

MEMORANDUM

ATTORNEY-CLIENT
PRIVILEGED and CONFIDENTIAL

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To: David Marwell
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From: Laura Denk

Subject: Permissible Scope of the Assassination Records Review Board's Authority to Compel Information, Records, and Testimony from Private Persons

The President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act") grants the Review Board the power "to request the Attorney General to subpoena private persons to compel testimony, records, and other information *relevant to its responsibilities under the Act.*" 44 U.S.C. 2107.7(j)(C)(iii) (Section 7(j)(C)(iii)). Related to the Review Board's subpoena powers are its powers "to hold hearings, administer oaths, and subpoena witnesses and documents" and "to grant immunity to witnesses." 44 U.S.C. §§ 2107.7(j)(F) and (k) (1992).

On its face, section (j)(C)(iii) does not specify the types of "testimony ... and other information" the Review Board may compel from private persons. A narrow reading of this provision might limit the Review Board to asking only those questions that involve the location of assassination records. A broad reading of this provision would allow the Review Board to compel from witnesses any information that may reasonably lead to the discovery of additional records or the authentication of already obtained records. Read with the plain language of the JFK Act, the Act's legislative history supports a broad reading of section 7(j)(C)(iii).¹

¹Legislative history evidences that Congress did place an outside limit on the scope of the Review Board's authority to compel testimony and information -- the Review Board must restrain from reinvestigating the assassination.

[T]he legislation does not authorize any new official investigation of the assassination. Its only purpose is to create a process by which the American public may be given the most complete access to review relevant records and to make their own observations and assessments.

The Assassination Materials Disclosure Act of 1992: Hearing on S.J. Res. 282 before the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 1 (1992) ("Senate Hearings").

There are several indications in the text of the JFK Act that Congress did not intend for the Review Board to halt its efforts at superficial questioning of witnesses. First, Congress' decision to provide the Board with powerful tools to compel information from private persons, such as the subpoena power and the immunity power, indicates that Congress expected that the Review Board would need to use them.

The Review Board's authority as facilitators, fact finders, advocates, and adjudicators is substantial. In addition to the authority to seek additional information, the Review Board has the authority to ... subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the law; ... receive information from the public regarding the identification and public disclosure of assassination records; and hold hearings, administer oaths, and subpoena witnesses and documents.

Nominations of Graff, Tunheim, Nelson, Joyce, and Hall: hearing before the Senate Comm. on Governmental Affairs, 103d Cong., 1st Sess. 13 (1994) (statement of Senator John Glenn).

Second, the text of the Act indicates that Congress intended for the Review Board to use its subpoena power to compel "*testimony, records, and other information."* If Congress had intended for the Review Board to compel records only, the rest of the phrase would be meaningless. Maxims of statutory construction teach us that no statutory text should be interpreted as though it were meaningless.

Third, the JFK Act directs the Review Board to derive the scope of its power to compel information from witnesses from its *other responsibilities under the Act*. A close examination of the Review Board's responsibilities under the Act reveals that Congress' primary goal in creating the Review Board was to restore public confidence in the Government's handling of the assassination investigation. This goal is evidenced by legislative history:

[T]he goal [in creating the Act] was to ensure a complete review and disclosure of files while at the same time satisfying the public that the Government was not covering up some conspiracy.

Assassination Materials Disclosure Act of 1992: Hearing on H.J. Res. 454 before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 102d Cong., 2d Sess. 55 (1992) (statement of Rep. Louis Stokes).

This bill is the result of a climate of suspicion and distrust that has grown over the years regarding the official explanation of the assassination of President Kennedy. ***

Disclosure of information is the only reliable way to maintain the public trust and to dispel distrust.

Senate Hearings at 1 (statement of Senator John Glenn). Congress clearly wanted to restore public confidence on the issue of the assassination, but it recognized that its prior attempts to meet this same goal (the Warren Commission, the House Select Committee, etc..) failed. Congress conceived of the JFK Act and the Review Board as an alternative means of reaching the same goal it has had for years:

Since the death of President Kennedy, we have had [investigations]. Yet, as we sit here today, major questions still remain in the public's mind. *** The American public has the right to put this assassination investigation behind it with the confidence that we know as much as we can know, that the Government conducted a full and responsible investigation, and that the findings that have been made are the most reliable and responsible ones. That can't happen unless and until the documents involved are made available to the public to the fullest extent possible, and we must make that happen.

Senate Hearings at 7 (statement of Senator Carl Levin).

There are several ways in which the Review Board can fulfill its statutory mandate to restore public confidence, without running the risk of reinvestigating the assassination. First, it can process and transmit to the Archives those documents that Federal agencies and private parties have already collected as assassination records. Second, it can seek out previously undocumented assassination records, primarily by investigating leads that indicate that some person may have records or knowledge of records. Third, it can authenticate those records that have already been named assassination records. Because so many questions about the assassination center around the forgery and/or destruction of documents, the authentication of assassination records is particularly important to the Review Board's mission to restore of public confidence.² Thus, locating and authenticating all existing records on the assassination is well within the scope of the Review Board's authority. More controversial is the Review Board's authority to create "new" records by compelling the testimony of private persons. Under some circumstances, the Review Board may conclude that its duty to restore public confidence requires it to question witnesses about more than the location and

²For example, the Review Board included "artifacts" in its definition of assassination record. *Guidance on Interpreting and Implementing the President John F. Kennedy Assassination Records Collection Act of 1992*, 60 Fed. Reg. 33,345, 33,350 (1995). To meet its objective of restoring public confidence, the Board must inquire into the existence, location, and *authenticity* (creation of the artifact, state and condition of the artifact when individual first saw it and last saw it, changes in the artifact, etc...) of the artifact.

authenticity of assassination records. Legislative history would support such a conclusion, as Congress has stated its intent that the Review Board go beyond the scope of previous inquiries in fulfilling its mandate.

To ensure a comprehensive search and disclosure of assassination records, particularly to enable the public to obtain *information and* records beyond the scope of previous official inquiries, the Review Board has the authority to ... subpoena private persons and to enforce the subpoenas through the courts.

S. Rep. No. 102-328, 102d Cong., 2d Sess. 19 (1992) ("Senate Report").

However, in going beyond the scope of previous inquiries, the Review Board must strike a balance. It must be careful not to reinvestigate the assassination primarily because Congress did not empower the Review Board to do so, but also because the Review Board does not have the resources to complete a full investigation, and a partial investigation will simply arouse additional suspicion in the Government's handling of the assassination.

If the Review Board compels witnesses to answer questions that do not relate directly to records, that fact alone does not signify that it is engaging in a reinvestigation. The Review Board will not be drawing conclusions at the end of its existence. Rather, it will be collecting the records it has gathered and placing them in the JFK Collection, and to the extent that testimony is information that has yet to be placed in a "record" form, the Review Board may choose to compel testimony and complete the record.

It may be useful to note that Congress provided the Review Board with the authority to issue guidelines interpreting the JFK Act, indicating that Congress anticipated that the Review Board may need to further refine parts of the JFK Act. The Review Board may want to consider issuing such guidelines in areas where the statute and the legislative history leave broad questions.

The Review Board must exercise its powers to seek additional records in a reasonable manner. "In exercising its authority the Review Board should act on a reasonable basis in requesting additional information or records." Senate Report at 31. Based on the statutory text and the legislative history, the Review Board may reasonably conclude that it is *at least* authorized to seek that information that appears reasonably calculated to lead to the discovery of records. Such a baseline standard would at least permit the Review Board to compel witnesses to answer any question as long as the Review Board can provide a reasonable explanation of how the information it requests could lead to additional records or information about records.