

March 22, 1995

TO: Assassination Records Review Board

FROM: Sheryl Walter, General Counsel

RE: Subpoena powers under the
Assassination Records Collection Act of 1992 (ARCA)

The ARCA provides that in the Review Board's pursuit of its mandate to identify, obtain, and, subject to the postponement provisions of ARCA's Section 6, publicly release all "assassination records", the Board is vested with subpoena power. This memo outlines the scope of that subpoena power and suggests procedures for implementing that power.

Scope of subpoena power

The Review Board's subpoena powers, set out in Section 7 of the ARCA, are:

"(j)(1) The Review Board shall have the authority to act in a manner prescribed under this Act including authority to

* * *

(C)(iii) request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the Act;

* * * and

(F) hold hearings, administer oaths, and subpoena

witnesses and documents.

(j)(2) A subpoena issued under paragraph (1)(C)(iii) may be enforced by any appropriate Federal court acting pursuant to a lawful request of the Review Board.

This language is somewhat unclear, in that it grants the Review Board authority to subpoena witnesses and documents, presumably both from government and private sources, but also conditions the Review Board's power to subpoena private persons on a request to the Attorney General to subpoena those persons on the Review Board's behalf.

The legislative history affirms the Review Board's subpoena powers, but does not further explain the role to be played by the Attorney General in issuing subpoenas to private, as opposed to public, sources. The Senate Report states that in order to "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 . . . and to subpoena private persons and to enforce the subpoenas through the courts." ¹ The Senate Report further states that the "Review Board has the authority to . . . subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under the law,"² but does not

¹ S.Rep. No.102-328, *President John F. Kennedy Assassination Records Collection Act*, at 19.

² *Id.* at 42.

mention the purpose for or intent behind the requirement that the Review Board go through the Attorney General to issue such subpoenas.

The scope of the Review Board's subpoena power is discussed in a legal memorandum prepared by the Congressional Research Service. In that April 28, 1992 memorandum (a copy of which was included in the Senate's May 12, 1992 hearing record and relevant excerpts of which are attached), CRS described the Review Board's subpoena power as follows:

"The Executive Director may also recommend to the Board that a subpoena issue to an Executive agency which has not granted voluntary access to records sought by her [sic]. The Board may ask the Department of Justice to enforce its subpoenas in federal court."³

The CRS memorandum interprets the subpoena authority as contained in a previous version of the ARCA, which is similar but not identical to the language finally enacted. The earlier version reads:

"Sec. 8 Determinations by the Review Board.

* * *

³ Congressional Research Service, American Law Division, Memorandum, "Legal Questions That Might Be Raised With Respect to H.J.Res. 454 and S.J. Res. 282, Assassination Materials Disclosure Act of 1992," April 28, 1992 at 1, reprinted at Hearing before the Committee on Governmental Affairs, U.S. Senate, 102d Cong., 2d Sess., on S.J. Res. 282, May 12, 1992 at 224.

(c) *POWERS.*-- The Review Board shall have authority to hold hearings, administer oaths, and subpoena witnesses and documents, and its subpoenas may be enforced in any appropriate Federal court by the Department of Justice acting pursuant to a lawful request of the Review Board."⁴

(d) *ADDITIONAL MATERIALS.*-- The Review Board shall have the authority and responsibility, where circumstances warrant, to inquire of any Executive agency as to the existence of further records that may be assassination materials beyond those made available by that agency, to obtain access to such records, and to use its subpoena power in support of this authority."

⁴ S.J. Res. 282, March 26, 1992, reprinted at *id.* at 142.

In interpreting this language, the CRS memorandum suggests that the process contemplated by the ARCA envisions the executive director recommending to the Board that a subpoena issue to an executive branch agency which has not granted voluntary access to the Board.⁵ CRS interpreted this language to also allow the Board to exercise on its own the subpoena authority over executive branch agencies in support of investigative initiatives without being required to seek Justice Department assistance.⁶

The CRS memorandum does, however, raise a question about the requirement, in both the earlier and the final versions of the ARCA, that the Board seek the Attorney General's assistance in exercising its subpoena powers. CRS notes that the legislative language does not mandate that the Justice Department in fact seek subpoena enforcement (and presumably the issuance of subpoenas to private persons as well), and that "it is unlikely that Congress could mandate such an exercise of prosecutorial discretion. . . Thus the potential exists for obstruction of the disclosure process by means of agency withholdings supported by DOJ refusals to seek subpoena enforcement in the courts."⁷

As a practical matter, this concern may not pose a problem for the Review Board's work. Section 10(b)(1) of the ARCA states the sense of

⁵ CRS Memorandum, supra note 3, at CRS-9, reprinted at id. at 232.

⁶ Id. at CRS-10, reprinted at id. at 233.

⁷ Id. (citation omitted).

Congress that "the Attorney General should assist the Review Board in good faith to unseal any records that the Review Board determines to be relevant and held under seal by a court or under the injunction of secrecy of a grand jury." It is likely that this sense of Congress can be interpreted reasonably to extend to assisting the Review Board in all of its activities that require the assistance of the Justice Department. The Review Board's experience to date with the Justice Department indicates that it will be fully helpful to and cooperative with the Review Board in the Board's exercise of its duties.

Mechanics of issuing subpoenas

The Review Board staff is in the process of working out with relevant Justice Department officials the mechanics of the Board's issuance of subpoenas. However, some general guidelines based on the practice of other agencies are helpful in thinking about how the Review Board's subpoena process should work.

1. Authorization: The ARCA is silent as to whether the Review Board may delegate its subpoena power to the Executive Director or to other staff. Given that the statute seems to grant the Review Board at a minimum the power to issue on its own subpoenas to executive branch agencies (which could, depending on the circumstances, include materials at presidential libraries), this power could be delegated to the Executive Director in consultation with the Review Board. The Review Board may wish to adopt a procedure whereby each subpoena, whether issued by the Review Board or with the assistance of the Justice Department, is authorized by formal recorded vote and approved by a majority of the Board.

2. *Issuance:* The statute provides little guidance on the mechanics of issuing subpoenas. The Review Board could establish a procedure in which the Executive Director (and maybe the General Counsel) is delegated the power to sign and arrange for service of Review Board-authorized subpoenas. Again, this delegation is probably best done by a formal recorded vote. Interpretive guidelines could be issued by the Board (without a Federal Register notice and comment procedure) to govern the process.

3. *Service:* In the absence of any specific language in the ARCA regarding the procedures for service of subpoenas, the Review Board could adopt the methods described in Fed.R.Civ.P. 4 and 45. Other methods like registered mail can also be adopted but should again be established first in interpretive guidance established by the Board.

Additional Considerations

The authority to issue subpoenas is powerful, but one perhaps best used sparingly and only when other methods of obtaining the materials sought have failed. In some cases, the Review Board's subpoena power may provide an individual or institution that has materials or information related to the identification and securing of assassination records with a face-saving means of providing the Review Board with that knowledge or those records. Some individuals may come forward only if also given adequate assurances of immunity, which the Review Board has the power to

grant under the act.⁸

⁸ See ARCA Section 7 (k).

The subpoena power only extends to providing the Board and staff with access to materials and does not vest in the Board dominion over such materials. The Board's use of the subpoena power simply to secure access to materials held by private parties for purposes of examining them to determine whether they are "assassination records" should not present a takings issue. On the other hand, permanent deprivation of a private party of originals which that party has legal title to and a property interest in potentially implicates the Takings Clause.⁹

⁹ The Takings Clause is a constitutional doctrine that is not superseded by the terms of the ARCA. It does not bar the government from taking private property for a public use (a threshold test the Review Board is likely to meet), but requires that the government provide just compensation for taking the property. A person with a claim for just compensation under the Takings Clause can bring suit in the federal Court of Claims. Where a statute authorizes agency activity that could give rise to a takings claim, as the ARCA appears to do, the availability to private persons of a remedy of just compensation (under the Tucker Act) is presumed unless the authorizing statute precludes such relief (which the ARCA does not).