

July, 1996

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

Re: Application of JFK Collection Act to the Zapruder Film

Dear Mr. Cohen:

We write in response to your letter dated June 25, 1996, which discusses issues related to application of the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (Supp. V 1994) ("Collection Act" or "Act"), upon ownership interests in the original Zapruder film.

Your comments were very helpful as we developed our thoughts on these issues. This letter addresses those comments and further analyzes the effect of the Collection Act on a possible Zapruder ownership interest in the film. This letter does not address the validity of the Zapruders' alleged ownership interest.

Background

[facts regarding ownership of film and deposit agreement]

Discussion

Our analysis of the effect of the Collection Act on ownership interests in the Zapruder film centers on whether the film is an "assassination record" under the Act. We focus on the film's status as an assassination record because the Act is written in a way that makes "assassination record" its controlling term. Significantly, while other less prominent terms, such as "government records," remain undefined, 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 --

David M. Cohen

July --, 1996

Page 2

a number of government bodies, including the Warren Commission and the National Archives and Records Administration ("NARA"). Section 3(2). The Zapruder film clearly falls within the definition of "assassination record" under the Collection Act because it is related to the assassination, was made available for use by the Warren Commission and is currently in the possession of NARA.

Moreover, key 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).

In contrast, we believe that references in the Act to "government records", largely confined to two clauses in the "findings and declarations" subsection of Section 2 of the Act, do not control or limit the scope of the statute. Indeed, as noted above, the term "government records" is not even defined in the Act. We find it hard to accept that "government records" could have been intended as a decisive or narrowing term and yet remained undefined.

Furthermore, the Collection 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).

David M. Cohen
July --, 1996
Page 3

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.

The court’s decision in Connick supports this reading of the statute. [expand]

To the extent a “government records” requirement exists in the Collection Act, a ruling by the Review Board interpreting the term “government records” to include the Zapruder film would be reasonable and binding. Agencies often are required to issue regulations interpreting the statutes they are charged with administering. Indeed, Congress granted the Review Board express authority to issue interpretive regulations of the Collection Act. Section 7(n).

Moreover, when a statute is silent or ambiguous with respect to a specific issue, as the Collection Act may be construed to be with regard to the term “government records,” and the administering agency 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 (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 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, 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.

In this regard, it is significant to our analysis of the Collection Act that, to the extent the Act employs the term “government records,” 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

David M. Cohen

July --, 1996

Page 4

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).

We believe the Zapruder film could be interpreted to be a government record under this reading of the Act because it is in the "control, custody and possession" of NARA. Dictionary definitions of custody and possession reveal that these words refer to the control or physical holding of a person or property and not absolute control or rightful ownership. Black's Law Dictionary 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 require an actual ownership interest.¹

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, 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:

¹Dictionary 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).

David M. Cohen
July --, 1996
Page 5

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 Collection Act supports a reading that it applies to all government-held records. 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 a government record under this analysis of the Act, despite their alleged ownership interest. 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 Collection Act because it is a record related to the assassination that is in the control, custody and possession of a government office (NARA), regardless of actual ownership interests.

Whether analyzed under an "assassination records" or a "government records" analysis, we believe the Act effects a taking of the Zapruder film. 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 Zapruder family would have an 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 Collection Act and the PRMPA provide for federal custody or physical possession of the affected property. The Collection 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 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.

David M. Cohen
July --, 1996
Page 7

Section 101(a).

Second, Section 4(d) of the Collection 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 Zapruder family's access to the film, depriving them of their 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 the Zapruder'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 Zapruder family "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 Collection 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 Collection 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,

David M. Cohen
July --, 1996
Page 8

T. Jeremy Gunn
General Counsel

cc: Laura Naida, National Archives and Records Administration