

ARRB Boston meeting:

Topics to cover:

(1) Subpoena power (civil)

(2) Section 11(a) powers

(3) documents under seal  
Manchester documents

deeds of gift and donations issues

(4) JFK library -- donations, deeds of gift, etc. [DM to do]

(5) Summary of comments

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Library of Congress

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check statute

leg history

other statutory authority, court rules

case law

treatises

NARA info re pres libraries, donations,

other sources [Manchester file]

## 1. Subpoena power

Per CRS memo, Executive director recommends to the Board that a subpoena issue to an Executive agency which has not granted voluntary access [this looks at HJRes 454]

Per house version, Board may on its own in support of investigative activities exercise the subpoena authority granted by section 8(c)

Provision that Board's subpoenas may be enforced in federal court by DOJ acting pursuant to a lawful request of the Review Board: does not mandate that DOJ seek enforcement at the board's request; Congress probably can't mandate that exercise of prosecutorial discretion.

Question -- are we vested with litigation authority?

Mechanics:

1. Authorization: The ARCA is silent as to whether the Review Board may delegate this power to the Executive Director or to other staff. A CRS report suggests that, insofar as another executive branch agency may be subpoenaed, the Executive Director should request authorization from the Review Board. The Review Board could adopt a procedure whereby each subpoena is authorized by formal recorded vote.

2. Issuance: The statute provides little guidance on this aspect as well. The Review Board could establish a procedure in which the Executive Director (and maybe the General Counsel) is delegated the power to sign and arrange for service of Review Board-authorized subpoenas. Again, this delegation is probably best done by a formal recorded vote. Interpretive

guidelines can be issued (without Federal Register notice and comment) to govern the procedure.

3. *Service:* Nothing is stated in the ARCA regarding the procedures for service. The Review Board could adopt the methods described in Fed.R.Civ.P. 4 and 45. Other methods like registered mail can also be adopted but should again be outlined in specific guidelines established by the Board.

4.

#### ARCA Section 7(j): Powers of Review Board

"(1) The Review Board shall have the authority to act in a manner prescribed under this Act including authority to . . .

(B) direct Government offices to transmit to the Archivist assassination records as required under this Act, including segregable portions of assassination records, and substitutes and summaries of assassination records that can be publicly disclosed to their fullest extent;

(C)(i) obtain access to assassination records that have been identified and organized by a Government office;

(ii) direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act;

(iii) request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the Act;

...

(F) hold hearings, administer oaths, and subpoena witnesses and documents.

(2) A subpoena issued under paragraph (1)(C)(iii) may be enforced by any appropriate Federal court acting pursuant to a lawful request of the Review Board.

(k) Witness immunity -- The Review Board shall be considered to be an agency of the United States for purposes of section 6001 of title 18, United States Code.

Section 10.

(a) Materials under seal of court.

(1) The Review Board may request the Attorney General to petition any court in the United States or abroad to release any information relevant to the assassination of President John F. Kennedy that is held under seal of the court.

(2)(A) The Review Board may request the Attorney General to petition any court in the United States or abroad to release any information relevant to the assassination of President John F. Kennedy that is held under an injunction of secrecy of a grand jury.

...

(b) Sense of Congress. It is the sense of Congress that

(1) the Attorney General should assist the Review Board in good faith to unseal any records that the Review Board determines to be relevant and held under seal by a court or under the injunction of secrecy of a grand jury.

...

II. Section 11(a)

(a) Precedence over other law. When 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 IRC), judicial decision construing such law, or common law doctrine that would otherwise prohibit such

transmission or disclosures, with the exception of deeds governing access to or transfer or release of gifts or donations of records to the United States Government.

...

Legislative history:

S.Rep 102-328:

[9] "to ensure a comprehensive search and disclosure of assassination records, particularly to enable the public to obtain information and records beyond the scope of previous official inquiries, the Review Board has the authority to direct any government office to produce additional information and records . . . and to subpoena private persons."

[21]

Autopsy Records: excluded from the scope of the act, donated by the family per a deed of gift executed on October 29, 1966. "The Committee believes this exclusion is a sound policy. The Committee believe that there is compelling justification for protecting the privacy of the Kennedy family from the unwarranted intrusion that would be raised by public disclosure of the autopsy records by the deed... The deed in no way restricts access to official government investigators concerned with the assassination. Other members of the public may obtain access with written permission. . . Committee found that since the time of the donation that public access has been granted judiciously and fairly [and] . . . this practice can and should continue as set forth by the terms of the deed and will rightfully balance the needs for access by professional with the privacy protection intended by the terms of the deed."

Also restored copies of these materials to NARA. Clear and documented understanding between the family and NARA GC in August 15, 1977 memorandum.

[26]

Presidential libraries. "It is incumbent on the presidential libraries to determine which of its records may qualify as "assassination records", regardless of whether the records were conveyed to the government by a deed or gift or donation, and reviewed under the standards for postponement established in the act."

[32]

Rules of construction.

Deeds of gift. Section 11(a) addresses the need to abide by the terms of deeds of gift and donation of records to the federal government. With the exception of the autopsy records which are excluded from the Act, this provision does not intend to exclude other donated records from the scope of assassination records, and all such records made publicly available are to be included in the the Collection as established by the Act . . .

[T]he committee should to determine the nature and extent of donations and gifts of "assassination records". It found that records and rights in such records have been transmitted by former Presidents, government officials, and private citizens to government institutions, including the Library of Congress, the National Archives, and the presidential libraries. . . . When necessary, the Committee requested that the individual, persons, or entities in controlling access to such records make them publicly available.

[examples]

"To the extent that there are other "assassination records" which have been donated to the federal government, it is intended that the

Review Board fully explore such records and governing legal instruments, and where possible seek the waiver or necessary permission to open the records to the American public."

[42] Review Board has the authority to . . . subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the law [no mention of AG]

House Rep. 102-625

[32]

Review Board should not undertake to petition a court using its own counsel until after it has requested that the Department of Justice do so.

Sanders and Zaid

[162] Witnesses with knowledge or records may come forward only if given adequate assurances of immunity. Board needs to decide whether it will sacrifice remote possibility for criminal prosecution in exchange for information.

III. Documents under seal per private agreement, ratified by federal court and agency action

A. Autopsy materials -- 10/29/66 letter Marshall to Knott (GSA administrator); "The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those

closely associated with him.. We know the Government respects these desires.

B. Manchester documents

1. Settlement agreement, Kennedy v. Harper & Row, Cowles Communications and William Manchester, Jan. 16, 1967. (RFK was also a party to the agreement though not to the suit).

\* Applies to manuscript and material

\* Materials : 4 tapes of JBK plus 1 transcript  
2 tapes of RFK plus 1 transcript

(no copies possessed by anyone except library)

Plus one certified additional transcript for each

interviewee

and one photocopy

RFK and JBK were to certify the accuracy of the original, Manchester kept the copy (if disagreed with the accuracy, provision was made for a /third party to listen to and certify the correctness and accuracy)

\* Photocopies went to the interviewees; the autido tapes and certified transcripts were deposited at NARA for eventual deposit at the Kennedy Library

\* No public release for 100 years from date of agreement, unless

1. express written consent of plaintiff

2. Written certification by defendant that they

need to inspect the transcripts in order to defend themselves in a legal

action. After certification, material inspected cannot be divulged except by written certification in 5 days of intended use, purpose, and limitation to matters reasonably necessary to defend against claim. (expired after 10 years or conclusion of then-pending suits)

2. Judgment/decree -- Jan. 31, 1967

1. "Material" covered includes

manuscript of book

versions of the manuscript

written notes of interviews of any member of plaintiff's family or her household (including person in their personal employ and person who served at anytime during the administration as White House household staff, personal secretaries, Secret service, and white house police attached in whole or part to president or members of personal family)

tape or other voice recording furnished to or possessed by Manchester of plaintiff or members of her family or members of her household (plus copies, abstracts, fragments, transcripts, summaries, excerpts of them)

letters and other written communications to and from JFK and JBK, between them and members of the household staff, (plus copies, abstracts, and summaries)

as were furnished to or obtained by Manchester from 3/26/64 through 3/15/66.

2. Conditions for release

Permanent injunction against publishing the Material, authorizing or consenting to others' publication, or furnishing, exposing or divulging the contents of the Material to anyone except with the consent of plaintiff and the copyright proprietor of the Material to be so divulged, in

each instasn expressed in writing ad addressed to the particualr situation, provided that

a. defendants can use to defend against a legal action

b. bring copyright infringement actions

3. None of the parties can make or authorize any movie, radio or tv program or othe rvisual or aural use of the naumscript or any aprt o fthe Material except on written consent of the plaintiff and the copyright proprietor of the Material.

4. All previous copies of the manuscript were to be destroyed, execte for file copies of versions as designated.

5. Manchester was to deliver to JBK all Material as described above, except for items for which delivery was waived in writing by plaintiff. The material is as described in the settlement agreement re the tapes and transcripts,

6. By separate agreement, Manchester donated the audio tapes and transcripts to the National Archives for deposit at the JFK library. No access for copying or examination until January 1977 except by express written consent of JBK. NARA staff have right of acces to perform necessary archival maintenance and preservation work. The donation form "acknowlege[s] that the restrictions and conditions set forth herein are primarily for the benefit of Jaqueline Kennedy and Robert Kennedy and may not be wiaved or modified without the written ocnsent of both of them and may be enforced by either of them. [agreement is unsigned and undated]. All parties "convey, assign, gives and donate to the government all of [their] rights, title and interest to the materials, subject to conditions." Agreement by all parties says the materials will not be

made public or available for copying by anyone or otherwise, including the parties, for a period of 100 years except on written consent of JBK or her designee [not signed either]

7. July 1967 memo to GSA administrator from the general counsel acknowledges highly restrictive nature of agreement, states belief that they would not be donated but for these terms. Nature of agreement is based on all parties "strong emotions" with respect to the materials and "apparent[] severe problems in communicating and dealing with one another." [Reference to a June 22, 1967 memo not in the file folder.]

8. Manchester and the IRS disputed the fair market value of the donation, and were fighting over an additional \$200,000 tax liability in 1974.

8. August 1967 letters to parties from GSA Administrator. "You may be certain that the tapes and transcripts will be carefully protected and preserved, and that the conditions and stipulations set forth in the agreement covering the gift of these materials to the United States will be observed scrupulously."

#### IV. Deeds of gift/donations

##### A. Archives and Manuscript Law

[p24]

Custody -- right to possession or use

Dominion -- property right

Legal title passage when materials move from person to institution

B. Donations

arms length transactions between equal parties with particular goals and objectives. Compromises agreed on by the parties are embodied in a document.

Donations are gifts, meaning title to the property passes from the giver to the recipient.

Legal characteristics are offer, acceptance, and delivery.

C. Threshold issues -- competency and clear title.

D. Transfer document should record disposition of physical and intellectual property.

E. Transfer recorded by exchange of letters, will or deed.

1. Letters -- indicates acceptance, but often doesn't record restrictions, archives' disposal authority, other issues.

2. Wills

3. Deeds -- elements

[25]

a. Who is the donor?

b. Who is the recipient?

c. Donations to foundations v. institution

if so, should be a separate agreement between the foundation and the institution. Does putting it in a foundation place it beyond applicable access laws? [could be the case with the JBK papers]

d. What is the date of the transfer of title? Need

dates of both donor signature and institutional acceptance.

e. What material is covered?

Can physically transfer all items and donate over as period of years.

f. Who holds the copyright?

g. What are the restrictions on use?

Time/content/both

[26]

h. Who can impose restrictions?

Donor, donor's designee, archivist

i. To whom do the restrictions apply?

j. Who can lift restrictions?

[does control pass to heirs? restrictions of 100 years are "almost always unacceptable"]

k. Who has disposal authority?

[27]

l. A deed of gift is a contract in which both parties promise certain things: the donor to give, the archives to respect the conditions stipulated by the donor in the deed. Once conditions are agreed upon, if the archives fails to meet its obligations the contract can be determined void and the donor could reclaim the property or sue the archives for breach of contract.

m. Conditions under which archives have returned items to donors or depositors. [what is the difference between donation and deposit?] Usually happens because of no clear title to donate. Can happen if donor unhappy. Deed should have revocation rights for that to occur, otherwise archives must consent.

4. Deposit agreements

Statement of intent to transfer title at some future date, usually unspecified, but in the meantime the prospective donor deposits the physical property with the archives for safekeeping. Need elements of

deed and also statement of intent to donate, statement regarding the archives' liability for accidental damage to the property, statement regarding the types of archival and preservation work that may be done.

Can make these materials available for research, but consider how much money will be spent to store, preserve, or process it. [issue re Zapruder film -- costs to govt to store, protect, process]

problem is with transfer of title. Is there authority to transfer title (or just seeking safekeeping)? Reluctance to designate termination date.

## 5. Undocumented gifts

[35]

### F. Tax implications

Current law (1984) -- deduction for donation of personal papers depends on

- a. nature of receiving institution
- b. nature of donated property

what is the fair market value of the property at the time of the contribution -- how much would it sell for on the open market on the day of donation.

c. can donor establish a basis in donated property  
not a capital asset, no long term capital gains, so allowable deduction is the donor's cost or basis in the property, meaning the out of pocket costs from the creation of such material.

Restrictions re future interest.

Morrison v. Commissioner, 71 USTax Ct. 683 (1979).

Humphrey repaid big tax deduction taken for donation of his papers to the Minnesota Historical Society.

[37]

Kerner v. Commissioner, 35 T.C.M. 36 (1976) -- appraisal issue

person's accomplishments and general popularity  
significance of the specific papers  
place and importance of particular papers  
is it an original or photocopy  
composition of market  
intensity of demand

But heirs can take a tax deduction on the donation of personal papers, if the heirs pass the papers through the estate of the creator and pay inheritance taxes. [what is the status of holding it in the LMH corp.]

d. Appraisal issue

(1985 act) donor of property valued over \$5000 to obtain a qualified appraisal of the property. Appraisal cannot be made by the donor, a party to the transaction, the donee, an employee of any of the above, or persons whose relationship would cause a reasonable person to question the independence of the appraiser.

Can hire another party to appraise.

Donor must attach summary of appraisal to the return in which a deduction is claimed and give a copy to the donee, who must acknowledge it.

V. Takings issue

A. Using subpoena power just to secure access to materials held by private parties for purposes of examination or perhaps even photocopying should not present a "takings" problem.

B. Permanent deprivation of a private party of originals which that party has legal title to and a property interest in potentially

implicates the takings clause. (This issue often arises in a real property context.) One question is whether state or federal law will govern this question. Often State property law governs. Where federal records are at issue, applicable federal law likely applies.

C. copies of documents -- a taking?

D. The takings clause doesn't bar the government from taking private property for a public use [a requirement the board most likely can always meet], but only requires that it give just compensation for such property. No need to pay in advance or contemporaneously, can "take now, pay later." Person with claim for just compensation under the Takings clause can bring suit in the court of claims. Where a statute authorizes agency activity that could give rise to a takings claim, the availability of the remedy under the Tucker Act is presumed unless the authorizing statute precludes relief. The ARCA is silent on this.

Issue:

Negotiate agreement with the parties for donation

Accept copies for the collection

Accept summary or description or partial document?

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