

National Archives and Records Administration

Transmittal Memo

DATE: September 28, 2006

TO: Office Heads, Staff Directors, ISOO, NHPRC, OIG

SUBJECT: NARA 1462, Recovery of Alienated Archival Materials

Purpose: This transmits a revised directive that outlines NARA's policy on replevin and criteria that staff must use to act on allegations and instances of alienation of archival materials that were in the National Archives of the United States or that should have been in the National Archives of the United States.

Background/significant changes: This directive, first issued on March 27, 2003 as Replevin of Archival Materials, now includes updated guidance to inform staff of instances when NARA may decide to pursue custody of Federal records that were never accessioned into the National Archives of the United States.

Effective date: This directive is effective the date of signature.

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Archivist of the United States

National Archives and Records Administration

NARA 1462
September 28, 2006

SUBJECT: NARA 1462, Recovery of Alienated Archival Materials

1462.1 What is the purpose of this directive?

This directive specifies NARA's policy on replevin and the procedures for acting on allegations and instances of alienation of archival materials that were in the National Archives of the United States or should have been in the National Archives of the United States.

1462.2 What is the authority for this directive?

- a. 44 U.S.C. 2107, 44 U.S.C. 2111, 44 U.S.C. 2111note, 44 U.S.C. 2112, 44 U.S.C. 2202, and 44 U.S.C. 2207 authorize the Archivist of the United States to accept records with historical value from Federal agencies, Congress and legislative branch agencies, the judiciary, and Presidential administrations.
- b. As the lawful custodian of archival Federal and Presidential records, the Archivist is also authorized under 44 U.S.C. 2905(a) and 44 U.S.C. 3106 to pursue replevin actions to recover records alienated from Federal custody that were or should have been in NARA's custody.
- c. The Inspector General Act of 1978, as amended, 5 U.S.C. App. 3 also applies.

1462.3 Definitions

- i. Alienation is: In a strict legal sense, the transfer of ownership of property. In addition, as used in this directive, alienation is the improper transfer or loss of custody of records/archives by their original custodian or owner to someone not legally entitled to them.
- ii. Owner is the individual or entity having legal title to records or archives. In this directive owner does not refer to an individual or entity having only physical possession of records or archives.
- iii. Replevin is the term used to describe a legal mechanism by which an owner recovers property that has been improperly separated or illegally removed from its custody. For purposes of this directive, this refers to NARA's civil recovery of archival materials.

1462.4 What materials are covered by this directive?

This directive covers archival Federal records, Presidential and Vice Presidential records, Nixon Presidential historical materials, and donated historical materials, including artifacts, that were or should have been in NARA's custody.

1462.5 What records are not covered by this directive?

This directive does not address:

- a. Records held by a Federal agency that are eligible for immediate accessioning into the National Archives (sometimes referred to as “retained records”).
- b. Records improperly removed from an agency when the records are still in the legal custody of the agency. (See NARA 1463, Unauthorized Destruction or Removal of Federal Records at Agencies, for steps NARA takes to assist agencies with the recovery of records removed while still in their legal custody.)
- c. Loans of records in the National Archives to Federal agencies and other institutions. (See NARA 1701, Loans of Holdings in NARA’s Physical and Legal Custody, for issues relating to securing overdue loans of records.)

1462.6 Who is responsible for implementing this directive?

- a. All NARA staff are responsible for reporting the discovery of suspected alienated records to their immediate supervisor and the Office of Inspector General (OIG). Par. 1462.7 describes the procedures to follow.
- b. The pertinent custodial unit in the Office of Presidential Libraries (NL), Office of Regional Records Services (NR), or Office of Records Services--Washington, DC (NW) reviews the records in relation to NARA’s holdings and provides supporting information to OIG and NGC, as appropriate.
- c. The Office of the Inspector General (OIG) investigates suspected criminal alienation and seeks recovery of archival materials that have been removed from NARA’s custody. OIG:
 - i. Notifies the Archivist, General Counsel (NGC), and the appropriate office of any reports as appropriate;
 - ii. Uses investigative methods permissible under the Inspector General Act of 1978 (Pub. L. 95-452), as amended, such as subpoena power, interviews, or other means;
 - iii. Works with individuals or entities contacting NARA about possible lost and stolen documents, as a result of the appeals on www.archives.gov, partnership with outside organizations, or other means;
 - iv. Mobilizes the Archival Recovery Team, which consults with NARA subject matter experts and NGC; and
 - v. Consults with the Department of Justice (DOJ) as appropriate.

- d. The Office of General Counsel (NGC) handles NARA's civil recovery efforts through settlement, replevin litigation, or other legal means. NGC:
 - i. Notifies the Archivist, OIG, and the appropriate NARA office (if the report did not come from the office) of any reports relating to suspected alienation;
 - ii. Develops the necessary background information about the records with the assistance of the relevant NARA custodial unit(s);
 - iii. Coordinates with DOJ, as appropriate, if NARA seeks civil remedies; and
 - iv. Obtains the approval of the Archivist before engaging in any recovery action.

1462.7 What must be done if alienation of records is suspected?

- a. Any staff member who discovers or receives a report of suspected alienated records (including information received in good faith from an institution that discovers possible alienated records among its holdings) must notify his or her immediate supervisor and OIG. See the Recovery Flowchart at the end of this directive.
- b. If suspected alienated records are to be auctioned or otherwise sold, provide OIG and NGC sufficient information to evaluate whether to try to stop the sale, while more detailed information is being developed (see subpar. e).
- c. The pertinent custodial unit in NL, NR, or NW conducts an initial assessment and reports to OIG as quickly as possible on whether the item:
 - i. Is a Federal record;
 - ii. Is appropriate for preservation at NARA; and,
 - iii. Was ever in the possession of NARA.
- d. If all three conditions are met, the OIG has lead responsibility. If conditions one and two, but not three, are met, then NGC has the lead responsibility.
- e. The custodial unit of the records then works with OIG and NGC as appropriate on the investigation and recovery effort, including by providing the following information:
 - i. A clear description of the records, including date span and subject matter if possible,
 - ii. A copy of the information that brought the records to the staff member's attention (e.g., catalog page, a letter from the public, or if an online auction, cite the specific item control number or other identifier).

- iii. Contact information for the current holder of the records, including the name of individual or institution, address, phone number, and relevant web sites or e-mail addresses, if known; and, if possible,
 - iv. For records that were held by NARA, documentation establishing that the records had been in NARA's physical or legal custody, such as a NARA-signed Standard Form 258, Agreement to Transfer Records to the National Archives of the United States, signed deed of gift or deposit agreement, or other legal documentation. Examples of other evidence are that the records are reproduced in a microfilm publication or described in a guide to records, finding aid, or other NARA product. A Federal file code or equivalent marking on documents is also another useful indicator. If such documentation is not immediately available, forward it as soon as it is located to OIG in a follow-up to the first notification of suspected alienation.
- f. In the case of a possible violation of an affiliated archives agreement:
- i. Staff must notify their immediate supervisor who must notify the NR or NW Affiliated Archives contact and the NR Affiliated Archives liaison;
 - ii. Supervisors contact the appropriate office that is the liaison for the affiliate, either NW or NR, depending on which affiliated archives is involved; and,
 - iii. The office of liaison may request that NGC review the relevant affiliated archives agreement.

1462.8 When does NARA take action to recover alienated records?

Our ability to document the circumstances of removal and establish Federal Government ownership of the materials may affect our assertion of title; each case must be assessed individually before taking any action.

- a. NARA always seeks the return of records alienated by loss or theft from NARA's custody (both physical and legal).
- b. In other instances, NARA determines on a case-by-case basis whether to seek recovery or allow the records to continue to be maintained by the current holder of the records, if the holder is an institution that can preserve and provide public access to the records consistent with NARA standards. NARA may request a copy of records maintained by the institution in some circumstances. For information about Affiliated Archives agreements, see NARA 1501, Custody of Federal Records of Archival Value. For information on Affiliated Archives applications and their review process, see NARA 1502, Procedures for Processing Proposals for Affiliated Archives.

The following chart provides a basic outline on NARA decision making:

If the records are...	...then
<ul style="list-style-type: none"> ● Federal records accessioned by NARA, including accessioned records located at an affiliated archives ● Presidential records (from January 20, 1981 to present) that have been transferred to NARA, excluding records for incumbent Presidents ● Donated historical materials accessioned by a Presidential library or the National Archives of the United States ● Nixon Presidential materials held by NARA 	<p>NARA seeks, without exception, the physical return of such records by appropriate means, including legal action if necessary.</p>
<ul style="list-style-type: none"> ● Federal records currently held by a non-Federal entity that are closely associated with NARA archival holdings 	<p>NARA seeks such records if we determine that the records should have come to NARA under an approved records schedule or under Federal law and the records warrant accessioning. NARA may explore establishing the non-Federal entity as an affiliated archives in some situations.</p>
<ul style="list-style-type: none"> ● Presidential or Vice Presidential materials covered by a deed of gift with NARA but currently held by a non-Federal entity 	<p>In coordination with the former President or Vice President, as appropriate, NARA seeks such records if we determine that the records should have come to NARA and that the records warrant depositing in a Presidential library.</p>
<ul style="list-style-type: none"> ● Supreme Court or Congressional records that have been on deposit with NARA 	<p>In coordination with the Supreme Court or the Congress, NARA may assist with the recovery of such records at the Court's or Congress's request.</p>

1462.9 How does NARA seek the return of records that belong in NARA's custody?

- a. If there is evidence that the alienation of NARA holdings was the result of theft or other criminal misconduct then the OIG will work with appropriate Federal and/or state

prosecutors to recover the holdings. If prosecution is declined or no criminal conduct is involved, OIG will work as needed with NGC to recover the material.

- b. If NGC determines, in consultation with the appropriate office (NW, NR, or NL), and the OIG, as appropriate, that records identified through the procedures in par. 1462.7 should have been, but never were in NARA's physical or legal custody, NGC establishes and presents the case for return of the records to NARA custody to the Archivist for a final decision.
 - i. If the Archivist determines that the records belong in NARA's physical or legal custody, NGC works to recover the records from the current custodian, including by:
 - a. Notifying the current custodian of the records of NARA's interest and provides our reasons for seeking return of the records;
 - b. Requesting that the records be safeguarded until NARA determines whether the records should be physically transferred to NARA; and,
 - c. Asking the current custodian how the records came into his or her custody.
 - d. Seeking recovery through donation or other voluntary settlement.
 - ii. If the current holder of the records does not agree to voluntarily return the records to NARA, NGC may initiate litigation, in coordination with the Department of Justice, and may request assistance from OIG. OIG may open an investigation leading to recovery. If recovery does not occur as a result, OIG works, as needed, with NGC to assist with recovery action.

1462.10 How does NARA decide whether to seek recovery of records that were never in our custody?

The decision to pursue the recovery of Federal records, Presidential and Vice Presidential records, Nixon Presidential historical materials, and donated historical materials, including artifacts, that were never in our custody is made on a case-by-case basis. Because the background research and other resources needed to prepare for a recovery action can be substantial, the alienated record must be both worth the effort and clearly a Federal record that would be accepted in a court of law (particularly if a formal replevin action needs to be taken through the courts). Among the evidence of Government possession that can serve as proof are: distinctive file markings and references in registers, microfilm, or other preservation copies. Accordingly, NARA considers the following criteria in making this decision:

- a. The content and the context of the alienated record or records clearly fit into a series of records or into a record group legally owned by the National Archives. (Note: the records could be in an Affiliated Archives, in which case they would not be physically in NARA, but would still be owned by NARA.)

- b. The record can easily be identified as Federal in nature. That is, the record has clearly visible file markings or other indicators that it was received and filed by the Federal government; or there are reliable and authentic register entries, microfilm or other copies, or other information that indicate receipt by the Government.
- c. Upon examination of applicable records schedules, deposit agreements, or other documentation, we have no reason to believe the record left government custody in accordance with authorized disposition instructions.
- d. The record has sufficient special value to justify the replevin effort. NW, NR, or NL archivists must furnish documentation to NGC in support of this value determination based on the guidance in par. 1462.11.

1462.11 How do we determine special value?

- a. We use this term in connection with recovery actions when NARA determines that it must take custody of an original record because of qualities in a record that a copy does not adequately convey.
- b. Some indicators of special value are:
 - i. Association with an important person, place, thing, issue, or historical event;
 - ii. The informational or evidential content of the record;
 - iii. The record's format or media, such as unique art, graphics, or other factors that give the record exhibit potential inherent in the original record; and
 - iv. Appeal to researchers or other special communities of users of NARA holdings such as military and war historians, local historians, historic preservationists, transportation historians, tribal historians, and others.
- c. Some records could be associated with an important person, place, event, thing, issue, or historical activity, but not have significant informational or evidential content. Such records may not possess sufficient special value to warrant recovery.
- d. A record must have significant special value to justify the extraordinary effort required to initiate replevin action of an item that was never in NARA's custody.
- e. In most cases, all four criteria listed in subpar. b should apply to an item to make the recovery effort worthwhile.

1462.12 Does NARA have any examples of how the process of determining special value works?

Yes. The following examples may be helpful:

- a. Example One:
 - i. A web search revealed the pending sale of a letter from Abraham Lincoln appointing George Harrington to serve temporarily as Secretary of the Treasury in the absence of Salmon P. Chase.
 - ii. Analysis of images of the document and NW holdings indicated that this appointment letter was received and recorded by the Department of State but that it was not filed following registration.
 - iii. Further, the entire text of the appointment letter had been entered in volume 2 of the Department of State's series of Temporary Presidential Commissions.
 - iv. NW concluded that replevin was not warranted in this case because "the content of the letter is routine and the entire text is in our files in the official record book."

- b. Example Two:
 - i. A web search uncovered a letter offered for sale from the Secretary of War Jefferson Davis to the Attorney General concerning the relationship of the Articles of War to the cadets of the Military Academy.
 - ii. Analysis showed that receipt of this letter had been registered by the Attorney General and that NW holdings include other letters registered as having been received at the same time and under similar circumstances, as well as the Attorney General's legal opinion responding to the letter.
 - iii. However, additional evidence indicated that this particular letter had never been in NW custody.
 - iv. Because this document clearly fit into a series of records in NW custody, had markings supporting its identity as a Federal record that was not authorized for disposal, involved important officials and concerned an important topic, NW recommended that action be taken to recover the item. Recovery was achieved through a donation.

1462.13 How are records created by this directive maintained under the NARA records schedule?

- a. NGC - Maintain records under file no. 1101, General Legal files or 1105, Litigation files, as appropriate.
- b. OIG - If theft is suspected or reported, maintain records under file no. 1208, Investigative Case files.

- c. If the matter results in an accession, acquisition or proposal to establish an affiliated archives:
 - i. Custodial units - If an accession or acquisition results, maintain records NW/NR/NL units would use file no. 1405 accession dossiers or 1409 acquisition case files (Presidential / Donated materials).
 - ii. Affiliated archives proposals - Records created by responsible offices and the review panel are currently unscheduled. They may not be destroyed until further notice (when a disposition has been approved by the Archivist of the United States.) Also see NARA 1502, par. 14.
- d. All other units - Maintain records under the appropriate program subject file (e.g., 109-2b).