

April 14, 1998

DRAFT

Hon. Frank Hunger
Assistant Attorney General
Civil Division
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Assistant Attorney General:

On ____, the Assassination Records Review Board sent a letter to you requesting that the Department of Justice issue a *subpoena duces tecum* to Mr. Lawrence Schiller for the production of *copies* of Soviet KGB records related to Lee Harvey Oswald. The Review Board has yet to receive a formal response to that request, although we have had ongoing discussions with attorneys in the Federal Program Branch concerning that subpoena. I am writing this letter to express our concern at the delay and to provide you with an additional explanation as to why we believe the Department of Justice should issue the subpoena.

Let me first, however, express our appreciation for the support that we have received during the past three years from the Department of Justice. We have appreciated the timely responses to our previous requests for the issuance of subpoenas and are pleased that all requests heretofore have been granted.

Background on the Soviet KGB Records on Lee Harvey Oswald

Because I am sure that there is little question about the importance of the records at issue, I will be brief. The accused assassin of President Kennedy, Lee Harvey Oswald, lived in the city of Minsk in the Byelorussian Republic of the Union of Soviet Socialist Republics from 1959-62. During that period, it is now known, Oswald was under close surveillance of the Soviet KGB. The files created by the KGB are now physically located in Minsk, Belarus.

More than three years ago, the Review Board decided that the pursuit of the Soviet KGB records on Oswald was an important part of its responsibilities under the JFK Act. Accordingly, the Review Board requested that the Department of State approach the Belarusian government and asked that it provide either copies or originals of the KGB files. Although no final answer has been

Hon. Frank Hunger
April 14, 1998
Page 2

received, the State Department does not believe that it is likely that Belarus will agree to make the files available. It is our firm understanding, however, that Belarus previously made some of these files available for copying to Mr. Lawrence Schiller and Mr. Norman Mailer, who were then preparing a book that ultimately was published as *Oswald's Tale*. (The Review Board has approached both Mr. Mailer and Mr. Schiller regarding the obtaining of copies, but failed to receive a favorable response.)

The Soviet KGB Records Fall Within the Review Board's Subpoena Authority

In enacting the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (JFK Act), Congress specifically identified the Soviet KGB records on Oswald as records "that may *hold information relevant to the assassination of President Kennedy . . .*" JFK Act § 10(b)(2) (emphasis added). It was the "sense of Congress" that the Secretary of State should approach the Government of Belarus to obtain this "information relevant to the assassination." *Id.* But the JFK Act provided not only that the Secretary of State should assist the Board in obtaining such "relevant" information, it found that all parts of the Executive branch should cooperate in pursuing such information. Thus the JFK Act provided that "*all Executive agencies should cooperate in full with the Review Board to seek the disclosure of all information relevant to the assassination of President John F. Kennedy consistent with the public interest.*"¹ JFK Act § 10(b)(3) (emphasis added). Because the Congress itself identified the KGB records as "information relevant to the assassination," and because the Congress specifically urged all Executive Branch agencies to cooperate with the Review Board in obtaining such information, there can be no question but that Congress intended the Department of Justice to assist the Review Board in obtaining relevant records, provided that there is a legal and appropriate mechanism for doing so.

¹The Act defines "public interest" as "the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes *and for the purpose of fully informing the American people about the history surrounding the assassination . . .*" § 3(10).

The JFK Act itself provided the Review Board with at least two such mechanisms for obtaining records from private parties. *First*, the Review Board is authorized to “request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act” Id. § 7(j)(1)(C)(iii). *Second*, the Review Board is authorized to “hold hearings, administer oaths, and subpoena witnesses and documents” JFK Act § 7(j)(1)(F). It is noteworthy that neither of these two subpoena authorizations is limited to “assassination records” as defined in § 3(2) of the Act.² Rather, the first subpoena mechanism extends to “information relevant” to the Board’s responsibilities, and the second subpoena mechanism contains no subject matter limitation whatever.

Given that Congress itself identified the Soviet KGB records as relevant, and given that Congress itself requested that all Executive Branch agencies cooperate with the Review Board in pursuing such relevant information, there is scarcely any subpoena that could be issued by the Department of Justice that would be more in line with the purpose of the JFK Act.

Moreover, agencies have broad discretion to issue subpoenas to obtain information relevant to their work. In a Supreme Court brief filed on behalf of the Review Board on April 10, 1998, the Solicitor General stated in words that would be fully applicable in an enforcement action for the subpoena now being requested:

This case involves an attempt to enforce an administrative subpoena. The scope of a district court’s inquiry in a proceeding to enforce an administrative subpoena is limited. [citations omitted] Though the test for enforcement has been phrased in various ways, the requirements to justify judicial enforcement of an administrative subpoena are ‘minimal’ [citations omitted], and the proceedings are summary in nature. [citations omitted.] The district court’s inquiry is essentially limited to three broad questions: (1) whether the records investigation is for a proper statutory purpose; (2) whether the documents the agency seeks are relevant to the records investigation;

²The definitional section of the JFK Act might be construed as limiting the scope of “assassination records,” and thus the scope of the Review Board’s authority, to records that were “created or made available for use by, obtained by, or otherwise came into the possession of [Federal agencies].” § 3(2). The question whether the Board has the authority to broaden the scope of “assassination records” will be discussed below.

and (3) whether the demand for documents is unreasonably broad or burdensome. [citations omitted] A district court must enforce a federal agency's investigative subpoena if it is 'not plainly incompetent or irrelevant to any lawful purpose of the [agency].'" [citation and footnote omitted.] If the government agency satisfies that 'minimal' standard, the burden then shifts to the subpoenaed party to make 'a *substantial* demonstration * * * based on meaningful evidence' that the Court's process would be abused by enforcement.

SG Brief, *Connick v. United States* [etc. etc.] at ___. Under this standard, articulated by the Solicitor General only last week, the Board's attempt to subpoena copies of documents on Lee Harvey Oswald is fully justified.

The Review Board May Subpoena Schiller's KGB Records because they are "Assassination Records" as Defined by the Review Board's Interpretive Regulations

As shown above, the Review Board's subpoena power is sufficient grounds for issuing a subpoena to Mr. Schiller without considering any other portion of the JFK Act. It thus is not necessary for you to decide whether the Review Board may issue interpretive regulations that broaden the definition of "assassination records" in order to decide that a subpoena properly may be issued to Mr. Schiller. Nevertheless, the issue of the scope of the Board's authority to issue such interpretive regulations has been raised by attorneys at the Department of Justice. Because this issue has been raised, and because it is apparently thought to be of relevance in reaching a decision on the Schiller subpoena, I thought it might be appropriate for me to address the issue in a very preliminary way here. To the extent that you deem this issue to warrant further analysis, I am prepared to address it further.

The JFK Act provides that the "Review Board may issue interpretive regulations." § 7(n). The Board in fact issued such regulations, which have been published at 36 C.F.R. § 1400 *et seq.* The Review Board's interpretation of "assassination records" included records related to the assassination of President Kennedy that are in private hands. *See* 36 C.F.R. § 1401(a). This interpretation arguably extends the scope of "assassination records" beyond the statutory definition provided at § 3(2) and would encompass records in Mr. Schiller's possession.

Obviously, the Review Board, like all Federal agencies, must interpret the terms of its authorizing legislation in a reasonable manner and in such a way as to accord with the essential purpose and meaning of the Act. Citing the authority of the Supreme Court, the Fifth Circuit found that the Review Board's interpretive regulations were valid.

Interpretive regulations are valid if they 'harmonize . . . with the plain language of the statute, its origin, and its purpose.' *See Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981). The regulations issued by the Board enable it to assimilate and preserve *all* assassination records -- whether they be in the hands of the federal government, a state, government, or a private citizen. These regulations are clearly in line with the stated purpose and express language of the Act and are, therefore, valid.

[*In re Connick*, ___ F.3d ___ n.3 (1997)] Thus the only two courts that have had occasion to consider the validity of the Board's regulations either explicitly (the Fifth Circuit) or implicitly (the District Court for the Eastern District of Louisiana) recognized the validity of the regulations.

There is, in fact, nothing in the statute or in the legislative history that states that the Review Board's authority extends solely to "assassination records" as defined narrowly by Section 3(2), or to "federal government records" (which is undefined). Any interpretation of the statute that would limit the scope of the Board's authority to these two areas is an interpretation that is not explicitly provided by the Act and is in flat contradiction to the legislative history. It is our understanding of the legislative history that Congress fully intended that the Review Board define "assassination records" in a reasonable and encompassing way. Although I am fully aware of the perils of using legislative history, it is of particular importance when attempting to determine whether an agency has acted reasonably. There are some particularly telling references in the Report of the Senate Governmental Affairs Committee:

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 direct any government office to produce additional information and records which it believes are related to the assassination. It has the authority to subpoena private persons and to enforce the subpoenas through the courts.

S. Report at 20 (emphasis added). Thus the Committee Report on the bill that was adopted, explicitly understood the Board's responsibility extended beyond governmental records and "assassination records" as narrowly found within § 3(2).

The Committee further explained why it did not provide a broader definition of "assassination record" than now appears in § 3(2).

The term 'assassination record' was not more specifically defined by the Committee because to do so before more is known about the universe of records would have been premature, and would have further injected the government between the records and the American public. There is a sufficient volume of known assassination records to organizer and review at the outset. However, it is intended that the Review Board issue guidance to assist in articulating the scope or universe of assassination records as government offices and the Review Board undertake their responsibilities. Such guidance will be valuable Guidance, especially that developed in consultation with the public, scholars, and affected government offices, will prove valuable to ensure the fullest possible disclosure and create public confidence in a working definition that was developed in and independent and open manner.

S. Report at 21. Thus the Committee fully expected that the Board would expand the scope of "assassination records."

'Assassination records' are defined in Section 3. *The definition of 'assassination records' is a threshold consideration for the successful implementation of the Act.* Its scope will be the barometer of public confidence in the release of assassination records. While the Records of past presidential commissions and congressional committees established to investigate the assassination of President Kennedy are included as assassination records under this Act, *it is intended and emphasized that the search and disclosure of records under this Act must go beyond those records.* While such records are valuable, they reflect the views, theories, political constraints, and prejudices of past inquiries. Proper implementation of this Act and providing the

American public with the opportunity to judge the surrounding history of the assassination for themselves, *requires including not only, but going beyond, the records of the Warren and Rockefeller Commissions, and the Church and House Select Assassination Committees.*

S. Report at 21 (emphasis added).

Even the Report of the House Committee, on a version of the bill that differed significantly from the version ultimately adopted, presumed that the Review Board would be expanding the scope of “assassination records.”

Therefore, while the Review Board must include the records of those official investigations that are specifically identified in the Joint Resolution, it may also determine that records not specifically delineated may nevertheless be relevant. It is the Committee’s intent that the Review Board consider any other records brought to its attention by members of the public in making such determinations.

House Report I at 21. The goal was not limited to opening “government records” or records narrowly defined by statute as “assassination records.” Rather,

The Committee’s intent in establishing the Review Board and the process by which it will operate is *to make available to the public all materials relating to the assassination of President John F. Kennedy* at the earliest possible date.

H. Report I at 14 (emphasis added).

Thus the Congressional Committee Reports, like the Fifth Circuit, understood that the Review Board had an important mission to collect those records that are reasonably relevant to the assassination of President Kennedy. I have found no statement in the legislative history that would suggest that Congress intended that the Review Board be bound by a narrow and crabbed interpretation that would preclude KGB files on the accused assassin from being “assassination records” within the meaning of the Act. Any interpretation of the JFK Act that would in fact restrict the Board’s authority to “assassination records” as narrowly defined in the JFK Act or to “federal

Hon. Frank Hunger

April 14, 1998

Page 8

government records" simply would be placing form over substance. Accordingly, I urge you to issue promptly the subpoena to Mr. Schiller.

Please do not hesitate to contact me if I can provide any further information. To the extent that you are not otherwise inclined to issue the subpoena, the Review Board requests that you meet with its Chairman, the Hon. John R. Tunheim (U.S. District Court Judge, District of Minnesota), at your earliest convenience.

Sincerely,

T. Jeremy Gunn
Executive Director and General Counsel

The Board has the authority to:

if necessary, investigate the facts surrounding the disposition of additional information, records, or testimony from individuals, *which the Review Board has reason to believe is required to fulfill its functions and responsibilities under the law*; and subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the law [and] receive information from the public regarding the identification and public disclosure of assassination records; and . . . hold hearings, administer oaths, and subpoena witnesses and documents. . . . *[The Review Board] may issue interpretive regulations regarding its duties and responsibilities.*

S. Report at 42-43.

Statutory references to Review Board “responsibilities” that go beyond:

- “assassination records” (as defined by Section 3(2) of the Act)
- “federal government records” (not defined by Act).

§ 5(a)(4): “No assassination record *created by a person or entity outside government* (excluding names or identities consistent with the requirements of section 6) shall be withheld, redacted, postponed for public disclosure, or reclassified.” [this is under section explaining responsibility of Government offices and can be used only with proper caveats.]

House Report I

[T]he Committee believes that historians, scholars, researchers, journalists, and the American public must draw their own conclusions about the assassination from the vast volumes of evidence collected by government investigating bodies *and others*

Hon. Frank Hunger
April 14, 1998
Page 10

over the past 29 years. The purpose of the joint resolution, and *the intent of the Committee, is simply to make publicly available all of these materials* at the earliest possible date.

H. Report I at 10.

"The term 'assassination material' applies only to those records which the Review Board has reviewed and determined to be assassination materials."

H. Report I at 19

The term "record of an official investigation" is intended to define the universe of material subject to this joint resolution. It includes records created, obtained, or generated by each of the governmental reviews of the assassination as well as records of agencies supporting those reviews. The term recognizes the discretion that the Review Board must have in determining whether a record is relevant to the assassination, and thus specifically includes the records of any other governmental activity which the Review Board finds relevant to the assassination, such as the investigations of the Dallas Police Department and the District Attorney of Orleans Parish, Louisiana.

Therefore, while the Review Board must include the records of those official investigations that are specifically identified in the Joint Resolution, it may also determine that records not specifically delineated may nevertheless be relevant. It is the Committee's intent that the Review Board consider any other records brought to its attention by members of the public in making such determinations.

House Report I at 21

House Report II August 11, 1992; nothing

Hon. Frank Hunger
April 14, 1998
Page 11

There are, however, numerous references in both the statute and the legislative history that provide for Review Board authority that goes beyond “federal government records” and “assassination records” as narrowly defined in Section 3(2).

S. Report = Senate Report no. 102-328, Governmental Affairs Committee, July 22, 1992.
H. Report - House Report. 102-625 Part I, June 29, 1992

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See H. Rept. at 20.

The Review Board requests that the following language or concept be inserted, if only by a footnote reference, in the Connick brief:

A separate and independent basis for affirming the Fifth Circuit’s holding that the Shaw files come within the scope of the Act and the Board’s authority derives from the Board’s authority to issue interpretive regulations under § 7(n) of the Act. The Fifth Circuit correctly held that the “Act authorizes the Board to issue interpretive regulations.” [Cite to footnote 3 of Fifth Circuit decision in *Connick v. U.S.*] [*See* 36 C.F.R. § 1401(a) and (b)(2)]

This separate basis would not have required that the staff of the House Select Committee on Assassinations examine the Garrison papers in order for the records to come within the scope of the JFK Act. We believe that this interpretation can be justified by referring

Under the legislative history, Congress foresaw that the Review Board would be issuing interpretive regulations to define the scope of “assassination records”:

It was the sense of the House Committee on Government Operations that the Review Board should have the responsibility for defining more fully the meaning of "assassination records" and that the Congress did not intend to limit the scope of such records to those narrowly defined by the statute. Although the House version differed in many ways from the Senate version, and although the House version was *not* adopted, the intent can be seen in the following portion of the Committee Report.

Therefore, while the Review Board must include the records of those official investigations that are specifically identified in the Joint Resolution, it may also determine that records not specifically delineated may nevertheless be relevant. It is the Committee's intent that the Review Board consider any other records brought to its attention by members of the public in making such determinations.

House Report I at 21

'Assassination records' are defined in Section 3. *The definition of 'assassination records' is a threshold consideration for the successful implementation of the Act.* Its scope will be the barometer of public confidence in the release of assassination records. While the Records of past presidential commissions and congressional committees established to investigate the assassination of President Kennedy are included as assassination records under this Act, *it is intended and emphasised that the search and disclosure of records under this Act must go beyond those records.* While such records are valuable, they reflect the views, theories, political constraints, and prejudices of past inquiries. Proper implementation of this Act and providing the American public with the opportunity to judge the surrounding history of the assassination for themselves, requires including not only, but going beyond, the records of the Warren and Rockefeller Commissions, and the Church and House Select Assassination Committees.

S. Report at 21

The Review Board requests that the following concept be inserted, if only by a footnote reference, in

the Connick brief:

There is a separate and independent basis for affirming the Fifth Circuit's holding that the Shaw files come within the scope of the Act and the Board's authority. Under § 7(n) of the Act, the Board is authorized to issue interpretive regulations, which ultimately were promulgated at 36 C.F.R. § 1400 *et seq.*³ Citing the authority of this Court, the Fifth Circuit held that "[i]nterpretive regulations are valid if they 'harmonize . . . with the plain language of the statute, its origin, and its purpose. See *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981). The regulations issued by the Board enable it to assimilate and preserve *all* assassination records -- whether they be in the hands of the federal government, a state, government, or a private citizen. These regulations are clearly in line with the stated purpose and express language of the Act and are, therefore, valid." [See footnote 3 of Fifth Circuit decision in *Connick v. U.S.*] The Fifth Circuit was correct.

The Review Board believes that it is very important that this independent basis for the Fifth Circuit's judgment be stated in the SG's brief. Such a basis would not have required that the fortuitous act that the staff of the House Select Committee on Assassinations examined the Shaw papers in order for the records to come within the scope of the JFK Act. Although not necessary for purpose of inclusion within the brief, we would point out in support of this position the following:

The Review Board has the "power" to:

"request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act" JFK Act § 7(j)(1)(c)(iii)

"hold hearings, administer oaths, and subpoena witnesses and documents" JFK Act § 7(j)(1)(c)(iii)

"The Review Board may issue interpretive regulations." § 7(n)

³In relevant part, see 36 C.F.R. § 1400.1(a) and (b)(2).

Under the legislative history, Congress foresaw that the Review Board would be issuing interpretive regulations to define the scope of "assassination records":

'Assassination records' are defined in Section 3. *The definition of 'assassination records' is a threshold consideration for the successful implementation of the Act.* Its scope will be the barometer of public confidence in the release of assassination records. While the Records of past presidential commissions and congressional committees established to investigate the assassination of President Kennedy are included as assassination records under this Act, *it is intended and emphasized that the search and disclosure of records under this Act must go beyond those records.* While such records are valuable, they reflect the views, theories, political constraints, and prejudices of past inquiries. Proper implementation of this Act and providing the American public with the opportunity to judge the surrounding history of the assassination for themselves, requires including not only, but going beyond, the records of the Warren and Rockefeller Commissions, and the Church and House Select Assassination Committees.

See S. Report (Governmental Affairs) at 21 (emphasis added) (photocopy attached)

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S. Report at 21 (emphasis added) (attached)

Hon. Frank Hunger
April 14, 1998
Page 15

It also was the sense of the House Committee on Government Operations that the Review Board should have the responsibility for defining more fully the meaning of "assassination records" and that the Congress did not intend to limit the scope of such records to those narrowly defined by the statute.

Although the House version differed in many ways from the Senate version, and although the House version was *not* adopted, the intent can be seen in the following portion of the Committee Report.

Therefore, while the Review Board must include the records of those official investigations that are specifically identified in the Joint Resolution, it may also determine that records not specifically delineated may nevertheless be relevant. It is the Committee's intent that the Review Board consider any other records brought to its attention by members of the public in making such determinations.

House Report I at 21 (copy attached)

Essentially, denial of the request to issue the subpoena would be to commit the logical fallacy of *inclusio unis est exclusio alterius*.⁴

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⁴Although the statute explicitly authorizes the Review Board to use the U.S. mails (sect. 7(j)(1)(H)), it would be unreasonable to conclude that by explicitly referencing the Board's "mail power" the statute should be read to deny the Review Board the authority to use the telephones, government couriers, or Federal Express.