

The original documents are located in Box 20, folder “John F. Kennedy Center for the Performing Arts (2)” of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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FOR IMMEDIATE RELEASE

APRIL 25, 1975

Office of the White House Press Secretary

THE WHITE HOUSE

The President today announced the appointment of seven persons to be members of the Board of Trustees of the John F. Kennedy Center for the Performing Arts. They are:

Ralph Philip Hanes, Jr., of Winston-Salem, North Carolina, Chairman of the Board, Hanes Dye and Finishing Company, Winston-Salem, North Carolina. This is for a term expiring September 1, 1980. He succeeds H.R. Haldeman who has resigned.

Peter H.B. Frelinghuysen, of Morristown, New Jersey, Member of Congress representing the 5th District of New Jersey, Washington, D.C. This is for a term expiring September 1, 1984. He succeeds Edward M. Kennedy whose term expired September 1, 1974.

J. William Fulbright, of the District of Columbia, Counsel to the firm of Hogan and Hartson, Attorneys at Law, Washington, D.C. This is for a term expiring September 1, 1984. He succeeds George Meany whose term expired September 1, 1974.

Frank N. Ikard, of the District of Columbia, President, American Petroleum Institute, Washington, D.C. This is a reappointment for a term expiring September 1, 1984.

Melvin R. Laird, of Marshfield, Wisconsin, Senior Counsellor for National and International Affairs, Readers Digest, Washington, D.C. This is for a term expiring September 1, 1984.

Donna J. Stone, of Evanston, Illinois, President, W. Clement and Jessie V. Stone Foundation; President, Donna J. Stone Foundation; and President, National Committee for Prevention of Child Abuse, Evanston, Illinois. This is a reappointment for a term expiring September 1, 1984.

Jean Kennedy Smith, of New York, New York, Trustee, Joseph P. Kennedy Foundation and Trustee, Lt. Joseph P. Kennedy Child Study Center for Retarded Children, New York, New York. This is a reappointment for a term expiring September 1, 1984.

The Board of Trustees consists of 30 members appointed by the President for 10 year terms.

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THE WHITE HOUSE
WASHINGTON

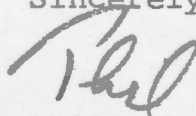
May 19, 1975

Dear Chuck:

From the looks of the attached clipping, the problem concerning the use of the Kennedy Center for the John F. Kennedy Library has been avoided.

Congratulations on the successful effect of your having postponed action by the Center Board.

Sincerely,



Philip W. Buchen
Counsel to the President

The Honorable Charles H. Percy
United States Senator
Washington, D. C. 20510

*J. F. K
Center*



the deuce: "No interest in

THE WASHINGTON POST

Saturday, May 17, 1975

D 2

Narrowing the Sites

For the JFK Library

BOSTON (AP)—The John F. Kennedy Library archives and museum appear destined for the University of Massachusetts, either at the Amherst or at the Boston campus.

The announcement from the library corporation said

forming Arts has been discarded.

The corporation announced Thursday that more than 100 site suggestions had been reviewed and the choices were narrowed to the university campuses.

However, the corporation

SALAMANDER FARM
THE PLAINS, VIRGINIA 22171
703-364-3377

May 28, 1975

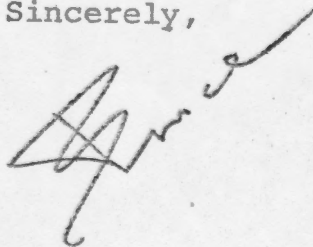
Mr. Philip W. Buchen
Counsel to the President
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500

Dear Phil:

Just a reminder to do something about renominating Mrs. Garrett to the Board of the Kennedy Center, if it is at all possible. Knocking her off the Board caused more unfavorable comment than the job warrants in circles in Washington where the President does not need any criticism at all. I am sure somebody looked, saw how old she was, and said lets remove her. Actually, next to Joy she probably knows more about the Kennedy Center, and has worked harder on it, than any other woman in town, and most men with the exception of Roger Stevens.

Best personal wishes.

Sincerely,



JFK Center



Monday 6/2/75

9:30 Ralph Becker is a trustee and General Counsel of the Kennedy Center and has been with the Center for about 18 years. He has had several calls from trustees to communicate to you -- says he thinks the question is moot, but would like to talk with you and clear it up.

293-1919

(In checking with his secretary, he is also the President of the Iran-American Society and a local attorney.)

He will call back a little later -- probably around

11:30 or 12:00



July 2

file

I telephoned Ms. Hasek's office to see if a message had been sent to Mrs. Garrett by the President when she was made Honorary Trustee of the Kennedy Center.

Ms. Hasek's office had no record of such a message and advised that I contact Central Files. They had no record either.

Shirley



SALAMANDER FARM
THE PLAINS, VIRGINIA 22171
703-364-3377

May 28, 1975


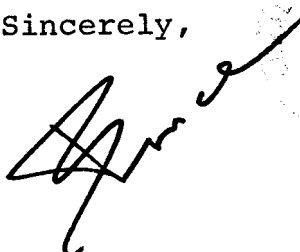
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Best personal wishes.

Sincerely,



This was attached to a
letter you gave me
during dictation.

Shirley



2030 TWENTY-FOURTH STREET
WASHINGTON, D. C. 20008

April 21st

My dear Mr. Buchen,


I did not answer your January 21st letter while I was in Palm Beach, for there seemed to be nothing to say. I do appreciate your effort to bring the subject of the columns to the proper authority, for I know such requests are numerous. I have, however, received so many similar replies to my request that I have put your letter into the "buried file" on the columns.

I did not pursue the subject of the John F. Kennedy Center, for I learned by chance that my appointment ended in 1974. My close association over a period of twenty years with first the National Cultural Centre and then the J.F.K. has made the Centre a paramount part of my life. It is seldom one sees one's dream come true, and I rejoice in its success.

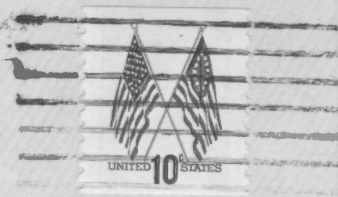
Do tell Mrs. Buchen I will miss her at my Garden Club of America dinner, but quite understand command invitations.

Again, many thanks.

Ethel Garret



POST OFFICE
WASHINGTON, D.C.



The Honorable Philip W. Buchen
The White House
Washington, D. C. 20500

2030 TWENTY-FOURTH STREET
WASHINGTON, D. C. 20008

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27 APR 8

SMITHSONIAN INSTITUTION
INAUGURAL EXHIBIT
SMITHSONIAN




JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Office of
The General Counsel
1819 H Street, N. W.
Washington, D. C. 20006
(202) 293-1919

MEMORANDUM

TO: Members of the Board of Trustees
John F. Kennedy Center for the Performing Arts

FROM: Ralph E. Becker, General Counsel 

DATE: July 3, 1975

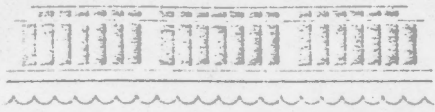
RE: Responsibilities of the Board of Trustees

Enclosed for your information is a copy of a letter to Abe Fortas, from me, in response to his letter of June 23, 1975, regarding our memorandum on the responsibilities of the Board of Trustees.

REB/cjh

Enclosure





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Office of
The General Counsel
1819 H Street, N. W.
Washington, D. C. 20006
(202) 293-1919

June 30, 1975

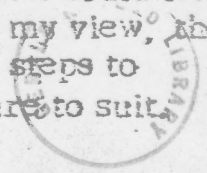
Hon. Abe Fortas
Fortas and Koven
1054 - Thirty-first Street, N. W.
Washington, D. C. 20007

Dear Abe:

I always value your counsel and judgment and appreciate your having set forth your views concerning my memorandum on the responsibilities of the Kennedy Center trustees. To the extent that you clarify my opinion that the trustees are not personally liable for the substantial outstanding debts of the Kennedy Center, your letter is most helpful.

However, it would not be consistent with my obligation as General Counsel to lead the trustees to think that there is no risk of liability. As you know, the facts and circumstances and legal issues relating to the exposure of the trustees to suit and liability are of continuing concern to us. There has already been a suit brought against trustees individually, which is being defended by the Department of Justice only after extensive negotiations and after extensive legal memoranda were prepared. Given the difficulty of persuading the Department of Justice to defend that suit, it is of paramount importance to us to obtain a ruling from the Attorney General that there is no personal liability. We are working with the Smithsonian and the National Gallery, which have a similar interest to ours in the question.

In my review of this area of trustees liability and public official immunity, I considered it important to set forth the facts and circumstances relating to the question as it pertains to the Kennedy Center trustees. Thus, citation of some of the many outstanding obligations of the Kennedy Center was done to point out the unusual facts and circumstances here that could lead to further litigation involving the trustees individually, albeit in my view, the trustees are not personally liable. I also recommended certain steps to carry out our responsibilities as trustees and reduce the exposure to suit.



June 30, 1975

It would not be appropriate at this time to engage private, outside counsel to render an opinion on the trustees liability. Even if we were to obtain such an opinion, which no doubt could be done, it would not provide the protection that an Attorney General opinion, or legislative clarification, would give to the trustees. Many trustees and their attorneys, in addition to Mrs. Folger, have made inquiries of our office about this matter during the past three months, and I am hopeful that it will soon be resolved to everyone's satisfaction.

Best regards,

Sincerely,

Ralph E. Becker
General Counsel

REB/cjh

cc: Mr. Roger L. Stevens





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

June 27, 1975



Board of Trustees
OFFICE OF THE CHAIRMAN

MEMORANDUM TO: Members of the Board of Trustees
John F. Kennedy Center for the Performing Arts

FROM: Roger L. Stevens, Chairman

RHS

For your information, I am attaching a copy of a letter from Abe Fortas, addressed to Ralph Becker, in response to Mr. Becker's memorandum of June 17th to the Members of the Board regarding Responsibilities of Trustees of the Kennedy Center.



FORTAS AND KOVEN

*Canal Square
1054 Thirty-first Street, N.W.
Washington, D.C. 20007*

(202) 337-5700

June 23, 1975

Ralph E. Pecker, Esquire
1819 H Street, N.W.
Washington, D.C. 20006

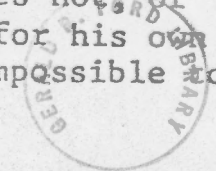
Re: Becker Memorandum on Responsibilities of Trustees

Dear Ralph:

I have carefully read the Memorandum on the responsibilities of Trustees of the Kennedy Center which you distributed at the Trustees's meeting on 18 June, and copy of which you have sent to non-attending Trustees. I am sending you this letter of comment in my capacity as a Trustee.

At a number of Trustees meetings in the past, I have felt compelled to object to statements made by you which, it seemed to me, vastly overstated the exposure of Trustees to personal liability. I felt that these overstatements were intimidating, in effect, although I have always assumed that this was not your purpose. Various Trustees, like Mrs. Folger, have on occasion openly indicated their distress. Your current Memorandum, sent to all Trustees, unless carefully- and perhaps professionally - read, is apt to create further confusion and apprehension. For this reason, I have undertaken the unpleasant and burdensome chore of writing this Comment, although it should be understood that the responsibility for legal advice, presented objectively and clearly, is yours, as General Counsel, and that I do not presume to infringe upon your role.

The net conclusion of your Memorandum, with which I agree, is that the Trustees are not personally liable for the debts or obligations of Kennedy Center. (Your Memorandum, p.5; p.9 "B"; see also last paragraph; p.10). This principle does not, of course, protect a Trustee from personal liability for his own fraud or personal wrongdoing (it is difficult or impossible to



FORTAS AND KOVEN

Ralph E. Becker, Esquire

June 23, 1975

Page Two

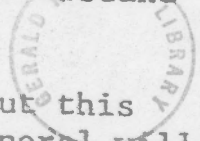
imagine such a situation arising, even theoretically, with respect to the non-operating Trustees of Kennedy Center, none of whom, so far as I know, has business or contractual relations with the Center or has any personal interest which he is capable, even in theory, of serving as a result of his position as Trustee).

As I have stated, it appears that we are in agreement concerning this principle of law. But your Memorandum is so composed that non-lawyer and non-business-executive Trustees may be confused by it, and may, for example, derive the impression that they have some personal liability for the debts of Kennedy Center which are detailed in the first four pages of your Memorandum. I cannot believe that you intended to create this impression, particularly because it is negated by your conclusion as to their immunity from personal liability.

Of course, I agree that Trustees should be aware of the financial condition of the Center, and that they should do what they can, individually and as a governing body, to deal with this problem and to oversee the steps taken relevant to it. This is, however, an obligation of conscience and public duty, and it is wrong, in my opinion, to seek to spur Trustees into meeting this obligation by insinuating a degree of personal legal accountability which does not exist. - I believe that you will agree with this observation, and that the contrary impact of your Memorandum was unintended.

Similarly, I regret your reference to the fact that the Trustees, individually, may be sued - even if there is no justification for the suit in terms of individual liability of the Trustees. - Of course, they may be joined as defendants in a suit; but the emphasis upon this is extremely confusing to many Trustees. - I may sue the Queen of England for divorce, and it is harmless to me to assert this because I doubt if the Queen would be distressed or tempted to surrender the throne because of my entirely valid assertion to this effect; but reiteration of such a statement to our Trustees causes needless concern and creates misunderstanding with respect to many of them.

May I respectfully suggest that it is about time to put this matter to rest. I will be pleased if the Attorney General will



FORTAS AND KOYEN

Ralph E. Becker, Esquire

June 23, 1975

Page Three

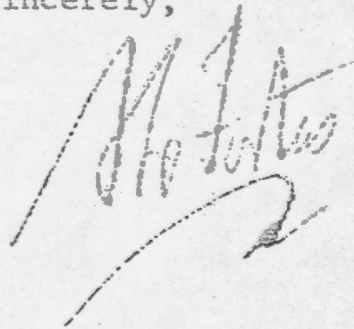
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We simply cannot, in justice and fairness to many of our Trustees and to Kennedy Center, permit the erosion of confidence to continue.

I am sending a copy of this letter to the Chairman of the Board of Trustees with my permission to circulate this to the Trustees, if he so desires.

My personal regards.

Sincerely,

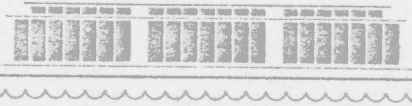
A handwritten signature in dark ink, appearing to read "Ralph E. Becker", with a long, sweeping flourish extending from the bottom of the signature.

cc: Roger L. Stevens, Chairman



File in
"Kennedy Center"






JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Office of
The General Counsel
1819 H Street, N. W.
Washington, D. C. 20006
(202) 293-1919

MEMORANDUM

TO: Members of the Board of Trustees
John F. Kennedy Center for the Performing Arts

FROM: Ralph E. Becker, General Counsel 

DATE: July 3, 1975

RE: Responsibilities of the Board of Trustees

Enclosed for your information is a copy of a letter to Abe Fortas, from me, in response to his letter of June 23, 1975, regarding our memorandum on the responsibilities of the Board of Trustees.

REB/cjh

Enclosure





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Office of
The General Counsel
1819 H Street, N. W.
Washington, D. C. 20006
(202) 293-1919

June 30, 1975

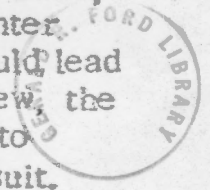
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Hon. Abe Fortas

- 2 -

June 30, 1975

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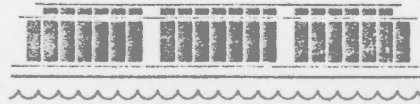
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Ralph E. Becker
General Counsel

REB/cjh

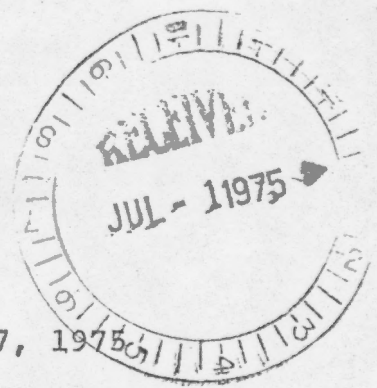
cc: Mr. Roger L. Stevens





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

June 27, 1975



Board of Trustees
OFFICE OF THE CHAIRMAN

MEMORANDUM TO: Members of the Board of Trustees
John F. Kennedy Center for the Performing Arts

FROM: Roger L. Stevens, Chairman

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FORTAS AND KOVEN

*Canal Square
1054 Thirty-first Street, N.W.
Washington, D.C. 20007*

(202) 337-5700

June 23, 1975

Ralph E. Becker, Esquire
1819 H Street, N.W.
Washington, D.C. 20006

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FORTAS AND KOVEN

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FORTAS AND KOVEN

Ralph E. Becker, Esquire
June 23, 1975
Page Three

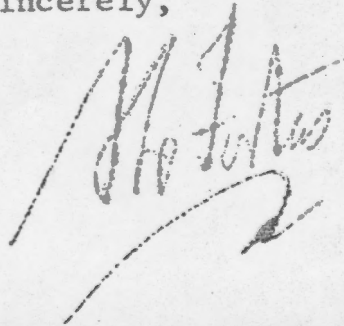
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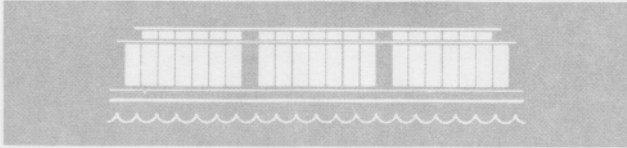
My personal regards.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. E. Becker", with a long, sweeping flourish underneath.

cc: Roger L. Stevens, Chairman





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

OFFICE OF THE
GENERAL COUNSEL

June 19, 1975

Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

I am enclosing a memorandum that was distributed at the Kennedy Center Board of Trustees meeting on June 18, 1975, for your information.

Ralph Becker
General Counsel





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

June 17, 1975

MEMORANDUM

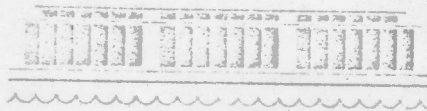
TO: Board of Trustees, John F. Kennedy Center for the
Performing Arts

FROM: Ralph E. Becker, General Counsel

RE: Responsibilities of Trustees of the John F. Kennedy
Center for the Performing Arts

(Please note that this Memorandum is for the use only of
the members of the Board of Trustees and of the officers
of the Kennedy Center; it is subject to the attorney-client
privilege.)





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

Office of
The General Counsel
1819 H Street, N.W.
Washington, D.C. 20006
(202) 293-1919

MEMORANDUM

TO: Board of Trustees, JFK Center for the Performing Arts

FROM: Ralph E. Becker, General Counsel

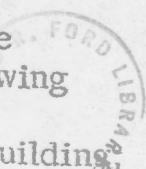
RE: Responsibilities of Trustees of the John F. Kennedy Center
for the Performing Arts

The question of the liability, responsibilities and exposure to suit of the Kennedy Center trustees has been raised by several trustees, in different contexts, during the past several months, and this memorandum is to provide some guidance for the answer to the question.

I. FINANCIAL DIFFICULTIES OF THE CENTER

The trustees have overcome numerous obstacles since the project was first established as the National Cultural Center in 1958. In the early years, the prospects for adequate funding were not good, but the concept was kept alive by the contribution of \$1 million by the late Corrin Strong to cover administrative expenses. When Roger Stevens became Chairman in 1961, the Kennedy Administration continued support for the concept. The project was reduced in size and before President Kennedy's death, plans were underway for a large-scale fund-raising effort. In addition, plans were made for federal funding of the parking garage substructure of the building, and the total cost in 1964 was estimated at approximately \$46.4 million.

The conversion of the project to a living memorial to the late President in 1964, with provision for matching appropriations and borrowing authority, made the project a feasible one; but the difficulties continued. The trustees first overcame grave opposition to the planned site of the building, we construed applicable statutes, with the concurrence of the Treasury Department, to permit deferment of payment of interest on the revenue bonds from 1972 to 1978; and we needed to provide for continuing administrative costs for operations of the Board of Trustees. These and many other problems prior to the commencement of construction were overcome under circumstances which need not be reviewed here.



The trustees continue to be faced with several substantial problems, primarily financial.

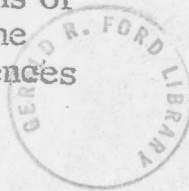
A. Construction Problems

First, construction problems, not uncommon to all large-scale projects, and not anticipated by either the trustees or by experts engaged to assist in planning, have been particularly endemic to the Kennedy Center. The architect seriously underestimated the amount of steel required for the building, by almost fifty percent. The drawings failed to provide adequately for coordination of the work required of the various trades. Numerous other deficiencies appeared as the project got underway. And they unfortunately were not uncovered quickly enough by General Services Administration, the Center's agent for design and construction. The architectural problems were complicated by numerous deficiencies in the work of the general contractor, marked at first by the untimely death of the person who was originally designated to supervise the job. And, construction took place during a period of unprecedented escalation in construction costs of approximately 12 percent per year. The result was the increase in the cost of the building from its original estimated amount to its present estimated total cost of somewhat more than \$72 million, exclusive of pending claims.

As a result of these unanticipated increases in costs, there was a severe shortage of funds for completion of the building. Several actions were taken. We were able to obtain some increase in borrowing authority and matching appropriations from the Congress in 1969. Deferral of completion of portions of the building, which remain incomplete today, was mandated. We were able to raise substantial funds totalling around \$4.25 million through financially advantageous agreements with our parking and restaurant concessionaires and other programs for raising funds were pursued.

Much of the remaining slack has been taken up by the United States Government as a result of the determination by the Justice Department that so long as the trustees are without funds, unpaid contractor invoices of over \$2 million are the obligation of the United States because, inter alia, the Kennedy Center building is a "public building" as defined by statute. In addition, the Justice Department has determined that the United States is liable for contractor delay damage claims, if established, totaling over \$4 million. These claims allege damage from delays in construction of the project caused by actions of the Government and by deficiencies in the designs and specifications of the architect. These determinations by Justice came after extensive conferences and briefs.

Important determinants in these conclusions by the Justice Department were the use of appropriated funds for construction and the



decision of the trustees to engage the General Services Administration as agent for design and construction of the building. But notwithstanding the Justice Department determinations, the Board is still faced with substantial accounts payable arising out of construction of the building and not payable by the United States.

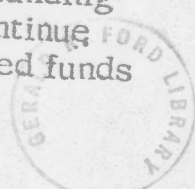
B. Operation and Maintenance

Another area of difficulty encountered by the trustees has been operation and maintenance of the building. For many years, representations were made to the Congress that no operations and maintenance funds would be necessary. By the time that the building opened in September, 1971, the cost of operations and maintenance had risen substantially, and the number of persons wanting to visit the memorial was far in excess of what had been anticipated. Because of the construction difficulties encountered, the trustees were without any funds. Accordingly, after consultation with the Office of Management and Budget, Congress and the National Park Service, 1972 amendments to the Kennedy Center Act were enacted providing for Park Service assumption of responsibility for "nonperforming arts" functions in the Kennedy Center building. The trustees now contribute 23.8 percent of the joint costs of operation and maintenance, although we face continued demands to increase our share. With the recent increases in utility and other operation and maintenance expenses, the trustees are fortunate to have made these arrangements for the operation and preservation of the building at a high standard.

We are still left, however, with substantial accounts payable incurred during the period of operation prior to the Park Service assumption of responsibility for operation of the building and in excess of the \$1.5 million appropriated by the Congress to the Board for operation and maintenance expenses during the fiscal year 1972.

C. Performing Arts Productions

A third area of continuing concern to the trustees is the need for funding for performing arts activities of the Kennedy Center. The establishment of Kennedy Center Productions, Inc., to handle "speculative" production activities has been of assistance to the trustees in carrying out its mandate to present attractions and programs and in keeping its theaters in full operation. Further numerous grants, restricted to performing arts programming, have been received from foundations and corporations for special performing arts programs and for the Bicentennial program. The Chairman has projected that there will be sufficient restricted funding for programs now contemplated. As in the past, the Board must continue to determine that it has or reasonably anticipates sufficient restricted funds



to assume additional obligations for production activities. Because of other outstanding obligations, any funds used for production activities must generally be restricted to that use by the donor.

As discussed at the last trustees' meeting, plans are being implemented to meet anticipated programming needs. The Board might also consider that the American Film Institute is requesting Congress to earmark to AFI 4% of the National Endowment for the Arts appropriations. Similar and private funding sources, restricted to use for productions, must be found if the Center is to incur substantial production obligations in the future.

D. Construction Deficiencies

Another area of concern is in the deficiencies that the trustees and the Park Service have encountered in construction of the building. Primary among these are the leaks in the roof terrace on the 109-foot level and the leaks in the East Plaza roadway. Although the Justice Department is asserting damages, by way of counterclaim against the architect and contractor in pending litigation, any recoveries will go only to reduce judgments rendered against the United States. The Park Service and the Congress maintain that construction deficiencies cannot be repaired out of appropriations for operation and maintenance. The cost of repair is in excess of \$1 million. Congress may be amenable to providing funds for these repairs.

E. Revenue Bond Interest

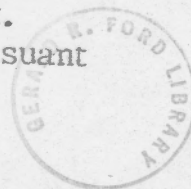
Finally, the trustees face the impending question of what to do about payment of accrued revenue bond interest, which will total \$14.6 million, when due in 1978. Yearly interest payments are also to begin in that year. There appears to be no reasonable prospect for meeting these payment requirements and appropriate relief must be sought at the appropriate time from the Congress. These bonds are payable to the United States, totaling \$20.4 million.

* * *

These are some of the most apparent problems confronting the Board of Trustees. They, and others, are plainly evident from an examination of our audited financial statements and General Accounting Office reports. They are, in my judgment, no more difficult than others faced successfully in the past. But they must be attended to and acted upon with prudence by the Board, pursuant to its responsibilities under the Kennedy Center Act.

II. EXPOSURE TO SUIT

In considering the steps to be taken to meet these problems, the trustees must be aware of the trend of an increasing number of suits brought



against officers and directors of corporations and trustees of charitable organizations. Further, the courts have been increasingly willing to expand their definition of standing, that is, of the class of persons who may bring these suits.

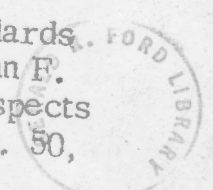
While there are cases going the other way, a recent District of Columbia suit is a good example of the increased exposure of trustees of charitable institutions to judicial scrutiny and of the expanding concept of "standing". In Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F. Supp. 1003 (1974) (called the "Sibley Hospital case"), the court permitted a former patient, representing a class of all patients, to assert claims of conflicts of interest among the trustees of the hospital and mismanagement of the hospital. The right of the patient to recover damages was proscribed, but the court permitted the plaintiffs to "act to prevent continued injury to the Hospital caused by the trustees' self-dealing and overreaching." Id. at 541.

The court in the Sibley Hospital case ultimately found that there had been no conspiracy between the defendant trustees and certain financial institutions with which they were associated to enrich themselves at the expense of the Hospital, but did find that there had been serious breaches by the trustees of their fiduciary duty to manage the hospital's investments. The breaches involved mismanagement, nonmanagement, and self-dealing.

In my view, the standards of a fiduciary, as applied in the Sibley Hospital case, are applicable to the Kennedy Center Board.^{1/} However, I do not consider that the trustees may be held personally responsible for their actions, because of their status as public officials.

The exposure of public officials to suit is no doubt more circumscribed than is the case with trustees of charitable corporations such as were involved in the Sibley Hospital case. The Supreme Court first recognized the immunity of government officers in the Executive Branch in 1845, when it denied recovery for an erroneous determination requiring the exercise of judgment by the defendant official. Kendall v. Stokes, 44 U.S. 87. Fifty years later, in Spalding v. Vilas, 161 U.S. 483 (1896), the Court held that the head of an Executive Department was not liable for money damages

^{1/} The basis for this view is the legislative history of the National Gallery Act, discussed *infra*, which indicates that trustee standards are to control the actions of National Gallery trustees. The John F. Kennedy Center Act, 72 Stat. 1698, as amended, is in many respects modelled on the National Gallery Act, Act of March 24, 1937, c. 50, 50 Stat. 51, 20 U.S.C. §§71-75.



for the performance of discretionary acts "having more or less connection with" the matters committed by law to his discretion. Id. at 498. Discretionary decisions, as opposed to operational decisions, have continued to be held to be immune from question to the present time. See, Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Barr v. Matteo 360 U.S. 564; Wood v. Strickland, _____ U.S. _____, 43 U.S.L.W. 4293 (1975). The immunity of Executive Branch officers also has been extended to other public officials in numerous cases.

However, even if the Kennedy Center trustees are immune from suit as public officials, there is some exposure to suit, even if there is limited potential personal liability. So long as the Kennedy Center is without any reserve of funds, there is a danger that trustees individually may be named as defendants in suits brought against the Kennedy Center, even though the claim may be without merit. An example is the case arising out of a 1971 agreement between the Board of Trustees and the contractor, in which the obligations of the Board were expressly to be met out of nonappropriated funds. In this suit, Pierce Associates, Inc. v. John McShain, Inc., et al., the trustees individually were named as defendants and in the ensuing discovery proceedings, questions were asked of witnesses relating to whether or not it was prudent for the trustees to enter into this agreement and whether there were sufficient funds to meet obligations arising out of the agreement when it was entered into in June, 1971. It is now expected that the suit will be settled, with the payment of \$485,000 by the United States and of \$35,000 by the Kennedy Center, with a full release of the trustees individually. (See, my report at the Board of Trustees meeting of February 25, 1975, as set forth in the minutes, relating to efforts by Pierce to upset the settlement of this case.

III. RESPONSIBILITIES OF THE KENNEDY CENTER TRUSTEES

Given that the trustees are at least susceptible to suit individually, the question then arises as to what standards of conduct are applicable to the trustees. This question is really distinct from the final question considered later -- the extent to which the trustees are liable personally for failing to meet these standards.

The John F. Kennedy Center Act, 72 Stat. 1698, as amended, itself defines specifically the authority and responsibilities of the Board in Section 6(b), as follows:

"The Board shall have all the usual powers and obligations of a trustee in respect of all trust funds administered by it."

This language curiously refers to the Board and not to the individuals who make up the Board. This same language appears in the legislation creating the Board



of Trustees of the National Gallery of Art, Act of March 24, 1937, c. 50, §5(c), 50 Stat. 53, 20 U. S. C. §75(c) and the legislative history of that act may indicate that the language is intended to set the standards of conduct for the trustees individually as well as the Board as a whole.

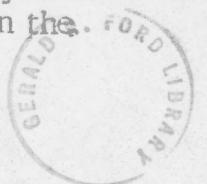
In H. Report 291, 75th Cong., 1st Sess. (1937), the House Committee on the Library, in reporting the National Gallery legislation, states that "the Board has the usual powers and obligations of a trustee and under general law would be subject to the supervisory powers of the appropriate courts of the District of Columbia" (p. 4). Similar language appears in the Senate Report on the National Gallery legislation, S. Report 114, 75th Cong., 1st Sess. at 4 (1937). Thus, the reports do not specify the obligations of the individual members of the Board. However, debates in the Senate on the bill give some indication that trust standards should control the conduct of individual members of the Board. During the floor debates, Senator Robinson made the following remarks when considering the manner in which the Board will be compelled to comply with its obligations:

" . . . any trustee can be compelled by proceedings in the courts to execute his trust in conformity with the trust deed. "

81 Cong. Rec. 2218 (1937)

Whether or not the standards of a trustee are applicable to the trustees of the Kennedy Center individually, we have counselled that prudence dictates that such standards should be adhered to. This memorandum obviously is not the place to give a comprehensive discourse on trust law. However, as particularly applicable to the Kennedy Center Board, brief reference should be made to the principal obligations of trustees that are commonly recognized by the Courts.

The duty of loyalty is the fundamental obligation of a trustee. He must administer the trust exclusively in the interest of the ultimate beneficiaries of the trust (in the case of the Kennedy Center, the people of the United States) and cannot put himself into an apparent or real conflict of interest situation. The duty not to delegate, is perhaps not fully applicable to the Kennedy Center because of other provisions in the Kennedy Center Act permitting the appointment of officers and employees for administration of the functions of the Board. Nevertheless, the provisions in the Act for delegation of functions cannot be construed to relieve the Board of its essential obligation to administer the Kennedy Center and carry out the trust established under the Kennedy Center Act. The duty to keep and render accounts is one which finds expression in the



Kennedy Center Act, where the trustees are obligated to report annually to the Congress and the Smithsonian Institution, "including a detailed statement of all public and private moneys received and disbursed by it." Section 6(c). In this regard, the General Accounting Office was particularly critical in its 1972 report to the Congress on the Kennedy Center. The most recent GAO report, submitted in April to the Congress, indicates that the Board's accounting functions are now satisfactory, except for the suggestion that an independent internal auditor be appointed. Recently, a member of the House Public Works Committee contemplated legislation requiring the establishment of the position of an independent internal auditor.

A trustee is under a duty to exercise ordinary care and skill. In administering the trust, the trustee must exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. Where an individual trustee has particular skills superior to that of the ordinarily prudent man, that individual trustee is held to a correspondingly higher standard of care. The application of this standard in the context of the present financial difficulties confronting the Kennedy Center is of primary importance. Under this standard generally, obligations may be incurred only where it is reasonably anticipated that there will be sufficient funds available to meet them.

The duty to administer the trust requires that, once appointment as a trustee is accepted, responsibility as a trustee cannot be disclaimed except in accordance with the terms of the trust. In the case of the Kennedy Center, it would appear that the trustees cannot disclaim responsibility unless and until their terms of appointment expire or until their resignations are accepted.

In addition to these generally applicable standards, the Kennedy Center trustees have several specified responsibilities under the Act which shall also be mentioned. Under Section 3, the Board was required to construct the Center building for the Smithsonian (it does not belong to the Kennedy Center Board). Under Section 2(a), the Board has the duty to administer and maintain the Kennedy Center (a living memorial) and its site, subject to the supervening responsibility of the Park Service for "nonperforming arts" functions in the building. Under Section 4, the Board is to present performing arts attractions, lectures, and special youth and elderly programs, and provide facilities for civic activities. And under Section 4(5) the Board is to provide a suitable memorial to the late President within the building. All of these responsibilities are to be met subject to the "usual . . . obligations of a trustee", as required under Section 6(b)



IV. LIABILITY OF THE TRUSTEES INDIVIDUALLY FOR THEIR ACTS OF OMISSION OR COMMISSION

As I have already commented, prudence would dictate that the trustees of the Kennedy Center should generally carry out their responsibilities in accordance with the standards applicable to trustees. However, the personal liability of the trustees for failure to meet this standard, is a separate and distinct issue.

A. Indemnification and Insurance

The trustees have been afforded considerable protection in this regard for many years. In the Kennedy Center By-Laws, there are provisions requiring the Kennedy Center to indemnify the trustees individually for liability they personally incur for acts of omission or commission. Further, the Kennedy Center maintains a standard officers and directors liability policy to cover the exposure of the trustees. Indemnification finds explicit sanction in the District of Columbia Nonprofit Corporation Act, 29 D. C. Code §1005(n). You should be advised that recently the National Gallery of Art trustees are considering an amendment of their by-laws to provide for indemnification and the purchase of an officers and directors liability policy.

But even with insurance and the indemnification provisions, the trustees are not fully protected. An indemnification provision can be determined to be inapplicable where there is a finding of bad faith. It is of little value where the institution is without funds to provide indemnification, as may be the case with the Kennedy Center. Many, although not all, possible claims against the trustees may be protected under the officers and directors liability policy; but insurance policies do not cover liability under certain exclusions, including failure to give notice of claims, conflicts of interest, failure to carry insurance, and others.

B. Public Official Immunity

The principal protection afforded to the trustees individually is their status as public officials. But the status of the trustees as public officials entitled to immunity for their discretionary acts, is not fully settled. The Justice Department has already determined that the trustees are immune from suit for their actions relating to construction.^{2/} This determination may or may not be adhered to by the Courts. No such determination has been made with respect to other activities of the Board, such as performing arts production

^{2/} In the pending suit of Pierce Associates, Inc. v. John McShain, Inc., the Department of Justice made the determination that for purposes of that suit, the trustees are public officials, immune from suit, and this defense is raised in the papers filed in that case. But it is doubtful that the District Court will rule on the defense, since the case will be settled. Further, we cannot rely upon the Justice Department decision as being of general applicability because of the very limited scope of the determination that was made.

activities. In my view the activities of the Board in construction and presentation of performing arts are not divisible. The statute requires the Board to do both in administering the living memorial. Immunity, accordingly, should cover all trustees activities.

The bases for Kennedy Center trustee immunity are the Kennedy Center Act itself, establishing the Center as a Smithsonian bureau without waiving the immunity normally applicable to governmental instrumentalities and the determinations in many contexts by other agencies since 1958, that the Kennedy Center is an instrumentality of the United States.

This question of immunity is one of common concern to our sister organizations, the National Gallery and the Smithsonian. Their counsel, with us, are exploring avenues to clarify the issue, including the obtaining of a ruling from the Attorney General, Office of Legal Counsel. Legislative clarification might also be considered; however, the legislative route, requires considerable study as there are many complications that must be resolved.

V. CONCLUSION

Unlike the situation with the National Gallery Board of Trustees and the Smithsonian which have substantial trust funds and continuing federal appropriations, the Trustees of the Kennedy Center are particularly susceptible to suit because of the shortage of funds available to the Kennedy Center to meet existing obligations.

Under these circumstances, the trustees should continue to be prudent in their administration of the Kennedy Center, giving particular heed to the standards which govern the conduct of trustees. Particular attention should be given to remaining construction obligations, operation and maintenance requirements, funding required for performing arts productions, construction deficiencies and revenue bond obligations.

Should there be another suit, similar to the Pierce suit, against the trustees individually, the trustees should be protected by the immunity which generally covers public officials. But should a court determine that the trustees are not immune, the indemnification provisions in the Center's By-Laws, the officers and directors liability policy, and the general adherence to trustee standards of conduct may adequately protect the trustees from personal liability.



THE WHITE HOUSE
WASHINGTON

June 16, 1976

*Kennedy
Center
(see
International)
+
Bicentennial*

MEMORANDUM FOR: MILT MITLER
SUSAN PORTER

FROM: PHIL BUCHEN *P.W.B.*

SUBJECT: Presentation by Prime Minister Miki
of gift from the Japanese government
to the Kennedy Center

Between the time that the President meets with Prime Minister Miki and the time of the luncheon to be held afterwards, it is planned that the Prime Minister will present a \$3 million check to the Kennedy Center for a new studio theater as the major Bicentennial gift from the Japanese government.

Roger Stevens would very much like to have Mrs. Ford, as Honorary Chairman of the Board of the Kennedy Center, receive this gift at a brief ceremony which could be attended by other members of the Board of Trustees. Although Roger Stevens is now out of the city and may not be back before June 30th, he advises me that people in his office will be available to assist in making the arrangements for attendance by members of the Board of Trustees.

cc: General Scowcroft
Jeanne Davis



Tuesday 6/15/76

Meeting
6/30/76
1 p.m.

10:45 Will you want to call Roger Stevens on this?

(Luncheon for the Prime Minister of Japan)



NSC-3264

KE 8/3/88
CONFIDENTIAL (CDS)

June 14, 1976

MEMORANDUM FOR:

Mr. George S. Springsteen
Executive Secretary
Department of State

SUBJECT: Luncheon for Prime Minister Miki of Japan

This is to confirm that the luncheon for Prime Minister Miki on June 30 will take place at 1 PM instead of 12:30 PM. Please inform the Japanese.

151
Jeanne W. Davis
Staff Secretary

cc: Jay Taylor
Gen. Scowcroft

Susan Porter
Maria Downs
Military Aide's Ofc
Milt Mittler
Phil Buchen ✓

3079

VIA LDX
NSC-3264

June 11, 1976

~~CONFIDENTIAL~~ (GDS)

MEMORANDUM FOR:

Mr. George S. Springsteen
Executive Secretary
Department of State

SUBJECT: Presidential Meeting and Lunch for Japanese
Prime Minister

The President has agreed to receive Prime Minister Miki on June 30 for a 60-minute office meeting at 11 AM and will host a luncheon in his honor at 12:30 PM, along the lines of the luncheon for Danish Queen Margrethe. It is our understanding that the Japanese Government wishes to present its major Bicentennial gift of a \$3 million check to the Kennedy Center for a new studio theatre on the occasion of the Prime Minister's visit to Washington. In this regard, the White House is agreeable to a brief and small ceremony in the Rose Garden following the Oval Office meeting for the purpose of the presentation of the check. We understand that the Minister in charge of the Prime Minister's office will want to present the check and we believe it would be appropriate for him to present it to Roger Stevens. ARBA Administrator John Warner could be in attendance and the press could be called in to view the presentation. The President will be present for the ceremony but should not be the recipient of the check.

The Department is requested to confirm acceptance of the meeting and luncheon. At the same time, the Department should convey to the Japanese the White House desire to have the ceremony follow the lines indicated above and seek their concurrence. It should be made clear that the presentation ceremony is to be brief, would conclude following presentation of the check, and attendance should be strictly limited.

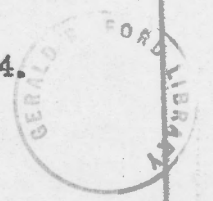
Please provide a suggested guest list for the luncheon to include spouses, no later than June 17. The Japanese party should be kept to 12. We would also appreciate knowing as soon as possible whether Mrs. Miki is planning to accompany the Prime Minister.

We will need the briefing material for the Miki visit no later than June 24.

Jeanne W. Davis
Staff Secretary

cc: Jay Taylor
Gen. Scowcroft

KE 8/3/88
~~CONFIDENTIAL~~ (GDS)



1706D
Stevens, Roger

THE WHITE HOUSE

WASHINGTON

May 24, 1976

MEMORANDUM FOR:

BRENT SCOWCROFT

FROM:

PHIL BUCHEN *P.*

SUBJECT:

Japanese Bicentennial Gift
to the John F. Kennedy
Center for the Performing
Arts

Attached is a copy of a memo from Roger Stevens to me on the above subject. I would very much appreciate your having someone on your staff prepare a Schedule Proposal.

I would join in recommending approval of the suggestion.

Attachment





JOHN F. KENNEDY CENTER FOR THE PERFORMING ARTS

May 21, 1976

Board of Trustees
OFFICE OF THE CHAIRMAN

MEMORANDUM FOR: Philip Buchen

FROM: Roger L. Stevens

SUBJECT: Japanese Bicentennial Gift to the
John F. Kennedy Center for the Performing Arts

As you know, the Japanese Government has agreed to contribute \$3 million to complete the studio theatre above the Eisenhower Theatre at the Kennedy Center.

Would it be possible for the Japanese Ambassador to present the check for this purpose directly to President Ford at the White House?

There would be about 12 to 15 people in their official party, some of whom would fly over from Tokyo for the event. They would be accompanied by a Japanese press corps of about 25 reporters. In addition, we would expect at least 25 Trustees from the Kennedy Center and several other appropriate guests. The ceremony should not take more than 15 minutes. The Embassy has suggested that any time between June 10 and June 15 would be suitable, at the President's convenience. However, they would appreciate some advance notice for those who would be planning the trip from Tokyo.

For your information, on July 9th, the Japanese Government will be presenting to Secretary Butz 100 bonsai trees for our Arboritum. I understand that these trees are from 200 to 300 years old and are invaluable. In addition, they will present 100 cherry trees to the District of Columbia in September, as well as hundreds of other cherry trees to the cities of San Francisco, Los Angeles and Seattle. Certainly these fine gifts are the most important the United States has received for the Bicentennial.

I appreciate very much your giving this your personal attention, and I will look forward to hearing from you.

