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**of the**  
**President John F. Kennedy Assassination Records Review Board**

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## INTRODUCTION

The Federal Bureau of Investigation is contesting nine of the first ten decisions regarding its records made by the Assassination Records Review Board.

*See* FBI Appeal to the President, August 8, 1995 (hereafter FBI Memorandum). In asking the President to continue to redact information in records related to the assassination of President Kennedy, the FBI relies *solely* on generalized arguments and on statements of Bureau policy. These general arguments do not satisfy the FBI's obligation under the President John F. Kennedy Assassination Records Collection Act (JFK Act) as adopted by Congress and as signed into law by President Bush in 1992.

In failing to offer the clear and convincing evidence required by the JFK Act, the FBI is effectively retreating from a promise made by its own Director. In his congressional testimony in 1992, Director Sessions pledged that the FBI stood ready to satisfy its statutory burden to provide clear and convincing evidence to the Review Board:

I would stand on the general proposition that has been expressed so openly here this morning that *we in the FBI should be prepared with particularity to defend a particular piece of information and the necessity of it not being divulged.*<sup>1</sup>

As will be shown below, the FBI Memorandum appeal not only makes no attempt to satisfy its prior pledge to Congress and its obligations under the JFK Act, *its arguments here are inconsistent with its own prior releases of information.* This memorandum will examine the FBI's appeal in three steps: Part I will address the basic statutory requirements of the JFK Act; Part II will address the issue of informants; and Part III will address the "foreign relations" issue.

We trust that, after considering the applicable provisions of the JFK Act, the information that the FBI wishes to redact, and the absence of "clear and convincing evidence" in support of continued secrecy, the President will agree

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<sup>1</sup> *Hearing Before the Senate Comm. on Governmental Affairs on S.J. Res. 282 to Provide For the Expeditions Disclosure of Records Relevant to the Assassination of President John F. Kennedy*, 102d Cong., 2d Sess., pp. 64, 66 (1992) (statement of the Hon. William S. Sessions) (emphasis added).

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with the Review Board's decision that the law requires full and immediate release of these records.

**PART I: THE JFK ACT PRESUMES DISCLOSURE OF RECORDS.**

*The statutory presumption favoring full disclosure.* The FBI Memorandum fail to cite the most pertinent language of the JFK Act: the standard for release of information. According to the act itself, "all Government records concerning the assassination of President John F. Kennedy should carry a *presumption of immediate disclosure.*" Section 2(a)(2) (emphasis added). The statute further declares that "*only in the rarest cases is there any legitimate need for continued protection of such records.*" Section 2(a)(7) (emphasis added).

The FBI Memorandum not only fails to cite the controlling language in the statute, it fails to address the substance of the issue as well. Indeed, nowhere in the FBI's submission is there any discussion of why the records at issue here are among "the rarest of cases" contemplated by the statute or why they differ in any way from the thousands of other records for which the Bureau also has redacted information.

*The evidentiary standard of "clear and convincing" evidence.* In addition to ignoring the statutory presumption favoring full disclosure of records in all but the rarest of cases,<sup>2</sup> the FBI also neglects to discuss the evidentiary standard imposed by the JFK Act on agencies seeking to withhold information from the public. For *each* recommended postponement, an agency is required to submit "clear and convincing evidence" that one of the specified grounds for postponement is present.<sup>3</sup> *Ibid.*, Sections 6, 9(c)(1).<sup>4</sup>

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<sup>2</sup> The Bureau recognizes in passing, and only in relation to the "foreign relations" issue, that the "clear and convincing" standard applies. See FBI Memorandum, p. 4.

<sup>3</sup> Congress "carefully selected" this standard because "less exacting standards, such as substantial evidence or a preponderance of the evidence, were not consistent with the legislation's stated goal" of prompt and full release. H.R. Rep. No. 625, Pt. 1, 102d Cong., 2d Sess., p. 25 (1992).

<sup>4</sup> The Bureau's memorandum not only fails to provide the clear and convincing evidence required by the statute, it exemplifies the Bureau's overclassification of government records. The Bureau's entire ten-page memorandum is classified "SECRET," although virtually all of the information it contains should not properly

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be classified at all. For example, the Bureau goes so far as to classify the statutory language of the JFK Act itself. *See* FBI Memorandum, pp. 1-2. Similarly, there appears to be nothing in the Bureau's discussion of informants that should be classified "SECRET," although the Bureau designates it as such. *See* FBI Memorandum, pp. 5-10. Indeed, the only information that could reasonably be considered to be classified are the six paragraphs (starting at the middle of page 3 and continuing on to page 4) that discuss the particular foreign relations question at issue. (Our discussion below will show why classifying even those paragraphs would be overreaching.) This façade of secrecy, exemplified by the FBI Memorandum itself, is inconsistent with both the letter and the spirit of Executive Order 12958. That Order affirms that "[o]ur democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information." Thus, whenever "there is significant doubt about the need to classify information, *it shall not be classified.*" Ex. Order 12958, Sec. 1.2(b) (emphasis added). The Bureau's memorandum and arguments take an approach that is exactly the opposite of the new Executive Order.

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## **PART II: THE FBI's INFORMANT POSTPONEMENTS**

The first four of the nine contested documents pertain to informant issues. *See* Tabs 1-4 (attached). The Review Board provided the FBI with every opportunity to present its "clear and convincing" evidence in support of continued redaction of the information. Although the Bureau has submitted written documents and has made oral briefings (in which it made the same general arguments as appear in its memorandum), *the FBI provided no evidence whatsoever regarding the particular informants at issue.*

### **A. The FBI Ignored its Statutory Obligation to Provide Clear and Convincing Evidence.**

The FBI redacted the four informant documents on the basis of two

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