
CLOSING BERMUDA'S U.S. NAVAL BASES

by Frank J. Parker, CRE

When the main American base plan for St. David's is approved and offered for bid, the same types of disputes and criticisms undoubtedly will occur at a higher level, given the significant dollar amounts involved. This will be true whether a base closing agreement has been signed with the U.S. or not.

HISTORY OF LEND LEASE IN BERMUDA

By the summer of 1940, the British Empire stood virtually alone in resisting the military strength of Germany (except for such help as could be given by the benevolently neutral United States of America). Britain's most pressing naval need was for well-armed, small craft for convoy duty on the North Atlantic shipping lanes. America's great concern was the defense of its continent, whether it was drawn into the war in Europe, or not.

The United States felt it needed extra bases to consolidate its defense in the Caribbean. As a result, the governments of the United States and Great Britain entered into negotiations, culminating in the "Destroyers for Bases" Agreement, signed on September 2, 1940.¹ By its terms, Britain received 50 over-age destroyers and the U.S. received the right, under terms of a 99-year lease, to construct bases in eight British possessions. All fell within the broadly-defined Caribbean defense area, except one in Canada, Newfoundland (Arguenta), which became

part of the North Atlantic defense area. The southern group consisted of Bermuda, Jamaica, the Bahamas, Antigua, St. Lucia, Trinidad, and British Guiana.

Bermuda is a small group of islands connected by bridges and causeways, stretching 21 miles from end to end. It is located in the Atlantic Ocean and is the most northerly group of coral forming islands in the world. The nearest land mass is Cape Hatteras, North Carolina, which is 650 miles to the west; New York 774 miles to the Northwest; and London 3460 miles to the Northeast.

During the fall of 1944, U.S. Military and Naval activities at American bases in Bermuda gradually diminished in importance, as the progress of the war in Europe became increasingly favorable to the Allies. The original 1941 agreement was updated fundamentally in 1978. Effective on December 6, 1978, the United States declared its intention to abandon certain leased areas on Bermuda. These areas included parts of the Naval Air Station Annex, Her Majesty's Dockyard,

Daniel's Head, Mount Hill, Cemetery Hill, and Skinner's Hill (see Figure 1). They were to be given to the Government of Bermuda for purposes that are outlined in the re-negotiated lease document. Basically, the United States decided to sublet to Bermuda part of the lands that the U.S. had originally leased from Great Britain in 1941. As part of the agreement, Bermuda was also expected to assume responsibility of these and other areas.

Until President Clinton announced the closing of the U.S. Naval Base on Bermuda as of September 1, 1995, there had been approximately 1,350 active-duty United States military personnel, some 440 Department of Defense civilian employees, and 1,100 military and civilian dependents. However, at the time the agreements was updated in 1978, provision was included for U.S. base rights on Bermuda until the year 2040.

BERMUDA YESTERDAY & TODAY

Bermuda has a long and fascinating history. Discovered by the Spanish navigator Juan de Bermudez in 1505, Bermuda was first settled and claimed by the British Virginia Company following a shipwreck in 1609. The representative assembly, which the Islands have had since 1620, makes it the third oldest parliament in the world. The Crown assumed direct responsibility for Bermuda in 1684 when the Bermuda Company, which had acquired the rights to the Islands in 1615, was dissolved.

Until the mid-nineteenth century, Bermudians were seafarers involved in trading, whaling, and ship-building. Agriculture developed from the 1840s on. Tourism took root during the last quarter of the century, and by the 1920s, the Islands were a highly-popular resort for North Americans. The volume of visitors increased dramatically after World War II with the development of commercial air travel. Bermuda is now a favored destination for many affluent travelers, as well as a base for many international businesses.²

Bermuda is a self-governing British Colony (Overseas Independent Territory). A 1968 constitution gave Bermuda even greater self-determination than was present under The Crown. This is why Bermuda is now treated as the landlord to the base lands and not a sub-tenant. The Government of Bermuda controls its own affairs and maintains a militia, the Bermuda Regiment. In a 1995 referendum, Bermudians voted to retain the existing constitutional position. According to Bermuda's Chief



Pictured above is an aerial shot of former United States naval base properties in Bermuda.

photo courtesy of the Royal Gazette

Statistician, the 1996 resident population stood at approximately 60,140. The population density is high at an estimated 1,200 people per square km. The racial composition of Bermuda is about 60 percent black and 40 percent white.

Once almost entirely dependent on tourism for foreign exchange earnings, Bermuda has developed its position as a premier international business center since World War II. Together, tourism and international business account for over half of the gross domestic product (GDP), thus consistently generating high levels of foreign exchange earnings. Residents of Bermuda enjoy a high standard of living. At current prices, its GDP per capita is one of the highest in the world at \$32,000 per person.

In 1994, international company-related expenditures generated about \$545 million in foreign currency earnings for Bermuda, approximately 44 percent of the total revenues for the country's government. Bermuda is regarded as a premier off-shore financial center because of its long-established and highly-developed commercial and social infrastructure. Its success as an international business center also includes: its proximity by air to the U.S.; ease of access to Europe; modern business facilities; excellent living conditions; and well-educated labor force. In addition, there is the absence of direct taxation and exchange controls for international business. Bermuda also has a long established legal system and an extensive, well-qualified support system of auditors, attorneys, and investment professionals. Equally important is Bermuda's stable economic and political history and the high standards of financial integrity set by its business community.

Bermuda is one of the world's leading specialty insurance markets. It is the world's largest domicile for captive insurers and it has developed a large and growing market for excess liability and property catastrophe reinsurance. In 1994, total assets in the Bermuda insurance market totaled \$76.1 billion. Total capital and surplus stood at about \$30 billion. At the end of 1994, 1400 international insurance companies were registered in Bermuda, generating \$228.4 million in earnings. Of these earnings, 90 percent were generated by companies with a physical presence in Bermuda.

When President Clinton decided that Bermuda should be among the U.S. Naval Bases scheduled to be closed during his administrations, he was motivated by two major reasons. First, the ending of the internal Soviet-U.S. rivalry lessened the strategic importance of Bermuda as a staging base for protecting the North Atlantic. Second, the constantly spiraling budget deficits strangling the U.S. taxpayer had reached a point that significant savings needed to be found. The obvious target . . . a foreign base that increasingly had become a rest and relaxation oasis for senior naval officers and their families.³

Bermuda was faced with a number of major decisions. Suddenly, there was the possibility of receiving back 10 percent of its land mass; this included some of the most beautiful, underdeveloped land on this overcrowded island. This massive disruption of the status quo came as the previously high-flying Bermuda economy (that had sailed through the 80s with scarcely a hiccup) had suddenly and decidedly gone into the tank. Failing tourism revenues were the main culprit.

For the year ending September 30, 1996, the eight major hotels lost \$5.6 million. The overall occupancy rate was stated to be 58.8 percent, and in two years, nightly room sales had fallen by \$39,000. Cumulative losses for the past nine years exceeded \$47.5 million. Overconfidence and outrageously priced food, room, tax, and taxi charges, and a failure to modernize existing facilities or construct new ones, all clearly took their toll. To make matters worse, it was estimated that Bermuda would also lose at least \$6 million a year in local direct purchases by base employees and dependents once the main U.S. Base was closed.

If it had not been for the strong performance of the international business sector, the economic situation in Bermuda would have been extremely

serious. The perceived political stability and financial integrity of Bermuda that has attracted international corporations in record numbers (especially in the reinsurance and private banking areas) seems to be slowing, especially with the turnover of power in Hong Kong to The Peoples' Republic of China. For one reason, the benefits to Bermuda from the Hong Kong takeover undoubtedly have peaked. In addition, a number of Caribbean Islands and countries throughout the world are adapting their own laws, seeking to entice these companies and others to leave or to incorporate and/or locate outside of Bermuda. Finally, there is fear that Cuba will be welcomed back into the free world which will pose significant business and tourism challenges to Bermuda.

Taken together, the weakening of tourism and the uncertainty of continued business growth make it essential that the American base lands and a far smaller Canadian base be integrated into the local economy in the most productive manner possible. Of course what business people would define as being the most productive manner possible, would likely differ significantly from the way environmentalists and domestic and foreign leisure seekers would define it.

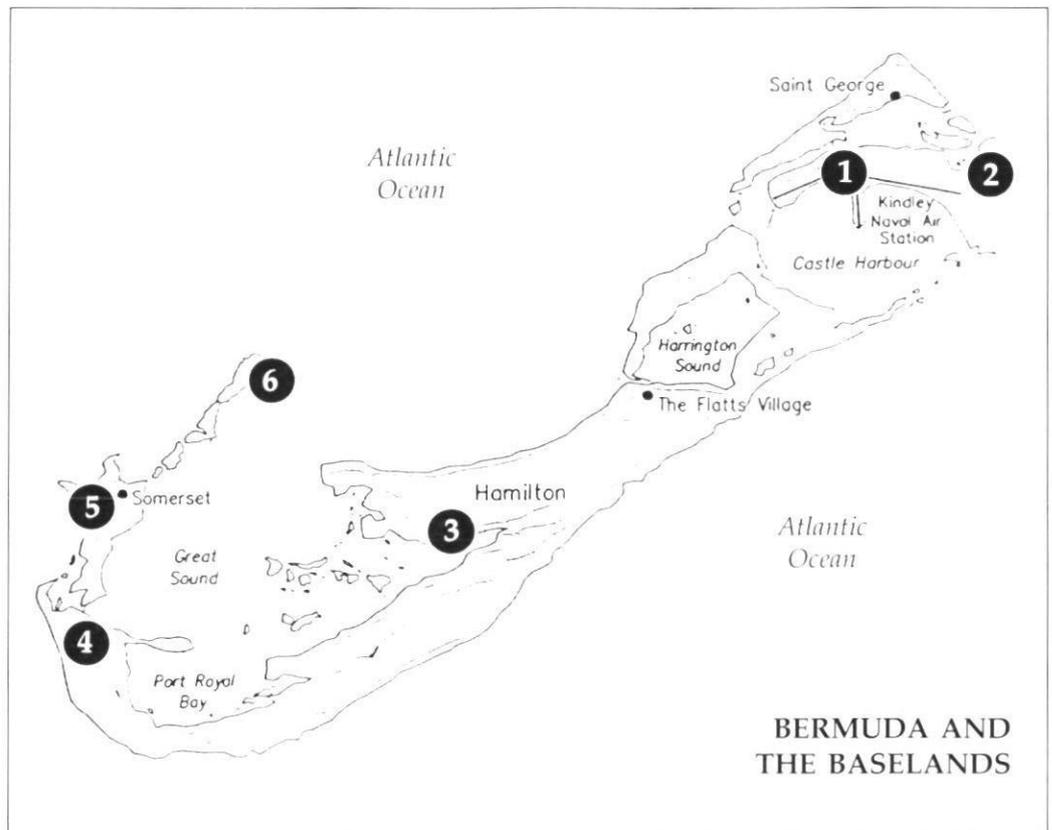
CONCILIATION OR CONFRONTATION?

Before significant development could take place on the abandoned base lands it would be necessary for Bermuda to negotiate a settlement with the United States. Four major questions are involved:

1. Does Bermuda owe compensation to the U.S. for improvements left behind as President Clinton claimed,⁴ or, in reverse, does the U.S. owe compensation to Bermuda for breaking a 99-year lease, 40 years ahead of time?
2. Is the U.S. liable for the early deterioration in the buildings that were faultily* constructed at the start of the 1940s? (*There is salt water in the concrete and mortar. Many buildings either will have to be taken down or, at the very least, substantially renovated.)
3. Should the U.S. pay for the hundreds-of-millions-of dollars worth of environmental cleanup that would be needed until this land could be safely used for commercial or recreational purposes?
4. By continuing to pay \$1.00 a year in rent could the U.S. return to the base at its discretion up until lease term? If so, could Bermuda assure an investor of "clean title?"

Key

1. Kindley Naval Air Station - Main Airport
2. U.S. Naval Base at St. David's
3. Hamilton, The Capital
4. The U.S. Naval Annex at Morgan's Point
5. The Canadian Base at Daniel's Head
6. The former British Base at Dockyard



During strategic planning, two diametrically opposite viewpoints emerged early on as to proper negotiating tactics for Bermuda's government to use in dealing with the U.S. Government.⁵ The choice was to be either:

1. conciliatory, recognizing the vastly superior strength of the United States and hope that the departing tenant would be beneficent while leaving; or
2. take the confrontational position that the departing tenant, the U.S., had broken its lease and if satisfactory compensation could not be agreed upon, request that the American Federal Courts enforce the contractual rights of the landlord in fact, if not in law — the Government of Bermuda.

Position of Conciliatory Approach Supporters

The conciliatory approach supporters advanced five major arguments on behalf of their position. First and foremost, they recalled the long history of warm relations between the United States and Bermuda. That history begins in Bermuda's earliest days when Captain John Smith sailed from there to save the starving colony at Jamestown. Second, they mentioned this good feeling was enhanced by the outstanding performance of Bermudian Armed Forces who served and died in World War II as part

of the British Armed Forces alongside their American compatriots. Third, the United States is far and away the economic and tourist engine that keeps Bermuda's "money earning train" on track. Any intense, American, bitter, feelings toward Bermuda could quietly turn the current island-wide recession into a depression. Fourth, the U.S. Government, through its myriad of executive departments and administrative agencies, provides regional technical and financial assistance to Bermuda, in a range of areas from drug interdiction and endangered fish, plant, and tree species preservation, to agricultural disease prevention, to name but three. If diplomatic relations with the United States deteriorated over base closing terms, it was feared that cutbacks in support services could occur across the board.

Fifth, these supporters took literally the terms of the original agreement that allowed the United States Government to almost totally leave the island anytime it wished; taking any improvements it desired with it.⁶ (It must be remembered that with the fall of the Channel Islands of Jersey and Guernsey off the French Coast to Germany on June 30, 1940, Great Britain was so panicked Germany would use these occupied plots of British soil as a naval jumping off-spot for an invasion of Great Britain

proper. As a result, they were willing to turn over ownership of Bermuda to the United States Government if it would carry out the lend-lease program that was the supply lifeline to keep Great Britain in the war.) The offer of "giving away" Bermuda was never seriously pursued by the United States Government. However, the fact that "giving away" was even suggested by Great Britain, demonstrated just how strong the bargaining position of the reluctant ally, the U.S., was at the time.

Position of Confrontational Approach Supporters

Those advocating the confrontational approach in base closing negotiations doubted that during 1993-1995, the U.S. was in any mood to be magnanimous. In addition, it was their belief that both law and equity favored the case of the Government of Bermuda. Five major counter arguments were advanced for this position. First, it was asserted that once the U.S. Government left the island on September 1, 1995, Bermuda's bargaining position would be significantly weakened. The failure of Premier John Swan's Government to obtain a negotiating session with the U.S. Defense Department in Washington before this date, let alone with President Clinton, was taken to be a bad omen.

Second, it was argued that the Bermuda Government should rely heavily on a lawsuit in a U.S. District Court on the precedent-setting, U.S. Supreme court case, *Vermilya-Brown Co. vs. Cornell*,⁷ dealing as it had done, most fortuitously, with Bermuda. This case stated that the United States Government must follow its own laws overseas, including: landlord tenancy laws of fixture removal, environmental damage caused by a tenant, and constructive termination of a leasehold interest. All of these issues in this case clearly favored the landlord—the Government of Bermuda.⁸

Third, again using the precedent of *Vermilya-Brown Co. vs. Cornell*, the provision in the base closing law prohibiting Federal funds to be spent on environmental damage at foreign U.S. bases should be challenged in United States courts on the grounds that the U.S. Government must follow its own laws. For unlike in the United States, where the Federal Government owns the land on which its bases are located, it does not do so elsewhere, as in Bermuda. As a tenant then, the U.S. must observe the host country's laws, as well as its own.

Fourth, the original lend lease agreement arguably was quasi-political in scope and thus, in international law, it is to be construed strictly against

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the nation which benefited the most from it. In 1940-1941, this arguably was Great Britain and, by extension, Bermuda. However, once the United States entered the war, protecting its own shores became a priority, and the benefit quotient changed. With the 1978 extension of the original agreement, the United States Government became the clear beneficiary. All-in-all, international law principles would seem to be a wash item. At the very least, Bermuda did not need to adopt a totally supine position in negotiations with the U.S. Government because of the terms of the original agreement.⁹

Fifth and finally, the continuing legal debate concerning the eventual constitutional status of Bermuda kept throwing uncertainty upon its bargaining position. Should its citizens ever vote for Independence from Great Britain, Bermuda would become just one more North Atlantic, Caribbean-area, micro-nation, presumably, with far less negotiating support than it receives today when Great Britain gives it full assistance as one of its overseas independent territories. At the time when the conciliatory or confrontational decision was being made in the Spring of 1995, Bermuda was headed toward a referendum on Independence¹⁰ in which then Premier John Swan strongly supported an affirmative position. Nevertheless, independence was voted down soundly and he resigned from the Premiership and later from Parliament.

Inspection Precedes Decision

A 1981 inspection of the facilities in Bermuda by a U.S. Congressional delegation showed that many buildings were in need of renovation.¹¹ Many of the facilities, including some barracks, offices, and

recreational facilities were built in the 1940s, using saltwater mixed with concrete or mortar. Consequently, the inspection revealed extensive leaching, blistering, and chipping taking place. With the exception of the bowling facility and child care center, the welfare and recreational facilities in operation at the time were considered to be substandard. For example, at the marina, wood structural members and decking had deteriorated to such a degree that the facility had become hazardous. Softball fields were not playable due to poor drainage and holes in the ground. The annex gymnasium had no shower facilities for women and the showers available for men were inoperable due to pipe ruptures. Tennis courts had deteriorated to such conditions that play was unsatisfactory or hazardous. The annex chapel was in need of repair and painting.¹²

After fully hearing and considering both the conciliatory and confrontational approaches the Government of Bermuda chose the conciliatory approach. The United States Navy left Bermuda as originally scheduled, September 1, 1995. The highest level of negotiations that took place by that time were conducted by the U.S. Consul on the island and the departing U.S. Naval Captain in charge of the island base. These talks were preliminary and inconclusive.

A NEGOTIATIONS UPDATE

The writing of this article comes two years after the conciliatory approach was adopted. As of publication, no agreement has been reached between the two governments. The Bermuda Government's successor to Premier John Swan, Premier David Saul, met with members of the U.S. Defense Department and with President Clinton. No agreement was reached and a follow-up visit by U.S. Naval Officials to assess environmental damage in Bermuda was criticized by the Bermuda Government as being perfunctory in nature.

Most surprisingly, Premier Saul resigned in March 1997. He was replaced by Pamela Gordon who has made reaching an agreement over the naval base closing a priority. Within two months her government held talks with the U.S. Defense Department and hoped to meet with President Clinton. Her government publicly stated it was encouraged, that after five years of negotiating with the Canadian government over environmental damage left behind at four abandoned U.S. bases in Canada, (one of them a lend lease base), the U.S. Government recently announced it intends to grant a \$100 million arms credit to the Canadian military,

as compensation. Bermuda is hoping that this agreement will be a precedent for them to also receive compensation.

Bermuda is seeking compensation to dispose of asbestos discovered in former U.S. buildings on the island and to remove underground storage tanks leaking petroleum products on former U.S. base lands. In addition, the U.S. is being asked to live up to its ongoing constructional responsibility to repair or rebuild Longbird Bridge leading to the island's airport, Kindley Field. Unbeknownst to most Bermuda tourists, until the 1995 turnover, Kindley had been operated by the U.S. Navy.

Despite the optimistic appraisal of its compensation chances, the Bermuda Government is not at all certain that the Canadian Base settlement agreement will be particularly helpful in its own negotiations with the United States Government. First, the settlement with Canada must be approved by the U.S. Congress. Substantial budget cuts across the board in the U.S. these days are in severe conflict with the plans of the U.S. Defense Department to preserve a military presence at current levels until at least the year 2000. As a result, there seems little room for substantial funding to rehabilitate an abandoned foreign base in Bermuda. Second, the Canadian bases are still being used by a NATO military partner of the U.S. and the money involved will be used to purchase sophisticated military weapons from American manufacturers, (a situation not applicable to Bermuda). Third, the U.S. Defense Department has made it clear that the Canadian deal is an exception to the general rule of not cleaning up environmental waste at foreign bases, unless the environmental damage constitutes a substantial endangerment to human safety and health. Even then, this exception only applies to active military installations, which Bermuda no longer is. Fourth, even a freely-offered cash payment of \$100 million would not begin to deal with all of the problems left behind by the U.S. military and naval presence in Bermuda.

The Bermuda Government has pushed ahead with commercial development plans, even without a base closing agreement.¹³ Two smaller bases, the American Naval Annex at Morgan's Point and the minuscule Canadian Base at Daniel's Head, have been offered for commercial development as a prelude to a major offering of the main American base at Saint David's. At best, the dress rehearsals have received mixed reviews. Virtually all of the bidders

on both projects expressed doubts as to whether they could make a profit due to Bermuda's high cost structure, floundering economy, and declining tourist trade. In addition, local environmental and recreational enthusiasts questioned the soundness of virtually each proposal. As of now, no plan has been selected for Daniel's Head. The one selected for Morgan's Point has not yet been approved by Parliament. It has been heavily-criticized by the average Bermudian for emphasizing up-scale housing, while at the same time, designing a less than state-of-the-art golf course.

When the main American base plan for St. David's is approved and offered for bid, the same types of disputes and criticisms undoubtedly will occur at a higher level, given the significant dollar amounts involved. This will be true whether a base closing agreement has been signed with the U.S. or not. All-in-all, the jury is definitely still out as to whether Bermuda will eventually rejoice or regret the September 1, 1995, closing of the U.S. Naval Bases in Bermuda.^{REI}

NOTES

1. Material on the History of Lend Lease is drawn largely from Department of the Navy, Bureau of Yards and Docks, *Building the Navy's Bases in the World War II* (Washington, D.C.: U.S. Government Printing Office, 1947), 2 Volumes. Also helpful was Edward R. Stettinius, Jr., *Lend Lease* (New York: The MacMillan Company, 1944) and Waren F. Kimball, *The Most Unsordid Act: Lend Lease, 1939-1941* (Baltimore: The Johns Hopkin's Press, 1969).
2. Lynda Milligan-Whyte, *Doing Business in Bermuda* (Hamilton: The Bank of Bermuda, 1994).
3. See, Defense Base Closure and Realignment Commission: 1993 Report to the President, United States Defense Base Closure and Realignment Commission (Washington D.C.: U.S. Government Printing Office, 1993).
4. The figure of \$138 million was cited by President Clinton. Heaven only knows that sum was arrived at but this threat seemed to paralyze the Bermuda Government.
5. The current author served as a consultant on this project to the Government of Bermuda from July 1994 until May, 1995. All views expressed in this article are his alone-and should not be attributed to the Government of Bermuda.
6. See, Thomas C. Suter, "Base Rights Agreements," *University Review*, Vol. 34, pp. 32-41, July-August 1983; Arie E. David, *The Strategy of Treaty Termination* (New Haven: Yale University Press, 1975).
7. *Vemilya-Brown Co. vs. Cornell*. 335 U.S. 377, (1948). In this regard, see also, *United States vs. Spelar*, Administratix, 338 U.S. 217 (1949) which is distinguished from *Vermilya-Brown Co. vs. Cornell*.
8. Further to footnote 7, see also, among other real estate principles texts, Frank J. Parker and Norman P. Schoenfeld, *Modern Real Estate* (Lexington, Massachusetts: D.C. Heath Co., 1979).
9. See, Maria Teresa M. Lim, "Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take It All?," *Loyola-Marymount Law Review*, Vol. 20, pp. 375-453, January 1987; Rafael A. Porrata Doria,

Jr., "The Philippine Bases and Status of Forces Agreement: Lessons for the Future," *Military Law Review*, Vol. 137, pp. 76-102, Summer 1992.

10. See, Elizabeth W. Davies, "The Legal Status of British Independent Territories"; "The West Indies and North Atlantic Region," Grotius Publications, (Cambridge: Cambridge University Press, 1995).
11. See, Committee on Armed Services of the U.S. House of Representatives, *Report on the Inspection of Military Facilities in Panama and Bermuda* (Washington D.C.: U.S. Government Printing Office, 1981).
12. Upon personal inspection, the author believes it fair to state that by 1995, the facilities involved were in far worse shape than they had been in 1981. Again, where did President Clinton find evidence that the U.S. was owed \$138 million?
13. See Jeffrey Simon, "U.S. Bases Abroad: Prime Opportunities for Developers," *Urban Land*, Vol. 56, No. 3, pp. 31-35, March 1997.
14. The author acknowledges financial support for this article from the Boston College Faculty Support Fund, The Boston College Jesuit Community Academic Support Fund and The Arthur Anderson Consulting Group Academic Support Fund.

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