DRAFT MEMORANDUM

July 7, 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 mandated 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. §§550.701 - 714 (1998)), various other provisions of Title V, and relevant case law.

## 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. §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." By 1994, Congress had clearly gained more of an appreciation for the daunting workload and special staffing needs of the Review Board. As the amending language indicates, Congress concluded that requiring the Review Board to adhere to the civil service laws would fetter its ability to complete its work.

It is significant that Congress exempted the Review Board from civil service laws with respect to appointment *and termination* of employees. The "appointment" exemption alone frees the Review Board from imposing any of the requirements and protections of the various civil service laws such as competitive examinations, completion of probationary periods, or rights to appeal adverse employment actions. When an employee is appointed without regard to civil service laws, they are deemed to be in the "excepted service" and are not entitled to various protections of the Civil Service Laws.[1] In this case, there can be no question that Review Board staff members are not entitled to the protections of civil service laws because not only may they be *appointed* without regard to the civil service laws, but they may also be *terminated* without regard to these laws. By also exempting the Review Board from having to follow civil service laws with respect to "termination" issues, Congress emphasized its intent that the Review Board not be bound by *any* of the civil service laws in making employment-related decisions.

[1] See e.g. *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038 (Fed.Cir.1985), which held that an employee of a government corporation which could appoint employees without regard to civil service laws, was in the "excepted service" and not entitled at that time to the civil service protections that govern reductions in force.

It is clear from other provisions of the JFK Act, that Congress had considered that the Review Board would be presented with issues relating to staff members' termination from 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.[2] Thus, as used in Section 8(b)(1) of the JFK Act, "terminate" clearly refers to the end of a staff member's tenure of employment.

### B. The Board may choose not to pay Severance, because this is an issue that relates to a staff member's "termination" from employment with the Review Board.

Generally, the issue of severance pay arises when an employee is unexpectedly terminated from his employment, through no fault of his own.[3] Severance pay issues relate to the conditions of an employee's termination from employment. Since "severance pay" falls within the general category of civil service laws, the Review Board is *not* required to afford this benefit to its employees.[4] Although the Board may choose to pay severance, it is not mandated 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 actions 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 do whatever possible to retain a sufficient complement of staff members until its termination date. The Board may determine that the best way to ensure that all its work is accomplished is to promise to pay retention bonuses or awards of merit to staff members who remain in the employ of the Review Board until September 30,

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[2] The word "terminate" is also used elsewhere in 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."

[3] 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).

[4] The Civil Service Reform Act of 1978 specifically amended portions of the Severance Pay Act. Also, the accompanying regulations to the Severance Pay Act (promulgated first by the Civil Service Commission, and then by OPM), are codified in the subchapter "Civil Service Regulations" 5 C.F.R. Chapter 1, Subchapter B.

1998. This would enable the Board to proceed with its work unimpeded by concerns of a depleted work force.

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

*The "Compensation" section of the JFK Act does not control the issue of severance pay, since it relates strictly to basic compensation and employee classification issues.*

Section 8(c), the provision of the JFK Act that relates to "Compensation" does not encompass the issue of severance pay, but relates only to the narrow issues of classification and pay rates. 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).

This provision relates only to issues of salary, giving the Chairman of the Review Board the authority to appoint employees without regard to any of the provisions of Title V that govern schedules for job titles and corresponding pay rates. As the title and the plain language of the section state, "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 more accurately defined as an "allowance."[5] Further, it is *not* "a basis for payment, and may not be included in the basis for computation of any other type of United States or District of Columbia Government benefits...." 5 U.S.C. § 5595(f).

A plain reading of the "Compensation" provision of Section 8(c) of the JFK Act makes clear that Congress meant this provision to refer only to the issue of basic pay, and to no other employment incidental. When Congress' intent is clear from the face of the statutory language, courts "must give effect to the unambiguously expressed Congressional intent." *Sloan v. West*, 140 F.3rd 1255, 1261 (9th Cir. 1998) quoting *Chevron, U.S.A. Inc., v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

> *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 made reference to the "appointment" of staff members, an argument could be made that although Congress exempted the Review Board from certain provisions of Title V, it did not exempt it from any of the other provisions of Title V (including the Severance Pay Act found at 5 U.S.C. § 5595). The United States Court of Appeals considered a similar argument in *King v. Briggs*, 83 F. 3rd 1384 (Fed.Cir. 1996). In *King*, the Executive Director of the National Council on Disability appealed her removal by the Council, contending that she had not been afforded the procedural protections provided under 5 U.S.C. § 7511.[6] 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:

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

[6] This provision delineates the employees entitled to appeal adverse agency actions with respect to removal, reduction in pay or grade, furlough, or suspension matters.

> 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 situation present in *King* does not mirror that of the Board. In *King,* the applicable statute contained only one provision that governed *both* the appointment and the compensation of the Executive Director. By contrast, the Review Board's enabling legislation contains only one provision that governs the issue of "appointment and termination" of employees. The very specific language of Section 8(b)(1) unambiguously states that the Review Board does not have to follow civil service laws with respect to appointing and terminating employees. It is this provision, and not the narrow "compensation" provision, that governs the Review Board's obligations with respect to the payment of severance.

*Congress specifically chose to draft the JFK Act so as to exempt the Review Board from the requirement of following civil service laws.*

Congress has repeatedly demonstrated that it knows how to draft legislative provisions which exempt agencies from the requirement of following civil service laws with respect to specific employment issues.[7] One such statute, 20 U.S.C.§ 241(a), was interpreted in *Todd v. Merit Systems Protection Board*, 55 F.3d 1574 (Fed Cir. 1995) [8] In *Todd,* 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 under 5 U.S.C. § 7512(4). The statute under which Todd had been hired clearly

[7] See e.g. enabling legislation of National Institute for Literacy Board, 20 U.S.C.§1213c; National Security Agency, 50 U.S.C.§402 nt.; National Gallery of Art, 20 U.S.C. §74(c).

[8] 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).

exempted Todd from the appeal rights afforded by 5 U.S.C. § 7512. Nevertheless, Todd brought the appeal, contending that a subsequently enacted statute brought her within the scope of employees with appeal rights, and supplanted the provision of the statute under which she was hired. *Todd*, 55 F. 3rd at 1546. 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 20 U.S.C. § 241(a), and concluded that the 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." *Id.* 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 (citations omitted).

As in *Todd*, the relevant statutory language at issue in this case addresses a narrow, precise and specific subject - to wit, the collection and processing of records related to the assassination of President John F. Kennedy. The legislative history of the JFK indicates that Congress was explicitly aware of the unique and temporary nature of the Review Board, and the extraordinary work required of it. Because of this, Congress gave the Review Board a clear directive - it was not obligated to follow the civil service laws with respect to appointing and terminating employees.

## II. A Decision by the Review Board to not Pay Severance, does not Contravene the Underlying Policy Considerations of the Severance Pay Act.

*Severance Pay Provisions are designed to protect long-time Federal employees who suddenly, and unexpectedly lose their jobs.*

Severance pay provisions were first enacted 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 that drove the enactment of severance pay provisions are inapplicable to the situation of the Review Board and its staff. None of the employees of the Review Board has ever believed 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 the possibility that the Review Board would finish its work ahead of its scheduled termination date. [9] As it were, Review Board staff members were granted one additional year of employment as a result of the 1997 amendment. Finally, the Review Board's finite life-span was frequently a factor that influenced employees' prioritization of work projects and allocation of resources.

Staff members cannot argue that the termination of the Review Board and the consequent end of their employment creates a situation which catches them off guard. Review Board employees have had months, and in some cases years, to prepare for the inevitable termination of the Review Board and the concomitant necessity of finding other employment.

*The Review Board's independent and temporary nature make it different*
*From other agencies that are required to make severance payments.*

Congress, in the Review Board's enabling legislation, specifically established the Review Board as an "independent agency." *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 has been critical to the Review Board's mission, which is primarily 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.

> "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

[9] 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."

> 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 Committee 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. This power necessitates that it operate differently from other agencies, and makes it unlike any other executive branch agency. Because of its temporary nature, the Review Board is similar to a Congressman's staff, or to an elected official's staff. These entities have uncertain durations and limited budgets, and are not subject to the requirements of the Severance Pay Act. The Review Board is even more temporary in nature, and under more stringent budgetary constraints. As such, it cannot be expected to have to provide severance benefits to its employees.