The Choice of Law, State or Federal, in Cases Involving Government Contracts

Munroe F. Pofcher
The Choice of Law, State or Federal, in Cases Involving Government Contracts

Munroe F. Pofcher

Citizens of every state in the union are today entering into contracts with the United States Government in greater numbers than ever before in the light of the present defense effort and the government’s expressed policy to let as many contracts as possible to the small businessman. This observation makes it clear why the long important question of what law governs government contracts is of increasing interest today.

The thought that the choice of law question in government contract cases may present a serious legal problem finds its present-day origins in the case of *Erie Railroad v. Tompkins.* The Supreme Court held therein that in a diversity of citizenship case, based on a tort allegedly committed in Pennsylvania, the federal district court must apply the applicable state law and could not use the general “federal common law” heretofore applied in such cases. The court overruled the interpretation given by *Swift v. Tyson* to Section 34 of the Federal Judiciary Act of September 24, 1789, which provides that:

“The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

---


2. 304 U.S. 64 (1938).

3. 41 U.S. 1 (1842).

The court also stated that the failure to apply state law in the instant case was an invasion of rights "reserved by the Constitution to the several states." 5

The Erie case, involving, as it did, the application of state law to a diversity of citizenship case, did not seem to have reference to contract actions between the federal government and private individuals. Nevertheless, the immediate reaction of several of the lower federal courts was that the scope of the Erie decision was broad enough to encompass government contract cases and that state law had to be used in such cases.

In the ensuing years the decisions of the federal courts indicate a contrary view. Today, some thirteen years after Mr. Tompkins took his memorable stroll beside the Erie tracks, there is still disagreement on the law to be applied to government contracts. This article will examine the cases which have arisen on the question and attempt to ascertain the present state of the law. Fortunately a substantial number of courts have had to deal with the choice of law problem in government contracts; an analysis of these decisions is the basis for the conclusions to be reached. 6

The first case to follow the Erie case was Keifer & Keifer v. Reconstruction Finance Commission, 7 wherein the plaintiff brought an action against the bailee Regional Agricultural Credit Corporation, for the loss of its bailment, under a contract of bailment with Regional. The contract contained a clause limiting Regional's liability for loss of the bailment by reason of Regional's negligence. The contract was entered into and performed in Nebraska, and the cause of action arose in Nebraska. Under Nebraska law a bailee could not, by contract, exempt itself from the consequences of its own negligence. Under federal law the limiting clause was valid. The court held that, by reason of the

5. 304 U.S. 64, 80.
7. 97 F. 2d 812 (8th Cir. 1938).
rule stated in *Erie Railroad v. Tompkins*, the issue of the validity of the limiting contract clause was to be decided by reference to Nebraska law, and so the plaintiff bailor had a cause of action.\(^8\)

The court held, however, that Regional was immune from suit as a governmental agency. It was on this point that the Supreme Court granted certiorari,\(^9\) and reversed the court below, holding that Regional in this case was not immune from suit. The choice of law problem, however, was not discussed, and the Supreme Court reversed without remanding. No further action was ever taken. This might indicate that a settlement was reached, or it might indicate an implicit recognition that Nebraska law was to govern in this case.

In 1939 the Supreme Court also decided *Board of Commissioners v. United States*.\(^10\) The case involved a suit by the United States under an 1861 treaty on behalf of an Indian for interest from a county for taxes wrongfully collected. The decision made much of the fact that the litigation was between the United States and the political subdivision of a state, under a federal treaty. It did not make reference to the choice of law problem in governmental contracts. Despite this, the case has been used by some lower courts as support for the proposition that federal law applies to government contract transactions. One such court was the federal district in California in the case of *Byron Jackson Company v. United States*.\(^11\) In this case the contractor had sued the federal government, and the government attempted to set off liquidated damages. The question before the court was the validity of a liquidated damages clause in a government contract. The court first upheld the clause on the ground that its validity was to be determined by the law of the place of making, the District of Columbia, and under District of Columbia law such a clause was perfectly valid. But the court then went on to say that:

---

8. The court said: "When this case was orally argued we were of the view that... the question was one of general law on which the federal court would follow its own decisions. Since the argument of the case, however, the opinion in *Erie R. Co. v. Tompkins*... has been handed down, and under the decision in that case it is incumbent on this court to follow the decisions of the highest court of the state in matters of substantive law. Under the decisions of the Supreme Court of Nebraska, a bailee may not be contract exempt himself from the consequences of his own negligence." Id. at 814.

“When the right to sue the government on a contract is confined to its own courts (i.e. under the Tucker Act, 28 U.S.C.A. 41 [20]) we have clearly a right arising under the laws of the United States as to which state laws are inapplicable. See: Board of Commissioners v. U. S. . . . It is inconceivable that the Congress of the United States, in surrendering a part of the Sovereign's immunity, intended to subject the determination of the validity of contractual undertakings to the laws of each state rather than to the general laws of the United States. To have done so would be to deprive the government, when sued, of uniformity and similarity of principles. This, in the case of a government, the domain of which is as vast as that of the government of the United States, would result disastrously. For, consider the consequences if a governmental agency, acting under the authority of the United States in entering into a contract, enforceable in its own courts only, were compelled to consider the law of each of the forty-eight states and run the risk of having clauses in general use and which have received the sanction of the federal courts set to naught by the decisions of state courts.”

Shortly thereafter, however, both the Ninth and Tenth Circuits refused the lead of the district court and reasserted the Erie doctrine. In United States v. Brookridge Farm, the Tenth Circuit applied the Erie case to the following situation: The government had cancelled a milk supply contract made with the plaintiff. Several months later the plaintiff and the government entered into a new contract for the supply of milk. The plaintiff brought this suit for breach of the first contract. The court initially decided that the first contract was wrongfully cancelled by the government, and the plaintiff was, therefore, entitled to damages. This result was reached solely by reference to federal law, and without any discussion of the choice of law problem. But the court went on: “We come now to the question whether the execution and performance of the second contract foreclose plaintiff from recovering damages which accrued after Oct. 1” (the effective date of the second contract). And the court held, without further discussion, that “The question must be deter-

12. Id. at 667.
13. 111 F. 2d 461 (10th Cir. 1940).
Government Contracts

mined by the law of Colorado [under] Erie R. Co. v. Tompkins.”

In the Ninth Circuit the court evidenced even stronger adherence to the Erie doctrine. The litigation here involved a contract wherein Alameda County, California, had agreed to operate certain bridges belonging to the United States. The government sued for specific performance of a contract, entered into in 1910 pursuant to an act of Congress of June 29, 1910, which specifically authorized the Secretary of War to turn over the control and maintenance of the bridges to Alameda County. The government had placed the bridges in good repair pursuant to the contract before turning the bridges over to Alameda County, in addition to making other concessions requested by the local government.

Alameda County performed the contract without question until 1939, when they informed the government that they would cease to fulfill the contract because the California decision of Alameda County v. Ross had held it to be void for want of mutuality, since the United States had retained the right to discontinue the local control at any time.

The court refused to discuss the validity of the contract, but rather held they were bound by Alameda v. Ross under the rule of Erie Railroad v. Tompkins. The government contended that the origin of its rights was in its constitutional control over navigable waters and was therefore excepted from the Erie rule. The court rejected this by finding that the government’s alleged right to enforce the provisions of the contract arose not from a constitutional provision but from the contract itself. The government also contended that the contract in the instant case was excepted from the Erie doctrine on the ground that it was specifically provided for by statute. This too the court turned down, finding that the statute in question did not confer on the government any right against Alameda County.

14. Id. at 464.
15. 124 F. 2d 611 (9th Cir. 1941).
19. The court did note that the power of the Secretary of War to enter into a contract was specified in the statute. However, the court thought it significant that “the terms to be included in any contract to be thereafter entered into are not specified, and there is nothing in such statute which
In the same year, however, the district court in *United States v. Grogan*\(^2\) showed an inclination to accept the federal common law in a case which involved the validity of a liquidated damages clause in a government construction contract. As an alternative ground for decision in denying a motion to strike part of the complaint, the court said:

"But it must be remembered that this is not a suit between private parties, but a suit by the United States to enforce its contract in its own court in respect to its property rights, and that the federal statutes and decisions would, therefore, control."\(^2\)

On appeal, in *United States v. American Surety Company*,\(^2\) the Supreme Court upheld the particular liquidated damages clause involved, finding statutory authority therefor.\(^2\)

The problem of choice of law in government contracts was first treated by the Supreme Court in *Clearfield Trust Company v. United States*.\(^2\) In this case the United States brought an action to recover the amount of a check drawn on the Treasurer of the United States for services rendered to the W.P.A., in Pennsylvania, on which the payee's name had been forged. The defendant bank had acted as agent for collection and had guaranteed all prior endorsements. Fifteen months later, this suit purports to confer on any appellant any power whatever, even if it could do so." 124 F. 2d 611, 616.

21. Id. at 820. Decided in the same year is *Kohler v. United States*, 40 F. Supp. 972 (D.C. Md. 1941) which likewise contains a dictum as to the inapplicability of local law to government contracts.
22. 322 U.S. 96 (1944).
24. 318 U.S. 363 (1943). As was pointed out in footnote 6 to the court of appeals opinion in the *Clearfield* case, 130 F. 2d 93, 95 (3rd Cir. 1942), the Supreme Court had avoided the question of the effect of *Erie Railroad v. Tompkins*: "Decisions of lower federal courts since *Erie R. Co. v. Tompkins* are in disagreement as to whether the rights and liabilities under a contract made by the United States are to be measured by the decisions of the state courts or by the laws declared in federal cases." It might be observed at this point that the Supreme Court had before it the choice of law question in non-diversity cases on at least three earlier occasions. These cases, however, did not concern government contracts, and the basis for decision therein was the particular federal statute or obligation involved. For this reason, they are probably not too persuasive in the field of government contract cases. These decisions are *Deltrick v. Greaney*, 208 U. S. 150 (1900) (suit by a receiver of a national bank involving the National Bank Act); *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941) (suit on a surety's bond given to accompany a taxpayer's claim for tax abatement); *D'oench, Duhme & Co., Inc. v. F.D.I.C.*, 315 U.S. 447 (1942) (suit by the F.D.I.C. on a demand note, involving the Federal Reserve Act).
was begun, based on the express guaranty. The bank defended on the ground that (1) under Pennsylvania law a delay as long as fifteen months in giving notice of the forgery bars such an action; and (2) since Pennsylvania was the place of transfer, Pennsylvania law should be applied to determine rights under a forged endorsement. The second contention had as authority United States v. Guaranty Trust Company.\(^2\) In that case, the Court had held that the rights of a transferee of a negotiable instrument under a forged endorsement depended on the law of the place where the drawer intended the instrument to be negotiated; so Jugoslavic law governed where the United States sent a check to A in Jugoslavia, even though the check was drawn and made payable in the District of Columbia.

The Supreme Court ruled that Pennsylvania law was inapplicable. It distinguished the Guaranty Trust Company case first on the ground that the check therein had “something of the quality of a foreign bill” of exchange and second on the ground that “the rule of Erie Railroad v. Tompkins did not apply to this action [because] the rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In absence of an applicable act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”\(^2^6\) Thus, the Pennsylvania law, which required notice of the forgery, did not bar suit by the United States.

It might be observed that the issue in the Clearfield case did not seem to be the right of the federal courts to declare the applicable rule which is to govern the rights of transferees of United States issued negotiable instruments. That right was conceded in the Guaranty Trust Company case, and is apparently within the exception to Section 34 of the Federal Judiciary Act of 1789 as necessarily stemming from the government’s constitutional power to issue commercial paper. The court had merely to decide in the Clearfield case what rule it wanted to apply. In the Erie case, on the other hand, the issue was the right to apply “federal common law” in diversity cases. Thus, the question of the scope of the Erie case was not necessarily before the court in Clearfield Trust Company v. United States, and the latter

\(^2^5\) 293 U.S. 340 (1934).
case may rest on the special right of the United States to issue commercial paper.

Whether or not this is the rationale of the Clearfield case remains unclear, but it must be pointed out that the case has been used as broad authority for the abrogation of the Erie rule in government contract cases. The immediate explanation is that all government transactions find their basis in a constitutional grant of power, and so federal law can always be applied. It seems doubtful, however, that this has been the reason for the use of the Clearfield case in subsequent Supreme Court decisions on this subject.

The Supreme Court first used the Clearfield case in this area in United States v. Allegheny County, Pennsylvania. 27 The Mesta Machine Company entered into a government contract for the manufacture of ordnance. In connection therewith, Mesta furnished for the government, or had supplied to it, certain equipment, title to which, under the terms of the contract, vested in the government upon delivery at the site of the work. The contract provided that Mesta was to use the equipment for the manufacture of ordnance under a lease arrangement. Machinery thus furnished was bolted on concrete foundations in Mesta's plant, on real property owned by Mesta.

Allegheny County, Pennsylvania, thereupon added to Mesta's previously determined assessment for ad valorem property taxes the value of the machinery in question. The contract between Mesta and the United States made the United States liable to reimburse Mesta for the tax paid by reason of this assessment.

The Supreme Court held that title to the property thus assessed was in the United States, under the contract, and, for this reason, the county could not levy a tax on this property. Justice Jackson, writing for the majority, said that state law is not decisive of the question of title, and that federal law governs the characterization of title. In arriving at the conclusion that federal law was applicable, the Court stated:

"Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by

27. 322 U.S. 174 (1944).
the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. . . . Procurement policies so settled under Federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. Clearfield Trust Co. v. U.S. . . .; Board of Commissioners v. U.S. . . ." 28

This is broad language indeed, which if applied literally, would make federal law the governing law in almost every situation involving government contracts. It is possible, of course, to read the Allegheny case as merely holding that, for purposes of taxation on property to which the United States claims title, the characterization of title afforded by state law is not controlling; were it otherwise, the supremacy clause of the Constitution could be effectively negated. The sweeping quotation just given was not necessary to the decision, and it can be effectively argued on the basis of the facts of the Allegheny case that it is merely a new statement of well-established law. 29

The scope of the Allegheny decision was further explored in S.R.A., Inc. v. State of Minnesota, 30 a case involving the power of the State of Minnesota to tax realty, legal title to which was in the United States. Jurisdiction over the realty in question had been ceded to the United States in 1867 in accordance with the exclusive legislation clause of the United States Constitution,

---

28. Id. at 182.
29. See, e.g., Carpenter v. Shaw, State Auditor of Oklahoma, 280 U.S. 363 (1930), wherein the court, per Mr. Justice Stone, struck down a tax imposed by the State of Oklahoma on oil lands belonging to the Choctaw Indians. By virtue of an 1898 act of Congress, these lands, belonging to the Choctaw Indians, were to be non-taxable. Oklahoma imposed the tax on the theory that it was merely a tax on the oil severed from the realty. The court said that it was not bound by this state characterization of what was being taxed, and, in its view, the tax was really "a tax upon the right reserved in them (the Indians) as lessors and owners of the fee." The tax was void, therefore, because of its conflict with congressional enactment. Cf. Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 68, 84 (1946).
30. 327 U.S. 558 (1946).
Article I, Section 8. The realty was subsequently conveyed to petitioner\textsuperscript{31} after purchase on public sale, and petitioner entered into possession. The contract of sale provided for payment by cash and annual installments, and for repossession by the United States upon the purchaser's failure to comply with any term or condition thereof. The major portion of the contract price had not fallen due and was unpaid at the time of suit. Minnesota levied a realty tax on the property, "subject to fee title remaining in the United States of America."\textsuperscript{32} Petitioner objected to the assessment, claiming that the realty was exempt from state taxation because title to all of the premises was in the United States. The Supreme Court of Minnesota denied tax exemption.

On certiorari, the Supreme Court of the United States affirmed the Minnesota denial of tax exemption. The court first pointed out that "the right of a State to tax realty directly depends primarily upon its territorial jurisdiction over the area."\textsuperscript{33} Because of certain assumptions then made, the issue of the existence of the territorial jurisdiction of Minnesota was held to depend upon "whether there was a transfer of the property by the contract of sale."\textsuperscript{34} This issue was resolved by the application of federal law: "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court. U.S. \textit{v. Allegheny County, supra...}"\textsuperscript{35} The court held, in accordance with what it said was its prior opinion on the subject, that the United States retained legal title only as security, and that the equity in the realty had passed to the purchaser. "Therefore, when the petitioner entered into possession of this real estate under its contract of purchase, the taxed property by the transfer became subject to the territorial jurisdiction of Minnesota."\textsuperscript{36}

Having decided this, the court then held that, where the ownership of the beneficial interest has passed to the petitioner, with legal title retained by the United States for security purposes only, and where the lien of the fee title of the United States is protected by state law in case of a state tax sale of the realty,

\textsuperscript{31} Under authority of 54 Stat. 764 (1940), 40 U.S.C.A. § 304a et seq. (1940), an act for the disposal of surplus federal real estate.
\textsuperscript{32} 327 U.S. 558, 560 (1946).
\textsuperscript{33} Id. at 562.
\textsuperscript{34} Id. at 564.
\textsuperscript{35} Ibid.
\textsuperscript{36} Id. at 565.
the property is not exempt from state taxation. These conditions having been met, the realty in question was subject to tax imposed upon it by the State of Minnesota.

The S.R.A. case is relevant to our problem because of the court's statement that federal law must be applied to determine "the meaning and effect of contracts to which the United States is a party." The court indicated that construction of the contract of sale was essential in deciding the existence of territorial jurisdiction. In this connection, two factors should be noted: (1) Application of Minnesota law would have led to the same result. 3 (2) Justices Stone and Frankfurter, concurring, pointed out that "everything said on the question of Minnesota's territorial jurisdiction to tax is dictum," because the issue was not presented to the court on appeal. "Our opinion should be confined to the single question which the petitioner presents for our decision, whether the retention by the United States of the legal title to the taxed land precludes its taxation to petitioner, which, under its contract with the Government, has acquired possession and right to possession." 38

It must certainly be conceded, however, that the broad language used in these cases indicates a trend towards the application of federal law, rather than state law, in all cases involving the federal government, even if the particular cases are not themselves clear authority for such a proposition. It comes as no surprise that the Allegheny decision has been seized upon by the lower courts as support for disregarding the rule of Erie Railroad v. Tompkins in government contract cases. An important example is Girard Trust Company v. United States, 39 a case involving the rights and obligations imposed upon the parties to a lease, where one of the parties is the federal government.

The Girard Trust Company was the lessor of a building occupied by the Securities and Exchange Commission. The trust company made certain repairs on the building which it claimed should have been made by the United States under the terms of the lease. It brought suit for reimbursement. The circuit court, after reversing the district court on a procedural point, went on to say:

37. "The United States retains only a legal title as security. In substance it is the position of a mortgagee. Minnesota has the same rule." Id. at 565.
38. Id. at 571.
39. 149 F.2d 872 (3rd Cir. 1945).
"The substantive law to be applied when the facts are found by the court below upon remand is not that of Pennsylvania. We can find no case directly in point, but the decisions of the Supreme Court in Clearfield Trust Co. v. U.S., and U.S. v. Allegheny County require the conclusion that the federal law governs the rights of the parties under a lease executed by the U.S. In the absence of any federal cases in point the court below may turn for guidance to the general law of landlord and tenant."\textsuperscript{40}

In 1947 the Supreme Court had before it a novel situation which again involved a consideration of the scope of the \textit{Erie} doctrine. Although the case turned on a question of tort law, rather than contract law, the court's reasoning carried it quite far towards the proposition that federal law is the applicable law in all cases involving the United States. In some respects, \textit{United States v. Standard Oil Company}\textsuperscript{41} may be considered an a fortiori case to the contract cases.

The federal government herein sued to recover hospital expenses and the loss of services incurred as a result of Standard Oil's negligent injury of a United States soldier. The Court denied recovery, holding (1) that the federal law applied, and (2) that under the federal law there was no such tortious liability established as was here contemplated; the court refused to establish such liability without action by Congress.

In arriving at its conclusion that federal law governed, the court indicated very strongly that, where the question is the attempt of the federal government to secure indemnity for injury to its property, federal law applies. The court's language goes further, perhaps, than any other case on this subject, in justifying the use of federal law:

"We agree with the government's view that the creation or negation of such a liability is not a matter to be determined by state law. The case in this aspect is governed by the rule of Clearfield Trust Co. v. United States ... rather than that of \textit{Erie R. Co. v. Tompkins}. ... Although the \textit{Clearfield} case applied these principles to a situation involving contractual relations of the Government, they are equally applicable to

\textsuperscript{40} Id. at 874.
\textsuperscript{41} 332 U.S. 301 (1947).
the facts of this case where the relations affected are non-contractual or tortious in character.

"Since also the government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the Clearfield case or from one involving the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries.

"As in the Clearfield case, moreover, quite apart from any positive action by Congress, the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the Erie decision. The great object of the Erie case was to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits. It was the so-called 'federal common law', utilized as a substitute for state power, to create and enforce the legal relationships in the area set apart in our scheme for state rather than for federal control, that the Erie decision threw out. Its object and effect was thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.

"Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly, the Erie decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings.... [Federal] power remained unimpaired for dealing indepen-
dently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.

"In this sense therefore there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision', outside the constitutional realm, untouched by the Erie decision. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the Erie ruling."  

If the Standard Oil case can be read as authority for the proposition that any matter involving the "government's purse" is to be governed by federal law, then it would seem that all questions involved in government contract cases should be governed by federal law. But here again, several factors must be considered in connection with the Standard Oil case. There is the peculiar nature of the military establishment, especially in wartime, which necessitates uniformity. There is the consideration that, in tort cases, the conflicts concept of applying the law that was most probably within the contemplation of the parties is not afforded the importance it has in contract cases; thus the tort grounding of the Standard Oil case may be significant (although the court obliquely indicates otherwise). Finally there is the fact that applying state law would have led to the same result as was reached by "using" federal law.

Whatever the importance of these factors, in distinguishing the Standard Oil case, there seems to be strong authority for the application of federal law in construing government contracts in the case of Priebe & Sons, Incorporated v. United States. There the question before the court was the validity of a liquidated damages clause in a contract between the government and a contractor who had agreed to supply dried eggs to the government.

42. Id. at 305-308.
43. Id. at 303, n. 4.
44. 332 U.S. 407 (1947).
In holding the clause to be a penalty clause and therefore unenforceable, the court said:

"It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law [rather than any particular state law]. U.S. v. Standard Rice Co. (1944) 323 U.S. 106, 65 S. Ct. 145 and cases cited. That has been done in other cases where the court has considered the enforceability of 'liquidated damages' provisions in government contracts. We adhere to those decisions and follow the same course here."

To indicate whatever uncertainty may be left in this field, it may be profitable to add a few remarks to the Priebe decision. For one thing, no discussion was had of state law in the Priebe case. It is possible that the state law was the same as the federal law and that, therefore, the holding quoted was not essential to a decision of the case at bar. Further, the holding in United States v. Standard Rice Company, cited by the Priebe decision, was that, in general, the United States as a contractor must be treated as other contractors under analogous situations: When problems of the interpretation of its contracts arise, the law of contracts governs. But in the Standard Rice case no mention was made of state law; and in resolving an issue of interpretation of words, the approach is generally the application of certain general rules of construction, without reference to any particular state law.

It is interesting to note that the dissent in the Priebe case by Mr. Justices Black and Murphy indicates that the law to be applied is not a nebulous general contract law, but rather a carrying out of congressional policies, insofar as they can be determined. If Congress has indicated its approval of the use of liquidated damages clauses, as these dissenting judges felt that it had, then such clauses should not be struck down because they are supposedly in conflict with the general law of contracts. If this reasoning is followed to its logical conclusion, it might be argued that, since every validly executed government contract stems from congressional authority, every clause in a government contract is valid as an expression of congressional policy, no matter the conflict with generally accepted principles of con-

45. Id. at 411.
It is probable that at least a few other present Supreme Court judges would not fully agree with this approach. For in a separate dissent, filed by Justice Frankfurter and the Chief Justice, in the *Priebe* case, this statement is found: “Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government. But this is not an ordinary peace-time Government contract.”47 (This dissent thought the clause valid because of the war emergency, and considerations of policy derived from emergency legislation.)

Any uncertainty that the Supreme Court cases impart as to the applicability of federal law does not seem to have been felt by the First or Ninth Circuits in deciding two recent cases. The first of these is *Whitin Machine Works v. United States*,48 a suit by the United States for damages occasioned by a defective fly wheel in a generator sold by the Whitin Company to the United States. The district court49 held that the Massachusetts law50 governed in this situation, and that the government could recover the damages allowed by the Massachusetts law for the breach of the implied warranty found to be existent under Massachusetts law. No mention was made of federal law. On appeal, the First Circuit stated:

“In this connection the government places its reliance upon Chapter 106, sec. 17, Mass. General Laws . . . which corresponds to sec. 15 of the ‘Uniform Sales Act.’ We question whether the law of any particular state is applicable to a case of this kind, involving rights and liabilities under a contract with the United States; it may be that, in the absence of a controlling act of Congress, the law to be applied is a general federal common law of sales, as formulated, ultimately, by the Supreme Court of the United States. See: *U.S. v. Bethlehem Steel Corporation; Clearfield Trust Co. v. U.S.; U.S. v. County of Allegheny; U.S. v. Standard Oil Co.; Priebe & Sons, Inc. v. U.S.* . . . But there is no reason to sup-

---

46. The logic might be pursued even further and such provisions be viewed as an exercise of rule-making power by the contracting agency. Thus provisions would be subject to judicial review as to interpretation but with such review possibly limited to the question of whether they were rational implementations of delegated authority.
48. 175 F. 2d 504 (1st Cir. 1949).
pose that such federal common law would imply any war-

ranties more extensive than those spelled out in the 'Uniform

Sales Act.' Hence, we shall assume in the government's favor,

without deciding, that the applicable law in the case at bar is

the following provision of the 'Uniform Sales Act', as embod-


It might be noted that in this case it was the government itself

which argued the applicability of state law. Although it must be

granted that the government often takes inconsistent positions in

different litigations, still this is an indication that the Department

of Justice does not consider the matter foreclosed for judicial

decision.

The second recent case is United States v. Jones. The gov-

ernmment instituted an action against the defendant Jones to set

aside and rescind a sale of certain surplus materials made to the

defendant. The complaint alleged mutual mistake, unilateral

mistake, lack of authority of the agents negotiating the sale, and

sale at an unfair price in violation of the 1944 Surplus Property

Act. In affirming judgment for the defendant, the court stated

that federal law governed the sale in issue. It should be noted

that it was the defendant who had argued for the application of

state law, and that there was no showing that state law would

have led to a different result. On the contrary, if the defendant

had a sound basis for urging its use, then local law would

probably have led to the same decision actually rendered. Never-

theless, the language of the court is interesting in this connection:

"Another contention can be disposed of with brevity. Jones

asserts that the validity of the agreement between him and

the government is governed by Oregon law. We cannot

agree.

"This is a case in which the Government, in its sovereign
capacity, deals with property which it owns. Its contracts
relating to such property stem from ownership, and the man-
ner of its sale is governed by specific federal statute. There is,
therefore, no room for the application of any local law merely
because the sale took place in Oregon, was made to a citizen
of Oregon by government agents resident in Oregon." 53

51. 175 F. 2d 504, 507 (1st Cir. 1949).
52. 176 F. 2d 278 (9th Cir. 1949).
In spite of the indications of these two recent court of appeals cases that the *Erie* doctrine does not apply to federal contracts, the United States Court of Claims in the case of *Rhode Island Discount Company v. United States*,54 decided in 1951, applied the state law without question. The case involved a suit by creditors of Somerset Shipyard, Incorporated, seeking to compel the United States to pay their claims pursuant to a supplemental contract which the government had entered into with Somerset, wherein the government agreed to pay certain debts for the hopelessly insolvent Somerset Corporation in order that Somerset could complete the original contract calling for the production of seven steel barges. The creditors contended that they were third party beneficiaries of the government’s promise to Somerset in their supplemental contract. The court answered this contention in the following manner: “However, the contract here involved was a Massachusetts contract, and the law of Massachusetts, contrary to the weight of American authority, does not recognize any right in a third party beneficiary against the promisor in a contract made for his benefit.”55

The creditors also argued that the government had directly promised them to pay their claim against Somerset. This too was rejected by the court: “If direct promises to the creditors had been made by the Government, the promises would have been promises to pay the debts of Somerset, and would have had to satisfy the Statute of Frauds, Massachusetts General Laws, Title V, Ch. 259.”56

The court made no mention of the *Allegheny County* case, the S.R.A. case or any of the others which had applied federal common law. It should be noted, however, that there was no indication in this case that the “federal common law” would have differed from that of Massachusetts.

**Conclusion**

Since *Erie Railroad v. Tompkins*, a number of cases have involved the choice of law question in government contracts. The answer given in the majority of cases has been “federal com-

---

54. 94 F. Supp. 669 (Ct. Cl. 1951).
55. Id. at 675.
56. Ibid.
mon law.” Viewing each case by itself, however, the answer does not seem to be definitive. Often there were reasons for applying federal law peculiar to the case; often the law was the same no matter what the choice; often the court’s choice was a gratuitous one. Certainly a few courts still lend support to the local law adherents. Nevertheless the parts cannot be viewed apart from the whole. And as a whole, the trend seems to indicate clearly that “federal common law” will be applied in those cases involving government contracts, where the choice of law question is in issue because of differences in federal law and the applicable state law. In this area, at least, the “brooding omnipresence” of the Erie case has lost its place in the sky.