[DRAFT]

ATTORNEY-CLIENT PRIVILEGE

April 14, 1998

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

Dear Mr. Assistant Attorney General:

On March 11, 1998, 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 his copies of Soviet KGB records related to Lee Harvey Oswald. The Review Board has yet to receive a formal response to its March 11 request, although we have been engaged in discussions with attorneys in the Federal Programs Branch wherein they expressed some concerns regarding issuance of the subpoena. I am writing this letter to express our concern at the continuing delay and to provide you with our 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 Civil Division of the Department of Justice. We have appreciated the timely responses to our previous requests for the issuance of subpoenas, including subpoenas to private parties, and are pleased that all requests heretofore have been granted.

## The Soviet KGB Records on Lee Harvey Oswald

Because there is little question about the importance of the records at issue, I will describe their background only briefly. Between 1959 and 1962, Lee Harvey Oswald, the accused assassin of President Kennedy, lived in the Soviet Union in the city of Minsk in the Byelorussian Republic. During that period, Oswald was under close surveillance by the Soviet KGB. The original files created by the Soviet KGB currently are located in Minsk, which is now the capital of the Belarusian Republic.

More than three years ago, the Review Board decided that the pursuit of the KGB records on Oswald was an important part of its responsibilities under the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (note) (Supp. V 1994) ("JFK Act").[1] Accordingly, the Review Board asked the Secretary of State to request the Belarusian government to provide either copies or originals of the KGB files. The request was made both through formal diplomatic channels and in a visit to Minsk by two Board members and its Executive Director. Although no final answer has yet been received from Belarus, the State Department does not believe that it is likely that Belarus will agree to make the files available. It is our understanding, however, that shortly after the demise of the Soviet Union, the then-newly independent state of Belarus made 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 of the KGB files, but failed to receive a favorable response. It is now the Board's judgment that the best means to obtain copies of these important records is through the issuance of the requested subpoena to Mr. Schiller. The Board believes it must take all reasonable steps to fulfill this important aspect of its responsibilities.

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

It is our understanding that there is some concern among attorneys at the Department of Justice as to whether the Review Board has the authority to request subpoenas to private parties for records that have not previously been made available to the government. It has further been suggested that the Board's authority may extend solely to documents that are: (a) "assassination records" as defined in Section 3(2) and (b) "federal government records."[2] It is our understanding that such an interpretation, which would significantly restrict the scope of the Board's authority, is premised in large part upon a reading of Sections 2 through 6 of the JFK Act that, reasonably enough, appear to pertain solely to "federal government records."

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[1] Pub. L. No. 102-526, § § 1-14, Oct. 26, 1992, 106 Stat. 3443-3458, as amended, Pub. L. No. 103-345, § § 2-5, Oct. 6, 1994, 108 Stat. 3128-3130, Pub. L. No. 105-25, July 3, 1997, § 1, 1997, 111 Stat. 240.

[2] "Federal government records" is not explicitly defined by the JFK Act, but might reasonably be construed in Section 3(2) to include only records that were "created or made available for use by, obtained by, or otherwise came into the possession of [federal agencies]."

*The Review Board believes that any interpretation of the JFK Act that would limit the scope of its authority to "federal records" wrongly presumes that the principal work of the Board -- as articulated in sections 2-6 -- is the Board's sole mandate under the law.* Although there is no doubt that the principal part of the Board's work involves reviewing and releasing federal government records, as provided in Sections 2 through 6 of the JFK Act, the Board has other responsibilities as well. Indeed, it should be noted at the outset that there is no provision of the JFK Act that explicitly limits the scope of the Board's mandate to "federal government records" or to "assassination records" as narrowly encompassed by Section 3(2).

By finding that KGB records "may *hold information relevant to the assassination of President Kennedy*," § 10(b)(2) (emphasis added), Congress itself explicitly acknowledged that the authority of the JFK Act extends to records beyond those that are narrowly defined in Section 3(2). Having identified the KGB records as relevant, Congress advised that the Secretary of State should approach foreign governments, such as Belarus, to obtain "information relevant to the assassination." *Id.*

Perhaps most importantly, the JFK Act provides not only that the Secretary of State should assist the Board in obtaining such "relevant" information, it provides that all federal agencies should cooperate with the Review Board in pursuing "information relevant to the assassination." The JFK Act unequivocally states 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.*[3]

§ 10(b)(3) (emphasis added). Section 10 thus anticipates that the Department of Justice, like all other agencies and departments, will cooperate in full with the Review Board in obtaining "all information relevant to the assassination." Because the Congress itself employed the same words to describe the KGB records as it used to describe the type of information that all federal agencies should assist the Review Board in pursuing, the JFK Act presumes that the Department of Justice should assist the Review Board in obtaining these relevant records -- provided that there are legal and appropriate mechanisms for so doing.

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[3]The 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) (emphasis added).

The JFK Act actually provides two separate 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*." § 7(j)(1)(C)(iii) (emphasis added). As was shown by its request to the Secretary of State, by the trips to Belarus, and by requesting this subpoena, the Review Board strongly believes that obtaining the Oswald KGB records are "relevant to its responsibilities under this Act." Surely the Department of Justice could not argue that the Board is unreasonable in interpreting its responsibilities as including the pursuit of the records that Congress itself identified as assassination-related.

*Second,* the Review Board is authorized to "hold hearings, administer oaths, and *subpoena witnesses and documents*." §7(j)(1)(F) (emphasis added). This second subpoena mechanism notably contains no subject matter or relevancy limitation whatever. By not qualifying the scope of documents subject to subpoena in Section 7(j)(1)(F), the Congress left the discretion to the Review Board to make reasonable judgments regarding the type of records that should be pursued.

The Review Board, like many other federal agencies, has the broad discretion to issue subpoenas to obtain information relevant to its work. Last week, the Solicitor General of the United States filed a Supreme Court brief on behalf of the Review Board in a subpoena-enforcement action. In words that would be equally applicable in an enforcement action for the subpoena now being requested, the Solicitor General argued:

> The scope of a district court's inquiry in a proceeding to enforce an administrative subpoena is limited. Though the test for enforcement has been phrased in various ways, the requirements to justify judicial enforcement of an administrative subpoena are 'minimal,' and the proceedings are summary in nature. 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; and (3) whether the demand for documents in unreasonably broad or burdensome. 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].' 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.

Brief for the United States in Opposition [to Petition for Writ of Certiorari], *Connick v. United States*, United States Supreme Court, October Term, 1997, No. 97-1145 (April 1998), 7-8 (citations and

footnote omitted). Under this standard, the Board's attempt to subpoena copies of documents on Lee Harvey Oswald is completely justified and the subject of the subpoena is certainly within the Board's area of responsibilities.

Given that Congress itself identified the KGB records as relevant, and given that Congress itself advised that all agencies should 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 than one to Mr. Schiller for Oswald's KGB file.

## The Review Board May Subpoena Schiller's KGB Records Because they are "Assassination Records" Within the Review Board's Interpretive Regulations

As shown above, the Review Board's subpoena powers constitute sufficient grounds for issuing a subpoena to Mr. Schiller without regard to 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 might broaden the definition of "assassination records" in order to decide that a subpoena properly may be issued to Mr. Schiller. But because 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, and because it is apparently thought to be of relevance in reaching a decision on the Schiller subpoena, I thought it might be appropriate at this time for me to address the issue in a preliminary way. To the extent that you deem that this issue warrants further analysis, I am prepared to address it later.

As stated above, the JFK Act provides a definition of "assassination records" in Section 3(2) and this definition reasonably could be read to limit such records solely to those that were "created or made available for use by, obtained by, or otherwise came into the possession of [federal agencies]." § 3(2). It is my understanding that attorneys at the Department of Justice have focused on this section of the JFK Act in particular and have suggested the possibility that the Schiller records fall outside its scope and that, therefore, his records may be outside the Board's jurisdiction.

It is the Review Board's position, however, that it is authorized by the JFK Act to issue interpretive guidelines that identify the scope of records that are reasonably related to the assassination of President Kennedy. The argument for this position is straightforward: the Board is authorized to issue interpretive regulations and there are several provisions of the statute under which the Board's guidelines are both needed and appropriate.

The JFK Act provides that the "Review Board may issue interpretive regulations." § 7(n). The Board in fact issued such regulations, the "Guidance for Interpretation and Implementation of the [JFK Act]," which were 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).

Even if it were presumed that the Review Board was not authorized to expand the definition of "assassination records" as provided in Section 3(2), there are several provisions of the JFK Act that presume that the Review Board will define the scope of records coming within its regulation-making authority:

> *First*, the Review Board is authorized to request issuance of subpoenas "to private persons to compel testimony, records, and other information relevant to its responsibilities under this Act." § 7(j)(C)(iii). Such an authority necessarily requires the Review Board to make intelligent and informed decisions about the scope of its "responsibilities." It certainly is reasonable for the Review Board to interpret its responsibilities as including the pursuit of records related to Oswald -- even if such records were not defined as "assassination records" under the JFK Act. Accordingly, the Board properly issued guidelines to identify the types of records that are relevant to its responsibilities and the assassination.
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> *Second,* the Board is permitted, without any explicit statutory limitation whatever, to "subpoena witnesses and documents." § 7(j)(F). Unlike Section 7(j)(C)(iii), which relies ultimately on the issuance of a subpoena by the Attorney General, Section 7(j)(F) may be issued by the Board on its own authority. Because there is no explicit statutory limitation on the scope of the "documents" that the Review Board may pursue under this provision, it cannot be found to be an abuse of its authority to offer its own reasonable definition of the type of records it will subpoena, regardless of whether they fit the narrow definition of "assassination records" provided by the Act.
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> *Third*, the Review Board is authorized to request the Attorney General to petition "any Court in the United States or abroad to release *any information relevant to the assassination* . . . that is held under seal of the court." § 10(a)(1) (emphasis added). Although this particular authority is not immediately pertinent to the specific issue of the Schiller subpoena, it is highly relevant to the question whether the Board

> is broadly authorized to pursue "information relevant to the assassination" rather than merely "assassination records" or "federal records." If the Board is authorized to pursue such relevant information, it surely is authorized to issue reasonable definitions of what it seeks to pursue. Moreover, this provision explicitly includes non-federal records as coming within the Board's authority, inasmuch as it refers to records held by foreign courts.
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> *Fourth*, the Review Board is authorized to pursue grand jury information that contains "information relevant to the assassination . . . ." § 10(a)(2)(A). Once again, the JFK Act does not limit the Board's responsibility or authority to "assassination records" or "federal records" within Section (3)(2), but extends to the much broader "information relevant to the assassination." Moreover, this provision explicitly pertains to non-federal records as coming within the Board's authority, as it implicitly refers to court records held by both state and federal courts.
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> *Fifth*, the JFK Act provides that it is the "sense of Congress" that all Executive agencies should assist the Review Board in seeking the broadly worded "all information relevant to the assassination . . . ." § 10(b)(3). How could Executive agencies know what type of records should be pursued unless the Review Board issues guidelines for identifying relevant records?

In each of these five provisions of the JFK Act, Congress did not limit the Board's authority to "assassination records" as defined in Section 3(2). Rather, Congress, after granting the Review Board regulation-making authority, entrusted the Board with pursuing, at a minimum, "information relevant to the assassination."

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 law's essential purpose and meaning. The Review Board's interpretive regulations were specifically challenged in federal court litigation by the District Attorney of New Orleans, and the Fifth Circuit explicitly held that the Board's regulations were valid. Citing the Supreme Court, the Fifth Circuit held that:

> 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*, 124 F.3d 718, 719 n.3 (5th Cir. 1997). Two courts have had the occasion to consider the validity of the Board's regulations. The Fifth Circuit explicitly found that the regulations were valid. In so doing, the Fifth Circuit affirmed the implicit judgment in favor of the regulations that was rendered by the District Court for the Eastern District of Louisiana. *In re Assassination Records Review Board,* C.A. No. 96-0598 (E.D. La. June 26, 1996).

The interpretation of the Review Board's authority that authorizes it to issue guidance regarding the scope of records coming within its mandate is amply supported by a strict reading of the JFK Act. But lest there be any concern that such an interpretation has been crafted in order to evade either the purpose of the statute or the intent of Congress, one need only turn to the legislative history to find that such an interpretation is fully warranted. Although I am aware of the perils of delving into legislative history, it nevertheless can be of assistance in underscoring that a reasonable interpretation of a statute fully accords with the congressional intent.

There are some particularly pertinent references in the legislative history that reveal Congress's presumption that the Review Board would issue regulations broadening the scope of assassination records. The Report of the Senate Governmental Affairs Committee states:

> '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. Rep. No. 328, 102d Cong., 2d Sess. 21 (1992) (emphasis added). 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 organize 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 an independent and open manner.

*Id.* at 21. Thus the Committee fully expected that the Board would expand the scope of "assassination records" as the Review Board came to understand and interpret its responsibilities. Congress presumed that the Review Board would seek records in addition to those that were collected by the prior investigations and thus beyond the narrow scope of Section 3(2).[4] The Committee Report explicitly understood the Board's responsibility extended beyond the records defined within Section 3(2).

Even the House Government Affairs Committee, reporting on a version of the bill that differed significantly from the version ultimately adopted by Congress, presumed that the Review Board

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[4]There is additional evidence that Congress did not intend the scope of "assassination records" to be limited to those that had been identified by prior investigations.

> 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*. [The Review Board] has the authority to subpoena private persons and to enforce the subpoenas through the courts.

*Id. at* 19 (emphasis added).

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.

H. R. Rep. No. 625(I), 102d Cong., 2d Sess. 21 (1992). The goal was not limited to opening "government records" or records narrowly defined by statute as "assassination records." Rather, "[t]he 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. *Id.* at 14 (emphasis added).

Thus the Congressional Committees, like the Fifth Circuit, understood that the Review Board has an important mission to collect records that are reasonably related to the assassination of President Kennedy. We 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 such records as the KGB files on the accused assassin from coming within the scope of the Board's responsibilities and authority, regardless of whether the statute itself included them in a narrow definition of "assassination records."

Any interpretation of the JFK Act that would restrict the Board from pursuing foreign intelligence records related to the President's accused assassin would accord neither with the explicit provisions of the JFK Act nor the intent of Congress. The Board has made a reasonable and prudent decision that pursuing such records is squarely within the scope of its responsibilities. Accordingly, I urge you to issue promptly the subpoena to Mr. Schiller. To the extent that you are not otherwise inclined to issue the subpoena, the Review Board requests that you meet, as soon as possible, with its Chairman, Judge John R. Tunheim.

I again extend my appreciation for your prior assistance. Please do not hesitate to contact me if I can provide any further information. Because the Chairman of our oversight committee has requested that we keep him apprised of our activities, I am copying him on this letter.

Sincerely,

T. Jeremy Gunn
Executive Director and General Counsel

cc: Chairman Dan Burton
House Government Reform and Oversight Committee