

December 7, 1994

TO: David Marwell

FROM: Sheryl Walter

RE: Inserts for Assassination Records Definition Board Briefing Paper:

As we discussed, below is additional language for inclusion in the briefing paper to be distributed to the Board for next week's discussions about the definition of "assassination record" at the Board's December meeting. Please let me know if you have any questions or need more information.

Background and Statutory Framework

The Board's enabling statute provides general guidance for defining "assassination record". In its "Definitions" section, the Act states that "[assassination record] means a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by or otherwise came into the possession of the Warren Commission, the Rockefeller Commission, the Church Committee, the Pike Committee, the House Assassinations Committee, the Library of Congress, the National Archives and Records Administration, any Presidential library, any executive agency, any independent agency, any other office of the Federal Government, and any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President Kennedy, but does not include autopsy records donated by the Kennedy family to the National Archives pursuant to a deed of gift regulating access to those records, or copies and reproductions made from such records." See 44 U.S.C. section 2107, Sec. 3(2).

The Act further states that "[r]ecord' includes a book, paper, map, photograph, sound or video recording, machine readable material, computerized, digitized or electronic information, regardless of the medium on which is it stored, or other documentary material, regardless of its physical form or characteristics." Id. at Sec. 3 (11). This language tracks the definition of records found in the Federal Records Act. The Federal Records Act describes "records" as "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States . . . and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them." 44 U.S.C. sections 2901(1), 3301.

The Act's legislative history contains useful insights into Congress's intent as to the scope of the definition that the Board eventually develops. The 1992 Senate Report states that "all

government records related to "[t]he 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." S.Rep 102-328 at 21. In constructing the Act the Senate sought "the most comprehensive disclosure of records related to the assassination of President Kennedy." Id. at 18. Explaining the Act's "rules of construction", the Senate Report notes that a broad definition of assassination record is necessary "to ensure review under the act's more relaxed standards" of as many records as possible arguably relevant to the assassination and its investigation and to make them publicly available in the collection at the National Archives as soon as possible. See id. at 32.

The Senate Report also emphasizes that in constructing and applying its definition the Review Board "The statute's purpose, according to the Senate Report, is that "all government records related to the assassination of President Kennedy should be preserved for historical and governmental purposes; that all such records should carry a presumption of immediate disclosure; and that all such records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination." Id. at 20. The House Report on the Act's companion bill (which was the first version introduced but which was later replaced by the Senate version) concurs that the collection is intended to be inclusive and that Congress expects the Board to apply a "broad and encompassing" definition of assassination records that "includes records created, obtained, or generated by each of the governmental reviews of the assassination as well as records of agencies supporting those reviews." H.Rep. 102-625, Part 1 at 19.

Thus, underlying the Act is an intent that, in response to the erosion in public confidence in government that prompted the Act's passage, the Board should collect and release not just documents related to the assassination itself but documents recording the government's response to it and efforts over the years to investigate it. Thus, the scope of relevant documents arguably is much wider than simply "the murder" of the president (as the State Department narrowly defined "assassination record" in a tasking memo sent on August 5, 1993 to a component asked to identify responsive records) and appears to be intended to include the organized crime files gathered by the FBI at the request of the House Select Committee on Assassinations. See also 1994 Conf. Report (H.Rep 103-587) at 2-3. ("Prompt disclosure of all records relating to the assassination is the best way to fulfill the American people's right to know what happened to their president. . . . There is continuing and compelling public interest in releasing all materials concerning the assassination at the earliest possible date, and . . . only in the rarest cases is there any legitimate need for continued secrecy or classification of those materials.")

The legislative history also provide guidance on the Board's broader power, as enunciated in the Act, to "direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." 44 U.S.C. section 2107 Sec. 7(j)((C)(ii). The Senate Report emphasizes that this power "is extremely important to the proper implementation and effectiveness of the act because it provides the board with the authority to seek the fullest disclosure possible by going beyond the information and records agencies initially choose to

release to the public and to the board." S.Rep 102-328 at 30. The Senate Report instructs that "[i]n exercising [this] authority the Review Board should act on a reasonable basis in requesting additional information or records. . . [and] consider whether the records are reasonably related to the history surrounding the assassination of President Kennedy." Id. at 31. The Senate Report acknowledges that "executive branch agencies are fearful that this power will be abused and result in too great a burden to search for potential records and information" while emphasizing how "[t]his provisions is extremely important to the proper implementation and effectiveness of the Act." Id. Given the significance of this broad power to the successful completion of the Board's work and the agencies' already-expressed apprehensions about how the Board will eventually invoke this power, the Board may wish to defer defining the scope of "additional records" for purposes of finalizing a definition in the near future.

Notice and Other Requirements for Publication of Definitions

Under the Administrative Procedures Act, no time is specified for the period that must be allowed for public comment when the Board's proposed definition of "assassination record" is published in the Federal Register. Generally, most agencies provide a 30-day comment period, although the Board could decide that a longer time frame for comments is more suitable. Given the desire to start the Board's substantive review work as soon as possible, allowing 30 days for public input on the Board's proposed definition seems appropriate.

Potential Issues for Consideration in Constructing Definition

Some issues that the Board may wish to consider in constructing its definition of "assassination record" include:

1. How detailed the definition should be.
2. Whether the collection should contain only originals or whether copies should be included and, if so, under what circumstances.
3. Whether artifacts should be included in the collection and, if so, how they should be treated.
4. What process will be established for applying the definition to particular records and for resolving conflicts with agencies as to whether certain records or record groups are "assassination records" as described by the Board.
5. What process will be established for responding to public requests that certain records or record groups be included in the collection of "assassination records" or in the category of "additional information and records" that the Board may request agencies to produce. For example, it may be wise to install procedures that adequately notify those members of the public when and why their suggestions for inclusion of certain records in the collection are rejected in order to avoid a

perception of "arbitrary and capricious" decision making prohibited under the Administrative Procedures Act.