Following the glossary is a "study outline" which, through a series of key questions or statements for each subject, is supposed to hit the highlights of each topic. It was also designed as an "index" to lead you quickly to the sections that have special interest for you. If you start with this outline we think you will find the text easier to wrestle with.

GLOSSARY

1. appropriate (funds) The legislative act of ear-marking a specific sum of money for specific governmental purposes.

2. Attorney General The chief law officer of the Government. In the executive branch he is the final authority on all questions of law. Although not binding on the courts, his opinions are conclusive on the departments and agencies. Many of his opinions are published and are cited in the monographs as "Op. Atty. Gen." with the Volume prefixed and the page afterwards; e.g. 47 Op. Atty. Gen. 29.

3. Comptroller General The head of the General Accounting Office concerned with, among other things, the proper expenditure of Federal funds. Like the Attorney General, his opinions are conclusive on the executive branch. They are cited as "Comp., Gen.", also with the Volume in front and the page afterwards.

4. condemnation The process by which private property is taken for public use.

5. condition In a conveyance, an obligation to do or not to do a particular thing. If a condition in a conveyance is violated, title to the property may be affected.

6. continuing legislation Permanent laws which remain in force indefinitely.

7. covenant An agreement or promise in a real estate conveyance or grant. Unlike a simple contractual agreement, a covenant cannot be assigned or transferred without the land and is considered inseparable from the land.

8. deficiency judgment In a condemnation, the difference between the court's award to the landowner and the amount deposited by the Navy as "just compensation".

9. easement A limited right or interest in the land of another entitling the holder to some use, privilege or benefit.

10. eminent domain The power of the government to take private property for public use.

11. estate The degree, quantity, nature and extent of a person's interest in real property.

12. fee title Total or absolute ownership. Ownership without qualification or limitation.

13. just compensation In eminent domain, the full and fair indemnity in money for the loss sustained by the landowner because of the taking of his property.

14. lease A writing constituting a conveyance of real property for a term of years and a contract for its possession during that term.

15. public domain (Lands) Lands owned by the United States and under the control of the Secretary of the Interior which are for sale or disposal under the general land laws and not held or reserved for any special governmental or public purpose.

16. recurring legislation Laws reenacted essentially in the same form in each of several successive legislative sessions. They deal with the same general subject matter, but can differ with respect to specifics.

17. reservation In a conveyance, the creation and retention by the grantor of some right in the property transferred.

18. special provisions In legislation, laws which deal with specific transactions rather than all such transactions of a similar nature.

STUDY OUTLINE

	Page No.
Real Estate Terms and Concepts	
What are some of the technical terms and words of art commonly used by real estate professionals?	i
Acquisition - General Principles	
What does the term "acquisition" mean?	1
What determines the "interest" to be acquired?	1
What determines the acquisition "method"?	1
What is the source and importance of the basic authority to acquire real estate?	1
Is the same basic authority necessary for all real estate acquisitions?	2
Are there different kinds of basic authority?	2
What, if any, is the basic authority necessary today?	2
Where can this basic authority be found?	3
How are acquisition projects defined?	5
How are acquisition projects interpreted?	5
Who owns Government real estate?	6
Acquisition - Purchases	
What does the term "purchase" mean?	8
Who or what defines the title to be purchased?	8
What is the effect of limitations or qualifications in conveyances?	9
How much discretion is there to accept conveyances with limitations or qualifications in the grants?	9
What is an "option" and how does it work?	10
What about "competition" and how does it bear on the purchase of real estate?	10

Page No.

Acquisition - Easements

What is the purpose of an easement? 12

What is an easement? 12

What is a license? 12

What kinds of easements are there? 12

Must there be a basic authority to acquire an easement? 13

What is the duration of an easement? 13

What, if any, is the role of state laws on easements? 13

Acquisition - Airspace Easements

What is an "airspace easement"? 14

What are a surface owner's rights in airspace? 14

What is the effect of flights by aircraft over someone else's land? 15

What obligations arise when aircraft fly over someone else's land? 16

What are the effects of laws governing air navigation? 16

What are the effects of regulations governing air navigation? 17

What necessary connection is there, if any, between land ownership and airspace? 18

Acquisition - Buildings and Space in Buildings

What are the basic rules governing the acquisition of buildings or space? 20

What is the role of the General Services Administration in space acquisition? 20

What kinds of space are there and how are they defined? 21

Who is responsible for the acquisition of what kind of space? 21

What about "competition"? 22

Page No.

Acquisition - Buildings and Space in Buildings (Continued)

Are there any exceptions to competition? 22

Can leases or contracts for buildings or space be modified? 23

What is the maximum time for which a lease may be written? 24

Acquisition - Transfers From Other Agencies

How, and upon what terms, can property be acquired from the other armed services? 25

How, and upon what terms, can property be acquired from civilian departments and agencies? 25

How, and upon what terms, can the use of other department and agency space be acquired? 25

What specific elements of cost are proper subjects for agreements between agencies for the use of space? 26

Acquisition - Condemnation

When is condemnation most frequently used? 29

What is the Navy's role in a condemnation action? 29

What is the basic source of the condemnation authority? 29

What are the mechanics of condemnation? 30

Whta flexibility is there to modify condemnations to meet changing needs? 30

What are the specific procedures for instituting a condemnation? 31

Acquisition of Public Domain Lands

What are public domain lands and what are they used for? 32

How and why does one withdraw land from the public domain? 32

What is the policy concerning the development of public lands? 33

What is the new policy concerning withdrawals? 34

What is the policy concerning multiple use of public lands? 36

Page No.

Outleasing

What is the basic authority to lease and what are its fundamental criteria? 37

How does the leasing mechanism work? 37

What are some of the important technical requirements of a lease? 41

What are some of the purposes for which leases may be issued? 42

The Legislative Process

How does Congress maintain oversight of the real estate program? 45

What are the "ground-rules" for meeting Congress's interest in the real estate program? 45

Legislative Jurisdiction

Definition of Legislative Jurisdiction 48

Types and Characteristics of Legislative Jurisdiction 48

What is the source and history of Legislative Jurisdiction? 49

What is the current Navy policy? 50

What is "reserved jurisdiction" and how does it bear on an activity's operation? 50

Why are adjustments in legislative jurisdiction necessary? 50

Can States interfere with the Federal Government's use of its property? 51

Who determines what constitutes interference with Federal functions? 54

What about indirect State interference? 54

How are adjustments accomplished? 54

Who normally initiates adjustments for Navy? 54

Page No.

Legislative Jurisdiction (Continued)

What is the authority for Navy to accept or relinquish legislative jurisdiction? 55

What methods may States use to relinquish jurisdiction? 55

Is it necessary for the Federal Government to own the land in order to exercise jurisdiction? 55

Must legislative jurisdiction be formally accepted by the Federal Government to be valid? 55

Under what conditions can the Federal Government lose (not relinquish) jurisdiction? 55

Licenses

What is a license? 57

How does it compare with a lease? 58

How does it compare with an easement? 58

What is the basis of the licensing authority? 58

What are the criteria governing the granting of licenses? 58

How limited is the discretion of an official to give a license? 58

Some discussion of the all-important "revocation" feature of a license? 61

SECTION I - ACQUISITION

PART A.

GENERAL PRINCIPLES GOVERNING THE ACQUISITION OF PRIVATELY-OWNED REAL PROPERTY

Principles Applicable to all Acquisitions of Private Property Regardless of the Interest to be Acquired or the Method of Acquisition

1. General. Normally, the term "acquisition" is understood to include withdrawals from the public domain and transfers from other Departments or agencies, but the discussion in this Part is limited to "private property" acquisitions. Moreover, this term "private property" embraces the property of states, municipalities, and other political units, because it is recognized as "private" within the meaning of the Fifth Amendment to the Constitution.

Acquisitions of Government property by transfer is discussed in Part F.

The interest or estate which the Navy acquires in real property necessarily varies according to the Department's requirements. Where there is a permanent need for the property, fee title usually is obtained. But in other situations a leasehold or other interest less than fee will be sufficient.

There are different rules applicable to specific types of acquisitions, discussed in other Parts. The discussion which follows focuses on the basic principles and guidelines which must be observed in all acquisitions of private property.

Above all, keep in mind that with any acquisition it is the policy, required by Public Law 91-646, to acquire through voluntary conveyance following amicable negotiations with the owner or others interested. Sometimes, though, it may be necessary or desirable to acquire through exercise of the Government's power of "eminent domain" (condemnation).[1]

2. Every Acquisition of Real Estate must be Authorized. No interest or estate in real property may be acquired without authority from Congress. Section 3736 of the Revised Statutes (41 U.S.C. 14) provides that

> "No land shall be purchased on account of the United States, except under a law authorizing such purchase".

---

[1] See Part G.

The Comptroller General strictly interprets this prohibition.

> 24 Comp. Gen. 339 (1944) involved a proposal of the National Housing Administrator to use rental funds collected from a national housing project to purchase the land on which the project had been erected. There was a restoration obligation in the lease. The Administrator represented that the land could be acquired for less than the cost of restoring the leased premises. But, the Comptroller General said that inasmuch as the proposed acquisition had not been authorized by statute, expenditure of the rental funds to buy the land would violate R. S. 3736, even though it might result in a saving to the Government.

The prohibition in R. S. 3736 extends to "interests and estates" in land.

> 35 Op. Atty. Gen. 183 (1927) concluded that the purchase of a leasehold interest is a purchase of land within the intent of Section 3736. The Comptroller General has likewise said that the purchase of a permanent right-of-way or easement constitutes a purchase of land, which would violate Section 3736 unless authorized by law. 17 Comp. Gen. 204 (1937).

3. Furthermore, Acquisitions Must Be Expressly Authorized. Sec. 501(b) of the Act approved July 27, 1954, currently revised as 10 U.S.C. 2676 says that

> "No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law".

4. An Example of an "Express" Authorization Is the "Minor Land Acquisition" Statute. Section 406 of the Military Construction Authorization Act, approved August 3, 1956, later amended and now appearing as 10 U.S.C. 2672, provides that a military department may acquire any interest in land that does not cost more than $100,000, exclusive of administrative costs and the amount of any deficiency judgments, which the Department concerned determines to be needed in the interest of national defense. The authority under this section may not, however, be used to acquire more than one parcel of land unless the parcels are noncontiguous or, if contiguous, unless the total cost is not more than $100,000.

This is the best known and most frequently used authorization which is both "express" and "continuing". The history of this law indicates that although it was initially designed to eliminate from the authorization bills a large number of "low cost" land items, it was intended nevertheless to provide authority to acquire land and easements in order to satisfy urgent requirements, provided the cost does not exceed $100,000. Later the "urgent" criterion was eliminated leaving the authority essentially as described above.

5. "Express" Authority is Also Found in the Annual Military Construction Authorization Acts. The greatest number of "express" authorizations are found in the annual acts of Congress authorizing military construction, the well-known Military Construction Authorization Acts. In these recurring acts (a new one each fiscal year) Congress authorizes specific construction projects, including the acquisition of land and interests in land. There is a separate Title for each Military Department. The specific projects are usually embodied in individual "line items", although authorizations are sometimes made in more general terms, for instance, where there is a lump sum total for many projects including land acquisition at "Various Locations".

Where land is needed in connection with a particular construction project to be authorized in a Military Construction Authorization Act, it has been the practice to provide for its acquisition in express terms. If express authority to acquire is not included, it is assumed either that the acquisition of land will not be required for the project, or, if it is required, that Government-owned land is already available for the purpose.

At any rate, it has been the accepted interpretation throughout the years that unless the acquisition of land is expressly provided for in connection with individual construction projects authorized in the Military Construction Authorization Acts, its acquisition is not authorized.[2] Moreover, the Committee Report on the recent Military Construction Codification Act addresses additional requirements for "express" authorization noting, among other things, that if the land cost is more than 30 percent of a total project, separate justification is needed. If this requirement is not fulfilled, the "express" authorization test will not be met and the project must be deferred unless it falls within the scope of the "minor" (10 U.S.C. 2672) or "urgent" (10 U.S.C. 2672a) land acquisition authorities.

(The Military Construction Authorization Acts also include, in addition to the many "line items" each applicable to a specific project, a provision expressly authorizing the appropriation of funds to accomplish all projects authorized. However, this "authorization for an appropriation" does not by itself authorize the expenditure of funds or the making of contracts obligating the money authorized to be appropriated. 16 Comp. Gen 1007 (1937). It is only when money is actually appropriated and apportioned that contracts may be signed and expenditures made.)

---

2 The importance of this principle cannot be overemphasized. With disappointing regularity, construction projects requiring real estate proceed through an entire programming cycle with no mention of the land that is critical to the use of the facility. Sometimes the omission is not discovered until too late. If the value of the land falls outside the scope of the Minor Land Acquisition Statute (See paragraph 3 above), there is usually no alternative until the next program cycle.

6. "Express" Authority Can Likewise Be Found In the Appropriation Acts. The Military Construction Authorization Acts have included special provisions which, although varying in the language used, have provided in express terms for the acquisition of less than fee interests, including leaseholds. But in addition to those authorities, which are usually limited to the projects specifically authorized, the Department's general authority to lease land and interests in land is customarily provided for in the annual Department of Defense Appropriation Acts under the specific heading "General Provisions".

7. But R. S. 3736 Is Not Applicable to Rental of Space in Buildings. In contrast, the Comptroller General does not consider R.S. 3736 applicable to the rental of space in buildings.

> An unpublished decision dated July 16, 1942 (MS Comp. Gen B-27329) advised the Civil Service Commission that funds of the Commission could be used for the rental of office space although not provided for in specific terms. He explained that "Appropriations made in general terms for specified purposes, usually are construed as available for the expenses reasonably and necessarily incident to the accomplishment of such purposes unless some particular item of expense is specifically prohibited by some general statute. In the present matter the two appropriations of your Commission above referred to provide generally for the salaries and expenses necessary to discharge the duties and functions imposed upon it by law. The rental of quarters necessary for the proper performance of such duties and functions must be considered as an expense reasonably and necessarily incident to the accomplishment of the purposes for which the appropriations were made, and since, as hereinbefore stated, the item of expense is not specifically prohibited by statute, no....reason is apparent why said appropriation should not be considered as available for that purpose."

8. Inattentive Planning Can Create Interpretive Problems Involving the Amount of Land or Interests which May Be Acquired. It is not always clear what discretion, if any, the Navy may exercise in defining the "scope" of an acquisition. Problems concerning the particular interest which may be acquired arise less frequently than in the past because the Military Construction Authorization Acts now contain provisions which broadly authorize the acquisition of land or interests in land, including temporary use, in those instances where acquisition is provided for in general terms. But, problems still arise as to the quantity of land or acreage which may be acquired. This is because neither the Authorization nor the Appropriation Act involved usually indicates a specific quantity of land which may be acquired in connection with the project provided for. It is then necessary to inquire into the legislative history of the authorization, particularly the "justification" submitted to the Congress in connection with the Department's Military Construction Program, which is considered a part of the legislative history of the project.

9. Authorizations to Acquire Land are Strictly Interpreted. According to the Comptroller General, if the justification which is submitted to the Congress in support of a proposed military construction project indicates in specific terms the quantity of land or acreage required for a project, the acquisition of any additional acreage, although relatively small, would not be authorized.

> The Military Construction Authorization Act approved January 6, 1951 included an authorization for the acquisition of land required in connection with a project at Wolters Air Force Base, Texas. The "justification" submitted to the Congress in support of the project indicated a requirement of 7,737 acres. Having acquired all this acreage the Air Force proposed to acquire an additional 26 acre tract. In deciding that this additional acquisition was not authorized, the Comptroller General explained that "since (the) Public Law does not include any specific authorization for procurement of the 26 acre tract, and since it appears from the record that the justification submitted to the Congress in support of the acquisitions authorized by said Public Law only pertained to 7,737 acres of land at Wolters Air Force Base, which acreage already has been acquired, (the) Public Law may not be regarded as authority for acquisition of the additional 26 acres." MS Comp. Gen. B-117120 dated October 15, 1953.

On the other hand, the courts have recognized that agencies must have latitude in defining the scope of a project. So, where Congress has given broad authority to acquire all land necessary for a particular object, the decisions have concluded that documents submitted for the purpose of aiding the Congress in determining whether to grant the authorization in question do not bind an agency to the absolute letter. U. S. v. 187.40 acres, 381 F. Supp. 54 (1974). See also 55 Comp. Gen. 812 (1976); 55 Comp. Gen. 307 (1975).

With these principles in mind, it is the current practice in the Naval Facilities Engineering Command to omit specific numbers of acres in block 9 of the Congressional justification sheets (DOD Form 1391) and describe in only general terms in block 10 the nature and dimensions of the proposed acquisition. This, it is believed, creates the kind of "broad authority" referred to in the 187.40 Acres case noted above, which will allow the Department to make reasonable changes in scope (number of acres!) necessary for accomplishing the project as initially conceived. (See example at the end of this Section.)

Keep in mind, though, that cost variations and scope reductions greater than 25% are subject to the "cost variation" provisions of 10 U.S.C. and that all this procedure does is avoid the need for an amended authorization. Moreover, there is always the requirement that the Department sustain its "good faith relationship" with the Congressional Committees and even a modest change may in some circumstances require "consultation" with the staff or members.

10. All Acquisitions are in Behalf of and Should be in the Name of "United States of America". Except for real estate acquired for the use of certain government corporations, all real estate acquired by the Government is owned by the United States and title should be in the United States and not in the name of the specific department or agency for whose use it may be acquired. 25 Op. Atty. Gen. 226 (1904). Although for convenience real estate is frequently described as "Navy" or "Marine Corps" property, it is United States of America property, and the Department is merely the custodian.

1. COMPONENT	FY 19 8X MILITARY CONSTRUCTION PROJECT DATA	2. DATE
NAVY		

3. INSTALLATION AND LOCATION	4. PROJECT TITLE
NAVAL BASE ANYWHERE	LAND ACQUISITION

5. PROGRAM ELEMENT	6. CATEGORY CODE	7. PROJECT NUMBER	8. PROJECT COST ($000)
1 22 33 N	911.10	P-XXX	5,500

9. COST ESTIMATES

ITEM	U/M	QUANTITY	UNIT COST	COST ($000)
LAND ACQUISITION.	LS	-	-	5,000
SUBTOTAL.	-	-	-	5,000
CONTINGENCY (5%).	-	-	-	250
TOTAL CONTRACT COST	-	-	-	5,250
SUPERVISION, INSPECTION & OVERHEAD (5.5%) .	-	-	-	290
TOTAL REQUEST	-	-	-	5,540
TOTAL REQUEST (ROUNDED).	-	-	-	5,500

10. DESCRIPTION OF PROPOSED CONSTRUCTION

Acquisition of interests in approximately 1350 acres of land.

11. REQUIREMENT:

(A more detailed description of the easements and other interests to be acquired and a succinct statement of the requirement are set out here.)

PART B.

ACQUISITION OF TITLE BY PURCHASE

Principles Applicable to the Acquisition of Title to Real Property Through Voluntary Action of the Owner

1. Terminology. As used in this part, "acquisition of title" refers to acquisition of an entire estate even though the conveyance may be subject to "reservations" and "conditions" as afterwards explained.

The term "purchase" or "acquisition by purchase" refers to acquisition through negotiations; that is, through voluntary action on the part of the owner.

(For a discussion of acquisitions by condemnation, see Part G.)

2. For the Most Part There Is Flexibility to Define the Title to be Purchased. Early on, the Comptroller General said that where Congress has in general terms authorized the acquisition of land, without expressly providing for the acquisition of a lesser interest, the implication must be that acquisition of fee simple title is intended. 10 Comp. Gen. 320 (1931). As a practical matter this rule has ceased to be of substantial importance because practically all Navy purchases are now accomplished under either 10 U.S.C. 2672 or the annual Military Construction Authorization Acts, both of which you will recall permit in express terms the acquisition of interests less the fee. On the other hand, acquisitions authorized by "special legislation" does not always provide the same flexibility.

3. The United States is Bound by Any Specific Use Limitations in a Deed. Where the United States acquires land by purchase, it is bound by any terms in the grant which limit use to a specific purpose.

> A deed to the United States from the City of Chicago conveyed the land described "for office and storage purposes in connection with the work of river and harbor improvements". In his opinion 37 Op. Atty. Gen. 356 (1933), the Attorney General advised the Secretary that the War Department would have no authority to authorize the use of land by the Coast Guard for the construction of a garage because the grant from the City of Chicago was restricted for a specific purpose. He also said that a violation of that restriction would give the City the right to declare a forfeiture of the grant, which would of course jeopardize the title of the United States.

4. And, a Purchase Subject to Provisions Restricting the Government's Use of the Property May Not Be Authorized. Under a liberal intrepretation of the authority in the Military Construction Authorization Acts to acquire interests in real property less than fee, it is arguable and generally accepted that the Navy can accept conveyances subject to provisions which, as a matter of judgment, will not interfere with the essential uses for which the land is required (See paragraph 5 below). On the other hand, the Comptroller General has cautioned that it would not be permissible to accept a conveyance subject to covenants running with the land which would have the effect of restricting the Government's use of the property.

> An Act of Congress approved July 3, 1930 authorized the Secretary of the Interior to acquire certain land in connection with the Colonial National Monument, Virginia. However, title to this land was burdened with nine "reservations", including a restriction on its use to residential purposes, limitations on resale, regulations on the location of structures, etc. The ninth and final reservation said that these covenants and restrictions would "run with the land and bind the owners of each and every lot, and his and their successors in title". After expressing the view that those "reservations" would limit the uses of land which are incident to a fee simple title, the Comptroller General concluded that in the absence of specific legislative authority to acquire subject to such "reservations", the purchase would not be authorized. (He suggested, however, that it would be possible to acquire the lands free from such "reservations" by condemnation.) 10 Comp Gen. 320.

5. But, As Mentioned Above, An Acquisition Subject to "Reservations" Is Permissible. Although it is not permissible, in the absence of express authority, to acquire title subject to "covenants" which would restrict the Government's essential uses of the land, it has been the long-standing practice of the Attorney General to approve acquisitions of title subject to "reservations" of rights-of-way, timber, minerals, and easements which in the judgment of the acquiring agency would not interfere with the land's contemplated use. 40 Op. Atty. Gen. 431 (1945).

Moreover, the Comptroller General has also ruled that in acquiring land for Government uses there would be no objection to the seller retaining title to improvements with a right of removal where such improvements are not required for the Government's intended uses. 22 Comp. Gen. 165 (1942).

6. Keep In Mind, Also, That "Building Restrictions" Are Not Binding on the United States. Building restrictions are mere contractual rights, not binding on the Government, which the Government could take without compensation in condemning the property for governmental uses. An early Federal Court decision (1899), in making this point said

> "Each landowner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes. He cannot evade this by any agreement with his neighbor, nor can his neighbor acquire a right from a private individual which imposes a new burden upon the public in the exercise of the right of eminent domain".

7. Options to Purchase. The "option to purchase" is a contract closely related to the "purchase contract", the agreement which binds the owner to sell and the government to acquire. Section 501(b) of Public Law 534, 83d Congress approved July 27, 1954 which, you recall, prohibited the acquisition of land unless expressly authorized by law, also provided

> "That the Secretaries of the military departments may, prior to such authorization, procure options on real estate which in their judgment is suitable and likely to be required in connection with prospective public works projects of the military departments, and to pay out of any funds available to such departments for real estate activities, amounts not in excess of 3 percentum per annum of the appraised fair market value of the real estate involved as consideration for such options."

The amount has since been raised to 5% and the statute reworded. The current version is 10 U.S.C. 2677. Please note that the authority here is merely to "procure options". It does not authorize the execution of a "purchase contract" which would obligate the Government to buy.

8. Land Acquisition is not Subject to the Procurement Rules and Regulations. The procurement authority of the Navy is set forth in Chapter 137 of the Act of Congress approved August 10, 1956 which codified existing laws applicable to all the military departments (Title 10, United States Code.) A key definition, which defines the scope of the procurement laws and their application, provides that:

> The term "supplies" shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and description, aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof.

The word "land", which is excepted, has been consistently interpreted in a restricted sense to mean land per se without regard to the existence of any improvements on it. Yet, it often is the case in a proposed acquisition that a particular tract selected as the site for a construction project authorized by Congress is already improved by buildings and other structures. Because the land itself in these cases is being obtained primarily as a site upon which to construct a project, the purchase would be considered an acquisition of "land" not subject to the advertising requirements or other provisions of the Procurement Laws.

9. Remember, Though, Space Acquisition is Subject to the Procurement Rules and Regulations. The situation is different where an acquisition is primarily to obtain the use of buildings or parts of buildings for office space or other like purposes. In such cases, even though the structures involved are necessarily located on land and the acquisition technically is a real property transaction, the essential purpose of the acquisition is nevertheless to acquire space in "buildings". Such an acquisition would fall clearly within the scope of the Procurement Rules and Regulations.[1]

[1] See Part E for more details on space acquisitions.

SECTION I - ACQUISITION

PART C.

ACQUISITION OF EASEMENTS GENERALLY

A Discussion of some of the Basic Principles Applicable to all Easements Acquired for Naval Uses

1. General. The Navy often finds it necessary to make limited use of adjacent privately-owned land and for such purposes there are alternatives to fee acquisition. If the required use is temporary, it can be obtained by means of a revocable license.[1] If the contemplated use is permanent, an easement can be acquired either through conveyance or by condemnation.

2. Easements and Licenses Compared. It probably would contribute little, if anything, to the present discussion to include a classical definition of an easement. There are as many definitions of the term as there have been writers on the subject. But inasmuch as both licenses and easements are employed to obtain the various uses required, it should prove helpful to point up some important differences between licenses and easements. This has been explained by one authority as follows:

> An easement is a right in land, distinct from the ownership of the land but generally viewed as an interest in the land itself. A license merely confers a privilege to do some act or acts on the land without granting an interest or estate in the property. An easement usually must be created by deed or other formal conveyance. A license may be by word-of-mouth. An easement possesses the qualities of inheritability and assignability, while these qualities are generally inconsistent with a license. An easement ordinarily is a permanent interest in the realty with the right to enter at all times and use it. A license, at least so long as it is in force, may be revoked at will and is terminated by a conveyance of the land by the party giving the license.

3. Types of Easements. Because lands under its control are devoted to the same general uses as privately-owned lands, including residential, commercial, industrial, recreational, and agricultural, the Navy has had occasion through the years to acquire easements to serve its property for practically all the purposes normally sought by private landowners. Such purposes include rights-of-way for

---

1 The term "revocable license" is really redundant because all licenses by definition may be terminated at any time. See the next section.

access, telephone, telegraph and power lines, oil and gas lines, water and sewer lines, canals, drainage ditches, etc. The purposes enumerated, as well as most other objectives for which easements have been acquired by the Navy, in general contemplate physical entry upon the surface of the land involved and for present purposes may be defined as "surface easements" as distinguished from easements involving some use of the airspace above the land, which may be called "airspace easements". Because "airspace easements" involve many novel and complicated issues which are not incident to other easements, they are dealt with separately. (See Part D.)

4. Authority to Acquire Easements. An easement is an interest in land. Therefore, the acquisition of an easement on behalf of the United States must be authorized by statute. 17 Comp Gen. 204 (1937). Acquisitions of easements over $100,000 are usually provided for in the annual Military Construction Authorization Acts. Easements may also be acquired under 10 U.S.C. 2672 which, you recall, authorizes the Secretaries of the military departments to acquire "land or interests in land" at a cost not exceeding $100,000.

5. Duration of Easements. Where Congress has provided for the acquisition of easements and has not restricted the duration of the easement to be acquired, the Navy would be authorized to acquire either a perpetual easement or one for a shorter duration. There is discretion in the matter, and the decision of the Department would not be subject to review. However, acquisitions of easements under special provisions are sometimes limited both in time and scope.

6. Applicability of State Laws. As explained in Part B. when the United States undertakes to negotiate with an owner for the purchase of his land, it is bound by any conditions in the grant as in the case of any other purchaser. This rule also applies to the acquisition of interests less than the fee, including easements. In negotiating for easements, therefore, it is similarly important to make sure there are no limitations which might at some future time restrict the United States in the exercise of the rights granted and, where any doubt appears, the easement must be acquired by condemnation.

SECTION I - ACQUISITION

PART D.

ACQUISITION OF AIRSPACE EASEMENTS

For the Purposes of this Part Airspace Easements are treated as Including Both "Avigation" and "Flight Clearance" Easements

1. Easements Fall into Two General Categories. Easements, as previously noted, fall into two general categories: (1) surface easements, and (2) airspace easements, which may include the unrestricted right to operate aircraft over certain altitudes in the airspace above the surface, as well as rights in the surface.

2. Aviation Poses Special Problems. The growing requirements of naval aviation have necessitated the establishment of many new naval air facilities as well as the expansion of existing ones. Moreover, the great increase in the speed and operating characteristics of military aircraft has required not only longer runways but also extended approach zones for takeoffs and landings. Also, it has been necessary to acquire easements extending beyond conventional approach zones because of increases in noise and the risks attendant to jets. These factors have posed new problems and it is sometimes difficult to determine what type of easement, if any at all, should be acquired in a particular situation. The following analysis is designed to highlight some of the issues which surround airspace easements.

3. What Are a Surface Owner's Rights in Airspace? There was an old rule, often referred to as the "ad coelum" theory, that a landowner owns all of the airspace above his land, extending even to the periphery of the universe. However, this doctrine no longer prevails. Or at least it has been substantially altered. It is now generally recognized that a landowner owns only that space above the ground that he can reasonably occupy and make use of. In discussing a landowner's rights in the airspace above his land, it was explained in a leading court case that

> "We own so much of the space above the ground as we can occupy and make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them."

No doubt, today, a landowner owns the airspace above his land as completely as he does the land itself, or the minerals beneath, at least insofar as it is necessary for his full enjoyment of the land. It has been succinctly stated by another authority that

> "The test determining the extent upwards to which a landowner may claim in adjacent airspace is whether the use of such airspace by another would be an intrusion so immediate and so direct upon the landowner's prospective use of his land as to subtract from the owner's full enjoyment of the property and limit his exploitation of it."

The doctrine that a landowner owns only so much of the airspace above the ground as he can use in connection with his land was first expressed by the Supreme Court of the United States in United States v. Causby, a famous decision and the leading case on the subject. In that case, the landowner, who was a commercial chicken farmer, complained that military planes operating from a local airport, which was used by the Government under lease, flew over his adjacent chicken farm, including his residence, at such frequent intervals and at such low altitudes that the noise of the planes and the glare of the landing lights destroyed the use of the land as a chicken farm and impaired his health and that of his family. This, he said, resulted in depreciation of his property, which amounted to a taking for which he was entitled to compensation. Upon review the Supreme Court, in discussing the nature and extent of the landowner's rights in airspace, said

> "* * * it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy and use in connection with the land * * * The fact that he does not occupy it in a physical sense--by the erection of buildings and the like--is not material."

4. Flights Over Another's Land May Amount to a Taking. Although the Supreme Court in the Causby case concluded that the peculiar circumstances involved in that case amounted to a taking of the owner's property rights for which he was entitled to compensation, it also cautioned that

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

The rule thus enunciated may be used as a general principle in all similar situations. Keep in mind, however, that every case must be judged on its own peculiar facts and circumstances. Conceivably flights might in one case amount to a taking for which the landowner would be entitled to compensation under the Fifth Amendment, whereas, in another case the same pattern and frequency of flights over different land might not amount to a taking, depending primarily upon the character of the use being made of the land, the location, height, and character of the structures thereon, the nature of the terrain, as well as other factors.

5. Furthermore, There May be a Taking Without Compensable Damage. Situations sometimes arise where the exercise of flight rights through the airspace over private land constitutes a technical taking, but does not result in any substantial financial loss to the owner.

> In a case involving the condemnation of avigation rights over an approach zone to a military airfield, the Government deposited $50.00 as compensation for the rights taken. However, the jury in the case returned a verdict of "no dollars". The court sustained the award because it did not appear that the land of any of the several defendants suffered diminution in value because of the contemplated flights.
>
> In another case involving commercial planes, the landowner sought to enjoin scheduled flights over his land at a low altitude (less than 100 feet). The court denied the injunction because the owner did not suffer any substantial damage as a result of the flights and this decision was affirmed by the Appeals Court.

6. Landowner's Rights: Effect of Laws Regulating Air Navigation.[1] As stated above, the coming of the airplane seems not to have taken away any of the rights of the landowner to his land or to the airspace above it; the landowner probably has a dominant right to use and occupy the airspace above his land which is superior to any right of aviators to navigate the airspace.

Moreover, his rights in that respect are probably not diminished by laws or regulations--either state or federal--which fix the minimum safe altitude of flight at which planes may fly over his land--the fact that such laws or regulations permit flights at any established altitude does not limit the landowner's right to build above this height wherever it is not prohibited by local zoning or building regulations.

> In a retrial of the Causby case directed by the Supreme Court, the Court of Claims dealt specifically with "navigable airspace" open to all. The Court indicated that its acceptance of the principle of "navigable airspace" did not mean that the landowner could not claim a

---

1 This is a particularly controversial issue. Although there is less than unanimous agreement, even within the Defense Department, it has generally been the Navy position that there is an unencumbered right to fly military aircraft in navigable airspace without any compensable damage to the underlying landowners, regardless of the impacts. To that extent, the conclusions in this section reflect a minority view on a subject which is still much in the process of definition.

proprietary interest in that space if he could show a realistic requirement for the erection of structures extending into it. On this point the Court explained, "The result of this [particular case] is to vest in the United States the right to fly its airplanes at any altitude [within navigable airspace] with impunity. This, of course, would prevent the plaintiffs from erecting on their property a building of the height of the Empire State Building...
Were this property located at a place where there was any likelihood that such a structure would be erected on it, the defendant [the Government], without paying for it, would have no right to the airspace above the property to an altitude so low as would prevent such a structure from being erected. But here there was but the most remote possibility that plaintiffs would ever put this property to such a use. The flight of airplanes above their property [in navigable airspace] in no way interfered with their possession and enjoyment of it or with any use they might conceivably make of it. In such case we do not think the defendant should have to pay for the right to fly its planes above this altitude. Stated otherwise--if defendant flew its airplanes [in navigable airspace] we do not think it can be said that it has imposed a servitude upon it. But in a case where the possibility of the erection of a structure above this minimum height is a real one, and not merely fanciful, we would, of course, be presented with a different problem."

7. Landowner's Rights: Effect of the Federal Aviation Regulations. Congress has empowered the Federal Aviation Agency to establish minimum safe altitudes of flight and has declared that the airspace above such minimum safe altitude of flight is "navigable airspace" subject to the public right of freedom in interstate and foreign air navigation. 49 U.S.C. 180. Regulations which the FAA has prescribed set minimum safe altitudes of flight. Note that the regulations which establish different minimum safe altitudes of flight for the three respective areas described begin with the words,

"Except when necessary for takeoff or landing, no person shall operate an aircraft below the following altitudes:".
[then are listed certain minimum altitudes for different kinds of areas]

And because of doubt existing in some circles as to the exact status of the airspace immediately above the glide angle in approach zones to airports, the FAA added that:

> "an aircraft pursuing a normal necessary path of climb after take-off or in approaching to land is operating in the navigable airspace."

On the basis of this latter statement it is argued that FAA's interpretation of its air traffic rules had the effect of limiting the landowner's property rights in the airspace immediately above the glide angle of approach zones, regardless of the altitude at which it may cross the owner's land. The reasoning is that if such airspace is navigable airspace and is therefore open to unrestricted travel by the public, it has the effect of restricting the surface owner's rights therein.

But this position, too, is open to question. The Supreme Court in the Causby case also said

> "* * * the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking-off were included, flights which were so close to the land as to render it unhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them--the minimum safe altitude of flight."

So, the height at which an airplane may pass above a man's land without trespassing is also unaffected by rules of the FAA.

8. No Compensation Payable in Absence of an Actual Taking. There can be no ownership of the airspace unconnected with the use of the land beneath. However, the judgment in the Causby case was based on the theory that the Government's invasion of the airspace substantially restricted the use of the underlying land and that the market value of the land accordingly had been diminished. In other words, the airspace above was treated as an integral part of the realty and the court considered that its taking resulted in socalled "severance" damage to the land itself. Damages in such cases would be restricted to the parcels of land which actually underly the airspace involved.

It sometimes happens, however, that a contiguous parcel of land, because of the particular use to which it is adapted, is depreciated in value as much as, or even more than, the parcel directly beneath the line of flight. However, in Federal Courts damages have not been allowed in such cases because there is no physical invasion of the property which would constitute a taking within the Fifth Amendment. It is only because of the taking of a part of his land that an owner is entitled to damages resulting to the remainder. In the absence of an actual taking, the Fifth Amendment to the Constitution would not be applicable. It is solely by virtue of the ownership of the tract involved that the owner would be entitled to damages.

9. Could Damage from Noise, etc., Amount to a Taking? The lawful flight of aircraft may cause a depreciation in value of property in proximity of an airfield by reason of noise, glare of lights, apprehension of danger, and so forth. One argument is that such annoyances are a consequence of the exercise of lawful governmental activities and are the price one must pay for living in a modern civilization; there must become actual physical invasion of the land and visible appropriation of some of its uses by the Government to constitute a taking for which damages will be awarded. But the last word is yet to be heard. There is a case now, involving a Marine Corps Air Station, which may conclude that noise alone can create a compensible taking.

PART E.

LEASES OF BUILDINGS OR SPACE IN BUILDINGS

A Discussion of the Navy's Authority to Acquire the Use of Privately-owned Buildings or Space in Buildings by Lease

1. Leasing, In General: Basics Reviewed. No one single act of Congress can be cited as over-all authority for leasing. Such authority may stem from any one of several enactments depending, among other things, upon the use to be made of the leased premises. Speaking generally, however, leases of real property for Navy uses fall into two categories: (a) leases of land per se without particular regard to the presence of any structures or improvements, and (b) leases of buildings or space in buildings without particular regard to the land itself.

On several occasions the Attorney General declined to approve proposed leases of land for the Government's uses on the theory that the lease proposed constituted a purchase of land within the purview of R. S. 3736 which provides that "No land shall be purchased on account of the United States, except under a law authorizing such purchase." On the other hand, the Comptroller General has indicated clearly that R. S. 3736 is not applicable to the leasing of buildings or space in buildings.

2. Leasing Space or Buildings--the Role of the General Services Administration Under Reorganization Plan Number 18 of 1950. Prior to July 1, 1950, the Navy had exclusive responsibility for all leasing. However, the President issued Reorganization Plan Number 18, effective July 1, 1950, Section 1 of which in effect transferred to the Administrator of General Services all functions of the Navy with respect to the acquisition of space in buildings by lease, except space that fell within the following categories which were expressly excluded:

> (a) space in buildings located in any foreign country;
>
> (b) space in buildings which are located on the grounds of any fort, camp, post, arsenal, Navy yard, naval training station, air-field, proving ground, military supply depot, or school, or of any similar facility, of the Department of Defense, unless and to such extent as a permit for its use shall have been issued by the Secretary of Defense or his duly authorized representative;
>
> (c) * * * * * * *

(d) space in other Government-owned buildings which the Administrator of General Services finds are wholly or predominantly utilized for the special purposes of the agency having the custody thereof and are not generally suitable for the use of other agencies (including but not limited to hospitals, housing, laboratories, mints, manufacturing plants, and penal institutions), and space acquired by lease for any such purpose.

In addition it was also provided that, on and after the 1950 date, the General Services Administration would perform all functions with respect to acquiring "general purpose space" in buildings within the metropolitan areas of each of 128 selected cities, the so-called "urban areas", and that the Department of Defense would perform all functions with respect to the acquiring of general purpose space in certain other buildings. Thus, the General Services Administration became the sole authority for the acquisition of most "general purpose space" in most areas, and remains so today.

3. "General-Purpose Space" Defined. The term "general-purpose space" is defined by the Administrator in the Federal Property Management Regulations (41 Code of Federal Regulations, Chapter 101) to mean

> "...space in buildings...including land incidental to the use thereof, which may be suitable for the use of agencies generally..." excluding specifically the space described in paragraphs 2.(a) and (b) above.

The regulations also break general purpose space down into three categories:

(a) office space (41 CFR § 101-17.003-2a)

(b) storage space (41 CFR § 101-17.003-2b), and

(c) special space (which must be distinguished from "special purpose" space). (41 CFR § 101-17.003-2c).

4. Delegation by the Administrator of General Services. The Administrator has delegated a limited portion of his leasing authority to the Military Departments. An express "Delegation of Authority" also effective December 1, 1950, provided in part as follows:

2. Pursuant to authority vested in me by the aforesaid Plan [Reorganization Plan No. 18], authority is hereby delegated to the Secretary of Defense to perform all functions with respect to acquiring space in buildings by lease for use of the Department of Defense, the asssignment and reassignment of such space, and the operation, maintenance, and custody thereof:

(a) Situated outside the metropolitan area of the urban centers ...; or

(b) When such space is required for use incidental to or in conjunction with space of any of the types listed in Section 1 of the Reorganization Plan ...; or

(c) Leased for no rental, or for a nominal consideration of One Dollar ($1.00) per annum.

3. The authority contained herein may be redelegated....[1]

5. Leases of Buildings or Space are Subject to Requirements of Armed Services Procurement Act. All procurement of services and supplies for the Navy, including the leasing of buildings or space in buildings, is governed by the requirements and limitations of the Procurement Act and its regulations which has as a central theme competition through advertising. Therefore, whether the Navy is acting under its own authority, or under delegated authority from the General Services Administration, the leasing of buildings or space in buildings must comply with those rules.

6. But Some Space Leases may be Negotiated Without Advertising. 10 U.S.C. 2304 requires that all purchases and contracts for supplies and services not falling within any of the 17 categories expressly excepted shall be made by advertising as provided in 10 U.S C. 2305. Some of these 17 excepted categories are unrelated to the leasing of space in buildings. However, the criteria most likely to be invoked by the Navy for leases without advertising would include the following:

(1) Where it is determined by the Secretary of the Navy that a proposed lease is necessary in the public interest during a period of national emergency declared by the President or by the Congress. (10 U.S.C. 2304(a) (1)).

---

1 The Military Departments were delegated this authority by the Secretary of Defense early on.

(2) Where the public exigency will not admit of delay incident to advertising the proposed lease. (10 U.S.C. 2304(a) (2)).

(3) The annual rental consideration of the proposed lease does not exceed $10,000. (10 U.S.C. 2304(a) (3)).

(4) Where the premises to be leased are outside the United States, its Territories, and its possessions. (10 U.S.C. 2304(a) (6)).

(5) Where it is impractical to secure competition. (10 U.S.C. 2304(a) (10)).

7. Modification of Leases.[2] Navy leases may be modified when it appears to be in the interest of the Government to do so. In 39 Op. Atty. Gen. 338 (1939) the Attorney General approved the modification of a Government lease by means of a "supplemental agreement" which provided for a disposition of the improvements erected on the leased premises by the Government in a manner deemed to be in the Government's interest. See also 37 Op. Atty. Gen. 253 (1933). However, modification of a lease which in effect deprives the Government of any of its rights without additional consideration running to the Government is unauthorized, even though the modification may appear equitable. 17 Comp. Gen. 279 (1937). Other decisions of the Comptroller General affecting the modification of Government leases provide substantially as follows:

No officer or agency of Government has authority to modify Government leases except in interest of United States. 14 Comp. Gen. 468 (1934); 18 Comp. Gen. 114 (1938); 18 Comp. Gen. 240 (1938); 19 Comp. Gen. 48 (1939).

Modification of lease which in effect deprives Government of any of its rights thereunder, without additional consideration running to the Government is unauthorized. 17 Comp. Gen. 279 (1937); 15 Comp. Gen. 25 (1935).

Express terms of lease cannot be modified by statements or representations collaterally made. 18 Comp. Gen. 820 (1939); 5 Comp. Gen. 534 (1926).

Officers of Government have no authority to surrender a right vested in or acquired by the Government under a contract. 22 Comp. Gen. 260 (1942).

---

2 Although presented within the context of space leases for convenience, these principles are equally applicable to land leases and real estate contracts generally.

8. Lease Terms. Except for overseas leases, for which multiple-year terms are expressly authorized by law, no lease of private property can be binding on the Government for a period extending beyond the fiscal year for which appropriation has been made. Therefore, such leases usually are made for an original term extending to the end of the current fiscal year, with an option to renew for as many additional annual periods as seems necessary or desirable. The basis for this limitation is R. S. 3679 (31 U.S.C. 665)[3] and the interpretation of the Comptroller General that a lease executed by or on behalf of the United States for a term of years, in the absence of specific authority therefor, is binding on the United States only to the end of the fiscal year for which the appropriation involved was available at the beginning of the term.

---

3 R. S. 3679 reads: "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

PART F.

ACQUISITION BY TRANSFER AND OBTAINING THE USE OF OTHER AGENCIES' FACILITIES

A Consideration of Some Means by Which the Navy Acquires the Custody and Use -- Temporary or Permanent -- of Government-owned Real Property from Other Departments or Agencies of the Government

1. Transfers from the other Military Departments and the Coast Guard. The authority of one military department to accept a transfer of real property from another military department or the Coast Guard depends upon the willingness of such other department to make the transfer. The statute which authorizes these transfers, at no cost, is 10 U.S.C. 2571(a).

2. Transfers from Civilian Departments and Agencies. Transfers from departments and agencies other than the military departments and the Coast Guard are authorized by Section 202(c)(2) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 483 (c)), which is administered by the General Services Administration. Such transfers are discretionary with the General Services Administration and there is now (since December 1982) a requirement for "reimbursement" at 100 percent of the fair market value of the property transferred. There has also been the suggestion that "reimbursement" will be required for "withdrawals" from excess and transfers among the Armed Services, but the policy is still under review (December 1982).

3. Host-Tenant and Other Similar Arrangements: The Navy May Use Other Departments' Buildings or Space in Buildings. Technically it is not permissible for one department of government to pay "rent" for the use or occupancy of property of another department. 20 Comp. Gen. 581 (1941). On the other hand, space in buildings under the control of one department not required for its own immediate needs may be made available to another department of government under Section 601 of the Economy Act of 1932, as amended (31 U.S.C. 686), and may reimburse the latter for certain "costs". Section 601 states in part:

> "Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such

executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau or office as may be requisitioned..."

This provision has been further interpreted to mean that prior to and as a condition of the use of buildings or space in buildings under the control of another department, the Navy may agree to reimburse the owning department whatever cost or expense it may incur as a result of the Navy's use of the premises, including the cost of any special services such as heat, water, light, janitor, etc., as well as the cost of any repairs and maintenance necessitated by the Navy's use.

24 Comp. Gen. 851 (1945) involved the occupancy by the Post Office of space in a building leased by the War Department. In holding that the Post Office Department could reimburse the War Department for the proportionate cost of the space improved, the Comptroller General said, "While furnishing of office space is not covered in specific terms, the statute [Sec. 601 of the Economy Act] is broad enough to include such cooperation between departments, and your Department being authorized by the referred-to permit to occupy space on which the rental is being paid by the War Department, there would appear to be no legal objection to the undertaking on the part of your Department to reimburse the War Department for not to exceed the proportionate cost of the space and other services so furnished your Department."

27 Comp. Gen. 317 (1947) stated that Sec. 601 of the Economy Act constituted "sufficient authority for one Government agency to make available to another Government agency, under an informal arrangement, surplus space in leased premises and to receive reimbursement for the proportionate cost of the space and all utilities and services involved."

> 26 Comp. Gen. 677 (1947) stated that a local draft board of the Selective Service System could, under Sec. 601 of the Economy Act, reimburse a Clerk of a United States Court for the cost of building services incident to the use of space in a United States Court for the cost of building services incident to the use of space in a United States Court House.

The cases discussed above leave no doubt that one department of Government occupying space under the control of another department, whether in a government-owned or leased building, may reimburse such other department the actual cost accruing to it as a result of such occupancy. Moreover, the Comptroller General has also recognized that depreciation attributable to the borrowing agency's use of the property involved may be included as a part of such costs.

> In 22 Comp. Gen. 74 (1942) the United States Engineering Office billed the Soil Conservation Service with "actual cost" of performing certain services for the latter agency, including an amount representing indirect or "overhead" expenses commonly recognized as legitimate cost items, including depreciation and maintenance of the property used in the performance of such services, general office expenses, etc. In recognizing that such items constitute proper elements of costs in such cases, the Comptroller General observed that under Sec. 601 of the Economy Act which provides for the making of adjustments on the basis of actual cost, "the performing agency properly may be reimbursed for items which commonly are recognized as elements of cost, notwithstanding such items may not have resulted in direct expenditures from funds of the performing agency."

Even more to the point is an unpublished decision of the Comptroller General B-32212 dated June 6, 1947, which involved the proposal of the State Department to purchase certain real estate in London which was already occupied by the Navy under lease, and thereafter to make space in the premises available to the Navy and other Government agencies on a reimbursable basis. One of the questions asked the Comptroller by the Secretary of State was whether it would be permissible for the State Department to request other departments and agencies of Government to reimburse the State Department for a proportionate share of the expenditures made for repairs, maintenance, light, water and other expenses incidental to the operation of the buildings concerned. On this point, the Comptroller General advised the Secretary of State that,

"it would be proper for your Department to enter into agreements with other Government departments and agencies occupying such buildings for adjustments of the actual costs of special services, such as light, heat, fuel, water and janitor services...and for the cost of repairs and maintenance to the extent that such repairs and maintenance are necessitated by the department or agency in occupancy."

See also 33 Comp. Gen. 565 (1954) in which the Comptroller said,

"Section 601 of the Economy Act, 47 Stat. 417, contemplates that materials, supplies or equipment furnished or work or services performed under an advance of funds shall be on an actual cost basis as agreed upon by the agencies concerned. The term 'actual cost' as used in that provision of law includes depreciation on property used in the performance of such work or services."

In addition the Federal Property Management Regulations (FPMRs) provide (41 CFR § 101-21.205) that:

"Any executive agency other than GSA that provides to anyone space and services is authorized to charge the occupant for the space and services at rates approved by the Administrator of General Services."

SECTION I - ACQUISITION

PART G.

CONDEMNATION PROCEEDINGS

A Brief Discussion of the Government's Power of Eminent Domain in the Context of Navy Acquisition of Real Property

1. Introduction. A considerable portion of the real property under Navy control was acquired through exercise of the Government's power of eminent domain. Because of the urgent need for immediate possession most land acquisitions during wars or national emergencies have been through condemnation. On the other hand, it has been the consistent peacetime practice of the Navy not to use condemnation except in those cases where (a) the owner would not agree to sell for a reasonable price or (b) where condemnation was necessary to remove title defects. Even so, on the basis of past experience it reasonably may be anticipated that in its future land acquisitions the Navy often will find it necessary to resort to condemnation.

2. The Department's Authority in Condemnation Proceedings. After the Navy has formally requested the Attorney General to institute condemnation and such proceedings have been filed in the court, the Attorney General becomes responsible for the conduct of the case and has sole authority to make all determinations on behalf of the Government, including determinations of value. The Navy at that point technically ceases to have any direct authority or control over the case, although it is the practice of the Department of Justice to consult with and seek the Department's recommendations with respect to all substantive issues.

3. Source and Extent of the Power of Eminent Domain. The power of eminent domain is an attribute of sovereignty. It is not dependent on any specific provision of the Constitution. Nonetheless it is limited and conditioned by the just compensation clause of the Fifth Amendment. Moreover, it is a power essential to the independence of the sovereign and its exercise can in no way be prevented by contract.

4. The Department's Basic Authority to Condemn. Although, as seen above, the power of federal eminent domain is an inherent attribute of sovereignty and does not depend on any Constitutional grant, the exercise of such power by agents of the Government nevertheless must be authorized by Congress. Congress has enacted numerous statutes, both general and special, specifically authorizing the condemnation of real property for Government purposes. However, the Navy's basic authority for condemnation today is the Act of August 1, 1888, as amended (40 U.S.C. 257), which provides that,

"In every case in which the Secretary of the Treasury or other officer of the Government has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public use, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so * * *."

5. The Declaration of Taking. Most Navy condemnations are under the basic condemnation act of 1888. That Act does not in terms authorize the Government to take immediate possession of the property condemned, although it is within the discretion of a court to grant immediate possession upon proper showing that the acquisition has been authorized by the Congress and that adequate provision has been made for compensating the owner. It is possible, however, for the Navy to acquire immediate possession by filing a "declaration of taking" with the condemnation proceedings as authorized by the Declaration of Taking Act of June 26, 1931 (40 U.S.C. 258a), which provides that upon the filing thereof and the deposit into the court of the amount of the estimated just compensation for the land taken, title to such land or the interest therein taken shall vest in the United States of America. The Act also expressly provides that the court shall have the power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession.

6. Amendments to Declarations of Taking. A proceeding to condemn real property for public use may not be abandoned after the filing of a declaration of taking so as to deprive an owner whose property had been taken of his constitutional right to have damages assessed and paid in money. Inasmuch as title vests in the United States upon the filing of a declaration of taking, the owner of the property becomes entitled to receive compensation and it was not legally permissible (prior to the so-called Stipulation Act of October 21, 1942) for the United States to amend the declaration to divest itself of title to any part of the land or any interest acquired, nor could a declaration be amended without the consent of the landowner to affect any substantive right which he had acquired pursuant to its filing.

All this was changed, however, with the enactment of the Stipulation Act. That Act Provides that,

"In any condemnation proceeding by or on behalf of the United States, the Attorney General is authorized to stipulate or agree on behalf of the United States to exclude any property or any part thereof or any interest therein that may have been or may be taken by or on behalf of the United States by declaration of taking or otherwise". (40 U.S.C. 258f).

Originally the Act was used sparingly by the Department of Justice, only to correct errors of description or other inadvertences or to reconvey small or minor parcels which were found to be in excess of the Government's requirements. In recent years, however, the Act has been used to reconvey substantial acreages or interests, including oil, gas, and mineral rights, and in some instances entire original takings were relinquished and property revested in the owners in contemplation of the Government taking substitute property more suitable to its needs.

7. Procedure Within the Department in Condemnation Cases.

(a) Basic condemnation proceedings. The original or basic condemnation petition is prepared in the Department of Justice usually by or under the direction of the local United States Attorney. It is filed pursuant to a letter from the General Counsel of the Navy to the Attorney General prepared in the Naval Facilities Engineering Command Headquarters.

(b) Declaration of Taking. Declarations of Taking filed in condemnation proceedings are prepared by the Naval Facilities Engineering Command Headquarters. They must be signed by the Secretary of the Navy or by the Under or an Assistant Secretary to whom he has assigned the responsibility. The authority to request condemnation and to execute a declaration of taking is retained in the Secretariat, one of the few real estate responsibilities not delegated to the Naval Facilities Engineering Command.

PART H.

ACQUISITION OF PUBLIC DOMAIN LANDS

A Discussion of Navy's Authority to Acquire and Use Public Domain Lands

1. Introduction. Of the 2.3 billion acres of land comprising the United States, over 1.8 billion acres were once a part of the federal public domain. These lands, also referred to as public lands, were acquired or ceded directly to the United States rather than to individual states. Public lands generally do not include lands acquired by federal agencies for specific uses. Over the years large portions of the public lands have been transferred to the states or to private ownerships. Today there remains 700 million acres of public lands, the vast majority being located in the West and in Alaska. The lands are under the jurisdiction and administration of the Department of the Interior, Bureau of Land Management (BLM).

As the title "public lands" implies, the lands are generally open to the public for uses and activities such as recreation, mineral exploration, and grazing. However, public lands may be set aside or restricted for specific uses. This is usually done through an administrative or legislative action to withdraw the property from the public domain. Over 180 million acres of public lands are presently withdrawn for such uses as national forests, national parks, wildlife refuges, and wilderness areas. Certain areas have also been withdrawn for defense purposes, including over 2 million acres presently used by the Navy.

2. Withdrawals. A withdrawal of land from the public domain is defined as "...withholding an area of Federal land from settlement, sale, location, or entry under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than property governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another bureau, department or agency."[1] The withdrawal action is similar in many respects to other transfers of land from federal agencies. Since the lands are already in federal ownership, withdrawals have been at

---

1 As defined in section 103(j) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1702.

This part was authored by Mr. A. Jeffrey Roth of the Naval Facilities Engineering Command.

no cost. However, the present Administration is considering full reimbursement for future withdrawals much the same as for other transfers. There has been no final decision on this matter.

Withdrawals are different from most other transfer actions in several important respects.

a. They are usually of limited duration and must be rewithdrawn at the end of the withdrawal term or returned to the public domain.

b. They are for specific uses and may not be used for other purposes in many instances. For example, a research site withdrawn specifically for research purposes may not be converted to a communications site unless the withdrawal is modified.

c. Public lands may be withdrawn by more than one agency for compatible uses. For example, at Adak, Alaska, the Navy has withdrawn land for a Naval Station and the Fish and Wildlife Service has withdrawn the same land for a wildlife refuge. More common than multiple withdrawals of the same land is dual jurisdiction of the withdrawing agency and the BLM. In this situation the withdrawing agency has jurisdiction over the land for the intended use under the withdrawal and the BLM administers and manages the land for its other uses. BLM will normally obtain consent of the withdrawing agency prior to allowing multiple uses of the withdrawn areas.

3. Development of Public Lands Policy. During the period from the 1800's through the 1950's there emerged a number of legislative and administrative authorities governing the use and management of the public lands. Under these authorities public lands were administratively withdrawn for defense and other purposes by the President through Executive Orders and Presidential Proclamations, or by the Secetary of the Interior through public land orders. Many of these withdrawals covered hundreds of thousands of acres of land for use as air bases and weapons testing and gunnery ranges. The withdrawals effectively closed vast land areas and their resources to public use for long or even indefinite periods.

World War II, the Korean War, and requirements for the testing of and the training of personnel in the use of new tech- nology weapons and aircraft resulted in drastic increases in military requirements for the use of public lands. Congressional concern over the withdrawal of vast areas from the public domain for military use resulted in enactment of the Engle Act in 1958 (43 U.S.C. 155-8) which provides, in substance, that no public land or water shall, except by Act of Congress, be withdrawn, reserved or restricted for defense purposes if it results in withdrawal reservation or restriction of more than 5,000 acres in the aggregate for any one defense project or facility. Withdrawals of 5,000 acres or less would continue to be by the Secretary of the Interior by public land orders.

Notwithstanding enactment of the Engle Act there was public and Congressional concern over the form and direction of the overall public lands policy. So the Congress later enacted the Federal Land Policy and Management Act (FLPMA) of 1976 (43 U.S.C. 1701.84) to establish a comprehensive policy for management, administration, and protection of all public lands.

FLPMA reconfirmed the authority of the BLM to administer the public lands. It also set forth specific policy guidance for all aspects of public lands use, including the processing of withdrawal actions by BLM. Although FLPMA repealed or modified many of the prior public land laws it did not repeal or modify the Engle Act for defense withdrawals. This precipitated a disagreement between DOD and BLM over the application of FLPMA withdrawal policies and processing requirements to Engle Act defense withdrawals. As a result no Engle Act withdrawal actions have been processed since enactment of FLPMA.

A long period of negotiations, during which progress was measured in micromillimeters, took place between 1976 and 1982. Recently, however, DOD and BLM reached a compromise agreement for processing future withdrawal actions. Legislation for re-withdrawal of a number of essential but expired defense withdrawals will be submitted to the Congress during calendar 1983.

4. Emerging Withdrawal Policy. The DOD/BLM compromise agreement for processing land withdrawals is purposely vague in some respects, so there is yet no clear policy in certain areas. The presentation of the withdrawal legislation to the Congress during 1983 may lead to clarifications. Following are basic elements of the emerging policy:

a. Segregation. When an agency applies to BLM for a land withdrawal, notice of the application is published in the Federal Register. At this time the lands proposed for withdrawal become temporarily "segregated" while the application is processed. "Segregation" means the lands are removed from entry, sale, disposal, or any other action that would be at variance with the proposed withdrawal. FLPMA specifies a maximum two year segregation period for withdrawal processing. The Engle Act sets no limit on the length of the segregation period.[2]

---

2 DOD does not agree with the two-year limitation on segregation for Engle Act withdrawals. These withdrawals have historically taken more than two years to process, including legislative enactment. When segregation ceases, public access to the lands for mining, recreation, etc. may be allowed. This would cause great problems, especially in cases of re-withdrawal actions when the property is actively in use or even contaminated. In such instance public access cannot be permitted.

b. Term of Withdrawal. In the past many withdrawals were of indefinite duration. New withdrawals will be limited to specific terms based upon justifiable requirements for the lands. Most major defense withdrawals are being processed for 20-25 year terms.

c. Resource Management. BLM as administrator of the public lands has the responsibility for managing its resources consistent with and with the approval of the withdrawing agency. In some cases BLM may allow the withdrawing agency to handle certain resource management responsibilities.

d. Mineral Development. Withdrawn lands will normally be open to mineral leasing under the Mineral Leasing Act of 1920 (30 U.S.C. 181 et seq.). Individual requests for leases must be approved by the withdrawing agency prior to entry upon the lands.[3] Under the Mining Act of 1872 (30 U.S.C. 22 et seq.) entry is permitted without agency concurrence. Withdrawn lands are therefore normally not opened to mining. The withdrawal document will specifically indicate that the lands are not opened to mining.

e. Contamination. Much of the Navy and other defense withdrawn lands have been used for weapons testing, gunnery, and bombing practice, and are thus contaminated with exploded and unexploded ordnance. Unless and until these lands can be safely decontaminated they must remain under DOD jurisdiction.

f. Withdrawal Review. Section 204(1) of FLPMA requires the Secretary of the Interior to review by 1991, with some exceptions, all land withdrawals in the eleven Western states (where the vast majority of public lands are located) which were in effect at the time of passage of the Act (1976). The purpose of the review is to determine how long the withdrawals should continue (remember some are of indefinite term), whether all the lands withdrawn are needed, whether the lands could be made available for other compatible uses, particularly mineral development, and whether the withdrawals are otherwise consistent with the objectives of FLPMA. The Secretary's recommendations, together with concurrence or non-concurrence of the withdrawal agency will be reported to the President and the Congress. The withdrawal review program is now in process for Navy lands. Affected activities and NAVFAC EFD's are working with the BLM to make sure Navy requirements are well defined and understood. Expected results of the review will be modification of existing land withdrawals to make them consistent with items b, c, d, and e above.

---

3 This approval requirement provides effective control over the use of the lands. It will allow complete prohibition of mineral development, if necessary.

5. Multiple Use of Public Lands. One of the basic tenets of FLPMA strongly supported by the Congress and the Administration is maximum multiple use of the public lands. In furtherance of this policy BLM has been directed to reduce the amount of withdrawn lands to the minimum required to perform agency and other functions. Furthermore, BLM must insure that the lands that are withdrawn will be open and available for multiple uses to the maximum extent consistent with the purpose of the withdrawal. This presents a significant problem for the Navy, which must, of necessity, insure the uninterrupted performance of its mission on the public lands. At the same time it must try to accommodate the multiple land use policies as best it can.

SECTION II

OUTLEASING

A Discussion of Some of the General Principles Governing the Leasing of Navy Real Property

1. The Military Leasing Act. Essentially all leases of real property by the Navy are under the Military Leasing Act, approved August 5, 1947, now Section 2667 of Title 10, United States Code. This Act provides, in substance, that whenever the Secretary of the Navy considers it advantageous to the Government, he is authorized to lease real or personal property under the control of his department that is (a) not "excess property" within the meaning of Sec. 472 of Title 40 of the United States Code and is (b) not for the time needed for public use. The lease may be to such lessees and upon such terms as the Secretary considers will promote the national defense or be in the public interest.

2. History of the Military Leasing Act. The Military Leasing Act is comprehensive in its coverage in that it applies to all types of real property under Navy control whether industrial, agricultural, residential, or otherwise. Although its terms and conditions are stated with reasonable clarity, doubts sometimes arise as to the scope of one or more of its provisions. A glimpse into the history of the legislation as reflected in the Congressional hearings will be useful in defining the coverage and explaining the operation of some of the major provisions.

The original Military Leasing Act was sponsored jointly by the War and Navy Departments. It was introduced in the 80th Congress and in testifying before the House Armed Services Committee at that time the then Assistant Secretary of the Navy, W. John Kenney, explained it in part as follows:

> Essentially the bill may be divided into two major parts. The first part would authorize the War and Navy Departments to lease real and personal property under their control beyond the impracticable limits now permitted....
>
> (Period of Lease Revocability)
>
> Turning to the first section of the bill which extends the Department's leasing authority, I wish to call the attention of the committee to the fact that under existing peacetime authority the Navy Department is authorized under the Naval Appropriation Act of August 29, 1916, to lease land for periods not to exceed 5 years with the requirement that such leases be revocable at any time. Such limited leasing authority is manifestly inadequate if the stand-by plants and reserve industrial equipment to which I have been adverting is to be made available to the civilian

economy, producing employment, revenue for the Government, and aiding in the reconversion process. It would be difficult if not impossible to find industrial lessees who will put these plants to use, making, as will be necessary in many instances, substantial capital investments, if their tenure is to be revocable at any time, as required by the 1916 statute, and may not extend beyond a term of 5 years. The present bill while it preserves the pattern of the existing law in requiring leases of real or personal property to be revocable and to extend for periods not exceeding 5 years would, however, authorize the Secretary of War or Navy Departments, as the case may be, to provide a longer term where necessary in the interests of national defense or of the public interest and to omit the requirement of revocation at will where such omission is deemed to be similarly necessary. The bill does provide that any such lease shall be revocable in any event during any period of national emergency declared by the President. It will thus be possible to negotiate leases to industry of the plants and shipyards constituting part of the Department's retained stand-by reserve for periods of 10 to 20 years or possibly longer, if circumstances so require and justify and the public interest will be best subserved thereby. Such leases will, of course, contain adequate provisions against any substantial structural alterations which might impair the capacity of the property to produce the type of war material for which the plant was designed or is being retained.

* *

(Lessee's right of first refusal to purchase)

There is also included in the first section of the bill a grant of authority to the Secretary of War or Navy to include in any such lease a right of first refusal in the lessee to purchase the property, if such sale is otherwise authorized by law, in the event of the revocation of the lease in order to permit of final disposition of the property by the Government. This additional authority I consider necessary in order to afford an industrial lessee some assurance of continuity of the property consonant with a right in the Government to dispose of any plant which may become obsolete or excess at some future date to the stand-by reserve requirements of the Department. In short, in order to afford

flexibility in the operation of the stand-by program the necessity for retention of particular plants will be subject to review from time to time and those properties no longer needed will be finally disposed of through surplus declarations or otherwise. Sale or other disposition could not properly be made to the best interests of the Government if such property were then subject to a long-term lease, and accordingly it is proposed to reserve a right in the Government to cancel the lease in the event of such proposed sale so that prospective purchasers may be assured of immediate possession. However, the only means by which the consent of the lessee to the inclusion of such a right of cancellation could be generally obtained would be by affording him a right of first refusal or opportunity to purchase the property at the highest and best price offered to the Government in the event of such sale. The provision in this section 1 clearly indicates that this bill does not in and of itself confer any authority on the Departments to sell Government-owned real or personal property.

(Maintenance, protection, restoration by Lessee)

The first section of the bill, in keeping with its essential purpose to aid the stand-by program of the War and Navy Departments, would also authorize any lease made under the act to provide for the maintenance, protection, repair or restoration by the lessee of the property leased as part or all of the consideration for the lease of such property. The basic reason for the inclusion of this provision lies in the possible restriction contained in section 321 of the Economy Act of June 30, 1932, which prohibits the inclusion in leases of Government property of requirements for the alteration, repair, or improvement of the property as a part of the consideration for the lease. Although this prohibition does not in terms appear to prevent the customary and normal provisions for maintenance by the lessee and return of the property leased at the conclusion of the term in as good condition as when rented, reasonable wear and tear excepted, it is made clear in this bill that the Departments have authority to require of their lessees that they properly maintain at their own expense Government-owned property

leased to them, that they provide for its protection both through the adoption of adequate security measures and by maintaining and carrying insurance thereon, that they repair any damage occasioned to the property during their tenure and that they restore the property to its original condition at their own expense in the event that changes or alterations in the leased property may have been made. In any leases of real property and particularly in plants and shipyards, it would be wholly impracticable for the Government to assume obligations of maintenance, protection, repair and restoration at Government expense either by the use of naval personnel or through the medium of separately reimbursing its own lessee for the maintenance, protection, and proper repair of the leased premises.

If the Department had to bear expenses of restoration it would be reluctant to permit alterations in leased premises to adapt them to the lessee's commercial use. If the Department had to pay for costs of repair it would sacrifice all incentive on the part of its lessees to properly care for and maintain Government-owned property. Furthermore, access to the leased property by the Government for purposes of maintenance and repair would in many instances create an unnecessary interference with the lessee's own operations. I believe it to be manifestly in the best interests of the Government that it be permitted to follow the accepted commercial practice of being able to look to its lessees for the proper maintenance, protection, repair, and restoration of Government-owned property.

Similarly, in order to obviate the practical difficulties of joint maintenance where part only of an installation is leased, or where a portion of a building is rented, it is considered desirable that authority be granted for the inclusion in any such lease of a provision that the lessee be responsible for the maintenance and protection of the whole. To illustrate -- if a substantial part of one of the Navy's shipyards were to be leased, it would not be practicable to call upon the lessee for the maintenance, protection, and repair only of those particular portions which he might be using and to have the Navy Department as lessor responsible for the protection and maintenance of the balance. Such a situation would require that Navy maintenance crews and Navy guards be more or less continually

in and upon the leased premises with consequent disruption of the lessee's own personnel in the protection of its own interests.

Where part of a warehouse or other building is leased, as opposed to an entire plant, it would be similarly impracticable to call upon the lessee to paint and otherwise preserve the portion leased by him and to have the Navy Department assume the responsibility for the maintenance and repair of the balance of the building. In order to prevent leases of a minor portion of a plant or building being used as a subterfuge to obtain maintenance without cost to the Department of an entire installation or building, provision is made in the bill for the imposition of such obligations on the lessee only when the lease covers a substantial part of the property. It is hoped that by the extension of this authority to the War and Navy Departments, stand-by facilities leased under the subject legislation will be placed as nearly as possible on a self-maintaining basis.

3. Specific Provisions of Military Leasing Act Discussed.

(a) Property leasable under the Act. The only Navy property leasable under the Military Leasing Act is real or personal property under the control of the Department which (1) is not "excess property", as defined in 40 U.S.C. 472 and (2) is not for the time needed for public use.

40 U.S.C. 472 defines "excess property" as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof". Accordingly, if property is not for the time needed for public use, it would be subject to leasing under the Military Leasing Act, but there would have to be an underlying requirement for the property to support its retention. Stated conversely, if the property is excess to the needs of the Navy, that is not for any reason required for its needs and the discharge of its responsibilities, it would not be leasable under the Military Leasing Act. In such a case it would be the duty of the Department to report it as excess under the Federal Property Act.[1]

---

1 There is a special provision for leasing "excess" property to a state or local government to facilitate economic adjustment efforts, but this applies only to property that is being disposed of as the result of a defense installation closure or realignment. Moreover, the concurrence of the General Services Administration is required and, for all practical purposes, these are their leases.

(b) Determinations to be made by the Secretary of the Navy. The Military Leasing Act contemplates that the Secretary of the Navy will make certain determinations prerequisite to the execution of Navy leases or to support the inclusion or omission of certain terms and conditions authorized by the Act. It is not necessary that all these determinations be formal in character, but the record must reflect at least the following:

> (1) If the lease (including options for renewal by the lessee) is for a period exceeding five years, the Secretary must determine expressly that such longer period will promote the national defense or will be in the public interest; and
>
> (2) If the lease does not contain a provision permitting the Department to revoke the lease at any time, the Secretary must determine expressly that the omission of such a provision will promote the national defense or be in the public interest.

(c) Period of lease. The Military Leasing Act provides that each lease "may not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest". The basic maximum five-year period indicated in the Act includes any renewals under options to renew where the original term was for less than five years. On the other hand, where the Secretary has made the determination that a longer period than five years will promote the national defense or will be in the public interest, the ultimate period of the lease is entirely within his discretion.

(d) Lessee's first right to purchase. Navy leases under the Military Leasing Act generally include a provision granting the lessee the first right to purchase the leased property in the event the lease is revoked to permit sale of the property by the Government. However, this authority should not be construed as authorizing the sale of any property unless its disposition is otherwise authorized by law.

(e) Government's right of revocation. The revocation provisions of the Military Leasing Act originally read as follows:

> "A lease under [the Act] * * * must permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest; must be revocable by the Secretary during a national emergency declared by the President; * * *".

The formal determination by the Secretary described in sub-section (b)(2) above would be required in the case of any Navy lease which does not include the right of the Government to revoke the lease at any time.[2]

(f) Oil and mineral rights. The Military Leasing Act includes an express provision that it "does not apply to oil, mineral or phosphate lands". However, this provision is not interpreted to prohibit the leasing of premises which otherwise qualify for leasing under the Act, where all mineral, oil and phosphate rights in the land involved are expressly reserved to the United States.

(g) Consideration, maintenance. Section 321 of the Economy Act of June 30, 1932 (47 Stat. 412, 40 U.S.C. 303b), required that, except as specifically authorized by law, the entire consideration for the lease of government buildings or properties should be paid in cash, with the rental proceeds from any such lease being deposited and covered into the Treasury as miscellaneous receipts. However, leases entered into under the Military Leasing Act "may provide, notwithstanding section 303b of title 40 or any other provision of law, for the maintenance, protection, repair, or restoration, by the lessee, of the property leased, or of the entire unit or installation where a substantial part of it is leased, as part or all of the consideration for the lease". Accordingly, Navy is authorized, when outleasing properties which may during the leased term require "maintenance, protection, repair, or restoration", to accept as a part or all of the rental consideration the assumption by the tenant of an obligation to maintain, protect, repair, or restore the leased premises with a consequent reduction in the cash rental which it would otherwise receive. There is a proviso: the reduction in the cash rent must be commensurate with the value of the obligations assumed by the tenant. To the extent the rental value established for the premises exceeds the estimated value of such obligations, the lessee is required to pay the difference as cash rent. No cash rent is required in the event the rental does not exceed the lessee's assumed maintenance obligation.

The obligations assumed by the lessee may include such items as the provision of insurance of specified types and amounts, the provision of a performance bond, and the performance of "Long-Term Maintenance" which consists of items primarily for the benefit of the property itself.

---

2 The second provision, calling for a national emergency termination provision, was eliminated as a legal requirement a few years ago. Nonetheless it is still Navy policy to include national emergency termination provisions in all leases. In fact it has been strongly suggested by a series of successive Assistant Secretaries that they would decline to authorize any lease beyond five years that did not include such a clause. Thus, it is considered that a national emergency termination provision is basic to any Navy outlease.

Long-term maintenance has sometimes been defined as "any item of protection, preservation, maintenance, and repair of the leased property or any part thereof, including overhaul, rehabilitation, or replacement with items of equivalent scope or capacity, the recurrence of which is not anticipated within the twelve-month period following its completion, but in no event shall include guard service or day-to-day maintenance, such as, but not limited to janitorial services, garbage and trash collection and disposal and clean up work."

In order to assure that the Government receives the full amount of the consideration established in the lease negotiations, the leases usually provide that amount of the obligation representing long term maintenance remains unexpended at the expiration or termination of the lease shall be paid to the Government as additional cash rent. In multiple tenancy leases, where security services are furnished by the Government, provision is sometimes made for the payment by the lessee of its pro rata share of the cost in cash.

4. Agricultural and Grazing Leases. Leases for agriculture and grazing are entered into under the Military Leasing Act. Normally such leases do not require expenditures by the lessee for the kind of maintenance and repairs found in leases of industrial properties. But agricultural and grazing leases customarily provide that all or part of the consideration to the Government shall be the performance of erosion prevention work, ditching, repairing terraces and flumes, dams and culverts, irrigation systems, cutting or removing brush, etc. In no case, again can the value of the entire consideration moving to the Government (i.e., cash rent plus the value of the work to be accomplished) be less than the fair market rental value, or the consideration offered by the successful bidder where the lease is granted after advertising for competitive bids.

A 1982 amendment to the Military Leasing Act also provides that rents received from agricultural and grazing leases may be used to finance "multiple-land use management programs". The history of this provision makes it clear, however, that the purpose of the legislation is to (a) increase income or (b) enhance land values, or both, and the "fund" is not to be used to cover any expense that cannot be logically tied to one of those objectives. The implementation of this law will be carefully controlled and guidelines on its use will be issued in early 1983.

SECTION III - LEGISLATIVE PROCESS

A Discussion of Congressional Reporting Requirements and Other Vehicles for Legislative Oversight of Real Estate Transactions

1. 10 U.S.C. 2662 - The Reporting Statute - General. Attached to this Part is the full text of Section 2662 of Title 10, United States Code, the so-called real estate reporting statute. Its importance lies in the fact that virtually all real estate transactions (except acquisitions specifically authorized in an annual Military Construction Authorization Act) involving $100,000 or more, prior to execution must be reported to the Armed Services Committees of both House and Senate before a contractual or other commitment can be made by the Navy. Moreover, it has been the custom of the House Committee since the original statute was enacted in the 1950s to hold oversight hearings on all items reported to it under 2662, and the military departments have traditionally deferred to the House Committee's judgment on these reports.

2. The 30-day Requirement. From a technical standpoint, the statute requires only that a report lie on the table for thirty days, after which the Navy would, theoretically at least, be free to proceed with the proposed transaction. But in connection with its long-standing practice to hold hearings on all reported items, the House Committee has made it clear that the 30-day provision applies only if (a) a hearing is held prior to the expiration of the waiting period and (b) the Committee has interposed no objection to the transaction.

3. Other Ground-Rules. In addition to the procedural requirements of the House Committee outlined above, there are also other "ground-rules" governing the reporting of transactions which do not fall within the obvious interpretations of the 2662 language.

For example, acquisitions of AICUZ easements, whether specifically authorized or not, are reported. Acquisitions for Reserve Forces Facilities projects are similarly reported. Moreover, any significant change in a transaction after an original report is also submitted to the Committees, although the format varies in each case. A completely redone transaction usually requires a new report. Something less than that can be handled through an amendment to the original. Minor or less significant variations are frequently addressed in an informal letter to the Chairman of the Subcommittee which hears the reports.

CHAPTER 159-REAL PROPERTY; RELATED PERSONAL PROPERTY; AND LEASE OF NON-EXCESS PROPERTY

§ 2662. Real property transactions; Reports to the Armed Services Committees

(a) The Secretary of a military department, or his designee, may not enter into any of the following listed transactions by or for the use of that department until after the expiration of 30 days from the date upon which a report of the facts concerning the proposed transaction is submitted to the Committees on Armed Services of the Senate and House of Representatives:

(1) An acquisition of fee title to any real property, if the estimated price is more than $100,000.

(2) A lease of any real property to the United States, if the estimated annual rental is more than $100,000.

(3) A lease or license of real property owned by the United States, if the estimated annual fair market rental value of the property is more than $100,000.

(4) A transfer of real property owned by the United States to another Federal agency or another military department or to a State, if the estimated value is more than $100,000.

(5) A report of excess real property owned by the United States to a disposal agency, if the estimated value is more than $100,000

(6) Any termination or modification by either the grantor or grantee of an existing license or permit of real property owned by the United States to a military department, under which substantial investments have been or are proposed to be made in connection with the use of the property by the military department.

If a transaction covered by clause (1) or (2) is part of a project, the report must include a summarization of the general plan for that project, including an estimate of the total cost of the lands to be acquired or leases to be made. The report required by this subsection to be submitted to the Committees on Armed Services of the Senate and House of Representatives concerning any report of excess real property described in clause (5) shall contain a certification by the Secretary concerned that he has considered the feasibility of exchanging such property for other real property authorized to be acquired for military purposes and has determined that the property proposed to be declared excess is not suitable for such purpose.

(b) The Secretary of each military department shall report annually to the Committees on Armed Services of the Senate and House of Representatives on transactions described in subsection (a) that involve an estimated value of more than $5,000 but not more than $100,000.

(c) This section applies only to real property in the United States, Puerto Rico, Guam, the American Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands. It does not apply to real property for river and harbor projects or flood control projects, or to leases of Government-owned real property for agricultural or grazing purposes or to any real property acquisition specifically authorized in a Military Construction Authorization Act.

(d) A statement in an instrument of conveyance, including a lease, that the requirements of this section have been met, or that the conveyance is not subject to this section, is conclusive.

(e) No element of the Department of Defense shall occupy any general purpose space leased for it by the General Services Administration at an annual rental in excess of $100,000 (excluding the cost of utilities and other operation and maintenance services), if the effect of such occupancy is to increase the total amount of such leased space occupied by all elements of the Department of Defense, until the expiration of thirty days from the date upon which a report of the facts concerning the proposed occupancy is submitted to the Committees on Armed Services of the Senate and the House of Representatives.

SECTION IV - LEGISLATIVE JURISDICTION

What Is Legislative Jurisdiction and What Does It Mean to a Local Activity

1. Definition. The term "legislative jurisdiction" refers to the authority to make and enforce laws. If the Federal Government has "legislative jurisdiction" over a particular area, it has the power to enact, execute, and enforce laws within that area. But the fact that the Federal Government has jurisdiction should not be construed to mean that it has actually legislated with respect to that area -- only that it has the authority to do so.

2. Types of Legislative Jurisdiction[1]

(a) Exclusive. The Federal Government has all of the authority of the State. The only condition the State usually imposes is its right to serve criminal and civil process (warrants) in the area for activities occurring outside the area. Only Congress has the authority to legislate in the area. State and local governments have no jurisdiction and cannot enforce their laws and regulations except for the service of process as noted above. Concomitantly, the State and local governments have no obligation to provide community services such as garbage removal, road maintenance, or fire protection. And in some states, residents in these areas, like military family housing tenants, may be denied many civil, political, and social rights and privileges, including the right to vote and access to State courts.

(b) Concurrent. The State grants the Federal Government what would otherwise be exclusive jurisdiction, but reserves the right to exercise the same powers concurrently with the Federal Government. Both state and Federal laws and regulations are enforceable, but in administering its laws, the State may not interfere with Federal functions. The State retains its power of taxation and theoretically is obligated to provide community services. Residents of the area are afforded the same civil, political, and social rights and privileges that other citizens of the State enjoy.

---

1 These definitions are not one-hundred-percent accurate because all state laws defining jurisdiction, although similar, are not identical. Nonetheless they give a reasonably precise picture of what is involved in each type of situation.

This Section was authored by Mr. Milton E. Nixon of the Naval Facilities Engineering Command Headquarters.

(c) Partial. The Federal Government has been granted the right to exercise certain aspects of the State's general authority, but the State reserves the right to exercise other authority beyond the right to serve process, either by itself or concurrently with the Federal Government. The Federal Government has the authority, either solely or concurrently, to legislate, execute, and enforce laws not otherwise reserved solely for administration by the State. In the most common examples of "partial" jurisdiction the States reserve the right to tax individuals and property.

(d) Proprietorial. The Federal Government has acquired some right in, or title to an area but it has no jurisdictional authority -- it has basically the same rights as a private landowner. But again, the Federal Government has the right to execute Federal functions without State interference; the State may not impose its regulatory power directly upon the Federal Government or tax its land, or regulate its residents in any manner which might directly interfere with a Federal function. Residents retain all the rights, privileges, and obligations of other residents of the State.

3. Source and History of Legislative Jurisdiction. Under the United States Constitution the powers of sovereignty are divided between the Federal Government and the States. The sovereignty of neither is absolute and unlimited. Prior to the Constitution the States possessed complete sovereignty, but by means of that document, they entered into a compact with each other in which they relinquished (released) certain of their powers to the Federal Government.

The "Jurisdiction Clause" of the Federal Constitution (Article 1, Sect. 8, cl. 17) provides that the Federal Government shall have exclusive jurisdiction over such areas not exceeding 10 miles square, as may become the seat of government, "and like authority over all places acquired by the Government, with the consent of the state involved, for Federal works." Prior to 1841 the practice of the Federal Government was to acquire land for Federal use without acquiring legislative jurisdiction. This practice ended with the passage of a joint resolution by the Congress on September 11, 1841 (Sect. 355 of the Revised Statutes) which required the States to consent to the purchase of State lands by the Federal Government for public works purposes before Federal funds could be expended. The States responded by passing general consent laws which had the effect of triggering the "Jurisdiction Clause", thereby giving the Federal Government exclusive jurisdiction over all lands acquired by it in the States.

This process through which the States willingly yielded legislative jurisdiction lasted for nearly a century. But in the 1930s States began to revoke their consent laws when they became aware that their practice resulted in loss of State tax revenues and other reductions in State and local authority over such lands. As a response, in February 1940, Congress amended 40 U.S.C. 255 to eliminate the requirement for State consent to Federal land acquisition as a prior condition to the expenditure of Federal construction funds. As a result the Federal Government now exercises varying degrees of legislative jurisdiction over the properties it owns or holds.

4. Current Navy Practice. Navy practice has been to acquire legislative jurisdiction over Federal property only when such jurisdiction is needed for the proper performance of a military function, mission, or task on the property. Generally, the jurisdiction acquired has been kept to a minimum but there has been no clear policy on this subject.

5. Reserved Jurisdiction and its Implications. As noted above, the Federal Government's legislative jurisdiction over its property is contingent upon such jurisdiction being relinquished by the States. It cannot have any authority over its lands within the States that is not essential to the Constitutional purposes for which the land is used unless such jurisdiction has been expressly relinquished by the legislatures of the States. Put in simplest terms, mere ownership or occupancy of land by the Federal Government, without more, does not diminish the States legislative authority over such land and unless the legislature of the State concerned has expressly surrendered part of its reserved jurisdiction, the legislative authority of the State within such areas remains complete and undisturbed.[2] But -- and this is a very, very important "but" -- the exercise of such State authority cannot interfere with the use of the land for authorized Federal purposes. See paragraph 8. below.

6. Adjustments of Legislative Jurisdiction. How does the question arise? Why are adjustments necessary? Questions about jurisdiction over Navy lands do not often come up because the Federal Government asserts a power delegated to it by the Constitution because the Courts have left no doubt that such powers may be exercised without regard to the police laws of any State.[3] On the other hand, jurisdictional questions do arise from either the attempted exercise by a State or local

---

2 United States v. San Francisco Bridge Company, 88 Fed. 891, 894 (1898); United States v. Penn, 48 Fed. 669 (1880); Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 29 L.Ed. 264, 5 S.Ct. 995 (1885); James v. Dravo Contracting Company, 302 U.S. 134, 141, 82 L.Ed. 155, 58 S.Ct. 208 (1937)

3 Jacobson v. Massachusetts, 197 U.S. 11, 25; Gibbons v. Ogden, 9 Wheat 210, 6 L.Ed. 23 (1824).

government of some authority relinquished by the State legislature, or because of a possible or actual denial by a State of vital local governmental services, which the Federal Government is ill prepared to provide and for which in many instances it simply does not have an apparatus in place. A common example of a need for a change in jurisdiction is where the area is "exclusive" and the State and local governments have no obligation to provide to the residents of that area such services as notary public, state coroners, vital statistics recordation, public schools, fire protection, access to State courts in such matters as probate, marriage, divorce and adoption of children, reduced tuition to State colleges and universities, State hunting and fishing licenses, refuse and garbage collection, the right to vote, public road maintenance, State supported welfare aid, social service counseling, State sanatorium or mental institutional care, public library, and -- most importantly -- law enforcement assistance by the local police.[4]

7. Taxation by State and Local Authorities.

(a) The Property of the Federal Government is Exempt from Taxation. Without Congressional consent, the property of the Federal Government is exempt from State and local taxation without regard to the manner in which it was acquired, the status of legislative jurisdiction, or the purpose for which it may be used.[5]

(b) On the Other Hand, Private Property Located Within Federal Land May Be Taxed. Private property within Federal boundaries is subject to State and local taxation, unless the power to tax has been relinquished by the State to the Federal Government, or if its exercise would interfere with Federal functions. Private

---

4 Op. Atty. Gen., Ind., p. 411, No. 66 (1948); Hufford v. Herrold, 189 Iowa 853; School Dist. No. 20 v. Steele, 46 S.D. 589; Sinks v. Reese, 19 Ohio St. 306 (1869); Lowe v. Lowe, 150 Md. 592; Divine v. Unaka National Bank, 125 Tenn. 98; Shea v. Gehan, 70 Ga. App. 229; Bank of Phoebus v. Byrum, 110 Va. 708; Commonwealth v. Clary, 8 Mass. 72 (1811); Arledge v. Mabry, 52 N.M. 303; Howard v. Commissioners, 344 U.S. 624 (1953); County of Norfolk v. Portsmouth, 186 Va. 1032.

5 McCulloch v. Maryland, 4 Wheat 315; Van Brocklin v. Tennessee, 117 U.S. 151; United States v. Rickert, 188 U.S. 432; Wisconsin Railroad Co. v. Price County, 133 U.S. 496; Forbes v. Gracey, 94 U.S. 762. Also see Editor's comment No. 1.

property within lands over which the Federal Government has exclusive jurisdiction is not subject to State taxation, unless such right of taxation is expressly reserved by the State in its grant of jurisdiction, or as may be consented to by the Congress.[6]

8. How Does Legislative Jurisdiction Affect a Commanding Officer's Ability to Operate and Manage His Activity? Theoretically, at least, the answer to the question is: Not at all! One of the powers expressly surrendered by the States under the Constitution is the power "To provide and maintain a Navy" (Article I, Sec. 8, cl. 13). Accordingly then, the enforcement of a State law may not be permitted to interfere with any authorized Naval function. Thus, the immunity of Federal operations from state interference stems not from the degree of legislative jurisdiction the Federal Government has but rather is incident to the status of the operations as functions vested in the Federal Government by the Constitution.[7]

Put in simpler terms, no State may exercise any authority over Navy lands that would in any manner interfere with or restrict the authorized Navy use of its property or obstruct it in the exercise of any of the powers which the States relinquished under the Constitution, regardless of the degree of legislative jurisdiction the Federal Government has over the particular installation.

---

6 Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525; Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). See, however, the "Buck Act" (54 Stat. 1060, U.S.C., Title 4, Sec. 14) allows States to extend their sales, use, and income taxes to persons residing or conducting business or transactions on Federal areas.

7 State of Ohio v. J. B. Thomas, 173 U.S. 276, 283 (1899). This case involved the interference by the State of Ohio in the operation of a National Soldier's Home. The Federal Government had no legislative jurisdiction. The State had passed a law in 1895 to prevent fraud and deception in the manufacture and sale of oleomargarine which required eating establishments to conspicuously post a sign with the words "Oleomargarine sold and used here" in the room where oleomargarine was furnished, sold, served or disposed of. In March of 1897, Mr. J. B. Thomas, Governor of the Soldiers Home, served oleo to the inmates as part of their rations and was subsequently arrested by the county constable, tried, and convicted by a Justice of the Peace and fined $50 for violation of the State law. Thomas refused to pay the fine citing lack of jurisdiction by the Magistrate. Upon appeal to the Circuit Court, the

On the other hand, the existence of exclusive legislative jurisdiction at an installation has some bearing on the question of State and local interference. Indirect State or local interference can occur through its control or regulation of private persons, corporations, or agencies that are in the position of being Federal employees, suppliers, contractors or concessionaires. There may be less of it where there is exclusive jurisdiction, but instances of such interference have occurred even in areas of exclusive. Moreover, a State may exercise purely administrative functions within an area of exclusive federal jurisdiction which are necessary to preserve to its citizens the rights and immunities guaranteed them by the Constitution.[8] Such actions would not be inconsistent with exclusive jurisdiction provided they do not interfere with any of the powers the State has relinquished to the Federal Government. Also, in assessing the benefits along with the disadvantages, be aware that the general use of exclusive jurisdiction by the Federal Government acts to deprive it of important benefits like having an acceptable alternative to federal prosecution of juvenile offenders through use of State/local juvenile counseling services and facilities, access to State and local social and related programs, schools, etc.

---

[7] (Con't)
State's case was ruled against for lack of jurisdiction and an order entered to discharge the Governor from the custody of the constable. The U. S. Supreme Court subsequently affirmed the Circuit Court ruling on appeal by the State of Ohio. The Court's opinion, in part, read "In making provision for so feeding the inmates, the Governor, under the direction of the board of managers and with the assent and approval of Congress, is engaged in the internal administration of a Federal institution, and we think a State legislature has no constitutional power to interfere...the police power of the State has no application...Federal officers who are discharging their duties in a State..in superintending the internal... management of a Federal institution...and with the approval of Congress are not subject to the jurisdiction of the State...and are not subject to arrest or other liability under the laws of the State in which their duties are performed." (Emphasis added.)

Despite the novelty of this case, it dramatizes an important point: Notwithstanding the Federal Government's lack of jurisdiction, it was effective in preventing the State's interference in the functioning of a Federal institution. Admittedly, the Governor personally paid a high price (he was jailed after his arrest) in performing his duties, but he certainly got his point across.

[8] Stewart & Co. v. Sadrakula, 309 U.S. 94; 16 Atty. Gen. 592; 7 Atty. Gen. 628, 631.

This is an important consideration especially in commands having military family housing areas. Juvenile problems tend to surface in such areas but, Navy does not normally maintain the facilities and services for the care and custody of juveniles.

There is a general principle of constructive relations between the States and the Federal Government which argues against the widespread use of exclusive Federal jurisdiction. This is shown in many ways by the actions of administrative officers of the Federal Government who, having control of exclusive jurisdiction areas, allow State or local governments certain privileges within such areas. These privileges, while of no direct benefit to the Federal activity, are beneficial to the affected state/local community, such as the use of Federal lands to accommodate highway, public utility, or other municipal purposes. Conversely, the state/local governments often provide, without obligation on their part, the local services and benefits previously mentioned to the residents of such exclusive jurisdictional areas.

9. Who Determines What Constitutes Interference With Federal Functions? It is well established that the judgment and decision of the responsible federal officer (e.g. Commanding Officer, etc.) as to what constitutes an interference with federal functions will not be questioned by the Courts.[9]

10. How Are Adjustments Accomplished? The Secretary of the Navy has authority to accept legislative jurisdiction under 40 U.S.C. 255. He accepts by filing through the Naval Facilities Engineering Command a formal notice indicating the Federal Government's acceptance of jurisdiction with the Governor of the State involved, or by complying in such other manner as may be required by State law.[10]

---

9 Hunt v. United States of America, 278 U.S. 96, 100; Camfield v. United States, 167 U.S. 518, 525; McKelvey v. United States, 260 U.S. 353, 359; Ohio v. Thomas, 173 U.S. 276, 283.

10 40 U.S.C. 255 in part, reads, "...the head or other authorized officer of any department...of the Government may...accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial...over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated."

Prior to 1940, it was not necessary for the Federal Government to take any affirmative action indicating its acceptance of jurisdiction unless required to do so by state law. But it is now necessary in all cases and Federal jurisdiction will not be valid until such notice of acceptance is received by the Governor of the State in which the land is situated.

Relinquishment of legislative jurisdiction by the Federal Government is similarly accomplished under the authority of 10 U.S.C. 2683 which authorizes the Secretary of the Navy to relinquish legislative jurisdiction to the states.[11]

11. What Methods May States Use to Grant Jurisdiction? There are two methods by which States may "cede" legislative jurisdiction to the Federal Government. Both require action by the legislature of the State. The first is by consenting to the purchase of land by the Federal Government as contemplated by Article 1, Sec. 8, cl. 17 of the Constitution (e.g. the "Jurisdiction Clause"). State relinquishment statutes using this method are known as "consent-to-purchase statutes". The second method is by State enactment of legislation expressly ceding jurisdiction to the Federal Government. These enactments are known as "cession statutes." By either method a State may grant exclusive, concurrent or partial jurisdiction.

12. Is it Necessary for the Federal Government to Own the Land in Order to Exercise Jurisdiction? In order to acquire any part of a State's reserved jurisdiction over areas devoted to Federal uses, it is not necessary that title to the land be vested in the Federal Government. A State may, within the discretion of its legislature, relinquish legislative jurisdiction to the Federal Government over any area used and occupied for Federal purposes, whether the Federal Government owns, leases or otherwise has the right to use the land involved.

13. Under What Conditions Can the Federal Government Lose (Not Relinquish) Jurisdiction? There are three circumstances under which the Federal Government may lose its jurisdiction:

---

11 10 U.S.C. 2683 states, "...the Secretary concerned may...relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession...by filing with the Governor (or if none exists, with the Chief executive officer)...a notice of relinquishment to take effect upon acceptance thereof, or...as the laws of the State, Commonwealth, territory, or possession may otherwise provide."

(a) If jurisdiction was acquired through ownership of the land, jurisdiction will be lost if the Federal Government disposes of the land. An exception is where the land is conveyed to a corporation created by Congress for the performance of a Federal function and is to be used by the corporation for purposes set out in the State statute under which Federal jurisdiction was acquired.[12]

(b) If, with the Federal Government's consent, the lands are devoted exclusively to private uses.[13]

(c) When the use of the land ceases to be for the Federal purposes authorized by the State's statute.[14]

---

12 S.R.A. v. Minnesota, 327 U.S. 558, 90 L.Ed. 851, 66 S.Ct. 749 (1946).

13 Palmer v. Barrett, 162 U.S. 399, 404; Crook, Horner and Company v. Old Point Comfort Hotel Company, 54 Fed 604 (C.C.Va. 1893); Williams v. Arlinjton Hotel Company, 15 F.2d 412 (E.D.Ark. 1926); United States v. City of Springfield, 99 F.2d 860, 864 (1st Cir. 1938).

14 Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 542; LaDuke v. Melin, 45 N.D. 349.

SECTION V

PRIVATE USE OF NAVY REAL PROPERTY

UNDER LICENSE[1]

An Explanation of When Private Use of Navy Real Property May be Granted by License

1. Background. In the past it had been the practice of the Military Departments to grant the temporary and indeterminate use of real property for private purposes by means of instruments known as "revocable permits", and some agencies have retained that terminology. However, the Navy has preferred the term "license", which conforms to general usage in commercial real estate transactions. Where the term "permit" or "revocable permit" is used in this chapter, either in quotation or otherwise, it is synonymous with the term "license".

2. Definition of License. A "license" in the real estate context is an authority to do a particular act or series of acts upon another's land without possessing any interest or estate therein. It is a personal privilege and is not assignable. It ceases upon the death of either party and is revoked by sale of the land by the licensor. It confers no right or estate or vested interest in the land, nor does it constitute a binding contract between the parties. It is a mere leave to be enjoyed as a matter of indulgence at the will of the party granting it. It is merely permission to do an act, which without such permission would amount to a trespass, and such permission is not equivalent to an easement. (Since one of the characteristics of a license is that it is revocable at the will of the licensor, use of the word "revocable" is redundant, but the practice is well established and you will hear the term "revocable license" frequently.)

---

1 It has also been a longstanding practice to make the temporary use of Navy real property available to other Departments and agencies of the Government by means of "permits" or "licenses" and technically all such transactions should be revocable at will in the same manner as permits and licenses authorizing the use of private property. In fact the "standard form" of license for use of real property by other agencies (NAVFAC Form 11011/30) is in terms "revocable at any time without notice at the option and discretion of the Navy". In reality, though, many "licenses" cannot be instantaneously terminated and in those cases the judgment of the official authorizing the transaction may be subject to criticism.

3. License and Lease Distinguished. The test of whether an agreement for the use of the real estate is a license or a lease hinges on whether it gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege of occupancy under the owner, in which case it is a license. (Neither the title of nor the language or form of the agreement is controlling. The facts determine and in the final analysis it is a question of law arising under the instrument. In Re Owl Drug Company, 12 F. Supp. 439 (1935). It may sometimes occur that an instrument, although drafted in customary lease terms, is in effect no more than a license or permit. On the other hand, what may appear on its face as a permit may be a lease in legal effect. See 20 Op. Atty. Gen. 527 (1893); 22 Comp. Gen. 563 (1942); Tips et al. v. United States, 70 F. 2d 525 (5th Cir. 1934).

4. License and Easement Distinguished. A license is a permission to do some act or series of acts on the land of another without possessing an interest in the land, and is dintinguished from an easement in that an easement is a permanent interest in the land, the word "permanent" here used not in the sense of perpetual but as relating to a specific period.

5. Licensing is Essentially a Management Prerogative. The authority to allow use of Government-owned real property by private persons and state and local governments under permits or licenses is essentially a management privilege not specifically granted by statute. It is an incident to the authority of the department head concerned to take whatever action he may deem necessary and proper to accomplish the most effective use of the property under his control for any purpose falling within the purview of the powers and duties vested in him by Congress.

Such authority is not necessarily as broad as in the case of special statutes authorizing the private use of such property as, for instance, the current leasing and easement statutes which in specific terms indicate when and under what conditions the use of the property may be granted. From a review of the several opinions of the Attorney General and the Comptroller General on the subject, it may be said that the authority to grant licenses and permits stems, in part, from the responsibility of the Secretary to protect property under his jurisdiction, as found in Section 161 of the Revised Statutes (5 U.S.C. 22), which provides that the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property appertaining to it. See 34 Op. Atty. Gen. 320, 326 (1924); 22 Comp. Gen. 563, 567 (1942).

This authority also derives support from the fact that it has been the practice for many years for the Secretaries and their designees, and even the President on occasion, to grant licenses to individuals for the temporary use of Government-owned real property, and this practice has been known to the Congress and acquiesced in by that body. See 19 Op. Atty. Gen 628 (1890); 22 Op. Atty. Gen. 240 (1898).

6. Proposed Use of Property Should be of Benefit to the Government or In the Public Interest. Having generally established the authority of the Navy to grant licenses for the use of real property, the next question is under what conditions may such authority be exercised. Various opinions of the Attorney General and the Comptroller General have approved licensing when the public interest will be served or when the Government will receive some benefit, but not otherwise.

In an early opinion of the Attorney General, 16 Op. Atty. Gen. 152 (1878), the Secretary of the Navy was advised that, although he had no authority to grant a City a permanent right to install and maintain a sewer line over the grounds of a Naval Hospital, a license for the use could be granted "especially if there should be reserved to the United States the right to avail itself of the accommodations ***."

In 16 Op. Atty. Gen. 205 (1878) the Secretary of War was advised that the permission given by President Lincoln to a railroad company in 1864 to use certain Government-owned land at Sandy Hook, Long Island, for the operation and maintenance of a railroad, and similar permission given the same company in 1869 with the approval of the Secretary of War, was a mere license, revocable at any time. The 1869 agreement provided that it would be in effect "so long as it may be considered expedient and for the public interest by the Secretary of War, or other proper officer of the Government ***."

In 21 Op. Atty. Gen. 476 (1897) the Secretary of the Treasury was advised that he had no authority to lease for a term of years certain Government-owned lands on Ellis Island, New York, for the purpose of the lessee erecting and maintaining an exhibition hall and conducting a land and labor bureau, although he might license the use of the land for such purposes. In this opinion no mention is made of the license being contingent upon a benefit to the Government or upon such use being in the public interest, although it might be inferred from the nature of the use that both would logically result.

In 22 Op. Atty. Gen. 240 (1898) the Secretary of War was advised that he might grant a license to a railway company to lay a single track railroad on Government-owned property near Cabin John, Maryland, but that "this custom cannot be maintained upon any ground except benefit to the public interests, either directly or indirectly."

In 22 Op. Atty. Gen. 544 (1899) the Secretary of War was advised that he could grant a temporary license to an individual to erect and maintain a wharf upon certain public domain lands in Puerto Rico "***if it conserves the interests of the Government and its administration of affairs in the island."

In 30 Op. Atty. Gen. 470 (1915) the Secretary of War was advised that he had the power to issue a license to a railroad company permitting it to occupy certain Government-owned land with its railroad tracks, and permitting the relocation of certain other of its tracks upon the same land because such power has been habitually exercised as an incident of the power of management and control "whenever, in the Secretary's judgment, the permission will subserve the interests of the Government". There was a stated limitation on that power; i.e., that "the trespass authorized must subserve some purpose useful or beneficial to the Government itself (and that it) is a question for the exercise of the judgment of the official vested with the power, rather than a question of law to be determined in advance by the law officers of the Government."

In 34 Op. Atty. Gen. 320 (1924) Attorney General Harlan F. Stone advised the Secretary of the Navy that he had authority to grant revocable licenses for use of a Government-owned patent. In this opinion the entire subject of revocable permits and licenses covering use of Government-owned real and personal property is explored, with Mr. Stone expressing the opinion that licenses for such use, if in the public interest, may be granted by the head of the appropriate department. He further noted that long-continued acquiescence by the Congress in the exercise of such power was strongly persuasive of the extent of that power. Mr. Stone, in citing several of the opinions discussed above, stated in part as follows:

> And it has been uniformly held that revocable licenses, in the public interest, for the use of Government property, could be given by the head of the appropriate Department. (22 Op. 240, 245; 30 Op. 470, 482; 32 Op. 511, 513; 33 Op. 325, 327.)

In 35 Op. Atty. Gen. 485 (1928) the Secretary of War was advised that he could grant a revocable permit to a railroad company to construct railroad tracks across a portion of a military reservation in California, if the permit was expressly revocable at will, the structures to be installed were capable of being removed in case of revocation, the use to which the licensee would put the land would not permanently damage or destroy it for Government use, and the granting of the permit and the use of the property would be of direct benefit to the United States.

In 22 Comp. Gen. 563 (1942) the Chairman of the Federal Communications Commission was advised that he could grant a revocable license or permit to an individual to cultivate certain Government-owned land for the purpose of eliminating or reducing fire and wind hazards to radio stations located on the land. Although in this decision the background of the authority of a department head to grant a revocable license for the use of Government property was generally reviewed, the Comptroller did not specify any absolute conditions to the exercise of such authority other than those contained in the opinions of the Attorney General referred to above setting out the requirements of benefit to the Government or in the public interest.

7. Determination of the Secretary, or Other Official, is not Subject to Review. If some rule can be elicited governing the granting of permits and licenses for temporary use of Government-owned real property, it is that the department head or his designee may grant them on a revocable at will basis when some benefit will inure to the Government, or if the public interest will be served. As noted from a review of the cited opinions, the rule is rather flexible. In any event, the determination of the Secretary or other official that any such private use of Navy real property would be of some benefit to the Government, or would be in the public interest, would not be subject to legal review. See 30 Op. Atty. Gen. 470, 482 (1915), where it is stated:

> Whether, as in this case, the determinable occupancy of the land in question is or is not a benefit to the Government in respect of that land or in respect of other property or interest under your control is a question for the exercise of judgment of the official vested with the power rather than a question of law to be determined in advance by the law officers of the Government.

But the issue of sound judgment in granting a license is always present, and an essential and very important provision of any license granting the private use of Navy real property is that it should be revocable at will by the Secretary or someone authorized to act for him in such cases.

8. Does Revocation at Will Mean What I Says? A question has arisen on several occasions in the past about the propriety of including in licenses or permits a provision obligating the Government to give advance notice of revocation. A review of the several opinions of the Attorney General and the Comptroller General discloses that this question has never been specifically answered, although these opinions are certain on the requirement that the instruments must be revocable at will.

In granting licenses and permits, it has been the practice of this Department to make them revocable at will without any advance notice of revocation. The Secretary of the Navy, in delegating his licensing authority in SECNAV INSTRUCTION 11011.12 in December 1955 specifically imposed the requirement that each license provide that the Department may revoke it at any time without notice, but the current delegation (SECNAV INSTRUCTION 11011.45) makes no mention of notice. The practice since the issuance of SECNAV INSTRUCTION 11011.45 had been to allow for notice where it would be unreasonable to demand instant departure, but the length of the notice has been kept to a minimum and its provision has not been voluntarily offered by the licensing officials.

CASE STUDIES

These case studies will be used on the second day to illustrate various principles covered in the monographs. The numbered case studies will be thrown open for general discussion on Tuesday, so you may wish to spend some time on them individually on Monday evening. Studies A and B will be assigned to groups on Tuesday, with an opportunity to work the problems as a team during the classroom schedule.

Case Study No. 1

Knowing that the local Navy activity is short of covered storage, the City offers to lease one of its unused warehouses at an attractive price. The Commanding Officer, seeing an opportunity to save some money, wishes to make an immediate commitment. How do you advise him?

Case Study No. 2

Because of a sudden and unexpected breakthrough in the development of a classified new weapons system, a Navy research activity needs approximately 10,000 square feet of space for about six months to complete some critical technical evaluations. There is nothing available on station and although the activity is in an isolated area, there is a nearby community college with which the command has an excellent working relationship. The Commanding Officer asks you to arrange with the college for temporary use of space in one of their engineering buildings. What do you do?

Case Study No. 3

Your activity needs to lease about ten acres of open space for a 15-18 month driver training course. There are several good sites close by. You have reason to believe the owners will be asking about the same rent. Moreover, a real estate broker has already contacted the Commanding Officer, indicating that he has an exclusive contract to represent all the owners. He further advises that if the station will give him an 18 month contract he will get one of the sites at much below market. The Commanding Officer likes the idea of saving some money. How do you advise him?

Case Study No. 4

A private contractor is a tenant in three of your warehouses under a standard form of outlease which includes the conventional long-term maintenance provision. The Commanding Officer notes that the one remaining warehouse in the Supply Department area, like the leased buildings, needs a new roof. He asks you to direct the tenant to re-roof all four buildings in lieu of cash rent. How do you respond?

Case Study No. 5

A local manufacturer leases about one-third of a temporarily unused administration building. The lease contains a conventional long-term maintenance provision. The Commanding Officer feels it would be more efficient for public works to do the maintenance, particularly because he will be moving some of his own operations into the vacant space within the next few weeks. He asks you to arrange for the manufacturer's rental payments to be paid into a special account, to be set up by the station comptroller, to cover the costs of anticipated maintenance on the whole building. How do you respond?

Case Study No. 6

An industrial tenant leases approximately 15 acres of your station for storage and lay-down. The site includes several buildings and is fenced. A portion of the lay-down area is hard-stand, but much is ungraded dirt. The lease contains a conventional long-term maintenance provision. The Commanding Officer would like a portion of the dirt area graded and asphalted. He asks you if this can be done at the tenant's expense. What is your answer?

Case Study No. 7

Same facts as Case Study No. 6. Here, however, the tenant is the one to suggest that a portion of the site be improved by grading and asphalt. The tenant makes a specific proposal to do the work at an acceptable cost which he proposes to deduct from the rent. What is your response?

Case Study No. 8

Construction of an auxiliary generator for emergency power is underway on your station. It is located in an area of exclusive legislative jurisdiction. The Commanding Officer just received a letter from the town government ordering a halt to construction because state and local building codes allegedly are not being followed. The town claims that the facility constitutes a potential hazard to the adjacent community. The Commanding Officer wants to prohibit local government officials from entering the station. He asks for advice. What do you tell him?

Case Study No. 9

Your activity has over 300 units of family housing. Unfortunately there has been a recent upswing in juvenile crime -- vandalism, unauthorized entry, and "racing" on the project streets. The problem is getting out of hand and the Commanding Officer wants advice on how to clear up this situation. The station is under exclusive federal jurisdiction. Assuming in the first instance that station security forces are adequate and in the second instance that they are not, what considerations would play a part in your recommendations to the Commanding Officer?

Case Study No. 10

The Federal Government acquired 100 acres of land before World War II from the State through a "cession" act which ceded the property and granted exclusive jurisdiction "for the purpose of fortification and other objects of national defense." Twenty years later approximately 10 acres of the facility was leased by the Navy to a private contractor for the construction and operation of a "theme park," which includes a motel, a movie house, a restaurant, and other entertainment facilities. This complex is expected to relieve the demand for military recreational facilities in the area. Upon completion of construction and to the dismay of the Commanding Officer, the local government -- which was never enthusiastic about the project -- asserted the right to apply its health and fire safety ordinances and other codes and began to enforce its regulations with a heavy hand. In fact, the contractor claims he has been singled out for "preferential" treatment. There is no evidence that other businesses in the area are being similarly treated. Compliance means increased operating costs and maybe, in the final analysis, a business failure. You have been asked to look into the situation and make recommendations.

Case Study No. 11

The local City has a license to use approximately one (1) acre of Navy land lying immediately adjacent to property the City acquired at no cost from the Navy. The City-owned land is now a developed marina; the licensed property is used for temporary outdoor storage and maintenance and repair of privately-owned pleasure craft. The City has been using the licensed property for over five years at an annual fee of $500. The license has expired and the City desires to continue use of the area. The fair market rental (appraised) is $13,000. The Station has requested that the rental be reevaluated to determine if there is any basis for licensing at less than fair market value or at no cost to the City. What circumstances might justify lowering the rent? What circumstances could justify a no cost license? Is a license the appropriate vehicle for this arrangement?

Case Study No. 12

The local City, acting as an umbrella agency, has been using the entire first floor of one of the buildings at your Station under license from the Navy for the past 10 years. The occupants of the first floor are the State Department of Motor Vehicles, the City Municipal Court, and the County District Court and Probation Department. Cash payment was waived because of "benefits" derived by the Navy from these uses. The license has expired and the City wants the renewal to include exclusive use of the entire two story building. The second floor would be used by two non-profit organizations. The building and the five (5) acre parcel it is on are in the process of being excessed. Is a license appropriate in this case? Would a lease be more appropriate? Should fair market rental be charged? A lesser rent? No rent? What could justify less than fair market rent or no rent? Should the Navy be dealing with the City as an umbrella agency or with each individual user. In light of the "excess" status of the property, what should the term of the license/lease be?

Case Study No. 13

The local City has been utilizing a 600 square foot building and approximately 1,000 square feet of Navy land under license, at no cost, for the last 10 years. The City uses the building as an Animal Shelter. The license has expired and the City wants to renew under the same terms. Is a license appropriate in this case? Would a lease be more appropriate? Should fair market rental be charged? A lesser rent? No rent? What circumstances could justify less than fair market rent or no rent?

Case Study No. 14

Your Station received authority to demolish two deteriorated warehouse buildings. The demolition cost for the warehouses (contract cost) is estimated to be $40,000.00. An industrial tenant currently leasing six acres of land at the Station for industrial fabrication wants to lease an additional 2 1/2 acres of land for a peak six month period.

Fair rental value for the 2 1/2 acres is estimated at $500.00 per acre per month. The warehouses to be demolished lie between and physically separate these two parcels of land. The industrial tenant has offered to demolish the buildings and fence the lot in exchange for a rent free license to use the additional land. Can the Navy accept the offer? Should the authorization be a lease or license? Should it be advertised? Trace the source of and disposition of funds in the demolition. What other means of demolition might be available?

Case Study "A"

Several buildings, which have not been used for years, have been approved for disposal by your major claimant. At that point a local businessman contacts your office and says that he has a definite use for the structures for at least 9 months, and maybe longer, and that he will be willing to pay rent for that period to use the buildings. Moreover, as a further inducement he proposes that if you will let him use the buildings, he will convert them to storage space at his own expense, which will include putting on new roofs, replacing all the windows, and adding new and modern electrical and heating systems. He further promises to turn the buildings back to the Navy at a cost which, by quick calculation, comes to less than half the actual cost of doing all the work proposed. (He has a legitimate business arrangement that allows him to make this kind of concession.) The station's master plan calls for additional warehousing down the road. This looks like a splendid opportunity to satisfy that requirement. Can you work it out?

Case Study "B"

The Base Chaplain comes into the morning meeting all enthused about a proposal he just received from the local Council of Churches to build a non-sectarian community services building on an unused corner of your station. It is a very simple proposition with no strings attached. The Council will form a non-profit corporation, which will fund and build an 8,000 square foot office building with a room for public gathering. The job will include landscaping. The Council recognizes that the Navy may need the proposed site some time in the future and consequently agrees to seek no long term commitment on their length of occupancy. In fact, the Chaplain says, they are prepared to build the building under a license which specifically calls for termination at any time and removal of the structure should the Navy need the location. The Chaplain further notes that the functions to be provided from the building by the Council include family counseling, preschool education for the children of working mothers, and other social services which would be of considerable value to station personnel and their dependents. Can you work this out for the Chaplain?