



Harvard Law Record

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Harvard Law Record

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CALENDAR

Notices for publication in the Calendar should be in the RECORD offices not later than noon the Friday before the date of publication.

Thursday, December 10

J. Newton Esdaile, Esq., will address the STUDENT BAR ASSOCIATION at 1:40 p.m. in Harkness Commons.

Friday, December 11

The Christmas Concert of the Harvard GLEE CLUB, Radcliffe Choral Society, and Bach Society Orchestra will be held in Sanders Theatre at 8:30 p.m.

The Law and Graduate School DEMOCRATIC CLUB will hold a luncheon at 1 p.m. for members. Professor Charles Abrams, guest lecturer at M.I.T., will speak on "Law in Underdeveloped Countries." At the meeting, a Democratic Club Committee will present a proposed campaign plank for the 1960 convention.

Tuesday, December 15

Professor Stanley G. Hoffmann of the Harvard Government Department will speak on "DeGaulle, Algeria, and Grandeur," in Sever 5 at 8 p.m. under the sponsorship of the HARVARD LIBERAL UNION.

The Law and Graduate DEMOCRATIC CLUB will hold an egg nog party for members and dates at 8 p.m. at the Radcliffe Graduate Center. Professor Earl Latham of the Political Science Department of Amherst College will speak.

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Brown Urges National Redirection

Last Friday night, before a crowd undoubtedly thinned by an earlier appearance before the Law School Democratic Club, California Governor Edmund G. "Pat" Brown addressed the Law School Forum.

Consistent with previous statements, Governor Brown prefaced his remarks by pointing out that "I am not a candidate for President . . . at least not right now."

Reappraisal of National Direction

Though not an eloquent speaker nor one whose wit brought many laughs from his audience, Governor Brown did hold attention



Governor Brown

by his sincere appeal for a "reappraisal of national direction" and "leadership to provide a moral impetus to our national consciousness." Since we are a nation of individuals, dedicated to freedom of action, we tend to reject restraint. If we are to meet the ever-mounting social needs of the mid-twentieth century, Governor Brown forecasts a need to subdue our personal drives to a more all-encompassing national purpose.

The recent TV scandals were pointed to as indicative of the low status of our national moral consciousness. And though Brown was quick to admit his own lack of higher education (except for four years of night law school in San Francisco), he expressed his appreciation for the opportunity to use a quasi-academic forum to discuss issues which are often subverted in the more mundane arena of day-to-day politics.

Political Wind-Sock

For all his emphasis on national reallocation of resources, and the need for a critical examination of national purposes, the governor was not above more down-to-earth matters. He accused Richard Milhouse Nixon of being a "well-mended political wind-sock from California" who is not equipped to handle the burdens of national leadership. Though expressing admiration for New York Governor Nelson Rockefeller, Brown noted that he had detected in Rockefeller's recent New York tax program a propensity for privileged treatment to upper-bracket taxpayers.

Public v. Private

Governor Brown, described in a recent *New York Times Magazine* article as "reminding one of an advertising optician in appearance," cited some phenomenal growth statistics from his own state to underline his main theme of greater need for the public sector of our economy to provide those services which the private sector is either unable or unwilling to undertake.

While eschewing a position as a member of the Los Angeles Chamber of Commerce, Brown cited his recently adopted plan for hydro-electric irrigation reclamation as indicative of the strides that the state and Federal governments must undertake to maintain a comfortable life for the average citizen. Citing the new California program, with its projected Feather River project—potentially the world's largest—Brown opened a fertile area for criticism of the Eisenhower Administration's water resource policy, first formulated by ex-Secretary of the Interior

Douglas McKay and lately carried out by Secretary Fred Seaton.

Questions

During the questioning period following his prepared address, the governor seemed to be much more at ease and "in his element" as a professional politician. His answers covered California, national, and international topics.

While explaining his administration's failure to press for repeal of the California Levering Act (loyalty and disclaimer oaths for public officials and teachers) due to lack of time during the last session of the legislature, he observed that he hoped the disclaimer oath in the National Defense Education Act would be repealed by the Congress.

Brown also said he favored strengthening the moral suasion available to the President under present labor relations laws. And in answer to the inevitable question about dissemination of birth control information to U.S. foreign aid recipients, Roman Catholic Brown said he didn't think the question of birth control posed any more difficult an issue to a Roman Catholic President than divorce posed to a Roman Catholic judge. Moreover, Brown volunteered the thought that the issue of religion will not be sufficient to elect or defeat a candidate for the Presidency in 1960.

In line with his earlier comments about the United States' need for re-alignment of objectives, Brown accused President Eisenhower of failing to measure up to at least one area where such a realignment appears possible: segregation. If we want to present a better picture of the United States to countries abroad, Brown feels it is time for our Chief Executive to say he agrees with the decision in *Brown v. The Board of Education*.

— Gold

Harkness Picture Brightens

The November receipts of Harkness Commons Dining Hall showed the first sign of improvement in the financial condition of the Law School's eating facility.

Gross receipts for the month of November were \$59,600 compared with receipts of \$54,000 for the same month last year. Louis A. Toepfer, Vice Dean, reports that this gives him new optimism for the successful operation of Harkness Commons under its new policy. He added that this reversal of a downward trend is particularly significant because

of its occurrence in November, which in recent years has been a month in which receipts took a sharp dip.

He added that November saw the efficiency of the staff increase, as they grew more accustomed to operation under the new plan, which includes a wide variety of foods, instead of one standard menu for everyone.

This Monday, another change in the dining hall was put into effect. During hours when two lines are in operation, one of these lines will be reserved for persons signed on board contracts. Mr. Toepfer explains that two-thirds of the customers are on contract and that about 80 percent of these take the contract meal instead of their a la carte credit. He indicates the hope that lines will be reduced during busy hours if these students can be rushed through a special line which serves only the contract menu.

Although efficiency has increased, this change is expected to further reduce labor costs, because the line which serves only the contract menu will require less labor than the a la carte line.

The hours when a special contract serving line will be open are from 8 to 9 a.m., 12 to 1:30 p.m., and 5:30 to 7 p.m. The other serving line will provide both the contract and the a la carte menus throughout the day.

New Honors for Dean Pound

University Professor Emeritus, Roscoe Pound, former Dean of the Law School, has been honored by the Italian Government.

In ceremonies at the Law School on Wednesday afternoon, Dec. 2, Alfredo Trinchieri, Italian Consul General in Boston, presented Professor Pound with the decoration of Order of Merit of the Italian Republic in the grade of *Commendatore*.

Professor Pound was cited for his international scope as a jurist and particularly for his work in Roman Law. Many of his writings have been translated into Italian. He is a fellow of several academies in Italy.

Professor Pound was 89 on October 27.

New Tax Book

The latest in the Harvard Law School studies produced by the International Program in Taxation, entitled *Taxation in Sweden*, has recently been published by Little, Brown, Boston publishers.

Forum Reaches for Outer Space

The vexing challenge of Soviet space successes will be one topic of an "Outer Space Symposium" to be presented by the Law School Forum on December 11. The symposium, set for 8 p.m. in Lowell Lecture posium, set for 8 p.m. in James Barr Ames Courtroom, will be moderated by President Eisenhower's chief scientific advisor, Dr. G. B. Kistiakowsky, on leave as Professor of Chemistry at Harvard.

Panelist Bruno Rossi, an M.I.T. physics professor, plans to explain the scientific rea-

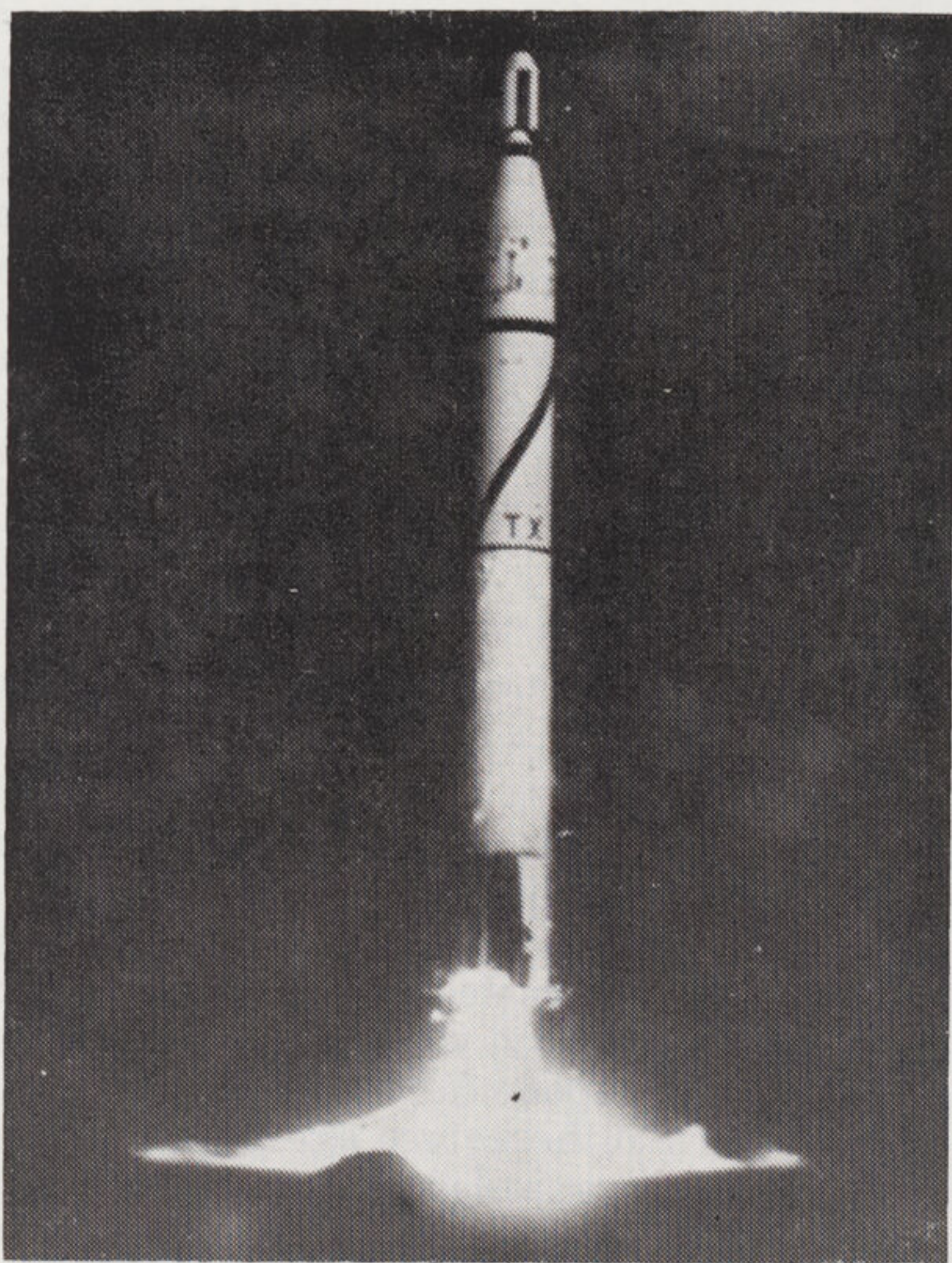
speak on the physical problems of reaching outer space.

As Forum moderator, Professor Kistiakowsky hopes to clarify a little-understood subject. His White House assignment is the most recent of many posts calling for both political and scientific acumen. In 1958 he took part in the Geneva talks on ways to cut the danger of nuclear surprise attack. Previously, he supervised phases of A-bomb development at Los Alamos, served on several governmental advisory committees and aided the Defense Department on ballistic missiles work.

Some thirty years ago Mr. Feldman began a long career of periodic government service when he helped Senator David I. Walsh draft the Walsh-Healey Act. Recently he has assisted two Congressional committees dealing with space problems, worked on the *Ad Hoc* Committee for Peaceful Uses of Outer Space and served as a State Department consultant.

Before joining NASA, Mr. Johnson had long experience in administrative law by working in the Department of Defense.

— Seith



Courtesy of Harvard Army ROTC

sons for sending instruments — as opposed to men — into space. John A. Johnson, General Counsel of the National Aeronautics and Space Administration (NASA), will discuss administrative difficulties of space development while the legal and diplomatic aspects will be the theme of New York lawyer George J. Feldman, an American delegate to the U. N. General Assembly. Dr. Homer Stewart, from the NASA planning staff, will

Gilbert Urges More Minority Participation

"It's very important for every shareholder to know what's going on with the affairs of his company — and he doesn't have to be a financial wizard to understand them. It's just when management doesn't tell you about things, that you want most to know about them. Management isn't going to publicize its mistakes. It likes to give the impression that it comprises the great supermen of our country — the Managerial Elite. When things go right it is all their doing. But when things go wrong it is 'due to conditions beyond the control of your management.'" These were among the remarks made by Louis Gilbert on the subject of "Shareholder Democracy" to the Bull and Bear Club on Friday evening last week. Mr. Gilbert is one-half of the team of Gilbert brothers who are self-

appointed champions of the minority shareholder.

The speaker was introduced by Professor Louis Loss who amused the audience with anecdotes about Mr. Gilbert for about twenty minutes. He explained that his reluctance to give up the rostrum could be attributed to the fact that he seldom gets "out of the shadows." "After all, Mr. Gilbert can't speak until I get through, and you won't leave until you hear him speak," he explained. Having warmed up the capacity audience sufficiently he placed them in Mr. Gilbert's eager hands.

Minority Influence

Mr. Gilbert began his remarks by noting how much minority shareholder influence has increased in the last thirty years. He stated that the change was due in great part to the work of the Securities and Exchange Commission and Professor Loss. Thereafter he spent the evening showing how much was due to the work of the Gilbert brothers.

The first thing the Gilbert brothers watch for in a corporation is the arrangement of inconvenient places for the meetings, designed to keep down attendance by small holders. "Dover, Delaware, is a wonderful place for you unmarried folks to go to for a honeymoon," he said, "but it's no place for a shareholders' meeting."

The next thing they check on are the techniques of voting in order to make sure that they allow for minority representation. Mr. Gilbert is definitely for cumulative voting, and against the stagger system. He held up California, with its tough laws guaranteeing cumulative voting, as the example which he hopes all the states will eventually follow.

Cold Scrutiny

The Gilbert brothers always go over the board of directors with a cold scrutiny on the lookout for uncontrolled stock option plans, high salaries, and low shareholdings. Mr. Gilbert related the details of his battle with General of the Army Douglas MacArthur brought on by the fact that the General owned no shares of Remington Rand after becoming chairman of the board. Although General MacArthur did not appreciate Mr. Gilbert's criticism of the way he invested his money, he bought eight hundred shares in the company in the year after the subject was raised at an annual meeting. The general opened the next annual meeting with "I would like

to welcome to this meeting my fellow veteran and fellow shareholder — Mr. Louis Gilbert."

"Honest and comprehensive communications with shareholders are essential to corporate democracy," Mr. Gilbert feels. He advises that shareholders who cannot attend annual meetings insist on post-meeting reports. He criticized companies that send out annual reports that are full of frills but lack substance. As an example of a useless annual report he showed the audience a copy of a Seagram's Distillers annual report which contained a ten-page financial report surrounded by thirty-five pages of whisky ads.

During the question period that followed his remarks, Mr. Gilbert was asked by a student just what it was that got him started in his crusade and what kept him going. The speaker answered that he felt his work was necessary because there was a great need to protect the small shareholder since the big investors' were neglecting their "fiduciary obligation" to them. He said that he was kept going by the encouragement and pleasure he got from seeing his work succeed and the hosts of new friends and disciples that were constantly flocking to his cause.

Southern Rises—Again?

The members of the Law School and Business School Southern Clubs will gather under the Stars and Bars at 75 Garfield St. (upstairs) on Sat., Dec. 12th, from 5 to 7 for an evening of talking, singing, drinking, mixing, and nobody knows what all. This festive occasion is in commemoration of the glorious Confederate victory which occurred at the "Battle of Cornpone Corner" when two gallant young Southern teen-agers armed only with cornstalks repelled the attack of the invading army and captured the entire union cavalry.

The party is BYOL; setups and awdurvs (pronounced hors d'oeuvres) furnished by the clubs. Wives and dates are most welcome. It is hoped that there will be a few select unattached belles present to mingle with the stags. To reach the party, drive north up Mass. Ave. away from Harvard Square until you reach the first Gulf Station; then turn right, which will put you on Garfield. 75 Garfield is at the end of the block, almost at Oxford St.

Chronic Indifference to Liberties

On Tuesday, December 1, at eight p.m. Lloyd K. Garrison spoke on "The Lawyer and Civil Liberties Today" in the Ames Courtroom of Austin Hall. Garrison, a former Dean of the University of Wisconsin Law School, present national Vice Chairman of the American Civil Liberties Union, is also a partner in the nationally recognized law firm of Paul, Weiss, Rifkind, Wharton, & Garrison.

After a gracious ten-minute introduction by Dean Erwin N. Griswold of the Law School, Mr. Garrison spoke for about thirty minutes and then answered questions. He began by refreshing the minds of the Law School students by reading selected articles of the U. S. Constitution regarding unreasonable searches and seizures, double jeopardy, due process, habeas corpus, etc., and commenting thereon.

Civil Liberties Union

Mr. Garrison then proceeded to describe briefly the American Civil Liberties Union, "the national office of which, located at 170 Fifth Avenue, N. Y. 10, is always happy to accept new members, particularly lawyers," to add to what Mr. Garrison termed the "Galant 800" — lawyers who serve the ACLU throughout the nation as eyes and ears.

Painting a picture of relieved gloom regarding the current American civil liberties scene, Garrison saw some bright spots. Nevertheless, "It is sad to relate, but most people have a sort of chronic indifference to the civil liberties of *other* people. Even members of minority groups are prone to sit back unless their own group rights are attacked."

Referring to the influence of mass media in an affluent society on individualism, Mr. Garrison suggested that "people are more timid today because of mass media and thus fear to stray from the mass herd which may charge them with being 'radical.'" Mr. Garrison excoriated the "dangerous habit of punishing people by exposure, presentments by grand juries which are not based on evidence but merely subvert the grand jury system into a means of trial by publicity. Garrison also referred to TV as part of what he called, "the merciless glare of publicity."

To chronic indifference, Garrison added another factor militating against stronger interest in civil liberties: the growing complexity of life in general. This leads to the atomization of the individual in the great cities, the fear of losing psychological anonymity as well as the growth of "bigness" in labor, management, and government itself.

Forms of Government

"Big labor and big management today are forms of government," Garrison asserted, "they perform governmental functions, their leadership speaks for a majority and is chosen by a majority." Although not clearly spelling out his conclusions, Garrison seemed to suggest that many of the limitations, self-imposed and otherwise, proper to governmental activity might be required to deal with the complex problems raised by "bigness."

A part of Garrison's talk was devoted to the practical problems of idealism in the workaday world of a lawyer. After freely granting that a lawyer who gets a name as a "civil liberties man" may find a few clients dropping away from him, Garrison suggested that nevertheless a moral *quid pro quo* would develop since "in the great confraternity of lawyers, honor and respect of fellow lawyers is of greater long-range interest than the loss of a few clients."

Privilege, Not Burden

More uplifting perhaps than the implied suggestion that by "doing good, one will do well," Mr. Garrison suggested that a lawyer might well be in favor of civil liberties because, after all, it will be in his long-range interest. His plea was to regard civil liberties cases as a "privilege, not as a burden." Mr. Garrison rose to real heights of eloquence in commenting: "If you get a chance to participate in one of these civil liberties cases, regard it as a privilege. If there is anything that is tragic about our age, it is the loss of the ability to act upon a sense of righteous indignation."

Regarding his six-month participation in the Oppenheimer case, Mr. Garrison lashed out hard at what he termed, "such a great and needless mutilation of a very great

American which took place right before my eyes." "It was a horrible experience," commented Garrison, "but also a great lesson that the safeguards which we have thrown about criminal trials, which we have developed with such sweat and pain, are precious beyond words. One only realizes how precious when one sees their opposite."

— Camp

Tribulations of Trial Lawyer

For many years the legal profession seemed to believe that trial lawyers were born, not made. Law schools gave no courses in trial practice, for after all when the young Perry Mason stepped into court, birthright would tell. Mr. James St. Clair in speaking to the Harvard Law Wives disclaimed this mythical birthright belief from his own and well-remembered inexperience. He recalled his first appearance in court—in addition to being totally ignorant of trial procedure he did not even know which seat to take. Since this time Mr. St. Clair has become an eminent trial lawyer with the Boston firm of Hale and Dorr and is presently teaching a course in trial practice at the Law School.

The course is set up to familiarize the student with courtroom procedure, as well as to instruct them in the rudiments of trial preparation. The class takes active part in practicing various trial techniques such as making motions, direct and indirect examination of witnesses, and how to enter documents and other tangible information as evidence.

Mr. St. Clair expressed the hope that many students will take up trial practice after graduation. Our legal system is based on adversary proceedings. Thus, trial lawyers are essential and, if they don't fulfill their allotted role, there is a danger of the system breaking down. Today's situation of crowded court dockets is in a great part due to the lack of an adequate number of practicing trial lawyers.

There is a tendency for large firms to farm out trial practice which has encouraged an informal barrister/solicitor relationship not unlike the formal arrangement used in England. Mr. St. Clair feels that this leads to the difficulty of a firm correctly advising a client on the handling of litigation, if no one in the firm has trial experience. Of course not all

work of a trial lawyer is in a courtroom. One of his most important functions is to advise clients on how to protect themselves in future litigation and how to avoid litigation altogether. Mr. St. Clair said he has represented clients before various boards or committees; for example he has represented a doctor before the Medical Society and an Internal Revenue Agent before the Internal Revenue Board.

The public often has a misconception of the work of a trial lawyer, assuming that the majority of his cases are criminal in nature. And how often has anyone connected with the law heard the question inevitably raised in a discussion of trial work, "How can you defend a guilty person?" In answer Mr. St. Clair said that it must be first understood that no person is guilty until proven so under our law. We have an adversary system, and, if a governmental body charges a person with a crime, it must prove this charge beyond a reasonable doubt. The defense lawyer's job in every case is to see that government proves its case *beyond a reasonable doubt*. If the defense were not to insist on full and complete documentation and proof there would be no restraint on the government, and the judicial process, itself, would be at stake, stated Mr. St. Clair.

He concluded his comments by highly recommending trial practice as most rewarding. For a young lawyer just starting out it is a field of the law in which he can make his mark quickly. There is a tangible measure of success in the winning of cases. This will not go unnoticed by his firm. It is possible that other branches of the law are more lucrative, suggested the speaker, but a good trial lawyer should not starve.

— Marilyn Pfaltz

Esdaile Speaks Today

J. Newton Esdaile, Esq., leading Boston attorney, will address the Student Bar Association today at 1:40 p.m. in Harkness Commons. Mr. Esdaile was credited last year with the highest award of damages brought in by a jury, in a negligence case, in the history of the state of Massachusetts. He is an authority in the field of medical testimony and his talk will deal chiefly with the problems of presentation of such evidence.

Who Holds the Air Space?

"Is ADIZ Legal?" was the title of a paper delivered to the International Law Club last week by Ivan L. Head, a graduate law student from Calgary, Canada. ADIZ is derived from the initials of Air Defense Identification Zone. These zones have been established by the U.S. and Canadian governments off both the Atlantic and Pacific coasts of this continent, as well as across the Arctic Circle and in certain other areas of the world. Mr. Head dealt only, for the purposes of his address, with those zones in the North Atlantic. The purpose of ADIZ is to permit the positive identification of all aircraft approaching North America at a time when those aircraft are still far removed from our shores. This is achieved by demanding that all approaching aircraft radio their identification to American or Canadian authorities while still well out over the ocean. Unidentified aircraft are detected on the far-flung radar nets which now encircle the northern half of the continent and, if necessary, interceptor aircraft are dispatched to ensure the friendly purposes of the airplane in question.

Broken Principles

Because the regulations of the two governments demand compliance by all aircraft with these self-identifying procedures, whether foreign or not, and because the outer boundary of these identification zones is in some cases as far as 300 miles from shore, a question is immediately raised as to whether or not the two states are "breaking principles of international law by thus placing restrictions on the innocent passage of aircraft over the high seas. The speaker stated that seldom has a unilateral act of any government so immediately affected so many other nations as have the ADIZ and CADIZ (Canadian) regulations. Practically every state in western Europe operates a government-owned or sponsored airline which operates as a regularly scheduled carrier on the North Atlantic route. Thus each of these European governments, in the course of its airline operations, encounters these regulations as often as several times a day, depending on the frequency of its flights.

Mr. Head stressed at the outset that any interest in the legality of ADIZ and CADIZ

was essentially of academic rather than of practical legal interest because as far as could be determined all carriers on the North Atlantic route have accepted without reservation the identification procedures imposed upon them by the U.S. and Canadian governments. Thus they could not now be heard to complain in an international tribunal that the U.S. and Canada were acting extraterritorially. But from an observer's point of view, the assertion of these regulations was open to challenge.

Flight Plan

After he described the air traffic control and "flight plan" procedure followed by an aircraft pilot-in-command, both in instances where an ADIZ was to be penetrated in the course of a flight and where it was not, actual aerial navigation charts were displayed to the audience. These charts were of the type carried in aircraft and used by the flight crew for the purposes of navigation, and clearly indicated the boundaries of the various identification zones. Additionally, the latest figures of the International Air Transport Association were quoted to reveal that during the first nine months of 1959, almost 1,100,000 passengers were carried by air across the North Atlantic. If it could be presumed that half of these people were approaching the shores of North America, then the regulations under discussion regularly affected a great number of persons.

The Chicago Convention of 1944 to which most of the world's nations outside of the Communist bloc have become parties, ruled that each state has "complete and exclusive sovereignty over the air space above its territory" and that such territory shall be presumed to include both "land areas and territorial waters adjacent thereto." The first question to be answered, then, in seeking a legal justification for these regulations, was the extent of the territorial sea. The historical reasons for the three-mile rule were traced from the time of Bynkershoek in the early 18th century down to the modern state practice and the effects, if any, of the increasing range of modern shore cannon were discussed. The character of the seas does not for all purposes change from territorial waters to high seas at the three-mile mark

even off the shores of those states which do recognize a three-mile limit, said Mr. Head. Instead, there is an indefinite zone extending seaward therefrom in which the littoral state may exercise certain limited rights of control. These rights have traditionally included protective practices such as anti-smuggling and quarantine patrols.

British "Hovering Acts"

These contiguous seas were the scene of activity by the Royal Navy during the 18th century off the coasts of Great Britain in enforcing the customs laws under the authority of the British "Hovering Acts" which permitted naval vessels to visit and search ships suspected of breaking the laws. Similar U.S. legislation is still in force and was used considerably during the prohibition era in attempts to stop rum-running. In some respects these laws can be regarded as precedents for ADIZ regulations. The English writer Twiss was quoted by the speaker, however, as saying that these restrictions upon innocent passage could not be construed as the absolute right of the littoral state but only as "permissive jurisdiction" insofar as they extended beyond the three-mile limit. If any distance can be regarded as more universally accepted than any other as the outer boundary of this contiguous zone, said the speaker, it would be 12 nautical miles i.e. 4 marine leagues. This is the traditional representation of the distance which a vessel can sail in one hour.

The reason that it is necessary to examine marine law with respect to contiguous zones, is not because of the recognized doctrine that the air shares the legal character of the subjacent surface, but rather because of the analogy that can be drawn between the 12 mile sea rule and an ADIZ reaching out some 300 miles. The analogy is that each of these

figures represents the distance that can be traveled through those mediums in one hour. If, therefore, it is accepted by the nations of the world that a maritime power is entitled to exercise certain controls over the bordering seas, then it is not unreasonable to suggest that similar controls should be applicable in the air.

In conclusion, the speaker expressed the opinion that neither ADIZ or CADIZ could be defended on the ground that they were mere manifestations of air traffic controls. Such controls have existed for some time and are quite adequate for the purpose without any assistance from ADIZ regulations. If the regulations are grounded in international law, it must be on the self-preservation theory. And if this theory is valid, then the outer boundary of the identification zone can extend seaward almost without restriction as the distance which can be traveled by modern aircraft in one hour becomes ever greater.

Combined Charities Drive Shows Early Promise

Earliest returns in the Law School combined Charities Drive show an average donation of \$4.88 from off-campus students. Forty-two donors had responded by December 7. Dormitory residents are being contacted throughout this week.

The Committee announced that the following first-year men have joined in contacting fellow class-members: John O'Meara, Hillsdale, Mich.; Ronald Morgan, Lansing, Mich.; Robert Smith, Westhampton Beach, N.Y.; and Steve Sughrue, Milton, Mass. Robert Scrivner 2L, Topeka, Kansas has joined the second-year effort.

The Drive continues through Sunday, December 13.

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FEATURES SECTION

I. C. C. Regulates Watermelons

by
Norris A. Lynch

Watermelons, long prominent in the summer diet of Americans, are highly susceptible to damage in shipment. With the introduction and wide popular acceptance of the Congo and Charlestown Gray, or long-type watermelon after the Second World War, the railroads in the southeastern part of the U. S. were faced with a particularly difficult shipping problem. The new melon, while of better eating quality than the earlier round-type, was of much poorer shipping quality.

This shipping problem eventually involved two governmental agencies, as well as powerful private interests in a conflict of jurisdiction.

The Agricultural Adjustment Act of 1946 (7 U.S.C. 427 *et seq.*) provided authority for the U. S. Department of Agriculture to carry on research for improving methods of transportation of agricultural products. The Interstate Commerce Commission has authority to investigate, upon petition by the shippers, rates on agricultural commodities to determine whether or not they are just and reasonable. (49 U.S.C. Sec. 13, p.1 *et seq.*)

As a result of a series of experiments begun in 1953, the Department of Agriculture concluded that crosswise loading of watermelon, rather than the lengthwise method, would substantially reduce external damage in the long melon; the department was unable to be entirely certain as to the effect of the new loading method upon internal damage to the melon.¹ The

1. The test compared the established loading method of the lengthwise load, that is, "where the melon is placed on its side with the longest dimensions paralleling the length of the car and with its stem end toward the door way of the car, with the experimental method, the cross-wise method, where "... the watermelons are placed in the cars with their ends pointed towards the sides of the car." (U. S. Dept. of Ag. *Crosswise Loading of Watermelon*, July, 1956, pp. 2-5.)

advantage of the crosswise experimental method is that it removes pressure from the ends of the watermelons, which are weak, and transfers it to the thicker rind of the side. Further, the total area of pressure or impact of one melon upon another is thus increased, which in turn results in less pressure per square inch.

Educational Campaign

In the summer of 1955, the railroads conducted an educational campaign among watermelon shippers and receivers designed to persuade them to adopt the crosswise loading method for long melons; both the railroads and the Department of Agriculture were relatively unconcerned about the method used for shipment of the more durable, and now economically less important, round melon. Rather quickly it was clear that the campaign was not succeeding, and in March of 1956 the railroads turned to the use of a tariff penalty of 10%, to be paid by any shipper loading melons by the old method.² The shippers and receivers immediately responded by petitioning the I.C.C. for relief from the penalty, asserting that it was unjust, unreasonable, and discriminatory. The I.C.C. denied their petition on the grounds that it was generally conceded that the railroads were bearing unreasonably high damage claims on watermelon shipments.

One month later, in April of 1956, the railroads filed with the I.C.C. a schedule calling for a 20%

2. This penalty was provided for in Rule 5 of the Uniform Classification, which was put into effect in May of 1952 as a result of a decision by the Commission in Docket Number 28,300. The decision provided for a tariff governing class rates of freight to be filed by the railroads. This decision gave the railroads the power to authorize agents to file tariff class and legal rates for transportation. The Uniform Classification had force and effect under 49 U.S.C. Sec. 6, p. 6. The tariffs filed were subject to investigation and suspension upon petition to the I.C.C. by the parties in interest under Sec. 15, p. 7.

penalty. The railroads had become convinced that the 10% penalty was not sufficient to gain compliance with the crosswise loading method, because damages paid on shipments loaded in the old lengthwise method exceeded the 10% penalty significantly. Thus, shippers could still afford to load melons lengthwise; and the railroads were still without protection. This time, the petition of the shippers and receivers for suspension of the penalty met with the approval of the I.C.C., which granted a suspension until November 18, 1956. The railroads, in turn, voluntarily extended this suspension until March 1, 1957, in order that their case might be consolidated.

In their second petition for suspension, the shippers and receivers claimed not only that the penalty payment constituted an unjust and discriminatory burden upon those shippers electing to use the old loading method, but also that it favored those shipping the round-type melon over those shipping the newer long varieties, and was thus likely to have a substantial effect upon the whole watermelon industry. Hence, while in March of

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1956, at the time of the imposition of the first penalty of 10% the question before the I.C.C. had been simply the reasonableness and justness of a rate, it now became a more complex matter of the legality of enforcing, by any means, the use of the crosswise loading method, in view of the probable effect upon the industry.

In its decision of August 19, 1957, the I.C.C. (301-I.C.C.-461) held the 10% penalty in effect from March 13, 1956 to March 1, 1957 inapplicable since the railroads had implied knowledge that cars were being loaded in the old method. The commissioners reasoned that since the railroads knew that in 1956 only a few cars were loaded in the crosswise method, there was implied knowledge by the railroads that the cars in 1957 were, also, for the most part, loaded in the old lengthwise manner. This being true, the railroads having continued to accept shipments, could not claim the penalty charge.

I.C.C. Allows 10%

With respect to the equity of compelling use of the new loading method, the I.C.C. relied heavily on the study conducted by the Department of Agriculture. Although the tests conducted were not 100% conclusive, owing to the fact that the paired test shipments were unexpectedly diverted from their intended destinations, the I.C.C. was of the opinion that they did demonstrate that the crosswise loading method cut the damage in shipment. Accordingly, the I.C.C. allowed for new tariff penalties of 10% to be filed by the railroads and applied against those using the old method. The commission held, however, that the 20% penalty, suspended by them until November, 1956, and in turn voluntarily extended until March 1, 1957, by the railroads, was excessive when measured against the average damage claims paid by the railroads on a lengthwise load.

After the I.C.C. decision, the railroads attempted to gain compliance with the crosswise loading method by the use of a 25% incen-

tive plan. The receivers were given a 25% reduction in rates if they accepted melons loaded in the crosswise method. Since watermelons are shipped f. o. b. point of origin, it was hoped that retailers would not forego the rate reduction. This plan proved unsuccessful when the northern trunk lines refused to adopt the same incentive proposal. Therefore the 25% reduction was only applicable to melons shipped between two points in the southeastern part of the U. S. The shippers did not use rail transportation in such hauls because it was more profitable to ship by truck and avoid extra handling costs. The railroads' problem was further aggravated by this increased use of shipping by truck. Today it is estimated that 80%-85% of the watermelons moved from the southeastern U. S. are shipped by truck. Faced with increasing damage claims and proof that the incentive plan was ineffective in persuading shippers to change their style of loading, the railroads filed for a 25% penalty for cars not loaded in the crosswise method. Hearings were held in Jacksonville, Florida, in September and October of 1959 and in Washington in November. It seems doubtful in the light of its earlier rulings that the I.C.C. will allow this penalty.

Two Problems

The watermelon case illustrates two types of problems. One of these is in the area of conflict of interests among private parties — a conflict sometimes not apparent until the intervention of an outsider, in this case the U. S. Government, through two of its agencies. The second is in relation to the differing responsibilities and powers of public agencies, each concerned with the same general problem, and each compelled to approach it in a somewhat different way. The over-all obligation of these agencies is to promote the public interest, yet, each must define the public interest in terms of its statutory functions.

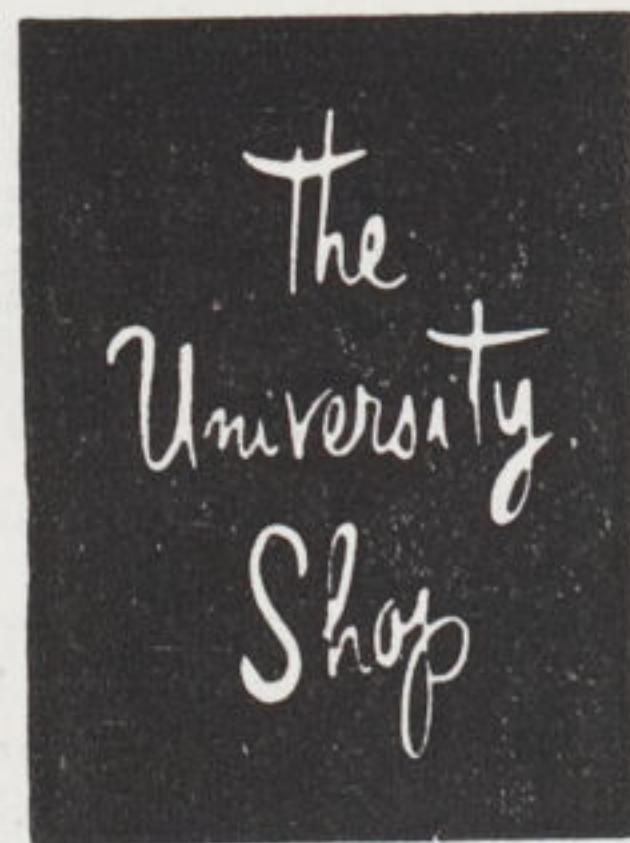
The shippers and receivers lined up on one side, the railroads on the

other. Receivers wished to retain the old loading method because the resultant damage claims which they could make upon the railroads constituted, in effect, an artificial market for them. The railroads served as "consumers," and the "price" paid by these "consumers" was an administered one. Moreover, since damaged melons were withdrawn from the regular trade, the supply became less plentiful, and this often had an effect upon market price favorable to the receivers. To add a final pleasing touch to this picture, it was usually possible for them to sell damaged melons, even though at a reduced price, and thus to add to their profits, insofar as the increased supply of damaged melons did not effect the price of the perfect melons.

The shippers were not especially concerned about how the melons were loaded. Their only interest was in selling watermelons. To do this, they had to ship in a form acceptable to the receivers, and this of course, was in that form likely to prove most profitable to the receivers.

The railroads, on the other hand, were faced with a situation very nearly impossible. Damage claims on watermelons loaded by the old method were prohibitively high. Short of a change in the loading method, the only solution seemed

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to be either a rate increase or a total refusal to accept melons as cargo. Either method would be extremely disadvantageous in light of growing truck competition. The new loading method looked like a possible answer to the problem.

It is at this point that the Government enters the picture, and conflict arises out of the differing responsibilities and powers of public agencies. The cross-purposes at which the Department of Agriculture and the Interstate Commerce Commission worked are of more than usual interest. The Department sought a scientific solution to a technical problem. Through the scientific method, it found a reasonably satisfactory technical solution. Accordingly, it recommended this solution, and sat back, its job done. The I.C.C., on the other hand, had to consider the effects of the technically sound recommendations of Agriculture upon the nation's transportation system—specifically, upon the position of the railroads vis-a-vis their most intense competition, the trucking lines. The I.C.C.'s problem was not susceptible of an exclusively technical solution. The Department of Agriculture must be completely neutral in a contest of the kind here involved between private parties. The job of the department is to develop methods of transportation which benefit society as a whole. Once the department has studied a particular problem it has no responsibility, and no power, to enforce its findings.

Private Cooperation

Moreover, the department's success is dependent upon the co-operation of private parties. For this reason the department's policy is not to represent, or appear to represent, any one particular interest. In large part because of its necessary neutrality, the department prefers not to give testimony in hearings such as that conducted by the I.C.C., and therefore not to honor the subpoenas issued, but rather to allow its research reports to stand as witness for the department. Doubtless, this posi-

tion, to which the department does make exceptions, sometimes seems less than co-operative to other governmental agencies, particularly when, for good reasons, perhaps technical in nature, the department's research can not dot the last "i" and cross the final "t" in respect to points which may be raised.

A further point concerns the fact that the department has the option to honor or not to honor a subpoena of a Federal regulatory body—such discretion represents sound executive policy, for it is an attempt to avoid a situation detrimental to the functioning of the executive departments. If subpoenas were required to be honored, hundreds of inspectors and graders would be spending much of their time before a regulatory body, and much necessary work would not be accomplished.

Finally, it may be suggested that at least in regard to its research program, the Department of Agriculture has a more restricted and therefore less complicated responsibility than that of such an agency as the I.C.C., whose decision, being enforceable, may have the most all-pervading consequences for the country's transportation system.

The I.C.C. is charged with determining fair and reasonable rates and enforcing them. The

term "fair and reasonable" is a flexible one. Students of government are aware that the I.C.C. must take into account all the technical and economic data which can be made available to it in approving rates; it must also take into account the long-range welfare of the nation's entire transportation system, and make a vigorous effort at balancing the interests involved. Values must be weighed with evidence. To apply factual evidence to a case and ignore values is as harmful to society as it is to weigh values without evidence. Unless a proper confluence of both is attained, one might have a near absolute concept of factual justice but no practical method of administering it. The I.C.C.'s position is further differentiated from that of the Department of Agriculture since it can not limit itself to that of recommendation; it can not take the comparatively comfortable position of the "recommending experts." It must be responsible for the effects long into the future of the decisions it not only makes but enforces.

The author is a candidate for a Ph.D. in government at Georgetown University. He holds A.B. and A.M. degrees from the University of Cincinnati. While in Washington, he has participated in several Federal research projects.

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A Tally of Federal Lands

The completion of an inventory of the Federal areas over which the various States have relinquished legislative jurisdiction to the Federal Government since the Constitution was adopted was announced this week by Franklin Floete, the Administrator of General Services.

President Eisenhower, in an approving letter, said that the inventory report will help focus attention on the problems that develop when States transfer to the Federal Government jurisdiction over land areas and their inhabitants.

The complications that result were illustrated a few years ago when the children of families residing on the grounds of a Veteran's Administration hospital in Pennsylvania were denied the right to enroll in the public schools of the State. It was held that the residents of such a Federal enclave under the "exclusive jurisdiction" of the United States were not residents of the State and hence were not entitled to the privileges of residents.

The exclusion of the States from these enclaves occurs only with the consent of the State and is provided for in the Constitution

by the same clause that provides for the creation of the District of Columbia. The report states, however, that unlike the District of Columbia, Congress "has legislated and provided little by way of local governmental machinery, for such Federal enclaves or for their inhabitants."

The report shows that a transfer of exclusive legislative jurisdiction from the State has occurred in each of the first 48 States. The transfers of jurisdiction are limited, except in certain unusual situations to federally owned land, but all transfers, including those with reservations of authority by the States, cover only 4 percent of the 400 million acres of Federal land in the 48 States. However, once that transfer has occurred no adjustment of the jurisdiction between the State and Federal Governments can now be had except through special legislation or upon the disposition of the land by the

Federal Government.

The inventory of jurisdictional status complements the inventory of real property owned by the United States, which is also maintained by GSA. This inventory was compiled as of June 30, 1957, and does not include the newly formed States of Alaska and Hawaii.

Report to President

The preparation of this inventory stemmed from a report in 1956 to the President, made by the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, headed by Assistant Attorney General Perry W. Morton. The

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work of that Committee, which extended over 2-½ years, pointed out the complications that arise from the transfer of legislative jurisdiction from a State to the Federal Government, particularly complications with respect to taxation, marriage, divorce, annulment, adoption, commitment of the mentally incompetent, and descent and distribution of property. The Committee recommended that residents of areas under the jurisdiction of the Federal Government be not deprived of any civil or political rights and that appropriate legislation be enacted to permit appropriate adjustments in the jurisdictional status of Federal areas.

Inventory

The inventory report states that "the extent to which transfers of jurisdiction have been made has not been generally known, and the effect of the transfers on such matters as civil rights of the residents of affected areas has not been generally realized." The inventory report shows that the Federal Government has exclusive jurisdiction, at least in part, over 5050 installations spread over the 48 States, which is more than one-half of the total number of Federal installations in the 48 States. In acreage, however, only 2 percent of the Federally owned land is under the exclusive jurisdiction of the United States.

The largest area of exclusive jurisdiction is Yellowstone National Park, comprising 2.2 million acres, of which 2 million acres are in Wyoming. All of such installations embrace an aggregate area more than 200 times the size of

the District of Columbia, and 42 of them are each larger than the District of Columbia. More than one-half of the Federal property under the exclusive jurisdiction of the United States is controlled by the Military Departments. In many cases the States have transferred jurisdiction to the Federal Government but reserved their jurisdiction in certain respects, such as the power to tax private property. Most of the areas involved are National Parks, and they aggregate an additional area 200 times the size of the District of Columbia. In still other areas the States have reserved their full authority, to be exercised, however, concurrently with the United States. This category involves only one-tenth of one percent of all Federal areas and is centralized in the States of Maryland, Virginia and Washington.

Military Lands

Substantially all of the land the jurisdiction of which is transferred to the United States is held by the Military Departments and by the Departments of Interior and Agriculture. Many of the smaller installations, some of them containing only one-tenth of an acre of land, involve post offices, office buildings and Coast Guard lights.

In the past, exclusive jurisdiction over land bought by the Federal Government was sought as a matter of course. This was true primarily because of a Federal statute passed in 1841 which required that the consent of the State to the purchase of such land be secured prior to the construction of any Federal building thereon. While that requirement was repealed in 1940, a cession of jurisdiction is still required before constructing lighthouses, beacons,

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As a result of the report to the Interdepartmental Committee, the United States has declined to seek exclusive jurisdiction over the Air Force Academy at Colorado Springs even though it has such jurisdiction over the Naval Academy at Annapolis and the principal portion of the Military Academy at West Point. Even prior to that report, the security conscious Atomic Energy Commission sought and obtained special legislation to retrocede to the States jurisdiction previously acquired from such States over most of the areas under its control.

Once a State has consented to the transfer of jurisdiction and it has vested in the Federal Government, there is no way of reversing the process except by legis-

lation or by disposition of the property by the Federal Government. This is true even though the original purpose for the transfer of jurisdiction is no longer a valid one.

A bill to permit the adjustment of legislative jurisdiction in accordance with the current needs and to repeal certain obsolete provisions of law is now pending in the Congress.

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