SERVICE OF CIVIL PROCESS OF STATE COURTS ON DEPARTMENT OF THE ARMY MILITARY PERSONNEL

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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April 1969

SCOPE

This thesis presents a critical analysis of those provisions in Army Regulation 27-40 (25 May 1967) regarding service of civil process of state courts on Department of the Army military personnel within the United States. In particular, a comparative study is made between those regulatory provisions and pertinent statutory and case law in three areas: the nature and effect of service of process; the unique status of military personnel in Federal service in regard to state process; and the jurisdictional authority of state courts to effect service on military installations.

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CHAPTER I

INTRODUCTION

For many years the Department of the Army has accepted the following proposition: Where exclusive jurisdiction over a military installation[1] situated within a state is vested in the Federal government, the persons living upon the premises become isolated from that state, both territorially and in respect to their civil relations.[2] In a political sense, the installation was no longer a part of the state and its occupants were nonresidents of the state. In Pennoyer v. Neff the Supreme Court held that state courts lacked jurisdiction to issue process, whether in the nature of a summons or a personal judgment, against a nonresident

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[1] An installation is real estate and the improvements thereon which are under the control of the Department of the Army, at which functions of the Department of the Army are carried on, and which has been established by order of the Department of the Army. The term "installation" will include installations, subinstallations, and separate locations having an activity. Army Reg. No. 405-90, subpara. 3c (23 Dec 1965) [hereafter cited as AR 405-90].

[2] W. Winthrop, MILITARY LAW AND PRECEDENTS 897-98 (2d ed. 1920 reprint); JAGA 1964/3500, 25 Feb 1964; Sewell, T. The Government As A Proprietor of Land, 35 Tenn. L. Rev. 287 (Winter 1968).

of the state, unless such persons had been personally served with process within the territorial borders of the forum state or he had made a voluntary appearance before the court.[3] Citing Pennoyer v. Neff Army authorities have maintained that inhabitants of a Federal enclave are not subject to civil process of state courts, except to the extent a state may have reserved to itself the right to execute its process on land ceded to the Federal Government.[4] These two concepts - that is, the

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[3] 95 U.S. 714 (1878). Mr. Justice Field, speaking for the Court, stated (dicta) that personal service of process on nonresidents within the state would not be required in cases affecting the personal status of a plaintiff - resident of the state or in cases where the defendant may have consented in advance to another mode of service. Id., at 733.

[4] E.g., JAGA 1964/3500, 25 Feb. 1964; JAGA 1964/3407, 23 Jan. 1964. The jurisdictional authority of state courts to serve process on Federal enclaves is discussed in Chapter IV, infra. The term "Federal enclave" is used to indicate a military installation over which the Federal government exercises exclusive jurisdiction. Army Reg. No. 405-20, para. 2 (28 June 1968) [hereafter cited as AR 405-20] defines the term "exclusive jurisdiction" as a situation wherein the Federal government has received, by whatever method, all of the authority of the state with no reservation made by the state, except the right to serve its process over the ceded area. Of course the state can reserve no greater rights that it possessed prior to cession, so the state authorities could never execute its process in a manner that would unduly interfere with Federal activities - these are protected under the supremacy clause of the Federal constitution.

lack of extraterritorial effect of state process in the absence of a reservation of right and the jurisdictional status of military installations are expressed in current provisions of Army Regulation 27-40 (25 May 1967).[5]

The Army's reliance upon Pennoyer v. Neff is stated in detail in a letter transmitted in 1964 from the Office of The Judge Advocate General, Department of the Army, to the Department of Justice.[6] The letter concerned a request from a civilian court for assistance in effecting service of state process. In 1963 a judge from the Juvenile and Domestic Relations Court in Petersburg, Virginia, informed the Department of Justice that his court had been unable to obtain service of process on a soldier stationed at Fort Knox, Kentucky, in an action instituted in Virginia, under the Uniform Reciprocal Enforcement of Support Act. The judge had sought assistance from both the County Attorney in Hardin County, Kentucky, where Fort Knox is located, and the Post Judge Advocate [sic] at Fort Knox; he was advised that neither the state authorities nor the Post Judge Advocate possessed authority to serve

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[5]Army Reg. No. 27-40 (25 May 1967) [hereafter cited as AR 27-40]. The pertinent provisions of the regulation are set out as an appendix to this thesis.

[6]JAGA 1964/3500, 25 Feb. 1964.

civil process on military personnel on the installation. The Assistant Attorney General, Office of Legal Counsel, Department of Justice, requested that the Judge Advocate General of the Army present his views on the matter. By letter dated 25 February 1964, the Chief, Military Affairs Division, Office of The Judge Advocate General, Department of the Army, furnished the following information: (1) The military reservation at Fort Knox, Kentucky is subject to exclusive Federal jurisdiction and the State of Kentucky has not reserved the right to serve process thereon; (2) under Kentucky law, state authorities are barred from serving process in an official capacity on the installation; and (3) Army Commanders and other military personnel lack the authority to make nonconsenting[7] personnel

[7]Apparently the Post Staff Judge Advocate had referred the Virginia process to the soldier concerned, and the soldier elected not to accept service of the process voluntarily. AR 27-40, ¶ 5b(3)(b) provides that this procedure be followed - that is, in areas of exclusive Federal jurisdiction not subject to the right in the state to serve process, commanders will bring the matter to the attention of the individual concerned and determine whether he wishes to "accept service voluntarily in accordance with the laws of the state issuing the process." If that individual does not desire to accept service, the party requesting such service will be informed that the nature of jurisdiction on the installation precludes service by state authorities.

available for service of process off the installation. This JAG opinion was based upon two premises: (1)The rule in Pennoyer v. Neff - that is, personal jurisdiction over a nonconsenting nonresident could be obtained only by service of process within the territorial borders of the forum state, was still in effect, "though in practice it has been modified to some extent,"[8] and (2)Military assistance under these circumstances might render the military commander subject to criminal prosecution under the provisions of the Posse Comitatus Act.[9] The

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[8]JAGA 1964/3500, 25 Feb. 1964 (quotation taken from the Notes for Retained Copy). The back-up papers for the opinion contain a reference to the cases of McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); and Hess v. Pawloski, 274 U.S. 352 (1927). As pointed out in Chapter II, the statement that these cases have in practice modified the territorial limitations of a state's personal jurisdiction as expressed in Pennoyer v. Neff, is a gross understatement.

[9]18 U.S.C. § 1385 (1964) [hereafter referred to as the Posse Comitatus Act.].

language in AR 27-40 reflects the influence of these premises.[10] Considering the expansion in scope of a state's personal jurisdiction over nonresidents in recent years, as discussed in Chapter II, infra, the first premise is clearly unsupportable in law. This thesis presents reasons why such a premise can no longer be accepted, and reasons why the policies and procedures established by the Department of the Army for handling requests for assistance from state authorities in this matter should be changed.

A general survey into the subject of service of state civil process on servicemen may be divided into three areas: the nature and effect of service of process; the status of the person upon whom service is to be effected - that is, military personnel in Federal

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[10] Subparagraph 5b(3)(b) prescribes a procedure for process of state courts in areas of exclusive Federal jurisdiction not subject to the right to serve process. Subparagraph 5b(3)(c) prescribes a procedure for process of state courts "in areas of exclusive Federal jurisdiction in which the right to serve process is reserved by, or granted to, the State or States, in areas of concurrent jurisdiction, and in areas in which the United States has only a proprietorial interest." Subparagraph 5b(1) cautions that the service of process is not a function of DA or of its military personnel in their official capacity.

service; and the jurisdictional authority of state courts to effect service on military installations. A comparative study between Army regulatory provisions and pertinent statutory and case law will be made in each of these three areas. In the conclusion an analytical approach to the subject is suggested and changes in Army procedures are recommended for handling requests from state authorities for military assistance in service of process.

CHAPTER II

SERVICE OF PROCESS

When a person trained in the law refers to service of process, normally he refers to original process and speaks generally of the final step in the competition of a statutory procedure whereby a court obtains jurisdiction to adjudicate a particular controversy. The term means little to other persons, yet its nature and effect is particularly important to a defendant - that is, the person upon whom service is sought. Although he may not waive objections relating to the court's lack of jurisdiction over the subject - matter of the action, a defendant may inadvertently waive objections relating to a court's unauthorized exercise of jurisdiction over his person or to matters of venue; a defendant's voluntary acceptance of service may be construed by the courts as a waiver of these matters.[11] Service of process may

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[11] E.g., Ill. Ann. Stat., ch. 110, § 17 (Smith-Hurd 1968) provides, in part, that any person who transacts any business or commits a tortions act within Illinois thereby submits himself to the jurisdiction of the state courts as to any cause of action arising from the act. The section further provides that personal service of summons upon the defendant outside of the state shall have the same force and effect as though summons had been personally served within Illinois. See also Kurland, The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts - From Pennover to Denckla: A Review, 25 U. Chi. L. Rev. 569 (1958).

become very important to a military commander when he receives from state authorities a request for assistance in service of process on a soldier. In this situation the commander's judge advocate had better understand completely the close relationship and interdependence of matters relating to jurisdiction and service of process. These two terms are among the most difficult to understand in civil procedure.

During the past few years many states have expanded considerably the statutory basis for the assertion of personal jurisdiction by its courts; they have also provided more flexible methods for accomplishing service of process issued by these courts - for example, the extensive use of state long-arm statutes to reach persons located outside of the state. Unfortunately, pertinent Department of Army publications furnish too little information and misleading guidance on these matters; these publications stress the jurisdictional status of military installations and, by inference, adopt the physical power function of service and the extraterritorial limitation on state process expounded in Pennoyer v. Neff

approximately one hundred years ago.[12]

Consider, for example, the situation in which the Commanding General controls an installation subject to exclusive Federal jurisdiction. The state, which had ceded jurisdiction over the land to the Federal government, did not reserve the right to serve process on the premises. A soldier stationed at the installation is being sued in a state court on a simple contract action. The deputy sheriff from a nearby town arrives at the General's headquarters and requests the Army's assistance in effecting service of summons.[13] Pursuant to the pro-

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[12]Pertinent Army publications include AR 27-40 (procedure for handling court process); AR 405-20 (policies on jurisdiction); U.S. Department of Army Pamphlet, No. 27-12, Legal Assistance Handbook (May 1964) (chapters 17 and 39) [hereafter cited as DA Pam. 27-12]; and U.S. Department of Army Pamphlet, No. 27-164, Military Reservations (October 1965) (para. 7.5) [hereafter cited as DA Pam. 27-164].

[13]For reasons discussed subsequently in Chapter IV, commanders have considerable discretion in determining whether he should extend "comity" to the state process. Unfortunately, pertinent Army publications, such as DA Pam. 27-12 (Legal Assistance), contain no information on state process laws. The judge advocate must turn usually to the digest of state laws in the current edition of the Martindale-Hubbell Law Directory (Volume V) to determine whether, for example, the State of Virginia has adopted the Uniform Acts on Desertion and Nonsupport or Reciprocal Enforcement of Support (the State has adopted both).

cedure prescribed in subparagraph 5b(3)(b), AR 27-40[14] the Commander shows a copy of the summons and the complaint therewith to the soldier, to determine whether the soldier wishes to accept service of the writ voluntarily. At this point, hasn't the Commander inadvertently provided the soldier with actual notice of the proceedings - which is the primary function of service? Assuming that the contract upon which the action is based constitutes certain "minimum contracts" between the soldier and the forum state,[15] due process requires only that in order to subject a defendant to a judgment in personam,[16] the method

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[14]The pertinent provisions of AR 27-40 regarding service of civil process from state courts are at the Appendix to this thesis. Note that the regulation contains expressions that appear purposely vague - for example, "bring the matter to the attention" of the individual, accept service "voluntarily in accordance with the laws of the State issuing the process",and military personnel serving state process can act only "in his individual capacity."

[15]See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1943) and Travelers Health Ass'n. v. Virginia, 339 U.S. 643, 648 (1950). The concept of "minimum contacts" is discussed subsequently in ch. 11.

[16]A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. Restatement, Judgments, §§ 1-3 (1942).

of service employed is reasonably designed to give the defendant actual notice of the action pending against him.[17] Here, the soldier has received actual notice of the action, because the military authorities informed him of the matter as required in AR 27-40. Is this conclusion supported by current case law? This chapter is divided into two sections as follows: (1)the bases upon which a state court may assert its jurisdiction over a nonresident-defendant, and (2)the nature and effect of service of process. In most instances, the scope of a state's jurisdiction will be measured in the constitutional due process sense, although as a practical matter few states have enacted statutes permitting their courts to take full advantage of recent Supreme Court decisions in this area.[18]

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[17] Milliken v. Meyer, 311 U.S. 457 (1940), rehearing denied, 312 U.S. 712 (1941).

[18] Compare Pallas v. Driv-Rite, Inc., 252 F. Supp. 582 (N.D.N.Y. 1966), wherein the court made it clear that the New York statute did not occupy the full constitutionally permissive area through which jurisdiction may attach to foreign domiciliaries because of tortious conduct, with Nelson v. Miller, 11 Ill. 378, 143 N.E.2d 673 (1957), wherein the Illinois Supreme Court determined that the state legislature had intended that a statute conferring personal jurisdiction over nonresidents to its courts covered all grounds acceptable within the due process clause.

A. Bases For State Jurisdiction

While the decisions of the United States Supreme Court have not always noted the distinction, the requirement that a defendant be accorded "due process of law" imposes two requirements. First, it must appear that the defendant over whom jurisdiction is asserted has had such "minimum contacts" with the state as to render it consistent with "traditional notions of fair play and substantial justice" that he be compelled to defend himself there.[19] Second, assuming the requisite "minimum contacts," a method of service must be employed which is reasonably designed to give the defendant actual notice of the pending action against him.[20] The purpose of this section is to review pertinent decisions of Federal and state courts, in order to reach a better understanding of the first, or "minimum contacts," requirement.

The right of a state to assert personal jurisdiction over a citizen or resident of the state when that person is absent from the state was made clear by Milliken v. Meyer. There, the United States Supreme Court held valid

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[19] International Shoe Co. v. Washington, 326 U.S. 310 (1943).

[20] Milliken v. Meyer, 311 U.S. 457 (1940), rehearing denied 312 U.S. 712 (1941).

a Wyoming judgment rendered against a resident of Wyoming (Meyer) who was personally served with process in Colorado pursuant to a Wyoming statute. Meyer did not appear at the trial, and the Wyoming court entered an in personam judgment against him for the wrongful withholding from Milliken of profits from the operation of certain Colorado oil properties. Four years later, Meyer requested a Colorado court to restrain Milliken's enforcement of the Wyoming judgment and to decree that the Wyoming judgment was a nullity for want of jurisdiction over Meyer or his property. The Colorado trial court found that Meyer was domiciled in Wyoming when the Wyoming suit was commenced, that Wyoming had jurisdiction over the person of Meyer, and that the Wyoming statute for substituted service [sic] were constitutional; the court then dismissed Meyer's bill. The Supreme Court of Colorado reversed the trial court's action, on grounds other than jurisdictional. The Supreme Court of the United States reversed, saying:

> The authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. . . One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method of apprising such an absent party of the proceedings against him.[21]

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[21] Id., at 463-64.

This quotation may be broken down into two elements: (1) a resident or citizen is subject to the personal jurisdiction of his "home state," even when he is absent from that state; and (2) the state must provide and employ a reasonable method for apprising the absent resident or citizen of proceedings initiated against him, to include the method of furnishing the defendant personally a copy of process outside of the forum state.[22]

From Milliken v. Meyer one can see that one of the relevant factors in approaching a problem regarding service of process - is the soldier a resident or citizen of the forum state? The answer to this question will direct one to the appropriate statutory provisions of the forum state, in order to determine the jurisdictional basis upon which personal jurisdiction may be asserted

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[22] The method of service, whereby the absent serviceman-resident is furnished notice of the proceedings, is discussed subsequently. One problem area for servicemen is whether substituted service provisions - i.e., leave process at his usual place of abode - authorized for "absent residents" - may be used when the serviceman returns periodically to the state. In Lerman v. Copperman, 183 Misc. 352, 52 N.Y.S.2d 50 (Sup. Ct. 1944); and Robinson v. Five One Five Associates Corp., 180 Misc. 906, 45 N.Y.S.2d 20 (Sup. Ct. 1943); state courts would not permit the use of substituted service against residents who were then in the military service.

and the permissive methods of effecting process.[23] If the serviceman is a nonresident of the forum state, there are more limitations upon the forum state.[24]

In personam jurisdiction was predicated in the early days of the common law upon physical control over the defendant, and civil actions were commenced by the arrest of the defendant under a capias. If the defendant could not be arrested, process could not be served and the court could not acquire personal jurisdiction over him. As the power to arrest stopped at state lines, so did the state's power to assert in personam jurisdiction. Although there was a change in the function of summons from arrest to simple notice in the institution of litigation, courts persisted in equating in personam jurisdiction to physical power over the defendant; this concept as applied to

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[23]The law of the forum determines the methods of serving process and the giving of notice of the proceedings to the defendant, as well as the methods of securing obedience to the court's proceedings and enforcement of its judgments. RESTATEMENT, Conflicts of Law, §§ 589-90 (1934).

[24]For purposes of this thesis the issues presented when the state authorities attempt to exercise jurisdiction over a Federal employee are reserved for Chapter III, and the premise that residents on an installation are considered nonresidents of the forum state is discussed further in Chapter IV.

nonresidents became a part of due process of law with the Supreme Court's decision in Pennoyer v. Neff.

The adversaries in Pennoyer v. Neff were Mitchell, Neff and Pennoyer. Mitchell, a resident of Oregon, brought a simple contract action for services rendered as an attorney against Neff, a resident of California, in a state court located in Oregon.[25] Neff was not personally served with process within Oregon, nor did he appear at the proceedings. Alleging that Neff owned property within Oregon and that he, Mitchell, did not know Neff's address in California, Mitchell obtained service upon Neff by publication of summons in a local newspaper. On 19 February 1866, the state court entered a default judgment, which Mitchell used subsequently in causing a levy of execution upon a tract of land in Oregon owned by Neff. The land was sold at a sheriff's sale and, in due course, Pennoyer obtained title. Neff brought suit in the Circuit Court of the United States

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[25]The general rule is that every country has jurisdiction over all persons found within its territorial limits for the purposes of actions in their nature transitory. Such actions may be maintained in any jurisdiction in which the defendant maybe found; once the summons has been legally served upon him, the jurisdiction of his person is complete. Smith v. Gibson, 83 Ala. 284, 285, 3 S. 321 (1887).

for the District of Oregon,[26] asserting title to the property from a patent which the United States had issued to him on 19 March 1866. The Circuit Court determined that the statutory procedures for effecting service by publication had not been followed properly, so it reversed the state judgment. The Supreme Court of the United States sustained the ruling of the lower Federal court, but it acted on jurisdictional grounds rather than alleged technical noncompliance with statutory procedures in service of process.

The Supreme Court accepted the premise that every state within the Federal Union possessed exclusive jurisdiction and sovereignity over persons and property within its territory except as restrained and limited by the Constitution. The court reasoned then that "the

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[26]Congress, in the provisions of the Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, gave the Circuit Courts original jurisdiction, concurrent with the courts of the several states, of all suits at law or equity arising under the Constitution, laws, or treaties of the United States, where the value of the matter in dispute, exclusive of costs, was in excess of $500. This jurisdiction remained with the Circuit Courts until January 1, 1912, when the Courts were abolished, save as the Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 required that the value of the matter in dispute, exclusive of interest and costs, be in excess of $2000.

laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision."[27] The state court in Oregon had attempted to adjudicate a case involving a resident of California (Neff) by use of its service by publication, even though the entire object of the action was an exercise of in personam jurisdiction. The Supreme Court believed that Neff, as a nonresident of Oregon, could be brought within the court's jurisdiction only through personal service of process within the state of Oregon or by his voluntary appearance at the proceedings. The Supreme Court believed that the requirement for personal service within the state was the "only doctrine consistent with protection to citizens of other states."[28]

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[27] Pennoyer v. Neff, 95 U.S. 714, 722 (1878). As discussed in chapter IV, infra, the Federal Congress has "allowed by comity" the application of state income taxes and state workman's compensation laws on inhabitants of a military enclave. Hasn't it also extended, by inference, comity to the service of process (except for specified types of writs of execution) on Federal servicemen under the provisions of the Federal Soldiers' and Sailors' Civil Relief Act of 1940?

[28] Id., at 726.

Because such service or appearance had not taken place, the state court lacked jurisdiction to adjudicate the controversy between Mitchell and Neff. The court used the due process clause of the Fourteenth Amendment to declare the state judgment void both within and without the State of Oregon.

The Supreme Court saw that the state, as a consequence of its exclusive jurisdiction over persons and property within its territory, has the power "to prescribe the subjects upon which [its inhabitants] may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced." [29] In cases involving breach of these contracts, a state through its tribunal may subject property situated within its limits and owned by non-residents to the payment of demands of its own citizens against such non-residents. Every state was seen to owe protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of a state's authority to hold and appropriate any property within its territory

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[29] Id., at 722.

owned by such non-residents to satisfy the claims of its citizens. However, the jurisdiction of a court to inquire into and determine the extent of a nonresident's obligations was deemed only incidental to the state's jurisdiction over the property. Unless the property of the nonresident was brought under the control of the court, by attachment or some other equivalent act, the state court had nothing upon which it could adjudicate. If the property was brought under the control of the court, then the defendant personally appears before the court, the in ren or quasi in rem action becomes essentially a suit in personam. If the defendant does not personally appear, the judgment recovered must be limited to the value of his property brought under the control of the court. In Pennoyer v. Neff, the land belonging to Neff and located in Oregon was not attached nor in any way brought under the control of the court prior to the time the court rendered its judgment and granted a levy of execution. Under these circumstances the state court lacked jurisdiction over both the person and pro-

perty of Neff.[30]

The Supreme Court, in its decision of Pennoyer v. Neff, took the opportunity to provide guidance on the meaning of the due process and full faith and credit clauses in the Federal Constitution. The Supreme Court would allow the validity of state judgments to be directly challenged, and their enforcement in a state resisted, on the ground that judicial proceedings conducted to determine the personal rights and obligations (in personam jurisdiction) of those persons over whom the court has no jurisdiction do not constitute due process of law.[31] Although the guidance is not very helpful from an analytical view, the Supreme Court defined due process of law

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[30]This question of jurisdiction to render an in rem or quasi in rem judgment will be discussed subsequently, when the case of Hanson v. Denckla, 357 U.S. 235 (1958) is reviewed. Remember at this time, however, that jurisdiction over the person does not necessarily confer the court with jurisdiction over his property located outside of the territorial borders of the forum state. The provisions of subparagraph 5b(3)(c), AR 27-40 (see Appendix) appear to authorize the attachment of personal property, whether the purpose of such attachment is an assertion of quasi in rem or in rem jurisdiction or on a levy of execution. As discussed in chapter IV, there may be a significant difference in the purpose of the attachment.

[31]See Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U.S. 287 (1890); Adam v. Saenger, 303 U.S. 59 (1938).

in judicial proceedings as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[32] The Supreme Court expressed a concept of full faith and credit similar to that used in the RESTATEMENT, Conflict of Laws, in its definition of jurisdiction - that is, jurisdiction means the power of a state to create interests which, under the principles of the common law, will be recognized as valid in other states.[33] The court believed that international law, as it existed among states in 1790, required that a judgment rendered in one state assuming to bind the person of another was void within the foreign state when the defendant had not been served with process or voluntarily made his defense before the court. The Supreme Court had held previously that the full faith and

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[32]Pennoyer v. Neff, 95 U.S. 714, 733 (1878). Note that only ten years previously, on 21 July 1868, Congress had adopted and transmitted to the Secretary of State a concurrent resolution, declaring that the Fourteenth "Article of Amendment" to the Constitution of the United States had been ratified by the necessary number of the States.

[33]RESTATEMENT, Conflict of Laws, § 42 (1934).

credit clause in the Federal Constitution[34] and the Act of Congress supplementing the clause[35] had not been intended to change this principle of international law or to extend national comity to such judgments rendered in the courts of one state.[36] While the Federal courts were not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignity, exercising a distinct and independent jurisdiction; they were bound to give to the judgments of state courts only the same faith and credit which the courts of another state are bound to give to them.[37]

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[34]U. S. Const., Art. IV, § 1 provides that: "Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general laws prescribed the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

[35]Congress has provided that: "Such Acts, Records, and Judicial Proceedings or copies thereof, so authenicated, shall have the same full Faith and Credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1964).

[36]D'Arcy v. Ketchum, 52 U.S. 165 (1850).

[37]Pennoyer v. Neff, 95 U.S. 714, 732-33 (1878). In Covell v. Heyman, 111 U.S. 176, 182 (1883) the Supreme Court of the United States stated that the duty of the Federal and State courts to avoid interference with the process of the other was more than a matter of comity - it was a principle of right and of law, and therefore of necessity. Does the "judicial arm" of the Department of the Army - that is, commanders and judge advocates, possess a similar duty?

Slight inroads began to be made in the application of the physical power concept of jurisdiction over nonresidents. The nonresident motorist statutes, now almost universal,[38] received their first constitutional test in the cases of Kane v. New Jersey[39] and Hess v. Pawloski.[40]

The State of New Jersey enacted a statutory scheme whereby a nonresident motorist, before operating his vehicle on the state highways, had to accomplish the following: (1)register his vehicle with the New Jersey state authorities, and (2)appoint in writing the New Jersey Secretary of State as his agent for purposes of accepting service of process for any action arising out of operation of the motor vehicle within the state. By statute, service of process upon the Secretary of State would have the same force and effect as if service had been accomplished upon the nonresident motorist within the state. Once service was effected upon the Secretary, the Commissioner of Motor Vehicles had a statutory duty to notify by mail the nonresident operator of the service

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[38] See Note, Nonresident Motorist Statutes - Their Current Scope, 44 Iowa L. Rev. 384 (1959).

[39] 242 U.S. 160 (1916).

[40] 274 U.S. 352 (1927).

of process. In Kane v. New Jersey, Kane was arrested while operating his vehicle in New Jersey; he had not complied with the statutory requirements regarding nonresident's operation of motor vehicles within the State. He was brought before a state court, convicted for a violation of the statute, and fined five dollars. The Supreme Court of the United States upheld the constitutionality of the statute. Through the state's power, in the absence of national legislation upon the subject, to regulate the use of its highways by motor vehicles moving in interstate commerce, the Court held that the State of New Jersey could require nonresident owners to appoint a state official as agent upon whom process may be served in proceedings brought against them, resulting from their activities within the state.[41] The State of Massachusetts then went one step further in a similar statutory scheme to assert personal jurisdiction over nonresidents.

In Hess v. Pawloski the Supreme Court upheld the validity of a statutory scheme whereby a nonresident motorist, by operating his vehicle on the state highways in Massachusetts, thereby subjected himself to the per-

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[41] Kane v. New Jersey, 242 U.S. 160, 167 (1916).

sonal jurisdiction of the state courts for any actions arising out of the operation of his vehicle. By the operation of his vehicle within the state, the nonresident also appointed the Registrar of Motor Vehicles as his agent for purposes of accepting any process issued during such actions. Hess, a resident of Pennsylvania, operated his motor vehicle on the state highways of Massachusetts and, while in the State, he was involved in a collision with Pawloski. Pawloski then initiated a law action in a Massachusetts court to recover damages for personal injuries; he alleged that Hess had operated his motor vehicle in a negligent manner within the state and had thereby struck and injured the plaintiff. Because Hess had left the State of Massachusetts soon after the collision, Pawloski took advantage of the state nonresident motorist act and left a copy of the summons and complaint with the Registrar. Pawloski then sent notice of the service upon the Registrar to the defendant by registered mail, for which Hess signed a receipt. Pawloski recovered an in personam judgment, which Hess appealed to the Supreme Court of the United States. The Supreme Court affirmed the judgment, stating that the statute was a valid exercise of the state police power.

Because motor vehicles were considered dangerous machines, the State of Massachusetts was permitted to subject a non-resident to the personal jurisdiction of its courts for any actions arising out of the operation of the vehicles within the state.[42]

The Kane and Hess cases are significant. Hereafter the State is permitted to assert personal jurisdiction over nonresidents through a statutory fiction where the nonresident appoints an agent within the state, provided that the method of service employed by the state meets the notice requirements of due process. In Hess the state was able, through the use of a legal fiction, to effect service upon the nonresident's agent within the state and thus meet, in a technical sense, the territorial requirement of Pennoyer v. Neff.

The Kane and Hess cases are important for another reason. They represent a shift away from the traditional bias in favor of the nonresident defendant. The party

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[42] 274 U.S. 352, 356 (1927). The Court, speaking through Mr. Justice Butler, takes one step beyond Kane, by stating that the State may, in the public interest, require a non-resident to answer for his conduct in the State where arises the causes of action alleged against him, as well as to provide for the claimant a convenient method by which he may sue to enforce his rights. Id.

injured by the nonresident is provided now a convenient forum in which he could sue to enforce his rights within the state where most of the witnesses were located. The traditional jurisdictional bias is reflected in those provisions of paragraph 5b(3)(b), AR 27-40 concerning process of state courts on Federal enclaves not subject to the right to serve process; the commander extends "comity" and permits service of state process only if the soldier elects to accept process voluntarily. The Army is concerned that a commander might commit a violation of the Posse Comitatus Act if he assists the state authorities in effecting service of state civil process where the state authorities are not otherwise authorized under state law to serve process.[43] The validity of this conclusion is questionable in the Hess situation, for the soldier will have already subjected himself to the jurisdiction of a state court; the process only serves the function of constituting actual notice of the proceedings. If the state courts have any jurisdiction basis upon which it may assert personal jurisdiction over the defendant, other than personal service of process, then the process presented to the military authorities represents only

[43] JAGA 1964/3500, 25 Feb. 1964.

actual notice of the proceedings - not an authorized assertion or execution of state law within the meaning of Pennoyer v. Neff. Therefore, it is important to study further the jurisdiction bases upon which state courts may assert personal jurisdiction.

In Henry L. Doherty & Co. v. Goodman[44] the Supreme Court rendered another land-mark decision expanding a state's power to impose terms to nonresidents regarding personal jurisdiction as to activities within their borders. In 1926 Doherty, a resident of New York, established an office at Des Moines, Iowa; and there, through agents, he carried on the business of selling corporate securities through the State. A salesman operating from the Des Moines office negotiated in that city a sale of stock to Goodman and, from this contract of sale, Goodman subsequently sought a personal judgment for damages against Doherty. An Iowa statute provided that whenever an individual transacts business through an office located in a county other than that in which the principal resides, service may be made upon any agent or clerk employed in that office. Pursuant to this statute summons was served upon Doherty's office manager in

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[44] 294 U.S. 623 (1935).

Des Moines. The Supreme Court of the United States affirmed the personal judgment recovered against Doherty, finding that the special state interest in this case, upon which the state could assert personal jurisdiction, was in regulating dealings in corporate securities. The Court used again the benefit-burden theory-that is, "a nonresident who gets all the benefit of the protection of [state laws] with regard to. . .business so transacted ought to be amenable to the [state laws] as to transactions growing out of such business."[45] Doherty's allegation that the statute denies him, a nonresident of Iowa, equal protection of the law was rejected. Ten years later, the Supreme Court decided International Shoe Co. v. Washington and swept aside most of the physical power concept of jurisdiction remaining from Pennoyer v. Neff.

The State of Washington required that employers pay into a state unemployment compensation fund a specific percentage of wages paid for the services of employees located within the State. The State assessed contributions to the fund from the International Shoe Company, a corporation incorporated in Delaware and that had its

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[45] Id., at 627.

principal place of business in St. Louis, Missouri. The company maintained no office in Washington, did not enter into any contracts either for sales or purchases of merchandise there, maintained no stock of merchandise in that State, and made no deliveries of goods in intrastate commerce. However, during the years from 1937 to 1940, the period for which the State assessed contributions, the company employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis, Missouri. These salesmen resided in Washington; their principal activities were confined to that State; and they were compensated by commissions based upon the amount of their sales. Notice of the State's assessment for the years in question was personally served upon a sales solicitor employed by the company in the State of Washington, and a copy of the notice was mailed by registered mail to the company at its address in St. Louis, Missouri. The administrative tribunals within the state Office of Unemployment and the state courts held that the state unemployment compensation statute was constitutional as applied to the company, and that the Commissioner was entitled to recover the unpaid contributions. The company appealed the state judgment to the Supreme Court of the United

States, alleging that the statute as applied infringed upon the due process clause of the Fourteenth Amendment. The Supreme Court held that the state courts held jurisdiction to render a judgment in personam over the company, because the company's activities through its agents within the state established its presence for purposes of suit for obligations arising out of those activities within the state.

The Supreme Court expanded considerably the concepts of a state's jurisdiction over nonresidents expressed in Pennoyer v. Neff, as follows:

> Now that the capia ad respondendum has given way to personal service of summons or the other form of notice, due process required only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[46]

The Court did note that a single or isolated activity was not a sufficient "minimum contact" to support jurisdiction of a nonresident defendant on causes of action unconnected with his activities there. However, to the extent that the International Shoe Company exercises the privilege of conducting activities within the State of Washington,

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[46] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

the company enjoys the benefits and protection of the laws of that state. These benefits subject the company to the burden of responding to suits brought to enforce obligations arising out of or are connected with its activities within the state.[47] The Court imposed a criteria for asserting in personam jurisdiction that looked to such "contacts of the [defendant] with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there."[48] This concept of reasonableness to defend in a particular jurisdiction becomes almost a constitutional right in itself, for the court states that the purpose of the due process clause was to insure "the fair and orderly administration of the laws."[49]

In McGee v. International Life Insurance Co.[50], the

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[47] Id., at 317. Note that a similar benefit-burden standard was applied to the sojourning resident in Milliken v. Meyer, and to the nonresident conducting business through an agent in Henry L. Doherty & Co. v. Goodman.

[48] International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

[49] Id., at 319.

[50] 355 U.S. 220 (1957).

Supreme Court held valid under the due process clause a California statute that subjected foreign corporations to suit on insurance contracts with California residents, even though the insurers could not be served with process in the state. The Texas Court of Civil Appeals, relying on the due process clause, refused full faith and credit to a California judgment based on this statute. The United States Supreme Court reversed, rejecting the "statutory consent," "doing business," and "presence" standards of jurisdiction; and it reaffirmed the test of "minimum contacts with [the state] such that the suit does not offend 'traditional notions of fair play and substantial justice,'" citing International Shoe Co.[51] McGee was the beneficiary under her son's insurance contract and, when he died, she sent proofs of his death to the defendant, an insurance company located in Texas. The International Life Insurance Company refused to pay her, claiming that the insured had committed suicide. McGee brought suit in California, and the defendant company was notified of suit by registered mail at its principal place of business in Texas. The defendant had no office or agent in California, nor did it solicit any business there apart from the policy sued upon. A state

[51] 326 U.S. 310, 316 (1945).

court in California assumed jurisdiction under the statute and rendered a personal judgment for McGee. She then went to Texas and filed a suit on the California judgment. As stated above, the Texas courts refused full faith and credit to the California judgment. The Supreme Court of the United States found that the requirements of due process had been met, for the suit was based on a contract which had substantial connection with California.[52] The elements of this connection enumerated by the Court were delivery of the contract in the state, payments of premiums from there, and the residence of the insured there when he died. The Court believed that California had a manifest interest in providing effective means of redress for its residents when their insurers refused to pay claims. While the defendant may have been inconvenienced when held amenable to suit in California, the Court saw nothing in the case which amounts to a denial of due process.

In the McGee case the Court commented on the trend towards the expansion of the permissive scope of state jurisdiction over nonresidents, observing that:

> In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may in-

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[52] McGee v. International Life Insurance Co., 355 U.S. 220, 225 (1957).

> volve parties separated by the full continent. . .At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.53

The Supreme Court has continued to assert that due process places some limitations on the power of state courts to enter binding judgments on persons not served with process within their borders. However, since the International Shoe Co. and McGee cases, it must appear only that the defendant over whom personal jurisdiction is asserted has had such "minimum contacts" with the state as to render it consistent with "traditional notions of fair play and substantial justice" that he be compelled to defend himself there. The decisions of the United States Supreme Court have so expanded the in personam jurisdiction of the state courts that, if the state statute permitted such practice, a state court could assert personal jurisdiction over a nonresident serviceman for a single breach of contract or single tortious act committed in a town near the military

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[53] Id., at 222-23. See Perkins v. Benguel Consolidated Mining Company, 342 U.S. 437, rehearing denied 343 U.S. 917 (1952) (substantial activities within the state gave state court jurisdiction over cause of action arising outside of the state); and Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) (close economic relationship between two communities separated by state lines).

installation at which he is stationed.[54]

For example, with the adoption of section 17 (as implemented by section 16), chapter 110, Civil Practice Act,[55] the State of Illinois expanded the in personam jurisdiction of its courts over nonresidents to the limits permitted under the due process clause of the Fourteenth Amendment.[56] The section provides that any person who does any of the acts hereinafter enumerated thereby submits himself to the jurisdiction of the state courts as to any cause of action arising from the doing of any such acts:

> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;

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[54] E.g., Ill. Ann. Stat., ch. 110, § 17 (Smith-Hurd 1968) provides that a person subjects himself to the jurisdiction of state courts if he commits a tortious act or breaches a contract within the state.

[55] Ill. Ann. Stat., ch. 110, §§ 16,17 (Smith-Hurd 1968).

[56] See footnote 18, supra at 12.

(e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.[57]

Section 16 provides that personal service of summons may be made upon any party outside of Illinois and, if made upon a citizen or resident of the state or upon a person who has submitted to the jurisdiction of the state courts, such service shall have the force and effect of personal service within the state. A recent state court in Illinois has interpreted section 17 to mean that jurisdiction exists: (1) if the defendant has voluntarily established certain minimum contacts with the State, (2) if the State has an interest in providing the plaintiff a forum for litigation, and (3) if the assertion of jurisdiction is not fundamentally unfair.[58]

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[57] Ill. Ann. Stat., ch. 110, § 16, ¶ (1) (Smith-Hurd 1968). Comparable provisions in other states are Cal. Civ. Pro. Code § 417 (West Supp. 1968); Colo. Rules Civ. Proc., Rule 4(f) (1963); N.Y. Civ. Prac. Law §§ 302, 313 (McKinney Supp. 1968).

[58] Koplin v. Thomas, Haab & Botts, 73 Ill. App. 2d 242, 248-49, 219 N.E.2d 646, 649 (1st D. 1966). There are several situations wherein a court may refuse to exercise its admitted jurisdiction over a serviceman - for example, a situation where there is no "rational nexus" between the forum state and the parties or the inquiry (see Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966)) or under the common law doctrine of forum non conveniens (see Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593 (1948)).

In Kropp Forge Co. v. Jawitz[59] a state court in Illinois assumed personal jurisdiction over a New York resident, on the basis of transacting of business within the state. The defendant was located in New York and had negotiated by mail with the plaintiff, located in Illinois, for the purchase of certain machinery from plaintiff. Defendant also visited plaintiff's premises in Illinois to inspect the machinery. The Appellate Court held that the Illinois court had jurisdiction by reason of "either the making of the alleged contract itself, or the activity in furtherance of it, while defendant was physically present in Illinois."[60] In Hichina v. Futura, Inc. a Federal court in Colorado made it clear that under the Colorado long arm statute personal jurisdiction could be asserted in tortious injury situations, so long as both the asserted negligent act or acts of the nonresident defendant and the injury they produce occur within Colorado.[61] In the

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[59] 37 Ill. App. 2d 475, 186 N.E.2d 76 (1st Dist. 1962).

[60] Id., 37 Ill. App. 2d 475, 481, 186 N.E.2d 76, 79 (1st Dist. 1962).

[61] 260 F. Supp. 252 (D. Colo. 1966). Compare with Gray v. American Radiator & Standard Sanitary Co., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), where the tort was committed outside the state, but the injury was incurred within the state.

many cases of this type - this is, where the defendant has subjected himself to the personal jurisdiction of the state courts by acts within the state, the courts have always looked to see whether the defendant had engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum.

As noted earlier in Pennoyer v. Neff, the Supreme Court believed that a state possesses exclusive jurisdiction over persons and property within its territory. Because of its duty to protect its own citizens when nonresidents deal with them, the state could exercise its authority to hold and appropriate any property within its territory owned by such nonresidents to satisfy the claims of its citizens.[62] However, in that case the court believed that the jurisdiction of a court to inquire into and determine the extent of the nonresident's obligations was only incident to its jurisdiction over the property of the nonresident. Subparagraph 5b(3)(c), AR 27-50 provides that "civil officials may enter areas [on military installations] subject to the right to serve process for the purpose of levy on and the subsequent sale

[62] Pennoyer v. Neff, 95 U.S. 714, 722(1878).

of personal property of personnel residing thereon, subject to reasonable limitations." Assuming that a state court had not obtained personal jurisdiction over the individual and he is away from the installation on temporary military duty, did the military authorities intend as a matter of policy to provide a state court in rem or quasi in rem jurisdiction under these circumstances?[63] Or, is the regulatory provision intended only to provide for the situation where a court had obtained previously in personam jurisdiction over the person and has now issued a writ of execution in satisfaction of a judgment? In Hanson v. Denckla[64] the Supreme Court of the United States discusses a state's in rem jurisdiction over property located beyond its territorial borders.

While domiciled in Pennsylvania, Mrs. Dora B. Donner executed in Delaware a revocable deed of trust making a Delaware Trust Company, Wilmington Trust Company, trustee

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[63] The nature and effect of process will be discussed subsequently in the section immediately following, but note here the regulation does not distinguish between original process and final process (usually writs of execution). In chapter IV the permissive scope of state reservations of the right to serve process will be studied.

[64] 357 U.S. 235 (1958). For more information see Carrington and Martin, Substantive Interests and the Jurisdiction of State Courts, 66 Mich. L. Rev. 227 (1967).

of certain securities. She reserved the income from the securities for life and provided that the remainder should be paid to such parties as she should appoint by inter vivos or testamentary instrument. Later, after becoming domiciled in Florida, Mrs. Donner executed (1) an inter vivos instrument appointing certain of her grandchildren to receive a large portion of the trust property, and (2) a will with a clause giving the residue of her estate to two of her daughters, Denkla and Stewart. Mrs. Donner died shortly thereafter. Denkla went into a Florida court, attacking the validity of the inter vivos appointment under Florida law. Hanson, as executriux under the will of Mrs. Donner, went into a Delaware court for a declaratory judgment. Both state judgments reached the Supreme Court of the United States. The Supreme Court reversed and remanded the Florida judgment, holding that the court had lacked in personam jurisdiction over the nonresident trust company in Delaware (an indispensable party to the action under Florida law) and had lacked in rem jurisdiction over the trust property located also in Delaware. The Delaware judgment was affirmed.

The Supreme Court saw in this case that there was a lack of those "affiliating circumstances" upon which the

courts of a state may enter a judgment imposing obligations on persons (jurisdiction in personam) or affecting interests in property (jurisdiction in rem or quasi in rem). The court restated its position in McDonald v. Mabee that "the foundation of jurisdiction is physical power," and that the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister states.[65] The basis of in rem jurisdiction is the presence of the subject property with the territorial jurisdiction of the forum state, and here all parties seem to assume that the trust assets that formed the subject-matter of this case were located in Delaware and not in Florida. The fact that Mrs. Donner, the owner of the trust fund, is or was domiciled within the forum state was not deemed a sufficient affiliation with the property upon which Florida could base jurisdiction in rem.

The court cautioned that the trend of expanding personal jurisdiction over nonresidents did not mean the end of all restrictions on state courts. It stated that "how-

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[65] Id., at 246. The court did not intend to infer that the in personam and in rem classifications exhausted all of the situations that give rise to jurisdiction. E.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (interest of each state in closing trusts); Williams v. North Carolina, 317 U.S. 287 (1942); and the McGee case (insurance contracts).

ever minimal the burden of defending in a foreign tribunal, a state may not call upon a defendant to do so unless he has had the 'minimum contacts' with that state that are a prerequisite to its exercise of power over him."[66] The cause of action in Hanson did not arise out of an act done or consummated in Florida, so the plaintiff could not say that the suit was one to enforce an obligation that arose from a privilege that the defendant exercised in Florida.[67]

Sufficient cases have been presented, so that one realizes that states are now given considerable latitude in prescribing the circumstances under which their courts may assert personal jurisdiction over nonresidents. Under a statutory scheme similar to that used by Illinois, the mere doing of a tortious act or committing a breach of contract within the state subjects the individual to personal jurisdiction of the state courts. In these circumstances the defendant may be served with process outside of the state, and the state need only provide a method of service that is reasonably calculated to provide the defendant with notice of the proceedings. It appears appropriate to study further the nature and effect of service of process.

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[66] McDonald v. Mabee, 243 U.S. 90, 91 (1917).

[67] Hanson v. Denchla, 375 U.S. 235, 251 (1958).

B. Nature and Effect of Service of Process

Assuming that the requisite "minimum contacts" exist between the soldier and the forum state, due process requires only that, in order to subject the defendant to a judgment in personam, the method of service employed is reasonably designed to give him actual notice of the action pending against him.[68] The purpose of this section is to review pertinent decisions of Federal and state courts, in order to reach a better understanding of the constitutional and permissive methods of service. In most instances the cases refer to a summons, or notice, which is a form of judicial process called original process. In Chapter III, the nature and effect of other forms of process - that is, mesne or immediate and final process, will be studied in pertinent cases and statutes involving military personnel.

The term "service of process" has a variety of meanings, dependent upon the context or the sense in which used. In technical language the term may be construed to mean the exhibition or delivery of a writ, notice of injunction, etc., by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he is concerned, and he is thereby advised

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[68] Milliken v. Meyer, 311 U.S. 457 (1940).

or warned of some action or step which he is commanded to take or to forbear.[69]

After the plaintiff has selected a court in which to commence his action, service of original process must be accomplished. The process typically consists of a summons which directs the defendant to appear and defend under penalty of default; that is, unless defendant answers the summons, a judgment will be entered against him. With the summons, the plaintiff, or some other person authorized by statute, will serve on the defendant the first of the pleadings, commonly called the complaint. Following the service of the plaintiff's complaint, the defendant must respond. He may challenge the complaint by a motion to dismiss, thus challenging the court's jurisdiction over the subject-matter of the action or the defendant's person, the manner in which the summons was served, or the improper venue of the court issuing the summons. Service of original process thus serves two functions: (1) to bring the body or property of the defendant under the control of the court by seizure or

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[69]United States v. McMahon, 164 U.S. 81 (1896). In its broadest sense the term "process" includes all writs which may be issued during an action under authority of the court.

some equivalent act; and (2) to inform the defendant of the object of the proceedings initiated by a plaintiff.

Service of process generally is achieved by personal service - that is, the summons is physically delivered to the defendant or is left at his home, sometimes by the plaintiff or his attorney, sometimes by a public official such as a sheriff or a United States Marshal.. If the defendant is a resident in, but temporarily absent from, the forum state, or the circumstances are such that a court in the plaintiff's state may assert personal jurisdiction over the defendant, summons may be personally delivered to him outside of the forum state. In this event, statutes usually provide that such service shall have the full force and effect as service had been accomplished within the state. Substitute service is accomplished usually by sending the process by registered mail to the defendant or by delivery to his agent located within the forum state. Even if the defendant cannot be located, constructive service, usually by publication in a newspaper for a certain length of time, may be allowed. Whatever method of service is provided, the Supreme Court repeatedly has emphasized that service must be of a kind reasonably calculated to bring the action to defendant's notice. Now it appears appropriate to study specific

cases where one of these methods of service have been employed.

The right of a state to provide for personal service upon a citizen or resident of the state when such person was absent from the state was made clear by Milliken v. Meyer. There the United States Supreme Court held valid a Wyoming judgment rendered against a resident of Wyoming (Meyer), who was personally served with process in Colorado pursuant to a Wyoming statute. Meyer did not appear at the proceedings, and the Wyoming court entered an in personam judgment by default against him. In its decision the Court stated that one incident of domicile, using the benefit-burden theory discussed earlier in this chapter, was the resident's amenability to suit within the state even during sojourns without the state, so long as "the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him."[70] The court referred to a case where the process was left at the absent

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[70]Milliken v. Meyer, 311 U.S. 457, 463-64 (1940). In its decision the Supreme Court made reference to its earlier decision in Blackmer v. United States, 284 U.S. 421 (1932), wherein a citizen of the United States was served with Federal process in Paris, France. The Supreme Court held the District Court for the District of Columbia by such personal service obtained personal jurisdiction over Blackmer.

defendant's usual place of abode within the state as an example of substituted service that met this standard.[71] For military personnel such a form of substitute service involves a determination whether his military quarters or his "home of record" constitutes "his usual place of abode" for purposes of the service statute. The case of McDonald v. Mabee lends light to this problem area.

Mabee, the defendant, was domiciled in Texas and left the state, intending to make his home elsewhere; his family resided in Texas in the meanwhile. During Mabee's absence McDonald initiated an action upon a promissary note against him in a Texas court. Mabee returned subsequently to Texas for a short time, then he departed with his family and established a domicile in Missouri. The only service of summons accomplished was that by publication in a newspaper after his final departure from Texas. The Texas appellate courts sustained the validity of the personal judgment recovered by McDonald. The Supreme Court of the United States reversed, saying that service by publication does not warrant the issuance of

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[71] Hurlburt v. Thomas, 55 Conn. 181, 10 A. 556 (1887). However, the method employed against a particular defendant must be authorized by state statute. See footnote 22, supra. at 15.

a personal judgment against a nonresident [sic]. As dicta, the Court stated:

> Perhaps in view of [Mabee's] technical position [domiciled in Texas] and the actual presence of his family in the State, a summons left at his last place and usual place of abode would have been enough. . .To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.72

Other Federal and state courts have used this criteria in cases involving defendants who lived within the forum state prior to entry into military service.

A number of state courts have not permitted substituted service upon the serviceman's "previous" residence within the State. Either the provisions of state statutes were interpreted strictly and the serviceman's "place of abode" was held to be at his military station, or the serviceman was held to have established his domicile elsewhere.[73] Other state courts, and all Federal courts that have considered the issue, have permitted an inference that the defendant did not change his "usual place of abode"

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[72] McDonald v. Mabee, 243 U.S. 90, 92 (1917).

[73] Eckman v. Grear, 14 N.J. Misc., 807, 187 A., 556 (C.P., Essex 1936). Accord: Booth v. Crockett, 110 Utah 366, 173 P.2d 647 (1946); Kurilla v. Roth, 132 N.J. 213, 38 A.2d 862 (1944).

upon entry into military service and held substituted service valid.[74] All these cases can be reconciled, however, in that the cases where such service was reasonably calculated to provide actual notice of the proceedings to the defendant, the service was sustained. In those cases where the service was not sustained and the statutory procedure for effecting service had been followed, it was clear from the circumstances of each case that leaving the process at the particular address did not meet the "traditional notions of fair play and substantial justice" within the meaning of McDonald v. Mabee. For example, in Eckman v. Grear,[75] the defendant was a minor who had been living with his parents in New Jersey at the time he joined the U.S. Army. He joined the Army with the intention of making it a career, removed all of his personal belongings from the house of his parents, and left for an assignment in Hawaii. While he was in Hawaii, the plaintiff caused a summons to be left with the soldier's father in New Jersey. Under these circumstances the New Jersey would

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[74]Allder v. Hudson, 106 A.2d 769 (Del. Super. Ct. 1954). Accord: Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942); McFadden v. Shore, 60 F. Supp. 8 (E.D.Pa. 1945); Ruth & Clark v. Emery, 233 Iowa 1234; 11 N.W.2d, 397 (1943).

[75]14 N.J. Misc., 807, 187 A. 556 (C.P. Essex 1936).

not permit the substituted service to stand, using as a rationale that the boy's "usual place of abode" was located, at the time of service, in Hawaii.

In those cases where a State court alleges that a defendant-soldier is a resident or citizen of the forum state, a judge advocate should carefully review all of the facts contained in the file and, in some instances, obtain information from the soldier himself, in order to ascertain whether the court would have a jurisdictional basis upon which it could assert personal jurisdiction in the absense of personal service of process upon the soldier.[76] If such a jurisdictional basis exists, then neither the military authorities nor the soldier should complain when process is left at the soldier's "place of residence" within his "home state," or process is served upon him on a military installation. In this case, the soldier can only complain that service was not accomplished properly under state statute, or he can assert his rights under the pertinent provisions of the

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[76]As noted earlier, the forum state must effect personal service within the state on the defendant or possess another basis upon which it can assert personal jurisdiction - E.g., residence, domiciliary wife sues for divorce (See Williams v. North Carolina, 317 U.S. 287 (1942)).

Soldiers' and Sailors' Civil Relief Act of 1940.[77] If such a jurisdiction basis does not exist, independently of personal service of process upon the individual, then the judge advocate must evaluate the jurisdictional authority of the state to effect service of process on the military installation, and this problem area is discussed subsequently in Chapter IV.

As discussed previously, there was an early shift in the function of service of process from arrest to simple notice for residents of the forum state. However, the Supreme Court's decision in Pennoyer v. Neff prevented for a period the development and utilization of state long-arm statutes providing for service of summons upon non-residents located outside of the forum state.

For the members of the Supreme Court in 1878, the more important function of service of summons was to bring the body or property of the defendant under the control of a court by seizure or some equivalent act. Because the

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[77]For reasons discussed in Chapter I, supra., a soldier living on a military installation within a state does not establish domicile or residence therein for service of process purposes. The provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 501 et seq. (1964) do not affect the method of service of state process. McFadden v. Shore, 60 F. Supp. 8 (E.D. Pa. 1945); Robinson v. Five One Five Associates Corp., 180 Misc., 906, 45 N.Y.S.2d, 20 (Sup. Ct. 1943).

summons of the Oregon court was deemed not to have effect beyond the territorial borders of that state, "process sent to [a nonresident] out of the State, and process published within it, [were] equally unavailing in proceedings to establish his personal liability."[78] Neff had not been served with summons in the State of Oregon, and he had not made a voluntary appearance at the proceedings; accordingly, the Oregon court lacked jurisdiction to render a personal judgment. The Supreme Court did say that in certain circumstances a method other than personal service within the State could be utilized. In dicta the Court stated that a state may be able to obtain personal jurisdiction over nonresidents in the absence of personal service within the state in cases in which another mode of service may be considered to have been assented to in advance or in cases affecting the personal status of the plaintiff.[79] The Court would allow also service by publication in actions against nonresidents:

> Where, in connection with process against the person for commencing the action, property in the State is brought

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[78] Pennoyer v. Neff, 95 U.S. 714, 727 (1878). This statement constitutes dicta, for in Pennoyer v. Neff, the only service accomplished was service by publication in a local newspaper; Mitchell, the plaintiff, had alleged that he did not know the address of Neff in California.

[79] Id., at 733.

> under the control of the court, and subjected to its disposition by process adopted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein.[80]

The court then discussed briefly the second function of service of process - that is, to inform the defendant of the proceedings.

Justice Field, speaking for the court, speaks of "that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its results."[81] He believed that if judgments in personam could be obtained ex parte against nonresidents with service of process by mere publication, which in the great majority of cases would never be seen by the parties interested, such judgments would be the constant instruments of fraud and oppression.[82]

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[80] Id. As stated previously, this requirement of seizure of equivalent act of property in in rem or quasi in rem proceedings is still good law. Hanson v. Deckla, 357 U.S. 235 (1958).

[81] Pennoyer v. Neff, 95 U.S. 714, 730 (1878) (emphasis added). In an earlier case the Supreme Court had determined that Congress had not intended that 28 U.S.C. § 1738 (implementing the full faith and credit clause) "displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another." The Lafayette Insurance Company v. French et al. 159 U.S. 404 (1856).

[82] Pennoyer v. Neff, 95 U.S. 714, 726 (1878).

Where the action was in the nature of in rem or quasi in rem proceedings, then the attachment or some equivalent seizure of the property in conjunction with the commencement of proceedings would suffice to inform parties of the proceedings.[83]

The nonresident-motorist statutes, now almost universal, represented an early opportunity for the Supreme Court to expand its statement that a nonresident may consent in advance to a mode of service other than personal service within the state. In Hess v. Pawloski the Supreme Court upheld a statutory scheme whereby a nonresident's operation of his vehicle upon the State highways within Massachusetts constituted his appointment of the Registrar of Motor Vehicles as his agent for acceptance of service of process. The agency relationship thus created only extended to acceptance of process from actions arising out of the operation of the motor vehicle within the State. This method of service provided that: (1) a copy of the process (summons) would be left with the Registrar of Motor Vehicles; (2) the plaintiff was required to send by registered mail notice of service and a copy of the process to the defendant; and (3) the plaintiff needed to submit to the court the defendant's return receipt

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[83] Id., at 727.

to the letter, showing actual receipt of the process. For purposes of the due process clause in the Fourteenth Amendment, the Supreme Court saw no substantial difference between the implied appointment of a state official to accept process and the expressed appointment of such an agent, a statutory practice the Court had upheld in Kane v. New Jersey.[84] One year later, in Wuchter v. Pizzutti, the Supreme Court held unconstitutional a similar statute providing for substituted service within the state upon nonresident motorists, because the statute itself "does not make provision for communication to the proposed defendant such as to create reasonable probability that he would be made aware of the bringing of the suit."[85]

In International Shoe Company v. Washington the Supreme Court delivered a significant decision wherein it swept aside most of the physical power concept of jurisdiction remaining from Pennoyer v. Neff. As stated earlier, the requirement that a defendant be accorded "due process of law" imposes two requirements. First, it must appear that the defendant over whom jurisdiction

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[84] Hess v. Pawloski, 274 U.S. 352, 357 (1927).

[85] 276 U.S. 13, 25 (1928). See National Equipment Rental Ltd. v. Szukhert, 375 U.S. 311 (1964), where the Court upheld a contract that did not provide for such communication.

is asserted has had such "minimum contacts" with the state as to render it consistent with "traditional notions of fair play and substantial justice" that he be compelled to defend himself there. The International Shoe Co. opinion provides the first case in which the Supreme Court expounded the "minimum contacts" theory. The case also furnishes the jurisdictional basis for the Court's decision in McGee v. International Life Insurance Co. The McGee case represents the broadest expression of the second requirement of due process - that is, a method of service employed which is reasonably designed to give the defendant actual notice of the pending action against him.

The State of Washington assessed contributions to a State unemployment compensation fund from the International Shoe Company, a corporation incorporated in Delaware and that had its principal place of business in St. Louis, Missouri. The company employed eleven to thirteen salesmen who worked and resided in Washington. Notice of the State's assessment for the years 1937 to 1940 was personally served in Washington upon a sales solicitor employed by the company, and a copy of the notice was mailed by registered mail to the company at its address in St. Louis, Missouri. The Supreme Court was unable to conclude that "service of process within the State upon an agent whose

activities established the [defendant's] 'presence' there was not sufficient notice of the suit, or that the suit was not so related to those activities as to make that agent an appropriate vehicle for communicating the notice."[86] The Court believed also that the mailing of the notice of suit to the company by registered mail at its home office was reasonably calculated to apprise him of the suit.[87]

Consider a situation where the military authorities refuse to effect service of state process upon a serviceman, or they refuse to permit any other person authorized to serve the process, to effect service upon the soldier on a military installation. Assuming that a state statute so authorized, could the person whose efforts were blocked by the military authorities effect service by using one of the following methods: (1) mail the process to the soldier by either registered or ordinary mail, (2) leave a copy of the process with either the commander or the installation legal officer, or

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[86] International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[87] Id. See Wagenberg v. Charleston Wood Products, Inc., 122 F. Supp. 745 (E.D.S.C. 1954), holding that the sending of notice by ordinary mail by the Secretary of State, after substitute service has been made upon him, is sufficient.

(3) refer the court's attention to those provisions of AR 27-40 which require the individual to be informed "of the matter" and to elect whether he will accept service of the process voluntarily. Within the constitutional sense of due process, any one of these methods could be considered reasonably calculated to apprise the defendant of the proceedings. However, at present few states authorize such a broad option in methods of accomplishing service.

In McGee v. International Life Insurance Company, the Supreme Court held valid under the due process clause a California statute that subjected foreign corporations to suit on insurance contracts with California residents, even though the insurers could not be served with process in the State. McGee, the beneficiary of an insurance contract with the insurance company, brought suit in California. The defendant company was notified of suit by registered mail at its principal place of business in Texas. The defendant had no office or agent in California, nor did it solicit any business there apart from the policy sued upon. The court affirmed the personal judgment recovered by McGee, stating that while there may be inconvenience to the insurer if it is held amenable to suit

in California where it had this contract, the court saw nothing which amounts to a denial of due process. The opinion did not even consider the method employed for service of process - that is, merely mailing process to the defendant's principal place of business outside of the forum state; it simply contained the statement that "there is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear."[88]

This study is not intended to suggest that in every case in which there exists the"minimum contacts" for assertion of personal jurisdiction, one can merely mail process to the defendant and meet the requirements of due process. Cases which stand for limitations on the method used are McDonald v. McBee, in which the Supreme Court required that a method be used that is most likely to reach the defendant, and Mullane v. Central Hanover Trust Co.[89] In the Mullane case the Supreme Court struck down a quasi-in-rem judgment based upon service by pub-

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[88]McGee v. International Life Insurance Co., 355 U.S. 220, 224 (1957); the omission appears deliberate, in view of the court's careful analysis of methods used from Pennoyer v. Neff to International Shoe.

[89]339 U.S. 306 (1950).

lication to all "known and unknown beneficiaries" of a common trust fund administered in New York.

A trust company, which had exclusive management and control of a common trust fund, petitioned under a New York statute for judicial settlement of accounts. Under state law such a settlement would be binding and conclusive as to any matter set forth therein upon everyone having any interest in the common fund or in any participating fund. The only notice of the petition given beneficiaries was by publication in a local newspaper pursuant to state statute. The Court saw that the interest of each state in providing a means to close trusts, that exist by the grace of its laws and are administered under the supervision of its courts, establish beyond doubt the rights of its courts to determine the interests of all claimants, residents or nonresidents. However, this interest of the state must be balanced against the property rights of the individual, and due process requires that statutory procedures provide each individual a full opportunity to appear and be heard. The Court stated while it has not "hesitated to approve or resort to publication as a customary substitute. . .where it is not reasonably possible or practicable to give more adequate [notice of the proceedings]", publication tradi-

tionally has been accepted as notification supplemental to other action, which in itself may reasonably be expected to convey notice - e.g., attachment of a chattel or entry upon real estate in the name of the law.[90] In the case of persons missing or unknown, the Court would recognize that "employment of an indirect and even a probably futile means of notification is all that the situation permits."[91] However, the Court believed that the statutory notice by publication to beneficiaries whose mailing addresses are known is inadequate, not because in fact it fails to reach everyone, but because "under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."[92] In this case due process requires that all beneficiaries whose addresses are in the trust company's files be provided notice of the proceedings by mail. After the ruling in the Mullane case, it appears that a court would not have jurisdiction to effect service by publication against a serviceman whose address is unknown, irregardless of the nature of the proceed-

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[90] Id., at 317.

[91] Id.

[92] Id., at 315.

ings, unless the court or plaintiff had attempted at least to transmit written notice to the defendant through Department of the Army channels.[93]

Now it appears appropriate to study the unique status of military personnel in the Department of the Army, in respect to state process. There exist a large number of Federal statutes on the subject, both providing and taking away the jurisdiction that state courts may assert over military personnel.

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[93] See Robinson v. Five One Five Associates Corp., 180 Misc., 906, 45 N.Y.S.2d 20 (Sup. Ct. 1943), wherein plaintiff had attempted to locate the defendant serviceman, but he was unable to obtain the defendant's address from the War Department or his relatives or business friends.

CHAPTER III

STATUS OF DEPARTMENT OF ARMY MILITARY PERSONNEL

The authority by which a state court issues process and effects its service is largely dependent upon its jurisdiction over the subject matter, the person, and the relief sought in a particular case. State courts have had specific limitations placed upon their jurisdiction in each of these three areas in cases involving military personnel in Federal service. For example, the supremacy clause in the Federal Constitution and McCulloch v. Maryland et. seq.[94] places limitations upon a state's jurisdiction over Federal activities (subject matter and personnel (the person)). The Soldiers' and Sailors' Civil Relief Act of 1940 places limitations upon a state's jurisdiction over the relief sought. On the other hand, the Federal Tort Claims Act[95] expands a state's jurisdiction over the tortious conduct (subject matter) of military personnel (person) in Federal service.

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[94] M'Culloch v. Maryland, 17 U.S. 316 (1819).

[95] 28 U.S.C. § 2671 et. seq. (1964). For purposes of this thesis, the expression "servicemen" means military personnel serving in the Department of the Army. Frequent references are made in this chapter to military personnel in Federal service and those in state service.

While the provisions of subparagraph 5b(3), AR 27-40 stress the right to serve state process and the acceptance of service voluntarily in accordance with state law, the regulation uses the term jurisdiction only in relationship to Federal jurisdiction over the installation (and whether the State had reserved the right to serve process).[96] The regulation does not provide guidance for a situation where a state court may have a right to effect service of process on a Federal enclave independently of a state reservation of such right.

The purpose of this chapter is to review pertinent statutes and cases concerning a state's jurisdiction over the persons of military personnel in Federal service and over their activities. The study will show that defendant's status as a serviceman in Federal service has a

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[96] See appendix. DA Pam. 27-164, which is intended to provide information and reference material for the military lawyer, contains the following statement in para. 7.5: "Service of state process in exclusive and partial jurisdiction areas is invalid unless the right to do so has been reserved by the state, or Congress has enacted enabling legislation as it has done in some instances." (emphasis supplied). However, the Pamphlet does not pursue the theory that "enabling legislation" such as the Federal Tort Claims Act or the Buck Act express Congressional intent that the state shall have jurisdiction in these areas - and the jurisdiction includes the right to serve process on Federal enclaves. This theory is discussed in Chapter IV, infra.

definite impact upon a state court's jurisdiction. However, before such a study is made, a brief discussion is appropriate concerning the operation of the judicial process in the United States and the function served by judicial writs (process) in civil litigation.[97]

A. Judicial Process

When approaching the concept of "service of process", one must keep in mind the nature of judicial process as it operates in the United States. The framework of judicial process whereby courts determine legal controversies is composed of procedural rules prescribing operation of the judicial system and of the community's general sense of order (i.e., jurisprudence). When one speaks of the issuance of writs, which is no more than an exercise of the court's authority, he must look first to the constitution and statutes under which a particular state court

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[97]There are at least two objections to a general discussion on the use of process in civil litigation: (1) only through research of applicable state law can one determine the scope and meaning of "process" and "service", and (2) a general outline of general civil procedure is too "elementary" for a thesis. To counter these arguments one can see there are generally accepted classifications of process and of service, and, for reasons stated in the textual material, commanders and judge advocates must proceed from the known to the unknown - and certain basic concepts in civil procedure are often overlooked by both groups.

is established.

The U.S. Constitution, Federal legislation, and opinions of the Supreme Court of the United States further limit the courts' authority but, generally speaking, the state constitution and statutes prescribe the authority which the court possesses to adjudicate particular controversies and the procedures by which the court must operate. If a state court is not operating within its own established procedures - for example, using a method of service not authorized, then a military commander of an installation has more relevant facts upon which he can grant or deny a request for military assistance.

Even in those cases where a state court is operating strictly within its prescribed procedures, state courts do not operate within their own separate sphere of influence in a Federal union. These courts derive their authority from the several states of the Union which are not, in many respects, independent; many of the rights and powers which originally belonged to the states were vested in the Federal government. The scope of a state's power (i.e. jurisdiction) has been narrowed in respect to individuals (the due process clause), to other states (the full faith and credit clause), and to the Federal government (the supremacy clause). As state

jurisdiction is limited in particular circumstances, so is the authority of its courts in issuance and service of process.

In chapter II it was pointed out that all writs issued by courts may be properly called process. Process in turn may be divided into three classifications: (1) original, (2) mesne, or immediate, and (3) final, or judgments. At that time the subject of original process was discussed. The second classification of process is the mesne or intermediate writ issued during the course of judicial proceedings between the commencement of the action and final judgment. Different types of mesne process would include attachments, preliminary injunctions, temporary restraining orders and civil arrest.[98] These particular writs are not technically a method of "service"; however, in those cases where their use is authorized as "provisional remedies," the writ may per-

[98]Note that after commencement of and during the course of an action a Federal court may use the mesne process (or sometimes called provisional remedies) available to the courts of the state in which it is sitting, to the extent the state remedies are not inconsistent with any other Federal rule or statute. 28 U.S.C.A., Federal Rules of Civil Procedure, Rule 64 (1960). For this reason the cumulative annual pocket parts in the Federal Code Annotated 2nd U.S.C.A. are important sources of information on state writs.

form the notice function of service.

There are two basic grounds for the use of attachment: (1) securing jurisdiction in in rem or quasi in rem cases when the court cannot acquire jurisdiction over the person of the defendant, and (2) preventing defendant from selling or otherwise disposing of any real or personal property that has been taken into the custody of the attaching officer. A preliminary injunction is available when defendant is acting or threatening to act in a manner that would irreparably injure plaintiff or render the judgment in the action ineffectual. When the plaintiff believes that immediate relief is essential, he may apply for a temporary restraining order, which a court will issue upon a showing that irreparable harm will occur absent an order. Unlike the preliminary injunction, an application for a restraining order usually is made ex parte because time considerations do not permit the giving of normal notice. A temporary restraining order generally will remain effective only for a relatively brief period or until a hearing is held on plaintiff's request for a preliminary injunction.

The provisional remedy of civil arrest had its genesis in the common-law practice of commencing an

action by taking the defendant into custody and imprisoning him until judgment was rendered or bail was posted. The availability of civil arrest varies widely from state to state, but it is seldom used today.

The third classification of process is the judgment - that is, the final determination of the law suit absent an appeal. A judgment may be in the form of an award of money to the plaintiff (compensatory), a declaration of rights between the parties (declarative), or specific recovery of property or an order requiring or prohibiting some future activity (specific). When the defendant has prevailed, the judgment generally will provide that the plaintiff takes nothing by his complaint. In most cases a judgment for plaintiff will simply state that the plaintiff shall recover a sum of money from defendant. If the defendant does not pay voluntarily, execution is the common method of forcing him to satisfy the money judgment. A writ of execution is issued by the court commanding an officer - usually the sheriff - to seize property of the defendant. If necessary, the officer will sell the property at public sale and use the proceeds to satisfy plaintiff's judgment. When plaintiff's recovery takes the form of an injunction requiring defendant to do something or

to stop doing something, the judgment (in this context typically called the decree) is said to operate against defendant's person. If the defendant fails to obey, he may be held in contempt of court and punished by fine or imprisonment.

Once a state court has obtained jurisdiction over the person of a serviceman through service of summons (original process) or over the property of a serviceman through attachment (mesne process), the court normally possesses jurisdiction through its proceedings. However, as pointed out in chapter II, supra, jurisdiction over the person or property of the defendant does not per se confer jurisdiction over the other. The state court must have a base upon which it can assert jurisdiction other than service of process upon the person or property of the defendant. Once a state court possesses a basis for assertion of jurisdiction over the person or property of the defendant, the court needs only to effect service of summons (original process) on the person or to attach property (mesne process) of the defendant to complete its authority to adjudicate the controversy. As stated by the Supreme Court of the United States: "The foundation of jurisdiction is physical power [and] it is not necessary to maintain that power throughout

proceedings properly begun...."[99] However, in the absence of comity, the Supreme Court has continued to insist that only final process - that is, judgments, resulting from proceedings during which the court had jurisdiction over the person or property of the defendant, will receive full faith and credit from other states. While the service of original and mesne process extraterritorially may lack coercive effect, the court will recognize that it will provide the defendant actual notice of the proceedings.

B. Under State Law

There is a distinction between being completely immuned from service of process and only being privileged in certain respects regarding the effect of service. When one possesses only privileges in regard to the effect of service, he must normally petition the court for appropriate relief - for example, the privilege to request continuances in trial proceedings is granted in the Soldiers' and Sailors' Civil Relief Act of 1940. However, when one is immuned from service, the court has no jurisdiction even to issue process.

42 Am. Jur., Process, § 137 (1942) contains the following statement:

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[99] McDonald v. Mabee, 243 U.S. 90,91 (1917).

> Immunity or privilege from civil process is accorded, upon grounds of public policy, to persons engaged in the military service, whether in the state militia or in the regular Army....

The editors of American Jurisdiction qualified this statement in the 1968 Cumulative Supplement to Volume 42, stating that no privilege from service of civil process in favor of these persons existed at common law. This provision highlights a real issue: What is the status of those engaged in the military service regarding service of state civil process? A review of pertinent cases shows that only a few courts have expressed an opinion that an immunity, aside from statute, exists for military personnel. On the other hand, the state legislatures have enacted many statutes granting military personnel privileges with respect to the effect of service.

1. Immunity as Public Policy

Persons may be accorded immunity, civil or criminal or both, because they hold a privileged status in the eyes of the forum state either at the time the alleged misconduct was committed or at the time service of process is sought. By the law of nations, ambassadors and other public ministers performing duties on behalf of their country within the jurisdiction of another country are exempt from the service of criminal or civil process in

that country. The doctrine of immunity or exemption from service of civil process had its origin at the common law and, in its inception as administered by the courts of England, had relation only to judicial proceedings. In this respect the doctrine was in no way dependent upon statute; but it was the outgrowth of the efforts of the civil courts to protect the administration of justice from interference with suitors, witnesses, and perhaps others, through civil process issued by other courts and found to derogate from orderly proceedings and jeopardize the ascertainment of truth. While the right of exemption from service of process has most frequently arisen and been applied in connection with parties and witnesses in judicial proceedings, some courts have extended its protection by analogous application to those engaged in other departments of public service. In particular, within the United States a number of jurisdictions, Federal and state, have developed by analogy to judicial proceedings a doctrine of immunity accorded persons who go into a jurisdiction other than their residence to perform public service.

Filer v. McCormick[100] is the only case found wherein a court held, clearly upon the facts presented and in the

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[100] 260 F. 309 (N.D. Cal. 1919).

absence of statute, that persons who temporarily enter a state other than that of their domicile while engaged in the performance of public service are entitled to immunity from service of civil process. Mr. McCormick, a resident of Utah and 82 years of age, was the president of a bank that was a member of the Federal Reserve System. The governor of a Federal Reserve Bank called him to a conference in California concerning the marketing of U.S. securities to assist in financing the war effort; World War I was then in progress. The plaintiff, Mr. Filer, caused a deputy sheriff to serve a writ of summons upon McCormick while both parties were in San Francisco. A Federal court for the Northern District of California issued the summons. The banking conference had been completed and, at the time of service, McCormick was recovering from a brief illness prior to returning to Utah. Filer had previously initiated a suit against McCormick on the same cause of action in Utah. Although that suit was pending trial at the time of the service in California, Filer advised the California court that he initiated the second suit as a matter of convenience to himself. While there was federal legislation during World War I affording servicemen certain privileges in regard to ser-

vice of state process, there was none according to Mr. McCormick similar privileges. The Federal court held under the circumstances McCormick was exempted from service of civil process while in California and sustained his motion to quash service of process. The court stressed the following considerations in granting the exemption: (1) the defendant involuntarily entered the state to perform essential public service in time of war; (2) there was no statutory relief available to counter the "inequities" presented in the case; and (3) the plaintiff was not "non-suited" because he could continue to seek damages on his cause of action in the Federal court where he had originally initiated a lawsuit against this defendant.

The Federal court provided a wide base for its decision, stating:

> Under well-settled principles of public policy one who temporarily enters a state or district other than that of his domicile, solely for the performance of duties of a public nature or to which a public interest attaches, is privileged from interference either by arrest under or service upon him of civil process, for a reasonable time on going to, returning from, and attendance upon the performance of such duty.101

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[101] Id., at 313.

The court in effect did no more than refuse jurisdiction as a matter of comity to another Federal court in Utah; however, it made no reference to Federal statutory provisions providing for a change of venue on forum non-conveniens grounds.[102] Certainly the court did not find those grounds upon which is normally based the doctrine of exemption from service of state process. There was no interference with a Federal activity because the conference had been concluded, nor had the defendant alleged prejudice in the preparation of his defense because he was served with process in a jurisdiction other than his domicile.

In United States v. Kirby,[103] the Supreme Court of the United States faced a situation wherein a Federal mail carrier had been taken into custody under a writ for his arrest for murder. The deputy sheriff who executed the criminal process was charged subsequently with wilfully obstructing the passage of the mail. The Supreme Court stated that although all persons in the public ser-

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[102] Act of Mar. 3, 1911, ch. 231, § 58, 36 Stat. 1103 and Act of Sept. 8, 1916, ch. 475, § 5, 39 Stat. 851 (these two statutes provide the basis for 28 U.S.C. 1404(a) (1964)).

[103] 74 U.S. 482 (1868).

vice were exempt from arrest upon civil process while thus engaged as a matter of public policy, it would not extend this general doctrine to a situation where a U.S. employee had been accused of a felony. Again, a general statement of agreement with the doctrine of immunity is misleading. The court's decision depended more upon a finding that the deputy sheriff had not intended to "knowingly and wilfully obstruct [sic] or retard the passage of the mail, or of any driver or carrier. . ." within the meaning of the criminal statute enacted by Congress.[104]

The Supreme Court made the following comment in the Kirby case concerning possible interference with a Federal activity by way of state judicial process:

> The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mails caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends.105

The court balanced the needs of society for an orderly system of judicial proceedings with the general privilege from state interference accorded Federal governmental

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[104] Id., at 486.

[105] Id.

activities, and these considerations of public policy precluded in this instance exemption from service.

In Dow v. Johnson[106] the Commanding General of Union forces that occupied the State of Louisiana permitted the Sixth District Court of the Parish of New Orleans to exercise jurisdiction over civil actions. A plantation owner outside of New Orleans brought suit against a Union commander, General Dow, alleging that a company of soldiers, acting pursuant to the General's"illegal orders", had seized and carried off certain personal property of the plaintiff. The state court caused summons and a copy of the complaint to be served personally upon General Dow. The General did not appear as summoned, and on 9 April 1963 the state court entered a judgment by default against him for the value of the property. The Supreme Court of the United States subsequently reversed the lower court's judgment, because the state court lacked jurisdiction to judge the legality of General Dow's actions.[107] Although

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[106] 100 U.S. 158 (1879).

[107] Justice Field, speaking for the Supreme Court, defined the issue as "whether an officer of the Army of the United States is liable in a civil action in the local tribunals for injuries resulting from acts ordered by him in his military capacity, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war." Id., at 163.

only dicta, the Supreme Court did specify two policy grounds against subjecting servicemen on active duty to service of state process: (1) the danger of hurting the efficiency of the armed forces by interfering with a soldier's performance of his official duties; and (2) the inherent difficulties presented in obtaining counsel and preparing defense to the civil suit.[108]

The Supreme Court of Iowa acknowledged (dicta) that immunity from process should be accorded to persons engaged in the military service on grounds of public policy.[109] However, the court believed the serviceman Conaway waived his objection to service in Minnesota when he failed to appeal the judgment entered against him. Conaway was a colonel in the United States Army commanding a medical regiment allocated to the State of Iowa, in which he was a resident. On or about 3 July 1927 he was ordered by the War Department of the United States to take his troops to Fort Snelling, Minnesota, for a training period of

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[108] Id., at 165. The Congress of the United States put these and other public policy considerations into statutory law forty years after Dow v. Johnson, in The Soldiers' and Sailors' Civil Relief Act of 1918. Act of March 8, 1918, ch. 20, §§ 100-604, 40 Stat. 440-49.

[109] Northwestern Cas. & Sur. Co. v. Conaway, 210 Iowa 126, 230 N.W. 548 (1930).

fifteen days. While at Fort Snelling Colonel Conaway was served with summons notifying him of the commencement of an action against him by the Northwestern Casualty and Surety Company, in the state district court of Ramsey County, Minnesota. In due time the defendant appeared before the Minnesota court and filed a motion to quash the summons, alleging that (1) service of the process was effected on a military installation subject to the exclusive jurisdiction of the United States; therefore, service was not effected within the jurisdiction of the state courts, and (2) his presence within Minnesota was solely in performance of military duty, and while in such capacity he was privileged from service of process in the state. The motion to quash the summons was overruled by the court, and judgment was entered against him. Colonel Conaway did not appeal the judgment, nor did he attack the court's ruling on the motion to quash the summons. Plaintiff then brought action upon the Minnesota judgment in Iowa. A lower court in Iowa entered judgment against Conaway, and he appealed the decision to the State Supreme Court. The Supreme Court of Iowa affirmed, stating that while the state court in Minnesota may have committed error by not quashing the summons on grounds of public policy, the court thereafter clearly had jurisdic-

tion to decide the issue. If the Minnesota court committed error in the ruling, then the defendant should have attempted to correct the error on appeal or by other appropriate proceedings in Iowa. In view of the defendant's failure to so act, the Iowa Supreme Court felt itself bound to give "full faith and credit to a judgment, rendered in a sister state, which is voidable only and not void."[110] As for service of process on the Federal enclave, the court alluded to the statutory reservation in Minnesota wherein the state had reserved the right to serve civil and criminal process upon such territory.

Murrey v. Murrey[111] is the case most frequently cited for the proposition that, as a matter of public policy, members of the armed forces of the United States should not be subject to civil process in a state where they are not residents, while they are temporarily within such state in the service of their country. Although the Supreme Court of California did not in fact grant the exemption, it stated: "As a matter of public policy, it is undoubtedly true that during a time of war, or

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[110] Id., 230 N.W. 548, 549.

[111] 216 Cal. 707, 16 P.2d 741, cert. denied 289 U.S. 740 (1932).

other national emergency, the exemption discussed in the Filer case, supra., would be extended to those in the military service."[112] Murrey was a resident of Utah who came to California for training as a reserve officer. While in San Francisco he was served with summons and an order to show cause in an action by his minor child to compel his father to contribute support. The defendant appeared specially and objected to the jurisdiction of the court, alleging that he was exempt from service of civil process. The lower court denied the motion to quash the service and entered judgment against the defendant. The Supreme Court of California affirmed the lower court's action and prescribed the following criteria for application of immunity for servicemen on grounds of public policy: (1) the convenience of the U.S. Government and the possible interference with the efficiency of the Army; (2) the convenience of the parties and the nature of the action involved; and (3) the rights of the state. The court did not believe that the efficiency of the Army would be impaired materially by subjecting reserve officers to service of process during peacetime in any jurisdiction where they might be stationed temporar-

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[112] Id., at 743.

ily. The court found that Murrey had volunteered for active duty and would be released from active duty at any time he so requested. Concerning the convenience of the parties, the plaintiff was a destitute minor child without funds to go to his father's state of residence (Utah) in order to force the father to contribute support money. The State of California had a strong public policy requiring that parents support their children, which the father had not done. By "balancing the equities" in this case the California court properly took jurisdiction.

In Tulley v. Supreme Court,[113] a Federal court in California assumed jurisdiction after service of process was effected upon a nonresident U. S. Army officer traveling from Nebraska, through California, to the Philippine Islands. The travel was being performed during a period subsequent to 8 September 1939, on which date the President of the United States had declared that a state of national emergency existed. When LTC Tulley stopped in transit at Fort Mason, his divorced wife had service of process effected in a civil action instituted to recover

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[113] 45 Cal. App.2d 29, 113 P.2d 477 (1st Dist., Dist. Ct. App. 1941).

money allegedly due under a written contract for the support of the minor child of the parties. Here was a situation where the Federal court could have applied the criteria for exemption specified by the California Supreme Court in Murrey, but it did not and denied the defendant's request for a writ of prohibition attacking the service. The court held that LTC Tulley was not exempt from such service, stating that the Murrey court intended relief by way of exemption from service only in a situation where some other remedy did not exist. Since Murrey the United States Congress had enacted the Soldiers' and Sailors' Civil Relief Act of 1940, and the Supreme Court of California did not believe the courts should, by judicial mandate, limit or expand policies established by the legislature, the policy making organ of government. The court made a clean break from the dicta in past cases and, in a well-reasoned opinion, stated:

> That statute contains the solemn declaration of the Congress of [the] United States as to what it believes public policy requires. The Congress has not deemed it necessary, in the public interest, to grant those in Military service an absolute exemption

> from civil process. Certainly, if Congress has considered the problem and has determined that the public interest does not require that an absolute freedom from civil process be conferred on those in military service, this court should not, and cannot, determine that public policy requires such an extreme protection.114

It appears that the courts will acknowledge, in dicta, that under special circumstances servicemen should be accorded immunity from service of state process. Because very few reported cases have discussed this issue since Tulley, one may assume that as long as servicemen have the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940, in only very unusual circumstances will a serviceman be granted such immunity. In summary, there are three basic principles in this area: (1) Federal and state courts will create new "public policy" only when confronted with a situation where the court believes the legislature, the proper policy-making organ of government, has failed to keep up with the needs of servicemen; (2) the supremacy clause will protect all activities of the Federal government from "undue interference" from state action; and (3) courts are reluctant by nature of the system to quash or to dismiss return of process, for

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[114] Id., 113 P.2d 477, 480.

this "relief" accorded defendant will necessarily deprive plaintiff of a judicial forum in which he may have his controversy adjudicated.

Granted that a serviceman is not granted broad immunity from service of process, are there state statutory provisions pertinent to the effect of service of state process? The answer is that in almost every state jurisdiction, a judge advocate will find such provisions that affect service of process on the soldier.

2. Statutory Privileges

From the first days of this Republic state legislatures have accorded various privileges to persons serving in the armed forces, state and Federal, regarding service of process. In some instances complete immunity from certain type "processes", such as arrest or attachment of personal property for debts, have been granted during times of national emergency or war. In general, legislation in this area may be divided into two categories: (1) that providing complete immunity from certain type processes, such as civil arrest or attachment of personal property for debts,[115] and (2) that having an

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[115] E.g., Pa. Stat. Ano. Tit. 51, § 1-842 (1954, Supp. 1967) provides that: "No civil process shall issue or be enforced against any officer or enlisted man of the Pennsylvania National Guard in the active service of this Commonwealth or of the United States...."

incidental effect on the service of process, such as moratory statutes passed during a national emergency. Moratory statutes normally do not exempt the individual from service of process in the nature of notice or summons; the individual must submit a request to the court for various types of statutory relief. Generally, the type privileges afforded servicemen include (1) continuing the case until such time as military duties permit the defendant's presence in court; (2) continuing the case until such time as the defendant may properly prepare his defense; (3) providing an opportunity to attack judgments entered in default against an absent defendant; (4) protecting against the termination of leases or foreclosure of mortgages; and (5) granting immunity from arrest, attachment, and execution.

Subparagraph 5b(3)(b), AR 27-40 contemplates that both commanders and their judge advocates possess a thorough knowledge of the law regarding service of process from the forum state. In particular, in areas of exclusive Federal jurisdiction not subject to the right to serve process, the following requirements are imposed: (1) Commanders will determine whether the individual requested to be served wishes to accept service "voluntarily in accordance with the laws of the State issuing

the process," and (2) Judge advocates will inform the individual of the legal effect of voluntary acceptance of service. As pointed out earlier, pertinent publications of the Department of the Army do not contain information on state process law on a state-to-state basis. While the current edition of Volume 5, Martindale-Hubbell Law Directory, does contain state-by-state statutory provisions regarding service of process generally, there is not a standard separate section on service on military personnel. While the Department of Army could publish a state-by-state compilation of service of process statutes, the commander and judge advocate need more than this information. One must know how a particular state statute is interpreted and applied in a case involving military personnel in Federal service. In chapter II it was pointed out that states take several approaches in applying substituted service provisions in cases involving serviceman. A review of statutes mitigating the effect of service upon the serviceman and how these statutes have been applied by state courts, will further illustrate the need for more information available at the installation level of Army commanders.

Between the Revolutionary War and the Civil War

state statutes tended to offer the serviceman broad protection from civil suits. In view of the poor means of communications and the low pay during duty in the armed forces, there was a great need for protection for the serviceman absent from his domicile. South Carolina adopted a statute in 1794 that prohibited a civil officer from executing any process on one obliged to bear arms. In 1822 Pennsylvania adopted a statute exempting militiamen from execution or other process when called into actual service by the President or Governor.[116] The Pennsylvania Supreme Court subsequently limited application of its successor, the Act of 1861, to those militiamen called into service to put down secession, stating that to apply the Act of 1861 to peaceful military service would render the act unconstitutional because of the possible unreasonable delay in enforcing obligations against a military man. Before Texas was admitted to the Union, its legislature in 1836 adopted a statute exempting soldiers and sailors from arrest, attachment, execution, embargo, and sequestration in all civil cases; the act

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[116]This statute was replaced subsequently by the Act of April 18, 1861, P. L. 408, Pa. Stat. Ano. tit. 51, § 21 (repealed in 1927) [hereafter referred to as the Act of 1861].

was re-enacted in 1843. During the Mexican War, Missouri passed an act suspending service of process "of any kind" and continuing suits already instituted against volunteers until after the serviceman had returned home.

Between the Civil War and World War I state enactments affording servicemen relief from service of process reached their greatest momentum. Missouri adopted a statute prohibiting institution of a civil suit or prosecution of the same against one in the military service until 30 days after his discharge. States passing statutes that in substance prohibited the issuance or enforcement of civil process against those in the military service until after their discharge or some fixed period thereafter included Pennsylvania, Wisconsin, Georgia, Illinois, and Iowa. Other states that enacted statutes prohibiting enforcement of certain types of writs or process included Florida, Alabama, Texas, and North Carolina. Kentucky passed a statute closing the courts as far as money judgments were concerned for a period of seven months during the Civil War. In those cases where the courts were uncertain as to the intended scope of the statute, some courts expanded considerably the meaning of the statute. For example, one Supreme Court has held that the statutory exemption from "arrest"

encompasses exemption from service of all process under certain circumstances.[117]

In Land Title & Trust Company v. Rambo the Supreme Court of Pennsylvania held that members of the state national guard temporarily within the jurisdiction by reason of military service must be exempt from the service of civil process on grounds of public policy. Rambo, an officer in the state national guard, had been served with a writ of scire facias sur mortgage while returning with his troops from an annual encampment through a county not his residence. The court did not discuss whether service under these circumstances "interfered" with the performance of his military duties or precluded his obtaining counsel or preparing a defense to the action. Instead, the court construed the statutory provision that: "No officer or enlisted man [of the Pennsylvania National Guard] shall be arrested on civil process, while going to, remaining at, or returning from a place where he is ordered to attend for election of officers or military duties"[118] as providing

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[117] Land Title & Trust Co. v. Rambo, 174 Pa. 566, 34 A. 207 (1896).

[118] A Pennsylvania statute now provides specifically that members of the National Guard are exempt from arrest on any warrant, except for treason or felony, and from issuance or enforcement of civil process, while engaged in active duty. Pa. Stat. Ano. tit. 51, §§ 1-841, 1-842 (1954, Supp. 1967).

a broad protective shield for servicemen from service of process.

It appears that,at present, most courts would not construe a statutory immunity from "arrest" as encompassing mere "service" of process, particularly in view of the scope of the Soldiers' and Sailors' Civil Relief Acts of 1918 and 1940. A Federal Court in the District of Columbia in,Carl v. Ferrell, also faced an interpretative problem of language in a Federal statute that provided: "No enlisted man shall, during his term of service, be arrested on mesne process, or taken or discharged in execution for any debt [incurred prior to entry on active duty]."[119] Unlike the Supreme Court of Pennsylvania in the Rambo case, this court reasoned that the term "arrest" connoted a degree of physical restraint not involved in mere service of summons in a civil suit. The court further held that mere service or process had not constituted being "taken or charged in execution for any debt."

The passage of the Federal Soldiers' and Sailors' Civil Relief Act of 1918, with its broad moratory pro-

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[119]Carl v. Ferrell, 109 F.2d 351 (D.C. Cir.), cert. denied, 310 U.S. 636 (1940). See Federal statute exempting enlisted men from civil arrest for debts. Act of August 10, 1956, ch. 1041, 70A Stat. 213, subsequently enacted as 10 U.S.C. § 3690 (1964) (repealed in 1968).

visions, terminated the obvious need that the state moratory statutes fulfilled. Many state statutes dealing with service of process on servicemen also began to be attacked in the courts as inconsistent with the new Federal legislation on the subject. At the time of World War I, for example, Wisconsin had adopted a statute making all those in the military service "exempt from all civil process." This statute was held in conflict with the Soldiers' and Sailors' Civil Relief Act of 1918, thus unconstitutional.[120] On the other hand, Oregon adopted a statute prohibiting mortgage foreclosures against one in the military service until 60 days after the expiration of his service. This statute was subsequently held to grant a privilege in addition to, and not in conflict with, the Soldiers' and Sailors' Civil Relief Act of 1918.[121]

After the Soldiers' and Sailors' Civil Relief Act of 1918 was repealed, the servicemen looked once more to state statutes for relief from service of state process. With the start of World War II Congress again recognized the need for relief in this area and passed the Soldiers' and Sailors' Civil Relief Act of 1940. This time, however,

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[120]Konkel v. State, 168 Wis. 335, 170 N.W. 715 (1919).

[121]Pierard v. Hoch, 97 Ore. 494, 191 P. 328 (1920).

the provisions in the Civil Relief Act were expanded considerably and were not repealed at the termination of hostilities. At present, this Act provides many forms of relief for the serviceman in addition to those state statutes still in force. It now appears appropriate to review how Federal law has affected the serviceman's status in state courts.

C. Effect of Federal Law

1. The Supremacy Clause

Article VI of the U. S. Constitution provides that the Constitution and laws of the United States "shall be the supreme law of the land." At an early date the Supreme Court of the United States held that activities and instrumentalities of the United States are immune from state regulation, and the Federal immunity doctrine envelopes the entire range of Federal activity.[122]

Because a court can issue writs only in those cases where it has jurisdiction, a few general rules will suffice regarding service of process against Federal em-

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[122] M'Culloch v. Maryland, 17 U.S. 316 (1819). Compare Department of Employment v. United States, 385 U.S. 355 (1966) (Red Cross is Federal instrumentality for purposes of immunity from state taxation) with United States v. Boyd, 378 U.S. 39 (1964) (cost-plus-fixed-fee contractor not Federal instrumentality for purposes of state taxation).

ployees. Government immunity from state writs, such as specific performance or an injunction, may not be avoided by naming any officer of the government as defendant; where the Federal government has not waived its sovereign immunity from "relief" of this nature, the state action may not be maintained.[123] Similarly, an action against employees of the National Park Service for injunctive relief of removal of obstructions erected across a road on Federal lands was in substance an action against the United States; because the Federal government was an essential party to the action and had not waived immunity, no action was possible.[124] A suit may be maintained against a Federal employee under the following conditions: (1) The Federal authority or employee is acting in excess of statutory authority or the acts transgressed a constitutional limitation, for then the authority or person

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[123] United States ex. rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94 (D.D.C.), aff'd 339 F.2d 753 (D.C. Cir. 1964) (mandamus action to compel architect of Capitol to award construction contract).

[124] Switzerland Co. v. Udall, 337 F.2d 56 (4th Cir.); cert. denied. 380 U.S. 914 (1964). See also New Mexico v. Backer, 199 F.2d 426 (10th Cir. 1952) (action against employees of Federal Bureau of Reclamation, with Secretary of Interior indispensable party).

ceases to represent the Federal government; (2) the statute or order conferring power on the officer to act in the sovereign's name is unconstitutional or otherwise invalid; or (3) the Federal Congress has waived Federal immunity in the area - for example, the Federal Tort Claims Act. However, Federal and state courts are reluctant to find that a Federal employee has acted outside of the scope of his office, particularly where his authority permits a series of discretionary acts.[125] Consider, for example, several cases involving acts committed by a Post Commander in his control of a military installation.

In Brittain v. Reid,[126] the defendant had sold his taxi cab business to the plaintiff, promising that he would not operate another taxi cab business within a fifty-mile radius of Augusta, Georgia, for twenty-five years. Soon

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[125] E.g., Jones v. Freeman, 270 F. Supp. 989 (W.D. Ark. 1967) aff'd 400 F.2d 383 (8th Cir. 1968) (Secretary of Agriculture has discretionary authority to preclude privately owned animals from National Forest, under remedies landowner has at common law).

[126] 141 S.E.2d 903 (Ga. 1965).

thereafter, the defendant and his wife received permission from the Commanding General, Fort Gordon, Georgia, to operate a taxi cab business on the military installation. Fort Gordon is subject to exclusive Federal jurisdiction and is located very near to Augusta, Georgia. Plaintiff sought an injunction in a state court to stop the defendant's operation of a taxi cab business on the military installation and between the installation and Augusta. The Court granted the requested injunction insofar as defendant's conduct off the installation was concerned, but it refused to refrain defendant from such operation on the Federal enclave itself. An appeal was made. The Supreme Court of Georgia affirmed the lower court's judgment, citing Fort Leavenworth R.R. v. Lowe[127] for the proposition that a state does not have any power (jurisdiction) to intervene in the manner in which the Federal government was using the land. A Federal court reached a similar conclusion in Harper v. Jones.[128] The Commanding General, Fort Sill, Oklahoma, had declared the plaintiff's business

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[127] 114 U.S. 525 (1885). The Supreme Court of the United States determined that land ownership by the Federal government, being of an essentially public character, is entitled to the privileges and immunities accorded other Federal activities. Id., at 539.

[128] 195 F.2d 705 (10th Cir.), cert. denied 344 U.S. 821 (1952).

premises "off limits" for all his military personnel. The plaintiff, Jones, and another were selling automobiles to the general public and to servicemen. The plaintiff requested that a Federal district court enjoin enforcement of the General's order and rescind the order itself. The court granted the requested injunction, but the 10th Circuit Court of Appeals reversed its judgment and ordered the complaint dismissed. The Court accepted two basic premises: (1) if a Federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has the jurisdiction to restrain him; and (2) where a Federal officer acts within the limits of his legal power and authority and exercises a function legally delegated to him, an action to restrain him cannot be maintained without impleading the sovereign, even though there is a claim of error in the exercise of that power of an abuse of discretion. In this case the Circuit Court believed that the Commanding General had the authority, delegated from the President of the United States, to declare defendant's premises "off limits" for the health and welfare of his troops.

From the discussion above, one can see that the

supremacy clause in the Federal Constitution provides substantial protection to Federal employees from the effects of state process. However, Congress has enacted a number of statutes that have a significant effect on the jurisdiction of state courts in cases involving military personnel.

2. Federal Legislation

There are three general types of Federal legislation that significantly expand (or limit, as the case may be) areas of state jurisdiction - hence the court's authority to issue process and to effect service.

The first category of Federal legislation confers additional jurisdictional powers upon states, in that the statutes adopt or extend the application of state law upon military installations subject to Federal exclusive or partial jurisdiction.[129] For example, state courts

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[129]The Federal government holds land under four distinct types of legislative jurisdiction: exclusive, concurrent, partial, and proprietorial rights only. The term "legislative jurisdiction", when used in connection with land areas, means the authority to enact general, municipal legislation applying within that land area. This authority should be contrasted with other legislative authority of the Congress, which is dependent not upon area but upon subject matter and purpose, and which must be predicated upon some specific grant in the Constitution. AR 405-20, ¶ 2.

have jurisdiction to adjudicate controversies arising from acts that take place on a Federal enclave when such conduct constitutes a violation of state wrongful death and injury laws[130] and the rights of parties to an action arising from death or injuries occurring in such place are governed by the laws of the state within whose boundaries the enclave is located.[131] The language in the Federal statute has been held to mean "existing state law" as declared from time to time by the state.[132] Another example is the statute permitting the application of state income taxes upon Federal enclaves, the so-called Buck Act.[133] In these situations where Congress has declared that the state courts shall have jurisdiction to

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[130] See Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), aff'd 149 Ohio St. 500, 79 N.E.2d 906 (1948) (Ohio law applicable in state court action brought to recover for injuries sustained in automobile collision with Army truck on military installation).

[131] 16 U.S.C. § 457 (1964). E.g., Watson v. United States, 348 F.2d 913 (5th Cir.), cert. denied 382 U.S. 976 (1965) (Ga. law applied in action against U.S. based upon alleged malpractice of doctor in out-patient clinic of the U.S. Public Health Service Hospital in Savannah, Ga.).

[132] Capetola v. Barclay-White Co., 48 F. Supp. 797 (E.D. Pa.) aff'd 139 F.2d 556 (3rd Cir.), cert. denied 321 U.S. 799 (1943).

[133] 4 U.S.C. § 105 (1964).

adjudicate controversies, and a state has not reserved the right to serve its process upon a Federal enclave located within its borders, can one say that the Federal government still possesses the right to "refuse" service of state process? Isn't a commander frustrating the intent of Congress when he refuses, for example, to allow state authorities to effect service of a writ (arising out of a state wrongful death statute) on the Federal enclave? Of course the military commander is concerned about possible violations of the Posse Comitatus Act and the need for control over the installation, but the case of Application of Thompson[134] may signify a new trend in Federal- state cooperation in regard to service of process.

The Federal court in this case appears to adopt the rationale of the United States Supreme Court in United States v. Kirby,[135] because both courts balance the temporary "public inconvenience" against society's need for

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[134] 157 F. Supp. 93 (E.D. Pa. 1957), aff'd United States ex. rel. Thompson v. Lennox, 258 F.2d 320 (3rd Cir. 1958), cert denied 358 U.S. 931 (1959), rehearing denied 359 U.S. 921 (1959).

[135] 74 U.S. 482 (1868).

an orderly system of justice. Unlike Kirby, where a Federal mail carrier was arrested on a state warrant for murder, a city court in Philadelphia issued a writ of capias id respondedum against Thompson, a civilian employee at the Philadelphia Naval Shipyard, for his failure to pay local taxes imposed by the city under the provisions of the Buck Act. Thompson was not a resident of the city of Philadelphia, but of New Jersey. He came to work every day on a ferry boat that travelled between New Jersey and the Philadelphia Naval Shipyard, an area under Federal exclusive jurisdiction subject only to the state's right to execute civil and criminal process therein. The writ amounted to a permissive arrest on civil process for fines or penalties and authorized the defendant's confinement pending his filing reasonable bail for appearance in court. Acting pursuant to the writ, the deputy sheriff seized custody of Thompson at the shipyard; Thompson then petitioned a Federal court for a writ of habeas corpus. The court refused to grant the writ, stating that the petitioner had not exhausted the remedies available in state courts and that it would not exercise its discretionary right to issue the writ. The court reasoned that the situs of the petitioner's failure to pay city taxes was not at the naval shipyard, but at the

City Hall Annex where he was required to pay the tax.

The court found no unreasonable interference with Federal activities in this case, but it pointed out that: "If the City should attempt to serve 100 such writs at the same time at the shipyard without working in cooperation with the Federal officials in charge, there might be such an interference with Federal activities as to require action by a Federal court."[136] The court reasoned that "application" of local tax laws included "enforcement". Again, the ultimate decision is how much "interference" would the state's executive (enforcement) or judicial (effect legal rights) acts have upon the performance of Federal activities on military installation. Although it is clear that mere service of process affording notice of judicial proceedings would not unreasonably interfere with Federal governmental operations, means adopted for securing obedience to the court, such as arrest and attachment of the defendant, injunction, sequestration of property, are not as settled as the Thompson case suggests.

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[136] Application of Thompson, 157 F. Supp. 93, 100 (E.D. Pa. 1957). The Federal and state authorities used this as a "test" case, and Thompson was detained only briefly until he had retained counsel and posted nominal bail.

The second category of Federal legislation in effect amounts to a taking away of jurisdiction from the state courts. Some statutes, such as the Federal Tort Claims Act, affects original process, in that the claimant must attempt to settle his claim administratively before he seeks judicial relief. Other statutes provide that where the defendant so requests, the case will be removed from a state court to a Federal court. Examples of Federal legislation of this type are the right of any member of the Armed Forces to a trial before a Federal court, rather than a state court, for a criminal charge or civil claim against him "on account of an act done under color of his office or status."[137] A Federal employee may also request the removal of an action against him arising out of the use of government property on an installation or the operation of a government motor vehicle. In those instances where the Federal employee has requested removal, the state court is very limited in the further exercise of jurisdiction in the case.

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[137] 28 U.S.C. § 1442a (1964) (Removal for act done under color of office). Note that the jurisdiction of Federal questions arising under sections of Chapter 85, 28 U.S.C., with the exception of §§ 1332 (diversity of citizenship) and § 1331 (federal question) is not dependent upon the amount in controversy or diversity of citizenship.

The third type of Federal legislation affecting state process amounts to a broad moratory statute - for example, the Federal Soldiers' and Sailors' Civil Relief Act of 1940. The protection and benefits provided by this Act apply in connection with civil court actions and certain financial obligations of all members of the Armed Forces on active duty. Among the privileges conferred by the Act are: (1) protection from default judgment in a civil lawsuit in any court unless a specific procedure afforded absent service members is followed;[138] (2) opportunity to request a court to stay the proceedings at any stage of a lawsuit, thus stopping or delaying to a later date the proceedings of the suit;[139] and (3) right to request that any judgment secured against absent servicemen be set aside within a ninety day period following termination of his active duty status.[140] Wide coverage as this Act provides, the serviceman is not given as broad an exemption from civil process, such as arrest, as he is under various state statutes. As stated in Tulley v. Supreme

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[138] 50 U.S.C. App. § 520(1) (1964).

[139] 50 U.S.C. App. § 521 (1964).

[140] 50 U.S.C. App. § 520(4) (1964).

Court: the Soldiers' and Sailors' Civil Relief Act "contains the solemn declaration of the Congress of United States as to what it believes public policy requires. The Congress has not deemed it necessary, in the public interest, to grant those in military service an absolute exemption from civil process."[141] Inasmuch as the Congress is given power under the U.S. Constitution to regulate the armed services, this Act amounts to the "supreme law of the land" under provisions of Article VI, U.S. Constitution. While a state may enact legislation conferring additional benefits upon servicemen, it may not delimit those benefits Congress has prescribed for all Federal and state courts in the United States.

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[141] 113 P.2d 477, at 480.

CHAPTER IV

SERVICE OF PROCESS ON MILITARY INSTALLATIONS

The jurisdictional status of a military installation is very important for purposes of service of process. Recalling the analysis in chapter II, one saw that the ingredients for a proper exercise of jurisdiction by a state court were a jurisdictional basis and service of process. Both of these elements are prescribed by state statute. The method of service that may be utilized under state law depends upon such operative facts prescribed by statute. Very few of these statutes contemplate a situation where a Federal enclave, subject to the right of the state authorities to effect service of state process thereon, is located within the state. Is the installation considered "within the state" for purposes of substituted service on residents or nonresidents motorists? Are tortious acts committed on the installation considered as "acts committed within the state" for purposes of state actions in state courts?

A review of pertinent cases and statutes affecting the jurisdictional status of military installations will provide the basis for informal opinions regarding these questions. To arrive at a legal opinion regarding a state's right to effect service of process on a particular

installation, however, one must have information concerning four matters: (1) what is the jurisdictional status of the particular installation and, if the state authorities have reserved rights over the installation, what are those rights; (2) what is the jurisdictional basis upon which the court issued process, and what is the nature of the process; (3) what methods of service are authorized under the law of the forum state for the jurisdiction basis alleged and this defendant; and (4) what are current Army policies, to include those of the Post Commander, regarding service of process on the military installation. The purpose of this chapter is to provide some background and guidance on these matters.

A. Federal Acquisition of Jurisdiction

There are several methods by which the Federal government acquires jurisdiction over geographical areas in the United States. When a particular territory is admitted to the Federal Union as a state, the Federal Enabling Act may provide that the Federal government reserves to itself jurisdiction over a specified area within the territory.[142]

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[142] In a general sense, the Federal government has legislative power over all territorial areas under the Federal Constitution, art. IV, § 3, cl. 2, whether the land is on or off Federal installations and whether under public or private ownership. Territorial governments are regarded as representatives of the Federal government, exercising delegated power therefrom.

In the absence of such a reservation of jurisdiction, any Federally-owned territory comes into the Federal Union subject to the legislative jurisdiction of the State within whose geographical limits it is located.[143] If the United States possesses or subsequently obtains legal ownership of a particular tract of land therein, it exercises over the land only those rights of an ordinary proprietor; state law applies throughout the Federally-owned land or installation to the extent such law does not interfere materially with the performance of a Federal function.[144]

The earliest recognized method by which the United States might acquire legislative jurisdiction from a state consisted of purchase by the Government of real property with the consent of the State in which the land was located. This method is the only method expressly provided for by the Constitution. The method is described as follows:

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[143] Fort Leavenworth R. R. v. Lowe, 114 U.S. 525 (1885); Olsen v. McPartlin, 105 F. Supp. 561 (D. Minn. 1952).

[144] Fort Leavenworth R. R. v. Lowe, 114 U.S. 525 (1885). As discussed subsequently, Army authorities need to maintain control over conduct and security on a military installation; however, such control is free from undue interference from state activities under the supremacy clause, and there is no need to construe "state reservations of rights" in the narrow sense for purposes of maintaining control.

> The Congress shall have power ... To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cesson of particular states and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all peaces purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings....[145]

In two early decisions the Supreme Court of the United States held that the term "exclusive legislation" was synonymous with "exclusive jurisdiction";[146] and while the United States could acquire land without the consent of the State, the Federal government did not obtain legislative jurisdiction in the absence of such consent.[147]

The early view was that "purchase with consent of the State" was the only method for transfer of jurisdiction; and unless the consent of the State was given, no transfer of jurisdiction could take place. What if a State "consented" to purchase of a particular tract of land by the Federal government, but attempted to save unto itself the exercise of government functions over the land? These

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[145] U. S. CONST. art. I, § 8, cl. 17 (emphasis supplied).

[146] United States v. Bevans, 16 U.S. 336 (1818).

[147] United States v. Hopkins, 26 Fed. Cas. 371 (No. 15, 387a)(D. Ga. 1819).

"reservations" were held inconsistent with what the early courts believed was required under the Constitution; hence the State had not in law given its consent to the Federal purchase.

In United States v. Cornell[148] a Federal court found Cornell guilty of murdering another soldier, named Kane, at Fort Adams, Newport Harbor, Rhode Island, on 4 July 1819. The defendant appealed the conviction to the Supreme Court of the United States, alleging that the Federal government lacked exclusive jurisdiction over Fort Adams; in the "act of consent" to the purchase by the Federal government the legislature of Rhode Island added a proviso that all civil and criminal process issued under the authority of the state, or any officer thereof, may be executed on the lands so ceded in the same way and manner as if such lands had not been ceded. The Supreme Court determined that the Federal government possessed exclusive jurisdiction for two reasons: (1) the State of Rhode

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[148] 25 Fed. Cas. 646 (No. 14,867)(C.C.R.I. 1819). In 1790 Congress provided for the punishment of murder, larceny, and certain other crimes committed on exclusive jurisdiction areas. Act of April 30, 1790, ch. 9, 1 Stat. 112. Cornell's conviction was based upon a violation of this statute. Congress provided more extensive criminal law coverage by enactment of the first "Assimilative Crimes Act" of 1825, which adopted the criminal law of the surrounding state as Federal law. Act of March 3, 1825, ch. 65, 4 Stat. 115.

Island intended only to prevent those lands from becoming a sanctuary for fugitives from justice, for there was no language from which the Supreme Court could infer that the State intended to have the right to punish offenders for acts done within the ceded lands; and (2) the court saw nothing incompatible with the exclusive sovereignity or jurisdiction of one state (here, the Federal government) that it should permit another state (Rhode Island) to execute its process within its territory.

In 1885 the Supreme Court of the United States decided Fort Leavenworth R.R. v. Lowe,[149] another landmark and focal point in the historical development of the law relating to the division of legislative jurisdiction between the Federal and state governments. The land on which the Fort Leavenworth Reservation is located was part of the Louisiana Purchase; the Reservation had been used for military purposes by the United States for many years before the State of Kansas was admitted into the Federal Union in 1861. At the time of admission Congress failed to reserve Federal jurisdiction over the land where the Reservation was located. In 1875 the State legislature ceded to the United States "exclusive jurisdiction"

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[149] 114 U.S. 525 (1885).

over the territory within the Reservation, saving however, the right to serve criminal and civil process and the right to tax railroad property therein. The plaintiff was the corporate-owner of a railway located on the Reservation and, in 1880, he was assessed by a Board of State Tax Assessors for the property. The company paid the tax of $394.40 under protest and sued to recover back the money thus paid. He alleged that the property being entirely within the Reservation, was exempt from assessment and taxation by the state. The state entered judgment for the defendant. The plaintiff appealed the judgment, through the Kansas Supreme Court, to the United States Supreme Court. The Supreme Court held for the first time that the U. S. Government could acquire jurisdiction over the area by cession from a state, in addition to the Constitutional method involving Federal purchase with the consent of a state. The State act of cession by Kansas and the limitations contained therein, having been accepted by the United States, were valid and enforceable insofar as they are consistent with the effective use of the property for the military purpose intended.

As a result of the Leavenworth decision, many states passed laws ceding jurisdiction to the United States, often in combination with "consent" statutes already on

their books. The significance of cession as a means of transferring jurisdiction is that the method is not subject to the Constitutional restraints inherent in the method involving purchase with the consent of the State. It is not essential that the land be "purchased," nor is it necessary that it be intended for one of the uses specified in the Constitution.

In James v. Dravo Contracting Company[150] the United States Supreme Court sustained the validity of a reservation made by the State of West Virginia, in a "consent statute", where the State reserved the right to levy a gross sales tax with respect to work done on the ceded lands. The Supreme Court saw no expressed prohibition in the Federal Constitution against State action to retain certain governmental privileges over ceded areas, so long as the state reservation does not "operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired...."[151]

In Howard v. Commissioners[152] the Supreme Court was confronted with the issue whether a Federal enclave ceased

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[150] 302 U.S. 134 (1937).

[151] Id., at 148-49.

[152] 344 U.S. 624 (1953).

to be a part of the Commonwealth of Kentucky when the United States acquired exclusive jurisdiction over the territory. A Naval Ordinance Plant was located on the enclave in question. The Secretary of the Navy on behalf of the United States accepted in 1941 exclusive jurisdiction over the area. By ordinances enacted in 1947 and 1950 the City of Louisville annexed certain territory, including the Ordnance Plant tract. After the annexation, the city started to collect from employees of the plant a license tax for the privilege of working in the city, under the provisions of the Buck Act. The plaintiffs, employees of the Ordnance Plant, sued in the state courts for a declaratory judgment that they were not subject to the tax. Judgment was entered against them, and they appealed to the Supreme Court of the United States.

The Supreme Court affirmed the judgment, holding that the property upon which the Ordnance Plant is located did not cease to be a part of Kentucky when the Federal government obtained exclusive jurisdiction over the area. The Supreme Court stated that:

> A change of municipal boundaries did not interfere ... with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the Federal area within its boundaries so long as there is no interference with the jurisdiction asserted by the Federal Government.153

So far as application of the Buck Act was concerned, the Supreme Court saw that this statute only modified Federal exclusive jurisdiction over the area. The city of Louisville had the authority to levy its tax within the boundaries of the Ordnance Plant. One might recall that in Application of Thompson, the court determined the right to apply tax laws included the right to enforce them.

Even though the Supreme Court held that a Federal enclave is within the state for "municipal annexation" purposes, do state courts have jurisdiciton over actions arising from tortious acts committed on such territory? In 1952, one year before Howard v. Commissioners, a Federal District Court in Minnesota held that the Federal government possessed exclusive jurisdiction over a civil cause of action arising from an automobile collision on

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153 Id., at 627. Accord, Bank v. Bank, 361 F.2d 276 (6th Cir. 1966) (Kentucky state banking law); Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (1952) (voting right); Beagle v. Motor Vehicle Accident Indem. Corp., 274 N.Y.S.2d 60 (Sup. Ct. 1966) (state automobile liability insurance policy).

Fort Snelling Military Reservation, a Federal enclave.[154] Because the State of Minnesota had not specifically retained any jurisdiction over civil causes of action arising on the installation, the court assumed jurisdiction to adjudicate the case. In cases of this nature a Federal court has two separate jurisdictional bases upon which it may adjudicate the controversy: (1) 16 U.S.C. § 457 (1964) which provides for the application of state wrongful death and injury laws on Federal enclaves - using current state liability laws as Federal law, and (2) the "McGlinn Doctrine," which permits those state laws in effect at the time of cession of state jurisdiction to remain in effect as Federal law.[155] The Olsen v. McPartlin case appears to be the minority view; however, and there appears to be substantial case authority for the proposition that civil causes of actions arising on a Federal enclave may be handled in either a Federal or state judi-

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[154]Olsen v. McPartlin, 105 F. Supp. 561 (D. Minn. 1952).

[155]The so-called "McGlinn Doctrine" came from Chicago, Rock Is. & Pac. R. R. v. McGlinn, 114 U.S. 542 (1885), and has been expanded in Stewart v. Sadrakula, 309 U.S. 94 (1940) and Stokes v. Adair, 265 F.2d 662 (4th Cir.), cert. denied 361 U.S. 816 (1959).

cial forum.[156]

In chapter II the operative facts which are required to authorize a particular method of service were discussed. An example was given wherein a plaintiff in a New York case could not use the state's substituted service provisions because the soldier-defendant maintained his "usual place of abode" outside of the state. This issue arises again concerning residence on a Federal enclave - are such residents considered nonresidents of the state within which the installation is located? If these inhabitants of the installation were considered residents of the state for service of process purposes, then Milliken v. Meyer would permit the state to use many methods of service other than personal within the state (assuming that the state court had a jurisdictional basis upon which it could assert in personam jurisdiction). If these inhabitants were considered nonresidents for service of process purposes, one must look to state law to see the authorized

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[156] See Ohio River Contract Co. v. Gordon, 244 U.S. 68 (1917); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101, aff'd 149 Ohio St. 500, 79 N.E.2d 906 (1948). Shepard's Federal Reporter Citators indicate that no cases have cited Olsen v. McPartlin. In Stokes v. Adair, 265 F.2d 662 (4th Cir.), cert. denied 361 U.S. 816 (1959) the court termed the cause of action transitory; and whenever a court obtained personal jurisdiction over the defendant, the case could be adjudicated.

jurisdictional base and method of service which will permit the state court to adjudicate the controversy.

Remember, in a specific situation the criteria for assertion of jurisdiction and the method of service authorized is not found so much in the Supreme Court cases on "due process"; in every case one must look to state law.

In Brennan v. Shipe[157] Mrs. Ship was operating her motor vehicle on the New Cumberland General Depot, located in Pennsylvania and subject to Federal exclusive jurisdiction, when the vehicle struck and injured the plaintiff Brennan. Before service of process was made upon defendant, she and her husband moved to Florida, changing their state of residence from Pennsylvania to Florida. Pursuant to the Pennsylvania Nonresident Motorist Act, the plaintiff effected service upon the Secretary of the Commonwealth as the statutory agent of defendant to accept service of process. The lower state court rejected defendant's contention that substitute service under these circumstances was unconstitutional. The Supreme Court of Pennsylvania affirmed the judgment, holding that the method of service authorized under this

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[157] 199 A.2d 467 (Pa. 1964).

statute could be used in this case. The state Supreme Court saw that the Federal statute on personal injuries and wrongful death on Federal enclaves provided that the laws of the state within which the Federal enclave is located shall govern the rights of the parties. The state laws of Pennsylvania included a Nonresident Motorist Act, which by its own terms covers all actions brought for injuries sustained "within the Commonwealth". The court believed that the Nonresident Motorist Act was intended to provide jurisdiction and substitute service for any vehicular collison involving nonresidents within the geographic boundaries of Pennsylvania, to include that land ceded to the Federal government.

The Brennan case is an interesting example, where a court held that state procedural law as changed from time to time would apply to a Federal enclave. This subject will be discussed subsequently under the topic of State Reservation of the Right to Serve Process.

B. Federal Policies Regarding Jurisdiction

For a number of years the Federal government believed the government needed exclusive jurisdiction over those lands which it owned. Because the Federal government did not reserve jurisdiction over many military in-

stallations and other Federally owned lands upon admission of the territories in which the areas were located, large parcels of Federally owned land came into the Federal Union subject to state legislative jurisdiction.[158]

In 1828, Congress sought to achieve uniformity in Federal jurisdiction over areas owned by the United States by authorizing the President to obtain exclusive jurisdiction over such areas where the United States did not possess exclusive jurisdiction and to obtain exclusive jurisdiction over future purchases.[159] In 1841, Congress enacted legislation requiring "consent" by a state and approval of title by the Attorney General as conditions precedent for the expenditure of Federal monies for the erection of structures on the land.[160] Until the amendment of this statute in 1940, the Attorneys General of the United States consistently believed that the consent required by Clause

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[158] A survey conducted in 1957 revealed that the United States did not exercise any type of legislative jurisdiction over about 95% of the land that it owned. General Services Administration, Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1957, at p. 11 (10 Nov. 1959).

[159] This provision was subsequently codified as R.S. § 1838 (1875) and now enacted as 4 U.S.C. § 103 (1964).

[160] 40 U.S.C. § 255 (1964).

17 (to transfer exclusive jurisdiction to the United States) was essential in order to permit expenditure of funds on the land.[161] For a long while the states were very willing to transfer such jurisdiction, because Federal activity and construction funds were a strong stimulus to their development. As the states became more populated and sure of themselves, they began to want to assert more political control over these Federal territories located within their geographic borders.

As discussed previously, the respective states started to attach more and more "conditions" upon their grants of legislative jurisdiction to the Federal government. These conditions were the right for the state government to exercise a particular governmental function over the ceded land, whether that authority be exercised by its judicial, legislative, or executive organ. One of the first "conditions" to be recognized was the right to serve criminal and civil process within the territory "as if the territory had not been ceded." The Supreme Court had called this "condition" permissive and not a reservation of jurisdiction, because Clause 17 had worked an ipso facto transfer of exclusive jurisdic-

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[161] 39 Ops. Att'y Gen. 285, 291 (1939); 8 Ops. Att'y Gen. 418 (1857).

tion to the Federal government.[162] From that date (1819) courts sought to preserve Federal exclusive jurisdiction in situations where states have used language such as "concurrent jurisdiction to serve process,"[163] "right to execute criminal and civil process,"[164] and "jurisdiction to serve and execute criminal and civil process."[165] In most cases all such language failed to deprive the Federal government of "exclusive jurisdiction".

Once the state had ceded exclusive jurisdiction to the Federal government, it was forever bound by the terms of its grant unless the Federal government elected to retrocede jurisdiction or otherwise permit the application of state law on the enclave.[166]

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[162] United States v. Cornell, 25 Fed. Cas. 646 (No. 14,867)(C.C.R.I. 1819).

[163] Mater v. Holley, 200 F.2d 123 (5th Cir. 1952). Cases of this nature - that is, where a court has said the Federal government possesses exclusive jurisdiction, are often used erroneously as source material on restrictions on the scope of a state's right to serve process. A state's right to execute vis a vis to serve process does not depend upon the lack of exclusive jurisdiction in the Federal government.

[164] Lasher v. State, 30 Tex. Ct. App. 387, 17 S.W. 1064 (1891).

[165] Rogers v. Squier, 157 F.2d 948 (9th Cir. 1946).

[166] Yellow Cab Transit v. Johnson, 48 F. Supp. 594 (D. Okla.), aff'd 137 F.2d 274 (10th Cir.), aff'd 321 U.S. 383 (1943).

The Federal government began to enact a series of statutes that extended the application of state laws as such upon exclusive and partial jurisdiction areas, such as state income taxes and state worksman's compensation laws. Enabling statutes of this type are permissive in nature, however; they provide often that such grant of authority is not to be construed as depriving the Federal government of exclusive jurisdiction.[167]

The current trend is towards the granting of more state legislative authority over all Federal enclaves located within its geographic boundaries. The principle of accommodation, as expressed by the Supreme Court in Fort Leavenworth R.R. v. Lowe, is bringing the two governments closer together in this area. While there is no general statutory authority for the cession of legislative jurisdiction to the states, there are three methods by which it may be given up: (1) cession by the Federal government to the state; (2) an unrestricted disposition of Federal property to private hands; and (3) reconversion to state jurisdiction upon noncompliance with a reverter provision in the state consent or cession statute. In 1962, Congress provided for the grant of easements to State agencies and, in connection therewith, a procedure

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[167] E.g., 4 U.S.C. § 108 (1964).

for the relinquishment of Federal jurisdiction over the granted area.[168]

C. Military Control

The Army's policy of obtaining legislative jurisdiction over land has reflected the general policy of the Federal government.[169] The Secretary of the Army, possessing authority to conduct all affairs for the Department of the Army,[170] has prescribed policies, procedures, and responsibilities relating to the acquisition and retrocession of Federal legislative jurisdiction over land areas within the United States that are under the control of the Department of the Army.[171] As a general rule, the Department will acquire only a proprietorial interest in land, will not acquire any degree of legislative jurisdiction except under exceptional circumstances, and will retrocede unnecessary Federal legislative jurisdiction to the State concerned.[172] Concurrent jurisdiction may be

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[168] 40 U.S.C. § 319 (1964).

[169] See JAGA 1964/3500.

[170] 10 U.S.C. § 3012 (1964), as amended by the Act of Nov. 2, 1966, P.L. 89-718, § 22, 80 Stat. 1118 (Supp. III. 1965-67).

[171] AR 405-20; Army Reg. No. 405-80, ¶ .28 (9 Aug. 1965).

[172] AR 405-20, ¶ 4.

accepted where it is found necessary that the Federal government furnish or augment law enforcement otherwise provided by a state or local government.[173] Exclusive or partial jurisdiction may be accepted in those few instances where the peculiar nature of the military operation necessitates greater freedom from state and local laws, or where the operation of state or local laws may unduly interfere with the mission of the installation.[174]

The Federal government might own land for any number of purposes. While title is normally in the United States, control is almost always in some specific department or agency. "Control" is a term used to describe the authority of the head of the particular department or agency to use, manage, operate, and othewise act with respect to real property.[175] Thus, the Secretary of the Army is authorized by law to take various legal actions with respect to real property "under his control". He has provided guidance with respect to service of state and Federal process on military installations in AR 27-40.

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[173] AR 405-20, ¶ 5b(1).

[174] AR 405-20, ¶ 5b(2).

[175] 10 U.S.C. § 101(5) (1964).

This regulation sets forth the basic policies and procedures appliable to legal proceedings in domestic courts of interest to the Army.

Commanding Officers are given considerable discretion under the provisions of AR 27-40 in handling civilian requests for assistance in service of judicial process; perhaps this latitude causes more problems than it solves. There are several basic problems with AR 27-40 as currently written. The local commander is given the authority to determine which processes are "of interest to the Army";[176] and no mention is made of the obligation on the part of the U. S. authorities to assist in service in those cases where the state has reserved the right to effect service on Federal enclaves.[177] Also, the commander is likely to evaluate the Army's interest in a particular process in "how does it affect the mission"? This approach may overlook the importance of safeguarding the serviceman from a possible in personam judgment in an instance where service could not be effected without the Army's assistance. The Commander exercises a judicial function in permitting state service of judicial process on the enclave as a

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[176] AR 27-40, ¶ 1. See Appendix.

[177] See Fort Leavenworth R.R. v. Lowe.

matter of comity.[178] He should receive more guidance on whether he should permit service by state authorities, than the present regulatory procedure wherein he determines whether the individual will"voluntarily" accept service.[179] The decision (judicial in nature) whether to permit (or assist) state law enforcement officers in effecting service has many important consequences on the individual's legal rights,and it is relegated to a vote procedure whereby the commander need only ascertain "whether [the individual] wishes to accept process voluntarily in accordance with the laws of the State issuing the process." There is a third objection to the provisions of AR 27-40 as currently written. While the commander is cautioned that "service of process is not a function of the Department of the Army or of its military personnel or civilian employees in their official capacity",[180] he is not advised that too much assistance by the military

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[178] RESTATEMENT, Conflicts of Law, § 71 (1934) provides as an example of an exercise of judicial jurisdiction when "an executive officer is given power to impose a duty on a person or to deprive a person of a right if he finds, after a hearing, that a certain fact exists, the officer who finds the existence of the facts acts judicially".

[179] See appendix, ¶ 5b(3)(b).

[180] See appendix, ¶¶ 5b(1) and 5b(3)(b).

authorities, particularly in seizing the individual's personal property or overcoming his resistance to service, may result in either the loss of a regular Army commission,[181] or criminal prosecution under the Posse Comitatus Act[182] or the Soldier's and Sailor's Civil Relief Act of 1940.[183]

D. State Reservation of Right to Serve Process

Virtually all state consent or cession laws transferring exclusive or partial jurisdiction to the United States reserve the right for the state authorities to serve civil and criminal process over the area covered. It is always necessary to ascertain the extent of Federal

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[181] A regular army officer may forfeit his commission by operation of law by effecting service of process, under the provisions of 10 U.S.C. § 3544(b) (1964), particularly when he effects service pursuant to court appointment as a process server. JAGA 1965/4447, 29 July 1965. 10 U.S.C. § 3544(b) (1964) was reenacted as 10 U.S.C. § 973, P.L. 90-235, § 4(a)(5)(A), Jan. 2, 1968, 81 Stat. 759.

[182] Under certain circumstances the use of military personnel to serve civil process on a military installation may constitute "executing" the Federal or state law upon which the process is based. JAGA 1964/3705, 7 April 1964.

[183] The Civil Relief Act makes it a misdemeanor to deprive a serviceman of several of his rights and entitlements prescribed therein. Does the commander become an accomplice when, for example, he permits seizure of a soldier's property on premises under the commander's control against specific provisions in the Civil Relief Act?

legislative jurisdiction over a particular tract by searching the applicable state consent or cession law for other reservations and qualifications to such grant; unfortunately, the statutory language will in all likelihood offer little guidance. As previously discussed, the only limitations on a state's "right" to accomplish service of process are (1) it must not interfere with the free and effective use of the property for Federal purposes; (2) the type of "process" and manner in which it is to be "served" must conform to the law of the forum; and (3) military personnel must not render that degree of assistance that would amount to "execution" of the state or Federal law upon which the process is based.

When one considers that the Federal statutes-like the Soldiers' and Sailors' Civil Relief Act of 1940 and AR 27-40, confer privileges other than exemption from service of process, it appears the only legal question for the local judge advocate is whether the person sought to be served should accept process "voluntarily". If the process or service appears unauthorized for any of the three reasons stated above, then the individual should be cautioned against "voluntary acceptance" because of the subjection to a possible in personam judgment from the

court issuing the process. Based upon similar considerations, the commander should be advised concerning his responsibilities in assisting or otherwise permitting such service. The individuals concerned should clearly distinguish the type of process involved - whether it merely gives due notice of proceedings to a defendant, or it amounts to a judicial order securing obedience to its proceedings or enforcement of a judgment. In either event, it is suggested that the civilian request for assistance or permission to effect process makes the legal proceedings "of interest to the Army" within the meaning of paragraph 1, AR 27-40.

It has been suggested that the state's right to serve process on a Federal enclave may be limited to that authority the state had in effecting its process at the time legislative jurisdiction was ceded to the Federal government. In all likelihood this reading of the language in the act of cession or consent would not be accepted by a court for the following reasons: (1) the movement of courts and legislative bodies is towards more accommodation in the division of legislative authority between the Federal and state governments; (2) the right to serve process has been held from the beginning of the

Federal Union not inconsistent with exclusive Federal jurisdiction; and (3) since Leavenworth R.R. Co. v. Lowe these "reservations" of governmental functions have been viewed as rights bargained for between two parties for their mutual benefit; the state government would not intend to limit its "service" rights in this manner.

Two Federal courts reached the conclusion that the term "service of process" in a reservation clause meant the state law as amended by the state from time to time. In Knott Corp. v. Furman[184] the plaintiff was a guest at the Chamberlin Hotel on the Fort Monroe Military Reservation at Old Point Comfort, Virginia. She was injured attempting to leave the Hotel during a fire. She sued the defendant, a Delaware corporation, for damages in a Federal Court. Fort Monroe was subject to Federal exclusive jurisdiction; however, the state act of cession contained the following provision: "the said cession shall not be construed or taken so as to prevent officers of the state from executing any process or discharging any legal functions within the jurisdiction or territory herein directed to be ceded."[185] Pursuant to a state

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[184] 163 F.2d 199 (4th Cir.), cert. denied 332 U.S. 809 (1947).

[185] Id., at 206.

"long-arm" statute the plaintiff caused substituted service to be made upon the Virginia Secretary of State acting as the statutory agent of a foreign corporation doing "business within the State". The court permitted the use of substitute service statute, stating that because the state has retained the right to serve process on foreign corporations and on others within the Reservation, it has the power to say what shall constitute such service. Accordingly, the court believed that the state could amend state laws from time to time to determine what acts constitute service of state process.

In Swanson v. Painter[186] another Federal Circuit Court of Appeals arrived at the same conclusion. Once personal jurisdiction was acquired over the foreign corporation in Washington under Montana's "long-arm" statute, the fact that the process was based upon incidents that occurred on a Federal enclave was considered"irrelevant".

"Local" actions, on the other hand, present a special problem; these actions must be enforced in the court having physical jurisdiction over the res or,in some instances, having jurisdiction over the place where the cause arose. Local actions include such matters as in rem

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[186] 391 F.2d 523 (9th Cir. 1960).

domiciliary proceedings, including divorce, adoption, probate, lunacy, and the like. The laws of the forum will determine whether a particular action is to be treated as transitory or local. In Matter of Kernan[187] the petitioner was the divorced wife of an officer in the United States Army and, under a decree of absolute divorce obtained in the State of Nevada, she was awarded custody of their daughter. On 4 November 1935 the father, appellant in this case, obtained custody of the child without the knowledge or consent of the mother and held the child at Madison Barracks, New York. The mother initiated proceedings for habeas corpus of the child in a state court. The writ was granted and served upon the father at Madison Barracks. New York had ceded exclusive jurisdiction over Madison Barracks to the United States, retaining only the right to execute state civil and criminal process. The court in Kernan found jurisdiction in the nature of the action itself, in that the question of domestic relations of husband and wife or parent and child was traditionally a local cause of action and subject to state laws, not Federal. At the time land was ceded to the United States, the New York state courts had jurisdic-

[187] 288 N.Y.S. 329 (Sup. Ct.) aff'd 272 N.Y. 736 (1936).

tion to regulate the custody of infants found within its territory; and under the McGlinn Doctrine the Federal government took the land ceded subject to state laws until such time as Congress passes a law inconsistent with the state law. Because Congress had never passed a law giving the Federal courts jurisdiction of habeas corpus proceedings to determine the custody of a child found within the boundaries of a Federal enclave, the municipal law of New York remained unchanged. The Court of Appeals held that the lower court had jurisdiction and affirmed the order granting the writ.

Once a state court assumes jurisdiction in cases involving domestic rights, it normally has authority to provide an adequate remedy even though activities or persons on Federal enclaves may be effected. For instance, where a state court in a divorce action had personal jurisdiction over the parties and ordered the respondent-serviceman not to visit his assigned quarters on a military post under exclusive jurisdiction, The Judge Advocate General concluded:

> That a state court having in personam jurisdiction has the power to require a defendant serviceman to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it

> might require to be done or omitted within the limits of such territory.... [however] a contrary result would follow if the courts' order would prevent accomplishment of an assigned duty or materially interfered with a Federal function.188

Again, whether service of process may be accomplished on a Federal enclave, and the force and effect of such service, depends upon the judicial jurisdiction of the court issuing the process. The permissive nature of process and the manner in which service is accomplished are matters for the law of the forum.

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[188] JAGA 1962/3507, 26 Feb. 1962. The rationale in the opinion was taken from Corbett v. Nutt, 77 U.S. 464 (1870).

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

From this review there seem to exist four problem areas. First, Army commanders are provided guidance - namely, in Army Regulation 27-40, that furnishes little information and prescribes poor procedures for handling requests for military assistance in effecting service of state process on military personnel. Next, Army judge advocates and other interested personnel have a definite need for additional information on state laws respecting their process, methods of service, bases for jurisdiction, and provisions (if any) otherwise affecting servicemen. The third problem is that state legislatures have not taken full advantage of recent developments in due process; almost every state could extend considerably the in personam jurisdiction of its tribunals and provide more flexible methods in effecting service of process. Lastly, the Department of the Army has resisted extending Federal comity to permit service of state process on military installations.

Army Regulation 27-40 should be revised. Commanders need an improved procedure for processing and evaluating civil process from state courts. A procedure could be

adopted similar to that method prescribed in AR 210-7, Personal Commercial Affairs, for processing debt complaints. A revised regulation should set forth clearly Army policy on possible trouble areas - such as, under what circumstances should (or may) the Army authorities render assistance in effecting service. Revised chapters in Department of the Army Pamphlet 27-12, Legal Assistance Handbook, could be utilized as a vehicle for communicating more information on state laws, on a state-to-state basis.

State laws in service of process matters are being revised and updated on a frequent basis. If the state courts in Kentucky (Fort Knox) and North Carolina-Tennessee (Fort Campbell) are unable to effect service of process upon military installations located within their respective states, their state legislatures have not provided their courts with sufficient authority to use substitute service methods. There is no need for a Federal comity statute. The Secretary of the Army possesses sufficient authority to extend Federal comity to all state original and mesne process recognized as lawful under the laws of a state within which a military installation is located.

5. Service of process.

a. Criminal process.

b. Civil process.

(1) The service of process is not a function of the Department of the Army or of its military personnel or civilian employees in their official capacity, except when required by treaty or international agreement. It is the policy of the Department of the Army, however, to assist civil officials in the service of process as provided in (3) and (4) below.

(2) Commanders and other Army officials will not prevent or evade the service of process in legal actions brought against them concerning their official duties ((4)(b) below and para 6b). This does not mean, however, that a commander or other Army official must personally accept service of process. Where such service would interfere with his military duties, he may designate a representative to accept service in his stead.

(3) Service of civil process within the United States, its territories and possessions is as follows:

(a) Process of Federal courts. Service of process is accomplished in accordance with the rules of the Federal court concerned (28 U.S.C. App.). Installation commanders may impose reasonable restrictions upon persons who enter their installations to serve the process.

(b) Process of State courts in areas of exclusive Federal jurisdiction not subject to the right to serve process. Commanders or other Army officials in charge will bring the matter to the attention of the individual requested to be served and will determine whether he wishes to accept service voluntarily in accordance with the laws of the State issuing the process. Judge advocates or other competent officials will inform the individual of the legal effect of voluntary acceptance of service. Any employee of the Department of the Army, military or civilian, serving process upon an individual wishing to accept service can act only in his individual capacity. If the individual does not desire to accept service, the party requesting such service will be notified and will be informed that the nature of the jurisdiction

precludes service by State authorities on the military installation.

(c) Process of State courts in areas of exclusive Federal jurisdiction in which the right to serve process is reserved by, or granted to, the State or States, in areas of concurrent jurisdiction, and in areas in which the United States has only a proprietorial interest. If Army officials are asked to serve process they may proceed as in (b) above. If the individual declines to accept service, the requesting party will be so notified and will be informed that he may proceed through authorities authorized to serve process by the applicable State law. Civil officials authorized by applicable State law will be permitted, upon proper application, to enter areas subject to the right to serve process for the purpose of making service. Commanders or other Army officials in charge will assist the civil officials by making military personnel or civilian employees available for service of process, subject to reasonable limitations. In addition, civil officials may enter areas

subject to the right to serve process for the purpose of levy on and the subsequent sale of personal property of personnel residing thereon, subject to reasonable limitations. This authority does not extend, however, to the levy on or the sale of personal property essential to or proper for the use of military personnel or civilian employees in the performance of their official duties.

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