Federal Operations Not Related to Land[1]

STATE LAWS AND REGULATIONS RELATING TO MOTOR VEHICLES: *Federally owned and operated vehicles.*—In an opinion by Justice Holmes, it was concluded by the Supreme Court that a State may not constitutionally require a Federal employee to secure a driver's permit as a prerequisite to the operation of a motor vehicle in the course of his Federal employment. *Johnson* v. *Maryland,* 254 U. S. 51 (1920). The court said (pp. 56–57):

> Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* v. *Hart,* Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* v. *Closson,* 229 Massachusetts, 329. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pur-

[1] See footnote 1, p. 249, *supra.*

suance of the laws of the United States. *In re Neagle,* 135 U. S. 1.

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim* v. *United States,* 177 U. S. 290, 293.[2]

Even earlier, but on similar principles, the Comptroller of the Treasury had disallowed payment of a fee for registration of a federally owned motor vehicle. 15 *Comp. Dec.* 231 (1908).

In *Ex parte Willman,* 277 Fed. 819 (S. D. Ohio, 1921), the driver of a mail truck, on a street which was a post road, was held not to be subject to arrest, conviction, and imprisonment because the lights on his truck, which were those prescribed by the regulations of the Post Office Department, did not conform to the requirements of a State statute. The court relied on *Johnson* v. *Maryland, supra,* and *Ohio* v. *Thomas,* 173 U. S. 276 (1899), in reaching its conclusion.

An apparently contrary conclusion was reached in *Virginia* v. *Stiff,* 144 F. Supp. 169 (W. D. Va., 1956), in which the question was presented as to whether State regulations as to the maximum weight of vehicles using the highways were applicable to a truck owned and operated by the Federal Government, and engaged on Federal business. In holding such

[2] See also *American Automobile Ins. Co., et al.* v. *Struwe,* 218 S. W. 534 (Tex., 1920).

regulations to be applicable so as to subject the Government employee truck driver to a criminal penalty, the court stated that their purpose is to protect the safety of travellers and to protect the roads from unreasonable wear; that the State of Virginia authorizes the use of highways by overweight vehicles in case of emergency; and that the Department of Defense seeks permits from the State to authorize the passage of overweight vehicles. It appears that in this case no facts were presented to indicate whether there was any federally imposed requirement upon the driver to operate the overweight truck, the defense being based merely on Federal ownership of the truck and the fact of its being engaged on Government business.

When Federal employees have failed to comply with local traffic regulations, the courts have generally applied the test of whether noncompliance was essential to the performance of their duties. Thus, in *Commonwealth* v. *Closson,* 229 Mass. 329, 118 N. E. 653 (1918), it was held that a mail carrier is subject to the rules and regulations made by the street and park commissioners requiring a traveller to drive on the right side of the road and in turning to the left into another street to pass to the right of and beyond the center of the intersecting street before turning. In *United States* v. *Hart,* 26 Fed. Cas. 193, No. 15,316 (C. C. D. Pa., 1817), it was held that an act of Congress prohibiting the stopping of the mail is not to be so construed as to prevent the arrest of the driver of a mail carriage when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants. In *Hall* v. *Commonwealth,* 129 Va. 738, 105 S. E. 551 (1921), it was held that the driver of a postal truck must comply with the State's speed laws. The court emphasized that no time schedules had been established by the Post Office Department which would require excessive speed.

That a Federal employee is not immune from arrest for noncompliance with State traffic regulations where performance of his duties did not necessitate such noncompliance

is well illustrated by the following excerpt from the opinion of the court in *Oklahoma* v. *Willingham*, 143 F. Supp. 445 (E. D. Okla., 1956), (p. 448):

> The State of Oklahoma has not only the right but the responsibility to regulate travel upon its highways. The power of the state to regulate such travel has not been surrendered to the Federal Government. An employee of the Federal Government must obey the traffic laws of the state although he may be traveling in the ordinary course of his employment. No law of the United States authorizes a rural mail carrier, while engaged in delivering mail on his route, to violate the provisions of the state law enacted for the protection of those who use the highways.
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> Guilt or innocence is not involved, but there is involved a question of whether or not the prosecution is based on an official act of the defendant. There is nothing official about how or when the defendant re-entered the lane of traffic on the highway. There is no official connection between the acts complained of and the official duties of the mail carrier. The mere fact that the defendant was on duty and delivering mail along his route does not present any federal question or defense under federal law. The efficient operation and administration of the work of the Post Office Department does not require a carrier, while delivering mail, to drive his car from a stopped position into the path of an approaching automobile. When he is charged with doing so, his defense is under state law and is not different from that of any other citizen.

Where, on the other hand, the Federal employee could not discharge his duties without violating State or local traffic regulations, it has been held that he is immune from any liability under State or local law for such noncompliance. Thus, in *Lilly* v. *West Virginia*, 29 F. 2d 61 (C. A. 4, 1928), the court

held that a Federal prohibition agent, who struck and killed a pedestrian while pursuing a suspected criminal, was excepted from limitations of speed prescribed by a city ordinance, provided that he acted in good faith and with the care that an ordinarily prudent person would have exercised under the circumstances, the degree of care being commensurate with the dangers. The court said (p. 64):

> The traffic ordinances of a city prescribing who shall have the right of way at crossings and fixing speed limits for vehicles are ordinarily binding upon officials of the federal government as upon all other citizens. Commonwealth v. Closson, 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C, 939; United States v. Hart, 26 Fed. Cas. No. 15,316, page 193; Johnson v. Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126. Such ordinances, however, are not to be construed as applying to public officials engaged in the performance of a public duty where speed and the right of way are a necessity. The ordinance of Huntington makes no exemption in favor of firemen going to a fire or peace officers pursuing criminals, but it certainly could not have been intended that pedestrians at street intersections should have the right of way over such firemen or officers, or that firemen or officers under such circumstances should be limited to a speed of 25 miles, or required to slow down at intersections so as to have their vehicles under control. Such a construction would render the ordinances void for unreasonableness in so far as they applied to firemen or officers engaged in duties, in the performance of which speed is necessary; and we think that they should be construed as not applicable to such officers, either state or federal, under such circumstances. State v. Gorham, 110 Wash. 330, 188 P. 457, 9 A. L. R. 365; Farley v. Mayor of New York City, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; Hubert v. Granzow, 131 Minn. 361, 155 N. W. 204, Ann. Cas.

1917D, 563; State v. Burton, 41 R. I. 303, 103 A. 962, L. R. A. 1918F, 559; Edberg v. Johnson, 149 Minn. 395, 184 N. W. 12.

Similarly, in *State* v. *Burton,* 41 R. I. 303, 103 Atl. 962 (1918), it was held that a member of the United States naval reserve, driving a motor vehicle along a city street in the performance of an urgent duty to deliver a dispatch under instructions from his superior officer, is not amenable to local law regulating the speed of motor vehicles. State laws, the court held, are subordinate to the exigencies of military operations by the Federal Government in time of war.

Closely allied to these cases relating to the applicability of State and local traffic regulations to Federal employees is the case of *Bennett* v. *Seattle,* 22 Wash. 2d 455, 156 P. 2d 685 (1945), in which State traffic regulations were held to have been suspended as a consequence of certain action taken by the military. Under the facts of the case, it appears that the plaintiff in a negligence action was walking on the right, instead of the left, side of the street, the latter ordinarily being required by State law. The court did not regard the State law as applicable in view of the closing of the particular street to the public by Army officers. As to the Army's action, the court said (156 P. 2d 687):

> The highway was closed to general public travel in December, 1941. Public authority acquiesced in the action taken by the army officers. The appellant does not question the right and power of the officers of the army to close the part of Sixteenth avenue from east Marginal way to the bridge to public travel and to admit into the closed area only such busses and automobiles of employees of the Boeing plant as they deemed advisable; but it contends that, notwithstanding this, such part of Sixteenth avenue did not cease to be a public highway and that the statutory rules of the road still applied.
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> The action taken in closing the highway to public use did not infringe upon, or interfere with, the exercise of any prerogative of sovereignty or any governmental function of the state or its legal subdivisions. The appellant, in maintaining its streets, acts in a proprietory capacity, and it acquired no right in a statutory rule of conduct by a pedestrian on the highway that would prevent its temporary suspension when such became necessary or convenient by an exercise of a war power of the kind we are now considering.[3]

Vehicles operated under Federal contract.—State laws which constitutionally cannot have any application to motor vehicles owned and operated by the Federal Government may, in many instances, be applicable to motor vehicles which are privately owned but which, under contract with the Federal Government, are used for many of the same purposes for which federally owned vehicles are used. A distinction must be made on the basis of ownership; the ownership may be of decisive significance.

Thus, it has been held that a State may tax vehicles which are used in operating a stage line and make constant use of the highways, notwithstanding the fact that they carry mail under a Federal contract; moreover, such tax may be measured by gross receipts, even though over one-half of the taxed income is derived from mail contracts. *Alward* v. *Johnson,* 282 U. S. 509 (1931). The Supreme Court said (p. 514):

> Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Railroad Co.* v. *Peniston,* 18 Wall. 5, 30; *Metcalf & Eddy* v. *Mitchell,*

[3] See also *King* v. *Edward Hines Lumber Co.,* 68 F. Supp. 1019 (D. Ore., 1946).

269 U. S. 514. The facts in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, and *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.

In reliance on this case, it was concluded, in *Crowder* v. *Virginia,* 197 Va. 96, 87 S. E. 2d 745 (1955), *app. dism.,* 350 U. S. 957, that a carrier is not exempt from a State's gross receipts tax even though, under a contract with the Post Office Department, it was engaged in the interstate carriage of mails, under direction from the Government as to routes, schedules and termini. A contractor engaged in transporting mail is not exempt from payment of State motor fuel taxes. *Op. A. G., Ill.,* p. 219, No. 2583 (Apr. 21, 1930). Nor is a contractor who is engaged in work for the Federal Government on a cost-plus-a-fixed-fee basis. *Id.* p. 252, No. 199 (Nov. 19, 1940). In *Baltimore & A. R. R.* v. *Lichtenberg,* 176 Md. 383, 4 A. 2d 734 (1939), *app. dism.,* 308 U. S. 525, a contractor with the Federal Government for the transportation of workmen to a Government project was held subject to State regulation as a common carrier.[4] In *Ex parte Marshall,* 75 Fla. 97, 77 So. 869 (1918), it was held that a bus company which enters into a contract with the military to transport troops between a military camp and a city, subject to terms and conditions specified in the contract, the United States having no other interest or ownership in or control over the buses, is liable to pay a local license tax for the operation of the buses.[5] In reliance on

[4] See also cases cited in footnote 10, p. 180, *supra.*

The Comptroller of the Treasury held that the United States may make its own contracts for transportation unrestrained by the laws of a State as to charges therefor. The substance of this decision is that State laws governing rates to be charged by common carriers transporting property within its jurisdiction do not apply when the contract of carriage is with the United States. 15 *Comp. Dec.* 648 (1909).

[5] *Cf. Searight* v. *Stokes,* 3 How. 151 (1845); *Louwein* v. *Moody,* 12 S. W. 2d 989 (Tex., 1929). The Attorney General of Arizona has held (opinion dated Mar. 8, 1932), that the State could require contractors engaged on work for the United States in Grand Canyon National Park to obtain State motor vehicle licenses. See *Op. Sol., Dept. of the Interior* (Aug. 30, 1932).

the decision in *Ex parte Marshall, supra,* it was held in *State* v. *Wiles,* 116 Wash. 387, 199 P. 749 (1921), that a contractor engaged in carrying mail for the United States within the State is not exempt from a State statute making it unlawful to operate motor trucks on the highways without first securing a license therefor, the fee varying according to the capacity of the truck. The court said that such a fee is not a direct tax on the property of the Federal Government or on instrumentalities used by it in the discharge of its constitutional functions, but at most an indirect and immaterial interference with the conduct of government business.

Even though title to a vehicle is not in the Federal Government, a State vehicle tax may not be levied on an automobile owned by a Federal instrumentality when by Federal statute the property of the instrumentality has been declared to be immune from State taxes. See *Roberts* v. *Federal Land Bank of New Orleans,* 189 Miss. 898, 196 So. 763 (1940).[6] And in an early case, *United States* v. *Barney,* 24 Fed. Cas. 1014, No. 14,525 (D. Md., *circa* 1810), it was held that a Federal statute prohibiting the stoppage of the mails serves to prevent the enforcement, under State law, of a lien against privately owned horses used to draw mail carriages.

STATE LICENSE, INSPECTION AND RECORDING REQUIREMENTS: *Licensing of Federal activities.*—The case of *United States* v. *Murray,* 61 F. Supp. 415 (E. D. Mo., 1945), involved a holding that a local subdivision could not require an inspector employed by the Office of Price Administration

[6] A cost-plus-a-fixed-fee contractor may not be reimbursed amounts paid to a State and municipality for automobile license tags and title for a Government-owned automobile, being used by the contractor in connection with the contract work, in the absence of a showing as to why the automobile could not be operated without such license and why it was necessary to obtain a title. 21 *Comp. Gen.* 769 (1942).

The Attorney General of Illinois has ruled that a Federal Land Bank is not exempt from the registration requirements of the State motor vehicle law. *Op. A. G., Ill.,* p. 603, No. 3584 (Nov. 14, 1931).

to conform with local requirements covering food handlers. The court said (p. 417):

> It is fundamental that the officers, agents, and instruments of the United States are immune from the provisions of a city ordinance in the performance of their duties. This principle of law, while having exceptions not here involved, applies to the ordinance alleged to have been the basis of the defendants' conduct in this case. It is the duty of the Government and its agencies to employ persons qualified and competent for their work. That duty it must be presumed to have performed, and a city cannot by ordinance impose further qualifications upon such officers and agents as a condition precedent to the performance and execution of duties prescribed under federal law.[7]

Applicability of inspection laws to Federal functions.—The United States Supreme Court has held that a State's inspection laws generally are inapplicable to activities of the Federal

[7] Local laws respecting licensing of physicians can have no application to medical officers of the Army, irrespective of the jurisdictional status of the area upon which they are carrying out their duties, so long as they are acting within the scope of their official duties. *Op. J. A. G., Army,* 1945/2297 (Mar. 9, 1945).

A person employed by the Federal Government in doing dental work in an alien detention camp may not be required by the State to comply with its licensing requirements. *Op. A. G., Tex.*, No. 0-4764.

A State statute which provides that no person shall be permitted to project any motion picture without first obtaining a State license has no application to the United States in the conduct of its activities; therefore, an employee of the Forest Service who obtained at personal expense a State license to project motion pictures in the course of his official duties may not be reimbursed from appropriated funds. 31 *Comp. Gen.* 81 (1951).

Although an ordinance or regulation of a local fire department requires obtaining of a permit for the operation of a gasoline pump, a Federal employee whose official duties require his operation of such a pump need not stand the examination or pay the fee which are prescribed. 3 *Comp. Gen.* 663 (1924).

Plumbers engaged in installing plumbing in a Post Office for the United States are not required to procure the certificates provided for by local statute relating to the examination and licensing of plumbers. *Op. A. G., Ill.*, p. 193, No. 3191 (May 8, 1931).

Government, even though such laws may be for the protection of the general public. *Mayo* v. *United States,* 319 U. S. 441 (1943).[8] In that case a State was held to be without consti-

[8] The Government is not liable for the payment of inspection fees prescribed by municipal regulations enacted under police powers for the purpose of controlling dangerous instrumentalities in connection with property used by the Coast Guard in the exercise of governmental functions. 27 *Comp. Gen.* 232 (1947).

The powder officer for the harbor of Norfolk, Va., appointed under a State statute, has no authority over powder belonging to the Federal Government, and the United States is not liable for any charge for services performed by him. 25 *Ops. A. G.* 234 (1904).

Local law restricting the amount of gun powder that could be stored in one location could not be applied to storage under a Government contract, irrespective of the jurisdictional status of the reservation. *Op. J. A. G., Army,* 1942/5068 (Oct. 30, 1942).

New Hampshire is precluded from enforcing its laws, by periodic inspections or otherwise, in connection with the Electric Manufacturing Shop of the Portsmouth Navy Yard, although the shop is operated in a privately owned plant building. *Op. J. A. G., Navy,* SO 725213 (Aug. 27, 1942).

A city ordinance which requires the inspection of elevators cannot obligate the Government for the payment of fees for the inspection of elevators in a building leased by the Government under a lease provision that the Government will maintain and repair the premises, in the absence of a requirement in the lease obligating the Government to pay such fees as part of the rental, since the Government is not liable for the payment of inspection fees prescribed by State or municipal regulations enacted under the police power. *Comp. Gen. Dec.*, No. B-91662 (Jan. 26, 1950).

A State regulation imposing certain restrictions on the importation of alcohol and requiring an affidavit to accompany applications to import the same is not binding on the General Government and payment of notary fees for oaths administered in connection with a shipment of alcohol, the property of the United States and destined for its use, is not authorized. 24 *Comp. Dec.* 540 (1918).

The imposition of a registration fee prescribed by a State statute in connection with the use of outboard motors on boats required to be used in the discharge of authorized governmental functions constitutes an infringement of the right of the United States to conduct its activities free from State interference or control, and, accordingly, payment of such fee upon demand therefor by the State is not authorized. 27 *Comp. Gen.* 273 (1947).

Since the provision of the Chicago City Code for inspection of mechanical refrigeration systems and the issuance of a certificate of inspection upon the payment of the required fee is one of regulation, payment of such fee is not authorized in the absence of Federal statutory provision therefor. *Comp. Gen. Dec.*, No. B-91662 (Jan. 26, 1950).

The Soil Conservation Service and the Forest Service of the Department

tutional power to exact an inspection fee with respect to fertilizers which the Federal Government owned and distributed within the State pursuant to provisions of the Soil Conservation and Domestic Allotment Act. The court said (pp. 447–448):

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. * * * These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal government must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Recording requirements.—It has also been held that the Federal Government is not required to comply with State recording requirements in order to protect its rights. *In the Matter of American Boiler Works, Inc., Bankrupt,* 220 F. 2d 319 (C. A. 3, 1955); see also *Norman Lumber Co.* v. *United States,* 223 F. 2d 868 (C. A. 4, 1955). In *In re Read-York, Inc.,* 152 F. 2d 313 (C. A. 7, 1945), it was held that the failure

of Agriculture are not required to submit to State inspection of their nurseries situated in Michigan or to pay fees for such inspection. *Op. Sol., Dept. of Agriculture,* No. 3572 (Sept. 12, 1941).

of the Federal Government to record a contract for the manufacture and delivery of gliders to the Army, in compliance with Wisconsin's public policy and statutes, did not prevent title from passing to the Federal Government, upon the making of partial payments, as against the manufacturer's trustee in bankruptcy. These results are in accord with an earlier decision by the United States Supreme Court, in *United States* v. *Snyder,* 149 U. S. 210 (1893), in which it was held that the lien imposed by Federal statute to secure the payment of a Federal tax is not subject to the requirement of a State statute that liens shall be effective only if recorded in the manner specified by the State statute. In *United States* v. *Allegheny County,* 322 U. S. 174 (1944), the court said (p. 183):

> * * * Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. * * * Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property. * * *

The courts of the State of Virginia have also recognized that State registration requirements can have no application to the Federal Government. In *United States* v. *William R. Trigg Co.,* 115 Va. 272, 78 S. E. 542 (1912), the question was presented as to whether the Federal Government is required to comply with the State registry laws and have its contracts recorded in order to make effective the liens reserved in such contracts, as against those who have no prior liens. The court said (78 S. E. 544):

> This power to contract, which is an incident of the sovereignty of the United States, and is, as stated by Judge Marshall, coextensive with the duties and powers of government, carries with it complete exemption of the

government from all obligation to comply with State registry laws, for the reason that it would grievously retard, impede, and burden the sovereign right of the government to subject it to the operation of such laws. * * *

If the states had the power to interfere with the operations of the federal government by compelling compliance on its part with state laws, such as the registry statutes, then, in the language of the Supreme Court, the potential existence of the government would be at the mercy of state legislation. * * *

While State recording requirements cannot in any way be applicable to the Federal Government, and while noncompliance therewith will not serve to dilute the rights of the Federal Government, it is clear that should the Federal Government decide to avail itself of State recording facilities it must pay to the State a reasonable fee therefor, but it cannot be subjected, without its consent, to State taxes which may be imposed upon such recordation. *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 374 (1923).[9] In *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21 (1939), it was held that the Maryland tax on mortgages, graded according to the amount of the loan secured and imposed in addition to the ordinary registration fee as a condition to the recordation of the instrument, cannot be applied to a mortgage tendered for record by the Home Owners' Loan Corporation, in view of the provisions of the Home Owners' Loan Act which declares the corporation to be an instrumentality of the Federal Government and which provides for its exemption from all State and municipal taxes. In the course of its opinion, the court said (pp. 32–33):

[9] It is not within the power of the legislature of a State to impose a tax upon a deed admitted to record that is executed to convey land purchased by the United States. 14 *Comp. Dec.* 256 (1907).

We assume here, as we assumed in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 422; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 208, 209; *Graves* v. *New York ex rel. O'Keefe*, *supra*. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve." *McCulloch* v. *Maryland*, *supra*, p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. *The Shreveport Case*, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., *Bank* v. *Supervisors*, 7 Wall. 26, 31; *Choate* v. *Trapp*, 224 U. S. 665, 668, 669; *Smith* v. *Kansas City Title Co.*, *supra*, p. 207; *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *Lawrence* v. *Shaw*, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing

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and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

APPLICABILITY OF STATE CRIMINAL LAWS TO FEDERAL EMPLOYEES AND FUNCTIONS: *Immunity of Federal employees.*— It is well established that an employee of the Federal Government is not answerable to State authorities for acts which he was authorized by Federal laws to perform. In *In re Neagle,* 135 U. S. 1 (1890), it was held that the State of California had no criminal jurisdiction over an acting deputy United States marshal who committed a homicide in the course of defending a United States Supreme Court justice while the latter was in that State in the performance of his judicial functions; that a writ of habeas corpus is an appropriate remedy for freeing such employee from the custody of State authorities; and that the Federal courts may determine the propriety of the employee's conduct under Federal law.[10] The court said (p. 75):

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

[10] Cf. *Maryland* v. *Soper,* 270 U. S. 9 (1926); *Colorado* v. *Symes,* 286 U. S. 510 (1932).

The underlying constitutional considerations prompting the conclusion that a State may not prosecute a Federal employee for acts authorized by Federal law were set forth in some detail in *Tennessee* v. *Davis,* 100 U. S. 257 (1880). In that case it was held that a State indictment of a Federal revenue agent for a homicide committed by him in the course of his duties is removable to a Federal court. In its opinion, the court said (pp. 262–263):

> Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin* v. *Hunter* (1 Wheat. 363), "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operation of the general government may at any time be arrested at the will of one of its members. The legis-

> lation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.
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> We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

The principle that a Federal official or employee is not liable under State law for acts done pursuant to Federal authorization has been applied in many instances. Thus, it has been held that a State's laws relating to homicide or assault cannot be enforced against a Federal employee who, while carrying out his duties, committed a homicide or assault in the course of making an arrest, maintaining the peace, or pursuing a fugitive. *Brown* v. *Cain,* 56 F. Supp. 56 (E. D. Pa., 1944); *Castle* v. *Lewis,* 254 Fed. 917 (C. A. 8, 1918); *Ex parte Dickson,* 14 F. 2d 609 (N. D. N. Y., 1926); *Ex parte Warner,* 21 F. 2d 542 (N. D. Okla., 1927); *In re Fair,* 100 Fed. 149 (C. C.

D. Neb., 1900); *In re Laing,* 127 Fed. 213 (C. C. S. D. W. Va., 1903); *Kelly* v. *Georgia,* 68 Fed. 652 (S. D. Ga., 1895); *North Carolina* v. *Kirkpatrick,* 42 Fed. 689 (C. C. W. D. N. C., 1890); *United States* v. *Fullhart,* 47 Fed. 802 (C. C. W. D. Pa., 1891); *United States* v. *Lewis,* 129 Fed. 823 (C. C. W. D. Pa., 1904), *aff'd.,* 200 U. S. 1 (1906); *United States* v. *Lipsett,* 156 Fed. 65 (W. D. Mich., 1907).

It has likewise been held that a United States marshal cannot be subjected to arrest and imprisonment by a State for acts done pursuant to the commands of a writ issued by a Federal court. *Anderson* v. *Elliott,* 101 Fed. 609 (C. A. 4, 1900), *app. dism.,* 22 S. Ct. 930, 46 L. Ed. 1262 (1902); *Ex parte Jenkins,* 13 Fed. Cas. 445, No. 7,259 (C. C. E. D. Pa., 1853). A State militia officer who, under the orders of a governor of a State, employs force to resist and prevent a United States marshal from executing process issued under a Federal decree is subject to punishment for violating the laws of the United States. *United States* v. *Bright,* 24 Fed. Cas. 1232, No. 14,647 (C. C. D. Pa., 1809). And in *United States* v. *Harvey,* 26 Fed. Cas. 206, No. 15,320 (C. C. D. Md., 1845), Justice Taney held that on an indictment for obstructing the mails it is no defense that a warrant had been issued under State law in a civil suit against the mail carrier.

Obstruction of Federal functions.—It has been held in a number of cases that State laws will not be applied to Federal employees or their activities where the application of such laws would serve to obstruct the accomplishment of legitimate Federal objectives. Thus, a State law prohibiting the carrying of arms may not be applied to a deputy United States marshal seeking to make an arrest. *In re Lee,* 46 Fed. 59 (D. Miss., 1891), (but this case was reversed—47 Fed. 645—on the basis of a Federal statute which limited the authority of marshals to the State for which they were appointed. Marshals now may carry firearms, nevertheless—see 18 U. S. C. 3053). A State statute providing for the punishment of one who maliciously threatens to accuse a person of a crime in or-

der to compel him to do an act has no application to a United States pension examiner who is charged with the duty of investigating fraudulent pension claims. *In re Waite,* 81 Fed. 359 (N. D. Iowa, 1897), *app. dism.,* 180 U. S. 635. Nor may a State proceed against a Federal military officer for allegedly disturbing the peace in clearing a roadway of civilians to enable a military company to proceed to a place where a National Guard recruitment program was being conducted, it has been held. *In re Wulzen,* 235 Fed. 362 (S. D. Ohio, 1916).

Nearly all the cases cited immediately above involved the release, by a Federal court, on a writ of habeas corpus, of a prisoner from State custody. On the other hand, a prisoner held pursuant to Federal authority is beyond the reach of the processes of a State for release by writ of habeas corpus. See *Ableman* v. *Booth,* 21 How. 506 (1859); *Tarble's Case,* 13 Wall. 397 (1871). Similarly, property obtained by a United States marshal by virtue of a levy of execution under a judgment of a Federal court may not be recovered by an action for replevin in a State court. See *Covell* v. *Heyman,* 111 U. S. 176 (1884). In *Ex parte Robinson,* 20 Fed. Cas. 965, No. 11,934 (C. C. S. D. Ohio, 1856), it was held that a Federal court may order the discharge of a Federal marshal who was held in State custody for contempt because of his refusal to produce certain persons named in a writ of habeas corpus issued by a State judge.

Liability of employees acting beyond scope of employment.—Federal officials and employees are not, of course, above the laws of the State. Whatever their exemption from State law while engaged in performing their Federal functions, this exemption does not provide an immunity from arrest for the commission of a felony not related to the carrying out of the functions. *United States* v. *Kirby,* 7 Wall. 482 (1868). In *In re Lewis,* 83 Fed. 159 (D. Wash., 1897), it was stated that a Federal officer who, in the performance of what he conceives to be his official duty, transcends his authority and invades private rights, is liable to the individuals injured by his actions (however, it has been held that absent criminal intent he is not liable under the criminal laws of the State). Employment as a mail carrier does not provide the basis for an exemption from the penalty under a State statute prohibiting the carrying of concealed weapons, in the absence of a showing of "authority from the federal government empowering him as a mail carrier to carry weapons in a manner prohibited by state laws." *Hathcote* v. *State,* 55 Ark. 183, 17 S. W. 721 (1891). However, even when a soldier is subject to punishment by a State, for an act not connected with his duties as a soldier, when the punishment will serve to interfere with the performance of duties owed by him to the Federal Government a Federal court will require utmost good faith on the part of the State authorities, and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, may be inquired into by the Federal courts in proceedings instituted by the soldier's commanding officer. The imposition of a sentence of sixty days for an offense which did not result in injury to person or property was held unwarranted, and the court discharged the soldier on a writ of habeas corpus. *Ex parte Schlaffer,* 154 Fed. 921 (S. D. Fla., 1907).

LIABILITY OF FEDERAL CONTRACTORS TO STATE TAXATION: *Original immunity of Federal contractors.*—In *Panhandle Oil Company* v. *Knox,* 277 U. S. 218 (1928), it was held that a State tax imposed on dealers in gasoline for the privilege of selling, and measured at so many cents per gallon of gasoline sold, is void under the Federal Constitution as applied to sales to instrumentalities of the Federal Government, such as the Coast Guard Fleet and a veterans' hospital. In *Graves* v. *Texas Company,* 298 U. S. 393 (1936), the court struck down as violative of the Constitution, when applied to sales to the Federal Government, a State tax providing that, "Every distributor, refiner, retail dealer or storer of gaso-

line * * * shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline * * *". The court held that a tax on storage, or withdrawal from storage, essential to sales of gasoline to the Federal Government, is as objectionable, constitutionally, as a tax upon the sales themselves. However, even in that day it was held that a tax was not objectionable merely because the person upon whom it was imposed happened to be a contractor of a government. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514 (1926).

Later view of contractors' liability.—In the decisions rendered by the Supreme Court, beginning in 1937 to date, the earlier decisions have not been followed. New tests for measuring the validity of State taxes on Federal contractors were devised in *James* v. *Dravo Contracting Co.,* 302 U. S. 134 (1937) . One of the issues involved in that case was whether a gross sales and income tax imposed by a State on a Federal contractor doing work on a Federal dam is invalid on the ground that it lays a direct burden upon the Federal Government. In sustaining the validity of the tax, the court observed (1) that the tax is not laid upon the Federal Government, its property or officers; (2) that it is not laid upon an instrumentality of the Federal Government; and (3) that it is not laid upon the contract of the Federal Government. The decision in the *Panhandle* case, *supra,* was limited to the facts involved in that case. The fact that the State tax might increase the price to the Federal Government did not, the court indicated, render it constitutionally objectionable. In answer to the argument that a State might, conceivably, increase the tax from 2% to 50%, the court said (302 U. S. 161):

> * * * The argument ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action. * * *

In *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941), the court not only made a further departure from the doctrine of the *Panhandle* case, but it expressly overruled the decision in that case. Involved was a sale of lumber by King & Boozer to "cost-plus-a-fixed-fee" contractors for use by the latter in constructing an army camp for the Federal Government. The question presented for decision was whether the Alabama sales tax with which the seller was chargeable, but which he was required to collect from the buyer, infringes any constitutional immunity of the Federal Government from State taxation. In sustaining the tax, the court said (pp. 8–9):

> * * * The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox, supra; Graves* v. *Texas Co., supra,* we think it no longer tenable. * * *

The court rejected the Government's contention that the legal incidence of the tax was on the Federal Government (p. 14):

> We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circum-

stance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co., supra.* * * *[11]

Immunity of Federal property in possession of a contractor.—Where, however, the tax is on machinery owned by the Federal Government, or where the tax imposed by a State on a contractor of the Federal Government is based, in part, upon the value of the machinery which is owned by the Federal Government but which is installed in the contractor's plant, the tax is objectionable on constitutional grounds. Thus, in *United States* v. *Allegheny County,* 322 U. S. 174 (1944), the court, in holding such a tax to be invalid, said (pp. 182–183):

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
>
> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * *[12]

[11] In a companion case, *Curry* v. *United States,* 314 U. S. 14 (1941), the court upheld a use tax imposed upon the contractor. And the Attorney General of New Mexico rendered an opinion that any type of State tax might be imposed upon a Federal contractor, even though the extra cost might have to be borne by the Federal Government, so long as an area under exclusive Federal jurisdiction were not involved. *Op. A. G., N. Mex.,* No. 5347 (Mar. 28, 1951).

The court added (pp. 188–189):

> A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.

The facts in the *Allegheny* case were distinguished from those involved in *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495 (1953), in which the Supreme Court sustained a State tax upon the storage of gasoline; the fact that the gasoline was owned by the Federal Government did not, the court held, relieve the storage company of the obligation to pay the tax. The court said (pp. 499–500):

> This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations;

[12] *Cf. American Motors Corp.* v. *City of Kenosha,* 274 Wis. 315, 80 N. W. 2d 363 (1957).

so it is not "on" the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 151, this has been no fatal flaw. We must look further, and find either a stated immunity created by Congress in the exercise of a constitutional power, or one arising by implication from our constitutional system of dual government. Neither condition applies to the kind of governmental operations here involved. There is no claim of a stated immunity. And we find none implied. The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax.

Economic burden of State taxation on the United States.—The Supreme Court's emphasis of the legal incidence test, as distinguished from the rejected test of the economic consequences, is best illustrated in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954). In that case, the court held that a State tax of 2% of the gross receipts from all sales in the State could not be applied to transactions whereby private contractors procured two tractors for use in constructing a naval ammunition depot under a cost-plus-a-fixed-fee contract which provided that the contractor should act as a purchasing agent for the Federal Government and that title to the purchased articles should pass directly from the vendor to the Federal Government, with the latter being solely obligated to

pay for the articles. The Supreme Court said (pp. 122–123):

> We find that the purchaser under this contract was the United States. Thus, *King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States. The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown.
>
> Nor do we think that the drafting of the contract by the Navy Department to conserve Government funds, if that was the purpose, changes the character of the transaction. As we have indicated, the intergovernmental submission to taxation is primarily a problem of finance and legislation. But since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself.

Legislative exemption of Federal instrumentalities.—The Supreme Court, in the first of the two excerpts quoted above from its opinion in *King & Boozer*, made reference to legislative exemption. Such legislative exemption of instrumentalities of the Federal Government has been sustained in two relatively recent cases. In *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941), the Supreme Court held that statutory exemption from State taxation was a good defense to a State's attempt to collect a sales tax on lumber purchased by the Federal Land Bank for repairs to a farm

which it had acquired by foreclosure. The Supreme Court said (pp. 102–103):

> Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18." *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33, and cases cited. We have held on three occasions that Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies. *Smith* v. *Kansas City Title & Trust Co., supra; Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp., supra.* * * *

Similarly, in *Carson* v. *Roane-Anderson Company,* 342 U. S. 232 (1952), the Supreme Court held that, under the provisions of the Atomic Energy Act, Tennessee could not enforce its sales tax on sales by third persons to contractors of the Atomic Energy Commission. In sustaining the immunity provided by the Atomic Energy Act, the Supreme Court said (pp. 233–234):

> * * * The constitutional power of Congress to protect any of its agencies from state taxation (*Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95) has long been recognized as applying to those with whom it has made authorized contracts. See *Thomson* v. *Pacific R. Co.,* 9 Wall. 579, 588–589; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161. Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the Government. The power stems from the power

> to preserve and protect functions validly authorized (*Pittman* v. *Home Owners' Corp., supra,* p. 33)—the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress. U. S. Const., Art. I, § 8, cl. 18. * * *