

[DRAFT]  
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Senate Governmental Affairs Committee  
Hearing on S. 712

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Mr. Chairman and Members of the Committee -- I appreciate the opportunity of being able to testify today from the perspective of a person who has labored in the declassification trenches for the past three and one-half years. Although I serve as the Executive Director of the Assassination Records Review Board, I wish to emphasize that I am testifying here not on behalf of the Review Board, but as a person who has had the opportunity of being involved in day-to-day interactions with numerous Federal agencies on issues related to declassification. My comments here should not be understood to be the "official position" of the Board members who were appointed by the President and confirmed by the Senate. The Board members -- Judge John R. Tunheim, Professor Anna Kasten Nelson (who is here today), Professor Henry F. Graff, Dean Kermit L. Hall, and Dr. William L. Joyce -- have provided the American people unparalleled access to information that has been held secret for more than a third of a century. The Review Board's official positions on matters related to declassification will be set forth in its Final Report to Congress and the President later this year.

## **I. Background**

Although the word "unique" is no doubt over-used, it nevertheless can be fairly applied to the work and accomplishments of the Review Board. The Board was created by Congress in an effort to release the government's still-secret files on the assassination of President Kennedy. In accordance with the declassification standards articulated in Section 6 of the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107, Pub.L. 102-526 (as amended) ("JFK Act"), the Review Board has opened up previously classified records from numerous agencies and departments, including the CIA, NSA, FBI, State Department, Defense Department, military services, Justice Department, Secret Service, Senate and House Committees, Treasury, and the National Security Council.

Under the JFK Act, agencies are required either to open in full assassination records, or to present to the Review Board proposed redactions and evidence in support of their proposed redactions. After receiving the agencies' evidence, the Review Board deliberates and makes "formal determinations" as to whether the records should be opened. The Board's determinations have been overwhelmingly in favor of opening records. If an agency disagrees with the formal determination of the Review Board, its sole recourse is to appeal the Board's decisions to the President. Thus far, only one agency has appealed Board decisions. (The appeals ultimately involved

approximately 90 records and four different issues.) After extensive briefings had been submitted to the President -- with each side arguing why the records should or should not be released -- the agency ultimately withdrew its appeals or negotiated with the Review Board for the resolution of the issues. I am pleased to report that, without exception, every formal determination ultimately made by the Review Board has prevailed. It has now been almost two years since an agency has appealed a decision to the President. Thus, the Board's work has been a success. Although I do not consider the JFK Act to be the ideal model for future government-wide declassification efforts, it nevertheless has provided valuable lessons that may be of use to you as you consider S. 712.

I strongly applaud the efforts of Senators Moynihan, Helms, and this Committee to reduce government secrecy. One of the tragic consequences of government secrecy has been the mistrust and suspicion of the government that has festered and grown since the assassination of President Kennedy. Many of the records that we have seen could have been opened to the public years ago without any harm to the national security. The efforts of this Committee should help alleviate the unnecessary secrecy and suspicion that has grown since the assassination of President Kennedy.

## II. The "Four Noble Truths" of Declassification

In the course of my work, I have observed significant institutional impediments to declassification. I believe that any conscientious effort to improve the procedures for declassification should take into account what I will call the "Four Noble Truths" of declassification: *first*, there are a lack of internal institutional incentives to declassify information; *second*, an independent entity, not the classifying agency, should be the final decision maker on declassification; *third*, the independent declassification entity should be informed, engaged, and skeptical; and *fourth*, the key to successful declassification guidelines is *not* the articulation of the categories of classifiable information (although the clear articulation of such categories is important), but the allocation of the burden of proof to the party that seeks continued classification.

The four points are, of course, interrelated. I would like to illustrate these points by referring to a series of documents and offering some commentary on them.

**-- INSERT 10-12 DOCUMENTS ILLUSTRATING THE FOUR POINTS --**

***First, there are a lack of internal institutional incentives to declassify information.***

- Ex. slug lines
- Ex. Doug's military records.

Ex. Chicago CIA Office

Ex. Swiss records

Commentary: secrecy is a habit. Agencies are in the business of collecting and protecting secrets, not revealing them. There is a natural disinclination to release what has been painstakingly acquired. Individuals at agencies that prize secrecy do not readily give promotions to people who release those secrets.

Incentives in the JFK Act: public attention to the issue, independent agency with authority, cost of appeal to the President. (To date, not one ISCAP decision has been appealed to the President.)

***Second, an independent entity, not the classifying agency, should be the final decision maker on declassification.***

Ex. Secret Service seeking continued postponement of published Warren Commission records.

COMMENTARY: Seventy percent of the documents appealed to ISCAP were opened in full over the objections of agency heads. In the remaining documents, additional information was released. "Realistic risk assessment."

***Third, the independent declassification entity should be informed, engaged, and skeptical.***

Ex. J. Edgar Hoover testimony to Congress. Appeals to the White House.

Commentary: FOIA judges do not have the time to do the research. Informed and skeptical independence. There must be ongoing and informed communications. Ongoing and informed staff communications are particularly important for the process. Although JFK Board is the ultimate decision-maker, many of the issues can be resolved short of appeals to a Board. How the dynamics played out. Daily contact between staffs of Review Board and other agencies to discuss the issues. The Review Board staff has taken a genuinely skeptical, but nevertheless open-minded approach to issues. The way that it has worked out is that agencies effectively understand that if they are not able to convince the Review Board staff, they will never be able to convince the Board.

By demanding evidence the Board has been able make informed choices by listening to the argument of the concerned agency and by examining the documents in question. Agencies typically wait to be challenged.

***Fourth, the key to successful declassification guidelines is not the***

***articulation of the categories of classifiable information (although the clear articulation of such categories is important), but the allocation of the burden of proof to the party that seeks continued classification.***

Ex. Argument collapsed when demand for evidence was made.

### **III. Recommendations for Making S. 712 More Effective**

1. Independence of National Declassification Center. Independent institutionally and independent in skeptical spirit. Resources to provide and informed staff.

2. Establish and allocate the burden of proof (possibly on a time basis).

3. Mere written justifications are insufficient. Require evidence, not assertion.

not “ensure that the amount of information classified is the minimum necessary to protect the national security.” § 4(a).

not “weigh the benefit from public disclosure of the information against the need for initial or continued protection of the information under the classification system.” § 4(c)(1).

§ 4(d) Regular declassification review. [not practical]

not “provide a detailed justification for that decision” § 4(c)(2)(A).

4. Require that “sources and methods” be broken down into component parts -- each of which may have different standards for release.

5. An important issue, that is perhaps outside the scope of S. 712, and on which I will not dwell, is the ability to make affirmative requests on the classifying agencies to locate records.