

DRAFT MEMORANDUM

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ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT

March 22, 1996

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Subject: **Whether the JFK Act Provides that Non-Federal Records May be Subject to a Fifth Amendment Taking**

This memorandum addresses the application of the *President John F. Kennedy Assassination Records Collection Act of 1992*, 44 U.S.C. § 2107 (Supp. V 1994) (“JFK Act”), to records that did not originate with the Federal Government, with particular attention to whether and how the JFK Act may work a taking of such records.

I. THE RELEVANT PROVISIONS OF THE JFK ACT

The JFK Act contains four principal provisions that are immediately relevant to determining whether Congress contemplated that assassination records that were not originally created by the Federal government may be taken by the Federal government for inclusion in the National Archives. First, Congress defined “assassination records” in such a way as to include non-Federal records; second, it created the President John F. Kennedy Assassination Records Collection (“the JFK Collection”), to be housed at the National Archives; third, it requires all Federal agencies to transmit “assassination records” to the JFK Collection; and fourth, it created the Assassination Records Review Board (“Review Board”) to ensure that assassination records in fact become part of the JFK Collection.

A. The Statutory Definition of “Assassination Record”

Section 3(2) of the JFK Act defines “assassination record” as

a record¹] that is related to the assassination of President John F. Kennedy, that was

¹Section 3(11) defines “record” to include “a book, paper, map, photograph, sound or video recording, machine readable material, computerized, digitized, or electronic information, regardless of

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created *or made available for use by, obtained by, or otherwise came into the possession of* --

(A) the Commission to Investigate the Assassination of President John F. Kennedy (the “Warren Commission”);

....

(E) the Select Committee on Assassinations (the “House Assassinations Committee”) of the House of Representatives;

....

(I) any Executive agency;

(J) any independent agency;

(K) any other office of the Federal Government; and

(L) any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy. (emphasis added)

By including within its definition of “assassination records” those records that were *used by or came within the possession* of any Federal Government office, Congress explicitly decided that some records that were not created by a Federal office were nevertheless to be included within the scope of “assassination records.” Thus, under the definition provided by Congress, a record created by a private individual or a local government office that is related to the assassination of President Kennedy *is* an “assassination record” covered by the terms of the JFK Act, provided that it was used by or came into the possession of a Federal government office.

B. The JFK Assassination Records Collection

Under section 4(a)(1) of the JFK Act, Congress created the JFK Collection at the National Archives for the purpose of collecting, maintaining, and preserving “assassination records” as defined by the statute. The statute obligates the National Archives to “ensure the physical integrity and original provenance of all [assassination] records.” *Id.* Records in the Collection “shall be preserved, protected, archived, and made available to the public at the National Archives.” Section 4(d)(1). The statute specifies that the JFK Collection “*shall include . . . all assassination records . . . that are required to be transmitted to the National Archives.*” Section 4(a)(2)(A)(ii) (emphasis added). The statute presumed that all “assassination records” would be transferred by Government offices to

the medium on which it is stored, or other documentary material, regardless of its physical form or characteristics.”

the JFK Collection.

C. Transfer of Records to the JFK Collection

The JFK Act obligates all Federal Government offices, including the Congress, Federal agencies, and the Review Board to transfer all “assassination records” to the National Archives. Under the Act, “each Government office” must “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.”² Each Government office must transmit all assassination records it has identified to the Archivist, either for immediate, unredacted release to the public (*see* Section 5(e)(1)) or with the release of some material “postponed, in whole or in part, under the standards of this Act, to become part of the protected Collection.” (*See* Section 5(e)(2)).

The purpose of the JFK Act is, in part, “to require the expeditious public transmission to the Archivist and public disclosure of [assassination] records.” Section 2(b). The Review Board itself was created, in part, to ensure that the statutorily defined “assassination records” were transferred to the JFK Collection. “The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that -- (A) a Government record is not an assassination record; or (B) a Government record or particular information within an assassination record qualifies for postponement” Section 9(c)(1). (For further discussion of the role of the Review Board *see infra*.)

Furthermore, section 11(a) provides that “[w]hen this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code), judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure.” Only deeds governing the donation of records to the United States are excepted from this provision.

D. The Assassination Records Review Board

The JFK Act establishes the Assassination Records Review Board “as an independent agency” with the mission “to ensure and facilitate” the above-described process of identifying and reviewing

²Section 3(5)(E) defines “Government office” as “any office of the Federal Government that has possession or control of assassination records,” including any “executive branch office or agency, and any independent agency.”

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assassination records, and transmitting them to the National Archives for disclosure to the public. Section 7(a), (b)(1). In this regard, Congress authorized the Review Board to “direct Government offices to transmit to the Archivist assassination records.” Section 7(j)(1)(B). Indeed, the Act *requires* the Review Board to “direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection,” unless the Review Board finds that a particular record is not in fact an assassination record or that a particular record “qualifies for postponement of public disclosure under this Act.” Section 9(c)(1)(B).

The scope of the Review Board’s authority is not limited to records already in the possession of the Federal Government. Section 7(j)(1)(C)(iii) authorizes the Review Board to “request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act.” Additionally, the Review Board is itself empowered to “hold hearings, administer oaths, and subpoena witnesses and documents.” Section 7(j)(1)(F).

II. APPLICATION OF THESE PROVISIONS TO RECORDS THAT ORIGINATED OUTSIDE THE FEDERAL GOVERNMENT

As demonstrated above, the transmittal and disclosure requirements of the JFK Act apply to every record related to the assassination of President Kennedy that comes into the possession of the Federal Government. These requirements are not limited to records created by the Federal Government,³ and their applicability does not depend on when or how assassination records came into Federal possession.

A. The Takings Issue

Because the JFK Act is not limited to records created by the Federal Government, it is possible that other parties could claim property interests in records that, under the JFK Act, must be transmitted to, and preserved within, the JFK Collection at the National Archives. This does not mean that, contrary to its plain meaning, the JFK Act should be read to exclude such records. It does mean that the JFK Act potentially intrudes on property interests in such records, and that, in certain circumstances, the

³Indeed, Congress specified disclosure criteria particularly for such records. Section 5(a)(4) of the JFK Act provides: “No assassination record created by a person or entity outside government (excluding names or identities consistent with the requirements of section 6) shall be withheld, redacted, postponed for public disclosure, or reclassified.”

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JFK Act could work a taking of property requiring just compensation under the Fifth Amendment.

1. General Principles

Congress unquestionably may enact legislation that effects a taking of property. *United States v. Carmack*, 329 U.S. 230, 240 (1946). Such legislation need not expressly divest the former owner of title or vest title in the United States. If Congress requires *or authorizes* a Government agency to take possession of property, a taking under the Fifth Amendment may occur. *Nixon v. United States*, 978 F.2d 1269, 1284 (1992), *citing*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), and *National Wildlife Fed'n v. Interstate Commerce Comm'n.*, 850 F.2d 694, 706 (D.C. Cir. 1988). Such takings are permissible, so long as:

- (i) the taking is rationally related to a conceivable public purpose; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1983); *National 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).

Any potential taking involved in implementing the JFK Act would satisfy both of these requirements. 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 -- plainly is a public purpose, and the transmittal and disclosure provisions of the JFK Act directly further that purpose. As to the availability of compensation, 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. Dickinson*, 331 U.S. 745 (1947). This reasoning should equally apply to any takings claim arising from the JFK Act.

2. Comparison of the JFK Act to the Presidential Recordings and Materials Preservation Act

In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit held that the operation of *The Presidential Recordings and Materials Preservation Act*, 44 U.S.C. § 2111, note (1988) (“PRMPA”), effected a taking of former President Nixon’s personal property. Because many of the

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provisions in the JFK Act mirror provisions in the PRMPA, comparing the two statutes is helpful in analyzing issues that could arise under the JFK Act.

In enacting both the PRMPA and the JFK Act, Congress did not expressly state that it intended to divest property owners of their rights.⁴ Instead, both statutes direct the Archivist of the United States and other Federal agencies to take certain steps to secure and preserve the historical materials at issue. PRMPA § 101; JFK Act §§ 4 and 5. Yet the *Nixon* court found that the PRMPA itself effected a taking of property, even though further action by the Archivist was required to complete the taking. *See, e.g.*, 978 F.2d at 1286 (“More importantly, PRMPA has completely abrogated Mr. Nixon’s right”); 978 F.2d at 1287 (“In conclusion, PRMPA not only physically dispossessed Mr. Nixon of his property”); and 978 F.2d at 1287 (“under the *per se* doctrine, PRMPA resulted in a ‘taking’”).

⁴With regard to the Nixon materials, Congress was not certain whether Mr. Nixon had property rights in any or all of the Presidential materials at issue. However, the D.C. Circuit held that former President Nixon did have a compensable property interest in those materials. 978 F.2d at 1284.

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In so holding, the *Nixon* court rejected the Government's argument that there was no taking because the PRMPA had not expressly divested Mr. Nixon of title. 978 F.2d at 1286. The court found a taking had occurred because the statute required that the Federal Government (1) physically possess Mr. Nixon's property,⁵ (2) restrict Mr. Nixon's right of access to the property,⁶ (3) restrict Mr. Nixon's right to exclude others from the property,⁷ and (4) restrict Mr. Nixon's right to dispose of the property.⁸ 978 F.2d at 1287. Implementation of the JFK Act regarding certain classes of records may yield similar results.

The manner in which the PRMPA worked a taking is common:

⁵*Federal Possession:* Section 101 of the PRMPA requires the Archivist to "receive, obtain, or retain, complete possession and control of all original tape recordings" and to "receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials" The terms of the JFK Act similarly require the Federal Government to retain, and authorize it to acquire, possession of statutorily defined historical materials.

⁶*Restrictions on Right of Access to Property:* As with the JFK Act, the PRMPA places historical materials in the custody of the Archivist and thus restricted Mr. Nixon's access to the materials. 978 F.2d at 1286. Both the PRMPA and the JFK Act require the Archivist to preserve historical materials. See PRMPA § 103 and JFK Act § 4(d) (one of the several provisions of the JFK Act that requires the Archivist to preserve assassination records.)

⁷*Restrictions on Right to Exclude Others:* In passing the PRMPA and the JFK Act, Congress attempted to ensure public access to important historical materials. Section 104 of the PRMPA provides for public access to Mr. Nixon's materials. However, the JFK Act's provisions requiring public access to assassination records are numerous, clear, and much stronger than the analogous provisions in the PRMPA. See, e.g., JFK Act §§ 2(a), (b); 4(b), (d)(1); 5(a)(4), (c)(1); and 9(c). Moreover, the JFK Act explicitly requires in section 5(a)(4) that no assassination record "created by a person or entity outside Government . . . shall be withheld, redacted, postponed for public disclosure, or reclassified," so that the Act almost completely removes from former owners the right to exclude others from their property. Thus, section 5(a)(4) strongly implies that Congress, in passing the JFK Act, chose to override any private property rights that might conflict with the Act's disclosure provisions.

⁸*Restrictions on Right to Dispose of Property:* The PRMPA and the JFK Act both require historical materials to be preserved, and explicitly prohibit destruction. See, PRMPA § 102(a) and JFK Act § 5(a)(2).

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[T]he implementation of the congressional program is normally carried out by the executive branch of the government. Usually, the actual taking of the property will occur when the executive branch acts to deprive the property owner of the property rights.

Jacques B. Gelin, David W. Miller, *The Federal Law of Eminent Domain*, § 1.2 (year). In much the same way, the JFK Act may require Federal agencies, particularly the Review Board and the National Archives, to act in a manner inconsistent with private property rights. The *Nixon* case demonstrates that, in the event such conflicts arise under the JFK Act, the terms of the JFK Act will override competing property claims, but the property claimants may be entitled to just compensation.

B. Particular Applications

Because the Review Board may be required to apply the JFK Act to several categories of records that did not originate within the Federal Government, some examples of possible applications are discussed below.

1. Records Received and Retained by Federal Agencies

Assume that, in 1963, a private citizen gave the FBI a photograph he took of the Presidential limousine driving through Dealey Plaza, and that the FBI retained this photograph until the passage of the JFK Act. The photograph is an assassination record under Section 3(2)(I), because it is a record related to the assassination of President Kennedy that was “made available for use” by an “Executive agency.” Accordingly, Section 4(a)(2)(A)(ii) of the JFK Act requires the FBI to transmit the photograph to the National Archives to be made available to the public in the JFK Collection -- notwithstanding any property rights the private citizen might have in the photograph.

2. Records Received By the Review Board Without Use of Subpoena (E.g., Garrison Grand Jury Records)

The Review Board (without solicitation or prior knowledge) has received from a New Orleans television reporter a set of records originating with the New Orleans District Attorney’s Office. These records, which pertain to Garrison-era grand jury inquiries into the assassination of President Kennedy, are not known to have been made available to any Federal agency prior to their receipt by the Review Board.

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These materials are assassination records by virtue of Section 3(2)(J): they are records related to the assassination of President Kennedy that “came into the possession of” an “independent agency” -- the Review Board.⁹ Accordingly, Section 5(c)(1) requires the Review Board to transmit these records to the National Archives for inclusion in the JFK Collection and disclosure to the public. As clearly stated in Section 11(a), the JFK Act supersedes any state laws to the contrary.

⁹Assassination-related records of the New Orleans District Attorney’s Office also fall within the category of assassination records defined by Section 3(2)(L), because that office “provided support or assistance or performed work in connection with a Federal inquiry into the assassination” (*e.g.*, in its November 1963 investigation of David Ferrie).

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3. Records Previously Made Available to Federal Investigations, But Not Retained by the Federal Government (*E.g.*, Garrison Records That Were Provided to the HSCA)

At the request of the Review Board, the Department of Justice has issued a subpoena for additional records of the New Orleans District Attorney's Office pertaining to its investigation into President Kennedy's assassination. The subpoenaed records were made available to representatives of the House Select Committee on Assassinations (HSCA) for use in that body's investigation of the assassination in the 1970's.

The subpoenaed records fall squarely within the class of assassination records defined in Section 3(2)(E): They are "records related to the assassination . . . made available for use by . . . the [House] Select Committee on Assassinations." Upon verification that records provided in response to the subpoena indeed relate to the assassination, the Review Board will be required under Sections 5(c)(1) and 9(c)(1)(B) to arrange for the transmittal of these records to the JFK Collection.

The District Attorney so far has resisted compliance with the subpoena; however, his obligation to produce the records is plain. Given that Congress (i) authorized the Review Board to "request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities" (Section 7(j)(1)(C)(iii)), and (ii) described the "role" of the Review Board as "ensuring and facilitating the review, transmission to the public, and public disclosure of records related to the assassination" (Section 7(b)(5)(B)), there could scarcely be a more appropriate exercise of the Review Board's subpoena authority than to obtain assassination records from non-Federal sources.

4. **Records Subpoenaed By the Review Board That Are Related to the Assassination, But Do Not Meet the Statutory Definition of "Assassination Record" Before They Are Obtained by the Review Board**

Assume that a private citizen took a photograph of the Presidential limousine driving through Dealey Plaza, but never made the photograph available to any investigating authorities. Somehow the Review Board learns of the photograph and, pursuant to Section 7(j)(1)(C)(iii), requests the Attorney General to subpoena the photograph.

The requested subpoena would be within the authority provided by the JFK Act because obtaining access to records related to the assassination is "relevant to [the Review Board's] responsibilities." Once, pursuant to the subpoena, the photograph is "made available for use by, obtained by, or

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otherwise [comes] into the possession of” the Review Board, the photograph would be an assassination record under Section 3(2)(J). Accordingly, Section 5(c)(1) would require the Review Board to transmit the photograph to the National Archives for inclusion in the JFK Collection, the photographer’s property rights notwithstanding.

The photograph in this example becomes an assassination record partly as a result of a discretionary decision by the Review Board (and the Attorney General) -- the decision to subpoena the photograph.

Nonetheless, because the hypothetical subpoena is within the authority granted by the JFK Act, and the subsequent transmittal of the photograph to the JFK Collection is required by the Act, any resultant “taking” follows from the Act itself. Any such taking is therefore permissible under the Fifth Amendment because the Tucker Act presumptively affords an adequate opportunity for just compensation.¹⁰

III. DEFERENCE TO THE REVIEW BOARD’S INTERPRETATION OF THE JFK ACT

For the reasons stated above, we believe that the applicability of the JFK Act’s transmittal and disclosure requirements to records that did not originate with the Federal Government is quite clear. However, in the event that some aspect of the above analysis is called into question, it should be noted that the Review Board’s interpretation of any ambiguities in the JFK Act is entitled to deference under the rule of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron established a two-step methodology for judicial review of an agency’s statutory interpretation:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, . . . the statute is silent or ambiguous with

¹⁰A somewhat different analysis is that Congress, to the extent it left to the discretion of the Review Board which assassination-related records to pursue, made a limited delegation of its power to take assassination-related records that had not been made available to Federal authorities other than the Review Board. Congress may delegate its taking power, and there is no need to adopt a narrow construction of delegations of the taking power to Federal agencies (as opposed to private parties). *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 421-422 (1992).

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respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

Accordingly, even if the JFK Act were thought to be “silent or ambiguous” regarding some aspect of its application to records that did not originate with the Federal Government, the Review Board’s interpretation must be given effect as long as it is reasonable. *See, e.g., National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). Courts are bound by this “rule of judicial deference to an agency’s statutory interpretation, even when the statute is one authorizing condemnation of private property.” *National Railroad Passenger Corp.*, 503 U.S. at 421-22.

We believe that the analysis described in Part II above should easily withstand this level of review.