



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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May 13, 1980

The Honorable Margaret M. Heckler
House of Representatives

Dear Mrs. Heckler:

This is in response to your letter raising several questions concerning the proposed sale of the Gilbert Stuart portraits of George and Martha Washington by the Boston Athenaeum to the Smithsonian Institution. The Smithsonian had originally planned to purchase the portraits for the offered sale price of \$5,000,000. More recently, however, a new agreement has been reached whereby the Boston Athenaeum has arranged to sell the portraits to the Smithsonian Institution and the Boston Museum of Fine Arts jointly for the combined purchase price of \$4,875,000.

Several of the questions you raised concern the general authority of the Smithsonian to enter into contracts of this type for the purchase of new acquisitions. In order to answer these questions it is necessary to first consider the unique nature of the Smithsonian.

The Smithsonian Institution was created in 1846 (9 Stat. 102) to administer the trust of John Smithson, who bequeathed the bulk of his estate "to the United States of America to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge among men." The principal of the bequest was required to be lent to the United States Treasury at 6 percent interest which was appropriated to the perpetual maintenance and support of the Institution. A tract of publicly owned land was appropriated to the Institution and the construction of a suitable building for a museum, laboratory, library, art gallery, and lecture rooms was authorized. From time to time the functions of the Smithsonian have been increased by laws placing under its control additional establishments or authorizing it to extend its activities into additional fields, but its fundamental organization and powers have remained substantially unchanged. See 20 U.S.C. §§ 41^{et seq.}

The nature of the Smithsonian was described at length by James Bradley, Under Secretary of the Institution, in the course of testimony before the Subcommittee on Library and Memorials, Committee on House Administration, July 21, 1970, p. 262:

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"* * * The Smithsonian was established as a charitable, nonprofit corporation to carry out the trust responsibilities of the United States, but independent of the Government itself.

"It receives the support and assistance of each branch of the Government without becoming a part thereof."

Mr. Bradley also quoted former Chief Justice Taft who said, at a 1927 Conference on the Future of the Smithsonian Institution:

"I must make it clear, gentlemen, that the Smithsonian is not and never has been considered a government bureau. It is a private institution under the guardianship of the government."

As a "private institution under the guardianship of the government" the Smithsonian enjoys broad discretion in the conduct of its affairs. This independence is specified by statute. For example, in reference to the National Portrait Gallery, 20 U.S.C. § 75e provides that the Smithsonian's Board of Regents is empowered to:

"(1) purchase, accept, borrow, or otherwise acquire portraiture, statuary, and other items for preservation, exhibition, or study. The Board may acquire any such item on the basis of its general historical interest, its artistic merit, or the historical significance of the individual to which it relates, or any combination of any such factors. The Board may acquire period furniture and other items to enhance its displays of portraiture and statuary.

* * * * *

"(4) sell, exchange, donate, return or otherwise dispose of any such item."

Further, the Smithsonian has statutory authority to accept and expend funds from private sources. Section 55 of title 20, United States Code, recognizes "the power of the Smithsonian to receive money or other property by gift, bequest, or devise, and to hold and dispose of the same in promotion of the purposes thereof." 20 U.S.C. § 56 provides for the disposal of unappropriated money as follows:

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"The Regents are authorized to make such disposal of any other moneys which have accrued, or shall hereafter accrue, as interest upon the Smithsonian fund, not herein appropriated, or not required for the purposes herein provided, as they shall deem best suited for the promotion of the purpose of the testator."

The Smithsonian, then, is funded both through Federal appropriations and by private bequests and donations. The administrative expenses of the Institution are generally paid from appropriated funds, the expenditure of which may be audited by this Office. In addition, the Smithsonian holds and administers a number of other funds for purposes stipulated by their donors. All trust funds may be expended by the Institution in accordance with the Smithsonian bequest, or other bequests, and are not subject to the usual rules applicable to Federal funds. We do not have the authority to audit the expenditure of such trust funds. (B-184705, September 4, 1975.)

In response to our request for information, S. Dillon Ripley, Secretary of the Smithsonian Institution, advised us that no appropriated funds will be used to purchase the Stuart portraits. According to the Secretary's letter, a copy of which is enclosed, the Smithsonian's share of the combined purchase price, \$2,750,000, would be met entirely from trust funds available to the Institution.

At the time you sent your letter, the issue of whether the Athenaeum held a marketable title to the Stuart portraits was as yet unresolved. In answer to an action brought by the Proprietors of Boston Athenaeum in the Probate and Family Court, Suffolk County, Massachusetts (No. EQ 1907), the Attorney General of the Commonwealth of Massachusetts subsequently approved the compromise plan for a joint sale to the Smithsonian and the Museum of Fine Arts. A hearing on the matter was held on March 31, 1980, and the court concluded that the Boston Athenaeum is authorized to sell the Stuart portraits of George and Martha Washington to the Boston Museum of Fine Arts and to the Smithsonian for \$4,875,000, under the terms of the agreement among the parties dated February 25, 1980, and pursuant to the restrictions imposed by the Commonwealth Cultural Preservation Trust upon its contribution (which includes the funds raised by citizens' groups) to the Museum of Fine Arts. We are enclosing copies of the judgment, pleadings, and relevant agreements.

It should be noted that the litigation in Massachusetts was concerned solely with the issue of the Athenaeum's authority to sell the Stuart portraits.

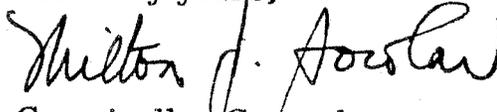
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To our knowledge, the issue of the Smithsonian's authority to purchase the portraits has not been determined by the courts, nor is it the subject of current litigation. As discussed above, the Smithsonian Institution has statutory authority to expend its private, unappropriated funds as the Regents deem "best suited" to promote the purposes of the trust. In addition, the Board has extremely broad discretion in obtaining artwork for exhibition in the National Portrait Gallery. The Smithsonian, of course, must follow the general contract principles which apply to all private individuals. However, we know of no rule of contracts which would prohibit the Smithsonian from purchasing the portraits under the terms of the approved agreements. Since, as noted above, we do not have the legal authority to audit the Smithsonian's trust funds, we are not in a position to comment on the present sufficiency of those funds to consummate the purchase.

Finally, if the proposed contract for the sale of the Stuart portraits is in fact executed, the terms call for the Smithsonian to pay its full share of the joint purchase price at the time of the closing. Following the sale, title would vest jointly in the Boston Museum of Fine Arts, and under 20 U.S.C. § 75d, the Smithsonian Institution. Accordingly, the copyrighting and marketing of reproductions of the portraits would seem to be matters to be resolved by and between the Museum and the Institution as joint owners.

We hope this information is helpful.

Sincerely yours,



For the Comptroller General
of the United States

Enclosures

GENERAL ACCOUNTING OFFICE

Audits

Agencies and activities not
subject to audit by GAO
Smithsonian Institution