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Sharon D. Stuart

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State Taxation of Military Housing: A Possessory Interesting Question

The whole of this subject of taxation is full of difficulties.¹

Since M'Culloch v. Maryland² in 1819, states have sought ways around the general federal governmental immunity from state taxation³ inherent in the Supremacy Clause⁴ of the United States Constitution. The broad basic doctrine of constitutional prohibition of state taxation of the possessions, institutions, or activities of the federal government⁵ is still upheld in contemporary cases.⁶ Only an express waiver by the United States can remove this immunity from state taxation.⁷

Most states continue to be confronted with the modern reality of financial pressures and the concomitant demand of constantly expanding bases of revenue. Although states still cannot tax federally owned land⁸ or the improvements upon it, many states, including California, have devised ways to avoid this limitation. By developing and imposing a concept of assessments of interests less than a fee interest, California and 21 other states realize some revenue from lands owned by tax-exempt entities.⁹ These so-called “possessory interests” typically arise when an individual or corporate private party leases land or improvements from a public owner, generally the federal government.¹⁰

². 17 U.S. (4 Wheat.) 316 (1819).
³. See id. at 361-66.
⁴. U.S. Const. art. VI provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land.”
⁸. See note 6 supra.
⁹. Besides California, these states are: Arkansas, Florida, Georgia, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Tennessee, Texas, Washington, and Wisconsin. Canada also follows similar procedures for taxation of possessory interests in tax-exempt property. See generally 55 A.L.R.3d 430.
Since the interest taxed is that of use or possession when it is unaccompanied by ownership in the land or improvements, taxation of possessory interests is not inconsistent with the doctrine of federal immunity from state taxation.11

The power to tax possessory interests in government lands is a particularly important one in California. The state presently receives only half of its revenue from property tax.12 Fully one-half of California's one hundred million acres lies in the public domain.13 Tax immunity for these lands stems from the Supremacy Clause of the United States Constitution as well as from the act that admitted California to the union.14 The pecuniary impact of this immunity is enormous. Receipt of some revenue from public lands would seem crucial to the fiscal stability of California, particularly in light of the financial insecurity generated by Proposition 13 and other recent taxpayer initiatives and legislative taxation relief measures.15

Section 10716 of the California Revenue and Taxation Code codifies the concept of taxation of possessory interests in California. Possessory interest is defined as "possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person."17 "Taxable improvements on tax-exempt land"18 are specifically included.

Despite the clear language of Section 107, two recent cases have yielded seemingly conflicting interpretations. Tax officials seeking to assess taxes on possessory interests in federal government housing presently are confronted with conflicting precedents regarding their authority to do so. In United States v. County of Fresno,19 the United States Supreme Court found constitutional the taxation of the possessory interests of forest rangers living in quarters provided by their employer, the United States Forest Service.20 But when tax assessors in Humboldt and Yuba Counties later levied assessments against United States
Navy and Air Force personnel residing in quarters furnished by their employer, also the federal government, the tax was invalidated. In United States v. County of Humboldt, California, the Ninth Circuit Court of Appeals sustained the trial court's findings that such a tax not only failed to qualify as a possessory interest tax, but that its imposition on military personnel violated the Supremacy Clause.

Future official actions regarding taxation of possessory interests now depend upon resolution of these conflicting decisions. Assessors must know whether they may validly tax possessory interests in residences provided by the federal government to the thousands of military personnel and federal employees living in government quarters located on or near tax-exempt lands in California. Resolution of the conflict is essential to an orderly administration of tax procedures so that adequate revenue can be obtained fairly and efficiently. Such a resolution first requires clarification of two central issues: does occupancy of government quarters on or near military installations constitute a possessory interest by service members living in these quarters, and, if so, does such an interest fall within the meaning of Section 107? If these two questions are answered in the affirmative then a further issue must be addressed, that of whether possessory use taxes can be imposed upon these interests in a manner that does not violate the Supremacy Clause or infringe constitutional immunities.

Through a brief examination of the development of the intergovernmental immunity doctrine as well as the concept of possessory interest and an analysis of recent case law, this comment will demonstrate that residence in government quarters by federal and military employees constitutes a valid possessory interest as authorized by California law. The comment also will show that taxation of this legitimate revenue base can be assessed without violating the United States Constitution.

21. 628 F.2d 549 (9th Cir. 1980).
22. See id. at 552-53.
23. Statistics for United States Air Force personnel alone indicate the numbers of potential taxpayers in this category. The ten major Air Force installations in California and their resident populations include: Beale Air Force Base, 13 miles E. of Marysville, 1737 family residences; Castle Air Force Base, 8 miles Nw. of Merced, 934; Edwards Air Force Base, 20 miles E. of Rosamond, 4038; George Air Force Base, 6 miles Nw. of Victorville, 1441; March Air Force Base, 9 miles S. of Riverside, 711; Mather Air Force Base, 12 mi. E.S. of Sacramento, 1272; McClellan Air Force Base, 9 miles N. of Sacramento, 675; Norton Air Force Base, 59 miles E. of Los Angeles, 264; Travis Air Force Base, 50 miles N. of San Francisco, 2167; Vandenberg Air Force Base, 81 miles N. of Lompoc, 2183. The Air Force thus provides housing for 15,462 families. See AIR FORCE MAGAZINE ALMANAC, May, 1981, at 176-82. Families residing in quarters provided by the United States Army, Navy, Marines, and Coast Guard are similarly situated.
24. This discussion will be limited to the possessory interest and constitutional issues relating to military personnel occupying family residences that are provided and owned by the federal government and located in California. California does not recognize possessory interest taxation of personal property. See EHRMAN & FLAVIN, supra note 12, §55 at 64 (1967). Possessory interest taxation of intangible property will be discussed historically and a discussion of the administrative
This comment will begin with a brief review of the concepts of possessory interest and federal governmental immunity from state taxation to lend perspective to the issues to be discussed later.

THE GENESIS OF FEDERAL GOVERNMENTAL IMMUNITY

A. The Early Doctrine

In 1819 the United States Supreme Court established the immunity from state taxation of the properties, functions, and instrumentalities of the federal government. M'Culloch v. Maryland brought these issues to the Court with the controversy of Maryland’s attempt to tax a federal bank upon issuance of bank notes. The tax was found to infringe the federal Constitution because the laws of the United States are the “supreme law of the land.” The bank had been created by an Act of Congress “to carry into execution the powers vested in the general government.” The state’s power to tax, the Court held, could not be used in a way that would effectively repeal the act creating the bank.

In the century following M'Culloch the doctrine of federal immunity from state taxation was expanded to invalidate taxation that only indirectly burdened federal entities. For example, on the premise that an income tax levied on the salary of a federal employee was a tax on the means by which the United States exercised its powers, state income taxation of federal workers was held unconstitutional in 1842. By the early twentieth century this immunity had been extended to lessees of government lands.

Although this doctrine of federal immunity stood for over a hundred years, a virtual reversal of its prohibitions was effected within a two-year period at the close of the 1930's. The economic adversities of the Depression were, perhaps, the impetus for state and local governments...
to seek additional tax revenue to avert financial crises. A few cases decided between 1937 and 1940 radically altered federal immunity from state taxation.

B. The Emergence of a Modern Doctrine

In 1937 the United States Supreme Court sustained a tax levied by West Virginia on the gross sales and income of a contractor who was a party to a construction contract with the United States. Distinguishing a private contractor from a government employee, the Court compared the sales and income tax assessments to property tax liability on property used to perform a contract. Then, in 1939, the nondiscriminatory taxation of the income of federal employees was permitted by the United States Supreme Court, holding that "a tax on income is [not] legally or economically a tax on its source." The Court noted that this taxation did not burden the national government economically and that federal employees should not be relieved "from contributing their share of the financial support of the other [state] government, whose benefits they enjoy ... ." This almost total reversal of the federal immunity doctrine was completed by the Supreme Court's overruling of cases that had extended tax immunity to lessees of federal lands.

Further inroads into the once complete immunity from taxation of the federal government were premised upon what may be seen as an early expression of the concept of possessory interest, and which appeared in cases involving sales and use taxes levied against parties having contractual relations with the United States. With a decision based upon the distinction between the legal incidence of a tax and its economic burden, the United States Supreme Court in 1941 decided Alabama v. King & Boozer, which sustained a state sales tax on lumber purchased by the contractor for use in a cost-plus government contract. The Court permitted the taxation even though title to the

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34. See generally Nowak, Rotunda & Young, supra note 30, at 367-68.
35. See generally Nowak, Rotunda & Young, supra note 30, at 367-68.
37. See id. at 153.
39. Id. at 483 (citing James v. Dravo Contracting Co., 302 U.S. at 156-58).
41. See generally Graves v. Texas Co., 298 U.S. 393 (1936) (state excise tax on stored gasoline sold to United States held invalid); Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) (sales of gasoline to United States for use in government vehicles held nontaxable).
42. 314 U.S. 1 (1941).
43. See id. at 8.
44. BLACK'S LAW DICTIONARY 312 (5th ed. 1979). A cost-plus contract is one that fixes the
construction materials was taken by the United States upon their delivery to the contractor.\textsuperscript{45} Although permitting the imposition of state taxes in cost-plus contractual arrangements ultimately increased the costs borne by the federal government, the taxation was upheld as not laid directly on the federal government. The Court specified that "the existence or nonexistence of an economic burden upon the Government can no longer be accepted as the touchstone of validity or invalidity of a tax imposed upon a private person."\textsuperscript{46}

Such dilution of the federal immunity doctrine was not seen immediately in the area of property taxation. In the 1944 case of \textit{United States v. County of Allegheny},\textsuperscript{47} for example, the United States Supreme Court reaffirmed that \textit{ad valorem}\textsuperscript{48} taxes could not be imposed on the property of the federal government.\textsuperscript{49} But in 1958 the Court decided three cases that radically affected the immunity that had been protected in \textit{Allegheny} and that ultimately culminated in a determination upholding the constitutionality of taxation schemes that assessed business users of property as if they were property owners.

\section*{C. Crystallization of the Modern Doctrine}

At issue in \textit{United States v. City of Detroit}\textsuperscript{50} and \textit{United States v. Township of Muskegon}\textsuperscript{51} were Michigan statutes permitting tax assessment and collection in the same manner for government lessees or users of tax-exempt property as for owners.\textsuperscript{52} In these cases corporations had leased federally owned commercial production plants\textsuperscript{53} or had been permitted to use government facilities to fulfill Army contracts.\textsuperscript{54} The Court sustained the statutes, reasoning that the tax did not violate any federal immunity because the assessment was on the amount to be paid the contractor on a general basis of the cost of the material and labor, plus an agreed percentage thereof as profits. Such contracts are used when costs of production or construction are unknown or difficult to ascertain in advance.

\begin{itemize}
  \item 314 U.S. at 10.
  \item Id. at 5. The justices noted that Congress had also declined to pass legislation immunizing cost-plus contractors from state taxation, see id. at 8. But see Kern-Limerick, Inc. v. Scullock, 347 U.S. 110 (1954) in which the Court invalidated state sales taxes on construction equipment under a cost-plus federal contract which specified that the construction company procure the equipment as an agent for the United States.
  \item 322 U.S. 174 (1944).
  \item Literally, "according to the value." An \textit{ad valorem} tax is imposed on the value of property and levied in proportion to its value, as determined by assessment or appraisal. \textbf{BLACK'S LAW DICTIONARY} 48 (5th ed. 1979).
  \item 322 U.S. at 189.
  \item 355 U.S. 466 (1958).
  \item 355 U.S. 484 (1958).
  \item See \textit{355 U.S.} at 485.
\end{itemize}
privilege of use and not upon the property itself.\textsuperscript{55} The Court permitted assessment on the full value of the property;\textsuperscript{56} Michigan therefore realized indirectly the amount of revenue that would have been produced by an invalid direct tax upon government property.\textsuperscript{57} These cases marked the first time the United States Supreme Court had upheld a tax against the federal government that so closely resembled a property tax. In noting that this tax was assessed only against users of property owned by tax-exempt entities, the Court indicated an awareness of the inequities of private users or occupants escaping taxation through the fortuitous circumstance of leasing property from a tax-exempt owner.\textsuperscript{58}

The Court fully repudiated the Allegheny prohibition against a property tax on the government in \textit{City of Detroit v. Murray Corporation}.\textsuperscript{59} There the Court upheld state taxation of airplane materials and work-in-progress in the possession of the Murray Corporation, a government subcontractor, although title to this property vested in the United States upon the acceptance of partial payment by the corporation.\textsuperscript{60} The relevant Michigan statute categorized the tax as a property tax on the full value of the property, to be assessed against either the owner or the person in possession.\textsuperscript{61} The Court sustained the statute by reasoning that its practical effect was identical to the use taxes found to be constitutional in \textit{United States v. City of Detroit} and \textit{United States v. Township of Muskegon}.

With this line of cases, the distinction had crystallized that a tax upon the use of property is not a tax upon the property itself and that a finding of constitutionality depends upon distinguishing the direct incident of a tax from its economic burden. Thus, constitutionality today depends upon whether the direct incidence of a tax falls upon the federal government or upon the party possessing the tax-exempt property or enjoying its use.\textsuperscript{62} Before such constitutional questions are addressed, however, a finding of possessory interest is required. The interrelationship between federal immunity and the requisite possessory interest is illustrated by the interests of federal employees in govern-

\textsuperscript{55} See 355 U.S. at 486, 355 U.S. at 469-70.
\textsuperscript{56} See 355 U.S. at 485, 355 U.S. at 467-68.
\textsuperscript{57} See 355 U.S. at 486, 355 U.S. at 473.
\textsuperscript{59} 355 U.S. 489 (1958).
\textsuperscript{60} \textit{Id.} at 491.
\textsuperscript{61} See note 52 supra.
\textsuperscript{62} See generally Note, \textit{The Supreme Court, 1957 Term}, 72 Harv. L. Rev. 157 (1958). The case law has not, of course, abolished such constitutional requirements as procedural and substantive due process, equal protection, public purpose, appropriate governmental immunity, etc.
ment living quarters in California. An examination of the development of the taxation of possessory interests as a state revenue policy is necessary to lend perspective to this interrelationship.

THE DEVELOPMENT OF POSSESSORY INTEREST TAXATION IN CALIFORNIA

The basic authority of California to tax is inherent in its sovereignty. The state retains the power of taxation of all property, with only such limitations as those expressed in its own and in the United States Constitution. These exemptions except exports, imports, and tonnages, as well as property held by the United States when the rights of the federal government might be impaired if its property were taxed by the constituent states.

The state constitution mandates that taxation of property is the rule. Any exemptions are the exception to that rule, a concept codified in Sections 201 and 202 of the California Revenue and Taxation Code.

With half of its lands in the public domain, California must obtain revenue from sources other than property tax. The tax burden has gradually shifted in the last 70 years from revenue derived from property tax to revenue derived from other sources. Recognition of the need to tax property interests other than the fee interest arose during the gold rush days. In the 1850's miners extracted gold worth millions of dollars from lands in the public domain without incurring tax

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64. See CAL. CONST. art. XIII, §1. Although the California Constitution purports to "exempt" federal property from state taxation, the true source of immunity is generally regarded as stemming from the United States Constitution, as interpreted in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). See note 65 and accompanying text infra. A more accurate term for such reservation of power regarding federally owned lands and improvements is "tax-immune" property, rather than "tax-exempt." But since statutes and all major sources in the literature use "tax-exempt," that characterization will be used throughout this comment.
65. The United States Constitution limits the taxing power of the states in a number of provisions: U.S. CONsT. art. VI (Supremacy Clause); art. I, §8, cl. 3 (Commerce Clause); §10, cl. 2 (limitations on taxation of imports and exports); and the fourteenth amendment (due process and equal protection clauses).
66. See id. BLACK'S LAW DICTIONARY 1334 (5th ed. 1979). Tonnage is the capacity of a vessel for carrying freight and other loads, calculated in tons, which is the basis for imposition of taxes and duties.
67. See generally NOWAK, ROTUNDA, & YOUNG, supra note 12, §1.3 at 6, 7 (2d ed. 1979).
68. Article thirteen, Section one of the California Constitution establishes that "all property in the State, except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value. . . ." California Revenue and Taxation Code Section 202 also specifically exempts from taxation property that is exempt under the laws of the United States.
69. See EHRMAN & FLAVIN, supra note 12, §1.3 at 6, 7 (2d ed. 1979).
70. See EHRMAN & FLAVIN, supra note 12, §50 at 60 (1967).
These interests ultimately were designated as taxable by the state Supreme Court in 1859. In 1866 the court expanded the concept of taxable possessory interests in tax-exempt property by upholding possessory interest taxation on improvements placed upon federally owned lands by an adverse possessor. The 1872 enactment of the Field Codes advanced the distinction of possession or right to possession from ownership, in lands and improvements. In 1895, taxation of possessory interests in tax-exempt lands was specifically codified and statutes enacted in 1921 permitted taxation of improvements on tax-exempt land. Legislative recognition that possession is "a valuable species of property subsisting in the hands of the citizens" was thereby complete.

The California case law and its relationship to federal constitutional issues that have developed since *M'Culloch* have established the foundation of the theory of possessory interest taxation without infringing intergovernmental immunities. California case law and state legislation support the concepts of multiple interests in property and of taxation of valuable possessory interests that may be imposed constitutionally although the land itself may not be taxed. Still unresolved, however, is the exact level of possessory interest required before taxation can be validly imposed on tenants of tax-exempt owners—such as military personnel. This problem continues to surface in recent cases.

### A. Judicial Interpretation Prior to Fresno

Possessory interest issues have been litigated consistently over the years, resulting in the clarification of some areas while others remain unsettled. Reaching a workable definition of what constitutes a possessory interest is a recurring problem.

73. See id.
75. See People v. Shearer, 30 Cal. 645, 655-58 (1866).
77. See id.
78. See id.
79. See 30 Cal. at 656.
81. The State Board has updated Assessors' Handbook AH 517 and greatly expanded its list of typical possessory interests. The new list is as follows:

1. Forest Service permits, residential and commercial, including ski lifts, resorts, stores, and cabins.

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To find a taxable possessory interest in the lessee of federally owned shipyards in *Kaiser v. Reid*, the California Supreme Court enumerated the requirements for finding a possessory interest as the conferral, by agreement, of exclusive use and possession for a fixed period. These elements were then found to generate a private benefit to the lessee. The *Kaiser* definition lent stability to the determination of what constituted possessory interest for about 35 years. Although Mr. Kaiser's benefit was the right to conduct his business at a profit, in *Rand Corporation v. County of Los Angeles*, an appellate court found a taxable interest even in federally owned improvements leased by a non-profit corporation. The court felt that this interest was property and the holder of such an interest should contribute a fair share of taxes to the state government. In the 1968 case of *Mattson v. County of Contra Costa*, the operator of a clubhouse on a municipal golf course was found to have a taxable possessory interest. Here the court enumerated the factors that gave rise to a possessory interest as those stemming from the agreement between the government and the lessee. Specifically, the factors were "relative durability, independence, exclusiveness and fixedness, and others of relative impermanence, subject to control and public participation." The court added that what constituted a possessory interest for taxation purposes depended upon an examination of the entire agreement between the government and the private party.

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2. Harbor leases, residential, commercial, and industrial.
3. Downtown auto parking leases.
4. Possession and use of residences owned by public agencies.
5. Employee housing on tax-exempt land.
6. Airport permits, including parking and garage leases.
7. Grazing land permits.
8. Indian land leases.
9. The right to cut and remove standing timber on public lands.
10. Gas, petroleum, or other hydrocarbon rights in public lands.
11. Unpatented mining claims.
12. The possession of public property at harbors, factories, airports, golf courses, marinas, recreation areas, parks, stadiums, and government facilities.
13. Possession and use of government-owned fixed equipment.
14. Air rights over public lands or freeways.

82. 30 Cal. 2d 610, 184 P.2d 879 (1947).
83. See id. at 618, 184 P.2d at 884. See generally *Possessory Interest Tax*, supra note 10 at 827.
84. See 30 Cal. 2d at 619, 184 P.2d at 885.
86. Id. at 590-91, 50 Cal. Rptr. at 701.
87. Id. at 592, 50 Cal. Rptr. at 703. See generally *Possessory Interest Tax*, supra note 10 at 835.
89. Id. at 212, 65 Cal. Rptr. at 650.
90. Id. at 209, 65 Cal. Rptr. at 648.
91. Id.
92. See id. See generally *Possessory Interest Tax*, supra note 10, at 836.
The lack of a definitive delineation of the elements necessary to support a finding of a possessory interest has contributed to the present unsettled situation in this area of assessment and taxation. A crucial area in terms of potential revenue and numbers of affected taxpayers is the interest of federal employees in living quarters provided by the United States on or near federal installations where these employees live and work. With half of California in the public domain and with the proliferation of military and government installations with large populations, lack of assessments of these potential taxpayers has resulted in the loss of a significant amount of revenue to the state treasury and a disproportionate shifting of the tax burden to non-exempt taxpayers.

Taxation of the possessory interests of federal employees in their living quarters at first appeared to be an uncontroversial source of revenue. In *McCaslin v. DeCamp*, 9 decided in 1967, a California appellate court held that employees of the Central California Irrigation District were subject to taxation for their occupancy of housing provided by this tax-exempt public agency. 9 Although workers paid monthly rental fees and their month-to-month tenancies were revocable at any time, the court concluded that the rentals rose to the level of a taxable property right. 9

In the same year, Fresno and Tuolomne Counties assessed a property tax against forest rangers residing in housing provided to them by the federal government in three national forests in those counties. 9 Although the rangers claimed to be mere agents of the government, and therefore without a taxable interest, the assessments were sustained on appeal and the decision affirmed in 1977 by the United States Supreme Court in *United States v. County of Fresno*. 9 The developing consistency of these cases, however, was soon disturbed. Presumably in reliance on *Fresno*, assessors in Yuba and Humboldt Counties sought to tax U.S. Air Force and U.S. Navy personnel residing in base quarters. 9 On appeal from the district court's summary judgment for the United States, a three-judge panel of the Ninth Circuit Court of Appeals declared the tax on military personnel unconstitutional on September 24,

94. See *id.* at 17-18, 56 Cal. Rptr. at 45-46.
95. See *id.*
97. See 429 U.S. 452, 453 (1977) which was heard together with the unreported case of *United States v. County of Tuolumne*, also on appeal from the Court of Appeal of California, Fifth Appellate District.
1980 in *United States v. County of Humboldt, California.*

With no appeals presently pending from the Ninth Circuit decision, the immediate resolution of these conflicting opinions will be unaided by Supreme Court consideration. Analysis of the future development of these issues, the consequences for thousands of individual taxpayers, and the impact on the state revenue base require closer examination of the two major decisions. An overview of Fresno and Humboldt will be followed by an analysis of the constitutionality of possessory interest taxation of occupants of quarters located on tax-exempt lands.

B. *United States v. County of Fresno*

In the wake of *McCaslin,* tax officials in Fresno and Tuolumne Counties levied annual possessory use assessments against rangers employed by the United States Forest Service. The rangers lived with their families in housing built and owned by the Forest Service in the Sierra and Sequoia National Forests. Occupancy was required in the provided residences so that rangers might be nearer their duties and presumably be better able to perform them, although some rangers lived in privately owned quarters located outside the forests. Bi-monthly payroll deductions were made by the Forest Service for providing housing, since receiving shelter was regarded by both parties as partial compensation for the rangers’ services. The amounts deducted were calculated by estimating the fair rental value of each unit and then discounting the figure to reflect disadvantages incident to the housing—the remote location, the distance from established communities, and the lack of such amenities as sidewalks, police and fire protection, or adequate telephone service.

Constitutional concerns over the issues in Fresno were expressed at the appellate level. The appellate court determined that assessment was not made against the government but rather was levied against private citizens who were employed by the government. The possibility of interference with government functions was disposed of by

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99. See 628 F.2d 549, 553 (9th Cir. 1980). This case included *United States v. County of Yuba* consolidated by the court.
100. 429 U.S. 452 (1976).
101. See id. at 455-56.
102. See id. at 454.
103. See id.
104. See id.
105. See id. at 454-55.
107. See id.
108. See id.
resort to *Penn Dairies v. Milk Control Commission*. In that case the United States Supreme Court indicated that state governments necessarily must function in coordination with the federal government. Within our dual system, state taxation inevitably imposed some burdens on the national government of the same kind as those imposed on the citizens of the United States within the states' borders. Those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system.

On appeal in *Fresno*, the United States Supreme Court held that California could constitutionally tax the forest rangers on their possessory interests in housing owned and provided by their federal employer. Beginning with a detailed examination of the *M'Culloch* prohibition against direct state taxation of the federal government and the historical modification of the immunity, Justice White delivered the majority opinion that taxes of possessory interests in exempt property are permissible so long as they do not discriminate, are not laid directly on the federal government, or are not forbidden by Congress. The use taxes sustained in the 1958 Detroit cases were cited as dispositive of the issue that the legal incidence of this possessory interest tax fell neither on the federal government nor on federal property, but rather on private persons employed by the government.

**C. United States v. County of Humboldt**

With the seemingly sufficient authority for possessory interest taxation of occupants of government quarters, established by *Fresno*, tax officials in Yuba and Humboldt Counties notified local military commanders of their intentions to commence assessment of possessory interests in military housing for the fiscal year 1977. Assessments were levied upon occupants of quarters at Beale Air Force Base in Yuba County and residents of government housing near the naval station in Humboldt County. The United States sought injunctive and declar-
atory relief in federal district court, raising constitutional grounds in briefs and arguments. The district court, however, declined to reach the merits of these contentions, deciding instead on the invalidity of the tax and finding it unauthorized by California law, holding that military occupancy did not meet the Section 107 definition of possessory interest. Citing *Fresno*, the court distinguished military housing on the characteristic of private and independent benefit to the occupant, a characterization upheld by the Ninth Circuit Court of Appeals.119 Stating that the interests of service personnel in housing provided to them “is neither private nor durable,” the Ninth Circuit panel summarily concluded that such housing could not be of private benefit because the Internal Revenue Service excludes it from gross income.120 Lacking the threshold finding of a possessory interest, the district court in *Humboldt* did not reach interpretation of constitutional issues.121 One Ninth Circuit judge concluded that possessory interest requirements were satisfied, but joined the other two judges in their opinion that even with a finding of a valid possessory interest, the tax could not escape constitutional prohibition.122 In the view of the Ninth Circuit panel, such a tax would impermissibly burden a federal function because it might create military recruitment disincentives and morale problems generated by disparate state administration of possessory interest taxation.123

**Constitutionality of Taxation of Occupancy of Military Quarters**

A determination of the constitutionality of taxation of occupancy of military quarters requires examination of two major issues. A finding of possessory interest is essential or the tax would fail even if otherwise constitutional. Second, the tax cannot impair or impede a function of the federal government.

**A. Is the Occupancy of Military Quarters a Possessory Interest?**

The historical difficulty of defining possessory interest continues, as seen in *Fresno* and *Humboldt*. The consensus of the decisions concerning private users of tax-exempt property,124 however, is that something

119. See id. at 856-57; 628 F.2d at 551.
120. 628 F.2d at 551. See Treas. Reg. §1.162-2(b) (1954).
121. See 443 F. Supp. at 856.
122. See 628 F.2d at 552-53.
123. See id. at 553.
124. See, e.g., Kaiser Co. v. Reid, 30 Cal. 2d 610, 184 P.2d 879 (1947); Pacific Grove-Asilomar Operating Corp. v. County of Monterey, 43 Cal. App. 3d 675, 117 Cal. Rptr. 874 (1974); Sea-Land Service, Inc. v. County of Alameda, 36 Cal. App. 3d 837, 112 Cal. Rptr. 113 (1974); Board of
more is required than merely meeting the statutory definition (use or possession unaccompanied by ownership). That "something more" generally is stated as a requirement that some private, beneficial use accrue to the users for their interest to rise to taxable levels. To demonstrate the existence of such possessory interest by military personnel, the facts of Humboldt will be compared to those of Fresno.

Although the Fresno appellate court noted that the right to use federally owned land or improvements has developed into an interest subject to state taxation, the court, in its consideration of the taxation of the forest rangers, also emphasized that not all private use of tax-exempt land and improvements is taxable. The use must rise to the level of possessory interest, and to do so, the interest must be more than "naked possession." The Fresno appellate court found that "something more" arose from a degree of exclusivity enjoyed by the occupants so that their use was more than a "right in common with others, or something more than serving only the needs of the employer." The user or occupant essentially must enjoy "something more than the means of performing their employer's purpose, so that it can be said, realistically, that the occupancy or use substantially serves an independent, private interest." This reasoning was used by the Ninth Circuit in Humboldt as a means of strengthening its finding that there was no possessory interest in occupancy by military tenants. To support this finding, the three-judge panel pointed out that even with the expanding nature of possessory interests, "four elements have always been required: whether a particular interest is a taxable possessory one is a question for case-by-case resolution; the principal factors are exclusiveness, independence, durability, and private benefit." While it is true that these factors originated in Mattson v. County of Contra Costa and were articulated in Dressler v. County of Alpine in 1976, their glibness as a test for possessory interest belies their usefulness as a workable analysis. The factors have proved to be more form than substance and their value as a dispositive test has never been borne out by


125. See note 124 supra.
127. See id. at 550-52, 123 Cal. Rptr. at 639.
128. Id.
129. Id.
130. See United States v. County of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980).
133. See 64 Cal. App. 3d at 564, 134 Cal. Rptr. at 558.
the cases. Beyond recitation of the terms over the years since *Mattson*, the opinions have not evolved the factors into a workable test. This is a weakness inherent in the opinion of the Ninth Circuit; the terms are merely mentioned, neither defined nor applied to the facts, and used to support a cursory conclusion. A more detailed analysis of these factors will illuminate additional significant characteristics.

1. Relative Durability

Two of the three Ninth Circuit judges labelled military housing "neither private nor durable," relying on its exclusion from gross income and the lack of rental payments.134 Two aspects of the durability factor must be considered; it is helpful to compare the interests of the forest rangers considered in *Fresno* with the concerns of the Ninth Circuit judges in *Humboldt*.

The two aspects of the durability factor that merit consideration are, first, termination of employment, and, second, transfer of duty stations occurring during the course of employment. Regarding the first aspect, either the forest rangers in *Fresno* or their government employer could terminate employment; the rangers could quit or the employer could fire them.135 Such voluntary or involuntary termination of employment is not duplicated for the service person. On the other hand, military employment is not an ironclad contract. Termination of military employment can occur by expiration of the service agreement,136 resignation by the individual,137 or termination initiated by the military for the convenience of the government.138 The length of the termination process depends upon whether it is voluntary, involuntary, or connected with disciplinary proceedings.139 These aspects would tend to give stability to military employment rather than add to the impermanent quality of military life mentioned by the Ninth Circuit court.

The Ninth Circuit court claimed that frequent transfer of military

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134. *See* 628 F.2d at 551.
135. *See* United States v. County of Fresno, 50 Cal. App. 3d 633, 640, 123 Cal. Rptr. 548, 551 (1975). This argument effectively defeated the rangers' contentions that they were merely agents of the government and thus without possessory interests.
139. *See note* 138 *supra.*
families results in the absence of durability in housing to such an extent that the tenancies of these families must be characterized, in effect, as tenancies at sufferance.\textsuperscript{140} Transfers between duty stations during the course of military service is a second aspect bearing on permanence of quarters. The Fresno appellate court specifically noted that the fact that leases of the forest rangers were terminable at the will of the lessor-employer did not automatically render the rangers without possessory interest.\textsuperscript{141} The mere possibility of revocation of the tenancy did not automatically render it valueless.\textsuperscript{142}

Military life is indeed somewhat nomadic. Change of duty station is inevitable, with or without promotion, as it is for many federal employees. While transfer was predominantly theoretical for the forest rangers,\textsuperscript{143} it is more than reality for the military employee. Even so, the reality of transfer in the modern military is not as disruptive or as frequent as the Ninth Circuit judges fear. Lengths of duty tours have stabilized under fiscal programs as well as under policies to reduce career irritants to military personnel.\textsuperscript{144} Certain assignments carry mandatory 36- to 48-month stability requirements,\textsuperscript{145} a length of time that can give substantial durability to occupancy of living quarters. In addition, local practice is to assign family quarters for the duration of the time the military member is assigned to the installation.\textsuperscript{146} Since the federal employer bears the cost of shipment of household goods for families occupying military quarters, occupancy of quarters and termination of rentals normally accompany only the permanent reassignment of the individual.\textsuperscript{147} Furthermore, the characteristic of mobility is not a factor unique to military life. Many corporate employees and their families are relocated frequently as conditions of their employment demand. Mobility and durability also are not considerations regarding

\begin{footnotes}
\footnotetext[140]{See United States v. County of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980).}
\footnotetext[141]{See 50 Cal. App. 3d at 640, 123 Cal. Rptr. at 551.}
\footnotetext[142]{The possibility of revocation is a factor to be considered, however, in fixing the value of the possessory interest. See id. See generally Sea-Land Service, Inc. v. County of Alameda, 36 Cal. App. 3d 837, 122 Cal. Rptr. at 113 (1974); Board of Supervisors v. Archer, 18 Cal. App. 3d 717, 96 Cal. Rptr. 379 (1971); McCaslin v. DeCamp, 248 Cal. App. 2d 13, 56 Cal. Rptr. 42 (1967).}
\footnotetext[143]{See 50 Cal. App. 3d at 640, 123 Cal. Rptr. at 552. It was estimated that the average Forest Service employee in Tuolumne County remained in Forest Service quarters for a period of five years. See United States v. County of Fresno, 429 U.S. 452, 456 (1977).}
\footnotetext[144]{See generally United States Air Force Reenlistment and Retention Program, AIR FORCE REGULATION 35-16 (1979); Airman Assignments, AIR FORCE REGULATION 39-11. "Career irri tant" is a military colloquialism referring to the less desirable aspects of life in the armed forces. Certain situations can become so annoying to military personnel that they resign from the service because of them. The most commonly mentioned are relocation, job transfers, frequent business travel, and lack of choice in job assignments and training programs.}
\footnotetext[145]{See note 144 supra.}
\footnotetext[146]{See generally Housing: Assignment of Family Housing, Chs. 6, 10, AIR FORCE REGULATION 90-1 (1977).}
\footnotetext[147]{See generally Members of the Uniformed Services, Chs. 4 and 8, JOINT TRAVEL REGULA TIONS (1977).}
\end{footnotes}
property taxes or rental costs that presumably reflect taxes paid by non-exempt owners.

2. Independence and Exclusiveness

The requirement of independence, called "privacy" by the Ninth Circuit,\(^\text{148}\) overlaps the factor of exclusiveness because of the development in the basic case law that the existence of possessory interest requires living arrangements to be exclusive enough to confer a private benefit to the user.\(^\text{149}\) In *Fresno*, the Forest Service reserved the right to use the homes rented to the rangers in emergency situations—e.g., stationing additional personnel in quarters during forest fires or other natural disasters.\(^\text{150}\) In a characterization important to the outcome of the case, the court termed such reservation of rights merely incidental to the rental arrangements.\(^\text{151}\) These incidental reserved rights thus did not disturb the residential character of the living quarters. In contrast, military housing is not subject to such emergency requirements, mainly because of their residential nature and the availability of other equipment and facilities to deal with contingencies.

The military occupant, like any occupant of rented quarters, does not have total control over the dwelling. The basic relationship between the military member and the employer in this aspect of the employment arrangement is that of lessee-lessee lessor. The government-lessee lessor thus retains master keys and reserves the right to give notice and perform periodic inspections of the premises.\(^\text{152}\) Such reservation of rights does not destroy the predominant residential character of the quarters and is within standard rental practice and established landlord-tenant law.\(^\text{153}\) Military occupants suffer no excessive intrusion nor any disturbance more onerous than their military colleagues residing in privately owned rental units. Reasonable entry by landlords for legitimate purposes is an incident of leased quarters in general and not a feature unique to military occupancy which might negate its exclusivity.\(^\text{154}\)

The cases establish not only that possession must be exclusive to support possessory interest taxation, but that the interest is taxable to the

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\(^{148}\) See *United States v. County of Humboldt*, 628 F.2d 549, 551 (9th Cir. 1980).

\(^{149}\) See note 124 supra.

\(^{150}\) See *United States v. County of Fresno*, 50 Cal. App. 3d 633, 635-636, 123 Cal. Rptr. 548, 550 (1978). But the record showed that this rarely happened.

\(^{151}\) See id.

\(^{152}\) See generally *Housing: Assignment of Family Housing*, Ch. 13 AIR FORCE REGULATION 90-1 (1977).


\(^{154}\) See note 153 supra.
person in possession. 155  *Fresno* is in accord with these decisions and should be valid stare decisis for the *Humboldt* court to have reached a similar conclusion.

3. **Private Benefit**

The factor dispositive of a finding of possessory interest is private benefit. 156 The user or occupant essentially must enjoy a substantial independent and private interest. 157 The characteristics of independence, exclusivity, and durability reinforce private benefit.

An important indication of private benefit is simply that service personnel occupying federal quarters thereby are relieved from finding and maintaining housing elsewhere. Despite its simplicity, the true value of this asset must not be overlooked. As Justice White wrote in *Fresno*:

> Since virtually everyone in this country pays for housing for himself or herself and family, common sense compels the conclusion that the occupancy of a house provided by an employer for an employee's family is of personal financial benefit to the employee—relieving him of the expense of paying for housing elsewhere. 158

This concept of benefit was supported unanimously by the United States Supreme Court in *Fresno*; one judge on the *Humboldt* panel also was persuaded by its logic. 159 Further indications of the value of the quarters provided are gained by an examination of the character of housing on military installations.

Large military installations such as Beale Air Force Base, located in Yuba County in northeastern California, are best described as resembling small towns. Literature available from official base organizations describes the Beale housing area as "nestled among the foothills of the Sierra Nevada" 160 and indicates that these quarters are "approximately 10 miles from the flight line and the noise associated with flying operations." 161 Beale Air Force Base provides housing for 1,737 families in multi-plexes of two-, three-, and four-bedroom units, described as "California ranch style, split level and duplex." 162 The housing units are suburban homes with modern amenities—multiple bathrooms in each unit, cable television, garages or carports. The housing areas are

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155. See note 124 infra.
156. See note 124 infra.
157. See note 124 infra.
159. See *United States v. County of Humboldt*, 628 F.2d 549, 553 (9th Cir. 1980).
160. See generally *California Challenge—Your Assignment at Beale Air Force Base* 20 (1979) [copy on file at the Pacific Law Journal].
161. See *id.*
162. See *id.* at 10.
landscaped and provided with streets, street lights, curbing, sidewalks, etc. Residents enjoy fire and police protection and major and minor repair services provided by the base civil engineers. In close proximity to the housing areas are chapels, commissaries, convenience stores, social clubs, and recreational facilities that include golf courses, gymnasiums, softball diamonds, and riding stables. Beale Air Force Base, like most modern military installations, is a self-contained community.

As part of the military enlistment agreement, the armed forces provide shelter to service personnel and their families. The service member receives in-kind quarters that vary according to the member's rank and the needs of his or her family. If quarters are unavailable, a monthly monetary award, called Basic Allowance for Quarters, is provided in lieu of in-kind housing. The quarters allowance permits the service person to make suitable private living arrangements in civilian communities near the military installation.

What is the value of the housing that the military provides to its personnel? Both the value of the quarters provided and the Basic Allowance for Quarters stipend are exempted from gross income for federal income taxation purposes. Gross income is defined traditionally as "all income from whatever source derived." Modernly the term has come to mean any item that increases the taxpayer's net worth. Receipt of housing increases net worth because the taxpayer who is provided shelter is relieved of obtaining it elsewhere, a substantial benefit even without determining its exact value.

The Ninth Circuit's concern with the duration of residency in military quarters does not negate the private benefit of this housing. Once quarters are occupied on a permanent basis by a military member who moves into them with his or her family and all household effects, the quality of the shelter ceases to be that of transitory lodging. Once that transitory status has been exceeded, the duration of the occupancy cannot be dispositive of finding of private benefit. Very brief occupancy may generate administrative problems in assessing and collecting the tax, but duration of residency alone is not a valid basis for

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163. See id. at 31-33.
164. Military housing is provided pursuant to 42 U.S.C. §§1501-1594 (1976).
168. See generally 84 C.I.S. Taxation §1096(a) (1954).
170. See United States v. County of Humboldt, 628 F.2d 549, 553 (9th Cir. 1980).
finding private benefit of little value. Other taxation procedures—for real property or income tax, for example—are not based upon duration of residency or duration of employment in the state. Brevity alone should not excuse tax liability. The benefit conferred must control tax liability. Once duration of possession is reasonable enough to support private benefit, taxation is appropriate because the possessory interest requisite to a finding of constitutionality has been established. This discussion of the factors of durability, independence, and exclusivity has established that the military tenant in government quarters enjoys sufficient private benefit to support a finding of possessory interest. This threshold requirement of possessory interest must precede a determination of the constitutionality of the taxation of that interest.

B. Constitutionality of Possessory Interest Taxation

1. The Indirect Burden

As cases since M'Clusky have established, a valid tax must be upon the individual and not upon the government.171 The Fresno Court emphasized that the tax was constitutional when levied upon the use of the quarters; this use was held to be by the occupant, and not by the government.172

The district court in Humboldt did not reach the constitutional issues since it found that military occupancy of government quarters did not rise to the level of a taxable possessory interest. The district court advanced the opinion, however, that even with the finding of a valid possessory interest, the tax would be unconstitutional.173 In agreement with the district court, the Ninth Circuit panel concluded that such a tax was unconstitutional in that it would burden a federal function with resulting recruitment disincentives.174 But, as the United States Supreme Court has said, "it is very hard to tell what is meant by the statement that a tax interferes with or burdens the Government's transaction."175 The Supreme Court also pointed out in United States v. City of Detroit that "all relevant circumstances" must be considered "to determine if a tax is actually laid on the United States or its property" rather than on a private individual. Although the Ninth Circuit judges pointed out possible inequitable assessments of possessory interest taxes in a generalized discussion and speculated that morale of military

\[\text{\footnotesize 171. See notes 5-7 supra.}\]

\[\text{\footnotesize 172. See United States v. County of Fresno, 50 Cal. App. 3d 633, 641, 123 Cal. Rptr. 548, 552 (1975).}\]


\[\text{\footnotesize 174. See id. at 857.}\]

\[\text{\footnotesize 175. Alabama v. King & Boozer, 314 U.S. 1, 3 (1941).}\]

\[\text{\footnotesize 176. United States v. City of Detroit, 355 U.S. 466, 469 (1958).}\]
members would decline were they subject to this taxation,\textsuperscript{177} the rule articulated in \textit{Fresno} established that the "economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on other similarly situated constituents of the state."\textsuperscript{178}

\section*{2. The Speculative Effect on Recruitment and Morale}

The Ninth Circuit relied upon \textit{Frontiero v. Richardson}\textsuperscript{179} to show that free housing is an incentive to enlistment in the armed forces and that if the tax were permitted the recruitment scheme would be rendered so ineffective that an impediment to the national defense would result.\textsuperscript{180} With this reasoning the court espouses the curious position that the removal of a benefit they characterized as valueless to the individual would destroy incentives to enlist in order to receive it. Additionally, military housing is not technically free. Although no rental payment is made each month, the military member occupies government quarters only with the forfeiture of the Basic Allowance for Quarters.\textsuperscript{181} And if the free housing is the recruiting incentive, it is this feature and not the freedom from tax that is the enlistment inducement. Furthermore, since almost half the states permit taxation of possessory interest, a conclusion that assessments would disrupt recruitment schemes is speculative at best. Finally, \textit{Frontiero} simply does not support the proposition for which it is cited.\textsuperscript{182}

The potential impact of possessory interest taxation on military morale or conduct is also entirely speculative. No valid evidence exists to support the contention that morale will decline, improve, or virtually be unaffected. A conclusion of negative impact is unsupportable and too speculative a basis for a finding of unconstitutionality.

\section*{3. Potential Discriminatory Impact of the Tax}

To be constitutional, any tax is required to be levied alike "on all persons similarly situated."\textsuperscript{183} Although otherwise valid, possessory in-

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\item 177. See United States v. County of Humboldt, 628 F.2d 549, 553 (9th Cir. 1980).
\item 179. 411 U.S. 677 (1973).
\item 180. See 628 F.2d at 553.
\item 181. See \textit{generally} \textit{Housing: Assignment of Family Housing, Ch. 13, AIR FORCE REGULATION 90-1} (1977).
\item 182. \textit{Frontiero} addressed an equal protection issue in which husbands of military service members were required to certify actual dependency and financial need before Basic Allowances for Quarters could be authorized while wives of servicemen needed only to show marital status, regardless of need or dependency. See 411 U.S. at 677.
\item 183. See \textit{generally} \textsc{Nowak, Rotunda, & Young}, \textit{supra} note 30, at 519-22. See also Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).
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terest taxation of federal and military employees may be held unconstitutional if found to be discriminatory in application or in effect.\textsuperscript{184}

The \textit{Fresno} appellate court found the tax on the forest rangers to be nondiscriminatory on the presumption that rangers living outside the forests contributed their share of the tax burden through the payment of higher rentals to the private owners from whom they leased living quarters.\textsuperscript{185} Such a rationale is applicable to the facts of \textit{Humboldt} to sustain taxation of service personnel living on base against allegations of discriminatory assessments from military members residing off the base.

In focusing on a different aspect of discriminatory application of possessory interest taxation, Justice Stevens, the only dissenter in \textit{Fresno}, pointed out that occupants of some quarters or improvements owned and maintained by tax-exempt owners presently are not subject to state taxation as are the forest rangers.\textsuperscript{186} Referring particularly to owners such as universities, hospitals, and churches, Justice Stevens noted in his opinion that the present lack of taxation of persons enjoying the possession or use of these government-owned lands or improvements is inequitable when compared to other government employees, arguably similarly situated, who presently are being taxed.\textsuperscript{187}

**CONCLUSION**

The issue of state taxation of federal lands or improvements has been a controversial one since \textit{M'Culloch v. Maryland}. It remains so today. The genesis of the issue lies in the concepts of federalism and basic intergovernmental immunities, concerns that underlie the controversy over state taxation of the possessory interests of private parties using or possessing land or property owned by a tax-exempt entity. Just as De-

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\textsuperscript{184} An argument might be raised that taxation of military personnel is prevented by 50 U.S.C. App. §574(1) (1981) commonly known as the Soldiers' and Sailors' Civil Relief Act. Examination of the legislative purpose indicates that the act is intended to prevent double taxation of military members by their states of domicile as well as by the host state in which they are stationed. In 1969 the United States Supreme Court held that the act did not intend to free service personnel from sales or use taxes of the host state and that prevention of double taxation did not relieve military members from bearing their fair share of the costs of the state government whose benefits they enjoyed. Such a holding is consistent with the imposition of possessory interest taxes on military members occupying government housing in California. See Sullivan v. United States, 395 U.S. 169, 181-82 (1969). See generally Bagley, Soldiers' and Sailors' Civil Relief Act—A Survey, 45 MIL. L. REV. 1 (1969); Murchison, The Impact of the Soldiers' and Sailors' Civil Relief Act on State Taxation of Mobile Homes, 19 A. F. JAG L. REV. 235 (1977).

\textsuperscript{185} The general federal governmental policy that use of community resources should not go uncompensated is reflected in 20 U.S.C. §236 (1976) which provides that California receive federal funds for educating children residing on federal property, even though such payments are substantially less than the tax yield from such property.


pression economic conditions contributed to the development of major limitations of governmental immunities, present adverse economic conditions are shaping the modern development of federal immunity from state taxation.

This comment has discussed the taxation of possessory interests of forest rangers in living quarters leased from their federal employer, taxation imposed by California and upheld as constitutional by the United States Supreme Court.\(^{188}\) By showing that military personnel occupying government quarters on military installations in northern California enjoy a possessory interest virtually analogous to that of the forest rangers, this comment has demonstrated that the interest enjoyed by the military personnel confers a private benefit upon them.\(^{189}\) Service members residing in base quarters owned, provided, and maintained by their military employer enjoy as much privacy, independence, and durability in these living arrangements as any private lessee. These interests therefore rise to the level of possessory interests, fall within the meaning of Section 107 of the California Revenue and Taxation Code, and may be validly taxed by the state.

The imposition of possessory interest taxes on military personnel would not violate federal immunities. This comment has shown that this would be levied upon the use of improvements on federal lands and not upon the property itself or upon the federal government.\(^{190}\) Furthermore, the constitutional validity of the tax depends not upon the nature of the federal instrumentality owning the property, but upon the effect of the tax. State taxation of military possessory interests can be imposed without impairing or impeding the federal function of national defense. The fears of the Ninth Circuit of declining enlistments, reduced retention rates, and plummeting morale led to its conclusion in *Humboldt* that taxation would impermissibly burden a federal function. No evidence supports such speculation. Moreover, the court's premise for this conclusion was that military housing is free, a proposition that has been shown to be factually erroneous.\(^{191}\) This comment has demonstrated that military personnel residing in government housing enjoy possessory interests in those quarters. A taxation scheme can thus be validly imposed upon these possessory interests without impeding federal functions or violating the Supremacy Clause of the United States Constitution—two concerns that remain as important to inter-

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188. See notes 100-115 and accompanying text *supra*.
189. See notes 116-123 and accompanying text *supra*.
190. See notes 156-65, 171-78 and accompanying text *supra*.
191. See note 181 and accompanying text *supra*.
governmental relations today as they were in *M'Culloch v. Maryland* over one hundred and sixty years ago.

*Sharon D. Stuart*