I. Subpoenas

A. Authorization: Statute silent on whether Board may delegate this power to the Executive Director or other staff. In any event, there is no apparent disadvantage to having the Board authorize each subpoena by formal, appropriately documented vote.

B. Issuance (Mechanics): Again, statute is silent. However, it seems best for the B oard to make a general delegation to the Executive Director (and possibly the General Counsel and Analysis and Review Chief) of the power to sign and arrange for service of subpoenas that the Board has authorized. This delegation should be made by formal, appropriately documented vote. Perhaps this delegation could be added to the final version of the Board's interpretation and guidance and published in the Federal Register, although the delegation should be valid without Federal Register publication.

C. Service: Statute is silent on manner of service. Methods described in Federal Rules of Civil Procedure 4 and 45 would undoubtedly suffice. Other methods, such as registered mail, should probably be upheld if authorized in regulations adopted by the Board and published in the Federal Register.

II. "Takings" Issues

A. Use of subpoena power merely to obtain documents from private parties for a brief period of examination, or to photocopy the documents in order to examine them, should present no "takings" issues.

B. Permanently depriving a private party of originals obtained from him would potentially implicate the Takings Clause. (This may be analogized to the state's physically occupying a piece of privately owned land, which could be deemed a per se "taking.") However, there could be no "taking" if the private party lacked a property interest in the documents obtained from him. Thus, whether the federal government or the private party "owns" a set of subpoenaed records bears on the "takings" analysis.[1]

C. Making copies of documents obtained from a private party available to the public could conceivably present a "takings" issue, if the private party had a property interest in the documents, and public access to the copies would substantially diminish the value of that interest.

> Example: A researcher tapes interviews with a number of "assassination figures." The Board subpoenaes the tapes, has them transcribed, retains the transcripts, and returns the tapes. Releasing the transcripts into the JFK Collection could give rise to a colorable "takings" claim, if the researcher shows he had a property interest in the content of the interviews, and that the book he was

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[1]It is often said that state property law determines whether a claimant under the Takings Clause has the requisite property interest. However, where ownership of (arguably) federal records is at issue, applicable (non-constitutional) federal law should bear on this question.

planning to write won't sell now that his "scoops" have been made public.

D. The Takings Clause does not bar the state from taking private property for a public use;[2] it only requires that it give "just compensation" for such property. The federal government does not have to pay in advance, or even contemporaneously -- it may "take now, pay later." This is because the Tucker Act allows anyone with a claim for just compensation under the Takings Clause to bring suit against the United States in the Court of Claims. Where a statute authorizes agency activity that could give rise to a "takings" claim, the availability of a remedy under the Tucker Act is presumed unless the authorizing statute expressly precludes such relief. Perseault v. ICC, __ U.S. __. Because our statute is silent on the question, it is likely that anyone with a "takings" claim against the Board would be relegated to post-"taking" relief under the Tucker Act.

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[2]The Board is unlikely to run afoul of the "public use" requirement.