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TO: Secretary Morgenthau.

FROM: Mr. Oliphant.

Re: Sale of building site to Federal Reserve Board.

It is my opinion that you are given authority by section 5 of the Act of May 25, 1926, as amended, (44 Stat. 633; Feb. 24, 1928, c. 94, 45 Stat. 137; Feb. 16, 1931, c. 203, sec. 2, 46 Stat. 1164; U. S. C., Title 40, sec. 345) to sell at private sale to the Federal Reserve Board, property of the United States described as squares E-87 and E-88, located on Constitution Avenue between 20th and 21st Streets, N.W., Washington, D. C.

The Federal Reserve Board is authorized to purchase this property under the provisions of section 4 of the Act approved June 19, 1934, (Public No. 417, 73rd Congress) which reads as follows:

"SEC. 4. Section 10 of the Federal Reserve Act, as amended, is further amended by changing the period at the end of the third paragraph thereof to a comma and inserting thereafter the following: "and such assessments may include amounts sufficient to provide for the acquisition by the Board in its own name of such site or building in the District of Columbia as in its judgment alone shall be necessary for the purpose of providing suitable and adequate quarters for the performance of its functions. After approving such plans, estimates, and specifications as it shall have caused to be prepared, the Board may, notwithstanding any other provision of law, cause to be constructed on the site so acquired by it a building suitable and adequate in its judgment for its purposes and proceed to take all such steps as it may deem necessary or appropriate in connection with the construction, equipment, and furnishing of such building. The Board may maintain, enlarge, or remodel any building so acquired or constructed and shall have sole control of such building and space therein."

The property in question had been leased by the Government in 1918 and upon this property the Government had constructed certain temporary buildings. Authority for the purchase of the property was given by the following provisions of the Act of June 12, 1922, (42 Stat. 646):

"The commission in charge of the State, War and Navy Departments Buildings * * * is hereby authorized and directed to acquire * * * the following squares of land for public purposes, to wit, the whole of squares known as numbers east of eighty-seven; east of eighty-eight; * * * Provided further, That the squares authorized to be acquired herein shall be under the control of the Superintendent of the State, War, and Navy Departments Buildings."

By the Act of February 26, 1925 (43 Stat. 983) the commission in charge of the State, War and Navy Department Buildings and the office of Public Buildings and Grounds were consolidated to form the office of Public Buildings and Public Parks of the National Capital. The Superintendent of the State, War and Navy Departments Buildings, under whose control the property in question had been placed, was invested with the powers and duties formerly held by the commission and was designated Director of Public Buildings and Public Parks of the National Capital. Subsequently, by Executive Order 6166 of June 10, 1933, the functions of the office of Public Buildings and Public Parks were transferred to the Office of National Parks, Buildings and Reservations of the National Capital, which office by the Act of Congress approved March 2, 1934 (Public No. 109 - 73rd Congress) became known as the National Park Service.

It will appear from the statutes here outlined that the property which the Government proposes to sell to the Federal Reserve Board is now under the "control" of the National Park Service. It does not

necessarily follow from this that the National Park Service has authority to dispose of the property. In the case of Farmers Bond and Mortgage Company v. Walker (1929) 207 Iowa 696, 223 N. W. 497, the Court used the following language:

"The word 'control' has various significations, depending on the circumstances and connection in which it is used. 2 Words and Phrases, First Series, p. 1549; 1 Words and Phrases, Second Series, p. 1021. The word may be so used as with the context to imply and confer complete dominion and ownership with the consequent power of disposition. Welsh v. Gist, 101 Md. 606, 61 A. 665. Of itself, however, the word is ordinarily the equivalent of 'manage', 'direct', 'govern', 'supervise', as conferring the usual power of a trustee, and, with respect to real property at least, without power of disposition. Bramell v. Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619; Randall v. Josselyn, 59 Vt. 557, 10 A. 577; Wolffe v. Loeb. 98 Ala. 426, 13 So. 744."

The question before the Court in In re Lyman (D. C., S. D. New York - 1893) 55 F. 29, concerned the right of the United States Treasury Department to interfere with the Court's possession of a certain room in the Post Office Building. In defense of its action the Treasury Department relied upon the fact that in appropriation acts the building was referred to as "under control of the Treasury Department". It was determined by the Court, however, that the "control" invested in the Treasury related only to the "care, maintenance and repair" of the building and did not extend to supervision over its use and occupation.

That the word "control" as used in the Act of June 12, 1922, was intended to include only the duty of care and maintenance, becomes evident upon examination of section 1 of the Act of March 3, 1883, which created the commission in charge of the State, War and Navy

Department Building. This section provided as follows:

"The President is hereby authorized and directed to designate from the Engineer Corps of the Army or the Navy, an officer well qualified for the purpose, who shall be detailed to act as superintendent of the completed portions of the State, War, and Navy Department Building, under the direction of the Secretaries of State, War, and Navy, who are hereby constituted a commission for the purposes of the care and supervision of said building, as hereinafter specified. Said officer shall have charge of said building, and all the engines, machinery, steam and water supply, heating, lighting, and ventilating apparatus, elevators, and all other fixtures in said building, and all necessary repairs and alterations thereof, as well as the direction and control of such force of engineers, watchmen, laborers, and others engaged about the building or the apparatus under his supervision; of the cleaning of the corridors and water closets; of the approaches, sidewalks, lawns, courtyards, and areas of the building, and of all rooms in the sub-basement which contain the boilers and other machinery, or so much of said rooms as may be indispensable to the proper performance of his duties as herein provided."

The "maintenance and protection" of the other temporary buildings erected during the War had been entrusted to the commission by the Act of March 28, 1918 (40 Stat. 483; June 4, 1918, c. 92, 40 Stat. 588) and convenience required that, when in 1922 the temporary buildings on squares E-87 and E-88 were acquired, the "maintenance and protection" of these buildings also should be given to the commission. It is necessary to conclude that the use of the word "control" was a shorthand method of accomplishing this result, In view of the fact that the commission never had any powers other than those necessary in the care and maintenance of public buildings, it is absurd to suppose that Congress intended that as to certain isolated property the commission should have also the power of disposition.

It is my opinion that the power to sell the property in question is not, therefore, in the National Park Service, but in yourself by

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virtue of the Act of May 25, 1926, as amended. Pertinent provisions of this Act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, to enable the Secretary of the Treasury to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, post-offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Treasury Department in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have heretofore been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under the control of the Treasury Department, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of this Act, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site heretofore acquired and such site is found by the Secretary of the Treasury to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: * * * *

"Sec. 5. * * *

"In carrying into effect the provisions of this Act, if the Secretary of the Treasury deems it to be to the best interests of the Government to construct Federal buildings to take the place of existing Federal buildings, he is hereby authorized to cause the present buildings to be demolished, in order that the sites may be utilized in whole or in part for such buildings, or where in his judgment it is more advantageous to construct a Federal building on a different

site in the same city, to sell any such building or buildings and the site or sites thereof, at such time and on such terms as he deems proper, and to convey the same to the respective purchasers thereof by the usual quitclaim deed, and to deposit the proceeds of the sales thereof in the Treasury as miscellaneous receipts, and to charge against the total sum of \$150,000,000 hereinbefore authorized only the respective net excess cost, if any, over and above the proceeds of such sales, of providing such new sites and buildings." (Underscoring supplied)

It will be observed that there are two provisions of this Act which give the Secretary of the Treasury authority to sell property of the Government under certain circumstances. The question as to which of these two provisions is applicable to the facts of the present case may for the moment be deferred. Let it be assumed that, acting in reliance on the authority of one of these provisions, you were to give a quitclaim deed to the Federal Reserve Board covering the property in question and it were then determined that the necessary authority for the execution of this deed existed not in you but in an official of the National Park Service. Even in that case, I believe it extremely doubtful that you would have submitted yourself to any danger of personal liability. It is well established that a public officer is not liable for mistakes of judgment in the performance of a discretionary act. Kendall v. Stokes (1845) 3 How. 87, 11 L.Ed. 506. And the Secretary of the Interior Department, of which the National Park Service is a part, in his wireless to the President dated July 13, 1934, would seem to have expressed his approval of your giving such a deed. In view of the status of the Federal Reserve Board as an independent establishment of the Government, it is doubtful if the Board could show any damage from the official act of an officer of the Government. Certainly in executing a quitclaim deed you would warrant nothing, except perhaps by implication

that you had authority to execute the deed, and it has been held that a public officer is not liable for deceit if in executing a contract he represents that the contract may be validly made by him, since the other contracting party is equally bound to know the law and to know it correctly. Commercial Trust Company v. Burch (D.C., S. D., Ga. - 1920) 267 F. 907. Of course, the Federal Reserve Board may refuse to accept the deed unless it is accompanied by another deed executed by an authorized officer of the National Parks Service. Of. United States v. Jonas (La. 1874) 19 Wall. 598, 22 L.Ed. 177. But that question is not involved in this memorandum.

The question remains as to whether authority to sell the property in question is given you by section 1 or section 5 of the Act of May 25, 1926. These sections appear to be mutually exclusive. Section 1 provides that when property acquired as a site for a Federal building is determined by you to be unsuitable, you may dispose of that property at public sale and acquire other property. Section 5 provides that in constructing a new Federal building to replace an existing one, you may sell the existing Federal building and site at such time and upon such terms as you may deem proper.

The scope of each of these provisions becomes apparent in the light of the purpose for which the provision was enacted. At the time of the passage of the Act of May 23, 1926, there had been no regular appropriation for public buildings since 1913. During the War it was necessary to put the monies provided for public buildings largely to other purposes, and as a consequence the Government found itself the

owner of numerous building sites which, in the course of years, had become unsuitable for the purposes for which they were originally acquired. It was, therefore, provided in section 1 that when a new building was about to be built and the Secretary of the Treasury determined that the building site provided therefor had become unsuitable, he might dispose of that site at public sale. In contrast to this, the provision under consideration in section 5 was not designed to care for an unusual situation; it was enacted to enable the Secretary generally to replace Federal buildings which had become obsolete. Provision was made that the Secretary might sell existing buildings and the sites thereof in connection with the construction of new buildings on different sites in the same city.

It will be seen that the present case clearly falls within the provisions of section 5, since it is contemplated to sell to the Federal Reserve Board not only a building site but the Federal buildings now standing upon that site. These buildings are largely occupied, I understand, by the Federal Trade Commission, for which a new building is being provided.

That this property may validly be sold to the Federal Reserve Board at private sale I have little doubt. Section 5 provides that sales shall be made by the Secretary "at such times and upon such terms as he deems proper", and it seems hardly probable that any court would apply the requirement of public sale contained in section 1 to sales under the provisions of section 5. In this connection the case of United States v. Jonas, supra, should be noted and distinguished. It was decided in that case that the act of March 3, 1863, providing for the sale of

property acquired by the United States in the collection of debts had the effect of amending the Act of May 29, 1930, insofar as it required that the Solicitor of the Treasury should obtain the Secretary's approval to the sale of such property. It was contended by the Government that there was no conflict between the statutes, since the later statute might be confined in its effect to unproductive property. The court dismissed this contention with the statement that "no good reason can be assigned why the disposition of unproductive lands should be subject to the approval of the secretary, and other property, which, in this case, consisted of valuable real estate in the City of New Orleans, with buildings on it, be left to the sole disposal of the subordinate officer." It is plainly evident that this language is not applicable to the present case, since there is a valid reason for supposing that Congress intended to require that sales under section 1 should be public, while permitting sales under section 5 to be made in such manner as the Secretary might deem proper. The buildings to be sold under section 5 are government buildings which are customarily purchased by States or municipalities, many of which are forbidden by law to bid at public sales, while the sites to be sold under section 1 are either vacant lands or lands containing buildings suitable for purchase by anyone.

While it has been the general practice of the Procurement Division in acting under section 5 to sell Federal Buildings and sites at public sale, yet exceptions have regularly been made when the circumstances required that private sales should be held. In view of the fact that

the Federal Reserve Board was created by Act of Congress, and is, as has been stated, an independent establishment of the Government, it would seem evident that in the present case an exception to the general administrative practice might appropriately be made.