

THE FEDERAL SUBSISTENCE HOMESTEADS PROGRAM

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FIVE days after the inauguration of the new Administration, Senator Bankhead of Alabama introduced into the Senate of the United States a bill¹ to make \$400,000,000 available "to provide for the redistribution of the overbalance of population in industrial centers by aiding in the purchase of subsistence farms." On April 17, Mr. Bankhead introduced a second bill² which followed closely the form of the first, but which reduced the sum to be made available to \$25,000,000, and, although the body of the bill still talked of "subsistence farms" the title now referred to "subsistence homesteads." Neither bill became law. However, when the National Industrial Recovery Act³ was approved on June 16, 1933, it contained Section 208, under the heading: "Subsistence Homesteads," which reads as follows:

"To provide for aiding the redistribution of the overbalance of population in industrial centers \$25,000,000 is hereby made available to the President, to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute a revolving fund to be administered as directed by the President for the purposes of this section."

It is the purpose of this article to discuss the problems of a legal nature confronting the administrative officers charged with setting up the administrative mechanisms and formulating the basic policies for effectuating the program thus defined.

I

SOCIAL AND ECONOMIC CONTEXT OF THE PROGRAM

The legal problems raised by this legislation are so intimately enmeshed in social and economic contexts that they cannot be discussed except with reference to that background. It will be helpful, therefore, to outline the situation out of which came the demand for this sort of program, to indicate what trends foreshadowed it, how the problems were formulated and the sort of solutions which were proposed and believed to be embodied in the provisions of Section 208.

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1. S. 69, 73d Cong., 1st Sess., March 9, 1933, referred to the Committee on Agriculture and Forestry. The quotation is from the title.

2. S. 1503, 73d Cong., 1st Sess., April 17, 1933, referred to the Committee on Banking and Currency. The provisions of the two bills are indicated briefly *infra* note 165.

3. 48 STAT. 195, 15 U. S. C. A. § 701 (1933). See discussion of legislative history, *infra* note 165.

It would be a mistake to assume that the present Federal program is an innovation without precedents. There have been various movements to return people to the land so that they might supplement an income derived from other sources with fruits, meats and vegetables they could produce, chiefly for their own consumption on garden tracts.⁴ These ventures, in the form of subsistence gardens, experimental colonies, small farm holdings or pure-type subsistence homesteads, have been organized, among other reasons, to assist immigrants in assimilating a new culture and to solve the problem of employing the returning soldiers. In addition, private industries, not always without ulterior motives, have assisted employees in developing home gardens from which the workers may satisfy at least a part of their needs. These movements have moreover spread to nearly every state in the union and almost every country in the world; and have in general, followed similar lines of development everywhere. These facts suggest that it is probably a mistake to regard the present trend toward this type of industrial-agricultural organization as a function of the depression solely, and to anticipate its disappearance should the depression end. It is more likely symptomatic of a far deeper-rooted failure of our urban civilization to meet needs and satisfy wants,⁵ although the depression has undoubtedly served to increase the tempo of the movement.

What are some of the problems to which the present legislation is directed?⁶ There is first, the problem of the large group of "stranded" industrial populations. The decline of an industry, or its relocation, frequently leaves a large number of its former employees without employment, and stranded in a region in which no other employment can be found. Movement of such groups, often large, to new sources of income is nearly always beyond the capacity of the people involved. An outstanding example is the plight of the people dependent on employment in coal mining. In the capacity-peak year of 1923, 9,331 commercial mines were in operation, spread over 32 states and Alaska, in 92 commercial fields, with a total capacity of 970 million tons annually.⁷ Yet the

4. Some notion of the number of ventures in this field can be derived from examination of a recently published "Bibliography on Land Settlement, with Particular Reference to Small Holdings and Subsistence Homesteads," U. S. Dep't of Agriculture, Misc. Pub. No. 127, Aug., 1934, which contains 419 pages and lists 2701 items. The literature compiled covers nearly every state in the United States and 72 foreign countries.

5. See comment on *Land Utilization* (1933) 9 ENCYC. SOC. SCIENCES 134; Pavlovsky, "The Course of the Agricultural Depression in 1931-32," *Monthly Bulletin of Agri. Econ. & Soc.*, Year XXIV, No. 1, at 31.

6. See Gen. Circ. No. 1, "General Information concerning the Purposes and Policies of the Division of Subsistence Homesteads," issued Nov. 15, 1933.

7. See Sachs, *Coal: A Report on a Dying Industry*, (Aug. 30, 1933) NEW REPUBLIC. The significance of the facts presented in Dr. Sach's report is their demonstration that unemployed coal miners probably cannot hope for reemployment in the mines even after the depression is over: they are permanently stranded.

highest amount of coal ever absorbed in one year, at the height of the World War, was but 579 million tons. As a result there has been wholesale closing down of coal mines. 704,793 miners were employed in coal mining in 1923; 450,213 were so employed in 1931; and 379,565 were so employed in 1932. In many areas, no alternative sources of employment were available, and whole communities became literally stranded when the mines closed. There is evidence that similar developments have taken place in other mineral industries—copper, lead, zinc and petroleum. So, too, in industries dependent on timber, thousands of families have been left stranded with the conversion of forests into cut-over lands. Manufacturing plants which have closed permanently, or moved to areas of lower wages or absence of union organization, have also left pools of the similarly stranded.

A closely related set of problems is presented by stranded agricultural communities. Great numbers of farm families are located on eroded and worn-out lands on which the soil is too poor to support an efficient agricultural enterprise. Many of these "submarginal" farms are isolated from populated areas, creating special problems and increased costs for sanitation, roads, schools and other public services. But the fact that approximately one out of every six rural families was on public relief in the spring of 1933⁸ is eloquent testimony that the mere settlement of people on small farms can provide no solution. Thousands of relief families have already tried desperately to sustain themselves on small farms and have failed.⁹

Thirdly, there are the problems of cyclical and seasonal unemployment, which suggest the value of small scale farming operations which may be turned to when industrial jobs are not available, and will require little attention when a job is open. In this context one thinks, too, of the movement toward the shorter workday and workweek. Equally relevant is the situation of the "over-aged" workers, retired involuntarily from industrial employment at from 45 to 50 years of age, in a few instances at 35 years, but strong and active at the retirement age.¹⁰ A subsistence homesteads program is relevant, further, in advancing contemporary plans for the decentralization of industry and the provision of better housing for the poor.¹¹

8. Gen. Circ. No. 1, *supra* note 6, at 5.

9. Because of the wording of Section 208, the reorganization of existing agricultural communities cannot be included in the present program: cf. *infra*, note 204 and text.

10. Cf. Epstein, *A Program for Old-Age Security* (1935) 81 *NEW REPUBLIC* 212.

11. Current public interest in the program is great. Most of the references to magazine and newspaper discussions in the "Bibliography on Land Settlement," *supra* note 4, are dated subsequent to 1916, and there has been a torrent of this discussion since March, 1933.

On Feb. 18, 1934, the Secretary of the Interior announced that projects which would require a total expenditure of \$4,500,000,000 had been submitted to the Subsistence Home-

What is involved in the concept of "Subsistence Homestead" thus embodied in the Act? We shall discuss later the problem of statutory construction raised by the use of this term;¹² it is important to state here what the economic content of the term implies. As conceived by the administrators of the Federal program, a subsistence homestead is a plot of land, on which is located the family dwelling, and which is tilled to supply a substantial part of the food needs of the family to supplement, together with the production of such other articles for consumption as may be produced in the home or a domestic workshop, cash income received from industrial or other outside employment. It should be noted that the definition is not satisfied by the vegetable garden, as such, which is not a part of a small farm, nor by the farm, large or small, on which are grown cash crops for sale in the market. Some surpluses may, of course, be sold from subsistence homesteads; but these may be regarded as incidental, and will tend to be insignificant in amount. The definition further presupposes that the homestead is looked to as a source of supply of only a part of the family needs, some source of supplementary income being imperative. The homestead is expected to be small because surprisingly little land is needed to supply the food requirements of a family, and because the homesteader will not, because of his principal employment, have available the time needed for farming a large acreage.¹³

steads Division; that more than 2,000 separate applications had been received, coming from every State and from Puerto Rico, the Virgin Islands, Hawaii and Alaska, and that applications requiring total expenditures in excess of the \$25,000,000 available for the entire country had been received from each of the following states: California, Texas, Florida, New Jersey, Illinois, Iowa, Pennsylvania, Ohio and Alabama. It should be noted, however, that this summary of applications received includes requests for individual assistance as well as for establishment of communities. Mr. M. L. Wilson, then Director of the Division, announced at the time of the statement by the Secretary that "a preliminary examination indicates that upwards of \$750,000,000 in proposals have genuine merit which would entitle them to further study and consideration."

12. Cf. *infra*, note 185 and text.

13. An interesting bulletin, entitled "Planning a Subsistence Homestead," (U. S. Dep't of Agriculture, Farmers' Bulletin No. 1733, issued May, 1934, prepared by W. W. Wilcox of the Bureau of Agricultural Economics, assisted by members of the staff of the Division of Subsistence Homesteads) has supplied concrete information on what can be done with a subsistence homestead. We are told that "Enough vegetables and small fruits can be raised on one-half to three-quarters of an acre of good land to furnish a family of five with all they want during the summer and with plenty for canned, stored and dried products for the winter." But it is important to note that not all of the food required for a satisfactory diet can be raised even on a five acre homestead. The tables presented in "Diets At Four Levels of Nutritive Content and Cost," by Stiebeling and Ward. Bureau of Home Economics, Dep't of Agriculture, in Circ. No. 296, issued Nov. 1933, make that abundantly clear. In addition to food supplementation, cash income will be required for taxes, repair of equipment, family living expenses for clothes, school supplies, medical care, furniture and furnishings, amusements, etc. It seems reasonable to assume that a minimum annual cash income of from \$700 to \$1000 will be needed to supplement domestic production, and to meet installment payments on the purchase price of the property.

The varied problems at which the legislation was directed resulted in the formulation of several distinct types of projects to be established. Five major types may be distinguished:¹⁴ (1) workers' garden homesteads near small industrial centers, in which small industries are located, and to which further decentralization is considered likely to take place; (2) workers' garden homesteads near large industrial centers, usually of heavy industries not likely to decentralize; (3) projects for rehabilitation of stranded industrial population groups, particularly bituminous coal miners, the projects, with some exceptions, to be established on a "self-help" basis—that is, to employ the prospective homesteaders to construct their own homesteads under the supervision of a few technicians; (4) projects for reorganization of stranded rural communities, for elimination of rural slums on lands submarginal for agriculture, and for movement of farm families from submarginal dry-farming lands in the West, (a type of project which was at first considered, but abandoned because deemed outside the powers conferred in the statute);¹⁵ (5) loans to groups of prospective homesteaders organized into cooperative societies.

We may isolate three social attitudes toward the program of establishing subsistence homestead communities. Many different groups with motives and anticipations frequently dissimilar, perhaps even antithetical, have been interested in this type of program. What may be called the "official" attitude views the subsistence homestead both as an instrument for supplementing wage-income, that is, an institutional device for combining life on the farm with industrial employment, and a ready-at-hand solution or step toward a solution of some of the problems listed above. This view emphasizes also what is coming to be referred to as "the subsistence homestead way of life." It is argued that there are psychological, human satisfactions "in carrying through the cycle of the seasons the production of a garden," and that "there are fundamental values which attach to a family exhibiting the skill, the initiative and the discipline necessary to the timely operations of garden production, and to the consumption by the family of something which is actually produced by the family."

While announcing the same goals, a large and increasing number of employers of labor in the United States are turning to the subsistence homestead idea with somewhat different motives. While not always avowed, the interest of some employers is to use the subsistence homestead program as an instrument for exerting "a beneficial moral influence" on employees. An employee who has made monthly payments to his employer for a year or more under a twenty year homestead purchase contract may become a shade more cautious about joining an "outside" union rather than the employer-sponsored "company" union, and more

14. Cf. Gen. Circ. No. 1, *supra* note 6 at 7-8.

15. Discussed *infra* note 204 and text.

hesitant about joining a strike. In fact, in the selection of homesteaders from among employees "good" employees will inevitably be selected over "trouble makers" who organize independent unions, conduct strikes, demand wage increases; and the lesson will not be lost. Homestead communities established for the employees of a single plant tend eventually to develop into what has become familiar to students of social pathology as the "company town." There is a quieting influence in a heavy debt burden; one does not move or change jobs with too great ease. Furthermore, payment of very low wages will not produce desperation as readily in cases where the wages can be supplemented with home grown vegetables and fruits. Certainly it is not true that all employers sponsoring this movement think along these lines;¹⁶ but the existence of this attitude toward the program, and the opposition which these possibilities of abuse have aroused, must be taken into account.

The most eloquent modern exponent of a third attitude is Mr. Ralph Borsodi,¹⁷ who advocates the substitution of domestic production for factory production of a great number of things we daily use, his theory being that the assumed relative inefficiency of domestic production as against mass production and specialization of labor is in the case of a very large number of industrial processes not demonstrable as a fact. To the extent that it may be demonstrated, he ascribes it to our failure to apply power to domestic machinery on a larger scale than has been done. On this theoretical basis he urges the development of "organic homesteads, organic in that they are consciously and with the maximum intelligence organized to function not only biologically and socially, but also economically. We shall then have homes which are economically creative and not merely economically consumptive." He would have our cities shrink to factory and industrial sites for the few mass production enterprises remaining after most of the productive processes have been transferred to the domestic workshop. This attitude, alone of the three, goes beyond consideration of the program as an alleviation

16. Cf. the report on "Land Policy" (1934) of Special Committee on Land Policy of U. S. Chamber of Commerce, at 37-39. All of these arguments, are much less applicable to communities established by the Government rather than by individual concerns. It should be noted, too, that the homestead may strengthen the worker's feeling of security by leaving him less dependent on his weekly wage, and hence perhaps freer to organize in defense of his interests.

17. His views have been stated most clearly in his *THIS UGLY CIVILIZATION* (2d ed. 1933). See also his *FLIGHT FROM THE CITY; THE STORY OF A NEW WAY TO FAMILY SECURITY* (1933); article entitled, *Subsistence Homesteads; President Roosevelt's New Land and Population Policy* (1934) 23 *SURVEY GRAPHIC* 11. The Borsodi program is a development of the program suggested by KROPOTKIN, in *FIELDS, FACTORIES, AND WORKSHOPS OR INDUSTRY COMBINED WITH AGRICULTURE AND BRAIN WORK WITH MANUAL WORK* (Rev. ed. 1919).

of economic ills, and finds in it a plan for complete economic reconstruction.¹⁸

Establishment of subsistence homestead communities as conceived by the Roosevelt administration is one phase of a general land-use program. On June 30, 1934 the President, by executive order,¹⁹ established the National Resources Board, and charged it to "present to the President a program and plan of procedure dealing with the physical, social, governmental and economic aspects of public policies for the development and use of land, water and other national resources."²⁰ The Board's report indicates that as an activity basic to all other programs in planning land-use there must be carried on a comprehensive and detailed classification of lands, indicating the probable optimum uses in each area in the light of analyses of soil and topography, proximity to other uses, and relation to local, regional and national planning programs. It seems

18. The Borsodi version of the subsistence homestead plan has been strongly criticized. One gathers that it is of this plan particularly, although the author may intend his remarks in criticism of all phases of the movement, that Lewis Mumford was thinking when he wrote: "Yet the lure of more primitive conditions of life, as an alternative to the machine, remains. Some of those who shrink from the degree of social control necessary to operate the machine rationally, are now busy with plans for scrapping the machine and returning to a bare subsistence level in little island utopias devoted to sub-agriculture and sub-manufacture. The advocates of these measures for returning to the primitive forget only one fact: What they are proposing is not an adventure but a bedraggled retreat, not a release but a confession of complete failure. They propose to return to the physical conditions of pioneer existence without the positive spiritual impulse that made the original conditions tolerable and the original efforts possible. If such defeatism becomes widespread it would mean something more than the collapse of the machine: It would mean the end of the present cycle of western civilization."

See, also, the critical reviews of *FLIGHT FROM THE CITY*, op. cit. *supra*, note 17, by Cowley (Nov. 29, 1933) *NEW REPUBLIC* 77, and by Bauer (1933) 137 *NATION* 489. Cf. BAUER, *MODERN HOUSING* (1935), reviewed by Mayer (1935) 82 *NEW REPUBLIC* 136. For discussion of another interesting deviation in the Borsodi plan from the communities being established under the Federal program, involving a variant of the "single-tax" plan, see *infra* note 189.

19. No. 6777. This order abolished the Committee on National Land Problems created by Executive Order No. 6693, dated April 28, 1934, and the National Planning Board of the Federal Emergency Administration of Public Works. All the functions of the latter agency were transferred to the National Resources Board.

20. Parts of this Report have since been made public. It is important to note that on page 3 of its list of Findings and Recommendations in Part I of the Report the Board recommends that "The integration of agricultural and industrial employment by the establishment of homes for workers employed in non-agricultural occupations where they may produce part of their living become a permanent national policy; and that this policy be broadened to include: Encouraging the location of industries, under proper conditions, in rural areas now seriously deficient in sources of income; reconstruction of existing rural industrial communities, which under laissez-faire policies took the form of wretched homes huddled around a mine or a factory; planning for the integration of agricultural and industrial employment in the case of relocating industries; encouraging the location of industries on the periphery of large cities in definite relation to rapid-transit facilities to the countryside, as an important objective in city and regional planning."

clear that, in view of our legal and economic postulates, a large part of the lands completely submarginal for agriculture, but now so employed, may have to be purchased by the State or Federal Governments in order to guide land uses into those indicated as optimum. The subsistence homestead program supplements the purchase of such submarginal lands by providing a partial solution for the problem of what to do with the displaced farmers.

To supplement the purchase program, other techniques must be found to guide land-use into the uses indicated as optimum. In so far as legislation is resorted to as an aid in this development it will probably have to be for the most part action by state legislatures in such fields as rural zoning, establishment of state planning agencies, revision of real property tax laws to permit use of the tax-power to encourage desirable land-use and discourage undesirable uses, regulation of private land-settlement activities, and similar fields. The whole field of land-use planning is in turn but a part of the problem of planning the use of resources, and the latter, a part of the problem of planning the national growth and development. It is within the new climate developing for these ideas that one must assess the subsistence homestead program. It seems clear that judgment on the social value of this program cannot yet be final; so much depends on the definition given this program in administration. If it is conceived with sufficient imagination, and adequate sources of industrial supplementary employment are made available, these communities may be forerunners of the American version of the "Garden City."²¹ Narrowly conceived, the program may assist the establishment of more "company towns" and the ruralization of a significant portion of our population on a peasant level.

II

SELECTION OF THE ADMINISTRATIVE VEHICLE

The discussion of the legal problems confronting the administrative officers who attempted to set up the mechanisms and formulate the basic policies and regulations for putting into effect the program defined in such general terms in Section 208 of the Recovery Act will be grouped about three topics: problems involved in the use of government-owned and controlled corporations as administrative agencies; the question whether the United States or the several states will exercise general civil and criminal "jurisdiction" over the communities to be established; special questions raised by the absence of specific provision in Section 208 or by the desire to establish certain "experimental" types of community organization.

21. Cf. MUMFORD, *TECHNICS AND CIVILIZATION* (1934); GEDDES, *CITIES IN EVOLUTION* (1915); HOWARD, *GARDEN CITIES OF TOMORROW* (1902).

Section 208²² appears in the Recovery Act, under Title II, almost as an afterthought, and apparently unrelated to the more detailed provisions of other sections under this title.²³ It specifies no administrative procedure; it provides, instead, that the President shall exercise the powers conferred "through such agencies as he may establish and under such regulations as he may make."

Following the enactment of the legislation, the President delegated to the Secretary of the Interior all powers conferred upon the President in Section 208,²⁴ and the Secretary set up the Division of Subsistence Homesteads within his Department. As its first function, the Division was asked to devise appropriate administrative mechanisms for effectuating the purposes of the legislation.

It was early decided that aid would not be extended to individual families. The funds available were so slight in comparison with the amounts that would be needed if actual solution of the relevant problems were to be attempted, that the fund of \$25,000,000 came to be looked upon as an experimental fund, made available to try out ideas and sound out the shoals, to indicate along what lines a possibly expanded program should later be laid. Since individual families could not well serve for such experimental "demonstrations," the money was to be used to aid in establishing homestead communities.²⁵ Four quite definite aims were therefore formulated, to be realized by the proposed agency for the administration of the program. The first aim was an administrative vehicle that could acquire, hold and dispose of title to land, buildings and personal property, that could enter into contracts with borrowers, purchasers, architects, title attorneys, and construction companies, that

22. Quoted *supra* at opening of Part I. It may be noted here that the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, grants powers and defines its programs in general terms similar to those employed in § 208. Hence, most of the following discussion is relevant to the work-relief program to be instituted under this new legislation, and in particular to the activities of the new Resettlement Administration: Cf. Executive Order No. 7027, April 30, 1935.

23. Special questions arose out of this fact. Cf. note 211, *infra*.

24. Executive Order No. 6209, July 21, 1933.

25. Two procedures seemed open—to make loans to finance others in establishing such communities, and to engage in direct construction under the power given to "otherwise aid." (This interpretation of the phrase is more fully discussed *infra* note 167 and text). It should be noted that, with the possible exception of corporations not organized for profit, there existed no agencies subject to public regulation which could serve as borrowers under this program. A very recent Alabama Statute (H. R. No. 131, approved Feb. 8, 1935, Ala. Reg. Sess. 1935; Cf. H. R. No. 129, approved Feb. 7, 1935, same session) provides for the organization of "Housing Authorities" within certain cities, but gives them jurisdiction over a 10-mile radius outside the territorial boundaries of the city. If other states were to adopt similar legislation, as they seem likely to do under the impetus of the Federal Housing and Subsistence Homestead programs, federal action may the more easily take the form of extending loans to such local authorities rather than direct construction by the Federal Government.

could bring suit to enforce contracts—that could do business freely. It was felt, secondly, that decentralization of administrative operations was desirable, in part because it was believed that this would make for greater speed and efficiency, but more because this could be expected to elicit a greater feeling of local responsibility and cooperation. For the attempt to “build” living communities, it was thought, differs vastly from the job of building typical government structures, such as post-offices or armories. Such communities must take local root and grow; they cannot be superimposed from national headquarters.²⁶ Thirdly, a vehicle of administration was sought, which would tend to remove from the subsistence homesteads program the aura of paternalistic governmental activity, and thus lessen the potential danger that homesteaders would seek to cure default in the making of purchase payments by appeals for legislative moratoria, as well as tend to differentiate this program from welfare or relief activities. These objects were thought most likely of attainment if the program were administered by some agency which, while answerable to the Government, was nevertheless independent of it. Furthermore, it was urged that if the program were administered through some agency partly independent of the government, and more closely approximating business forms, private enterprise could the more readily emulate the government and extend credit in an expansion of this type of activity. Fourthly, an administrative vehicle was sought which would tend to free the program from as many as possible of the procedural technicalities and delays inherent in the very size of the Government and in the established administrative procedures. It was argued that since the establishment of subsistence homestead communities in different parts of the country was a new and different type of activity for the Federal Government, existing procedural rules which had been formulated for the purchase of land for national forests or parks, the construction of post-offices and the establishment of army reservations, would make development along desirable lines difficult or impossible.

With these specifications stipulated, it was a short step to the decision to organize a government-owned corporation to serve as the administrative vehicle.²⁷ Further, to accomplish the plan of decentralizing ad-

26. An excellent statement of the case for decentralization was made by Noble Clark, Ass't Dir., Agricultural Exper. Station, University of Wisconsin, in an address, Oct. 22, 1934, before joint meetings of the Amer. Civic Ass'n, and the National Conference on City Planning. The address is available at the Experiment Station, in mimeographed form.

27. On Aug. 31, 1933, the Secretary of the Interior requested the opinion of the Attorney General on the power of the Secretary under this legislation to purchase land, construct houses and sell homestead tracts to selected families, as well as upon the propriety of making loans to non-profit corporations to assist them to establish such communities. The Attorney General's opinion of Oct. 4, 1933, in reply suggested that “consideration be given to the organization of a Government-controlled corporation for the purpose of carrying on the subsistence homesteads project,” and pointed out that “other important gov-

ministration of projects, it was decided to organize a separate corporation for the establishment of each project, the stock of each such corporation to be held by the parent corporation. Thereupon on December 2, 1933, the Secretary of the Interior issued a departmental order directing the formation of a corporation under the laws of Delaware,²⁸ to be named Federal Subsistence Homesteads Corporation. The order provided that all the stock of the corporation should be issued to the Secretary, to be non-transferable and to be held by him or his successors in office in trust for the United States of America. The corporation was duly organized.²⁹

At the first meeting of the directors of this corporation, resolutions were adopted allocating funds for establishing eleven projects, and directing the formation of subsidiary corporations for their operation.³⁰ Each subsidiary corporation was to be authorized in its charter to issue \$1,000

ernment undertakings have been successfully handled through such corporations." See also Opinion of the Attorney General, addressed to the Secretary of the Interior, of July 18, 1934. There is a distinct trend toward the use of such corporations. For lists of those organized to serve as agencies of the United States see Comment (1934) 44 *YALE L. J.* 326, n. 72; Culp, *Creation of Government Corporations by the National Government* (1935) 33 *MICH. L. REV.* 473; Skinner & Eddy Corp. v. McCarl, 275 U. S. 1, 5 (1927).

Congress has constitutional power to authorize the use of corporations as instrumentalities, *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819), if the powers to be exercised by the corporations are themselves valid under the Constitution. *Osborn v. Bank of the United States*, 9 Wheat. 738, 860 (U. S. 1824).

28. Cf. note 30 *infra*.

29. The certificate of incorporation conferred broad powers upon it, including, beside a grant of power in the language of Section 208, power to acquire and dispose of all types of property, to lend and borrow money, to establish subsistence homestead communities and in connection therewith schools, industries and other establishments necessary or desirable to their success, to establish subsidiary corporations, and the other powers generally conferred upon Delaware corporations. The charter provides that the corporation shall have perpetual existence. But see *infra*, notes 38-40 and text.

30. At subsequent meetings, organization of additional corporations was directed. In all, thirty corporations were organized, for operation in eighteen states. It was decided to organize all subsidiaries under the laws of Delaware, so far as no special reason should be present for local incorporation. This enabled use of a single set of forms and hence much greater speed in setting up the agencies. All thirty were organized between December 12, 1933 and March 17, 1934; twenty-seven were organized by January 16, 1934. Organization under the laws of one state would simplify, also, disposition of questions of corporate procedure, filing of reports, returns and the like, by rendering applicable the laws of but one state. The "liberality" of Delaware's corporation law may be legitimately invoked for this purpose, avoiding requirements, such as are found in the laws of many states, that stockholders' meetings be held in the state, that corporate books be kept in the local office, that incorporators or officers be stockholders, that directors or officers be residents of the state, requirement of publication of notice of intent to file charter, with ensuing delays, high organization fees, etc. Twenty-seven of the 30 subsidiaries were organized under the laws of Delaware. The charter powers of the subsidiaries were very much like those of the parent (*supra* note 29) except that certain designated powers, e.g. execution of mortgage upon realty or personalty, and making changes in bylaws, could be exercised only with the approval of the sole stockholder.

of common stock, all of it to be subscribed for by Federal Subsistence Homesteads Corporation. The directors of each subsidiary were to adopt a resolution valuing the planning, research, organizational and other services performed for it by the parent at "at least \$1,000," and issuing all of its stock to the parent in payment for such services.³¹ Through stock ownership the parent would be empowered to select the directors of each subsidiary and thus to control the fundamental policies to be pursued. A loan contract was to be executed between the parent and each subsidiary for the amount of the allocation for the project, the contract to recite that the borrower would expend advances under the contract for establishment of the project in accordance with the plans and itemizations summarized in the "Project Book" prepared in the Division of Subsistence Homesteads. The parent corporation was thus to serve as a convenient device for integrating the activities of the subsidiary corporations, and would provide a continuing entity for owning and voting the stock of the subsidiaries. The actual operating vehicle for each project was to be the subsidiary corporation formed for that project. That corporation was to take title to the land acquired, retain attorneys for preparation of title papers, contract for the construction of homesteads, select the homesteaders and execute contracts with them to cover the sale of the homestead tracts, and operate and supervise the communities to be established. The original directors of these corporations were to be local citizens, with representation for significant groups in the community; state universities and experiment stations, county agents, labor and business groups were all to be represented. On each board was to serve at least one member of the staff of the Division, to be present at all board meetings and to act as liaison officer between parent and subsidiary. As the homesteaders accumulated equities in their homesteads, their representatives could be elected to membership on the board. The loan contracts were in fact to provide that when all homestead purchase contracts had been performed in full, the stock of the local corporation was to be issued to the homesteaders who could thereafter continue to operate the community through the corporation, incorporate as a village or town, or simply divide the community properties among themselves through transfer of interests and live each independently on his homestead. Under the bylaws of each subsidiary, any director could be removed by the parent, the sole stockholder, at will, with or without cause. A uniform classification of accounts and a set of instructions as to basic policies and procedures in the making of purchases, award of contracts, appointment of staff, selection of homesteaders and the like were to be issued to all boards. Thus organized, the local corporations would be free to follow ordinary business procedures in the establishment

31. Cf. 5 THOMPSON, CORPORATIONS (3d ed. 1927) §§ 3966, 3978.

and operation of the communities, guided by the project plan and by policies to be formulated from time to time in bulletins issued by the parent to all or particular boards.

As indicated, the center of gravity lay, not in the parent corporation but rather in the subsidiaries. The parent might even have been dispensed with, and the stock of the local corporations held directly by the Secretary of the Interior. In favor of the interposition of the parent corporation was the possibility that it might prove necessary in some instances to take over a project and operate it directly, in which case this could best be done by a corporation with the same rights, powers and privileges as those enjoyed by the subsidiary, and that the use of the parent followed more closely the prevailing business pattern. The parent corporation was organized, therefore, only to the extent necessary to enable it to perform its functions. While it had a full staff of officers and directors, it employed no personnel. The planning, supervision and administrative work done in Washington is performed by the personnel of the Division of Subsistence Homesteads, employed and functioning as employees of an administrative department rather than of the Corporation. The Corporation is itself but an arm of the Division.

Did this plan meet the stated objectives? Certainly it met the first two stated. The local corporations could freely do business, make purchases, enter into contracts; and a considerable degree of decentralization could be thus accomplished. In fact, however, the extent to which decentralization would be carried out would seem to depend on the practice of the parent corporation in specifying from time to time rules for the guidance of the local boards or in failing to do so. Such rules or instructions could be general or detailed, could delegate discretion or not as the parent saw fit. It is extremely hard to say whether this proposed plan met the third objective; certainly all homesteaders would know that the funds were supplied and the program devised by the Federal government. Yet the knowledge that the directors of the operating corporation were local citizens not on the Federal pay-roll might go far to give the enterprise a private, local color, and divorce it to that extent from its governmental aspect. The matter can be determined, perhaps, only in the light of actual experience. We come to a crucial problem in attempting to determine whether this plan of organization would accomplish the fourth aim. The answer depends upon whether corporations thus organized can conduct their enterprises as ordinary business companies or must observe the meticolae of government procedure. The first question on this point is whether the Executive had power under this legislation to devise this corporate form of administration at all. This question has several parts—is a grant of power to establish corporate agencies contained in Section 208? If contained, may the corporation be organized with charter powers greater than needed

to carry out the statutory functions? Finally, may the corporations be created under a state law, as was the Federal Subsistence Homesteads Corporation?

Authority to Organize, and Powers of the Corporation

Section 208 does not in terms empower the creation of corporate agencies in administration of its provisions. But its provision, that the appropriated money is made available to the President to be used by him "through such agencies as he may establish and under such regulations as he may make," would seem to be broad enough to cover the establishment of almost any type of agency which the President, in a reasonable exercise of the discretion conferred upon him, might deem appropriate to carry out the contemplated activities. Under the Executive Order referred to,³² an equally broad power has been delegated to the Secretary of the Interior. The Comptroller General of the United States has, nevertheless, cast doubt upon the propriety of setting up corporations as administrative vehicles under this legislation.³³ The Attorney General, however, has expressed the opinion that the President has power under Section 208 to utilize corporate agencies as administrative vehicles.³⁴ It is difficult to see on what basis designation of such an agency can be excepted from the broad grant of power to establish agencies. Such agencies have frequently been created or authorized,³⁵ and, as the Attorney General pointed out,³⁶ similar interpretation of almost identical language under another statute was acquiesced in by Congress, and the status of two corporations set up as government instrumentalities under similar language of authorization was recognized and confirmed by the courts.³⁷

32. *Supra* note 24.

33. See decision of March 15, 1934, (A-51605) to Sec'y. of the Int. Cf. decision of January 11, 1934, (A-53085) to Fed. Emer. Admin. of Public Works on power to organize a corporation under the almost identical language of § 201 (a) under Title II of the Recovery Act.

34. Opinion cited *supra* note 27. Cf. opinion of February 7, 1934, to Sec'y of Int. concluding that power to organize such corporations is likewise conferred in § 201 (a).

35. *Supra* note 27.

36. Cited in note 34, *supra*.

37. Section 2 of the Food Control Act, 40 STAT. 276 (1917), provided that "in carrying out the purposes of this Act the President is authorized to * * * create and use any agency or agencies * * *." Under this grant of power the President issued Executive Order No. 2681, Aug. 14, 1917, ordering "that an agency, to-wit, a corporation, under the laws of Delaware be created, said corporation to be named Food Administration Grain Corporation." Congress acquiesced in this action when in the Act of Mar. 4, 1919, 40 Stat. 1348 (1919) it authorized the President "to utilize any department or agency of the Government, including the Food Administration Grain Corporation." See, also, Executive Order No. 3087, May 14, 1919. The United States Sugar Equalization Board was similarly organized in 1918 under the same authority by the Food Administration with the President's consent. See VAN DORN, GOVERNMENT OWNED CORPORATIONS (1926) 178; cf. United States Grain Corp. v. Phillips, 261 U. S. 106, 110 (1923); Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, 268 Fed. 575, 584 (S. D. N. Y. 1920); Skinner & Eddy Corp. v. McCarl, 275 U. S. 1, 6 (1927).

The Attorney General and the Comptroller General have agreed however that, if a corporation is to be created to serve as such an agency, its charter powers should not be greater than necessary to exercise the authority conferred in the statute.³⁸ One may venture to doubt both the wisdom and the necessity of this conclusion. It is of course clear that to the extent that the corporation operates with funds appropriated in particular legislation, it may exercise only such powers as are common to both its charter and such legislation. But the vesting of the corporation with limited statutory powers should not militate against the validity of its being created with broader charter powers in contemplation of a future expansion of its statutory powers. The only necessity is that it refrain from expending funds for purposes other than those for which they were appropriated. A grant of full charter powers will obviate the necessity of filing amendments to the certificate of incorporation whenever the basic legislation is amended. Section 208 in particular is almost frankly experimental; its amendment as experience with the program accumulates is very likely.³⁹ There is also the strong possibility that, once in existence as a government instrumentality, it can serve as an agency to administer other but related legislation, if provided in its charter with a wide range of corporate powers.⁴⁰ There seems little ground for doubt that the economy of phrase common in legislation is inappropriate in a corporate charter, if only because of the contrary practice which prevails in the case of the latter.

The Comptroller General also has questioned the power to organize such corporate agencies under state laws.⁴¹ And the Attorney General, while concluding that they may be organized under state laws, has suggested nevertheless that it may be preferable to organize corporate agencies of this character under the laws of the District of Columbia.⁴² It would, however, be hard to find purposes for which it would be more legitimate to resort to the "liberal" incorporation law of Delaware than

38. Opinions cited *supra*, notes 34 and 33 respectively.

39. See *infra*, note 214.

40. In its short existence to date, the utilization of Federal Subsistence Homesteads Corporation as the vehicle for effectuating other, but functionally related, legislation has been twice considered. Both the Commodity Credit Corporation and the Federal Surplus Relief Corporation, organized under the Recovery Act by executive and administrative order, respectively, cf. Executive Order No. 6340, Oct. 16, 1933 have from time to time been used as agencies for particular purposes under various emergency acts. It should be noted, however, that on more than one occasion objection has been voiced in Congress to the broad powers listed in the Delaware charters of such agencies, on the ground that these are "socialistic" corporations. Cf. 79 Cong. Rec. February 19, 1935, at 2266-68. Granting the unwisdom of limiting expression of corporate powers to the language of the enabling act, it is probably not necessary to include the broad range of powers which has become usual.

41. Opinion cited in note 33, *supra*.

42. Opinion cited in note 34, *supra*.

the instances under discussion.⁴³ That incorporation under state laws will not subject such agencies to the imposition of burdens from which they would be free if incorporated under the laws of the District will appear from the ensuing discussion.⁴⁴

Accountability of the Corporation

Valuable light may be thrown upon the whole question of the use of such agencies in public administration from consideration of some specific problems which arise out of the activities of such corporations. The most important single question is probably whether or not such corporations are accountable to the General Accounting Office of the Federal government, which is authorized to settle and adjust all claims and demands by or against the government.⁴⁵ We are thus prepared to consider whether the fourth main objective sought in the choice of an administrative vehicle—speedy and efficient action, untrammelled by procedural rules developed with far different governmental purposes in view—can be achieved under the corporate system described.

The only court decision on the principal question involved arose on a petition for a writ of mandamus to compel the Comptroller General to pass upon relator's claims against the Government arising out of contracts for the construction of vessels entered into by relator with the United States Shipping Board Emergency Fleet Corporation.⁴⁶ The Corporation was organized, pursuant to authority to form "one or more corporations" conferred upon the United States Shipping Board in the Shipping Board Act of 1916,⁴⁷ as a private corporation under the general laws of the District of Columbia, with power to purchase, construct and operate merchant vessels. The contracts entered into by the corporation with relator, out of which arose the claims which relator presented to

43. The provisions of the District of Columbia incorporation acts are less adaptable to the purposes of such corporations than are those of the Delaware law; Cf. D. C. CODE (1929) tit. 5, §§ 261, 264, 265, 276.

44. There may be argument here, however, for enactment of a Federal incorporation law, or, lacking that, for direct creation of such agencies as corporations in the enabling legislation. The difficulty is that it is not always clear, on adoption of the legislation, what administrative vehicle is most appropriate, and Congress frequently wishes to leave the matter to be decided administratively, after survey of the problems during the early formative period. That seems to have been the motive in the phrasing of Section 203, and indeed of a good deal of the emergency legislation. Cf. VAN DORN, GOVERNMENT OWNED CORPORATIONS (1926) 282.

45. See 42 STAT. 21 (1921), 31 U. S. C. A. § 71 (1926).

46. *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 4 (1927). The United States was threatening suit against relator on claims assigned to it by Emergency Fleet Corp., and relator believed it necessary, under R. S. § 951 (1878), 28 U. S. C. A. § 774 (1926) to have its claims passed upon by the Comptroller General to enable it to plead those claims as a set-off in the suit by the United States.

47. Section 11, 39 STAT. 728, 731 (1916) 46 U. S. C. A. § 810 (1926).

the Comptroller General and which the latter officer refused to pass upon, asserting that he had neither the duty nor the power to do so, referred to the corporation as "representing the United States." The court, speaking through Mr. Justice Brandeis, admitted that the language of section 236 of the Revised Statutes, "if standing alone, might possibly be broad enough to include authority to audit accounts and to pass upon claims arising out of contracts made by a government-owned corporation 'representing the United States.'" But this language does not stand alone: "Here it must be construed in the light of the statutes dealing specifically with the Shipping Board and the Fleet Corporation, of the latter's origin and character and of the administrative practice prevailing with regard to it and other similar corporations." The Court then referred to a number of corporations employed by the United States as its instrumentalities, and said:

"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 financial transactions of the United States.*⁴⁸ 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."⁴⁹

There are two grounds which may be urged to distinguish this decision from our present problem. First, the Shipping Board Act directly authorized the Shipping Board to form "one or more Corporations";⁵⁰ but no such express authorization appears in Section 208. That section merely authorizes the President to act "through such agencies as he may establish." The argument on this point is that when Congress authorizes formation of a corporation it thereby employs a word of art which carries with it the connotation of accountability solely to the corpora-

48. For further statements of this motive for establishing corporate agencies see: *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928); *Merchant Fleet Corp. v. Harwood*, 281 U. S. 519, 525, (1930); *Federal Sugar Refining Co. v. U. S. Sugar Equalization Board*, 268 Fed. 575, 587 (S. D. N. Y. 1920); *Haines v. Lone Star Shipbuilding Co.*, 268 Pa. 92, 96, 110 Atl. 788, 789 (1920); *Dalton v. United States*, 71 Ct. Cl. 421, 426 (1931); 55 CONG. REC. 3549 (1917); ANN. REP. OF INLAND WATERWAYS CORP. (1925) 1-5; ANN. REP. OF CHIEF OF INLAND & COASTWISE WATERWAYS SERVICE (1923) 5, 11-13; VAN DORN, GOVERNMENT OWNED CORPORATIONS (1926) 263, 266, 299; See 79 Cong. Rec., May 14, 1935, at 7754 et seq.

49. *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 4 (1927).

50. See note 47, *supra*.

tion's own fiscal officers, but no such connotation hovers about the word "agencies." Executive officers cannot thereafter "lift themselves by their own bootstraps," and, by deciding to administer particular legislation through a corporate agency, free themselves from the provisions of Section 236 of the Revised Statutes. The second possible distinction lies in the fact that in the case of the Emergency Fleet Corporation, several statutes, adopted by the Congress between the time of the incorporation and the decision by the Court, indicated that Congress in fact intended that the Corporation's accounts should be settled by its own fiscal officers. These indications may be said to have expressed Congressional approval of the actual practice of the corporation in so settling and auditing its accounts.⁵¹

Neither of these supposed distinctions has much weight on careful analysis. While it is true that the corporation in the principal case had been organized pursuant to a statute which expressly authorized formation of "one or more corporations," nevertheless, this was not true of all the corporations considered in the Court's opinion, and placed by the Court in a single class to be comprehended under a single rule.⁵²

Nor is there any necessary logic in the first distinction. Where Congress has authorized the setting up of "agencies," it has used a term broad enough to include corporate agencies, and has delegated power to determine what agencies shall be employed. Any supposed intent

51. See Court's notes 9 and 10 in *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8, 9 (1927).

52. Corporations organized under eight statutes were considered by the court. In two, the corporations were created by Congress in the statutes under consideration: "There is created a corporation * * * to be known as the Inland Waterways Corporation", 43 STAT. 360 (1924), 49 U. S. C. A. § 151 (1926), "* * * are hereby created a body corporate and politic," 40 STAT. 506 (1918), 15 U. S. C. A. § 331 (1926). In Act of March 4, 1923, 42 STAT. 1454 (1923), the Federal Farm Loan Board was given power "to grant charters for 12 institutions to be known and styled as Federal Intermediate Credit Banks." In three statutes the President or an administrative officer was given power, in his discretion, to organize corporate agencies: "may form * * * one or more corporations," 39 STAT. 731 (1916), 46 U. S. C. A. § 810 (1926); "may authorize the creation of a corporation or corporations," 40 STAT. 595 (1918); 40 Stat. 845, 888-89: "may * * * form under the laws of the District of Columbia or under the laws of any State one or more corporations," 40 STAT. 888, § 1 (1918). In Act of August 10, 1917, 40 STAT. 276, § 2 (1917), the President was authorized "to create and use any agency or agencies." In Act of March 4, 1919, 40 STAT. 348 § 2 (1919), no power to create new agencies was conferred, but the President was authorized "to utilize any department or agency of the Government including the Food Administration Grain Corporation". We have seen, in meeting the similar argument on the question whether Section 208 authorizes the use of corporations at all (*supra* note 37), that this was an acquiescence by Congress in the President's executive order, interpreting the power conferred on him in the Act of Aug. 10, 1917 to "create and use any agency or agencies" as including the power to direct formation of a corporation under the laws of Delaware. It must be noted that while the opinion found a common administrative practice in the case of all these corporations, and approved it, the precise question now under argument was not before the court.

which may properly be inferred from the Congressional authorization to use corporations should, it seems, be equally inferrable from the same authorization when given in this alternative manner. It is difficult to escape the persuasiveness of the argument that the Congress has acquiesced in the interpretation of its language here defended; the authorization to use "such agencies as he may establish" was given in 1933, almost sixteen years after nearly identical language had been administratively construed to authorize creation of a corporation under State laws with power to have its accounts audited and settled by its own fiscal officers, almost fourteen years after the Congress had concurred in this administrative construction, and six years after the Supreme Court had upheld it.

Furthermore, the second possible ground of distinction of Section 208 from the statute involved in the principal case is not one that impresses after a careful reading of the opinion in that case. That opinion, it is clear, was based upon the presumed intention of Congress in adopting the statute from which was derived authority for organization of the corporation, and in the administrative practice with reference to its accounts, rather than in the indications of Congressional intention in legislation adopted after the corporation was organized.⁵³

This question whether a corporation established as an agency in the administration of Section 208 would be required to render accounts to the General Accounting Office and observe the minutiae of administrative procedure applicable to the operations of executive departments was submitted to the Solicitor of the Interior Department. The Solicitor concluded⁵⁴ that under the accepted administrative practice and the decision in the principal case, the accounts of such a corporate agency would not be required to be settled in the General Accounting Office. That the Comptroller General might have decided otherwise, if the administrative changes below discussed had not prevented submission of the question to him for decision, is indicated in the decision rendered

53. It is worth noting that in the *Skinner & Eddy case* the Court considered the contention by which it was sought to distinguish the case of the Emergency Fleet Corporation from that of the other corporations earlier used as government instrumentalities, that the others expended no money appropriated by Congress save that received from the sale of stock to the government, whereas the Fleet Corporation expended moneys appropriated to the Shipping Board and by it turned over to the corporation. See 275 U. S. 1, 8-9 (1927). The court found no sufficient basis of distinction in this fact. In the case of Federal Subsistence Homesteads Corporation, as in the case of the Emergency Fleet Corporation, appropriated moneys have been made directly available to the corporation, rather than through stock purchase. The subsidiary corporations in turn received funds from the parent under loan contracts providing for the expenditure of the moneys in establishing subsistence homestead communities. The fact that the moneys expended are appropriated moneys made directly available, rather than through stock purchase, is therefore not controlling.

54. Memorandum Opinion, Oct. 19, 1933, to the Director of Subsistence Homesteads.

by him to the Public Works Administrator concerning the activities of the Housing Corporation.⁵⁵ The Comptroller General, in foreshadowing⁵⁶ a decision that the fiscal affairs of the Housing Corporation must be audited and settled in the General Accounting Office, drew a sharp distinction between corporations which are created, or whose organization is in terms authorized, in acts of Congress, and those set up by executive officers, although pursuant to statutory authority to create and designate appropriate agencies.⁵⁷ While it would be exceptionally unfortunate if there were foreclosed the possibility of the use by the government of corporations as administrative agencies, with a scope of action free of the general governmental procedural requirements, the Comptroller General's decision does not spell such a foreclosure. Congress can still provide for this result by expressly so enacting.

A decision as to the accountability of the Federal Subsistence Homesteads Corporation and its subsidiaries was imminent when an Executive

55. See *supra* note 33.

56. As stated in note 33, *supra*, and accompanying text, the January 11, 1934 decision was not final, but invited the Public Works Administrator to submit further information, if he saw fit so to do, to meet the objections raised. No further information was submitted; the housing program has since been carried forward through the agency of the Housing Division of the Public Works Administration, and the Housing Corporation has been inactive.

57. The decision said in part:

"There is a clear and vital difference between a corporation *created pursuant to statutory direction* with clear statutory grant to remove its transactions from the safeguards surrounding appropriations and to avoid not only Executive direction but accountability for the public moneys entrusted to it, and a corporation created within the Government *under an authority to use existing and to create additional agencies* to assist in administering a law, and which operates with appropriated moneys. In some instances, it is true, the laws creating corporations have been so broad as to exclude Executive control and permit escape from accountability. A corporation of the other class, however, created as an additional administrative agency, can have no such status or uncontrolled authority. It can exercise no wider authority than as though operating as an unincorporated unit in the Executive branch. By the act of incorporating Executive responsibility is not shifted, Executive control avoided, nor accountability escaped." (ital. supplied)

The soundness of this ground of distinction has been discussed. It surely is a *non sequitur* to conclude that in cases where the financial transactions of a corporate agency are audited and settled by its fiscal officers rather than in the General Accounting Office, responsibility is being shifted, Executive control avoided and accountability escaped. With the stock of such corporations held by Executive officers of the United States in trust for the United States, corporate officers appointed by the stockholders are directly subject to Executive control, and saddled with full responsibility. Accountability, too, is not escaped; the procedure for such accountability has merely become more flexible and more in accord with the needs of the special problems to be solved. There remains the question of the possible advantages of independent audit and settlement of accounts, and the balancing of this policy against the procedural delays. On this whole question, compare McGuire, *Government by Corporations* (1928) 14 VA. L. REV. 182, with VAN DORN, *GOVERNMENT OWNED CORPORATIONS* (1926). See letter of Comp. Gen. to Sec'y. of the Navy (A-60070) Feb. 27, 1935. On the use of corporations by State governments, see Note (1932) 32 COL. L. REV. 881.

Order⁵⁸ was issued, temporarily settling the matter by providing that "accounts of all receipts and expenditures by governmental agencies, including corporations, created after March 3, 1933, the accounting procedure for which is not otherwise prescribed by law, shall be rendered to the General Accounting Office in such manner, to such extent, and at such times as the Comptroller General of the United States may prescribe".

It was indeed urged, that although under this order the accounts of the parent corporation are required to be rendered to the General Accounting Office, the subsidiary corporations are not affected thereby, on the ground that the subsidiary corporations are not "governmental agencies", but borrowers. It should be recalled that the directors of the subsidiaries were local citizens, none of whom were government employees, all in fact serving without compensation, and that a loan contract was executed between the parent and subsidiary, the terms of which regulated the expenditure of the funds advanced in establishment of the community. To the argument that the fact of complete stock ownership by the parent made the subsidiary a government agency, even if once removed, it was replied that such stock issuance was in substance but a pledge as security for the loan, and hence not controlling.⁵⁹ Upon consideration of the intent of the President in promulgating the Executive Order referred to, however, it seems clear that the subsidiary corporations should be deemed to be "governmental agencies" within its terms. Promulgation of this order thus made unrealizable the hoped-for freedom from required observance of the established procedural rules. The other reasons for use of the corporations in administration remained—and raised several legal problems of importance.

58. No. 6549, Jan. 3, 1934. The decision of the Comptroller Gen. of Jan. 11, 1934, (*supra* notes 33, 57) could have rested its conclusion as to the "accountability" of the Housing Corporation solely on this Order.

59. The right to vote pledged stock is "an essential element of its value as collateral." See *Clark v. Forster*, 98 Wash. 241, 167 Pac. 908 (1917). The courts recognize the surrender of voting control to a pledgee as a proper part of a credit transaction. *Pauly v. State Loan and Trust Co.*, 165 U. S. 606 (1897); *Hill v. United States*, 234 Fed. 39 (C. C. A. 8th, 1916); *In re Argus Printing Co.*, 1 N. D. 434, 48 N. W. 347 (1891); *Berkey v. Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58 (1926). Such a pledge of stock, carrying with it voting rights, does not effect a merger of identities: *Kingston Dry Dock Co. v. Lake Champlain Trans. Co.*, 31 F. (2d) 265 (C. C. A. 2d, 1929); *Berkey v. Third Ave. Ry. Co.*, *supra*. The Solicitor of the Department of the Interior in fact expressed the opinion (Mar. 20, 1934) that if a private corporation which had not earlier come into any legal relationship with Federal Subsistence Homesteads Corporation should borrow money from it with which to establish a homestead community, and pledge as security all of its stock, with full voting power, the borrower would not thereby become a "governmental agency." It is apparent, however, that the conclusion may very well be different in the case of the subsidiaries who were organized by the parent for the sole purpose of serving as agencies for effectuating the legislative program.

*Some Problems in the Use of Government Corporations as
Administrative Agencies*

One of the most urgent questions facing the administrators of the Subsistence Homesteads programs is whether the homestead properties will be subject to taxation by state and local authorities, if title is taken in the operating or the parent corporations. That the properties would be exempt from such taxation if title were in the United States is, of course, clear.⁶⁰ Generally when this problem is presented the attempted imposition of state taxes is resisted by the federal agency and regarded as a possible interference with its operations.⁶¹ The administrators of the subsistence homesteads program were hopeful, on the contrary, that a way could be found to enable payment of the usual property taxes, and would have regarded it as a consideration in favor of the use of corporate agencies in administration if such use enabled accomplishment of this result. More than a thousand acres is frequently required for a subsistence homestead community, the part not subdivided into homestead plots being used for pasturage, woodlots, park and recreation spaces, and similar community purposes. Not infrequently, some of the best land in a county will be purchased. The exemption of such property from taxes may therefore serve, not only to retire from the tax rolls property on which taxes have theretofore been paid, but to make the effect on local government doubly burdensome inasmuch as the settlement of 100 to 200 families on such land will substantially increase the needs for roads, streets, school facilities, police and fire protection and other public services normally provided for, at least in large part, from property taxation. It may become difficult or impossible for the local community to furnish these needed facilities; local taxpayers may therefore grow hostile to the favored newcomers; the new community will find it hard to take root, and the homesteaders themselves will have forcibly brought home to them the idea that they are a class apart, wards of the Federal Government.⁶² Further, the reason for the rule

60. *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886). See *Irwin v. Wright*, 253 U. S. 219 (1922); *Lee v. Osceola Imp. Dist.*, 268 U. S. 643 (1925). The possibility that taking title in the name of corporate agencies might subject government properties to state taxation was suggested by the Comptroller General as a reason for not resorting to their use: *supra* note 36. On the general question of the use of government corporations in administration, see *Robinson, Some Problems Confronting the Public Works Emergency Housing Corporation* (1934) 19 CORN. L.Q. 548, and Note (1935) 83 U. OF PA. L. REV. 346.

61. See, for example, *Clallam County v. United States*, and *U.S. Spruce Production Corp.*, 263 U. S. 341, 346 (1923); *King County v. Emergency Fleet Corp.*, 282 Fed. 950, 952, (C.C.A. 9th, 1922); Comment (1934) 44 YALE L. J. 326.

62. When word spread in some localities that the new homestead communities would claim such exemption, the Subsistence Homesteads Division had the uncomfortable experience of receiving telegrams from local citizens beseeching the Division to stay out of the State.

of exemption of federal property from local taxation would seem to be absent in the present case, the sole aim of the Federal Government in acquiring and administering the property being, not to retain the land for federal purposes, but rather to aid the homesteaders to acquire such property for themselves.

The courts have, however, consistently held that the real and personal property of government-owned and financed corporations is exempt from State and local taxation.⁶³ In one group of cases⁶⁴ this result was reached by refusing to give effect to the interposition of the corporate entity on the ground that the property does not lose its public character merely "because the Government chose to have the legal title taken in the name of a corporation, which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns".⁶⁵ More frequently, the exemption has been placed upon the narrower ground that, even though the separateness of the corporate entity be recognized so that the property cannot be considered to be owned by the United States, taxation of such property would be a burden upon the operations of a Federal instrumentality.⁶⁶

63. Consistently, if we accept the grounds of distinction urged to explain *Thomson v. Union Pacific Rr. Co.*, 9 Wall. 579 (U.S. 1870) and *Union Pacific Rr. Co. v. Peniston*, 18 Wall. 5 (U.S. 1873). These cases sustained state taxation of railroad properties when the railroad companies were, while engaged in private business for private profit, also serving as federal agencies. The decisions have been explained as limited to taxation of properties not used or useful in serving the agency function. See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522 (1926); *Alward v. Johnson*, 282 U.S. 509, 514 (1931); *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575 (1931); *Clallam County Spruce Production Corp.*, 263 U.S. 341 (1933); *Spruce Production Corp. v. Lincoln County*, 285 Fed. 388, 390 (D. Ore. 1922). This distinction depends upon the rule of *McCulloch v. Maryland*, 4 Wheat. 316 (U.S. 1819). Since this distinction is difficult to square with the facts of the two cases, the railroad property being the very property which advanced the agency functions, it seems preferable to regard these cases as overruled on the question of property taxation by the cases cited *infra* notes 64, and 66, but sustainable as cases of taxation upon the property of a corporation not exclusively engaged as a Federal agency, but primarily in a private business, under circumstances where the tax does not interfere with ability to perform the agency function. Cf. *Cohen and Dayton, Federal Taxation of State Activities and State Taxation of Federal Activities* (1925) 34 YALE L. J. 807, 818-819; Note (1923) 36 HARV. L. REV. 737.

64. *King County v. Emergency Fleet Corp.*, 282 Fed. 950 (C.C.A. 9th, 1922); *Emergency Fleet Corp. v. Delaware County*, 17 F. (2d) 40 (C.C.A.3d, 1927), writ of error dismissed, 275 U.S. 483 (1927), affirmed on rehearing, 25 F. (2d) 722 (C.C.A. 3d, 1928), cert. denied, 278 U.S. 607 (1928). See *U.S. v. City of Hoboken*, 29 F. (2d) 932, 939 (D. N. J. 1928).

65. *King County, Wash. v. Emergency Fleet Corp.*, 282 Fed. 950 (C.C.A.9th, 1922). The decision in this case discussed also and rejected the contention that the resort to a corporate agency for administration was itself an indication of Congressional intention to make the property subject to state taxation.

66. *Clallam County, Wash. v. United States and U. S. Spruce Produc. Corp.*, 263 U.S. 341 (1933); *City of New Brunswick v. United States*, 276 U.S. 547, 555 (1928); *Lincoln County v. Pacific Spruce Corp.*, 26 F. (2d) 435 (C.C.A. 9th, 1928); *U. S. Spruce Production Corp. v. Lincoln County*, 285 Fed. 388 (D. Ore. 1922); *United States v. Coghlan*, 261 Fed. 425 (D. Md. 1919).

In the Clallam County decision, *supra*, the court, per Mr. Justice Holmes, found the

The applicability of this rule to Federal Subsistence Homesteads Corporation seems clear. It was called into being and it functions and acquires property solely as an arm of the Government in effectuating a particular program. So too the fact of the slight additional remoteness of the subsidiary corporations from the Government (their stock is owned by an agency rather than by the Government itself) is not of great importance, since they are none the less surely agencies employed by the United States.⁶⁷

Does the taxable status of the property change after a contract of sale has been executed with a homesteader? It is apparently well settled that when a purchaser from the United States has complied with all the requirements of the purchase contract and nothing remains to be done but the execution and delivery of a deed, the United States becomes a "naked trustee" of the legal title and the property is subject to state taxation, but so long as the United States retains title as security for the payment of any part of the purchase money or to secure the performance of any other condition to be satisfied by the purchaser, the land is not subject to such taxation.⁶⁸ Where the contract provides for delivery of a deed upon payment of less than the full purchase price, the property becomes taxable when the right to a deed has become established, although the United States may secure a mortgage to be executed in its favor as security for the balance of the debt.⁶⁹

invalidity of the tax on the ground of interference with the activities of the instrumentality so clear that it was "unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States." To reach the result by ignoring the separateness of the corporate entity creates inconsistencies with other decisions on analogous problems, as on the suability of such corporations. See *infra* note 76, and cf. Note (1923) 36 HARV. L. REV. 737.

67. Both the Atty. Gen. (Opinion to Sec'y. of Int., July 18, 1934) and the Solicitor for the Interior Department (Opinion of June 15, 1934) advised that the parent corporation could claim exemption from state property taxation. The question whether the subsidiary corporations could claim such exemption was not submitted because, as discussed below, it was decided in April, 1934, to discontinue operation through the subsidiaries.

68. See *Irwin v. Wright*, 258 U.S. 219 (1922); *Lincoln County v. Pacific Spruce Corp.*, 26 F. (2d) 435 (C.C.A.9th, 1928).

69. See *City of New Brunswick v. United States*, 276 U.S. 547 (1928); *City of Philadelphia v. Myers*, 102 Pa. Super. 424, 157 Atl. 13 (1931); *Hance v. City of New Brunswick*, 7 N.J. Misc. 610, 146 Atl. 673 (1929). In such case, if the property is to be sold for taxes the sale must be made subject to the lien and interest of the United States: *City of New Brunswick v. United States*, *supra*. Whether the interest of the purchaser under a contract to buy land from the United States is taxable as personalty has not been decided by the Supreme Court. There are conflicting decisions on the point. See *Port Angeles Western Rr. v. Clallam County*, 36 F. (2d) 956 (W.D. Wash. 1930), *aff'd* on jurisdictional grounds, 44 F. (2d) 28 (C.C.A. 9th, 1930), *cert. denied* 283 U. S. 848 (1931), holding such tax valid, and *People ex rel. Donner-Hanna Coke Corp. v. Burke*, 128 Misc. 195, 217 N.Y. Supp. 803 (Sup. Ct. 1926), *aff'd* without opinion, 222 App. Div. 790, 226 N.Y. Supp. 882 (4th Dep't, 1927) (holding tax invalid as unreasonable burden upon attempt by the United States to dispose of property).

The intention of the administrators of the Federal subsistence homesteads program has been to maintain sufficient control over the use of the land acquired and the general development of the communities established thereon, to make these communities in some genuine sense guided and controlled developments, so that some conclusions could be drawn from experience with them. To this end, it was desired to reserve to the Corporation certain important powers which should be operative until the homesteader had become fairly well established. It was decided, therefore, not to issue deeds upon a down-payment, or after payment of a small part of the purchase price, with reliance upon a purchase money mortgage as security for the balance, but rather to execute with each homesteader a contract for a deed which should entitle the homesteader to a deed only after the last payment had been made.⁷⁰ The standard sale contract which has been prepared for use on the projects contains this provision.⁷¹ Title will thus remain in the operating corporation for many years, since the amortization period, generally provided for, ranges from twenty to thirty years. It follows that this arrangement will result in removing from local tax rolls all property in the communities, and in keeping it off such rolls for two decades or more, except for such occasional parcels as may be earlier paid for.

Under one plan which has been considered for solution of this problem, the Corporation would make payments to states and local tax authorities in cash, "in lieu" of taxes, in return for which the local authorities would undertake to furnish necessary roads, schools, police and fire protection and the other usual public services. The fact that the exemption of the property from taxation probably does not of itself relieve local authorities of the general obligation to supply such public facilities and services to residents of the state who are resident upon such property,⁷² provided the general civil jurisdiction of the state extends

70. It is anticipated that there may be many defaults, particularly at first, until a relatively permanent group has become settled in each community. Under the laws of most states, it will be simpler in the case of such early defaults to retake possession under the terms of a sale contract, than it would be to file a bill to foreclose a mortgage and clear the title upon default. It seems generally true, also, that a greater variety of provisions regulating the use of the property can be safely included in a contract for the sale of land and buildings than in a mortgage.

71. To enable the Corporation to supervise development of the community, the contract provides, for example, that the buyer may not transfer or encumber his interest except with the consent of the seller, that the buyer shall use the property only for subsistence homestead purposes and defines certain practices to be observed by the buyer; that "The Buyer will also adopt and adhere to the cropping program and tillage practice to be stipulated by the Seller"; and lists restrictions on land use that are stated as intended to be covenants running with the land. In no event may the Seller be compelled to accept the last \$100 payable, within a period of 5 years from the date of the instrument.

72. To hold otherwise would be to permit the state seriously to impair the advantage of tax exemption. If the state be not permitted to urge such tax exemption as a ground for refusal to furnish the usual facilities, there will be nothing to take such properties out of

over such property,⁷³ does not mean, however, that there will necessarily be an absence of consideration in a contract of the Corporation to make such payments in lieu of taxes. "Local authorities may not be forced to supply roads, school facilities, or other similar advantages unless public funds are available. Moreover, the members of a community have no right to the construction of roads or schools of any particular description or at any designated time or place. Certainly any agreement between Federal Subsistence Homesteads Corporation and local authorities that such services be rendered to a subsistence homestead community in a particular manner would involve an undertaking different from any duty legally incumbent upon the local authorities and would, therefore, be a contract upon legally sufficient consideration."⁷⁴

The Subsistence Homesteads Corporation can thus turn the privilege of tax exemption to advantage, in that it can by the contract with the local government render more specific and more readily enforceable the generalized duty to supply public facilities. At the same time, such a decision of the Corporation not to claim the full benefit of the privilege can avoid the unfortunate consequences of such a claim as applied to this particular type of federal activity.⁷⁵

Will the courts deny to Federal Subsistence Homesteads Corporation the immunity from suit which its sovereign principal enjoys? The decision in *Sloan Shipyards Corporation v. United States Shipping Board*

the general rule. On this ground, the Solicitor for the Interior Department advised (Opinion of June 15, 1934) that residents on the properties would remain entitled to such facilities. The Atty. Gen. likewise so concluded. Opinion to Sec'y. of Int., July 18, 1934.

73. Whether exclusive jurisdiction is acquired by the United States over subsistence homestead communities is discussed *infra* as part III.

74. Opinion of Solicitor, *supra* note 72. There must also be found power in the Corporation to expend money to supply roads, schools, fire protection and the like before it may be concluded that it may contract with others for the furnishing of these facilities. This and related questions arising out of the phrasing of Section 208 are considered together *infra* as part IV.

A precedent for the execution of such contracts is present in the activities of the United States Housing Corporation. See 1 REP. U. S. HOUSING CORP. (1920) 349, 358. In some states, legislation may be necessary to empower civil subdivisions to enter into such contracts or accept such payments.

75. It has become generally accepted, despite the absence of any decision by the Supreme Court directly upon the question, that a corporation exclusively engaged as a federal instrumentality may carry on its activities in states other than that of its incorporation without qualifying as a foreign corporation, and without paying any tax or fee for the privilege of doing so. The decisions in *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181 (1888), and *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (1892), generally cited as deciding this point, contain no more than dicta on the question. The principle of the decision in *Johnson v. Maryland*, 254 U. S. 51 (1920), in which it was held that a state may not require the driver of a Post-Office truck to qualify as a competent driver and secure a driver's license under state law, is, however, applicable. That case is further discussed *infra* note 206. There are other dicta in accord: *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524 (1926); *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 8, 11,

Emergency Fleet Corporation,⁷⁶ although by a divided court, may be difficult to escape. In this opinion the court disposed of three cases; the first was a bill brought by the Sloan Shipyards Corporation to set aside a contract of settlement, and for an accounting on shipbuilding

16 (C. C. A. 8th, 1907); *State of Wash. v. Wiles*, 116 Wash. 387, 391-2, 199 Pac. 749, 751 (1921). The Attorney General of Ohio advised the Secretary of State of that State [Op. Atty. Gen. Ohio 2175 (1917)] that the U. S. Shipping Board Emer. Fleet Corp. could not be required to qualify as a foreign corporation before doing business in Ohio. The Attorney General of Texas (Op. addressed to Sec'y of State of Texas, Feb. 19, 1934), the Secretary of State of Tennessee, and the Commissioner of the Dept. of Revenue of North Carolina (the last two in rulings not accompanied by formal opinions) have held that the subsidiary corporations of Federal Subsistence Homesteads Corporation are not required to qualify as foreign corporations and are exempt from state franchise taxation. The Attorney General of the United States (Op. to the Sec'y. of Int. July 18, 1934) and the Solicitor for the Interior Department (Op. of June 15, 1934) both advised that the corporation was exempt from the requirement to so qualify. The United States Housing Corporation (Report cited *supra* note 74, at 348) did business in many states without so qualifying.

This rule is analogous to, and perhaps even a stronger case on principle than, the rule that a state cannot condition the right of a foreign corporation to engage in a legitimate branch of interstate commerce within its borders with a requirement that it obtain a license from the state and pay a license fee. *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). Nor may the states burden the activities of such governmental agencies with license, franchise, occupation and other excise taxes. See the National Bank cases beginning with *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819); *Osborn v. Bank of the United States* 9 Wheat. 738 (U. S. 1824); *Williams v. Talladega*, 226 U. S. 404 (1912); *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1 (C. C. A. 8th, 1907); *De La Vergne Co. v. State Tax Comm.*, 211 App. Div. 227, 207 N. Y. Supp. 680 (3d Dep't, 1925), *aff'd* without opinion in, 241 N. Y. 517, 150 N. E. 536 (1925). Cf. *Panhandle Oil Co. v. Knox*, 277 U. S. 218 (1928).

It would seem, however, that the state of incorporation stands in a somewhat different position. It too may not tax the activities of the corporation, nor the property employed in its governmental functions; surely it may, however, charge a fee for the service it is asked to perform when application is made to it to issue a corporate charter and create a body corporate. The Atty. Gen. and Solicitor both so held. Opinions cited, *supra*. The beneficiary of a privilege granted by a state in its sovereign capacity surely cannot be heard to demand a grant of the privilege on other terms than the state offers it. Cf. decision of the Comp. Gen. rendered to the Sec'y. of Int., Aug. 28, 1934, holding that upon filing an application with the State of Pennsylvania for a highway occupancy permit, to permit extension of water mains on a subsistence homestead project under the surface of state-owned highways, a fee may be paid for issuance of the permit, even though the itemization of the fee, made by the State, claimed part of the fee for "issuance of the permit" and part for "final inspection" of the highways after the mains are laid. The decision held such charges payable as covering "acquisition of an easement and services in connection therewith—rather than a State tax upon an instrumentality of the United States." Cf. 18 Op. Atty. Gen. 491 (1887); 23 *id.* 299 (1900). See *infra* note 182.

76. 258 U. S. 549 (1922). Accord: *Fleet Corp. v. Harwood*, 281 U. S. 519 (1930); *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641 (C. C. A. 2d, 1923), cert. denied, 264 U. S. 586 (1924); cf. *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1 (1927), and same case below, 8 F. (2d) 1011 (App. D. C. 1925); *Federal Sugar Ref. Co. v. U. S. Sugar Equalization Board*, 268 Fed. 575 (S. D. N. Y. 1920); see *Bank of the United States v. Planters Bank of Georgia*, 9 Wheat. 904 (U. S. 1824) for a decision applying the same rule to a corporation in which a State was a stockholder. *Contra*:

contracts, dismissed by the District Court on the ground that this was in substance a suit against the United States, and hence the only court with jurisdiction was the Court of Claims. At the time of the execution of the contract involved, the corporation could exercise only the powers conferred in its charter. The second case was a suit against the same corporation for breach of contract, dismissed below on the same ground as was the first, but the contract here involved had been executed after broad governmental powers had been conferred upon the corporation in an Executive Order of the President. There was in this case the further seemingly important fact that the contract in suit referred to the Fleet Corporation as "A corporation organized and existing under the laws of the District of Columbia (herein called the 'corporation'), representing the United States of America"; and one paragraph of the contract referred to the corporation "and/or the United States". The third was a claim to priority in payment asserted by the Fleet Corporation in a bankruptcy proceeding and denied below. The court reversed the decree and judgment in the first two cases saying:

"The Shipping Act contemplated a corporation in which private persons might be stockholders, and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock, but that did not affect the legal position of the company * * *. These provisions (and the broad powers conferred upon the corporation before execution of the contract in the second case) 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 * * *. 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. * * * We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, 'representing the United States of America'. * * * The fact that the corporation was formed under the general laws of the District of Columbia

Ballaine v. Alaska Northern Ry. Co., 259 Fed. 183 (C. C. A. 9th, 1919). See discussion of *Ballaine* decision in *Federal Sugar Ref. Co. v. U. S. Sugar Equalization Board*, *supra*, at 585. The dissent by Chief Justice Taft, in which Justices Van Devanter and Clark joined drew a distinction between liability to suit before and after the additional powers had been conferred by Executive Order, denying suability only in the latter case. The principal discussion in the dissent is, however, an expression of concern over anticipated procedural difficulties. See *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U. S. 549, 573 (1922). See opinion of the court, at 568, for reference to those of its earlier decisions which the court felt "led up to and almost required" the present decision.

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."⁷⁷

The third case decided in the opinion last quoted denied to the Fleet Corporation a claim to priority of payment in bankruptcy proceedings, the basis for the decision being, here also, that the Fleet Corporation was an entity distinct from the United States and therefore not entitled to the special rights afforded to the United States in bankruptcy proceedings.⁷⁸

The same corporation was, however, held to be entitled to the right of priority of transmission of its telegraphic messages, and to the specially favorable rates, provided for in the Post Roads Act of 1866 for "the several departments of the government of the United States."⁷⁹ The latter decision in substance holds no more than that "the Fleet Corporation is a department of the United States within the meaning of the Post Roads Act."⁸⁰ While the Court admitted that the Fleet Corporation was "in form" a private corporation, it refused to deny to the Corporation's messages the government rate on that ground. It again held that the possibly "chief reason for employing a corporate agency was to enable the Government to employ commercial methods and to conduct the operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure and its control over the financial operations of the United States";⁸¹ and concluded that "It obviously was not the intention of the Government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rate" for its telegraph messages.

Searching further to discover to what extent the courts will give weight to the fact that such corporations are independent entities we find some peculiarities in the cases which have passed upon the question as to when the United States is a proper or indispensable party in a

77. 258 U. S. 549, 565, 566, 567-8 (1922). The last quoted sentence, finding in the fact of incorporation an intent of Congress to subject the corporation to suit, may be compared with the refusal to regard the same fact as evidencing Congressional intention to make the corporation's property subject to state taxation. See *supra* notes 64-66. Cf. the very recent decision in *Federal Land Bank of St. Louis v. Priddy*, U. S. Sup. Ct. April 29, 1935.

78. 258 U. S. 549, 570 (1922). There was no dissent from this part of the decision, although the concurrence was in the conclusion only, on the ground that preferences in bankruptcy under the statute extend only to claims for taxes: *Id.* at 574. On the principal point, cf. *West Virginia Rail Co. v. Jewett, Bigelow & Brooks Coal Co.*, 26 F. (2d) 503, 504 (E. D. Ky. 1928).

79. *Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415 (1928). But see *Commercial Pacific Cable Co. v. Philippine Nat. Bank*, 263 Fed. 218 (S. D. N. Y. 1920).

80. *Id.* at 423.

81. See *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 4 (1927).

suit arising out of the activities of such a corporation. The Supreme Court has held⁸² that the United States is a proper party to join as plaintiff with the United States Spruce Production Corporation in a suit at law to recover damages for breaches of a contract to which the corporation and the defendant were alone parties; yet, of course, not every sole stockholder is a proper party plaintiff in such case. Thereafter the United States was permitted to sue as sole party plaintiff to recover on causes of action accruing to government controlled corporations.⁸³ The United States was regarded in the last mentioned cases as being the principal for whom the corporation was acting as agent.⁸⁴ Relying on the agency relationship as being the sole basis for the right of the United States to bring suit, one District Court has held⁸⁵ that the United States is not a proper party where the suit is on a sealed instrument. It has, further, at least in one case,⁸⁶ been denied that the United States is the "real party in interest" in a mortgage held by one of its wholly financed and controlled corporations so as to make it an indispensable party defendant to a suit to foreclose such mortgage. The court in this last case refused to extend to the Fleet Corporation the rule that an estoppel cannot be raised against the United States by acts of its officers, and held the corporation estopped to deny its power, and that of its officers, to consent to a subordination of a lien in its favor. On the other hand, a state court⁸⁷ extended to the same corporation the rule that a state statute of limitation will not run against the United States, and permitted the United States to sue and recover on a claim

82. *Erickson v. United States*, 264 U. S. 246 (1924). The suit was therefore held to be a "suit brought by the United States" and thus to confer jurisdiction upon the District Court.

83. In *United States v. Czarinkow-Rionda Co.*, 40 F. (2d) 214 (C. C. A. 2d., 1930) the United States was held proper parties to maintain a libel to recover demurrage for delays in loading a chartered ship, where the charter party was made between the Emergency Fleet Corporation and the defendant. Accord, on similar facts: *Russell Wheel and Foundry Co., v. United States*, 31 F. (2d) 826 (C. C. A. 6th, 1929); *United States v. Gano-Moore Co.*, 35 F. (2d) 395 (E. D. Pa. 1929) (permitting the United States to sue at law to recover overpayments made through error); see *United States v. Brown*, 247 N. Y. 211, 160 N. E. 13 (1928).

84. See, especially, cases cited in note 83; although in *Erickson v. United States*, 264 U. S. 246 (1924) the Supreme Court did not rely on the agency relationship, but held that the United States was seeking to enforce "a right in which it claims to have a direct and legal interest." *Id.* at 249.

85. *United States v. New Amsterdam Casualty Corp.*, 52 F. (2d) 148 (S. D. N. Y. 1931), holding that the recital in the contract that the corporation was "representing the United States of America" did not make the latter a party to the instrument. See discussion of this case in *Crane v. United States*, 55 F. (2d) 734 (Ct. Cl. 1932).

86. *Prov. Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641 (C. C. A. 2d, 1923), cert. denied, 264 U. S. 586 (1924).

87. *United States v. Brown*, 247 N. Y. 211, 160 N. E. 13 (1928). *Quaere*, whether the decision would have been the same if the corporation had sued as sole party plaintiff.

in favor of the Fleet Corporation after the terms of the statute had run against the claim.

Similar contrasts are not wanting. In *Crane v. United States*,⁸⁸ the Court of Claims held that the United States may counterclaim against a demand for refund of overpayments of income taxes a claim of the Fleet Corporation against the taxpayer on a bond executed by it as obligor. In *Lindgren v. Merchant Fleet Corporation*⁸⁹ the Court held that where suit was instituted against the United States and abated, and a later suit was instituted on the same cause of action against the Fleet Corporation, the suit was not against the same defendant, within the terms of a Virginia Statute under which the former suit would avail to extend the running of the statute, if the defendant were the same in the two suits.

It is difficult to quarrel with the result reached in any of these decisions taken singly, but it has become equally difficult to predict when the interposition of the separate entity of the corporate agency will be ignored and when it will be given considerable weight or even taken as controlling. An interesting contrast is presented in the decisions in *United States v. Strang*⁹⁰ and *United States v. Walter*.⁹¹ In the *Strang* case the Court held that an employee of the Fleet Corporation was not "an officer or agent of the United States" within the intendment of Section 41 of the Criminal Code, providing that no officer or agent of any company or corporation shall be employed or shall act as an officer of the United States for the transaction of business with such company or corporation. The Court therefore held that an inspector of the Fleet Corporation did not violate that provision in awarding contracts for ship repairs to a firm in which he was a partner. In the *Walter* case the Court held that conspiring to present a fraudulent claim against the Fleet Corporation is a violation of the provision in Section 37 of the Criminal Code punishing conspiracy "to defraud the United States in any manner or for any purpose".⁹² These are, however, cases of statu-

88. 55 F. (2d) 734 (Ct. Cl. 1932).

90. 254 U. S. 491 (1921).

89. 55 F. (2d) 117 (C. C. A. 4th, 1932).

91. 263 U. S. 15 (1923).

92. In the *Strang* case, 254 U. S. 491, 493 (1921), the Court said:

"The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41". In the *Walter* case, 263 U. S. 15, 18 (1923), the Court said:

"While it is true that the corporation is not the United States . . . the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of a very important instrument. We are of opinion that it was within the words of Section 37, 'defraud the United States in any manner'".

tory construction, and the statutes differ sufficiently in wording to have enabled Mr. Justice Holmes to cite the one case, apparently with approval, in the decision of the other.⁹³

The Supreme Court again disregarded the interposition of the corporate entity in *United States Grain Corporation v. Phillips*,⁹⁴ in which the Court held that a naval officer of the United States could not recover the fee which would be otherwise due him for carrying gold upon a steamship of which he was commanding officer where the legal title to the gold was in the defendant corporation, wholly owned and controlled by the United States. It was admitted that under applicable statutes and navy regulations the fee could not have been charged or collected if title to the gold had been in the United States. "In substance", said the Court,⁹⁵ "the gold was the property of the United States. It is true that the legal title was in the Corporation, that the property of the corporation might have been taken to pay a judgment against it, and that in other ways the difference of personality would be recognized * * *. But for purposes like the present imponderables have weight." In a not dissimilar case,⁹⁶ the Court of Claims later held that one who had for almost nine years served as President of the Fleet Corporation at a

93. The Circuit Court of Appeals for the Second Circuit had earlier, however, by giving full heed to the separateness of the corporate entity which the Supreme Court had itself so frequently found occasion to emphasize, decided in *Salaas v. United States*, 234 Fed. 842 (C. C. A. 2d, 1916), that the very same statute passed upon in *United States v. Walter* was not violated when an officer of the Panama Railroad Company, in which the United States owned all the stock, entered into an agreement with others to share profits which should have gone to the corporation. Cf. *United States v. Chem. Foundation*, 272 U. S. 1, 19 (1926).

94. 261 U. S. 108 (1923).

95. *Id.* at 113, per Mr. Justice Holmes.

96. *Dalton v. United States*, 71 Ct. Cl. 421 (1931); the decision in *United States Grain Corp. v. Phillips*, 261 U. S. 106 (1923), was apparently not brought to the attention of the court. The separateness of corporate entity was given weight in 34 Op. Atty. Gen. 241 (1922), to permit the hiring of private detectives as employees of the Fleet Corporation although they could not be employed by the United States because of the provision in the Act of March 3, 1893, 27 STAT. 591 (1893), 5 U. S. C. A. § 53 (1926), to the effect that "no employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service . . ."; and in 25 Op. Atty. Gen. 465 (1905), concluding that employees of the Panama Railroad and Steamship Line, in which the United States had acquired by purchase nearly all of the stock, were not employees of the United States within the meaning of the Act of Aug. 1, 1892, 27 STAT. 340 (1892), 40 U. S. C. A. § 321 (1926), prescribing an eight hour day for laborers and mechanics "employed by the Government of the United States." This separateness was ignored, however, in 8 Comp. Gen. 420 (1929), holding that "The claimants are employees of the United States," and thus not entitled to compensation for claims for damage to property in the operations of the railroad. The railroad referred to was the Alaska Railroad. Cf. *Ballaine v. Alaska Northern Railway Company*, 259 Fed. 183 (C. C. A. 9th, 1919). 34 Op. Atty. Gen. 120 (1924), giving weight to the separateness of the corporate entity, in holding employees of the Fleet Corporation not entitled to the benefits of the United States Employees' Compensation Act, was almost wholly overruled in 34 Op. Atty. Gen. 363 (1925), holding similar employees so entitled.

salary of \$18,000 per annum was entitled to receive throughout this period the retirement pay of a brigadier general of the Army despite the statutory prohibition of the payment of salaries from two offices of the United States to one person, the ground of decision being that "The Corporation is an entity distinct from the United States and from any of its departments and boards".

A difference of opinion exists as to whether such governmental corporations should be held to share the sovereign's immunity from garnishment and attachment process. The Pennsylvania Supreme Court has held⁹⁷ that this immunity is not shared; the Court of Appeals of the District of Columbia that it is.⁹⁸ The Pennsylvania Court placed some reliance upon the Supreme Court's decision in *Bank of United States v. Planters' Bank of Georgia*,⁹⁹ as supporting the supposed rule that purchase of stock in a corporation by a government does not raise the corporation to governmental status. This ground for the decision, however, overlooks the important distinction between a government's purchasing some stock in a corporation, without more, and purchase of all the stock, or a controlling interest therein, and the utilization of such corporation exclusively to carry out delegated governmental purposes and functions. It may be conceded that the purchase of some, or even a controlling interest in, the stock may leave the corporation a strictly private one, but its utilization as a government agency should not be overlooked because the agency happens to be a corporate body. It is perhaps a feeling that the sovereign has descended to proprietary functions in purchasing stock in a corporation and controlling its activities that has produced some of the decisions noted.¹⁰⁰

If we draw together some of the threads of the foregoing discussion, we may note that, on the side of extending to corporations owned and controlled by the United States and employed as agencies for effectuating

97. *Haines v. Lone Star Shipbuilding Co.*, 268 Pa. 92, 110 Atl. 788 (1920).

98. *McCarthy v. Merchant Fleet Corp.* 53 F. (2d) 923 (App. D. C. 1931). [The name of U. S. Shipping Board Emergency Fleet Corp. was changed to U. S. Shipping Board Merchant Fleet Corp. in the Act of Feb. 11, 1927, 44 STAT. 1083 (1927), 46 U. S. C. A. § 810 A (1934)]. Cf. *Foley v. Shriver*, 81 Va. 568, 575 (1886). The recent decision in *Federal Land Bank of St. Louis v. Priddy*, U. S. Sup. Ct. April 20, 1935, held Federal Land Banks, which are, however, not wholly government-owned, subject to attachment process for their *own* debts.

99. 9 Wheat. 904 (U. S. 1824). Other courts have done likewise without observing the distinction noted in the text; see e. g., *Salaas v. United States*, 234 Fed. 842 (C. C. A. 2d, 1916); cf. 25 Op. Atty. Gen. 465 (1905).

100. It should also be noted that the decision in the *Bank of Georgia case* was that a corporation in which the State of Georgia owned some stock was subject to suit. Being suable for its own debts or claims need not involve being subject to garnishment on the claim of another against a third party. The Supreme Court has held Federal Corporations suable (*supra* note 76); but has otherwise recognized their special status as governmental agencies.

federal purposes, the powers, privileges and immunities enjoyed by the United States, it has been held: that the real and personal property of such corporations is exempt from taxation by states and their governmental subdivisions;¹⁰¹ that they need not qualify as foreign corporations before engaging in purely intrastate activity in states other than that of their incorporation,¹⁰² although they must pay to the state of incorporation the fee charged for grant of the corporate franchise,¹⁰³ that they are entitled to priority in transmission and to the special rates for telegraph service provided for on behalf of the United States in the Post Roads Act;¹⁰⁴ that the United States are sufficiently the "real party in interest", or, as the case may be, the principal on whose behalf the agent has been acting, to be a proper party to join as plaintiff with the corporation, and thus to confer jurisdiction upon the District Court as of a suit to which the United States are a party,¹⁰⁵ and even to sue at law as sole party plaintiff on a contract of the corporation;¹⁰⁶ that when the United States so sue on a contract of the corporation, the general rule that state statutes of limitation do not run against the United States is applicable;¹⁰⁷ that the United States may plead in counterclaim an obligation owed by the plaintiff to one of such corporations;¹⁰⁸ that a fraud upon such corporation is a fraud upon the United States, within Section 37 of the Criminal Code;¹⁰⁹ that regulations prohibiting an officer of the United States from charging fees for transporting property of the United States prevent his charging a fee for rendering this service to such a corporation;¹¹⁰ that because employees of the United States are not entitled to compensation for damaged property under existing legislation, although citizens, generally, are the claims of employees of such a corporation must be disallowed;¹¹¹ and that employees of such corporations are entitled to compensation under a statute conferring such rights upon employees of the United States.¹¹² On the side of giving recognition to the independent entities of such corporations and to differentiating their status from that of administrative boards and departments of the United States generally, they have been held to be free of the following statutory provisions binding upon the regular boards and departments: that requiring accounts to be audited and settled in the General Accounting Office,¹¹³ that prohibiting officers of the United States who are also officers of private companies to act for the United

101. Notes 64, 66 *supra*. No attempt is made in this summary to indicate the varying weight to be ascribed to these decisions from consideration of the importance of the source.

102. Note 75 *supra*. 103. Note 75 *supra*.

104. Note 79 *supra*. 105. Note 82 *supra*.

106. Note 83 *supra*. 107. Note 87 *supra*.

108. Note 88 *supra*. 109. Note 91 *supra*.

110. Note 94 *supra*. 111. Note 96 *supra*.

112. Note 96 *supra*. 113. Note 46 *supra*.

States in transactions with such companies,¹¹⁴ that prohibiting payment to one person of salaries from two offices of the United States,¹¹⁵ that prohibiting the employment of private detective agencies,¹¹⁶ and that providing for an 8-hour work-day for employees;¹¹⁷ while they have been held to be subject to the following burdens from which the regular boards and departments are free: they are subject to suit for claims against them,¹¹⁸ they are not entitled to priority for claims filed in bankruptcy proceedings,¹¹⁹ they can be estopped through the conduct of their officers,¹²⁰ and the courts are divided as to whether they are subject to garnishment and attachment process to reach property in their possession belonging to another and sought by a third.¹²¹

It is apparent that the courts have been engaged in a gradual process of inclusion and exclusion to determine what the limits of special consideration for such corporations shall be. The basic reason for the use of such corporations has been often recognized;¹²² it is to make available an arm of the government that can move with speed and freedom, that can carry on the novel types of government activity which are being increasingly forced upon the national government by developments within the economic order, under procedures adapted to the programs to be carried out. From this fact we may reasonably conclude that the Congress intended that these agencies shall be free of the general run of restrictive procedural requirements and prohibitions, but that, except so far as is necessary to advance this aim, the agencies shall be entitled to claim the rights, privileges, immunities and perquisites which the United States enjoy. It is not pretended, however, that this formula, if it is that, will enable confident decision of specific cases. Experience with such agencies now dates back over more than two decades. The discussion suggests that it may soon be possible for Congress in a special act to prescribe an appropriate set of rights, powers, privileges and immunities for such agencies, the employment of which is now on the increase and shows signs of good capacity for growth. Experience with the many New Deal corporate agencies should help to spell out the appropriate provisions.

We can the more clearly see now, by reference to the above stated four objectives¹²³ which the administrative officers of the Division of Subsistence Homesteads hoped to achieve in their choice of an administrative vehicle for effectuating the purposes of section 208, that the vehicle of the parent and subsidiary corporations was, on the whole, likely to further those objectives; but we can also see that when the Executive Order of January 3, 1934,¹²⁴ required the accounts of cor-

114. Note 90 *supra*. 115. Note 96 *supra*.

116. Note 96 *supra*. 117. Note 96 *supra*.

118. Note 76 *supra*. 119. Notes 76, 77 *supra*.

120. Note 86 *supra*, and text. 121. Notes 97, 98 *supra*.

122. Some of the cases and other materials have been collected in note 48 *supra*.

123. *Supra* note 25 and succeeding text. 124. *Supra* note 58.

porations organized since March 4, 1933 to be rendered to the General Accounting Office, one of the principal advantages of incorporation was gone,¹²⁵ and some of the disadvantages would begin to loom large. Indeed, within three months of the issuance of this executive order it became clear that the very existence of the subsidiary corporations might prove an obstacle to efficient operation under the new procedures; attempts to superimpose the governmental regulations upon the corporate forms of procedure, to which the local personnel had become accustomed and which had left them free to follow business practice in many matters of detail, led to no little confusion. There had come, too, a growing feeling that some of the economies possible in pooled centralized purchases and centralized administration might overbalance the advantages of local responsibility and decentralization. In April, 1934, the Secretary of the Interior decided to discontinue operation of the projects through subsidiary corporations, and to substitute direct operation of each project by the personnel of the Department. The subsidiary corporations are, therefore, no longer functioning. The parent corporation still serves, however, as an operating arm of the Division. Title to land is acquired in its name and it serves as a contracting agency; but it does not operate independently of the Division, appoints no personnel independently of the Department and is subject in all respects to governmental procedures. To retain so far as possible local interest in, and cooperation with the projects so that the new communities may take root in favorable soil and air, care is taken to select for each project a "Board of Sponsors and Advisers" which takes the place in large measure of the former board of directors. That there is not the former local responsibility, nor the same local power over appropriated moneys, is undeniable. These new boards consult with the Federal project manager charged with responsibility for the particular project.¹²⁶

125. Accountability to the General Accounting Office, in practice, means that all the detailed requirements and prohibitions governing purchases, sales, leases, personnel selection and compensation, the making of contracts and the regular routine of business procedures, as embodied in statutes and regulations and generally applicable to administrative departments, must be observed.

126. The Division and Corporation are no longer the exclusive agencies established to administer Section 208 of the Recovery Act. It was discovered shortly after projects were approved to establish subsistence homesteads for Indians and in the Virgin Islands that these two types of projects presented so many problems unique to the people to be assisted that separate administration under personnel familiar with the special problems was desirable. The Secretary of the Interior issued a Departmental Order, Sept. 26, 1934, creating the Indian Subsistence Homesteads Authority, appointing the present Commissioner of Indian Affairs to that position, and making \$400,000 available for projects for Indians. On November 26, 1934, a similar order created The Virgin Islands Homestead Authority, designated the Governor of the Virgin Islands to that position, and made \$242,000 available for projects in the Virgin Islands. On the question whether loans for homesteads in the Virgin Islands may be made under Section 208, see Op. of Atty. Gen. to Sec'y. of Int., Mar. 19, 1934, and Op. of Dept. Solicitor, Mar. 3, 1934.

III

"JURISDICTION" OVER HOMESTEAD COMMUNITIES

Whether the United States or the several states will exercise general civil and criminal jurisdiction over subsistence homestead communities established under Section 208 presents an important problem, and one not academic to the residents involved. If the United States acquire exclusive jurisdiction over such lands, residents of the communities are nonresidents of the states in which the lands are located, are not entitled to the benefits, and are not subject to the obligations of citizenship in the respective states.¹²⁷ In such event, the homesteaders will be "wards" of the Federal government, living on islands within the states and effectively marked off from their neighbors. Perhaps no other single circumstance could as seriously hamper the desire to aid the development of indigenous communities. It has been held that residents on lands over which the United States exercise exclusive jurisdiction are not entitled to the benefits either of the local public schools,¹²⁸ or of the state poor laws;¹²⁹ and may not sue for divorce in the local courts.¹³⁰ While their right to vote in local elections will be dependent upon the wording of state laws, they will generally be held not entitled to such vote.¹³¹ The obligation of the state and its governmental subdivisions to supply roads, streets, police and fire protection, and similar public facilities will not apply to such lands. In turn, such residents are not subject to state tax laws¹³² and may not be required to work on county roads under state laws.¹³³ On acquisition of exclusive jurisdiction by the United States, the state criminal laws cease to operate over such territory.¹³⁴

Since the writing of this article was completed the President, by Exec. Ord. No. 7041, on May 15, 1935, transferred from the Sec'y. of the Int. to the Resettlement Administration (cf. *supra* note 22) properties acquired in carrying out the provisions of Section 208, and authorized the Administrator of the Resettlement Administration to administer the activities authorized under that Section.

127. See Comments (1928) 37 YALE L. J. 796; (1926) 40 HARV. L. REV. 130; *infra*, note 128 et. seq.

128. Opinion of the Justices, 42 Mass. 580 (1841); Cf. Fort Leavenworth Railroad Company v. Lowe, 114 U. S. 525, 536 (1885); (1912) Dig. Op. Judge Advocate Gen. 938.

129. Opinion of the Justices, 42 Mass. 580 (1841).

130. Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926).

131. Opinion of the Justices, 42 Mass. 580 (1841); Sinks v. Reese, 19 Ohio St. 306 (1869); State v. Willett, 117 Tenn. 334, 97 S. W. 299 (1906); cf. Cashman v. Board of Comm. of Grand County, 153 Ind. 302, 54 N. E. 809 (1899); Fort Leavenworth Rr. Co. v. Lowe, 114 U. S. 525 (1885); 6 Op. Atty. Gen. 577 (1854).

132. Surplus Trading Co. v. Cook, 281 U. S. 647 (1930); Opinion of the Justices, 42 Mass. 580 (1841); 6 Op. Atty. Gen. 577 (1854).

133. Pundt v. Pendleton, 167 Fed. 997 (N. D. Ga. 1909).

134. In re Ladd, 74 Fed. 31 (C. C. D. Neb. 1896); People v. Hillman, 246 N. Y. 467, 159 N. E. 400 (1927); Maine v. Kelly, 76 Me. 331 (1884); Fort Leavenworth Rr. Co. v. Lowe, 114 U. S. 525 (1885). The Federal Courts have jurisdiction to punish crimes there committed. Benson v. United States, 146 U. S. 325 (1892); United States v. Holt, 218 U. S. 245 (1910).

General civil laws of the former government remain in effect except in so far as inconsistent with laws of the new,¹³⁵ but laws later adopted by the former government, even if by way of amendment to the former laws,¹³⁶ have no effect in the territory.

Congress has only partially attempted to meet the difficulties raised on acquisition of exclusive jurisdiction by the United States. An assimilation crime statute has been in force since 1825,¹³⁷ under which an act or omission not made penal by any law of Congress but which is such under the laws of the state in which the territory is situated at the time of adoption by Congress of its assimilation act, is made punishable in the Federal courts, with imposition of the same penalty the state courts would impose for a like act. The present form of this act, to avoid the charge of unconstitutionality on the ground of delegation of legislative power,¹³⁸ expressly provides that repeal or modification of such a state statute shall not affect its applicability for this purpose. It is thus necessary that the assimilation statute be periodically reenacted, to keep the applicable criminal law up to date. Since Congress has not adopted a statute for private rights parallel to the assimilation crime statute, private rights in such territory, under the rule of the *McGlinn* case,¹³⁹ will be determined by the local laws applicable at the time of Federal acquisition of jurisdiction, and no local legislature has power to keep such laws adapted to changing needs. Perhaps more important yet, even such a statute will not relieve residents of the specific disabilities mentioned above: they will still not be entitled to access to the public schools, or to vote in local elections, or to sue for divorce in local courts, or to the supply of roads, streets, police and fire protection.¹⁴⁰

We must see, therefore, whether the United States will necessarily acquire exclusive jurisdiction over lands purchased for subsistence homesteads, and thus bring about the consequences described. Article I, section 8, clause 17 of the Constitution of the United States authorizes the Congress to exercise "exclusive legislation"¹⁴¹ "over all places pur-

135. *Chicago, Rock Island and Pacific Ry. Co. v. McGlinn*, 114 U. S. 542 (1835); *Williams v. Arlington Hotel Co.* 22 F. (2d) 669 (C. C. A. 8th, 1927); *Steele v. Halligan*, 229 Fed. 1011 (W. D. Wash. 1916).

136. *Williams v. Arlington Hotel Co.*, 22 F. (2d) 669 (C. C. A. 8th, 1927) (holding that the liability of innkeepers as insurers for loss of property by guests continued in such territory despite the provisions of a state statute, adopted ten years after cession of jurisdiction over the territory to the United States, changing the earlier law and limiting liability to cases of loss due to wrongful intention or negligence).

137. See 4 STAT. 115 (1825), 18 U. S. C. A. § 468 (1926).

138. Cf. *Franklin v. United States*, 216 U. S. 559 (1910).

139. 114 U. S. 542 (1885).

140. See *supra* notes 128-133.

141. This phrase has been held to be equivalent in meaning to "exclusive jurisdiction". *Surplus Trading Co. v. Cook*, 281 U. S. 647 (1930) (and cases therein cited); see also *United States v. Wurtzbarger*, 276 Fed. 753 (D. Ore. 1921).

chased 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". This provision was considered in the leading case of *Fort Leavenworth Railroad Co. v. Lowe*.¹⁴² The general rule as outlined in this and later decisions may be thus summarized: the United States may acquire exclusive jurisdiction over lands in any of three ways: by reserving such jurisdiction over designated areas at the time of admission of a State into the Union;¹⁴³ by purchase, with the consent of the State, for purposes included within the constitutional enumeration;¹⁴⁴ or, from passage of a State Act expressly ceding such jurisdiction.¹⁴⁵

A strict construction of the constitutional provision would have yielded a much narrower rule. Thus, the maxim *expressio unius* might have been applied to the interpretation of this provision in either of two ways: it might, first, have been held that since Congress is expressly given power to acquire exclusive jurisdiction over lands in one way—by purchase with consent of the State—all other methods are unavailable, so that the United States lack power to accept and exercise such jurisdic-

142. 114 U. S. 525 (1885).

143. *Ibid.*; *Surplus Trading Co. v. Cook*, 281 U. S. 647 (1930). We shall not here be further concerned with this manner of acquiring exclusive jurisdiction.

144. *United States v. Wurtzbarger*, 276 Fed. 753 (D. Ore. 1921); *United States v. Tucker*, 122 Fed. 518 (W. D. Ky. 1903); *Kelly v. United States*, 27 Fed. 616 (C. C. D. Me. 1885); *Opinion of the Justices*, 42 Mass. 580 (1841); 6 Op. Atty. Gen. 577 (1854); and see cases cited in note 143, *supra*. It is important to note that mere purchase by the United States, coupled with an expression of State consent, will operate to transfer jurisdiction; no formal acceptance of jurisdiction by the United States is required. *U. S. v. Wurtzbarger* and *United States v. Tucker*, *supra*. For an instance where jurisdiction was, however, expressly accepted, see *Williams v. Arlington Hotel Co.*, 22 F. (2d) 669 (C. C. A. 8th, 1927). Where a State consents to purchase by the United States, it may reserve the right to serve civil and criminal process within the territory, but may impose no other conditions, this single exception being intended to avoid making such lands an asylum for fugitives from justice. See *Fort Leavenworth v. Lowe*, 114 U. S. 525 (1885). Where, however, jurisdiction is ceded, the State may impose any condition that will not interfere with the Federal uses of the property. *Palmer v. Barrett*, 162 U. S. 399 (1896); *Chicago, Rock Island & Pacific Ry. Co. v. McGlenn*, 114 U. S. 542 (1885); *United States v. Unzeuta*, 281 U. S. 138 (1930); *Surplus Trading Co. v. Cook*, 281 U. S. 647 (1930). But once jurisdiction has been ceded, a state may not thereafter impose new conditions or restraints: *In re Ladd*, 74 Fed. 31 (C. C. D. Neb. 1896).

145. *United States v. Unzeuta*, 281 U. S. 138 (1930); *Williams v. Arlington Hotel Co.*, 22 F. (2d) 669 (C. C. A. 8th, 1927); *People v. Hillman*, 246 N. Y. 467, 159 N. E. 400 (1927); and see cases in two preceding notes. Where jurisdiction is ceded over the entire tract, the courts will not look to the uses to which particular parts may be put, but will recognize federal jurisdiction over the whole. *Benson v. United States*, 146 U. S. 325 (1892); *Williams v. Arlington Hotel Co.*, *supra*. Where, however, the act of cession provides that jurisdiction is ceded for only so long as the lands are used for stated purposes, the courts will examine into the facts of use and give effect to this provision: *Palmer v. Barrett*, 162 U. S. 399 (1896). Congress may expressly re-cede jurisdiction to the state. *Cashman v. Board of Commissioners*, 153 Ind. 302, 54 N. E. 809 (1899).

tion where a State seeks to cede jurisdiction independently of a purchase by the United States. This possible interpretation was, however, rejected in *Leavenworth v. Lowe*.¹⁴⁶ In that case, although the United States had acquired jurisdiction over the military reservation in question by mere voluntary and unsolicited cession of the State, rather than by "purchase with consent of the State", nevertheless, the court held that the United States had acquired and had power to exercise exclusive jurisdiction over the reservation. It might, secondly, have been held that the power to acquire and exercise exclusive jurisdiction, however unlimited as to manner of acquisition, is limited to places used for the purposes specified in the constitutional provision. These purposes are stated to be "Forts, Magazines, arsenals, dock-yards and other needful Buildings." However, the broad construction which has been given to the phrase "other needful Buildings"¹⁴⁷ has to some extent confused discussion of this point. Thus, it is not always possible to determine whether a State Legislature in granting consent to purchase by the United States, or in ceding jurisdiction over particular places to them, was proceeding on the assumption that such places are included within "other needful Buildings", or on the belief that jurisdiction may be transferred to the United States over any place whatsoever, for any purposes of the United States.

A number of States have adopted general statutes of cession, ceding jurisdiction to the United States over all places within their borders purchased for any purpose of the United States.¹⁴⁸ This practice finds

146. 114 U. S. 525, 542 (1885); see, also *Chicago, Rock Island & Pacific Rr. v. McGinn*; *United States v. Unzeuta*; *United States v. Tucker*; *Williams v. Arlington Hotel Co.*; *Kelly v. United States*, all *supra* note 144; *Benson v. United States*, 146 U. S. 325 (1892).

147. The following have been held to be included: an army mobilization camp [*Surplus Trading Co. v. Cook*, 281 U. S. 647 (1930)]; a military "park" and post [*Pundt v. Pendleton*, 167 Fed. 997 (N. D. Ga. 1909)]; locks and dams [*United States v. Tucker*, 122 Fed. 518 (W. D. Ky. 1903)], in which the court said: "The cases seem to leave no doubt that the broadest construction has been wisely put upon that language—one which makes it cover all structures and all places necessary for carrying on the business of the national government.]; a home for disabled soldiers [*People v. Mouse*, 203 Cal. 732, 265 Pac. 944 (1928)]; and Sinks v. Reese, 19 Ohio St. 306 (1869)]; piers [*United States v. City of Hoboken*, 29 F. (2d) 932 (D. N. J. 1928)]; postoffices and court buildings [*Battle v. United States*, 209 U. S. 36 (1908)]; State ex rel. *Jones v. Mack*, 23 Nev. 359, 47 Pac. 763 (1897)]; even an Indian school [*United States v. Wurtzbarger*, 276 Fed. 753 (D. Ore. 1921)]. In practice, jurisdiction has been ceded in various state statutes of cession and consent over forests, parks, wild-life refuges, military cemeteries, hospitals, canals, aqueducts, Indian reservations, irrigation and drainage projects, river improvements, and in one state for "factories of any kind or character". W. VA. CODE ANN. (Michie, 1932) c. 1, art. 1, § 3.

148. Nearly every state has adopted some form of "consent" Act. A few states have limited themselves to the constitutional enumeration in such acts. Cf. 1 CAL. POL. CODE (Deering, 1931) § 34; N. D. COMP. LAWS ANN. (1913) § 3; VT. PUB. LAWS (1934) § 52. Even these states have adopted additional acts ceding jurisdiction over special places. Perhaps half the states have consented to purchase for stated purposes in addition to those

some support in the language of the court in *Leavenworth v. Lowe*. That decision has been taken as indicating an opinion that a State may cede jurisdiction to the United States over lands used for any federal purpose.¹⁴⁹ It would seem from the discussion thus far, therefore, that if a community of homesteads be deemed to be included within the scope of "other needful Buildings", the United States will necessarily acquire exclusive jurisdiction over such lands, in almost every State—that is, in every State which has consented to purchase of lands by the United States for the purposes enumerated in the Constitution.¹⁵⁰ Further, even if such a community be deemed not included within the phrase,

enumerated in the Federal Constitution, but have stopped short of consenting to purchase for general unlimited purposes. Cf. ALA. CODE ANN. (Michie, 1928) § 3147; DEL. REV. CODE (1915) §§ 3-5; GA. CODE ANN. (Harrison, 1933) § 15-301; R. I. LAWS 1926, c. 805. Almost half the states (apparently a total of 23) have adopted general consent acts covering "any other purposes" or "the public purposes" of the United States. Cf. COLO. COMP. STAT. (1921) § 493; 2 CONN. GEN. STAT. (1930) § 5064; ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 143, §§ 23, 29; IOWA CODE (1931) § 4; 1 LA. GEN. STAT. (Dart, 1932) tit. 20, § 2897; 2 MISS. CODE ANN. (1930) § 6059; 2 OKLA. STAT. ANN. (1931) § 153. Whether the courts will, by application of the rule of *ejusdem generis* or otherwise, limit the phrase "any other purposes of the United States" to a scope narrower than an inclusive catch-all cannot be determined on the presently available case material. *Colorado v. Toll*, 268 U. S. 228, 231 (1925); *Robbins v. United States*, 284 Fed. 39 (C. C. A. 8th, 1922); cf. *Six Cos. Inc. v. De Vinney*, 2 F. Supp. 693, 698 (D. Nev. 1933). See note 147 *supra*, on construction of the similar phrase, "other needful buildings." In addition to these "consent" acts, nearly every state has adopted one or more special "cession" acts ceding jurisdiction over all places to be acquired by the United States for forests, parks, wild-life reservations, public buildings and the like. Expression of State consent to Federal purchase for one of the constitutionally enumerated purposes is sufficient to effect a transfer of jurisdiction, without words of cession. *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis. 1895). But it is customary for State statutes both to announce consent and cede jurisdiction.

149. See particularly *Williams v. Arlington Hotel Co.*, 22 F. (2d) 669 (C. C. A. 8th, 1927). The court's statement in the *Lowe case* is ambiguous, but, in its decision in the *McGlinn case*, 114 U. S. 542 (1885), delivered on the same day by the same Justice, was interpreted broadly, thus: "We also held that it is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the General Government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally * * *". This interpretation was approved in *Benson v. U. S.*, 146 U. S. 325, 331 (1892). On the other hand, in an early dictum, *New Orleans v. United States*, 10 Pet. 662, 737 (1836) the court had said: "Special provision is made in the constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States where it can exercise a general jurisdiction." Cf. *In re Kelly*, 71 Fed. 542, 549-550 (C. C. E. D. Wis. 1895); *In re O'Connor*, 37 Wis. 379 (1875). The writer of an annotation in (1929) 74 L. ed. 761, 767, concludes that while it was "formerly supposed" that jurisdiction could be transferred to the United States only for purposes included in the constitutional enumeration, "The now well settled rule is that jurisdiction may be transferred by cession for any 'governmental purpose' of the United States". It is true that this seems to be the theory on which state legislatures are proceeding (see *supra* note 147 and 148) but direct case adjudication is conspicuously lacking.

150. See *supra* note 148.

exclusive jurisdiction will still be acquired in about half the States, that is, in States which have adopted general cession acts covering purchases for any purpose of the United States.¹⁵¹

It is submitted that this is not, however, a conclusion to which we are necessarily driven. The Supreme Court held in *Leavenworth v. Lowe* that "in the absence of any dissent" on the part of the United States, acceptance on their part of a cession of jurisdiction by a State will be presumed, on the ground that such cession "conferred a benefit".¹⁵² If this presumption may be deemed to be rebuttable rather than conclusive,¹⁵³ then, wherever it can be shown that a transfer of jurisdiction would not confer a benefit upon the United States, the United States should not acquire jurisdiction merely upon purchasing lands in a State which has ceded jurisdiction to the United States over all places to be acquired for federal purposes. The facts of the instant case would seem to be adequate to rebut such a presumption, since no benefit can flow to the United States from exercise of exclusive jurisdiction over these communities, and on the contrary, the purposes of the program become thwarted by such transfer of jurisdiction.¹⁵⁴

Although the foregoing argument may serve to exclude subsistence homestead communities from the operation of the general cession acts ceding jurisdiction over places acquired for any purpose of the United States, there will remain the question whether such places are included within the scope of the phrase "other needful Buildings". For, if they are, it might be argued that the United States would under the constitutional provision necessarily acquire jurisdiction over them in cases where state statutes consent to purchase by the United States for the purposes enumerated in the Constitution. We have seen¹⁵⁵ that the comprehensive scope given the phrase "other needful Buildings" makes the application to it of the rule of *ejusdem generis* almost meaningless. If the phrase covers piers, locks, dams, parks, post-offices, court buildings, Indian schools and soldiers' homes, why not a homestead community? If the rule is as stated in the quotation from *United States v. Tucker*,¹⁵⁶ no place purchased by the United States is excluded from

151. *Ibid.*

152. 114 U. S. 525, 528 (1885); accord: *Benson v. United States*, 146 U. S. 325 (1892); *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928).

153. Cf. *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis. 1895), and see *infra* note 158.

154. See Part I *supra*. It is important to note that title to subsistence homestead properties is held only as a security device while purchasers are making payments under sale contracts. All such titles are acquired for purposes of resale. Cf. *Six Cos., Inc. v. De Vinney*, 2 F. Supp. 693, 698 (D. Nev. 1933).

155. See *supra* note 147.

156. See *supra* note 147. It has been suggested that the rule may exclude places not acquired pursuant to one of the expressly delegated powers, but under the general spending power derived from Art. I, § 8, Cl. 1 of the Constitution.

the scope of the provision. However, the provision in Article I, section 8, clause 17 of the Federal Constitution is a grant of power and no more. Therefore, despite the rule, indicated above,¹⁵⁷ that the United States will acquire jurisdiction over places within the constitutional enumeration simply upon purchase with State consent, and that no act of acceptance by the United States is necessary, State acts consenting to purchase by the United States for the purposes enumerated in the Constitution should be deemed qualified by a rebuttable presumption even as are the general acts ceding jurisdiction over all places acquired for any of the purposes of the United States. On this line of reasoning, exclusive jurisdiction will be acquired by the United States, (both under those State statutes which grant consent to Federal purchase for the purposes enumerated in the Constitution, and under those which cede jurisdiction over places acquired for any purpose whatever) only over such places as, from the use to which they are to be put it can be seen that the purposes of the acquisition will be advanced, or at least not hindered by exercise of exclusive federal jurisdiction.¹⁵⁸ This analysis, and the conclusion stated, are derived from the decided cases, but it must be admitted that in no one case has the rule been thus formulated.

It is open to the Congress, by statutory enactment, to set at rest the group of problems here discussed. The United States may acquire property, by purchase¹⁵⁹ or by condemnation,¹⁶⁰ within any State without

157. *Supra* note 144.

158. Cf. *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis. 1895), and *In re O'Connor*, 37 Wis. 379 (1875) on whether the presumption is rebuttable. Whether the situation is one in which it will be disadvantageous to the purposes of the acquisition for the Federal Government to exercise exclusive jurisdiction, should be finally determinable when the land is first acquired, and the presumption deemed definitely rebutted, at least until the use to which the property is put be completely changed. See Opinions of Atty. Gen. to Sec'y. of Int. of Oct. 4, 1933, July 18, 1934 and Aug. 23, 1934, and Opinion of Solicitor of Int. Dept., June 15, 1934, concluding that the States would continue to exercise jurisdiction over lands on which these communities were established.

Will the fact that title to the property is taken in the name of a government-owned corporation rather than in the name of the United States place such acquisitions outside the scope of State Acts of cession and consent? The question is especially pertinent where the Act of Cession provides that "the United States shall have jurisdiction over any tract of land within the commonwealth *acquired by it in fee * * **": 1 MASS. ANN. LAWS (Lawyer's Co-op., 1933) c 1, § 7 (ital. supplied). Cf. 4 N. J. COMP. STAT. (1910) 5393, § 122; N. H. PUB. LAWS (1926) tit. 1, c. 1, § 1; WIS. STAT. (1931) c. 1, § 1.02. In the few available decisions on this question the courts have divided. See, holding that the United States will acquire exclusive jurisdiction although title be taken in the name of a government-owned corporation: *People v. Mouse*, 203 Cal. 782, 265 Pac. 944 (1928); *Sinks v. Reese*, 19 Ohio St. 306 (1869); *Foley v. Shriver*, 81 Va. 568 (1886). *Contra*: *In re O'Connor*, 37 Wis. 379 (1875); cf. *Clarke v. Milwaukee Co.*, 53 Wis. 65, 9 N. W. 782 (1881), and *In re Kelly*, 71 Fed. 545 C. C. E. D. Wis., (1895); Annotation in (1929) 74 L. ed. 761, 764.

159. *Leavenworth v. Lowe*, 114 U. S. 525 (1885); *Palmer v. Barrett*, 162 U. S. 399 (1896); cf. 14 Op. Atty. Gen. 557 (1875).

160. *Kohl v. United States*, 91 U. S. 367 (1876).

securing the consent of the State and without waiting for a cession of jurisdiction. Where lands are acquired without such consent or cession, the possession of the United States "is simply that of an ordinary proprietor" with the important difference that so far as such properties are used to effectuate purposes of the Federal Government, they are "free from such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed", because "Such is the law with reference to all instrumentalities created by the general government."¹⁶¹ It has therefore been often urged¹⁶² that, since the States may not interfere with the Federal use of such properties, acquisition of exclusive jurisdiction by the United States is never a necessity or even an important convenience, and that in many instances it can serve merely to raise difficult situations for residents on federally owned lands. Thus, Congress has found it necessary in the case of the national forests, and some migratory bird conservation areas, to provide for a reextension of state, civil and criminal jurisdiction.¹⁶³ It is now open to the Congress to enact a similar provision covering all places or properties owned by the United States, other than the District of Columbia and the Territories. This is a more effective solution than adoption of assimilation crime statutes.¹⁶⁴

IV

SOME PROBLEMS IN ESTABLISHING AND ADMINISTERING HOMESTEAD COMMUNITIES UNDER SECTION 208

In this final section we may note some special problems and difficulties which have arisen in part out of the absence of explicit provision in Section 208, and in part out of the fact that this program is essentially a novel one for governmental administration. There is little in the legislative history of the Recovery Act to throw light on the meaning

161. *Leavenworth v. Lowe*, 114 U. S. 525 (1885). Accord: *Ohio v. Thomas*, 173 U. S. 276 (1899); *Surplus Trading Co. v. Cook*, 281 U. S. 647 (1930). See *Pundt v. Pendleton*, 167 Fed. 997 (N. D. Ga. 1909) and *In re Kelly*, 71 Fed. 545 (C. C. E. D. Wis. 1895). As to the instant case, further support can be found in the provision in Article IV, Section 3, of the Federal Constitution that Congress shall have power to "make all needful rules and regulations respecting the territory or other property belonging to the United States." Cf. *United States v. Hunt*, 19 F. (2d) 634, 641 (D. Ariz. 1927), *aff'd*, 273 U. S. 96 (1928).

162. Cf. Lieber, *Cessions of Jurisdiction by States to the United States* (1893) 32 *Am. L. Rev.* 78.

163. See 16 U. S. C. A. § 480 (1926), derived from Act of June 4, 1897, C. 2, Sec. 1, 30 *STAT.* 36 (1897), and the Weeks Act of March 1, 1911, c. 186, § 12, 36 *STAT.* 963 (1911); Act of Feb. 18, 1929, c. 257, § 8, 45 *STAT.* 1224, 16 U. S. C. A. § 715 g (1929). It is significant that in bills recently introduced for agricultural settlement programs express provision is made to avoid transfer of exclusive jurisdiction to the United States. Cf. section 7 (a) of S. 2367 introduced by Senator Bankhead, 74th Cong., 1st Sess., March 13, 1935.

164. See *supra* note 137 and text.

of Section 208, which appears as almost an independent item under Title II.¹⁶⁵ Its provisions were not discussed in the debates or in the Committee reports. But it is apparent from the grant of power to the President in this section, to carry out its purposes "through such agencies as he may establish and under such regulations as he may make", that the program was viewed as essentially an experiment in a new field, for which the desirable lines of development could not yet be determined with any certainty.¹⁶⁶ The sum appropriated was itself an indication that no attempt was to be made actually to solve a national problem under this legislation, but rather to get under way, a larger sum to be perhaps later appropriated to build a national program upon the experience of this one.

It was early decided not to conduct a straight loan system, because of a desire not to extend aid to isolated families but rather to aid in establishing homestead communities, a decision clearly within the language of the section. It was decided, also, not to make loans even to groups desiring to establish such communities but rather directly to purchase land and build the necessary dwellings and other structures, and then to sell individual homesteads under installment contracts. Power to follow this procedure would probably be lacking if the statute empowered only the making of loans, even though the plan is in substance a "loan", with title being held only as a security device to cover the investment. The section, however, gives power "to make loans for and otherwise aid". The form of extension of aid thus outlined is closest to a mere lending system and would seem to be clearly included within the power to "otherwise aid".¹⁶⁷

Congress has provided, however, that "No land shall be purchased on account of the United States, except under a law authorizing such pur-

165. It is clear that it was intended in Section 208 to cover essentially the program outlined in the two bills introduced in the Senate before Section 208 was written into the Recovery Act (see *supra* notes 1, 2), which were much alike, and which provided for establishing an agency in the Interior Department to aid people desiring to acquire "subsistence farms"; provided for making direct loans, for preference to married applicants, for appointment of local committees to serve as advisers without compensation, for the purchase and resale of land, buildings, livestock, equipment and farm implements; that the interest rate on loans should not exceed 4½%; that loans may be made to cooperative associations and that the Secretary of the Interior should promulgate necessary regulations. The Recovery Act, as originally introduced, contained no reference to subsistence homesteads—see H. R. 5755, 73d Cong., 1st Sess. Section 208 was added in Committee after the bill had been passed by the House. Cf. H. R. REP. No. 159, SEN. REP. No. 114, H. R. 5755 as ordered printed by the Senate, with amendments numbered, on June 6, 1933, and Conf. Rep., H. R. Doc. No. 243; see 77 CONG. REC. 5350 (1933).

166. Cf. Atty. General's opinion to the Sec'y. of Int. Oct. 4, 1933, and Opinions of Solicitor of Dept. of Int., March 3, 1934 and August 15, 1934.

167. Both the Attorney General (Op. of Oct. 4, 1933) and the Department Solicitor (Op. of Sept. 8, 1933) so held.

chase".¹⁶⁸ Does Section 208 contain a sufficient authorization? The Attorney General held that such authorization may be granted by implication, and that the necessary implied authority was here conferred.¹⁶⁹

With the power to purchase lands will come the power to institute eminent domain proceedings. Although the power to condemn is not conferred in this section, Congress has provided that in every case in which an officer of the Government has been authorized to procure real estate "for the erection of a public building or for other public uses", he may resort to condemnation proceedings where necessary or "advantageous".¹⁷⁰ Granting, however, the constitutional power of Congress to authorize acquisition of real estate by eminent domain proceedings,¹⁷¹ and the sufficient grant of power to the particular officer, there remains the question whether acquisition of land under this program is for a "public purpose". The Supreme Court of California has held that purchase by the state of large acreages to be subdivided and sold to war veterans, to assist them in acquiring farms and farm homes, advances a public purpose.¹⁷² On the closely related question whether acquisition of land by states and municipalities for erection and sale of low-cost

168. U. S. REV. STAT. § 3736 (1878), 41 U. S. C. A. § 14 (1926).

169. Opinion cited in note 167, *supra*. Cf. 15 Op. Atty. Gen. 212, 213 (1877); 22 *id.* 665, 666 (1899); 28 *id.* 463 (1911); the Department Solicitor's opinion cited in note 167, and opinion of June 28, 1934. The fact that title will be held only for security purposes and will be transferred to ultimate purchasers seems insufficient to make such original purchases not purchases "on account of the United States."

170. Act of Aug. 1, 1888, c. 728, 25 STAT. 357 (1888), 40 U. S. C. A. § 257 (1926).

171. The constitutional power of the United States to condemn lands was established in *Kohl v. United States*, 91 U. S. 367 (1876). The statute cited in note 170 has served to avoid questions whether particular officers have been authorized to institute proceedings. See discussion in *Kohl v. United States*, *supra*, and cf. *Hanson Lumber Co. v. United States*, 261 U. S. 581, 587 (1923); *Old Dominion Land Co. v. United States*, 269 U. S. 55 (1925); 16 Op. Atty. Gen. 326 (1879). The constitutional power of Congress to provide for aiding the redistribution of the overbalance of population in industrial centers by aiding in the acquisition of subsistence homesteads is assumed herein; if Section 203 of the Recovery Act is unconstitutional, all the questions here discussed are moot. Under the rule of *Massachusetts v. Mellon*, 262 U. S. 447 (1923), a taxpayer as such will presumably not be heard to challenge this instance of the spending power. Where eminent domain proceedings are brought, the question of constitutionality of the program can be directly presented. The issues will be substantially similar to those involved with reference to other Federal construction projects under the Public Works program. See *Culp*, *supra* note 27, at 499-511.

172. *Veterans' Welfare Board v. Jordan*, 189 Cal. 124, 208 Pac. 284 (1922). See review of other state court decisions in this opinion. The court held, however, that a companion act under which the veteran selected his farm and the administration then purchased it and resold it to the veteran (as distinguished from a "land settlement" program under which the state acquired large acreages and subdivided them) was invalid as a loan of the credit of the state for private purposes in violation of a state constitutional provision. Aid to soldiers may be said, also, almost to stand in a special category of "public purpose."

housing is in furtherance of a public purpose, the courts are divided, with a slight majority concluding affirmatively.¹⁷³

It was decided by the administrators of the subsistence homesteads program, however, that as a matter of administrative policy, eminent domain proceedings would not be instituted to compel sale of any tract of land. More than enough good land is readily to be found for sale; and rousing opposition to the program through compulsory sales seems quite unnecessary.¹⁷⁴

The purchase of land entails a number of necessary incidental expenditures, such as payments to secure binding options, fees for preparation of abstracts of title, appraisal of lands, making soil surveys, recording fees and the like, none of which is expressly provided for in Section 208. Under the established procedure of audit and settlement of accounts of the United States, it has become necessary to provide expressly in the several appropriation acts for expenditures for such purposes. Thus, the power to pay for options has been denied where not expressly conferred.¹⁷⁵ In the case, however, of the low-cost housing program under the Recovery Act, the Comptroller General concluded that under the broad emergency powers conferred, expenditures may be made for options despite the absence of explicit authorization.¹⁷⁶ It would seem the same conclusion would be necessary for the essentially similar problem presented under the instant program. Both the Attorney General and the Department

173. Holding that construction of low-cost housing is a "public purpose": *Wilmon v. Powell*, 91 Cal. App. 1, 266 Pac. 1029 (1928); *Green v. Frazier*, 44 N. D. 395, 176 N. W. 11 (1920), *aff'd*, 253 U. S. 233 (1920); *cf. Hoskins v. City of Orlando*, 51 F. (2d) 901, (C. C. A. 5th, 1931); *Simon v. O'Toole*, 108 N. J. L. 32, 155 Atl. 449 (1931); *Chapman v. S. Dak. Rural Credits Board*, 46 S. D. 72, 190 N. W. 884, 885 (1922). *Contra*: Opinion of the Justices, 211 Mass. 624, 98 N. E. 611 (1912); *cf. Lowell v. Boston*, 111 Mass. 454 (1873); *Salisbury Land & Improvement Co. v. Massachusetts*, 215 Mass. 371, 102 N. E. 619 (1913). For discussion of "public use" in condemnation cases, see NICHOLS, *EMINENT DOMAIN* (2d ed. 1917); and *cf. Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112 (1896); *Rindge Co. v. Los Angeles*, 262 U. S. 700 (1923); *Dingley v. Boston*, 100 Mass. 544 (1868); *Robinson*, *Some Problems Confronting the Public Works Emergency Housing Corporation* (1934) 19 CORN. L. Q. 548. The major difference of opinion is on the question whether "public use" is limited to use by the Government itself in the performance of "governmental" functions, or includes uses which will advance the public welfare, though contemplating occupancy by the public or portions of the public rather than by government bureaus.

174. The related program of construction of low-cost housing under the Recovery Act finds it unavoidable, however, to institute such proceedings, and a case which may shortly determine this question for that program is now pending. The decision of District Judge Dawson (D. C. Ky. W. Dist. Jan. 4, 1935), sustaining a demurrer to the Government's petition in condemnation proceedings for a low-cost housing project, on the ground of lack of constitutional power to condemn for such purpose, is being appealed.

175. See 9 Comp. Dec. 569 (1903); 7 *id.* 62 (1900); 6 *id.* 949 (1900); 4 *id.* 687 (1898); *id.* 544 (1898); *id.* 446 (1898); 3 *id.* 221 (1896); *id.* 187 (1896); *cf.* 23 *id.* 116 (1916).

176. Decision to the Public Works Administrator of Feb. 8, 1934.

Solicitor so concluded.¹⁷⁷ So, too, while the power to pay for the preparation of abstracts of title has been recognized as a power necessarily implied in a grant of power to purchase land,¹⁷⁸ there is less willingness to admit a similar power to pay for expert appraisals, soil surveys, certifications of title and the like.¹⁷⁹ Again, however, such expenditures were deemed authorized for the low-cost housing program,¹⁸⁰ and, by parity of reasoning, may be deemed authorized under Section 208.¹⁸¹ Payment of recording fees to record the deed of conveyance has been held to be a legitimate expenditure.¹⁸²

When a tract of land large enough to serve as site for a community is acquired, the task of subdividing it into homestead plots inevitably raises the question whether roads, streets and walks, and strips of park and parkway may be laid out and improved, to be thereafter dedicated to public use and to become public ways. If a livable community is to be established at all, roads and streets, with accompanying park strips, seem essential, and certainly, at least, the roads and streets are indispensable to make the homesteads physically accessible. The very definition of subsistence homesteads implies that these will be located in rural areas. Where a new community is to be built, these facilities must be supplied, and the power to supply them may reasonably be said, therefore, to be necessarily comprehended in the powers expressly conferred.¹⁸³ Their dedication to public use, while in form a gratuity, more nearly approximates a transfer of a liability, since the expense of maintenance is assumed by the local authorities upon such dedication. If the cost of construction of such roads, etc. is distributed over the homestead properties, and assumed by the homesteaders, the Government will not sustain a loss on the investment in such construction.¹⁸⁴

The needs of the prospective homesteaders, if they are to operate true subsistence homesteads, will include a dwelling, fencing, wells, a barn, or other farm buildings such as poultry sheds, livestock, chickens,

177. Opinions of July 18, 1934 and June 15, 1934, respectively. See, also, Atty. Gen's. Op. to Public Works Administrator of Feb. 7, 1934.

178. See 23 Comp. Dec. 266 (1916); 9 id. 569 (1903); 8 id. 212 (1901); 6 id. 133 (1899).

179. Cf. Comptroller General's decision to Public Works Administrator, Feb. 8, 1934 (second opinion of same date).

180. Ibid; even though it might later be decided not to purchase some property thus appraised, or for which the title has been examined.

181. The Attorney General and Solicitor have so held. See opinions cited in note 177.

182. 18 Op. Atty. Gen. 491 (1887); cf. 17 Comp. Dec. 720 (1911); 1 Comp. Gen. 569 (1922).

183. In Opinions of Sept. 10, 1934, and Aug. 15, 1934, respectively, the Atty. Gen. and Dept. Solicitor so held.

184. In the opinions cited in note 183, such dedication was held to be empowered. The power to grant gratuities to homesteaders, or to extend subsidies to them, is discussed *infra* note 198 and text.

perhaps a pig or two, farm implements and machinery, and furnishings and equipment, including in many cases, household furniture. Can loans be made under Section 208 for these purposes, and is power given to the administrators to purchase or construct such properties for sale to homesteaders? While "homestead" has been generally defined to include a dwelling house, the land upon which it is situated, "and the appurtenances connected therewith",¹⁸⁵ the term "subsistence homestead" is not defined in Section 208 and equally undefined in the common law. The adjective "subsistence" should be sufficient, it would seem, to indicate that the "appurtenances" included in the connotation of the term "homestead" should be broadened to include livestock, farm machinery, and the like. The Attorney General advised¹⁸⁶ that in his opinion the lending power, and the power of purchase and resale, extended to the items listed.

A more difficult problem is presented when we come to community buildings and facilities which it would be strange to consider as part of the "appurtenances" of a subsistence homestead. It early became apparent that in some of the new communities it would be necessary to provide a school building (one building may well serve to house a school, church, library, social center, and first-aid clinic), general merchandise store, work-shop for manufacture of small home and farm appliances, or small dairy. The problem of making such community buildings and facilities available for the equal use of all homesteaders led to the plan to organize cooperative associations of the homesteaders, such association to include within its membership all the homesteaders in a given community together with a small number of specially qualified technical personnel. We may briefly note several other reasons for resort to such a plan. It is frequently uneconomical to break up all the land into individual homestead tracts; the topography and nature of the soil, and the location of the individual tracts frequently make it desirable, or even imperative, that a large tract of land be set aside for pasture, woodland, play ground, general farm, etc., for the equal benefit of all the homesteaders; so, too, some crops intended for the use of the homesteaders can be grown more economically on one large general farm or general orchard, in the products of which all the homesteaders may share. Further, a herd of 100 cows may be adequate to supply milk, cream, cheese and butter for 200 families, and one large poultry and dairy farm can more economically and efficiently provide for the needs of 200 families than 200 separate small farms. It was desired, also, to secure the economies of large scale purchases of food and other staples, seed, fer-

185. 29 Corpus Juris 781; cf. 13 Ruling Case Law 540; THOMPSON, HOMESTEAD AND EXEMPTION § 145.

186. Opinion cited *supra* note 183; cf. his opinion of Sept. 10, 1934, and the Dept. Solicitor's op. of June 15, 1934.

tilizer, clothing and other general small articles, to be sold to the homesteaders in a cooperative store at cost. Where it is many miles to the nearest hospital, an inexpensively equipped first-aid clinic may be essential. (A nurse or doctor may be included among the homesteaders.) To provide employment for cash income for some of the homesteaders, to manufacture small articles needed, and to enable all homesteaders to share in any profits of the sale of such articles, it seemed desirable in some cases to build a small handicraft shop or factory. Heavy farm machinery is sometimes needed for economical operation of the agricultural tracts; it is frequently uneconomical, however, for each of the homesteaders to attempt to purchase or hire such machinery. Frequently, too, the local county or township is not in financial position to build and equip a needed school building for the community, and existing school facilities may be totally inadequate to meet the increased demand. If such a building can be supplied without cost to the county, the county will frequently be willing to pay the salaries of teachers and to meet other operating expenses. As indicated above, such a building may also contain an assembly hall available for religious services, and may contain study and reading rooms, game rooms and the like. Organization of a cooperative association of the homesteaders to purchase and operate such properties, and to make their advantages available on equal terms to all the homesteaders seems the best solution at hand for these related problems.

Both the Department Solicitor and Attorney General concluded¹⁸⁷ that the proposed sales of such properties to privately organized¹⁸⁸ homesteaders' cooperatives, was within the powers conferred in Section 208.

The proposal by several groups,¹⁸⁹ however, that some projects be established as entirely cooperative, in distinction from projects in which only group properties of the types above listed are cooperatively owned, seems to be precluded by the wording of Section 208, and was not adopted. This proposal would involve sale of all the land, as well as of the group buildings, to the cooperative. Because of the "psychology" of home ownership, however, dwellings might be individually owned, with the right of removal from the land. The cooperative would lease to homesteaders tracts of land upon which the dwelling and individual farms would be located, charging therefor an annually determined "economic

187. Opinions cited *supra* note 183.

188. It is important to distinguish such cooperatives from agencies of the government organized by it to aid in administration. The cooperatives are purchasers, rather than agencies: they are groups of homesteaders, dealing at arm's length with the government, and of course to no extent subject to procedural rules governing the activities of governmental agencies.

189. Particularly by Mr. Borsodi and his group of co-sponsors of the so-called "Dayton Plan of Homesteading." Cf. *supra*, note 17. This plan is not, however, in operation on the project being established near Dayton, Ohio.

rent". This rent would be high at first, covering installments due on the purchase price, with interest, taxes, and a contribution toward administrative overhead. When the land was fully paid for by the cooperative, the rent would be but a nominal sum above taxes. It was hoped thus to avoid speculation by homesteaders on a rise in land values, as well as to preserve the character of the community by putting it beyond the power of individual tract owners to sell their property for purposes inconsistent with such character. Section 208 empowers the use of the appropriated moneys "to make loans for and otherwise aid in the purchase of subsistence homesteads". The word "purchase" was obviously used advisedly. The proposed plan would make homesteaders lessees rather than purchasers of the land on which their homesteads were situated. On the other hand, it may be argued, the homesteaders would hold in addition to a lease of the land, certificates of beneficial interest in the cooperative which does purchase the land. The homesteaders, thus, are purchasers, although in a group, rather than individual, capacity. The point is a close one, and upon it the Department Solicitor and Attorney General divided,¹⁹⁰ the Attorney General's opinion being that the plan could not be carried out under the terms of Section 208.

It was found desirable to include in the communities individuals who can render special services but who do not wish to become permanent homesteaders, such as social workers and agricultural experts. Is it possible under Section 208 to secure the residence of such people within the community by leasing homesteads to them from year to year, despite the use of the word "purchase" in Section 208 and the decisions of the accounting officers of the Government that "in the absence of specific statutory authority therefor, Government officers and heads of departments may not legally rent Government owned property"?¹⁹¹ The Department Solicitor and Attorney General concluded that under the broad power to aid purchasers in establishing themselves in subsistence homesteads, such necessary supervisory and expert personnel may be brought into the community by leasing homes to them.¹⁹²

To what extent inducements may be offered to industries to establish factories near the site of the new communities became an urgent question. Some cash income from part time industrial employment is essential in the whole scheme of subsistence homesteads.¹⁹³ It is obvious that Section 208 does not make funds available for encouraging a "decentralization of industry" into rural areas. Three indirect forms of

190. Opinions cited *supra*, note 183. Cf. Atty. General's op. of Oct. 4, 1933, and Solicitor's op. of Oct. 10, 1934.

191. Decision of Aug. 28, 1934, addressed to Postmaster General. To same effect see decision of Compt. of Treas., Oct. 11, 1920, to Sec'y. of the Treasury.

192. Opinions cited *supra*, note 183.

193. Cf. *supra* Part I, *passim*, and particularly note 13, and text accompanying note 21.

assistance for such decentralization were considered, however, as inducements which the administrators of this program might possibly be empowered to extend: sale of a site on the outskirts of a community, lease of such site, a short term loan of operating capital in consideration of an agreement to give employment to a number of homesteaders. We have seen that neither the power to sell or lease properties, generally, has been expressly conferred. We have seen, too, that even the power to acquire and resell homestead properties may be spelled out only as a step in the process of aiding purchasers to acquire a subsistence homestead. Supplying a site to a proposed factory is, however, a step directly calculated to supply sources of cash income and hence to aid in purchase. The Department Solicitor "questioned" the power to sell sites for such purposes, but advised that short term leases, carrying a right of resumption of possession on short notice, were empowered.¹⁹⁴ The Attorney General concluded that both powers could be exercised, but agreed that the leases should be subject to termination on short notice.¹⁹⁵ Both officers agreed that a loan of operating capital to a private concern in return for a promise to employ a stated number of the homesteaders is "immediately and primarily an aid to the private entrepreneur", and "cannot be justified by its remote tendency to help the homesteaders".¹⁹⁶ Loans of operating capital to homesteaders' cooperatives to enable them to operate cooperative dairies and stores, as a way of securing supplies more cheaply, and incidentally employing some of the homesteaders, were approved by both officers.¹⁹⁷ It is open, of course, to such cooperatives, to purchase a factory site or building from the Government and to lease such site to a private entrepreneur, pledging such lease rentals as additional security for payment of the purchase price. It will be apparent, however, that little or no direct inducement to industry to decentralize can be offered under Section 208.

The poverty and need of a large number of the prospective homesteaders made urgent the query whether gratuities or subsidies could be extended to them.¹⁹⁸ The form of the inquiry generally was, can community facilities be supplied and the costs written off, or, may the homestead be sold at a price lower than the cost of construction? The Attorney

194. In practice, a sharp distinction has been drawn for some time between leases of government property and issuance of "use permits," subject to the right to resume possession on short notice. Cf. 22 Op. Atty. Gen. 240 (1898); *id.* 544 (1899); 19 *id.* 628 (1890); 16 *id.* 206 (1878).

195. The opinions of both officers are those cited *supra*, note 183.

196. *Ibid.*; Cf. Atty Gen. op. of Mar. 19, 1934, concerning the Virgin Islands Company.

197. *Ibid.*

198. The official attitude of the Subsistence Homesteads Division has been that the program does not attempt to aid people on relief, but is aimed at the economic group who, with low incomes, are in danger of becoming relief clients if not assisted to a better economic adjustment.

General and Solicitor were both of the opinion¹⁹⁹ that Section 208, in providing for "loans" or other assistance, and creating a "revolving fund", clearly contemplated repayment of advances made and authorized no gratuities. Suggestion was made that a special fund might be set aside as an "experimental fund", to try out various types of community assistance, the costs of which should not be included in the sale price of the homesteads; yet, clearly such a plan is a gratuity with change of name, and equally unauthorized.²⁰⁰ There are some reasons why the cost of the homesteads may be expected to be lower than the homesteaders would otherwise have to pay for equal accommodations: the properties are to be sold at cost; such economies as are possible from large scale purchases and mass construction of housing are passed on; a substantial advantage accrues from the fact that administrative overhead, including in the present program a considerable amount of the architectural and engineering work, is written off. This latter is apparently the single allowable instance of direct subsidy.²⁰¹ Beyond these aids, the cost of the properties is to be repaid by the homesteaders. Section 208 is silent about interest on loans and advances. It is presumably, therefore, within the discretion of the administrators to fix the interest rate, or to charge no interest. In any event it seems clear that interest collected from purchasers is to be deposited as "miscellaneous receipts" in the general fund of the Treasury and does not go to the credit of the revolving fund created in Section 208.²⁰² The interest rate has been set at 3%, or the average cost of the money to the Government.²⁰³ The amortization

199. Opinions of July 18, 1934 and June 15, 1934, respectively.

200. See opinion of Department Solicitor, Oct. 10, 1934.

201. Cf. subsections (b) and (c) of Section 201 under Title II of the Recovery Act. Varying amounts of work have been performed on several projects, in land clearing, road building and home construction with labor paid by the C.W.A. and the F.E.R.A. Such contributions, while noted as part of the bookkeeping of the project, to enable statistics of costs to be accurate, are not included in the sale price of the homestead to the purchaser, and are, of course, subsidies. The Public Works Title authorizes [§ 203 (a) (2)] making grants "to States, municipalities or other public bodies" of 30% of the cost of labor and materials employed upon construction projects. It is worth noting that if such public bodies borrowed money from P.W.A. to erect schools and community facilities within subsistence homestead communities, such a grant would be available on such projects.

202. See Opinions cited *supra*, note 183; cf. 26 Comp. Dec. 295 (1919); 1 Comp. Gen. 656 (1922); 12 *id.* 553 (1933).

203. A case for charging no interest might be made out, on these grounds: 1. For most of the homesteaders only an exceedingly low annual cash income is in sight; 2. Since Section 208 permits no write-off of the capital cost, this is the sole permissible substantial subsidy; 3. Since interest will be deposited in Miscellaneous Receipts, rather than in the revolving fund, it seems preferable to resort to income and inheritance taxes to pay off the public debt, rather than to use payments collected from people relatively so destitute; 4. This is an equivalent of the 30% grant allowed to municipalities on construction projects; 5. In the case of many of the homesteaders only such a subsidy will permit construction of otherwise than a sub-standard house within the capacity of the homesteader to repay; 6. No adverse criticism should be thus aroused, since this extends to an

period, likewise not prescribed in the statute, will vary with need up to 30 years.

The wording of Section 208 makes it clear that it is "to provide for aiding the redistribution of the overbalance of population in industrial centers." By reason of this language the Department Solicitor concluded in a recent opinion²⁰⁴ that "only those homesteaders may be selected . . . who either presently reside in industrial areas or who have but recently and temporarily removed from industrial areas in the course of the present economic disturbances." It may be questioned, however, whether the Solicitor's conclusion necessarily follows from the language of Section 208. Available studies in movement of population indicate that migration to the cities from certain types of rural areas is to be expected, if the rural economy is not improved. It is submitted that the scope of Section 208 is possibly broad enough on two grounds, to include subsistence homesteads projects designed to prevent this threatened migration. First, if only by preventing an accentuation of the problem, such projects would aid in the redistribution of the overbalance of population. Second, and more important, a demonstration of how reorganization of farming systems on the subsistence homestead pattern may improve forms of rural life may be the most effective long-time aid to cutting down the rate of migration cityward.

Decision has been made, on grounds of policy and for considerations of comity, to comply with local zoning laws, building codes and regulations, in establishing homestead communities. It may be questioned, however, whether there is legal need to observe such regulations in this program, and it may prove necessary in some instances to avoid the incidence of obsolete or unreasonable requirements in building codes by refusing to comply. In the recent decision in *Arizona v. California*²⁰⁵ the Supreme Court held that the plans and specifications of the Boulder Canyon dam, reservoir and power plants need not be submitted to the state engineer for approval, on the ground that "The United States may perform its functions without conforming to the police regulations of a state". The court cited *Johnson v. Maryland*,²⁰⁶ in which it had held that a state may not require the driver of a Post-office truck to secure a state license and take an examination concerning his competence as a driver,

underprivileged group a form of aid parallel to the subsidy to industry in the tariff, to agriculture in the processing tax, and the direct subsidy to shipping and the air mail.

204. Dated Nov. 24, 1934.

205. 283 U. S. 423 (1931).

206. 254 U. S. 51 (1921). Cf. *Commonwealth v. Closson*, 229 Mass. 329, 118 N. E. 653 (1918); *Hall v. Commonwealth*, 129 Va. 738, 105 S. E. 551 (1921). In *Ex parte Willman*, 277 Fed. 819 (S. D. Ohio, 1921) it was held that a driver of a mail truck, using lights prescribed by the Postmaster General, may not be held on a conviction for not using stronger lights prescribed under state law. See also *State of Wash. v. Wiles*, 116 Wash. 387, 199 Pac. 749 (1921); 28 Op. Atty. Gen. 604 (1911).

and *Hunt v. United States*,²⁰⁷ in which it had held state game laws inapplicable to federally owned forests and game preserves. Some attempt has been made to qualify the rule of exemption to permit "reasonable" requirements to be made, or to permit state regulation so far as the subject matter of such regulation has not been expressly covered by Federal enactment or rule.²⁰⁸ It may be doubted whether these qualifications can stand, in view of the Supreme Court pronouncements that there is an "entire absence of power on the part of the states to touch the instrumentalities of the United States".²⁰⁹

It has been earlier indicated that the structure of Title II makes Section 208 appear largely unrelated to the public works and construction program to which every other section under this Title refers. The legislative history of the Recovery Act in fact reveals that the section was inserted in Title II for reasons other than a desire to make its provisions part of the Public Works program. It has since been administered independently of the Public Works Administration. Two facts have operated, however, to tie this activity to the Public Works program perhaps more than Congress may have intended. One is that the \$25,000,000 "made available" in Section 208 was not appropriated independently, but was included within the \$3,300,000,000 appropriated for effectuating Title II.²¹⁰ The other is that many of the provisions of this Title are expressed to be applicable to construction work entered upon "under this Title," and these phrases seem necessarily to embrace the later inserted Section 208. Section 206 under this title requires that "all contracts let for construction projects and all loans and grants pursuant to this title" shall contain certain labor provisions, two of which are important here: provision for a thirty-hour work week, and for the payment of "just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort". Application of the Public Works wage scales, it was felt, would bring the cost of house construction to a point beyond the capacity of the homesteaders to pay. Since these scales were administratively determined, the setting of special "Subsistence Homestead wage rates" for such construction by accepting "prevailing wages" as the standard was open under Section 206; this procedure was adopted. It proved necessary, however, to observe the 30-hour week requirement, although this likewise served to increase the costs of construction.²¹¹

207. 278 U. S. 96 (1928); cf. *Ohio v. Thomas*, 173 U. S. 276 (1899).

208. See *Closson*, *Hall* and *Willman* cases, all *supra* note 206; cf. *Ohio v. Thomas*, 173 U. S. 276 (1899).

209. *Johnson v. Maryland*, 254 U. S. 51, 55-56 (1920); cf. *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932); *Gilbert v. Minnesota*, 254 U. S. 325, 341 (1920) (dissenting opinion of Mr. Justice Brandeis).

210. Fourth Deficiency Act, fiscal year 1933, app'd. June 16, 1933.

211. See opinion of Department Solicitor, Oct. 2, 1934. The General Counsel of the

A second consequence of incorporation of this legislation in the Public Works title has been that no new construction may be entered upon, or loans made, after June 16, 1935.²¹² The Comptroller General has held that allocation of funds for definite projects, to be expended in construction by "force account" under the supervision of federal agencies, is not such an obligation of the funds as will prevent the unexpended balance from reverting to the surplus fund.²¹³ The conclusion seems necessary; but in consequence, only that part of the program which reaches the stage of contractual commitments by June 16, 1935 can be carried out under the present legislation. To extend the program beyond that date, and to make explicit the grants of power which it has been necessary to deduce from the oracular language of Section 208 by divinations of Congressional intention, a bill has been introduced into the present Congress.²¹⁴ If that bill becomes law the program will enter upon its second stage of development.

P.W.A., in opinion of May 16, 1934, concluded that because of the evidence that Section 208 was intended to serve as an independent item of legislation, the provisions of Section 206 need not be observed in homestead construction under Section 208.

212. Sec. 201 (d) under Title II of Recovery Act. The appropriation act, see *supra* note 210, makes the money available until June 30, 1935.

213. See decisions of Oct. 15, 1934 (A-57604); Oct. 19, 1934 (A-58070); and Jan. 9, 1935 (A-59268). It is true that Section 208 creates a "revolving fund," but only repayments received from homesteaders go to make up this fund. Necessarily some time must elapse before such funds are available for extensions of this program.

214. H. R. 6475, 74th Cong., 1st Sess., March 6, 1935, by Mr. Fulmer and referred to Committee on Agriculture. Cf. Section 12 of Emergency Relief Appropriation Act of 1935, app'd April 8, 1935, and decision of Comptroller General thereon, (A-61630) dated May 7, 1935, to Sec'y of the Interior.