DRAFT MEMORANDUM

June 23, 1998

To: File

From: T. Jeremy Gunn, Executive Director and General Counsel

Subject: **The Review Board's obligations with respect to Severance Payments.**

This memorandum sets forth the reasons why the Review Board is not required to make severance payments to its staff upon the Review Board's termination on September 30, 1998. Analysis of this issue requires examination of the President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. Sec. 2107 (Supp. V 1994) ("JFK Act"), the Severance Pay Act, 5 U.S.C. §5595, the OPM regulations that supplement the Severance Pay Act (promulgated at C.F.R. Sec. 550.701 - 714 (1998)), and various other provisions of Title V.

I. The JFK Act Exempts the Review Board from the Requirement that it Make Severance Payments.

A. Pursuant to Section 8(b)(1) of the JFK Act, the Review Board is exempt from the civil service laws with respect to appointing and terminating employees.

Congress granted the Review Board full authority with respect to the appointment and termination of its staff. This authority is set forth in Section 8(b)(1), which provides as follows:

> **Staff** - (1) The Review Board, without regard to the civil service laws, may appoint and terminate additional personnel as are necessary to enable the Review Board and its Executive Director to perform the duties of the Review Board.

44 U.S.C. Sec. 2107.8(b)(1) (Supp.V 1994) ("Section 8(b)(1)"). As an examination of the legislative history of the JFK Act makes clear, Congress conferred this broad authority upon the Review Board with respect to the employment conditions of its staff, in order to assist it in fulfilling its stringent statutory duties within an extremely limited time period. In considering the 1994 version of the JFK Act, the House Committee on Governmental Operations stated:

> In view of the Review Board's urgent need to hire staff and to aid in processing the voluminous assassination records and the limited duration of this employment (less than 3 years), hiring employees in accordance with civil service laws is not the most effective way for the Review Board to execute its responsibilities. *The committee concludes that the*

Review Board should be authorized to appoint and terminate employees without regard for civil service laws.

H.R. Rep. No. 587, 103d Cong., 2d Sess. 21-22 (1994) (emphasis added). The initial version of the JFK Act did not contain this plenary authority, but provided as follows:
"[t]he Review Board may, in accordance with civil service laws, but without regard to civil service law and regulation for competitive service as defined in subchapter 1, chapter 33 of title 5, United States Code, appoint and terminate additional personnel as are necessary to enable the Review Board and its Executive Director to perform its duties." As the amended language indicates, Congress appreciated the daunting task facing the Review Board, and concluded that requiring the Board to adhere to the civil service laws would inhibit its ability to complete its work.

The Severance Pay Act falls under the category of civil service laws.[1] Generally, the issue of severance pay arises when an employee is unexpectedly terminated from his employment, through no fault of his own.[2] The payment of severance to an employee constitutes a condition of the employee's termination. As used in the JFK Act, "terminate" clearly refers to the end of a staff member's tenure of employment. Specifically, Section 8(b)(3)(ii) provides that if a person hired on a conditional basis does not qualify for the security clearances necessary for the work of the Review Board, the Review Board shall immediately terminate the person's employment. [3]

Because the Review Board may establish the terms and conditions of an employee's termination without regard to the civil service laws, the Review Board is not mandated to make Severance payments to its employees. Although the Board may choose to pay severance, it is not required to do so. The Board may elect to pay retention bonuses or awards of merit to employees, in lieu of making severance payments. All that the JFK Act requires of the Board is that its avctions with respect to appointing and terminating employees are "necessary to enable the Review Board and its Executive Director to perform the duties of the Review Board." Section 8(b)(1).

In light of the significant work that remains, it is crucial that the Board retain its full complement of staff members until its termination date. The Board may determine that it is necessary to promise to pay retention bonuses or awards of merit to any staff member who remains in

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[1]The Civil Service Reform Act of 1978 specifically amended portions of the Severance Pay Act.

[2] An employee separated by removal for cause on charges of misconduct, delinquency, or inefficiency is not eligible for severance payments. 5 U.S.C. § 5595 (b)(2).

[3]The word "terminate" is used elsewhere throughout the JFK Act to refer to the end of the work of the Review Board. *See e.g.* Section 7(o), "Termination and winding up;" Section 12 "Termination of effect of Act"; Section 9(d)(4) "the Review Board shall provide written notice to the President and Congress of its intention to terminate its operations at a specified date."

the employ of the Review Board until its termination date of September 30, 1998. This will enable the Board to secure the workforce necessary to complete all of its work.

B. Section 8(b)(1) of the JFK Act is the only Provision that Governs the Review Board's Obligations with Respect to the Payment of Severance.

(I) Section 8(c), which relates to "compensation," refers only to basic pay and pay rates, and does not refer to severance pay.

Section 8(c), the provision of the JFK Act that relates to "Compensation" does not encompass the issue of severance pay. Section 8(c) provides as follows:

> **Compensation** - Subject to such rules as may be adopted by the Review Board, The chairperson, without regard to the provisions of title 5, United States Code [Title 5], governing appointments in the competitive service and without regard to the provisions of chapter 51 and subchapter iii or chapter 53 of that title, [section 5101 et seq. and section 5331 et. seq., respectively, of Title 5] relating to classification and General Schedule pay rates, may
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> (1) appoint an Executive Director, who shall be paid at a rate not to exceed the rate of **basic pay** for level V of the Executive Schedule; and
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> (2) appoint and fix compensation of such other personnel as may be necessary to carry out this Act.

44 U.S.C.§8(c) (emphasis added). In this section, "Compensation" refers only to "basic pay." Severance payments do not fall under the category of "basic pay," and they do not constitute "Compensation" for purposes of Title V. Severance Pay is not covered within the "pay schedule" and "classification" laws of Title V - but is codified in a separate section. Severance Pay is not compensation - but rather an "allowance."[4] It is occasioned by the atypical situation where an

[4] The Severance Pay Act defines severance pay as "a basic severance allowance computed on the basis of 1week's basic pay at the rate received immediately before separation for each year of civilian service..."5 U.S.C. §5595(c)(1).

employee is unexpectedly terminated from his or her job.

Severance payments are not what is contemplated by the "Compensation" provision of Section 8(c) of the JFK Act. This provision only relevant to the issue of basic pay and pay rates. The provision that governs the payment of severance, and any other employment incidential, is found in Section 8(b)(1).

(II) Because Section 8(c) of the JFK Act does not govern the issue of Severance pay, the argument of "expressio unius est exclusio alterius" is inapplicable.

Were Section 8(c) the only provision of the JFK Act that referred to appointment of employees, an employee seeking severance payments, could argue that although Congress exempted the Review Board from certain provisions of Title V, it did not exempt it from having to comply with any of the other provisions of Title V (including the Severance Pay Act found at 5 U.S.C. §5595). Recently, the United States Court of Appeals considered a similar argument in *King v. Briggs*, 83 F. 3rd, (Fed.Cir. 1996). In *King*, the Executive Director of the National Council on Disability appealed her removal by the Council, contending that it was in violation of the procedural protections provided under 5 U.S.C. § 7511.[5] The Executive Director had been hired pursuant to 29 U.S.C. §783(a)(1), which provided that the Council "may appoint, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, an Executive Director to assist the National Council to carry out its duties." King's employer argued that the exclusions from Title 5 set forth in section 783(a)(1) "took the Executive Director's position outside the scope of other sections of Title V." *King,* 83 F. 3rd at 1386. The Court disagreed with the employer's contention, holding that with respect to the statute at issue:

> Congress gave the Council the option of disregarding only certain parts of Title 5. To interpret the section as giving the Council the option to disregard additional, unenumerated parts of title 5 would run afoul of the maxim 'expressio unius est exclusio alterius' and in a domain where, as *Todd* amply demonstrates, Congress knows how to exempt a civil service position from the protections found in the procedural protections of title 5 (chapters 75 and 77) if it so desires.

Id. at 1388 (citations omitted).

The holding in the *King* case does not apply to the situation of the Review Board. In *King,* the applicable statute contained only one provision that governed the appointment and compensation of the Executive Director. By contrast, the Review Board's enabling legislation contains a very specific provision that governs the appointment and termination of staff. This provision unambiguously

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[5]This provision defines employees who have the right to appeal adverse agency actions with respect to removal, reduction in pay or grade, furlough, or suspension matters.

states that the Review Board does not have to follow civil service laws with respect to appointing and terminating employees.

In the Review Board's case, the JFK Act contains a very specific provision that delineates the power of the Board with respect to appointing and terminating employees. It is this specific provision that determines the issue of whether the Board must make severance payments. Further, in the Review Board's case, the legislative history makes clear that Congress considered the finite time-limit when according the Review Board full power to appoint and terminate its employees without respect to civil service laws. Analysis of the legislative history, is often instructive in cases where there is some conflict. The Review Board's situation is similar to the facts of the Because the JFK Act contains this specific provision, this is the provis *Todd v. Merit Systems Protection Board*, 55 F.3d 1574 (Fed Cir. 1995), a temporary contract employee who had been hired by the Department of Defense pursuant to 20 U.S.C. Sec. 241(a), attempted to appeal an adverse holiday pay policy. The statute under which Todd had been hired, specifically exempted her from the appeal rights provided to a certain category of employees in Section 7511 of Title 5. [6] Todd argued that a more recently enacted statutory provision brought her within the scope of employees with appeal rights, and supplanted the provision of the statute under which she was hired, that took away these appeal rights. The court held that it was the specific statute under which Todd was hired, that governed whether or not she was eligible to appeal this adverse action. In reaching this conclusion, the court examined the Legislative History of the statute under which Todd was hired, and concluded that this statute was "intended to provide military dependent's schools with the flexibility to make the personnel practices and compensation for school employees comparable to the labor practices generally found in public schools, rather than in the public service." *Todd* at 1577. The court further stated:

> This is a case of conflict between a specific statute which addresses a narrow category of activity and a generally applicable statute that covers a broad range of activity. Although Todd falls within the literal scope of both statutes, they are in conflict and only one can properly be applied to her. This conflict is properly resolved by applying the longstanding principle of statutory construction that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.

Id. at 1578.

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[6] This statute provided: "For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of title 5; (2) subchapter I of chapter 63 of Title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) 1302(b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512, and 7701 of title 5; and (5) chapter 43 of title 5." 20 U.S.C. § 241 (a).

In this case, Congress gave the Review Board a clear directive - it did not have to follow the Civil Service Laws with regard to appointment and termination of employees. This was a reasoned directive - based on the unique posture of the Review Board, and its need to complete an extraordinary amount of work in a short time period. The legislative history did not address the issue of "Compensation" since that was obvious from the plain language of the statute - it related merely to compensation, and no other employment incidentials. Indeed, the expansive power accorded to the Broad is unique. Although other agencies are not required to follow civil sevice laws in many aspects- none seem to have the enacting legislation that governs "appointment *and termination*" such as the Review Board's. [7]

II. The Review Board is not subject to the provisions of the Severance Pay Act.

Among the category of "agencies" that are required to comply with the provisions of the Severance Pay Act, are "Executive Agencies." 5 U.S.C.§ 5595(a)(1)(A). The term "Executive Agency" for purposes of the Severance Pay Act, is defined at 5 U.S.C. Section 105, as "an Executive Department, a Government Corporation, or an independent establishment." The Review Board is clearly not an Executive Department or Government Corporation, and further analysis reveals that it is not an "independent establishment." For purposes of Title V, "independent establishment" is defined as follows:

> an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive Department, military department, Government corporation, or part thereof, or part of an independent establishment.

5 U.S.C. Sec. 104 (emphasis added).

The Review Board is not an establishment in the Executive Branch. Congress, in the Review Board's enabling legislation, specifically established the Review Board as an "<u>independent agency</u>." *President John F. Kennedy Assassination Records Collection Act of 1992* Sec. 7(a), 44 U.S.C. Sec. 2107 (Supp. V 1994) (emphasis added). In so doing, Congress underscored the Review Board's independence by prohibiting the President from removing Review Board members without cause. 44 U.S.C. Sec. 2107.7(g)(1)(b). The Review Board's status as an independent agency is crucial to the Review Board's mission, which is to promote declassification of records that Executive Branch agencies may otherwise wish to protect. In creating an independent Review Board, Congress expressed its intent that the Board make its determinations about assassination records free from Presidential control.

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[7]See National Institute for Literacy Board; National Security Agency Act, National Council on Disability,

> "Our intent is to establish a neutral body that gives legitimacy to our efforts. The very structure and appointment of the board is designed to accomplish this by dispelling any notion of prejudice by any political persuasions or improprieties of any manner. Thus, it is imperative that the review board be an independent agency."

The Assassination Materials Disclosure Act of 1992: Hearing on S.J.Res. 282 before the Senate Comm. On Governmental Affairs, 102d Cong., 2d Sess. 28 (1992) (statement of Representative Louis Stokes).

The Review Board is a unique agency - one that is unprecedented in its power to compel cooperation from *all* governmental agencies that may have assassination records. By definition, it is an independent, temporary agency, that is not part of the Executive Branch. These attributes distinguish the Review Board from other agencies that fall within the Executive Branch. The Review Board is more appropriately compared to a Congressional staff - all of which are exempted from the scope of the Severance Pay Act.

III. A decision by the Review Board to not pay severance, does not contravene the underlying policy considerations of the Severance Pay Act.

Severance Pay legislation was first passed in 1965 to provide "for the payment of severance pay benefits upon involuntary separation from Federal service." *Akins v. United States*, 194 Ct. Cl. 477, 439 F. 2d 175, 178 (1971). The legislative history indicates that the purpose of the severance provisions "was to afford monetary relief to Federal employees who, after long years of faithful public service, 'find themselves out in the cold without work and without retirement,' and with the complete loss of earned employee rights."*Akins,* 439 F.2d at 178 (quoting from 111 Cong. Rec. 25677 (1965)). Severance pay legislation was "intended to provide 'reasonable compensation to help tide Federal employees over difficult transition periods' when they became separated from Federal service through no fault of their own." *Id.* quoting H.R. Rep. No. 792, 89th Cong., 1st Sess. 11 (1965).

The policy considerations underpinning the statutorily established Severance pay scheme, is inapplicable to the situation of the Review Board and its staff. There was never any possibility that the Review Board would be a permanent agency. Staff members were told *before* they accepted employment that their assignments would not endure beyond the September 30, 1998 date. The enabling legislation established a date certain for the outside limit of the duration of the Review Board. The statute even contemplated that the Review Board could finish its work ahead of its scheduled termination date. [8] Finally, staff considered this termination date in prioritizing work

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[8]Section 9(d)(4) provides that "At least 90 calendar days before completing its work, the Review Board shall provide written notice to the President and Congress of its intention to terminate its operations at a specified date.

projects, and in allocating resources. To contend that the termination of the work of the Review Board will result in employees suddenly, and unexpectedly being left "out in the cold" is contrary to all of the facts.