MEMORANDUM

July 14, 1995

ATTORNEY-CLIENT
PRIVILEGED and CONFIDENTIAL

To: T. Jeremy Gunn, Esq., Acting General Counsel

From: Laura Denk, Esq.

Subject: Review Board's Immunity Power and Procedures for Granting Witness Immunity

This memorandum provides a brief recap of our discussion yesterday regarding witness immunity. I have attached relevant statutes, cases, and treatises as appendices.

STATUTES

JFK Act
"The Review Board shall be considered to be an agency of the United States for purposes of [18 U.S.C. § 6001.]" 44 U.S.C. § 2107.7(k) (attached as Appendix A.)

Immunity of Witnesses -- 18 U.S.C. §§ 6001-6005 (attached as Appendix B.)
§ 6001 Definitions
§ 6002 Immunity Generally
§ 6004 Certain Administrative Proceedings

PROCEDURES

Step 1: Agency Request
According to 18 U.S.C. § 6004, any agency may request authority from the Attorney General to issue an order compelling a witness to testify. At 28 CFR § 0.175 (attached as Appendix C), the Attorney General authorizes the Assistant Attorney General in charge of the Criminal Division, or any Deputy Assistant Attorney General of the Criminal Division, to exercise the authority vested in the Attorney General by 18 U.S.C. § 6004. Practically, this regulation means that agencies should send a request for approval both to the Attorney General and to the Assistant Attorney General in charge of the Criminal Division, although courts approve of agencies sending such requests only to an Assistant Attorney General. See, e.g., In re Sealed Case, 776 F.2d 335, 337 (D.C. Cir. 1985), and In re Application of the President's Commission on Organized Crime, 763 F.2d 1191, 1199-1200 (11th Cir. 1985) (both attached as Appendix D).

The request must contain the following parts:

- First, the agency must make a judgment that the information it seeks is in the public interest. 18 U.S.C. § 6004(b)(1). Federal Trade Commission v. Foucha, 356 F. Supp. 21 (N.D. Ala. 1973). The DOJ Manual has an excellent section on factors an agency should take into account in determining whether it is necessary to the public interest to obtain information. Department of Justice Manual, § 9-23210, pp. 9-484, 9-485 (Supp. 1992) ("DOJ Manual") (attached as Appendix E).

- Second, the agency must make a judgment that the witness in question has refused or is likely to refuse to provide the information on grounds that it might incriminate the witness. 18 U.S.C. § 6004(b)(2). It is not clear how strictly DOJ construes this section, but an agency affidavit stating the agency's reasons supporting its belief that the witness is likely to refuse to provide the information should be sufficient.

- Third, if the agency intends to immunize the witness for the act of producing records, it should so state in its request. DOJ Manual, § 9-23.215.

Step 2: Wait for Authorization

The DOJ Manual indicates that, upon receipt of a request for an order of immunity pursuant to 18 U.S.C. § 6003 (immunity in court and grand jury proceedings), the Assistant Attorney General, Criminal Division, generally turns over the witness' name to the FBI so that it can do a check on the witness. The DOJ Manual does not answer the question of whether DOJ sends witness' names to the FBI if an agency is requesting approval for its issuance of an order pursuant to 18 U.S.C. § 6004, but I suspect that the procedure is the same. DOJ Manual, § 9-23.130.

Once the FBI reports back, the Assistant Attorney General/Criminal Division will send the requesting agency a written authorization.

Step 3: Order

Once the agency has received the Assistant Attorney General's approval, it may issue its order instruction the witness to testify or provide information.

Step 4: Communication of Order

Then, the agency person who "presides over the proceeding" must communicate the grant of immunity to the witness.

Step 5: Enforcement

If the witness refuses to provide information even after being granted immunity, the agency may file a

motion to compel the witness' testimony in Federal District Court. If the witness continues to refuse to provide the information, the agency should move the Federal District Court for a civil contempt order.

OTHER ISSUES

Statute of Limitations Applicable to Crimes Committed in Violation of 18 U.S.C. § 641

18 U.S.C. § 641 (attached as Appendix F) is the Federal criminal code section prohibiting persons from, inter alia, concealing and retaining stolen government property. Presumably, we will immunize some witnesses from prosecution under this section.

A five year statute of limitations applies to crimes committed under this section. Thus, it seems that a person who misappropriated government property more than five years ago could raise a limitations defense. However, in United States v. Blizzard, 27 F.3d 100 (4th Cir. 1994) (attached as Appendix G), the Fourth Circuit held otherwise. The court wrote that receiving and concealing stolen government property in violation of 18 U.S.C. § 641 is a continuing offense for purposes of limitations periods. "Stolen government property is not unlike contraband. The passage of time does not give the defendant a license to possess it." Id. at 102.

Informal Immunity

You asked me to look into whether the Review Board might be able to make a broad offer of immunity to the public at large -- for example, a regulation that states that "any person who turns over assassination records to the Review Board within 90 days [from the date of publication in the *Federal Register*] is immune from prosecution under 18 U.S.C. § 641 for the act of producing the records."

Because of the requirement stated in 18 U.S.C. § 6004(b)(2) -- that the agency must determine that an "individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination" -- the Review Board probably will not be able to make a broad offer of *statutory* immunity to the public.

However, the Review Board may be able to work out some sort of a public offer of informal immunity with the appropriate officials in the Criminal Division of the Justice Department.

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