October 30, 1937.

OPINION NO. 1660

UNITED STATES; MILITARY RESERVATIONS, JURISDICTION OVER.

If Congress should assume exclusive "legislative jurisdiction" over military or

naval reservations in the Territory the United States thereby would assume exclusive jurisdiction for all purposes.

TAXATION, GENERALLY; MILITARY RESERVATIONS, JURISDICTION TO TAX IN.

Assumption by the United States of exclusive jurisdiction over a military or naval reservation eliminates the taxing jurisdiction of the state or territory in which such reservation is situated.

UNITED STATES; MILITARY RESERVATION, JURISDICTION OVER.

Upon the assumption by the United States of exclusive jurisdiction over a military or naval reservation the laws previously applicable in such territory, including statutory law, continue in effect until superseded by action of Congress, but statutes and amendments subsequently passed in the state or territory in which such reservation is situated have no effect unless adopted by Congress.

COURTS; JURISDICTION OVER MILITARY OR NAVAL RESERVATION.

Upon the assumption by the United States of exclusive jurisdiction over a military or a naval reservation, the courts of the state or territory in which such reservation is situated continue to have jurisdiction in actions arising in the reservation if transitory in their nature and if service is made outside of the reservation.

SAME; SAME.

Some federal courts have held that an action arising in territory within the exclusive jurisdiction of the United States

is an action arising under the laws of the United States, but even so, the amount in controversy must exceed $3,000.00 for such federal courts to have jurisdiction, and the jurisdiction of the federal courts does not extend to some matters, such as probate matters.

SAME; SAME.

Some state courts have assumed jurisdiction over actions arising in such reservations even though local in character and even though service is made on the reservation, but the assumption of such jurisdiction appears to be founded solely upon necessity.

SAME; SAME.

The United States Courts have jurisdiction over all offenses arising under the authority of the United States and the United States has made provision for the adoption of state and territorial penal laws.

ARMY AND NAVY RESERVATIONS; CIVIL RIGHTS AND PRIVILEGES.

Persona residing on reservation over which the United States has exclusive jurisdiction, do not thereby acquire a residence in the state or territory in which such reservation is situated, and are not entitled to any of the rights or privileges dependent upon residence.

Honorable J. B. Poindexter,
Governor of Hawaii,
Honolulu, T. H.

Sir:

Pursuant to your request we have gone into the

matter of proposed legislation with respect to the exclusive jurisdiction of the federal government over military and naval reservations in the Territory.

A copy of the bill, which is proposed for enactment by Congress, is annexed to this opinion. (See p. 336.)

The existing situation as to jurisdiction over such military and naval reservations was the subject of Op. Att'y Gen. (1935) No. 1629, and the answering memorandum of the Department Judge Advocate General for the Commanding General, Hawaiian Department, dated March 25, 1936, and was touched upon in a reply memorandum by this office dated June 15, 1936. It appears unnecessary to review the existing situation at this time, other than to state that the Territory has taken the position that the jurisdiction of the territorial government extends to such reservations in so far as there is no interference with federal instrumentalities in the exercise of federal functions. As stated in the memorandum of the War Department dated July 14, 1937, the Navy Department is not ready to admit that this position is correct, while the War Department is inclined to admit it as a fact with some doubt as to its legality.

This memorandum is confined to the situation under the proposed legislation, which is treated under five headings: A. Taxation; B. Civil Matters in General; C. Jurisdiction of Courts in Civil Matters; D. Criminal Matters; and E. Civil Rights and Privileges.

A. Taxation

The proposed legislation would provide that, the territorial government should have no "legislative jurisdiction" over such reservations. It is well settled that the exclusive "legislative jurisdiction of Congress thus established means exclusive jurisdiction of the federal government for all purposes, and eliminates the taxing jurisdiction of the state. Thus, in *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, the Supreme Court said at page 652:

> "But Camp Pike is not in the same class with any of the reservations of which we have spoken and should not be confused with any of them. Nor should it be confused with military or other reservations within a Territory of the United States. It is not questioned, nor could it well be, that Camp Pike comes within the words 'forts, magazines, arsenals, dockyards, and other needful buildings' in the constitutional provision. The land therefore was purchased by the United States with the consent of the legislature of the State in 1917. The constitutional provision says that Congress shall have power to exercise 'exclusive legislation in all cases whatsoever' over a place so purchased for such a purpose. 'Executive legislation' is consistent only with exclusive jurisdiction * * *."

The court held that a personal property tax could not be imposed on certain blankets which had been purchased from the United States by a private company a few days before the tax assessment date and were at Camp Pike awaiting removal by the company. It thus appears that whenever territorial jurisdiction is involved in the levy of a tax, all taxing power of the Territory over the reservation, including taxing power over civilians on reservations, will be taken away by the proposed legislation. The same was held in the following cases as to the taxes noted. All of the cases involved civilians. *Yellowstone Park Transp. Co.* v. *Gallatin County,* 31 F. (2d) 644 (C.C.A. 9th, 1929) *(cert. denied* 280 U.S. 555)—personal property tax; *Concessions Co.* v. *Morris,* 186 Pac. 655, (Wash. 1919)—personal property tax; *Standard Oil Co. of Calif.* v. *Calif.,* 291 U. S. 242 (1934)—license tax measured by sales; *United States* v. *Cordy,* 58 F. (2d) 1013 (D.C. Md. l932)—license tax measured by sales; *Winston Bros.* v. *State Tax Commission,* 62 P. (2d) 7, *(cert. denied* May 3, 1937)—excise tax on privilege of doing business and income tax. With the above cases may be compared *Ralph Sollit & Sons Construction Co.* v. *Commission,* 172 S. E. 290, appeal dismissed for want of substantial federal ques-

tion, 292 U. S. 599, 604, in which a license fee was sustained upon the ground that the contract was not performed wholly on the United States territory.

If in transferring jurisdiction to the United States taxing jurisdiction is retained, taxes may be imposed. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525 (1885)—personal property tax; *Rainier Nat. Park Co.* v. *Martin,* 18 F. Supp. 481 (D. C. W. D. Wash. S. D. 1937)—excise tax on doing of business, sales tax, and other excise taxes.

In the Hawaii National Park Act, Act of April 19, 1930, 46 Stat. 227, c. 200, there is a provision:

"* * * saving further to the Territory of Hawaii the right to tax persons and corporations, their franchises and property on the lands included in said par.* * *"

This provision is sufficient to save all taxing jurisdictions *(Rainier Nat. Park Co.* v. *Martin, supra)* but no such provision is contained in the proposed legislation as to military and naval reservations.

Although domicile is a separate ground of taxing jurisdiction for some taxes, distinct from the territorial jurisdiction which will be affected by the proposed legislation (New *York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 81 L. Ed. Adv. Ops. 409), very few of the territorial taxes turn upon domicile. Domicile determines the application of the poll tax (Op. Let. Att'y Gen. [December 11, 1935]), and the situs of intangibles for income tax and inheritance tax purposes, at least if business situs is not involved *(Ewa Plantation Co.* v. *Wilder,* 289 Fed. 664; *Hill* v. *Carter,* 47 F. (2d) 869, *cert. denied* 284 U. S. 625; *First National Bank* v. *Maine,* 284 U. S. 312) and similarly the situs under the Unemployment Relief and Welfare Act of dividends from foreign companies (Op. Let. Att'y Gen. [July 7, 1933]) and accordingly such taxes will not be affected. On the other hand income and gross income taxes on income and gross income derived from business done and property located within the reservations, will be eliminated, except to the extent the Territory has some taxing jurisdiction, i. e., if some tax would have accrued had the business been done or the property located on the mainland. It will be immaterial whether the person or agency deriving such income or gross income is a federal agency or not, and it will be immaterial whether such agency is organized for profit or not. Services performed within such reservations will not be subject to unemployment relief tax, as the place where the services are performed determines taxability (Op. Let. Att'y Gen. [July 7, 1933]). Property located on such reservations will not be subject to property taxes. Of course, real property owned by the United States is not taxable at the present time.

With the above preliminary statement we desire to call to your attention two situations which will arise and which require clarification in our opinion.

1. *Unemployment compensation tax.*

Employment upon the reservations would not be subject to the territorial unemployment compensation tax (Act 243, L. 1937), under the proposed legislation, and such employees would not come within the benefits of the territorial act. The injustice of this result is apparent since employers (if not instrumentalities of the United States) would be subject to the federal tax without any opportunity for their employees to benefit through the local act as contemplated by Congress.

We therefore recommend that there be included in the proposed legislation a provision to the effect that Act 243, L. 1937, as the same may be amended or reenacted, shall apply to such reservations, or a general provision to accomplish the same result.

2. *Commerce between points in the Territory and points in the reservations.*

The decisions above cited do not dispose of the question of the taxability of commerce between points in the Territory and points in the reservations. In *Standard Oil Co.* v. *Cal., supra,* the court held that both sale and delivery occurred in the Presidio and the transaction was not subject to tax as it was both begun and concluded in the Presidio. In *United States* v. *Cordy, supra,* the court pointed out that the tax applied only where both sale and delivery were made in the state, and held that since delivery was made on the reservation it was not made in the state within the meaning of the Act. In both these cases, therefore, the statute in terms did not apply and the jurisdictional question could not arise. In the *Cordy* case, however, the court further held:

"We have already pointed out that the statute expressly provides that the tax 'shall not be imposed on motor vehicle fuel when exported or sold for exportation from the State of Maryland to any other State or nation. * * *' Section 218. While federal territory is not mentioned in this provision, we believe that it is proper to say that it must be so included by implication. * * *" p. 1015.

It thus appears that the court did regard the shipment of goods from the state to the Army Post as an exportation out of the state, though again no jurisdictional question was involved as the matter was treated as a problem in statutory interpretation. On the other hand, in *Grayburg Oil Co.* v. *State,* 3 S. W. (2d) 427 (Tex. 1928), where a similar situation arose, the court said that the sales necessarily were intra state since the point of shipment and the point of delivery (the military reservation) were wholly within the state, but the case was reversed by the United States Supreme Court, 278 U. S. 582, on the authority of *Panhandle Oil Co.* v. *Minnesota,* 277 U. S. 218, which held that sales to the

United States might not be included in the measure of the tax.

In *Hanley* v. *Kansas City Southern Railway Co.,* 187 U. S. 617, the action involved the jurisdiction of Arkansas to penalize a railroad for charging more than the rate fixed by the state for a shipment from a point in Arkansas through the Indian Territory to another point in Arkansas. The Court said:

"It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States, Stoutenburgh v. Hennick, 129 U. S. 141 ; and the distinction hardly is important since the appellants are asserting similar authority where the loop beyond the state boundary runs through Texas. * * *

"The transportation of these goods certainly went outside of Arkansas, and we are of the opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not." pp. 619-620.

In *United States* v. *Tucker,* 188 Fed. 741 (D. C. S. D. Ohio E. D. 1911), there was involved a prosecution under the Pure Food and Drugs Act for the mailing in Ohio of medicine containing cocaine, addressed to a point in Washington, D. C., in fulfillment of an order received in Ohio. The District Court judge made this broad statement:

"Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state, or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce, * * *" p. 743

We respectfully submit, however, that whatever the rule may be as to military reservations in a state, the

present situation is different. Where a state is involved, the question is as to the respective powers of the state and Congress under the Constitution, and if Congress has power in the matter such power is derived from the interstate commerce clause and Congress may not delegate such power. *Stoutenburgh* v. *Hennick,* 129 U.S. 141. Here the power of Congress over the whole territory is beyond doubt and includes the power to regulate commerce between points in the reservations and other points in the Territory. No question as to the respective powers of a state and Congress is involved. Moreover, as this power arises from the power of Congress over the territories and not from the interstate commerce clause, it is a power which can be vested in the territories. The question then is one of the intention of Congress, i. e., whether Congress intends that such power shall be vested in the territories. It would seem that such power is vested in the Territory of Hawaii under section 55 of the Organic Act: "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. * * *", since neither the Constitution nor the proposed legislation is inconsistent with such power. Clarification on this point appears advisable, however, as needless complications would arise if the Territory did not have power to regulate, tax, or otherwise burden commerce between points in the Territory and points in the reservations. Owing to the number of scattered areas involved all within the geographical limits of the Territory, it is easy to visualize the technicalities which would arise from the application in the present situation of a doctrine similar to the interstate commerce doctrine. For example, problems would arise in connection with telephone, bus, and other utility service between the reservations and other points in the Territory, also in connection with sales made in the Territory proper of goods delivered on the reservations. As to the latter, it

should be noted that the statute (Act 141, L. 1935) does not require sale *and delivery* in the Territory before the tax applies, so that the matter cannot be disposed of on the ground that a necessary element of taxability is missing, as was done in the *Standard Oil* case and the *Cody* case, *supra.* The statute in terms does not apply to any sales which constitutionally may not be taxed, but as previously submitted the present situation depends rather upon the intention of Congress.

We therefore recommend that there be included in the proposed legislation a provision to the effect that nothing therein contained shall be deemed to affect the jurisdiction of any territory to regulate commerce with places subject to the exclusion legislative jurisdiction of Congress, if such places be within the exterior boundaries of such Territory, or to tax or otherwise burden such commerce.

B. Civil Matters in General

It is well settled that statutes of a state do not apply to such reservations after exclusive jurisdiction has been taken. *Western Union Tel. Co.* v. *Chiles,* 214 U. S. 274, (1909).

However, the law in existence at the time jurisdiction is taken continues in effect in the reservations until superseded, and this includes statutory law. *Chicago Rock Island and Pacific Ry. Co.* v. *McGlinn,* 114 U. S. 542; *Hoffmann* v. *Leavenworth Light Etc., Co., 138* Pac. 632, (1914).

Statutes passed in the state after exclusive jurisdiction has been taken have no effect upon the reservations. *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, *affirming 280 S.* W. 20 *(overruling demurrers)* and 4 S. W. (2d) 7 *(sustaining final judgment).*

Consequently a state law in effect at the time exclusive jurisidiction is taken continues in effect in the

reservations until superseded by action of Congress, although meanwhile such statute has been superseded in the state itself by action of the state legislature. *Kaufman* v. *Hopper,* 115 N. E. 470 (N. Y. 1917).

Such statute continued in effect at the time exclusive jurisdiction is taken, of course is superseded by action of Congress covering the subject matter. *Webb* v. *J. G. White Engineering Corporation,* 85 So. 729 (Ala. 1920).

Instead of legislating for the reservation, Congress may adopt state legislation and may provide that such right of action shall exist as though the place were under the jurisdiction of the state, and when this has been done the state statute applies as amended from time to time. *Murray* v. *Joe Gerrick & Co.,* 291 U. S. 315, 1934.

With the above preliminary statement, we desire to call to your attention four matters which require action in our opinion:

1. *Actions for death or personal injury.*

The statute of February 1, 1928, Chap. 15, 45 Stat. 54, 16 U. S. C. A. sec. 457, provides:

"Sec. 457. Action for death or personal injury within national park or other place under jurisdiction of United States; application of state laws. In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be. (Feb. 1, 1928, c. 15, 45 Stat. 54.)"

If proposed legislation is passed the above statute should be amended to apply to territories.

2. *Workmen's compensation.*

The statute of June 25, 1936, 49 Stat. 1938, Chapter 822, secs. 1 and 2, 40 U. S. C. A. sec. 290, provides:

"Sec. 290. State workmen's compensation laws; extension to buildings and works of United States.

"Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

"For the purposes set out in this section, the United States of America hereby vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, that by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to thc enforcement of their State workmen's compensation laws as herein designated: Provided further, that nothing in this section shall be construed to modify or amend sections 751 to 796 of Title 5. (June 25, 1936, c. 822, sees. 1, 2, 49 Stat. 1938.)"

If the proposed legislation is passed the above statute should be amended to apply to Territories,

3. Laws *applicable to places within the exclusive jurisdiction of the United States.*

There should be included a general provision to the effect that all laws applicable to places held for military or naval purposes within the exterior boundaries of any state and under the exclusive jurisdiction of the United States, shall have force and effect in such places

within the exterior boundaries of any Territory, and for this purpose the word State shall be deemed to include Territory.

4. *Determination of law applicable to civil matters.*

Although it is well settled that when the United States takes exclusive jurisdiction the date when such exclusive jurisdiction is taken determines what law is applicable, until and unless superseded by action of Congress, the War and Navy Departments do not concede that at the present time the Territory has legislative jurisdiction over these reservations. It therefore appears advisable to include in the proposed legislation a provision that for the purpose of determining the application of the laws of the territories to such reservations, the date of the enactment of such Act shall be deemed the date when legislative jurisdiction of the Territory ceased.

C. Jurisdiction of Courts in Civil Matters

The proposed legislation contains the following provision:

> "* * * *Provided*, That the territorial governments shall have the right to serve civil or criminal process within the limits of such places in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed, within the geographical limits of the said territories but outside the limits of such places:* * * "

At this point we propose to investigate the question whether under the proposed legislation a complete remedy may be had in some court for all rights acquired and obligations incurred within the reservations. The authorities which have been examined fall into three groups:

1. *Transitory actions.*

In so far as (a) the right of action is transitory in nature, and (b) service of process may be made within the Territory proper, it is clear that suit can be brought in the territorial courts upon the same principle as if the right of action had arisen in another state. Ohio *River Contract Co.* v. *Gordon,* 244 U. S. 68; *Madden* v. *Arnold,* 47 N. Y. S. 757, (1897), *affirmed* 162 N. Y. 638, 57 N. E. 116; *McCarthy* v. *R. G. Packard Co.,* 94 N. Y. S. 203, (1905), *affirmed* 182 N. Y. 555,75 N. E. 1130; *Norfolk & P. B. L. R. Co.* v. *Parker,* 147 S. E. 461 (Va. 1929).

2. *Federal courts.*

The jurisdiction of the federal courts over civil matters arising in such reservations is not as clear as in criminal matters, *infra*.

In *Steele v. Halligan,* 229 Fed. 1011 (D. C. W. Wash. S. D. 1916), one ground for sustaining the jurisdiction in the federal court was that an action for personal injuries arising in territory within the exclusive jurisdiction of the United States was an action which "arises under * * * the laws of the United States" (28 U. S. C. A. sec. 41 [1-a]) on the theory that when exclusive jurisdiction is taken the laws of the state, which continue in effect until superseded, become "laws of the United States."

In *Woodfin* v. *Phoebus,* 30 Fed. 289 (C. C. E. Va. 1887), there was involved a controversy among executors as to the sale of a hotel located at Fortress Monroe within the exclusive jurisdiction of the United States. One ground for sustaining the jurisdiction of the federal court was that the cause arose under the laws of the United States as it was necessary to determine the effect of the laws governing the jurisdiction over Fortress

Monroe in relation to the probate of the will in the Virginia Court, and similar matters.

It is apparent that whatever the jurisdiction of the federal courts may be on the theory of a matter in controversy arising under the laws of the United States, such jurisdiction exists only "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000," (28 U. S. C. A. 41 [1]).

It is apparent also that the jurisdiction of the federal courts does not extend to certain matters such as the probate of a will.

3. *Local matters.*

There remains for consideration a group of cases in which a state court has assumed jurisdiction over a matter arising on the reservation and local in character, which would not have been within the jurisdiction of the state court had the matter arisen in another state, or has assumed jurisdiction over a matter arising in the reservation when process was served on the reservation. In *Divine* v. *Unaka National Bank,* 140 S. W. 747 (Term. 1911), an administrator appointed by the state court for a deceased resident of a National Soldier's Home sought control of the decedent's bank account and possession of certain papers in the possession of authorities at the Home. The state court pointed out that the federal court had only the jurisdiction conferred by Congress, limited by the amount in controversy, and no other jurisdiction existed, while at the same time the state law continued in effect. The state court held that it had jurisdiction. Another case in which the court did not give any reason for its decision that it had jurisdiction is ex *parte Kernan,* 4. N. E. (2d) 737 (N. Y. 1936). In that case the state court assumed jurisdiction of a *habeas corpus* proceeding to determine the custody of a child taken by her father, an Army officer, to Madison Barracks. Process was served at the barracks upon the petition of the divorced wife. The least intelligible of all these cases is *Danielson* v. *Donmopray,* 57 F. (2d) 565 (D. C. Wyo. 1932), an action for wrongful death from injuries received in an accident occurring within a military reservation. The action was begun in the state court, service of process made on the reservation, and the case then removed to the federal court. The federal court recognized that its jurisdiction depended upon the jurisdiction of the state court, but sustained its jurisdiction despite the fact that in ceding exclusive jurisdiction to the United States the state had saved only the right to serve process on account of obligations incurred outside the reservation. The court nevertheless said that the jurisdiction of the state court over the controversy carried with it a reasonable inference that service of the process might be made upon the reservation.

It is submitted that the reasoning of this group of cases is unsatisfactory and founded in substance upon the necessity of the cases, and that the proposed legislation should be framed so as to leave no gaps in the matter of judicial jurisdiction. The proposed legislation, as previously noted, provides for service of civil process on the reservation *only* in matters arising outside of the reservations. The United States District Court for the District of Hawaii has only the jurisdiction of other district courts. Organic Act, sec. 86. Even assuming that matters arising in such reservations arise under the laws of the United States, as reasoned in *Steele* v. *Halligan* and *Woodfin* v. *Phoebus, supra,* there remains a gap in the judicial jurisdiction over matters arising in the reservations, to-wit: (1) All actions, whether transitory or not, in which process can be served only on the reservations and less than $3,000 is involved; (2) all actions not transitory in character in which less than $3,000 is involved; (3) all matters not transitory in na-

ture and of a nature not within the jurisdiction of the federal courts, such as probate of wills of decedents leaving property on the reservations.

While the proposed legislation is of a type often used in transfers of exclusive jurisdiction to the United States, in many instances the state has reserved the right to serve process in all cases, and not only in cases arising outside of the reservations. See, for example, the cession of the Hot Springs reservation, as set forth in *Arlington Hotel* v. *Fant, supra,* 278 U. S. 439, and the cession of Camp Lewis by the State of Washington, Laws of Washington 1917, Chap. 3, sec. 20, as set forth in *Concession Co.* v. *Morris,* supra, 186 Pac. 655, at page 657. But even if it were provided that civil process might be served within the reservations in all cases, whether arising in the reservations or not, the jurisdiction of territorial courts in the type of matters classed as (2) and (3) above, would not be entirely clear. We respectfully submit that the simplest course will be to confer upon the territorial courts the same jurisdiction in civil matters as is enjoyed with respect to other places within the Territory. If a matter commenced in a territorial court is within the jurisdiction of the United States District Court it can be removed to that court as in other cases. Since the judges of the territorial courts are appointed by the President and confirmed by the Senate, or appointed by a judge who himself is appointed in that manner, the control of the United States over the reservations can not be affected.

It is submitted that the difficulty in the matter of judicial jurisdiction, as the proposed legislation is now drafted, is very real in this Territory. A foreign corporation entering the Territory solely to perform a contract on the reservation would not have to qualify to do business in the Territory or appoint an agent for the service of process. If, then, a person were injured by a servant of such corporation, service could be made

on the reservation only, and accordingly no action could be brought in the territorial court as the proposed legislation is now drafted, nor in the federal court unless possibly on the theory that the action arose under the laws of the United States, if more than $3,000 was involved. Again, if an unincorporated concessionaire should die leaving equipment on the reservation, it is not apparent to whom title would pass, for if the reservation is made a separate jurisdiction letters testamentary granted by the Territory have no effect there; if the reservation were another state, ancillary letters of administration would be taken out. These are merely examples of situations which might arise in which we feel the proposed legislation as now drafted would create needless complications.

D. Criminal Matters

In addition to the proviso above quoted, reserving to the territorial government the right to serve criminal process within the reservations on account of crimes committed within the geographical limits of the territories, but outside the limits of the reservations, the proposed legislation provides:

> "* * * *Provided further*, That whoever, within the geographical limits of such territories, but within or upon any of the places aforesaid, shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the territory by the laws thereof now in force, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment."

The evident intent is to bring up to date the provisions of the Act of March 4, 1909, as amended, 18 U. S. C. A. sec. 468, which now provides:

> "Sec. 468. (Criminal Code, section 289). Laws of States adopted for punishing wrongful acts; effect of repeal.

"Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof in force on April 1, 1935, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment. (Mar. 4, 1909, c. 321, sec. 289, 35 Stat. 1145, as amended June 15, 1933, c, 85, 48 Stat. 152; June 20, 1935, c. 284, 49 Stat. 394.)"

The proposed legislation should be compared with the Hawaii National Park Act which provides:

"Sec. 3. That if any offense shall be committed in the Hawaii National Park, which offense is not prohibited or the punishment for which is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the Territory of Hawaii in force at the time of the commission of the offense may provide for a like offense in said Territory and no subsequent repeal of any such law of the Territory of Hawaii shall affect any prosecution for said offense committed within said park." 46 Stats. 227, c. 200, sec. 3.

It will be noted that the proposed legislation adopts the penal laws in effect at the time said statute is enacted and still in force when the offense is committed; the general statute (18 U. S. C, A. sec. 468) adopts the penal laws in effect on April 1, 1935, and still in force when the offense is committed; and the Hawaii National Park Act adopts the penal laws in force at the time the offense is committed. The proposed legislation will supersede the general statute as to the territories, but not the Hawaii National Park Act.

No question of the jurisdiction of the courts arises, as the United States District Court has jurisdiction:

"Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows: * * *

"(2) Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States. * * *" 28 U. S. C. A. sec. 41.

E. Civil Rights and Privileges

While it is entirely clear that under the proposed legislation no person will be able to acquire a residence in the Territory simply by a residence on a reservation, it is not so clear what civil rights and privileges in the Territory depend upon residence. The principal matter which has come to our attention is that of the right to attend public schools.

In *Fort Leavenworth R. R. Co.* v. *Lowe, supra*, 114 U. S. 525, the Supreme Court reviewed the Opinion of the Justices, I Mete. (42 Mass.) 580, and said:

"In March, 1841, the House of Representatives of Massachusetts requested of the Justices of the Supreme Judicial Court of that State their opinion whether persons residing on lands in that State purchased by or ceded to the United States for navy-yards, arsenals, dock-yards, forts, lighthouses, hospitals and armories, were entitled to the benefits of the State common schools for their children in the towns where such lands were located; and the Justices replied that, 'where the general consent of the Commonwealth is given to the purchase of territory by the United States for forts and dockyards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence with the single exception expressed: and consequently that no persons are amenable to the laws of the Commonwealth for crimes and offenses committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated.' And accordingly they were of opinion that persons residing on such lands were not entitled to the benefits of the common schools for their children in the towns in which such lands were situated. 1 Met. 580."

In *Ryan* v. *State*, 61 P. (2d) 1276, 1283, probable jurisdiction noted, March 29, 1937, the court said:

"* * * if the state were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insur-

ance, and the rules for sanitation would be suspended; for, if the state be wholly without jurisdiction, then it must follow that the state may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 1 Metc. (42 Mass.) 580; In re Town of Highlands (Sup.) 22 N. Y. S. 137; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. CO. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091." pp. 1283-84.

And in the case of *In Re Annexation of Reno Quartermaster Depot*, 69 P. (2d) 659 (Okla. 1937), the court said:

" * * * the general school laws of this state cannot have any application to the military reservations located within the state,"

In 56 C. J. 809, sec. 986, it is said:

"As a general rule the free school privileges of a district, town, or city are open only to children, otherwise eligible, who are bona fide residents of that district, town, or city; * * *"

Section 752, R. L. 1935 provides that persons of school age shall be required to attend the school of the district in which they reside, unless granted permission to attend in another district. This does not expressly state that a person who resides in no school district and cannot be required to attend school (and clearly children of residents of such reservations cannot be required to attend) may not attend the public schools. However, in view of the liability of the respective counties for the repair, maintenance and equipment of schools within the county and the provision for the inclusion of a special school fund for such purposes in the "budget submitted to the treasurer for the purpose of determining the tax rate (sec. 773, R. L. 1935), in the event of passage of the proposed legislation the question will arise as to whether or not it is intended that the liability to receive pupils in the public schools shall coincide with the taxing jurisdiction of the county. In this connection it should be noted that from 1933 through 1937 only real property could be affected by the tax rate so fixed, and the real property being property of the United States, was and always has been nontaxable. However, in connection with the provision for the general school fund (sec. 771, R. L. 1935) to be met from territorial taxes, in the event of passage of the proposed legislaton the question will arise as to whether or not it is intended that the liability of the territorial schools to receive pupils shall coincide with the taxing jurisdiction of the Territory. We respectfully call this matter to your attention so that it may receive consideration in dealing with the proposed legislation if deemed of sufficient importance.

Conclusion

We respectfully submit for your consideration the recommendations made *supra*, as follows:

1. That there be included in the proposed legislation a provision to the effect that Act 243, L. 1937, as the same may be amended or reenacted, shall apply to such reservations, or a general provision to accomplish the same results.

2. That there be included in the proposed legislation a provision to the effect that nothing therein contained shall be deemed to affect the jurisdiction of any Territory to regulate commerce with places subject to the exclusive legislative jurisdiction of Congress, if such places are within the exterior boundaries of such Territory, or the jurisdiction of any Territory to tax or otherwise burden such commerce.

3. That the statute of February 1, 1928, 45 Stat. 54, c. 15, 16 U. S. C. A. sec. 457, be amended to apply to territories.

4. That the statute of June 25, 1936, 49 Stat. 1938,

c. 822, sees, 1 and 2, 40 U. S. C, A, sec. 290, be amended to apply to territories.

5. That there be included in the proposed legislation, or separately enacted, a general provision to the effect that all laws applicable to places held for military or naval purposes within the exterior boundaries of any state and under the exclusive jurisdiction of the United States, shall have force and effect in such places within the exterior boundaries of any territory, and for this purpose the word "State" shall be deemed to include "Territory".

6. That there be included in the proposed Act a provision that for the purpose of determining the application of the laws of the territories to such reservations the date of the enactment of such Act shall be deemed the date when legislative jurisdiction of the Territory ceased.

7. That in lieu of the proviso "provided that the territorial governments shall have the right to serve civil or criminal process within the limits of such places in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed, within the geographical limits of the said territories but outside the limits of such places", there be included a provision to the effect that the territorial courts shall continue to have the same jurisdiction in civil matters as is enjoyed with respect to other places within the exterior boundaries of the Territory, together with a provision that the territorial government shall have the right to serve criminal process within the limits of such reservations, in prosecutions for crimes committed within the geographical limits of the Territory but outside the resvations.

Respectfully,

RHODA V. LEWIS,
Deputy Attorney General

APPROVED:

S. B. KEMP,
Attorney General

A BILL

To provide further for the National Defense.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the governments of the territories of the United States, whether organized or unorganized, shall have no legislative jurisdiction over any places which are now held or which may hereafter be acquired in any manner by the Government of the United States for military or naval purposes within the said territories: *Provided*, That the territorial governments shall have the right to serve civil or criminal process within the limits of such places in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed, within the geographical limits of the said territories but outside the limits of such places: *Provided further*, That whoever, within the geographical limits of such territories, but within or upon any of the places aforesaid, shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which if committed or omitted within the jurisdiction of the territory by the laws thereof now in force, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to a like punishment.