

DRAFT

7/19/96 10:45 p.m.

July, 1996

David M. Cohen
Director, Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Preliminary Analysis of the Legal Status of the Camera Original Zapruder Film under the JFK
Assassination Records Collection Act

Dear Mr. Cohen:

I am writing in response to your letter dated June 25, 1996, which poses some questions pertaining to the legal status of the "camera original" motion picture film taken by Abraham Zapruder that depicts the assassination of President Kennedy.¹ Your comments were very helpful to us as we formulated our preliminary analysis of the legal status of the film under The President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (Supp. V 1994) ("JFK Act" or "Act"). This letter is a preliminary analysis of the legal issues from my perspective as the General Counsel of the Assassination Records Review Board. The letter does not purport to constitute either my final legal conclusion or the position of the Review Board.

It is our understanding that the original Zapruder film currently is stored at the National Archives and Records Administration ("NARA" or "Archives") pursuant to a Storage agreement dated July 10, 1978 between LMH Company through its representative, Henry G. Zapruder, which represents that it is the owner of the Zapruder film, and the James W. Moore for the National Archives ("Storage agreement") [ARRB version of this agreement is unsigned. File 6.3.1.9]. We further understand that, in a letter dated October 18, 1995, LMH Company, through its attorney, demanded return of the film under the Storage agreement, but that the Archives has not returned the film pending resolution of its legal status under the JFK Act.² [Are there any prior demands?]

¹It is our understanding that there is one "camera original" Zapruder film and that it is currently stored at the National Archives. All of our discussion below refers solely to this one camera original film and not to any duplicates, copies, internegatives, or other versions of the film.

²*For the purposes of this letter only*, I am assuming that the following statements were true as of the time that the JFK Act became law: *first*, LMH Company possessed legal title to the

Zapruder film; *second*, the Zapruder film was physically stored at the National Archives; *third*, the Zapruder film was stored at the Archives pursuant to the Storage agreement; and *fourth*, the Zapruder film was shown to the Warren Commission. For an elaboration of this fourth point, *see* part ___ below.

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The question is whether the JFK Act, which became law on October 26, 1992, affected the legal status of the film and whether the Act now imposes upon the Archives any new obligations that might supersede the terms of the Storage agreement. It is our understanding that the Archives wishes to comply fully with its responsibilities under all applicable law, but that it is uncertain as to what its responsibilities might be. Specifically, the Archives is uncertain as to whether the Zapruder film, pursuant to the JFK Act, should be transferred to the President John F. Kennedy Assassination Records Collection ("JFK Collection") at the Archives or whether the film should be returned to LMH Company under the terms of the Storage agreement.

Although the questions raised by you and by the Archives might be formulated in several different ways, I believe that the pertinent question should be posed as follows:

Does the Assassination Records Review Board have the authority to determine that the JFK Act supersedes, in relevant part, the terms of the Storage agreement and that the Archives must transfer the Zapruder film to the JFK Collection?

As the analysis below explains, my preliminary answer to this question is an unequivocal "yes." Although we now believe that, as a matter of law, the Review Board does have the authority to make this determination, it does not necessarily follow that the Zapruder film must be transferred to the JFK Collection, because the Review Board retains, in its sole discretion, the power to accept a copy of an assassination record in lieu of an original. See 36 CFR § 1400.6.

Part I: The Operative Provisions of the JFK Act

The two operative provisions of the JFK Act affecting the Archives' handling of the Zapruder film are as follows:

Not later than 300 days after the date of enactment of this Act, each Government office shall review, identify and organize each *assassination record* in its *custody or possession* for disclosure to the public, review by the Review Board, and transmission to the Archivist [for inclusion in the JFK Collection.]

Section 5(c) (emphasis added).

Assassination records which are *in the possession* of the National Archives on the date of enactment of this Act, and which have been publicly available in their entirety

without redaction, shall be made available in the [JFK] Collection without any additional review by the Review Board or another authorized office under this Act . . .

Section 5(d)(B)(3) (emphasis added).

Both sections impose obligations on the National Archives. Section 5(d) explicitly refers to the Archives' responsibilities, while Section 5(c) refers to the Archives' obligations by virtue of the fact that it is a "Government office." In fact, the JFK Act explicitly provides that: "'Government office' means any office of the Federal Government that has *possession or control* of *assassination records, including . . . the National Archives* as custodian of assassination records that it has obtained or possesses" Section 3(5) (emphasis added).

The applicable provisions of the JFK Act thus provide that government offices generally (Sect. 5(c)), and the National Archives specifically (Sect. 5(d)), are required to identify "assassination records" that are in their "possession," "custody," or "control," and that government offices must thereupon transfer those assassination records to the JFK Collection at the Archives. Therefore, if the Zapruder film is an "assassination record" within the meaning of the Act, and if the Archives has, within the meaning of the Act, "custody," "possession," or "control" of the film, then the Archives presumptively must transfer the film to the JFK Collection. These two issues will be considered in turn.

A. The Zapruder film as an "assassination record" within the meaning of the JFK Act.

There are at least three reasons that the Zapruder film might be identified as an "assassination record" within the meaning of the Act: *first*, the common-sense meaning of the term; *second*, the Act effectively defines the film as such; and *third*, the Review Board has the authority, under its regulations, of so designating records.

First, there is no question that, in a common sense meaning of the term, the Zapruder film is an "assassination record." The film depicts, better than any other record, the immediate events surrounding the fatal shots to President Kennedy. No film or document related to the assassination has been more carefully scrutinized for its evidentiary value than the Zapruder film.

Second, beyond the common sense meaning of the term, the JFK Act and the rules

promulgated thereunder, would seem to provide that the film is an "assassination record." The Act broadly defines "assassination record" as

a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of --

a number of government bodies, including the Warren Commission and NARA. Section 3(2).

Third, under the Review Board's regulations, it has the authority to designate records as assassination records. The Act itself grants the Review Board express authority to issue interpretive regulations of the JFK Act. Section 7(n). The Review Board's published regulations regarding the definition of "assassination record" underscore the literal statutory definition (*see* 36 CFR § 1400.1(b)(1)), but illuminate the scope of such records to include those that reasonably may be designated as such by the Review Board. *See* 36 CFR § 1400.1(2)-(3) and § 1400.8. Although the Review Board has taken no steps specifically to designate the Zapruder film as an "assassination record," such a designation is clearly within its power and authority.

Therefore, whether as a matter of common sense, the statutory definition, or a potential Review Board designation, the Zapruder film is an "assassination record" within the meaning of the Act.

B. The Zapruder film as being in the "possession," "custody," or "control" of the Archives.

The JFK Act does not explicitly define the terms "possession," "custody," or "control," although the terms are employed in several sections of the Act.³ Under controlling Federal law, the Review Board is charged with the authority of interpreting any silent or ambiguous terms in order to give proper effect to the legislation that it is created to regulate. With respect to the terms "possession, custody and control," when the Review Board interprets the statute, the issue for a court reviewing that interpretation is "whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted). The Court recently endorsed this deferential level of review:

It is our practice to defer to the reasonable judgments of agencies with regard to the

³See Sections 3(2), 3(5), 5(c)(1), 5(d)(3), 5(f), and 9(a).

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meaning of ambiguous terms in statutes that they are charged with administering. ... We accord deference to agencies under Chevron ... because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. Smiley v. Citibank (South Dakota), 116 S. Ct. 1730, 1732-1733. (1996) (citing Chevron at 842-845).

Thus, to the extent the terms "possession, custody and control" are ambiguous, the Board's interpretation of these terms would be entitled to great deference.

Dictionary definitions of custody and possession reveal that these words may properly be used to refer to the control or physical holding of a person or property without requiring an ownership interest in the property at issue. Black's Law Dictionary, for example, defines custody as "the care and control of a thing or person. . . . Immediate charge and control, and not the final absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody." Black's Law Dictionary at 384 (6th ed.), West Publishing Co. (St. Paul, Minn. 1990). Black's Law Dictionary defines possession as "having control over a thing with the intent to have and to exercise such control." Id. at 1163. Other dictionary definitions of custody and possession support a common usage of these terms that is broad in scope and does not necessarily require an actual ownership interest.⁴

Moreover, the Act itself uses the term custody in the context of the physical disposition or the physical holding of assassination records. For example, Section 5(f) of the Act, entitled, "Custody of Postponed Assassination Records," reads

An assassination record the public disclosure of which has been postponed shall,

⁴Dictionary definitions of custody include: "Care, supervision, and control exerted by one in charge." American Heritage Dictionary (3d. ed.) at 462, Houghton Mifflin Co. (New York 1992); "immediate charge and control exercised by a person or an authority." Webster's Seventh New College Dictionary at 205, G&C Merriam Co. (Springfield, Mass. 1972).

Dictionary definitions of possession include: "Actual holding or occupancy with or without rightful ownership." American Heritage Dictionary (3d ed.) at 1413, Houghton Mifflin Co. (New York 1992); "the act of having or taking into control; control or occupancy of property without regard to ownership." Webster's Seventh New Collegiate Dictionary at 663, G&C Merriam Co. (Springfield, Mass. 1972).

pending transmission to the Archivist, be held ... by the originating body ...

(emphasis added). Section 9(a)(1) also equates custody with the physical disposition or holding of assassination records:

Pending the outcome of the Review Board's review activity, a Government office shall retain custody of its assassination records for purposes of preservation, security, and efficiency, unless -- the Review Board requires the physical transfer of records for reasons of conducting an independent and impartial review

(emphasis added).

Additionally, the legislative history of the JFK Act suggests that the operative concept is not government "ownership" or "title," but whether the records are merely "held" by the Government. The House Report states that it is "the purpose of this legislation to provide for the full release of all Federal Government-held assassination materials" H.R. Report No. 625, 102nd Cong., 2d Sess., at 20 (1992). The House Report goes on to state that "the [B]oard would have the authority to examine any material held by a federal agency or the Congress that the [B]oard determines is related to the assassination of President Kennedy." *Id.* At 25 (statement of James L. Blum). The Senate Report echoes the House in this regard, stating that "[g]overnment offices holding assassination records are required to begin organizing and reviewing such records upon enactment" Senate Report No. 328, 102nd Cong., 2d Sess., at 18 (1992).

The Zapruders themselves, through their attorney, have acknowledged that the "United States has possession of the [Zapruder] Film." Letter from James Lovin Silverberg to Christopher M. Runkel, Esq. (Oct. 18, 1994) at 1. This admission effectively precludes them from later arguing that the film is not in the "possession, custody or control" of a government office under this analysis of the Act, despite their alleged ownership interest. Therefore, by our preliminary analysis, the Zapruder film comes within the scope of the JFK Act.⁵

⁵ Section 11(a) of the JFK Act states that the Act "take[s] precedence over any other law ... [or] judicial decision construing such law" For this reason, judicial decisions interpreting the Freedom of Information Act ("FOIA") are of limited value in construing the JFK Act. Nonetheless, we note that the Court's decision in Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) is not inconsistent with our analysis of "possession, custody and control." In Kissinger, the Court held that transcripts of Kissinger's telephone conversations made while he was an advisor to the President and later physically transferred to his office at the State Department were not

Part II: The Meaning of “Government records” and whether the term imposes any additional obligations on records to be sent to the JFK Collection.

In Part I above we discuss the two statutory preconditions for a record to be transferred to the JFK Collection: that it be an “assassination record” and that it be in the possession, custody, or control of a government agency. We note in your June 25 letter that you raise the question whether there is yet an additional third requirement, that the record be a “government record.” See June 25 letter at 6. For the following six reasons, we believe that there is no additional statutory requirement that a record be a “government record” in order to trigger the operative provisions of the JFK Act.

First, the JFK Act nowhere states that an assassination record must be an agency or government record in order to trigger the obligation of the agency to forward the record to the JFK Collection. Neither the operative provisions of the statute that we cite above, nor any other relevant provisions of the Act, establish any such requirement.⁶

under the control of the State Department and, therefore, were not “agency records” merely because of their physical location. Kissinger, 445 U.S. at 157. However, unlike Kissinger, where the records “were not used by the [State] Department for any purpose,” the Zapruder film was used by the Warren Commission and is currently used by NARA in the legitimate conduct of official duties. Id.

⁶Key functional components of the Act specifically refer to assassination records. For example, Section 5(c)(1) of the Act directs that “each Government office shall review, identify and organize each assassination record in its custody or possession ... ” (emphasis added). Section 5(c)(2) of the Act requires that “ a government office shall-- (A) determine which of its records are assassination records” (emphasis added). Section 5(e) mandates that “[e]ach Government office shall-- (1) transmit to the Archivist and make available to the public, all assassination records that can be publicly disclosed ... ” (emphasis added). Section 7(i)(2)(a) of the Act grants the Review Board the power to determine “whether a record constitutes an assassination record” (emphasis added). Section 7(j)(1)(A) & (B) authorizes the Review Board to “direct Government offices to ... organize assassination records” and to “direct Government offices to transmit to the Archivist assassination records ... ” (emphasis added).

Second, the provisions of the statute that you cite regarding “government records” are confined largely to two clauses in the “findings and declarations” subsection of Section 2 of the Act.⁷ [Jeremy, the Act references “government records” in Sections 4(a)(1), 7(b)(1) and 9(c)(1)(A) & (B) -- how do we deal with this?] We are aware of no case law and no canon of statutory construction that provides that the introductory declaration or finding provisions of statutes must be construed to constitute terms of limitation of a statute. Indeed, our understanding is that “[c]ourts generally interpret legislation giving equal weight to all parts of an act.” J. Sutherland, Statutes and Statutory Construction, § 47.04 (N. Singer 5th ed. Rev. 1992). We presume that the declarations and findings provisions that you cite are in fact not terms of limitation, but are designed to underscore Congress’s firm intention that *all* government records that also are assassination records should be made available promptly. The declarations and findings provisions thus underscore a type of record that must be released, but do not preclude other records from being released as well. In terms of logic, the declarations and findings provisions highlight a *sufficient* condition for the transfer of records to the Archives, but they do not impose a *necessary* condition.

Third, the JFK Act expressly contemplates Review Board action and jurisdiction over persons and documents beyond government. For instance, the Act provides that

No assassination record created by a person or entity outside government . . . shall be withheld, redacted, postponed for public disclosure, or reclassified.

Section 5(a)(4). Although this language seems to encompass the possibility of some type of private ownership interest in assassination records, the Act makes no exception to its application for documents created and owned by persons outside government. In addition, pursuant to the Act the Review Board can “request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities . . .” Section 7(1)(C)(iii). Also, the Review Board is authorized to “receive information from the public regarding the identification and public disclosure of assassination records” and to “hold hearings, administer oaths, and subpoena witnesses and documents.” Sections 7(j)(1)(E) & (F). Accordingly, these provisions suggest that the scope of the Act encompasses all “assassination records” and should not be confined merely to records generated or owned by the government.

⁷The JFK Act does not define “government records.” We believe it would be especially unwise to construe an undefined term to have a significant limiting effect on the scope of the statute given Congress’ intent to “enable the public to become fully informed about the history of the assassination.” Section 2(a)(2).

Fourth, the sole Federal court that has considered this question ruled in a way that would be entirely inconsistent with such a requirement. [The court's decision in Connick supports this reading of the statute. TJG will expand]

Fifth, as noted above, under controlling Federal law, when the Review Board interprets a statutory term that might be construed as ambiguous, such as the term "government record," the issue for a court reviewing that interpretation is "whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (footnote omitted). Thus, assuming that the term "government records" in the Act is construed to be ambiguous, the Review Board's reasonable interpretation of that ambiguity would be entitled to great deference.

Sixth, to the extent the Act is read to include a "government records" requirement, it effectively employs it to mean records in the "possession, custody or control" of a government office. The Act's reliance on the terms "possession, custody and control" to delineate its application to government records is evident in its definition of "government office" as "any office that has possession or control of assassination records ..." (emphasis added). Section 3 (5). The Act's reliance on these terms is further illustrated by Section 5(c)(1), which provides that "each government office shall review, identify and organize each assassination record in its custody or possession ..." (emphasis added).

As articulated above, the terms "custody, possession and control" may properly be used to refer to the control or physical holding of a person or property and not absolute control or rightful ownership. Indeed, the words "own" or "government ownership" are never used in the Act in the context of defining the term "government record" and should not be read into it. Accordingly, we believe that the Zapruder film could be interpreted to be a government record under the JFK Act because it is a record related to the assassination that is in control, custody and possession of a government office (NARA), regardless of actual ownership interests.

Part III: Preliminary Takings Analysis

Whether analyzed under an "assassination records" or a "government records" analysis, we believe the Act probably effects a taking of the Zapruder film, *i.e.*, unless the Review Board were to determine that a copy of the Zapruder film would be an acceptable substitute. 36 C.F.R. § 1400.6.

Takings legislation need not expressly divest the former owner of title nor vest title in the United States for a lawful taking to occur. Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995).

Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992). Such takings are permissible if

- (i) the taking is rationally related to a conceivable public purpose; Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1983); Nat'l Railroad Passenger Corp. V. Boston & Maine Corp., 503 U.S. 407 (1991); and
- (ii) The former owner has the opportunity to recover just compensation; United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985); United States v. Holmes, 414 F.Supp. 831, 840 (D. Md. 1976).

A taking of the Zapruder film via implementation of the JFK Act satisfies both of these requirements. First, the intent of the JFK Act -- to collect, preserve and make available to the public a full historical record regarding the assassination of President Kennedy -- is plainly a public purpose. This public purpose is furthered by the transmittal and disclosure provisions of the Act. Second, the Supreme Court has held that the presumptive ability of a property holder to file a post-takings suit against the United States under the Tucker Act, 28 U.S.C. § 1491, is a constitutionally adequate opportunity for just compensation. United States v. Riverside Bayview Homes, Inc., 474 U.S. at 128; United States v. Holmes, 414 F.Supp. 831 (D.Md. 1976), citing, United States v. Dickenson, 331 U.S. 745 (1947). The LMH Company would have ample opportunity to recover compensation by initiating suit against the United States.

The taking of the Zapruder film effected by the Act is similar to the taking of President Richard M. Nixon's presidential papers under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note (1988) ("PRMPA"). In Nixon v. United States, the court found a taking had occurred because the statute required that the Federal Government (1) physically possess President Nixon's property, (2) restrict President Nixon's right of access to the property, (3) restrict Mr. Nixon's right to exclude others from the property, and (4) restrict Mr. Nixon's right to dispose of the property. 978 F.2d at 1287. We believe the JFK Act effects a taking on the Zapruder film in the same manner.

First, both the JFK Act and the PRMPA provide for federal custody or physical possession of the affected property. The JFK Act requires each government office to transmit to the National Archives for inclusion in the Collection all assassination records that can be publicly disclosed and all assassination records for which disclosure has been postponed. Sections 5 (e) (1) and (2). Similarly, the PRMPA provides that

[A]ny Federal employee in possession shall deliver, and the Archivist . . . shall

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receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal government.

Section 101(a).

Second, Section 4(d) of the JFK Act authorizes NARA to preserve and protect assassination records in the Collection and explains the restrictions on access of such records by the public. As the court stated in *Nixon*,

The test [for whether there is a taking] must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former owner been deprived of a definable unit of economic interests?

Nixon, 978 F.2d at 1286. By placing the Zapruder film in the custody of the Archivist, the Act restricts the LMH Company's access to the film, depriving it of its bargaining power and economic use of the property.

Third, Sections 2(b), 4(b), 5(a)(4) and 9(c) of the Act all effectively restrict LMH Company's right to exclude others from the film. In particular, Section 5(a)(4) provides that "[n]o assassination record created by a person or entity outside government . . . shall be withheld, redacted, postponed, or reclassified." As the court noted in *Nixon*, "the right to exclude other is perhaps the quintessential property right." *Nixon*, 978 F.2d at 1286. Through implementation of the JFK Act on the Zapruder film, the LMH Company "retains no 'right' to exclude others from this property; and certainly not one capable of being called a property interest." *Nixon*, 978 F.2d at 1287.

Finally, just as the court found it significant in *Nixon* that the PRMPA restricted Nixon's "right to dispose of the property" at issue, the JFK Act deprives the Zapruder family of the right to destroy the film. *Nixon*, 978 F.2d at 1287. The JFK Act prevents the destruction of property once included in the Collection: "No assassination record shall be destroyed, altered, or mutilated in any way." Section 5(a)(2). For these reasons, just as the PRMPA mandated a taking of President Nixon's property, we believe the JFK Act mandates a taking of the Zapruder film.

We hope these comments will further the resolution of these issues. Please call me with any additional thoughts on this matter.

Sincerely,

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T. Jeremy Gunn
General Counsel

cc: Miriam Niebet, National Archives and Records Administration

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