

Regardless of whether a “government records” requirement exists, the Act effects a taking of the Zapruder film. Without question, Congress may enact legislation effecting such a taking of property. United States v. Carmack, 329 U.S. 230, 240 (1946). By means of a valid enactment, Congress can require or authorize a Government agency to take private property for a Fifth Amendment takings to occur. Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995). But, takings legislation need not expressly divest the former owner of title nor vest title in the United States for there to be a taking. Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992). 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); 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 would satisfy 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, regarding 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. 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 of a similar fashion as 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”). A comparison of the JFK Act with PRMPA proves helpful given that many of their respective provisions mirror each other.

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. The same is true of the JFK Act’s affect on the Zapruder film.

First, both the JFK Act and the PRMPA provide for federal custody or physical possession of the

affected property. The JFK Act provides that:

The Collection shall consist of record copies of all Government records relating to the assassination . . . which shall be transmitted to the National Archives . . . [and all] assassination records that have been transmitted to the National Archives or disclosed to the public.

Section 4(a)(1) and (2). The PRMRA provides:

[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.

Section 101(a).

Second, section 4(d) of the JFK Act authorizes NARA to preserve and protect assassination records in the Collection and explains the restrictions on access of such records by the public. By placing the Zapruder film in the custody of the Archivist as such, the Act restricts the Zapruder family's access to the property.

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.

Third, sections 2(b), 4(b), 5(a)(4) and 9(c) of the JFK Act restrict the Zapruder's right to exclude others from the property. Section 5(a)(4) provides that "No assassination record created by a person or entity outside government . . . shall be withheld, redacted, postponed, or reclassified." As with President Nixon's papers and the PRMPA, through implementation of the JFK Act 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, 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). The Act thus deprives the Zapruder family of the right to destroy the film. In sum, just as the PRMPA mandated a taking of President Nixon's property, the JFK Act mandates a taking of the Zapruder film.

[The JFK Act] not only physically disposed [Mr. Zapruder] of his

property, but it also severely restricted his right of access to the property, his right to exclude others from the property, and his right to dispose of the property. Therefore, under the *per se* doctrine, [the JFK Act] resulted in a “taking”.

Id.