

ARRB Draft
April 20, 1998
SETTLEMENT PROCEDURE AGREEMENT

AGREEMENT made as of April , 1998, by and among the named parties in United States v. Nancy Sheridan and NBC, United States District Court, D.D.C., Case No. 1:97MS00287 (TPJ), including the United States of America and the Assassination Records Review Board (collectively, the "ARRB"), the National Broadcasting Company, Inc. ("NBC"), and Nancy Sheridan, who are parties to the proceeding, and Dr. David G. Marwell ("Dr. Marwell"), each of whom is a Party to this Agreement.

WHEREAS, the Parties to this Agreement are undertaking the following procedures in an effort to narrow and/or resolve their competing claims concerning the materials that are the subject of the Proceeding, to wit, 13 folders relating to the 1967 NBC White Paper on the Jim Garrison investigation (the "Materials"); and

WHEREAS, NBC asserts that it has a well founded claim that some or all of the Materials are privileged from production because of a "qualified journalist's privilege," Federal or State constitutional protections, or state "shield" laws (collectively "Qualified Privilege Claim");

THE PARTIES THEREFORE AGREE THAT:

1. NBC will undertake a good-faith examination of all of the Materials and will provide to the ARRB all documents within the Materials for which it does not have a well founded Qualified Privilege Claim. For the purposes of this Agreement, NBC will provide to the ARRB at a minimum, the following types of documents: (a) all published materials (including, *e.g.*, newspaper clippings and published articles); (b) notes on interviews with a named source *to the extent that* it is already a matter of public record that NBC or Walter Sheridan interviewed the named source *and* that the information in these notes is a matter of public record; (c) notes that are not attributable to a named source *to the extent that* the subject matter of these notes is already a matter of public record; and (d) letters *to the extent that* they are not from or concerning a named source.

2. NBC will provide to the ARRB a privilege log that identifies all of the Materials (with reference to the specific Bates numbers set forth on the index of withheld documents annexed hereto as Exhibit A) for which it asserts that it has a well founded Qualified Privilege Claim. The privilege log shall identify each document by number and describe with reasonable specificity: (a) the type of document (*e.g.*, letter, memorandum, interview notes, other notes); (b) date; (c) the basis of NBC's Qualified Privilege Claim (*e.g.*, "identifies confidential source" or "interview of confidential informant"); (d) whether the document itself contains intrinsic information that supports the privilege (*e.g.*, "document contains language assuring source that confidentiality will be protected"); and (e)

that NBC, Nancy Sheridan, and their attorneys, having exercised due diligence, are aware of no prior waiver of the Qualified Privilege Claim.

3. The Parties will jointly engage Dr. Marwell as an independent and neutral evaluator. Dr. Marwell agrees to conduct a privileged, in-camera review of the Materials and to render an impartial opinion (pursuant to the procedures set forth in paragraph 5) as to (a) whether any documents identified on the privilege log created pursuant to paragraph 2 are described inaccurately on the privilege log and (b) whether or not the Materials, or any portion thereof, substantially contribute to an understanding of the assassination of President John F. Kennedy (a “Substantial Contribution”); The parties agree to accept Dr. Marwell’s opinion as a substantive matter, subject to the procedures and rights set forth below.

4. Dr. Marwell will review the Materials at the offices of Miller Cassidy Larroca & Lewin at a mutually convenient time. He will not copy or remove any of the Materials from the premises of the Miller Cassidy firm, but may take such notes as he deems necessary to perform the requested services, subject to the privilege restriction set out below in paragraph 9. He may conduct additional research in public archives prior to rendering an opinion concerning the inquiry contemplated by paragraph 5. If he determines that information or documents identified on the privilege log are duplicative of information or documents already in the public archives, such information or documents (insofar as they are contained within the Materials) shall be deemed, by definition, not a Substantial Contribution.

5. Dr. Marwell will render his opinion and the Parties will proceed thereupon, according to the following procedures:

(a) Dr. Marwell will examine the Materials identified on the privilege log and advise whether he believes that there has been any material misidentification of documents on the privilege log. That opinion will be contained in a letter (“Opinion Letter”) that will identify the document(s) at issue and will be sent to all parties. Dr. Marwell’s advice with respect to any misidentification shall be taken to be his own opinion and no party is obligated either to accept or to reject Dr. Marwell’s advice.

(b) If Dr. Marwell determines that none of the Materials identified on the privilege log either: (a) was misidentified (under paragraph 3(b), or (b) constitutes a Substantial Contribution, he will issue an opinion stating only that conclusion, in the Opinion Letter delivered simultaneously to counsel for all Parties, without further explanation or description of the Materials. In that event, the Proceeding will be voluntarily dismissed with prejudice pursuant to Fed.R.Civ.P.41(a)(1)(ii), with each side to bear its own costs, and the ARRB and the United States will discontinue all efforts to

compel production of the Materials. The stipulation of dismissal will set forth as the grounds for dismissal that "an independent evaluation of the materials that are the subject of this proceeding concluded that none of the materials substantially contributes to an understanding of the assassination of President John F. Kennedy."

(c) If Dr. Marwell determines that any portion of the Materials constitutes a Substantial Contribution, he will issue an opinion that offers only that conclusion and that identifies which document(s) he determines to contain a Substantial Contribution, without further explanation or description of the Materials. In the event NBC desires clarification or explanation of Dr. Marwell's opinion, it may conduct ex parte oral or written communication with Dr. Marwell on a privileged basis for that purpose.

(d) Dr. Marwell may not release the Separate Letter (or otherwise communicate its contents or any other information learned through review of the Materials) to any person or entity other than counsel for NBC, without the express written permission of counsel for NBC. Within one week of receipt of the Separate Letter, NBC will determine whether or not to release the Separate Letter to the ARRB in some form. In the event NBC determines in good faith that it cannot release the Separate Letter to the ARRB in any form without impairing its Qualified Privilege Claim, it may withhold such release entirely, and the Proceeding will then resume. In such event, the Parties agree to negotiate further in good faith up to May 15, 1998, to reach an agreement that will provide for the release of substantive material within the documents that won't in any way compromise the identity of a confidential source, in an effort to reach a mutually acceptable resolution of the Proceeding without further litigation. Such negotiations, as well as any subsequent litigation should those negotiations fail, will be limited to the documents that the Separate Letter identifies as a Substantial Contribution. The parties will negotiate in good faith to reach an agreement that will provide.

6. Dr. Marwell's Separate Letter and oral communications with NBC will be subject to NBC's Qualified Privilege Claim. Dr. Marwell will not disclose to the ARRB or to any other party the contents of the Separate Letter, or his discussions with NBC except as NBC shall authorize. Dr. Marwell agrees that, other than in delivering the Opinion Letter pursuant to the procedures outlined in paragraph 5, he will not disclose to any person or entity: (a) the content of any of the Materials; (b) any opinion rendered pursuant to this agreement; (c) any other information learned or notes taken during review of the Materials; or (d) the substance of any Privileged communication with NBC. Neither submission of the Materials to Dr. Marwell for his review, nor release of the Separate Letter described above, nor any communication with Dr. Marwell by any Party or representative of any Party, shall constitute a waiver of any Party's attorney-client privilege, attorney work-product privilege, journalist's privilege, or other privilege recognized by law. No Party, nor any representative, agency, employee or member of any Party, will at any time seek to pierce those

privileges based on any communication with Dr. Marwell, or otherwise invade or attempt to invade the Qualified Privilege Claim attaching to Dr. Marwell's engagement by any means, formal or informal. Neither this agreement nor any communication related thereto shall be filed with the Court except as may be necessary to enforce its terms. The Parties and Dr. Marwell agree and intend that all of the Qualified Privilege Claim restrictions and non-waiver provisions specified herein will continue in perpetuity and will survive the conclusion or termination of Dr. Marwell's engagement and this litigation.

7. Pending the review, opinion-drafting and negotiations, if any, conducted pursuant to paragraphs 1-6, the Parties will suspend further discovery proceedings and motion practice. The Parties will jointly seek to make all best efforts to complete the above procedures before the status conference currently scheduled for May 15, 1998, at 9:30. If, however, despite such efforts the Parties are unable to accomplish dismissal or reach a settlement by that date, they may jointly seek a brief further adjournment for those purposes. In the event no settlement can be reached by the further adjourned date, the Parties agree to use best efforts to complete all remaining discovery within 30 days of that adjourned date, subject to a jointly filed application seeking the Court's approval of an extended discovery period.

8. NBC and ARRB will be jointly responsible for compensation of Dr. Marwell on such terms as they and he agree upon, and for reimbursement of any expenses he may incur. It is understood and agreed that Dr. Marwell is undertaking the tasks specified herein as a service to the ARRB and NBC and not for any personal gain and that he is providing such services in his private capacity and not pursuant to any official duties associated with his present employment.

9. This agreement is entered into for settlement purposes only and without prejudice to any and all claims and defenses asserted or to be asserted by any of the parties; however, the privilege log created pursuant to Paragraph 4 above shall not be privileged and may be used by either party in the event of litigation. No statement, opinion, action or inaction by any of the parties or by Dr. Marwell in the course of any of the procedures or negotiations described above may be offered or admitted in evidence or otherwise used by any other party for any litigation purpose. None of the Parties will offer or seek to obtain any further testimony by Dr. Marwell, either by affidavit or live testimony, nor will Dr. Marwell otherwise undertake any further role in this Proceeding, after he has undertaken his review under this agreement. In the event that Dr. Marwell is served with a subpoena by any person, entity, or court seeking testimony, documents or information related to the Materials or to his services under this agreement, he will provide written notice (via facsimile and mail) to counsel for NBC and the ARRB within 24 hours of such service, and, in the event of an objection to the subpoena by any Party, will withhold disclosure of any information subject to the Qualified Privilege Claim provisions

herein until such objection is resolved by agreement or court order or until he is ordered to comply with the subpoena by a court of competent jurisdiction.

10. The parties agree that ARRB will take the deposition of Nancy Sheridan for purpose of inquiry into additional records over which she or her late husband, Walter Sheridan, had possession, custody or control.

AGREED:

UNITED STATES OF AMERICA

By: _____
Name:

ASSASSINATION RECORDS REVIEW BOARD

By: _____
Name:

NATIONAL BROADCASTING COMPANY, INC.

By: _____
Daniel M. Kummer, Litigation Counsel

NANCY SHERIDAN

DAVID G. MARWELL