

March 22, 1995

TO: *Assassination Records Review Board*

FROM: *Sheryl Walter, General Counsel*

RE: *Section 11(a) and treatment of deeds of gift under the  
Assassination Records Collection Act of 1992 (ARCA)*

The "Rules of Construction" set out in Section 11(a) of the ARCA specifically address how the Review Board should deal with materials that fall into the definition of "assassination record" but are subject to a deed of gift or other deposit instrument in a public or private institution. Section 11 (a) reads:

*"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 Internal Revenue Code), judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure, with the exception of deeds governing access to or transfer or release of gifts or donations of records to the United States Government." (emphasis added)*

The legislative history provides important guidance on this topic, especially as it relates to presidential libraries. The Senate Report

emphasizes that:

*"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 where appropriate, be reviewed under the standards for postponement of the Act . . . \* \* \* Section 11(a) addresses the need to abide by the terms of deeds of gift and donations 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 Collection as established by this Act."<sup>1</sup>*

---

<sup>1</sup> S.Rep. No. 102-328, *President John F. Kennedy Assassination Records Collection Act of 1992*, at 26, 32.

The Senate Report describes in some detail the oversight committee's attempts to "determine the nature and extent of donations and gifts of 'assassination records.'"<sup>2</sup> 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. In certain instances, described in the report, the Senate committee requested that the individual, persons, or entities who controlled access to the records agree to make them publicly available and obtained that consent.<sup>3</sup> In this vein, the Senate Report specifically instructs the Board that:

"[t]o 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."<sup>4</sup>

From these passages, it seems clear that Congress intended that deeds of gift and similar instruments be respected, and that where "assassination records" are identified the Review Board is to consider negotiating agreements with the parties to lift any restrictions on access or to donate them to the government for purposes of inclusion in the Collection

---

<sup>2</sup> Id. at 32.

<sup>3</sup> Id. at 32-33 (relevant excerpt attached).

<sup>4</sup> Id. at 33.

established at the National Archives. (The ARCA and its legislative history are silent as to the effect or intended treatment of donations, deeds of gift, or other instruments transferring "assassination records" to state, local, or private entities.) Moreover, the ARCA's direction that deeds of gifts and related agreements be respected does not appear to preclude the issuance of a subpoena to allow the Review Board to examine the materials to determine whether they are "assassination records." <sup>5</sup>

During the Review Board's visit to the Kennedy Library, it may be useful to inquire about the conditions under which materials likely to be of interest to the Review Board are subject to deeds, donation or deposit agreements, or other instruments, arrangements, or understandings and the nature and extent of any restrictions. It may also be useful to inquire as to what donors or depositors may have been informed about the Review Board's existence and activities and to request copies of any relevant correspondence.

### General principles governing deeds of gift and donations

The exact terms and conditions under which materials are deeded, donated, or deposited in institutions, including federal archives, will vary on a case by case basis depending on individual circumstances, so it will be

---

<sup>5</sup> But see the separate memo in this briefing book on the agreements governing access to the William Manchester materials at the Kennedy library.

important for the Review Board to have access to as much information as possible about such arrangements in order to proceed under the act. As it is helpful to have some understanding of basic issues that arise in many such situations, summarized below are some the standards that often apply, many of which will be familiar already to the Review Board.

A donation of materials to an institution can be effective only if the donor has custody (the right to possession or use) and dominion (a property right in the material). A donation is a gift, meaning that legal title to the materials passes from the donor party to the donee institution, albeit often with restrictions on access agreed on by the parties and described in the documents. The legal characteristics of a donation are an offer by the donor, its acceptance by the donee, and delivery by the donor to the donee.<sup>6</sup>

A significant threshold issue for the Review Board will be whether a particular donor or depositor, at a presidential library or elsewhere, has clear title to the materials, particularly when the materials fall into the definition of "federal records" or where the materials appear to have been produced as part of an individual's official government service. Such materials often in the past have been taken out of government hands upon an individual's departure from a government post, but arguably are still the property of the federal government. This may hold especially true if the records contain national security classified material.<sup>7</sup>

---

<sup>6</sup> Peterson and Peterson, *Archives and Manuscripts: Law, Basic Manual Series*, Society of American Archivists (Chicago, 1985) at 24.

<sup>7</sup> An important exception are presidential records of

Transfers from donors to donees are generally recorded by an exchange of letters, a will, or a deed. Exchanged letters at a minimum usually indicate acceptance of the materials but may not record restrictions, the institution's disposal authority, or other relevant matters. Deeds are a formal agreement transferring title, and should, but do not always, have the following key elements:

1. Identity of the donor
2. Identity of the donee
3. Date of transfer of title with donor signature and institution acceptance
4. Description of the material covered (some agreements initially physically transfer all items but donate them over a period of time)

---

administrations prior to the enactment of the Presidential Records Act. The D.C. Circuit has ruled in the context of former President Nixon's suit for compensation under the Takings Clause following enactment of the *Presidential Recordings and Materials Preservation Act* (passed by Congress to prevent former President Nixon from destroying his papers post-Watergate) that such papers were properly considered the personal property of that president. This ruling was based in part on the practice prior to the Presidential Records Act of presidents exercising complete dominion and control over their presidential papers, with presidential ownership of White House papers found by the court to have been widely assumed by members of all three branches of government. The court found that the government could "take" Nixon's papers but had to compensate him. See Nixon v. U.S., 978 F.2d 1269 (D.C.Cir. 1992).

5. If there is a copyright, designation of ownership
6. Restrictions on use (usually based on lapse of time or materials' content)
7. Who can impose restrictions, to whom they apply, and who can lift them
8. Who has disposal authority

A deed of gift is in essence a contract in which both parties promise certain things, with the donor committing to give and the institution agreeing to abide by the restrictions imposed by the donor as a condition to receiving the gift. Once certain conditions are agreed upon, if the donee fails to meet its agreed-upon obligations the contract can be determined void and the donor could reclaim the property or sue for breach of contract.<sup>8</sup> Another wrinkle that can arise is if the donation is to a foundation related to but separate from the intended recipient institution. In such cases a separate agreement between the foundation and the institution may be required to effect a valid donation.<sup>9</sup>

Materials are often also placed at libraries and archives under deposit

---

<sup>8</sup> See Peterson, supra note 6 at 24.

<sup>9</sup> The Review Board may be confronted with this issue regarding certain papers of Jacqueline Kennedy Onassis, which staff at the Kennedy Library have indicated to Review Board staff have been donated to, although apparently not yet received by, the private foundation affiliated with the Kennedy Library. There may also be a question whether materials deeded to this foundation are subject to the same access laws that generally apply to records in institutions supported by federal funds.

agreements. Such instruments usually are a statement of intent to transfer title at some future date, sometimes unspecified, while in the meantime the prospective donor deposits the physical property with the institution for storage. Sometimes such materials may be available for research and are subject to access by the institution's staff for archival and preservation work, but title is not vested in the institution. There also can be instances of undocumented gifts.

Some record groups at the Kennedy Library about which the circumstances of donation or deposit will need to be determined include the materials donated by William Manchester (described in a separate memorandum in this briefing book), Robert Kennedy's and Edward Kennedy's papers, the records removed by Walter Sheridan shortly after the ARCA's enactment, diaries and other papers deposited by Arthur Schlesinger, and materials to which the House Select Committee had access.

Robert Kennedy's materials appear to be housed at the Kennedy Library under a deposit agreement dated November, 1973, which continues to vest ownership in Mrs. Kennedy (but with a stated intent to donate them to the library in the future) which allows researcher access on the condition prohibiting "use, inspection, or access . . . which might embarrass, damage, injure or harass living persons, or might injure the security interests of the United States." A copy of the agreement between the Kennedy Library and Mrs. Ethel Kennedy is attached.