (1928), *cert. den.* 278 U. S. 614, 49 Sup. Ct. 19 (1928); *Re* Kelly, 71 Fed. 545 (C. C. E. D. Wis. 1895); Lieber, *Cessions of Jurisdiction*, 32 AM. L. REV. 78 (1898); *cf.* Six Cos. v. DeVinney, 2F. Supp. 693 (O. Nev. 1933).

[86](1928) 37 YALE L. J. 796; (Note) 74 L. ed. 761, 762. Whether "purchase" includes condemnation is problematical. See State v. Board of Commissions, 153 Ind. 302, 304, 54 N. E. 809, 811 (1899); *cf.* Fort Leavenworth v. Lowe, *supra* note 43; United States v. Beatty, 198 Fed. 284 (W. D. Va. 1912).

[87]Fort Leavenworth v. Lowe, *supra* note 43; People v. Mouse, *supra* note 83; United States v. Wurtzburger, 276 Fed. 753 (D. Ore. 1921).

Whether a cession of jurisdiction may be rejected without an act of Congress is problematical. Rejection by an agency appears dubious. Consent of the state to a retrocession of jurisdiction by Congress, on the other hand, has been held unnecessary.[88] A similar problem exists in the case of acquisition of jurisdiction by purchase with state consent alone. Once the property has been resold to private individuals, however, jurisdiction reverts to the state.

The further objection to the acquisition of exclusive jurisdiction may be, and has been, raised that Art. I Sec. 8 (17) of the United States Constitution and the State statutes of consent and cession of jurisdiction apply only to lands and buildings held by the United States in the name of the United States and not to lands and buildings whose "title" is technically in a corporation. It must be borne in mind, too, that there is a difference in terminology between the United States Constitution and the supplementary State statutes of consent, and the State cession laws. The first makes no mention of the word "title", the second specifically refers to "title" in the United States. In an early Wisconsin case, *In re O'Connor,*[89] the objection was raised and sustained that the United States Constitution is applicable only where purchase is by the United States *as such* and not where title is held by a National Soldiers' Home, a corporation created by an act of Congress, with officers including the President of the United States, the Secretary of War, and the Chief Justice of the United States Supreme Court. There was in existence a state statute ceding jurisdiction, but the Court spoke in terms of Art. I Sec. 8 (17) of the United States Constitution, i. e., purchase with the consent of the state. The California Appellate Court upheld a similar argument, involving the same Corporation, but that decision was later reversed.[90]

The Corporation involved above differs materially in financial and corporate structure from the Housing Corporation. Nevertheless, for many purposes, corporations organized under state laws for federal purposes have been considered *alter egos* of the United States.

[88]Renner v. Bennett, 21 Ohio St. 431 (1871); *cf.* State v. Board of Commissions, *supra* note 86; see Arlington Hotel Co. v. Fant, *supra* note 85, at 455, Sup. Ct. at 231. Once the purpose has ceased, jurisdiction reverts in accordance with the statutory provisions. *Cf.* Palmer v. Barrett, 162 U. S. 399, 16 Sup. Ct. 837 (1896). Jurisdiction would revert to the state, therefore, on sale by the Housing Corporation.

[89]37 Wis. 379, 19 Am. Rep. 765 (1875).

[90]People v. Mouse, *supra* note 85.

In *United States Grain Corporation v. Phillips*,[91] for example, the whereabouts of legal "title" was expressly considered immaterial.

Exclusive jurisdiction so acquired might result in embarrassing difficulties. Persons residing on the land might be deprived of civil and political rights. In Massachusetts in an *Opinion of the Justices*[92] it was said that residents of the Boston navy-yard were not entitled to vote in town elections nor their children to take advantage of local schooling benefits. In *Sinks v. Reese*[93] the inmates of a Soldier's National Home were barred from voting. Again in *Lowe v. Lowe*[94] residents of a federal reservation in Delaware were held not entitled to sue for divorce in the state courts of Delaware. Presnmably the city in which the building is located might refuse to furnish police and fire protection. Municipalities might deny the use of their water and lighting plants. Other government buildings such as post offices and customs houses supply their own police protection and receive fire protection as a matter of courtesy. But antagonism to government construction of housing might lead to a withdrawal of such facilities.

Before undertaking construction in any particular locality, therefore, the Housing Administration will require evidences of good faith and cooperation from the local governments. The legal, or, at least, moral obligation not to sabotage the projects by taxation, burdensome building regulations, or withdrawal of municipal facilities will be a prerequisite to government construction. The social and economic benefits that will result from the construction of housing by the government is expected to obviate any antagonism.

The Housing Corporation As An Alter Ego of the United States

As already indicated the question of the similarity of identity of the United States and of the Public Works Administration Housing Corporation may be in issue in a nnmber of situations, primarily that of taxation, state regulation, jurisdiction. Cases involving the interchangeability of the personalities of the United States and its federal corporations and their subjection to state laws or to duties imposed upon business corporations have arisen frequently. There is no definite line of demarcation. For some purposes the corporations have been considered the United States; for other purposes the idea

[91] 261 U. S. 106, 43 Sup. Ct. 283 (1922).

[92] 42 Mass. 580 (1841); 6 Op. of Att'y Gen. (U. S.) 577 (1854).

[93] 19 Ohio St. 306 (1869).

[94] Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926).

of a separate and distinct entity has been maintained. The so-called war-time corporations, on the whole, were created under state laws pursuant to an Act of Congress authorizing the creation of a corporation by the President.[95] At least two corporations, the United States Grain Corporation and the Sugar Equalization Board, Inc., were organized under an act merely authorizing the President to "create and use any agency" necessary to effectuate the purposes of the act and not expressly authorizing the creation of a corporation.[96] All the corporations were financed at first, at least, by a sale of stock to the United States.

(a) *Immunity from suit*

A case much cited by later federal cases and the precursor of a horde of federal court decisions is *Sloan Shipyards Corporation v. United States Emergency Fleet Corporation*[97] (hereafter called the Fleet Corporation) involving three separate cases. The first case involved the right to sue the Fleet Corporation in the federal courts to set aside a contract allegedly induced by duress and to have requisitioned properties restored. The second case was a similar proceeding for a breach of contract. The third ease presented the question of whether the Fleet Corporation was entitled to priority in bankruptcy proceedings on a claim arising under a contract wherein it was designated as "representing the United States." Although recognizing the Fleet Corporation as a federal instrumentality, the United States Supreme Court held the corporation subject to suit as a private corporation. The Court said:

> "The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States."[98]

A large number of eases have since arisen attempting to distinguish the case on various grounds, principally that (1) the Court construed the intention of Congress to be that the Fleet Corporation shall be not immune from suit; (2) liability was imposed on the Corporation on the theory that an agent committing a wrong is himself liable. As the court said:

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[95]For a list of these corporations see United States v. McCarl, 275 U. S. 1, 48 Sup. Ct. 12 (1927). [96]40 STAT. 276 (1917).

[97]258 U. S. 549, 42 Sup. Ct. 386 (1922).

[98]*Id.* at 570, Sup. Ct. at 388.

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Goverument he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. . . The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred. The District Judge gave weight to the phrase in the general incorporation law of the District that corporations formed under it shall be eapable of suing and being sued in any Court in the District. Code D. C. 607. But we do not read those words as putting District corporations upon a different footing from those formed under the laws of the states."[99]

The fact that the contract was made by the Fleet Corporation "representing the United States of America" however was regarded as unimportant by the Court. In the later case of *Fleet Corporation v. Harwood,*[100] the contract read, by the Fleet Corporation "representing and acting . . . for and in behalf of the United States of Ameriea (hereinafter referred to as the owner)". Yet the Court held the Fleet Corporation to be bound on the contract, saying that one acting as a private agent may be bound, although the agency is known, if he executes a contract in his own name, and refusing to accept the presumption that a public agent is not bound as an individual since no one is justified in believing that he meant to be bound.

[99] *Id.* at 566, Sup. Ct. at 388.

[100] 281 U. S. 519, 50 Sup. Ct. 372 (1930).

The issue has arisen in a number of other factual and legal set-ups. They may be readily classified as:

(b) *"Real party in interest"*

In a suit to compel the Fleet Corporation to comply with an agreement to subordinate its mortgages to the plaintiff's mortgages, the objection was raised that the United States was an indispensable party to the suit.[101] In an extensive opinion holding the Corporation to be no different from an ordinary business corporation, the court denied the contention. This was so despite the fact that the bonds and mortgages described the Fleet Corporation as representing the United States.

Other cases have held the United States to be the real party in interest. In *Erickson v. United States,*[102] the United States was held a proper party plaintiff in a breach of contract action. In *United States v. Czarnikow-Rionde Co.,*[103] the United States was also a proper party plaintiff. But that case is distinguishable since the United States owned the vessels involved and the Fleet Corporation quite clearly acted as agent only. The *Harwood* and *Providence Engineering Co.* cases were differentiated on the ground that they were cases of suit against the Fleet Corporation. And in *Russell Wheel & Foundry Co. v. United States,*[104] the United States was held to be the proper party plaintiff, in an action to recover an over-payment made under a contract executed by the Fleet Corporation, both at common law and under a Michigan statute reading "every action shall be prosecuted in the name of the real party in interest." But where a surety bond was under seal and made out to the Fleet Corporation, "representing the United States (hereinafter called the obligee)" only the Fleet Corporation was permitted to sue on the bond.[105] The cases are reconcilable once one regards the Fleet Corporation as the agent of the United States and the United States as the real party in interest.

(c) *Counterclaim and set-off*

Analogous to the question of *alter ego* and "real party in interest" is the question of whether the United States may counterclaim or set-off claims owned by the Fleet Corporation.

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[101]Providence Eng. Corp. v. Downey Shipbuilding Corp. 294 Fed. 641 (C.C.A. 2d, 1933). [102]264 U. S. 246, 44 Sup. Ct. 310 (1923).

[103]40 F. (2d) 214 (C.C.A. 2d, 1930), *cert. den.* 282 U. S. 844, 51 Sup. Ct. 24 (1930); U. S. v. Gano-Moore, 35 F. (2d) 395 (E.D. Pa. 1929); U. S. v. Brown, 247 N.Y. 211, 130 N.E. 13 (1928). [104]31 F. (2d) 826 (C.C.A. 6th, 1929).

[105]U. S. v. Amsterdam, 55 F. (2d) 277 (S.D. N.Y. 1932).

The Court of claims has ruled that where the Fleet Corporation has made a contract containing the language "representing and acting in all respects to all matters . . . for and on behalf of the United States" the United States may in a tax refund action counterclaim as principal for damages arising out of such contract. In *Crane v. United States,*[106] the Court said:

> "It should especially be noted that in none of the cases cited on behalf of the plaintiffs was the relation of the Fleet Corporation (as agent) to the United States so expressly defined."[107]

The Court distinguished the Sloan case, the contract involved therein containing the language "representing the United States", on the ground that the Supreme Court looked at the contract as brought about by the unlawful act of the Fleet Corporation. In effect, however, the holding is merely that the principal may bring the action himself. In an analogous situation, the United States and the Fleet Corporation were not regarded as the same persons so that an action against the United States did not toll the running of the Virginia statute of limitations for wrongful deaths against the Fleet Corporation.[108]

(d) *Employees and Agents as Employees and Agents of the United States*

A distinction has been made between the Fleet Corporation and the United States in that employees of the Fleet Corporation have been regarded as not being the employees of the United States. For example, in *United States v. Strang,*[109] an inspector of the Fleet Corporation was held not to be affected by the United States Criminal Code Sec. 41 providing that no officer or member of a firm contracting with the United States shall be an agent of the United States, on the ground that the Fleet Corporation was not the United States but a separate entity, its inspectors being appointed not by the President or Congress, but by the officers of the Fleet Corporation, and subject to removal by the Fleet Corporation only. The Attorney-General had ruled previously that a federal eight hour law applying to employees of the Federal Government did not include employees of a railroad corporation organized in New York and operating in Panama, most of whose stock was owned by the United States, a few shares

[106]55 F. (2d) 734 (Ct. Cl. 1932), *cert. den.* 287 U.S. 601, 53 Sup. Ct. 7 (1932).
[107]*Id.* at 736.
[108]Lindgren v. Fleet Corp. 55 F. (2d) 117 (C.C.A. 4th, 1932), *cert. den.* 286 U.S. 542, 52 Sup. Ct. 499 (1933).
[109]254 U.S. 491, 41 Sup. Ct. 165 (1921).

being privately owned, and the shares of each director being secured to the United States by an option of purchase.[110] In *Dalton v. United States*,[111] a retiring officer of the United States Army, appointed a trustee of the Fleet Corporation did not come within a Federal act prohibiting the holding of two federal offices and the drawing of pay in both capacities. But in *United States Grain Corporation v. Phillips*,[112] the Supreme Court held that gold owned by the Corporation and having its legal title in the name of the Corporation was nevertheless the property of the United States so that naval regulations giving to a naval officer a fee for carrying gold did not apply. It was admitted by the Court that if the United States had had legal title to the gold, there would have been no doubt whatever that the naval officer was not entitled to a fee.

For Purpose of Criminal Statutes

In *United States v. Walter*,[113] it was held that a fraud against the Fleet Corporation was a fraud against the United States under the United States Criminal Code imposing liability on persons "defrauding the United States", inasmuch as pecuniary loss to the United States would have resulted and the efficiency of a very important instrumentality of the United States would have been impaired. This holding was separate and apart from a holding in the same case to the effect that United States Criminal Code Sec. 41, making it a crime to present a fraudulent claim against "any corporation in which the United States is a shareholder" was intended to apply to corporations like the Fleet Corporation that are instrumentalities of the United States and in which, for that reason, it owns stock.

The earlier case of *Salas v. United States*[114] involved a railroad corporation whose entire stock was owned by the United States and whose corporate set-up was used to avoid the restrictions of United States laws regarding the Canal Commission. The court there held that a fraud upon the corporation was not a fraud upon the United States on the ground that the United States had abandoned its sovereign capacity. That corporation was not one originally organized by the United States. Yet in both cases the United States was more than a mere stockholder; it was the owner.[115]

The *Salas* case was distinguished in *Ballaine v. Alaska Ry.*,[116] on

[110] 25 Op. of Att'y Gen. (U. S.) 465 (1905). [111] 71 Ct. Cl. 421 (1931).
[112] *Supra* note 91. [113] 263 U.S. 15, 44 Sup. Ct. 123 (1923).
[114] 234 Fed. 842 (C.C.A. 2d, 1916).
[115] See Bank of United States v. Planters' Bank, 9 Wheat. 905 (U.S. 1824).
[116] 259 Fed. 193 (C.C.A. 9th, 1919).

the ground that there the United States had ventured into a commercial enterprise whereas in this case all the stock and assets of the railroad were purchased for public purposes. The court in *Ballaine v. R. R.*, therefore, permitted the railroad to claim the immunity of a sovereign.

(e) *Priority in Bankruptcy*

The claim of the Fleet Corporation to priority as a creditor in bankruptcy proceedings was denied by the Supreme Court in the third Sloan case.[117] Yet the denial of priority resulted in financial loss to the United States. *United States v. Crane,* discussed above under counterclaims, distinguished the case on the ground that the bill against the trustee was brought in the name of the Fleet Corporation.

(f) *Priority In and Reduced Rates for Telegraph Service*

In *Fleet Corp. v. Western Union Tel. Co.*,[118] the Fleet Corporation was held entitled to the lower rates given the United States. The Court's theory was that although the Fleet Corporation was a private corporation, all of its stock was owned by the United States; payment of private rates would increase the charges upon the Treasury (the original $50,000,000 had long since been spent and appropriations made directly); that there was no intention on the part of the United States to deprive itself of the benefit of priority and lower rates, unlike the intention to be subject to suit; that even though it may be subject to suit as a private corporation, there is:

> "no reason for denying that the Fleet Corporation is a Department of the United States within the Post Roads act."

In short, the Court found that the Fleet Corporation is entitled to the government rates

> "not because it is an instrument of the government, but because it is a Department of the United States within the meaning of the Post Roads Act."[119]

National Banks and Federal Reserve Banks were distinguished as being private corporations because of the presence of private capital.

The earlier ease of *Commercial Pac. Cable Co. v. Philippine National Bank*,[120] is distinguishable. Only 85% of the capital stock was owned by the Philippine Government.

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[117] *Supra* note 97; W. Va. R.R. v. Jewett, 26 F. (2d) 503 (E.D. Kan. 1926).
[118] 275 U.S. 415, 48 Sup. Ct. 198 (1928).
[119] *Id.* at 426, Sup. Ct. at 202. [120] 263 Fed. 218 (S.D. N.Y. 1920).

(g) *Attachment or garnishment*

A federal court has held that the Fleet Corporation may not be garnisheed for the wages of an employee of the Fleet Corporation on the ground that although the Corporation may sue or be sued it cannot be subjected to garnishment in cases unrelated to its own duties or liabilities.[121] In *Haines v. Lone Star Shipbuilding Co.*,[122] however, garnishment was permitted on the ground that though an arm of and agent of the United States, the Fleet Corporation is subject to the liabilities of ordinary business corporations, there being nothing about immunity in the Act of Congress authorizing its organization. These, however, were cases of garnishment of sums due third parties. Under the ruling in *Lake Monroe*,[123] the property of the corporation presumably may be attached and sold for debts of the corporation itself.

The financial structure of the Housing Corporation differs from that of the Fleet Corporation. The latter corporation was financed mainly by sales of stock to the United States; the Housing Corporation expects to obtain its funds by an appropriation and allotment of Public Works moneys, to be disbursed by the Treasury. Less possibility exists therefore of the courts permitting a levy of execution against the funds of the Housing Corporation. That is, they may be considered non-attachable funds of the United States.

In regard to the relation of the Fleet Corporation to the United States, Justice Brandeis has said:

> "At no time, during the War or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the goverument or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during federal control, have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration. Indeed, an important, if not the chief, reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the treasury under its established procedure of audit and control over the

[121] McCarthy v. Fleet Corp., 53 F. (2d) 923 (App. D.C. 1931).

[122] 226 Pa. 82, 110 Atl. 788 (1920).

[123] 250 U.S. 246, 39 Sup. Ct. 480 (1919); *cf.* Fleet Corporation v. Rosenberg, 276 U.S. 202, 48 Sup. Ct. 256 (1928); Johnson v. Fleet Corporation, 280 U.S. 320, 50 Sup. Ct. 118 (1930).

financial transactions of the United States. . . . For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards, and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers, except so far as control may be exerted by the Shipping Board." * * *[124]

There is more basis for terming the Housing Corporation an *alter ego* of the United States than in the case of the war time corporation. Those corporations were financed mainly by sales of stock to the United States. The Housing Corporation as now organized is to derive its funds from a direct allotment by the Public Works Administrator.

It is difficult to ascertain a consistent rationale in these cases. The war time corporations were not created to evade personal liability of the United States. Suit against the United States in any event would be unavailing without the consent of the United States. There is no reason, therefore, for imposing the duties and liabilities assumed by business corporations in return for the privilege of limiting the liability of their shareholders. Congress authorized the creation of the corporations as a means of avoiding governmental delays and for the sake of administrative convenience. Permeating all the cases is the feeling, expressed by Justice Brandeis in *United States v. McCarl,* that the chief reason for employing these incorporated agencies was to give them the advantages of commercial methods and a freedom supposed to be inconsistent with accountability to the treasury. Whether or not Congress intended the concomitant detriments, however, the courts have in some instances imposed them.

Conclusion

These problems constitute the major difficulties and pitfalls of the Public Works Emergency Housing Corporation. The increased use of federal corporations inevitably will raise further issues not as yet litigated in the courts. New bills are constantly being drafted, resulting in corporate agencies such as the Reconstruction Finance Corporation, the Tennessee Valley Authority and the Home Owners' Loan Corporation. In the drafting of the acts establishing such organizations as these, some of the problems discussed above may be obviated. Draftsmanship, however, is notoriously faulty, new legislation brings to light issues previously unknown, and the intention of legislators is always a subject of controversy. The next few years should give birth to a wealth of legal problems centering around the activities of these and future governmental corporations.

[124] *Supra* note 95.