

Response to DOJ Letter

- I. JFK Act applies to all assassination records and is not limited to government records.
 - A. Assassination record is the significant statutory term of the Act.
 - assassination record is defined in the statute while government record is not (Sect. 3(2))
 - key functional components of the Act refer to assassination records (Sections 5(a), 5(c)(1)&(2), 5(e), 7(i)(1)&(2), 7(j)(1) (A)&(B))
 - Zapruder film is clearly an assassination record because it is related to the assassination and was obtained and used by the Warren Commission and NARA
 - B. References to government records in the scope of the statute are not controlling.
 - Act does not even define the term government record so it could not be intended to be a decisive term (other significant terms such as assassination record, record and government office are defined)
 - the term government record only appears in the findings and declarations subsection of Section 2 of the Act and not the purposes subsection [check Sutherlands]
 - the Act clearly contemplates government action and jurisdiction over persons and documents outside of government (Sections 5(a)(4), 7(j)(1)(C)(iii), 7(j)(1)(E)&(F))
 - Connick supports this reading of the statute
- II. To the extent a government record requirement exists in the statute, the Zapruder film meets that requirement.
 - A. If ambiguity exists with regard to the use of the term government record in the statute, the Board's interpretation must be given effect if reasonable.
 - Chevron analysis (Congress failed to define or clarify meaning of government record and Board's answer is a permissible construction of the statute)
 - Citibank ("It is our practice to defer to the reasonable judgments of agencies with regard to the 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 ... to possess whatever degree of discretion the ambiguity allows.") -Congress granted the Board express authority to issue interpretive regulations (Sect. 7(n))
 - B. The Act implicitly defines the term government record through repeated references to records in the "possession, custody or control of a government office."
 - the term government office is defined as "any office of the Federal Government that has possession or control of assassination records" (Sect. 3(5))
 - the Act directs each government office to "review, identify and organize each assassination record in its custody or possession" (Sect. 5(c)(1))
 - dictionary definitions of custody and possession refer to immediate control or physical holding and not absolute control or rightful ownership

- the meaning of the term custody may be derived from the Act itself, which uses custody in the context of the physical disposition or physical holding of assassination records (Sections 5(f) & 9(a)(1))
- the legislative history of the Act supports a reading that it applies to all government-held assassination records (Senate Report at 2967, House Report at 20, 25)
- despite providing that “No assassination record created by a person or entity outside government ... shall be withheld [by a government office],” which seems to presume the possibility of some type of private ownership interest, the Act makes no exception for records with a private ownership interest (Sect. 5(a)(4))
- the words own or government ownership, despite their clear meaning, appear nowhere in the statute and should not be read into the the statute
- the Zapruders have already acknowledged, through their attorney, that “the United States has possession of the Film” (October 18, 1994 Letter)
- accordingly, the Zapruder film is a government record under the Act because it is a record related to the assassination that is in the custody or possession of a government office (NARA), regardless of actual ownership interests

III. Regardless of whether a government record requirement exists, the Act effected a taking of the Zapruder film.

- A. Takings occur only as a result of lawful or authorized government action, but takings legislation need not expressly divest the former owner of title or vest title in the U.S. (Short v. U.S., Nixon v. U.S.).
- B. A taking under the Act is rationally related to a conceivable public purpose (to collect, preserve and make available to the public a full historical record of the assassination--a purpose furthered by the transmittal and disclosure provisions of the Act) and compensation is available under the Tucker Act, 28 U.S.C. Section 1491.
- C. The Act effected a taking on the Zapruder film in similar fashion to the taking of Nixon’s presidential papers by the PRMPA.

- as in Nixon, the Act provides for federal custody or physical possession of the property (Sections 4(a)(1) & (2) -- the Collection shall consist of or include “all government records relating to the assassination” and “all assassination records that have been transmitted to the National Archives or disclosed to the public”)
- by placing the film in the custody of the Archivist, the Act restricts the Zapruder’s access to the property, thereby depriving them of their economic use of the property and bargaining power with regard to the property (“The test must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former been deprived of a definable unit of

economic interests?"--Nixon) (Section 4(d) authorizing NARA to preserve and protect records)

-the Act restricts the Zapruder's right to exclude others from the property (Zapruder "retains no 'right' to exclude others from this property; and certainly not one capable of being called a property interest--Nixon) (Sections 2(b), 4(b), 5(a)(4) & 9(c) -- particularly 5(a)(4) providing that "No assassination record created by a person or entity outside government ... shall be withheld, redacted, postponed, or reclassified.")

-the Act prevents the destruction of property in the Collection (Zapruder loses "his right to dispose of the property"--Nixon) (Section 5(a)(2) -- "No assassination record shall be destroyed, altered, or mutilated in any way."