



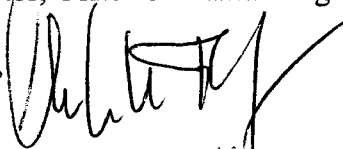
OFFICE OF THE COUNTY ATTORNEY


Douglas M. Duncan  
County Executive

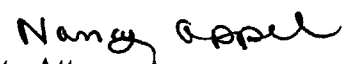
Charles W. Thompson, Jr.  
County Attorney

MEMORANDUM

TO: Odessa M. Shannon, Director, Office of Human Rights

VIA: Charles W. Thompson, Jr.,   
County Attorney

Marc P. Hansen, Chief,   
Division of General Counsel

FROM: Nancy Appel   
Assistant County Attorney

DATE: September 19, 2005

RE: Office of Human Rights' Jurisdiction Under Chapter 27 on Federal Enclaves

You have requested a formal legal opinion regarding the jurisdiction of the Office of Human Rights to adjudicate employment discrimination complaints under Chapter 27 of the Montgomery County Code against private (non-federal) employers located on federal enclaves in Montgomery County. We understand that a Respondent to an employment discrimination complaint has contended that OHR has no jurisdiction on federal enclaves, because federal enclaves are not part of Montgomery County and, thus as an employer, its actions, on a federal enclave, fall outside the jurisdiction of Montgomery County, and Chapter 27.

As a result of this challenge, you have requested formal guidance to determine whether OHR has jurisdiction to adjudicate employment discrimination complaints against private employers who operate on federal enclaves.

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<sup>1</sup> Lucas Aubrey, an incoming second-year law student at The Catholic University Law School for September 2005, participated in researching this memorandum.

### Short Answer

The term "federal enclave" refers to a tract of real property within a State owned by the United States, often called "a State within a State," and includes military forts, post offices, national parks, research facilities, and veterans' hospitals.

By statute, Maryland ceded exclusive jurisdiction to the United States for all property transferred from 1906 until 1943. However in 1993, the Maryland Court of Appeals ruled this statute did not abdicate all jurisdiction to the United States; instead, the Court of Appeals adopted the Supreme Court's liberal Howard Rule holding that Maryland retains concurrent jurisdiction over private activity occurring on a federal enclave as long as the law being enforced is not inconsistent with federal law or policy. Therefore, OHR will have jurisdiction on federal enclaves to adjudicate complaints filed under Chapter 27.

### DISCUSSION

#### 1. The Need for Enclave Jurisdiction

Federal enclave jurisdiction refers to any real property held by the federal government under its specific enclave powers in the Constitution.<sup>2</sup> Federal enclave jurisdiction originated as a response by the Framers of the new Constitution to rioters in the City of Philadelphia in June of 1783. For several days, mutineers from General Washington's Army besieged the Continental Congress. When Congress asked Pennsylvania to arm its militia and restore peace, Pennsylvania refused. The rioting ended because Congress adjourned to New Jersey.<sup>3</sup> This experience

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<sup>2</sup> In addition to real property for the erection of forts, magazines, arsenals, docks, and other needful buildings under the Enclave Clause, the United States also holds vast amounts of land under the powers granted under the Property Clause, Article IV, Section 3, Clause 2 of the United States Constitution; that clause provides "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution contained, shall be so construed as to prejudice any claims either of the United States or of any particular State." U.S. Const. art. IV, § 3, cl. 2. In the western states, the federal government owns the following percentages of land: Arizona - 45%, California - 45%, Colorado - 36%, Idaho - 64%, Montana - 30%, New Mexico - 35%, Oregon - 52%, Utah- 66%, Washington - 30%, Wyoming, 48%; W. Cleon Skousen, *The Making of America* 459, Nat'l Center for Constitutional Studies, 2nd ed. 1986.

<sup>3</sup> U.S. Attorney Gen., Report of the Interdepartmental Committee for the Jurisdiction over Federal Areas

prompted those favoring adoption of the Constitution to advocate that federal functions be protected, in specific enclaves, under exclusive federal dominion and control, without any State power or influence.<sup>4</sup> The Framers responded by drafting the Enclave Clause, Article I, Section 8, Clause 17, into the United States Constitution to provide:

Congress shall have the power to exercise exclusive legislative<sup>5</sup> jurisdiction ... over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.<sup>6</sup>

While the Founding Fathers worried about safeguarding their young federal system, they also feared unchecked federal power and consequently required States to consent to "exclusive" federal authority. The Enclave Clause incorporates this checks and balance system of consent: "In other words, the Enclave Clause reflects a respect for the autonomy of federal and state governments by equipping Congress with the "sword" of legislative authority and supplying the states with the "shield" of consent."<sup>7</sup>

States that reserved jurisdiction at the time of cessation share concurrent jurisdiction in the federal enclave with the United States. Absent a state's consent to cede property, the federal government may acquire land within a state through purchase or condemnation; however, the United States does not obtain exclusive or concurrent jurisdiction. Instead, the United States acts as an ordinary proprietor.<sup>8</sup> But even in this circumstance, the United States may secure jurisdiction over the purchased or condemned land through "a [post-acquisition] cession of legislative authority and political jurisdiction" from the state,<sup>9</sup> and the cession may be either total or qualified.<sup>10</sup>

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Within the States, pt II, at 11, U.S. Government Printing Office 1957.

<sup>4</sup> The Federalist No. 43 at 273 (J. Madison) (C. Rossiter ed. 1961 ed. 1961) (discussing Madison's response to States that objected to Enclave Clause and his response discussing the principle of the need to protect federal functions in enclave areas from the interference and excessive influence of any state).

<sup>5</sup> In 1930, the Supreme Court clarified that that the words "exclusive legislative" means "exclusive jurisdiction." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930).

<sup>6</sup> U.S. Const. art. 1, § 8, cl. 17.

<sup>7</sup> *Commonwealth of Virginia v. Janet Reno*, 955 F. Supp. 571, 577 (E.D. Va. 1997) (dismissing Virginia's complaint that U.S Attorney General lacks authority to designate Lorton, which is located in Virginia, as a District of Columbia prison).

<sup>8</sup> *Surplus Trading*, 281 U.S. at 650.

<sup>9</sup> *Lowe*, 114 U.S. at 541-42.

<sup>10</sup> See *Paul v. United States*, 371 U.S. 245, 264-65 (1963) (federal policy precludes state milk pricing scheme from operating on California bases).

Historically, few states conditioned their consent to purchase land by reserving jurisdiction.<sup>11</sup> Over the years, the Supreme Court<sup>12</sup> has articulated three approaches to determining whether state or federal law controls within land acquired by the United States: 1) the "McGlinn" Rule,<sup>13</sup> and 2) the "Howard" Rule<sup>14</sup> and 3) the "Paul" Rule.<sup>15</sup>

The McGlinn Rule states that when jurisdiction is transferred from a state to the federal government to form an enclave, the state law at the time of the transfer becomes federal law. The McGlinn Rule mandates that: "whenever political jurisdiction and legislative power over any territory are transferred from one sovereign to another, the laws which are intended for the protections of private rights, continue in force until abrogated or changed by the new government or sovereign."<sup>16</sup> State law changes subsequent to the transfer, however, are not applicable within the enclave unless authorized by specific congressional legislation. Consequently, the state law is frozen at the moment of cession until Congress legislates otherwise.<sup>17</sup>

The Howard Rule dictates that all state laws apply in the federal enclave unless the state law interferes with the federal government's jurisdiction. The Howard Rule represents a liberalization in which the federal government shares powers with the State, even in enclaves in which a State ceded all authority: "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

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<sup>11</sup> Altieri, *Federal Enclaves, The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 Mil. L. Rev. 55 (1978).

<sup>12</sup> In *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174 (1988), the United States Supreme Court specifically bypassed an issue similar to the one at issue, to this - namely deciding whether a state could directly regulate operations at a federal facility operated by a private contractor.

<sup>13</sup> *Chicago, Rock Island & Pacific R.R. v. McGlinn*, 114 U.S. 542 (1855) (state liability laws apply to railroad for incident occurring on military enclave). For a modern day application of the McGlinn Rule, see *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1449-50 (N.D. Cal. 1986) (holding that Congress had not removed restrictions to tidelands for specific shipyards and denying corporation's motion for reconsideration for title).

<sup>14</sup> *Howard v. Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953). (Louisville's annexation of adjoining naval plant under exclusive legislative jurisdiction did not interfere with federal government's jurisdiction).

<sup>15</sup> *Paul* at 371 U.S. 245.

<sup>16</sup> *McGlinn*, 114 U.S. at 546.

<sup>17</sup> See *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929) (private proprietor of Hotel located at Hot Springs National Park, federal enclave, liable under common law for damages despite contrary state law passed nine years earlier releasing innkeeper from common law liability).

there is no interference with the jurisdiction asserted by the Federal Government."<sup>18</sup> Although this decision precedes *Paul v. United States*<sup>19</sup> by ten years, the Howard Rule of noninterference has been the acknowledged trend by courts and commentators.<sup>20</sup> Most notably, the Court of Appeals has embraced the Howard Rule. Therefore, we have based our opinion that OHR has jurisdiction on federal enclaves on the Howard Rule.<sup>21</sup>

## **2. Enclave Jurisdiction In Maryland**

### **A. Statutory Code Provision: Maryland Consent for US Acquisition of Land**

The Maryland Code describes the terms and conditions for Maryland's consent to the United States' acquisition of specific tracts of land.<sup>22</sup> Maryland now reserves jurisdiction to the full extent permitted by the Constitution and authorizes the Governor to enter agreements with the United States to establish full or partial concurrent jurisdiction by the State and the United States over lands held by the United States.<sup>23</sup> However, Maryland ceded exclusive jurisdiction to the United States "over land or persons, property, and transactions on land that the United States has acquired" on or before May 31, 1943 to the extent the State ceded jurisdiction under:

- 1) Chapter 193, §§ 3 and 4 of the Acts of the General Assembly of 1874;
- 2) Chapter 395, §§ 13 and 14 of the Acts of the General Assembly of 1874;
- 3) Chapter 67, § 21 of the Acts of the General Assembly of 1900;
- 4) Chapter 743, §§ 2 and 3 of the Acts of the General Assembly of 1906;
- 5) Chapter 194, §§ 194 of the Acts of the General Assembly of 1908;

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<sup>18</sup> *Howard*, 344 U.S. 624.

<sup>19</sup> The Paul Rule provides that state laws generated after cessation apply within the federal enclave as long as the state law reflects the same "fundamental law" in existence at the time of cessation. Thus, the state/federal law is not frozen in time as of cession, but continues to develop with the state.

<sup>20</sup> Altieri, 72 Mil. L. Rev. at 57 - 62; *Cobb v. Cobb*, 545 N.E.2d 1161, 1163 (Mass. 1989) (applying Howard Rule and examining trend toward application of Howard Rule with general discussion non-interference being modern standard).

<sup>21</sup> Our advice is limited with the caveat that non-interference appears to be a trend but has not been unequivocally adopted by the Supreme Court. *See*, footnote 20.

<sup>22</sup> Md. Code. Ann. State Gov't §14-101 *et. seq.* (2004 Replacement Volume).

<sup>23</sup> *Id.* at §14-101(a)(c).

6) any other act that gave consent for the acquisition of property and ceded jurisdiction with respect to that property.<sup>24</sup>

B. Abandoning the State Within A State Concept: Application of the Howard Rule of Concurrent Jurisdiction

Strictly construed, Section 14-101(b) requires a search to determine the year and terms of consent surrounding each federal enclave. However, in 1993 in *Hansford v. District of Columbia*<sup>25</sup> the Maryland Court of Appeals reversed a Court of Special Appeals decision that adopted this strict construction. In *Hansford*, the Court of Appeals ruled that the District of Columbia could be sued for its negligent operation of a juvenile facility on a federal enclave located in Maryland. The Hansfords sued the District of Columbia for civil rights violations after a detainee escaped from the Oak Hill detention center operated by the District of Columbia near Laurel, Maryland and killed their son. In its ruling, the Court of Appeals announced that despite the "far-reaching" statutory language of §14-101(b), Maryland shares concurrent jurisdiction with the United States if the two systems can peacefully co-exist. Therefore, even for tracts of land ceded before 1943 with no reservation of jurisdiction, Maryland's jurisdiction depends on whether the State and federal jurisdiction can peacefully co-exist. In reaching this decision, the Court of Appeals relied on the Howard Rule.

C. Peaceful County and Federal Co-Existence: Preventing Discrimination

In addition to adopting the Howard Rule, the Court of Appeals took an additional step in *Hansford* to include a discussion of the Supreme Court's ruling in *Evans v. Cornman*.<sup>26</sup> In *Evans*, the Supreme Court ruled that the Permanent Board of Registry of Montgomery County could not remove the names of persons living on the grounds of NIH, a federal enclave, from the voting rolls, as being unqualified to vote for failure to meet Maryland's residency requirement. The Supreme Court rejected the Permanent Registry Board's argument that "NIH residents are substantially less interested in Maryland affairs than other residents of the State because the Constitution vests 'exclusive legislation in all Cases whatsoever' over federal enclaves to Congress."<sup>27</sup> The Supreme Court noted that "Congress has permitted the States to extend important aspects of state powers over federal areas."<sup>28</sup> Income, sales, and use taxes apply to persons on federal enclaves, along with State unemployment and workers compensation laws.

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<sup>24</sup> *Id.* at §14-101(b).

<sup>25</sup> *Hansford v. District of Columbia*, 329 Md. 112, 617 A.2d 1057 (1993).

<sup>26</sup> *Evans v. Cornman*, 398 U.S. 419 (1970).

<sup>27</sup> *Evans*, 398 U.S. at 423.

<sup>28</sup> *Evans*, 398 U.S. at 423-424.

The *Hansford* Court observed that in those areas in Maryland, where the fiction of a "state within a state" continued, citizens would be stripped of access to the courts and civil proceedings, since those citizens would no longer live in the jurisdiction of the State, or County. The Court of Appeals signaled that no resident should be left without a jurisdiction: "It is noteworthy that the specific holding in the *Lowe* case would leave the residents of a federal enclave without a remedy, .... The Supreme Court has made its clear, however, that 'no area however small will be left without a developed legal system for private rights.'<sup>29</sup>

In Montgomery County, the County and Federal government share a common goal to eradicate discrimination and protect private rights. Montgomery County has been designated "substantially equivalent" to the EEOC to prosecute employment discrimination for persons who elect to file a discrimination complaint under Chapter 27 rather than Title VII of the Civil Rights Act. This contractual arrangement of joint County and Federal jurisdiction is also consistent with the Howard Rule.

### Conclusion

Historically, Respondents may have had a valid basis, supported by the Maryland Code and application of Maryland case law, to contest OHR jurisdiction on federal enclaves, because these tracts of land owned by the United States were, "states within a state." Strictly construed under its Enclave Consent Statute, Maryland retained concurrent jurisdiction only for those specific tracts of property, ceded after 1943. However, the adoption of the liberal Howard Rule which provides for concurrent jurisdiction, explicitly abandoning the "state within a state" rule allows OHR to assert jurisdiction over discrimination complaints against private employers who operate on federal enclaves located in Montgomery County.

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<sup>29</sup> *Hansford* at 329 Md.133, 617 A.2d 1067 citing *James Stewart & Co. v. Sadruakula*, 309 U.S. 94 (1940).