Chapter 4:
The Standards for Release of Information Under the JFK Act

A. Introduction and Background

Section 6 of the *President John F. Kennedy Assassination Records Collection Act of 1992,*[1] ("JFK Act"), establishes a short list of reasons that Federal agencies can cite as a basis for requesting postponement of public disclosure of records relating to the assassination of President Kennedy. The JFK Act directs the Review Board to sustain postponements under Section 6 only in the "rarest cases," but beyond the statute's presumption of disclosure,[2] the Review Board had little guidance from Congress concerning how to apply each of the grounds for postponement set forth in section 6. This chapter will explain how the Review Board analyzed and applied each of the standards for declassification listed in section 6.

Part I of the chapter will begin with an overview of the existing law governing the Federal Government's release of information. In addition, Part I will summarize the Review Board's analysis and decision-making about the section 6 standards. Part II will enumerate the general principles, or "common law," that the Review Board established as it applied the provisions of section 6 to individual documents. Part II also addresses the general principles that the Review Board applied in dealing with records that it determined to be less relevant to the assassination.

1. Current guidelines for release of assassination-related information.

[1] 44 U.S.C. § 2107 (Supp. V 1994) (hereinafter "JFK Act").

[2] "[A]ll Government records related to the assassination of President Kennedy should carry a presumption of immediate disclosure." JFK Act, section 2(a)(2).

Before Congress passed the JFK Act, members of the public who wished to review the Government's assassination records could either request the records under the Freedom of Information Act[3] ("FOIA") or wait for the records to be released under the terms of the current Executive Order.[4] Like the JFK Act, the FOIA is a disclosure statute that assumes that all government records, *except for those that fit within one of the enumerated exemptions,* may be released. Also like the JFK Act, the FOIA places upon the Government the burden of proving that material fits within the statutory exemptions. The nine FOIA exemptions that allow Government agencies to withhold information from the public are listed below.

*a. The Freedom of Information Act Exemptions***.**

> (b) This section does not apply to matters that are --
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> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> (B) are in fact properly classified pursuant to such Executive Order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute
>
> (A) requires that the matters be withheld from the public in

[3]5 U.S.C. § 552 (1988) (hereinafter "FOIA").

[4]President Reagan's Exective Order was in effect at the time that the JFK Act was passed. *See* Exec. Order No. 12,356, ____ C.F.R. ____ (19____ - 1995), *reprinted in* ____ U.S.C. § (19____) (hereinafter "Executive Order 12,356"). The current Executive Order is Exec. Order No. 12,958 ____ C.F.R. ____ (1995-present), *reprinted in* ____ U.S.C. § ____ (19____) (hereinafter "Executive Order 12,958").***Chris Burton is locating cites ***

such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged and confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would

> disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
> (F) could reasonably be expected to endanger the life or physical safety of any individual;
>
> (8) contained in or related to examination operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
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> (9) geological and geophysical information and data, including maps, concerning wells.

The second set of guidelines that governed the disclosure of records relating to the assassination of President Kennedy before the passage of the JFK Act is contained in the President's Executive Order. At the time that Congress enacted the JFK Act, Executive Order 12,356 was in effect.[5] In 1995, President Clinton signed Executive Order 12,958.[6] The current Executive Order applies to all Executive branch records and, unlike the JFK Act, requires agencies to engage in a systematic declassification of all records over 25 years old. The Executive Order's terms governing automatic declassification are listed below.

[5]Executive Order 12,356 was not as disclosure-oriented as Executive Order 12,958. The Senate Report for the JFK Act notes that it believed that,

> Executive Order 12,356, National Security Information, has precluded the release of [assassination] records. . . .
>
> [L]egislation is necessary . . . because E.O. 12,356, "National Security Information," has eliminated the government-wide schedules for declassification and downgrading of classified information and has prevented the timely public disclosure of assassination records. . . .

S. Rep. No. 102-328, 102d Cong., 2d Sess. 17, 20 (1992) ("Senate Report").

[6]Because the audience for this report presumably will encounter the current Executive Order more often, the standards for release of information under Executive Order 12,958 are quoted. We have not quoted the standards for release of information under Executive Order 12,356.

b. Executive Order 12,958, Section 3.4(a)-(b): Automatic Declassification (April 17, 1995).

(a) Subject to paragraph (b), below, within 5 years from the date of this order, all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. Subsequently, all classified information in such records shall be automatically declassified no longer than 25 years from the date of its original classification, except as provided in paragraph (b), below.

(b) An agency head may exempt from automatic declassification under paragraph (a), above, specific information, the release of which should be expected to:

(1) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state of the art technology within a U.S. weapon system;

(5) reveal actual U.S. military war plans that remain in effect;

(6) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

(7) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

(8) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

(9) violate a statute, treaty, or international agreement.

The JFK Act guidelines that govern the disclosure of records relating to the assassination of President Kennedy are listed below.

c. JFK Act Section 6: Grounds for postponement of public disclosure of records.

Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that --

(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --

(A) an intelligence agent whose identity currently requires protection;

(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United

States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person;

(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;

(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest;

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

B. Key distinctions between standards of release under the FOIA, the Executive Order, and the JFK Act.

In considering whether the JFK Act was necessary to guarantee public access to assassination records, Congress evaluated the effectiveness of both the FOIA and the then-current Executive Order 12,356. Both the House and the Senate concluded that the FOIA and the Executive Order, as administered by the executive branch, had failed to guarantee adequate public disclosure of assassination records. At the time that the JFK Act was enacted, the largest collections of records concerning the assassination were under the control of the FBI, the CIA, and the Congressional Committees who investigated the assassination. The FOIA provides special protections for each of these entities. *First,* the FOIA exempts CIA operational files from disclosure.[7] *Second,* the FOIA provides broad-based protection for law enforcement files and therefore allows the FBI to protect a substantial amount of its information from disclosure.[8] *Third,* the FOIA does not apply to unpublished Congressional records.[9] Thus, for the above reasons, combined with Congress' finding that the FOIA did not provide for the disclosure of records actually *within* its scope, Congress believed that the FOIA was not a satisfactory mechanism for guaranteeing disclosure of assassination records.[10]

[7]5 U.S.C. § 552(b)(3) (**Chris Burton is locating current version of FOIA so that we can insert language from Exemp. 3 of the FOIA**).

[8]5 U.S.C. § 552(b)(7) (**Chris Burton is locating current version of FOIA so that we can quote relevant provisions from exemp. 7**)

[9]The Senate believed that the "legislation is necessary" in part "because congressional records related to the assassination would not otherwise be subject to public disclosure until at least the year 2029." S. Rep. at 20. The "FOIA does not provide public access to unpublished congressional records." CRS Report for Congress: President John F. Kennedy Assassination Records Disclosure: An overview (March 3, 1993).

[10]The House Committee that sponsored an early version of the JFK Act wrote in its report:

> [T]he [FOIA], as implemented by the executive branch, has failed to secure the timely release of information relating to the assassination. The FOIA provides a mechanism for the disclosure of agency records. Many records pertaining to the assassination of President Kennedy have been disclosed under that Act, but many executive branch records have also been withheld. Several factors have failed to secure the timely release of assassination records under the FOIA.
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> First, and most importantly, the executive branch has routinely made extensive and

> unjustified use of statutory exemptions to withhold information that no longer actually warrants protection. . . . Unfortunately, agencies have been unwilling to use their existing authority to release documents that can be disclosed without harm to any significant public or private interest. . . .
>
> Second, both the agencies and the courts have been relying on presumptions -- sometimes irrebuttable presumptions -- to justify the withholding of information. This interpretation is directly contrary to the express language of the FOIA, which provides that "the burden is on the agency to sustain its action." Executive agencies and the courts which conduct de novo review, are required by the FOIA to find facts in each individual case that justify withholding. Although any reliance on presumptions is wholly inconsistent with the language and the intent of the FOIA, such practices have become widespread and have prevented th release of records which may not actually qualify for withholding.
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> It is the [House] Committee's intent that [the House version of the JFK Act] be implemented with full recognition that the FOIA as implemented by the executive branch has failed to secure the timely release of information relating to the assassination.

H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 18 (1992).

Of course, President Clinton did not sign Executive Order 12,958 until April 17, 1995 -- over 2 years after Congress passed the JFK Act. Clearly, the terms of the Executive Order apply to most assassination records because it applies to Government records that are of permanent historical value *and* that are over 25 years old.[11] Most Government records relating to President Kennedy's assassination meet these two criteria. At the time that President Clinton's Executive Order came into effect, the Review Board compared its provisions to those of the JFK Act and realized that although the Executive Order would require agencies to *review* assassination records under its terms, it would not require agencies to *release* the records. Instead, the Executive Order allows agency heads to exempt records from automatic declassification provided that the agency head expects that disclosure of the records will result in one of the nine enumerated categories of harm. Thus, although the Executive Order's standards for declassification appear to be disclosure-oriented, the Executive Order fails to hold agency heads accountable for their decision-making.

On the contrary, the JFK Act does require agencies to account for their decisions. To ensure agency accountability, Congress included four essential provisions in the JFK Act: *first,* the JFK Act presumes that assassination records may be released; *second*, the JFK Act states that the only way that an agency can rebut the presumption of disclosure is for an agency to prove, *with clear and convincing evidence,* that disclosure would result in harm and that the expected harm would outweigh any public benefit in the disclosure; *third,* the JFK Act created an *independent* agency -- the Review Board -- whose mandate was to ensure that agencies respected the presumption of disclosure and honestly presented clear and convincing evidence of the need to protect information; and *fourth,* the JFK Act required agencies to provide the Review Board with *access* to Government records, even where those records would not become part of the JFK Collection. Without these accountability provisions, the JFK Act would not have accomplished its objective of maximum release of assassination records to the public. So, while the FOIA and the Executive Order each express the goal of

[11] **cite to E.O. 12,958 (Chris Burton is locating a current copy of the E.O. so that we can cite the proper section.)**

obtaining maximum disclosure, the JFK Act ensures that the goal will be met. The two accountability provisions that relate directly to the Section 6 grounds for postponement -- the presumption of release and the standard of proof -- are discussed in detail below. The third provision discussed below is the Review Board's obligation to balance the weight of the evidence in favor of postponement against the public interest in release.

a. JFK Act Presumes Disclosure of Assassination Records

The most pertinent language of the JFK Act is the standard for release of information. According to the statute, "all Government records concerning the assassination of President John F. Kennedy should carry a *presumption of immediate disclosure."*[12] The statute further declares that *"only in the rarest cases is there any legitimate need for continued protection of such records."*[13]

b. JFK Act Requires Agencies to Provide Clear and Convincing Evidence

If agencies wish to withhold information in a document, the JFK Act requires the agency to submit "clear and convincing evidence" that the information falls within one of the narrow postponement criteria.[14]

Congress "carefully selected" the "clear and convincing evidence" 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.[15]

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[12]Section 2(a)(2) (emphasis added).

[13]Section 2(A)(7) (emphasis added).

[14]*See* Sections 6, 9(c)(1).

[15]H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 25 (1992). The legislative history of the JFK Act emphasizes the statutory requirement that agencies provide "clear and convincing evidence." The House Committee on Government Operations concluded in its Report on H.J. Res. 454:

> There is no justification for perpetual secrecy for any class of records. ***Nor can the withholding of any individual record be justified on the basis of general***

confidentiality concerns applicable to an entire class. Every record must be judged on its own merits, and every record will ultimately be made available for public disclosure. H.R. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 16 (1992) (emphasis added).

When agencies do present to the Review Board evidence of harm that will result from disclosure, it must be more than speculation.

> The [Review] Board cannot postpone release because it might cause some *conceivable or speculative harm* to national security. Rather in a democracy the *demonstrable harm* from disclosure must be weighed against the benefits of release of the information to the public.[16]

The Review Board's application of the clear and convincing evidence standard is covered in more detail in Section II of this chapter. Section II includes a discussion of the "Rule of Reason" that the Review Board ultimately adopted with regard to receiving evidence from the agencies.

c. *JFK Act Requires the Review Board to Balance Evidence for Postponement Against Public Interest in Release.*

[16]H. Rep. No. 625, 102d Cong., 2d Sess., pt. 1, at 26 (1992) (emphasis added).

Assuming that agencies do provide clear and convincing evidence that information should be protected from disclosure, the terms of section 6 require that information not be postponed unless the threat of harm outweighs the public interest in disclosure. As used in the JFK Act, "public interest" means "the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy."[17] The Review Board interprets the balancing requirement to mean that agencies must provide the Review Board with clear and convincing evidence of the threat of harm that would result from disclosure. However, to the extent that the JFK Act leaves room for discretion in evaluating the historical significance, or public interest, of particular assassination records, it is the Review Board -- not the agency that originated the document -- that is to exercise this discretion. The JFK Act established the Review Board as a panel of independent citizens with expertise as historians and archivists precisely in order to secure public confidence in such determinations.[18]

d. Other Relevant Provisions: Segregability and Substitute Language.

If the Review Board determined that the risk of harm *did* outweigh the public interest in disclosure, it then had to take two additional steps: (1) ensure that the agency redacted the least amount of information possible to avoid the stated harm, and (2) provide substitute language to take the place of the redaction.

3. Summary of Review Board's application of declassification standards to assassination records.

a. Defining "Assassination Record."

The JFK Act defines "assassination records" to include records related to the assassination of President Kennedy that were "created or made available for

[17]JFK Act, Section 3(10).

[18]*See*, *e.g.*, S. Rep. No. 328, 102 Cong., 2d Sess. 30 (1992).

use by, obtained by, or otherwise came into the possession of" the following groups: the Warren Commission, the four Congressional committees that investigated the assassination, any office of the Federal Government, and any State or local law enforcement office that assisted in a Federal investigation of the assassination.[19]

[19]JFK Act, Section 3(2).

When it passed the JFK Act, Congress intended for the JFK Collection to include the record groups that it identified in section 3(2), but it also intended for the Review Board to carefully consider the scope of the term "assassination record" and to issue an interpretive regulation defining this crucial term.[20] The Act requires Government agencies to identify, organize, and process those assassination records that are defined as assassination records in section 3(2).

Chapter 6 of this report explains how the Review Board interpreted its responsibility to define and seek out "additional records and information."

b. The record groups and the standards applied to each.

Once the Review Board promulgated its regulation defining "assassination record," it turned its attention to those assassination records that were clearly within the scope of the statutory definition of "assassination record." Prior to the Review Board's nomination and appointment in 1994, some of the agencies had started to identify and process the following assassination record groups:

i. The FBI's "Core and Related" Files.

The FBI's "core and related" files consist of those records that the FBI gathered in response to FOIA requests that it received in the 1970s for records relating to the assassination of President Kennedy. The "core" files include the FBI files on Lee Harvey Oswald and Jack Ruby, as well as the FBI's Warren Commission files and the JFK assassination investigation file. The "related"

[20]The JFK Act, section 7(n), allows the Review Board to issue interpretive regulations. In its report on the JFK Act, the Senate noted,

> Government offices are required to begin the review and disclosure of records upon enactment to expedite public access to the many records which do not require additional review or postponement. However, the ultimate work of the Review Board will involve not only the review of records recommended for postponement, but requiring government offices to provide additional information and records, where appropriate.

Senate Report at 21.

files include FBI files on Marina Oswald, Marguerite Oswald, George DeMohrenschildt, Ruth Paine, and Michael Paine. The FBI began its processing of the "Core and Related" files in 1993. The Review Board applied very strict standards in its review of the core and related files.

ii. CIA's Lee Harvey Oswald "201" file.

CIA opens a 201 file on when there is some sort of operational interest in an individual. The Agency opened Lee Harvey Oswald's 201 file on December 9, 1960 in response to a request from the Department of State on defectors. But the Oswald 201 file is not a typical 201 file. After the Assassination of President Kennedy, it served as a depository for records gathered and created in CIA's wide-ranging investigation of the assassination. Thus, the file is the most complete record of CIA's inquiry in the months and years immediately following the assassination rather than an operational file on Lee Harvey Oswald.

iii. The FBI's "House Select Committee on Assassinations" Subject Files.

During the HSCA's tenure, the Committee made a number of requests to the FBI for records that the Committee believed might produce records relevant to their investigation of the Kennedy assassination. In response to the HSCA's requests, the FBI made available to the HSCA staff approximately 200,000 pages of FBI files. The FBI began its processing of the "HSCA Subject" files in 1993. The Review Board applied the "Segregated Collection" guidelines to the HSCA subject files.

iv. The CIA's "Segregated Collection" files.

During the investigation conducted by the House Select Committee on Assassinations, HSCA investigators gained access to CIA files. Upon completion of the HSCA's work, the CIA files that had been made available to the HSCA were segregated and retained as a group, known as the Sequestered Collection. The Collection is divided into two parts: hard copy records and microfilm. The hard copy records, which can be found in the first 63 boxes of the collection, were available to the HSCA staffers during their investigation. Box 64 contains 72 reels of microfilm which were copied from the complete files

of the records to which the HSCA had gained access. In many cases the microfilmed files contain material well beyond the scope of the HSCA investigation, for example, covering an agent's entire career when only a small portion of it intersected with the assassination story.

v. FBI records on the Congressional Committees that investigated the assassination.

The JFK Act defines "assassination record" to include records relating to the Kennedy assassination that were used by the following congressional committees who investigated events surrounding the assassination: the Commission on CIA Activities within the United States (the Rockefeller Commission), the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), the Select Committee on Intelligence (the "Pike Committee") of the House of Representatives, and the House of Representatives Select Committee on Assassinations (the "HSCA").[21]

Before President Clinton appointed the Review Board, the FBI collected and began to process its administrative files from each of these committees. In large part, the records contained in the Bureau's administrative files related to topics other than the Kennedy assassination. To the extent that the Review Board reviewed records that related to non-Kennedy assassination related topics, it designated the records, "NBR" and removed them from further consideration.[22] All Kennedy assassination related information present in these files was processed according to the strict "core" file standards.

vi. Requests for Additional Information.

In order to ensure the success of the Review Board, Congress included in the JFK Act a provision that allowed the Review Board to obtain additional

[21]JFK Act, section 3(2).

[22]***add NBR footnote with language from guidelines***

informaiton and records beyond those that were reviewed by previous investigations. Chapter 6 of this report explains in great detail the requests that the Review made and the assassination records designated as a result of those requests. Because Congress considered these records to be of very high public interest, the Review Board processed the "requests for additional information" files using strict "core" file standards.

vii. ****** SPACE HOLDER FOR RECORD GROUPS of OTHER AGENCIES ******

B. Declassification Standards

Section 6 of the JFK Act establishes a framework for the Review Board to analyze agency claims for continued protection of assassination records. The Review Board's primary purpose, as outlined in section 7(b) of the JFK Act, is to determine whether an agency's request for information in postponement of disclosure of an assassination record meets the criteria for postponement set forth in section 6. Section 6 consists of an introductory clause, which establishes the "clear and convincing evidence" standard, and five subsections that set forth the criteria under which the Review Board can agree to postpone public disclosure of assassination-related information.

1. Standard of Proof: Clear and Convincing Evidence.

Text of Section 6

> *Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that:*

a. Review Board guidelines. For each recommended postponement, the JFK Act requires an agency to submit "clear and convincing evidence" that

one of the specified grounds for postponement is present.[23] The Review Board required agencies to submit specific facts in support of each postponement, according to the Review Board's guidelines for each postponement type.

b. Commentary. Although the FBI and the CIA in particular argued that the clear and convincing evidence standard could be satisfied by a general explanation of those agencies' positions in support of postponements, the Review Board determined that the clear and convincing evidence requirement was a document-specific one. Thus, the Board required agencies to present evidence that was tailored to individual postponements within individual documents.

[23]JFK Act, sections 6, 9(c)(1).

The JFK Act clearly required agencies to provide "clear and convincing evidence" in support of its postponements, but it did not establish a mechanism for when and how such evidence should be presented. The legislative history provides a clue as to Congress' intent: "[T]o the extent possible, consultation with the government offices creates an understanding on each side as to the basis and reasons for their respective recommendations and determinations."[24] The Review Board did consult with Government offices to determine fair, efficient, and reasonable procedures for presenting evidence.

The Review Board began its review of assassination records by considering pre-assassination records on Lee Harvey Oswald. In an attempt to arrive at consistent decisions, the Board asked the staff to present the records on an issue-by-issue basis. In the case of the FBI records, the Review Board's views on the "clear and convincing evidence" standard came to light according the following chain of events. First, the Review Board slated a group of FBI records for review and notified the FBI of the meeting date at which it intended to vote on the records. The Review Board invited the FBI to present its evidence. Second, the FBI requested that it be allowed to brief the members of the Review Board. At the briefing, the FBI presented its position to the Board -- both in an oral presentation and in a "position paper." The FBI's "position papers" (attached) summarized the FBI's general policy preferences in support of continued classification of certain categories of information. Third, the Review Board staff researched existing law on each of the FBI's "positions" and determined that the arguments that the FBI put forth in support of its JFK Act postponements were essentially the same arguments that the FBI offers to courts in support of its FOIA decisions. Of course, in legislating the declassification standards of the JFK Act, Congress intended for the JFK Act standards, and <u>not</u> the FOIA standards -- to apply. Aware of Congressional intent, the Review Board finally rejected the FBI's general policy preferences on the basis that the arguments did not constitute the "clear and convincing" evidence necessary to support a request for a postponement under section 6. The FBI did appeal the Review Board's decisions to the President, but the Review Board's document-specific interpretation of the "clear and convincing" evidence standard

[24]S. Rep. No. 328, 102 Cong., 2d Sess. 31 (1992).

ultimately prevailed.

"Rule of Reason." Of course, some assassination records are of great interest to the public. With regard to records that had a close nexus to the assassination, the Review Board was extraordinarily strict in its application of the law. For example, the Review Board voted to release in full nearly all of the information in the FBI's pre-assassination Lee Harvey Oswald file and the **[is there a CIA or other agency file we could use as an example here? The Lopez Report?]** because of the high public interest in that material. With regard to the FBI files, the FBI believed that its arguments were compelling enough to merit appeals to the President on nearly all of the Review Board's decisions on the pre-assassination Lee Harvey Oswald records. The FBI, the Review Board, the White House Counsel's Office, and ultimately the State Department spent a substantial portion of time resolving the issues that arose in the appeal process, and for those important records that were at issue, the Review Board considered its time well-spent. The Review Board similarly dealt with other key records and spent as much time as was necessary to deliberate and decide upon those records.

The postponement-by-postponement review at each Review Board meeting proved to be a rather slow process. In its January 1995 meeting, the Review Board reviewed, considered, and then did not vote on, four (4) Warren Commission records. While the Review Board did need time to develop its policies, the Board's pace had to increase over time. In an effort to streamline its work, the Review Board consulted with Federal agencies such as the CIA and FBI to work out an approach for review of records that would allow the Review Board to make informed decisions, but not require agencies to spend hundreds of hours locating evidence for and providing briefings on each postponement within an assassination record.

The first step to developing a reasonable approach was for the Review Board to formulate general rules for sustaining and denying postponements. The Review Board's "guidance" to its staff and the agencies became a body of rules -- a Review Board "common law" -- which this chapter describes in Part II. Once the Review Board notified an agency of its approach on a particular type of postponement, the agency learned to present only those facts that the Review

Board would need to make a decision. For example, with regard to FBI informants, the Review Board notified the FBI of what it considered to be the relevant factors in its decision-making. In other words, it defined for the Bureau what it considered to be "clear and convincing" evidence." Then, the Review Board worked with the FBI to create a one-page form titled an "Informant Postponement Evidence Form" that the FBI could use to provide evidence on an informant. The form allowed the FBI to simply fill in the answers to a series of questions about the informant in question, which in turn allowed the Review Board to focus on those facts that it deemed to be dispositive in a particular document. This approach had the added benefit of providing some consistency to the Review Board's decision-making.

A large number of records that the JFK Act defined as "assassination records" proved to be of very low public interest.[25] For those documents that were of little or no public interest, the Review Board modified its standards in two ways: *First*, for those records that truly had no apparent relevance to the assassination, the Review Board designated the records "not believed relevant" ("NBR.") The "NBR" guidelines allowed the Review Board to remove irrelevant records from further consideration. Records that the Review Board designated "NBR" were virtually the only groups of records that the Review Board agreed to postpone in full. Thus, the Review Board was always extremely reluctant to designate records "NBR" and only did so on **(need to count NBR memos)** occasions. *Second*, for those records that were not immediately relevant, but shed at least some light on issues that the Congressional Committees that investigated the assassination explored as potentially relevant to the assassination, the Review Board created the "Segregated Collection Guidelines[26]."

[25]The JFK Act required the Review Board to process all records that were "made available" to the Warren Commission and the Congressional Committees that investigated the assassination, whether or not the records were used by the Commission or the committees. Many of these records, while interesting from a historian's perspective, are not closely related to the assassination.

[26]The regulations that the Review Board adopted on November 13, 1996, define "Segregated Collections" to include the following: (1) FBI records that were requested by the House Select Committee on Assassinations ("HSCA") in conjunction with its investigation into the assassination of President Kennedy, the Church Committee in conjunction with its inquiry into issues relating to the Kennedy assassination, the other Congressional Committees (such as the Pike and Rockefeller Committees) that investigated issues related to the assassination; (2) CIA records including the CIA's

The Segregated Collections records, although marginally relevant, were not appropriate for "NBR" designation, as the "NBR" Guidelines would have resulted in withholding records in full. Instead, the Board passed the "Segregated Collection Guidelines," which ensured that the Review Board staff would review every page of the marginally relevant records, but would not require agencies to present the same amount of evidence in support of postponements. Where the Review Board's standards differed between core files and Segregated Collection files, the guidelines set forth below note the distinction.

Thus, throughout its tenure, the Review Board sought to be vigorous in applying the law, but, in order to complete its work, found it necessary to employ a "rule of reason."

2. Intelligence agents

Text of Section 6(1)(A)

> *. . .clear and convincing evidence that the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --*
>
> *(A) an intelligence agent whose identity currently requires protection*

a. CIA Officers.

i. Review Board guidelines. Names of CIA Officers who are still active or who retired under cover in potentially risky circumstances were generally protected. Names of officers who were deceased or whose connection to the CIA was public knowledge were generally released throughout the collection.

Sequestered Collection of 63 boxes as well as one box of microfilm records and the microfilm records (box 64) and several boxes of CIA staff "working files."

"CIA Employee" was used as substitute language, though when available, useful, and appropriate an alias or pseudonym was substituted.

ii. Commentary. Review Board members confronted CIA employee names in the first CIA document they reviewed but did not close the issue until two years later. The drawn out review of CIA employee names points to some of the challenges that existed in the process and to the seriousness with which those involved, both on the Review Board and at the Agency, approached the task at hand.

CIA began by defending the protection of employee names as a matter of policy. First, since many employees are "under cover," CIA argued that the maintenance of that cover is critical to gathering intelligence. CIA contended that the identification of a name can identify the cover provider and jeopardize operations. Second, although the majority of names are of retired CIA employees, CIA is bound by a confidentiality agreement to protect the relationship. Many of these former employees objected to release of their former Agency affiliation, complaining that it violates this agreement and suggesting that such release might jeopardize business relationships or threaten personal safety. Initially, CIA wished to argue these as general principles for the protection of all employee names. But the Review Board determined that the merits of these arguments could only be determined on a case-by-case basis. Gradually the CIA began to provide supporting evidence of the postponement of individual names.

CIA's initial refusal to provide evidence on individual names was met, not with the wholesale release of names by the Board, but with a firm but patient insistence that the Agency meet the requirements of the Act. Names of a few individuals who were of central importance to the JFK story were released early in the process, but for others the Board gave the Agency a number of additional opportunities to provide specific evidence. For example, December 1995 was the first name day, a Board meeting at which the Agency was to provide evidence for names encountered in records during the previous six to seven months. But CIA offered a generalized blanket response. Realizing that the personal safety of individuals could be at issue, Board members gave CIA more time to provide

evidence. Other name days were set in May 1996 and May 1997. As deadlines for submission of evidence approached, CIA agreed to release some of the names, but in most cases, continued to offer less than satisfactory evidence on those they wished to protect. By May of 1996 the position of the Board on names of CIA employees was as follows: There is a presumption that the true name of a CIA employee should be opened. However, the presumption shifts to protect, if the individual retired under cover or abroad or if the individual objects to the release of his or her name when contacted. (CIA agreed to attempt to contact former employees.) . The name may also be postponed if the Agency is able to identify an ongoing operation in which the individual has been involved or if it can be demonstrated that the person is still active for the Agency. In instances when the individual was important to the Assassination story further evidence was required to sustain a postponement. The Board gave the Agency until May 1997 to provide evidence on the remaining names. Over the year, the list of pending names grew as review expanded from the Oswald 201 file to the Sequestered Collection.

When the name issue was finally resolved in July 1997, the names were viewed in two categories: those with high public interest and those with a reduced level of public interest. High public interest names included all those that appeared in the 201 file and those that appear frequently in the collection and/or considered important to understanding the assassination. Progress had already been made. Fifty-eight of the 83 names in the 201 file that had been pending at some point were released by this date. CIA had begun to provide specific and convincing evidence on names. The Board voted to protect a number of names and released a few additional names. Those names with lower public interest outside of the core collection were postponed with a reduced level of scrutiny than those more central to the assassination story.

Thus, the Review Board considered the names of CIA officers on a case-by-case basis when the individuals were seen as having high public interest as part of the story of the Assassination of President Kennedy. High public interest was determined by a substantive connection to the assassination story or by the appearance of the name in CIA's core assassination files, notably Oswald's 201 file. The Board demanded specific evidence of the need to protect the individual. It was presumed that employee names would be released if their

identities were important to the assassination story unless the CIA could provide convincing evidence of the need for protection. This evidence included the current status and location of the individual and the nature of the work he or she did for the Agency.

This approach was the most practical given the limited time and resources available to complete review of the files. The Review Board would have preferred to review each name at the same high level of scrutiny. On the other hand, the CIA was compelled to release many more names than they would have desired. Though protracted and selective, Board review of CIA employee names forced the CIA forced to take a careful look at them and weigh the need to postpone each name, and it allowed the Review Board to carefully weigh evidence on names of import.

b. "John Scelso" (pseudonym).

i. Review Board guidelines. The true name of the individual known by the pseudonym of John Scelso was protected but will be opened in full on either May 1, 2001 or three months after the decease of the individual, whichever comes first.

ii. Commentary. The postponement of the true name of John Scelso was an instance when public interest was very high, but the evidence to support postponement outweighed it. John Scelso was a throw away alias used by the CIA employee who was head of WH3 during the period immediately after the assassination of President Kennedy. His name appears on hundreds of documents, many of which were the product of the Agency's extensive post-assassination investigation that spanned the globe. The Board was inclined to release Scelso's true name, but the Agency argued strongly against release. As an interim step, "Scelso" was inserted as substitute language. CIA provided evidence on the current status of the individual, shared correspondence sent by him, and even arranged an interview between him and a Review Board staff member. At the May 1996 Board meeting, Board members determined that the evidence was persuasive, but still wanted to insure that his true name would be revealed as soon as was prudent. Their solution was the release in five years or upon his decease.

c. Information that identifies CIA Officers.

i. Review Board guidelines. Identifying information was approached using the same standards applied to true names. If it was determined that the identity of the officer required protection, specific identifying information was protected, but generic information released.

ii. Commentary. This postponement was viewed as part of the CIA officer issue. Only that identifying information that was specific enough that it might reveal an identity that merited protection was redacted.

3. Intelligence sources and methods, and other matters relating to the national security of the United States.

Text of Section 6(1)(B) and (C)

> *. . .clear and convincing evidence that the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal --*
>
> *(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or*
>
> *(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States , the disclosure of which would demonstrably impair the national security of the United States;*

*a. CIA Sources***.**

i. Review Board guidelines. Sources, Assets, Informants

and the Identifying information that describes them were reviewed under standards similar to those for CIA officers. Names that carry a high level of public interest were subjected to close scrutiny. The Board protected the identity of foreign nationals unless they are of high public interest in relation to the assassination story, in which case CIA was required to provide specific evidence of the need to postpone. Sources, assets and informants in this country were protected if CIA could demonstrate that ongoing operations could be jeopardized or individual harmed by release of a name. If none of these criteria could be met the name was released. In addition, names of individuals whose connection to the CIA was a matter of public knowledge, especially if previously released in US government records, were released.

ii. Commentary. The Board's decision to protect the name of Sources, assets, and informants in cases where the identity of the source is of reduced public interest was based on two factors: the concern that, since CIA sources generally live outside the Untied States, they risk harm if their identities were revealed. In records where the identity of the source is of possible public interest in relation to the assassination story or is important to understanding information related to the assassination, the CIA was required to provide additional evidence to support the protection of the source's identity. The Board protected the sources for ten years except in cases where it might be inferred that the source was committing treason. In these cases, the name and identifying information for the source was protected until 2017.

2. CIA pseudonyms.

i. Review Board's Guidelines. Pseudonyms were released with only a few exceptions. In some instances pseudonyms were used as substitute language for the individual's true name.

ii. Commentary. Very early in the review process it was determined that, since pseudonyms were a sort of throw away identity, they could be released. The Agency offered little resistance to this release, a decision that CIA may have regretted in some instances later in the review. However, on the few occasions when CIA was able to demonstrate that release of a pseudonym was particularly sensitive, the Board sustained the postponement.

c. CIA crypts.

i. Review Board guidelines. Crypts or digraphs are generally releasable within the JFK collection and in related records. All US government crypts are released. "LI" crypts, especially those in the core files, are generally releasable. "AM" crypts are generally releasable. For all other crypts, the digraph is usually protected and the rest of the crypt is released. A few exceptions to these guidelines exist. For these, CIA was required to present specific evidence of the need to protect.

ii. Commentary. Early phases of the review of crypts highlighted the cultural differences between the Agency and the Review Board. For the Agency, crypts were an operational method that required protection despite the fact that CIA had years ago replaced most of the crypts at issue. For the Review Board, crypts, having been conceived as a code to obscure an identity or an operation discussed in a document, could presumptively be released without compromising the identity or the operation. Some push and shove in the early months of Board deliberations brought the two entities to a middle ground where CIA yielded to the release of most crypts and digraphs in the JFK context and the Review Board acknowledged that some sensitive crypts required protection.

Early in the review process the CIA argued for the protection of all crypts, even those such as ODENVY- the crypt for the FBI- which were no longer used and which had been inadvertently released in other records. The Board quickly rejected this postponement. For other crypts, the burden of proof was on the Agency, and CIA began to identify the crypts for the Board. Those that might be sensitive were tabled at the early meetings so that CIA could provide additional information. At one point CIA complained that the research necessary to identify all the crypts was cumbersome. But since the Act requires that agencies provide clear and convincing evidence, CIA continued to reveal the identities to the Board. Next, after the release of a number of LI-crypts -LI was the digraph for Mexico City at the time of the assassination- CIA argued for the postponement of all "LI" series crypts on the grounds that mosaicing would allow researchers to piece together the puzzle and discern the identity being

protected by the crypt. The Board rejected this argument, and CIA provided more detailed evidence for crypts they considered more sensitive. When faced with crypts that refer to sensitive operations, the Board opted for a contextual treatment of crypts. Crypts for some sensitive operations were released in many circumstances, but in other contexts when release of the crypt may reveal the sensitive operation, they were postponed.

The crypt-by-crypt review was productive and necessary for core records, but soon it became clear that this approach would not be possible for the entire collection since hundreds or thousands of different crypts appear in the assassination related records of the CIA. The solution was the postponement of the digraph and release of the rest of the crypt for crypts outside of the LI, AM, and OD series. Thus, the majority of crypts in the collection were released in full or released with the digraph protected. Sensitive crypts for which CIA has provided convincing evidence are protected in full; For AM and LI crypts in non-core files, the digraph may have been protected when [a] the crypt appears next to a true name that has been released; [b] when the crypt appears next to specific identifying information; [c] when convincing evidence has been provided of the need to protect.

d. CIA Slugline.

i. Review Board guidelines. The slugline is releasable according to the same criteria applied to crypts and digraphs.

ii. Commentary. The slugline is a routing action indicator, composed of crypts, that appears just a couple of lines above the text in CIA cables. At the very beginning of the review process, the CIA had argued to postpone the slugline even when the crypts in the slugline were released elsewhere. An example can be found in the slugline RYBAT GPFLOOR. RYBAT is a crypt that means secret, and GPFLOOR was the crypt CIA gave to Oswald in the post-assassination investigation. In a number of records CIA was willing to release the RYBAT indicators at the top and bottom of the record and GPFLOOR when it appeared in the text but defended postponement of the slugline RYBAT GPFLOOR. This was a knee jerk reaction by CIA. When asked why it should be postponed the response was a simplistic, CIA cannot

reveal the slugline. The Agency had no reason to protect the slugline other than habit, and when the Act forced the CIA to consider this aspect of their culture of secrecy, the only reasonable response was release.

e. CIA surveillance methods.

i. Review Board guidelines. CIA surveillance methods, the details of their implementation and the product produced by them are generally releasable in the context of the JFK story, except when convincing evidence has been provided that they are politically or operationally sensitive. When postponed, the language substituted for this type of redaction was "Surveillance Method," "Operational Details," or " Sensitive Operation."

ii. Commentary. Since surveillance, notably teletaps and photo operations, were a central part of the Oswald Mexico City story, the Review Board addressed them early in process during review of Oswald's 201 file. CIA attempted to defend postponement of surveillance as a current method that requires continued protection. The Board's response was that the fact CIA has used the type of surveillance methods employed in Mexico City is common knowledge and that officially acknowledging the use of these methods in Mexico City in 1963 would reveal nothing about the type, scope or location of CIA operations today. The Board concluded that the public interest far outweighed any possible risk to national security and directed release of the information. However, in records that may have revealed sensitive aspects of an operation, those aspects were postponed if CIA was able to provide specific and convincing evidence.

f. CIA installations.

i. Review Board guidelines. All CIA installations related to the Mexico City story are releasable from 1960 through 1969. All remaining installations are releasable in the context of the Assassination story from the date of the Assassination to the publication of the Warren Commission Report, with the exception of a few installations for which CIA has provided convincing evidence of sensitivity,. In Oswald's 201 file, again with the exception of a few installations for which CIA has provided convincing evidence of sensitivity, all

installations are releasable from 01/01/61 through 10/01/64. Outside of these time frames, CIA installations are protected.

ii. Commentary. The Review Board chose substitute language for these postponements that will allow researchers to track individual CIA installations through the JFK collection without revealing the exact location of the installation. To accomplish this, the world was divided into five regions: Western Hemisphere, Western Europe, Northern Europe, East Asia/ Pacific, and Africa/ Near East/ South Asia. Then a number was added to refer to each different location in the region. Thus, substitute language such as "CIA Installation in Western Hemisphere 1" serves as a place holder for a particular installation in all CIA related records in the collection.

From the beginning the Review Board displayed an inclination to release CIA installations. During first phase of review of CIA records, Review Board members examined documents related to the Mexico City story. In this context, they voted to release CIA installations over only minor objections from the Agency. But as the context broadened to the world wide sweep that the CIA made after the assassination, the location issue became more contentious. CIA argued for postponement but produced only a minimal amount of evidence to defend the postponements. Responding to CIA's insufficient evidence, the Board voted for the release of all CIA installations that appeared in records they reviewed at the January 1996 meeting. CIA responded by assembling an appeal package. The suggestion of appeal sharpened the debate. Anticipating an appeal, Board members stressed the importance of communicating to the White House their frustration with the sketchy evidence initially provided. They wanted to make informed responsible decisions but were hampered by incomplete information. And the Board worried that precious time might be squandered on the review of just a few records if they could not obtain complete evidence in a timely manner. Further, since CIA records were among the first reviewed, Board members were concerned that their handling of CIA issues would be scrutinized by other agencies. Ultimately, the Agency provided a complete evidence package that convinced the Board members of the sensitivity of a small number of CIA installations. However the Board believed that public interest related to the assassination story weighed heavily for release of CIA installations during a period of time that has arguable relevance to that story.

Board members didn't want to make this an "Oswald issue," so they established a time frame broader than the Oswald story. With the noted exceptions, CIA installations referenced in the 201 file were released from 01/01/61 through 10/01/61 and those that appear in the rest of the collection the were released from the date of the assassination to the end of the Warren Commission.
The installation issue exemplifies two recurring themes in the review process. The first is that layers of evidence that were slowly added by the Agency. The CIA would initially provide only minimal evidence of a postponement. Without clear and convincing evidence, the Board voted to release the information. The CIA then responded with a more comprehensive evidence packet sometimes accompanied by a threat of appeal to the president. While this pattern was frustrating and slowed the early stages of the review process, the larger issues were sorted out and addressed. CIA's reluctance to share complete information may have been driven by a concern that they were sharing secrets beyond the immediate assassination story or a fear that the Review Board might not act responsibly with the information. But the submission of evidence became more dependable when CIA understood that the Board would use the evidence as mandated by the act and that such evidence must be produced if postponements were to be sustained. The second theme is that appeal to the president loomed large but was something that both the Agency and the Review Board wished to avoid. The Board was willing to review additional evidence even though they had given CIA ample opportunity to present it before they reviewed the records. This was motivated by a desire to accomplish a responsible review, but possibly also by a wish to avoid an appeal to the president. CIA provided the additional evidence, and often released additional information. The release may have been an admission that the information was not as sensitive as they had argued, but it may also have been an attempt to avoid appeal to the president. The check provided by appeal to the president was never utilized in the review of CIA records, but it did influence the review of those records.

g. CIA prefixes (cable, dispatch, field teport).

i. Review Board guidelines. Cable Prefixes, Dispatch Prefixes and Field Report Prefixes were released when the installations to which they refer were released and protected when the installation to which they refer

were protected. Substitute language for cable prefixes parallels that was applied to CIA installations, for example: "Cable Prefix for CIA Installation in Western Hemisphere 1." Language for the other prefixes was "Dispatch Prefix" and "Field Report Prefix."

ii. Commentary. There was little specific debate on cable, dispatch and field report prefixes. They were considered during deliberations on the CIA installations to which they refer.

h. CIA job titles.

i. Review Board guidelines. CIA Job titles were released except when their disclosure might reveal the existence of an installation that is protected or the identity of an individual that requires protection.

ii. Commentary. CIA job titles were not generally viewed as requiring postponement, but the context in which they appeared did on occasion demand the redaction of the job title to protect other information that was protected.

i. CIA file numbers.

i. Review Board guidelines. All file numbers that refer to Mexico City, except those for which CIA has provided convincing evidence of their sensitivity, are releasable. All remaining country identifiers (the first segment before the hyphen) are protected with the exception of all "15" and "19" files. 201 file numbers are generally releasable in the context of the JFK assassination story.

ii. Commentary. The release of file numbers, particularly 201 file numbers, was another type of postponement that was released early in the review process with little resistance by the CIA. And as with pseudonyms, there were occasions later in the process when the Agency wished to sustain 201 numbers. On the rare occasion, the Board did sustain this type of postponement when the CIA was able to provide convincing evidence of a need to protect

j. CIA domestic facilities.

i. Review Board guidelines. References to domestic CIA facilities which are a matter of official public record were released. Domestic facilities not publicly acknowledged were protected if CIA provided evidence of their sensitivity or if they are of peripheral interest to the assassination story.

ii. Commentary. Very few CIA domestic facilities were at issue in the review of CIA Assassination records. The vast majority are a matter of public record. For those that the Board postponed, they did so grudgingly, only after the CIA supplied strong evidence of a need to protect.

k. CIA official cover.

i. Review Board guidelines. Official Cover was treated differently In records that were generated by Executive Branch agencies such as the CIA, than it was In documents created by Congressional entities, such as the HSCA. In Congressional documents, cover information was released unless the information might reveal details of the scope of official cover or important details about the mechanisms of official cover that were not generally known to the public. In Congressional records, information was released if the CIA or another agency of the Executive Branch was able to demonstrate that it has taken affirmative official action to prevent the disclosure of such information in the past and that its release in a particular record would cause identifiable damage to national security. In Executive Branch documents and in documents derived from Executive Branch documents, substitute language such as "official cover" or "details of official cover" was used in lieu of the actual cover or the details of official cover. The cover status of certain high-profile individuals was released when disclosure has previously been permitted by affirmative official acts of the Executive Branch of the US government. Cover status of other individuals was disclosed only to the extent that they were important to the assassination story, subject to review on a case-by-case basis.

ii. Commentary. When the issue of official cover was first considered by the Review Board, Board members viewed it as an open secret

which they were prepared to release in JFK records. The Agency had a much different perspective ans was prepared to defend this issue to the President. After a long process of briefings and negotiations, the above solution was reached, a solution which is, frankly, a fig leaf through which anyone who knows the specifies of official cover can see.

l. Alias documentation.

i. Review Board guidelines. The details of alias documentation were protected, but the existence and use of such documents was released. Thus, the specific pieces of identification that the CIA made available to its people and the means of producing that identification were redacted.

ii. Commentary. The CIA defended the postponement of alias documentation as a currently utilized intelligence method that is vital to performance of intelligence operations. Further, the Agency argued that release of this information would add little, if anything, to the assassination story. Largely accepting this argument, Review Board members viewed the specifics of alias documentation to be of reduced public interest in terms of the Assassination story and did not insist that the Agency provide specific evidence on each piece of identification. Though releasing the names of a small percentage of the of the items of alias documentation might be possible without threatening the performance of CIA operations, the Board weighed the resources that would be required to research each item against the low pubic interest and concluded that such an effort would not be productive.

m. Human sources in FBI foreign counterintelligence (assets).

i. Review Board guidelines. The Review Board evaluates the need to postpone the identity of human sources in foreign counterintelligence operations on a case-by-case basis. Where the human source was a *foreign national*, the Review Board generally agreed to protect the individual's identity *unless* the individual's name is already known to the foreign government at issue. Where the human source was a *United States citizen interacting with foreign government officials,* the Review Board sometimes released the identity of the individual if the public interest in the informant was high. Where the human source was a *United*

States citizen interacting with other United States citizens, the Review Board tended to treat the source more like other domestic informants.

ii. Commentary. In its position paper, the FBI defined "intelligence source" as "any individual who has provided or is currently providing information pertaining to national security matters, the disclosure of which could reasonably be expected to result in damage to the FBI's intelligence and counterintelligence-gathering capabilities."

The FBI offered the following arguments in support of its request to keep intelligence sources' identities secret: (1) Review Board disclosure of intelligence sources would harm the FBI's ability to develop and maintain new and existing sources, because sources would reasonably believe that the Government would reveal their identities. (2) Review Board disclosure of intelligence sources may subject the sources, their friends, and their families to physical harm, ridicule, or ostracism.

The Review Board's interpretation of the "clear and convincing" evidence standard required it to reject the FBI's general policy arguments, and instead required the FBI to present asset-specific evidence of harm that explained the particular harm that the FBI expected the asset to face if his or her identity was disclosed. As a general rule, the Review Board usually protected the identities of foreign nationals who could be prosecuted in their home countries for espionage. Likewise, where the asset was a United States citizen interacting with foreign government officials, the Review Board considered whether the individual was in a position of trust with the foreign government and whether he or she might be in danger if the relationship with the FBI were disclosed. Unlike the above-referenced scenarios, the source who was a *United States citizen interacting with other United States citizens* was generally evaluated according to the Board's domestic informant standards.

n. FBI foreign counterintelligence activities.

i. Review Board guidelines. As a general rule, the Review Board believed that most aspects of the FBI's foreign counterintelligence ("FCI") activities against Communist Bloc countries during the cold war are well-known

the public, are of high public interest, and are not eligible for postponement pursuant to § 6(1)(B)-(C) of the JFK Act.

ii. Commentary and overview of FCI appeals. The FBI's assassination records contain information that reveal many of the FBI's foreign counterintelligence activities during the cold war period. Beginning in late 1995, the Review Board considered how it could release as much information as possible without jeopardizing operations that still require protection.

In March and April of 1996, the Review Board considered and voted on a group of FBI records relating to the FBI's FCI Activities. In response to the Review Board's "Requests for Evidence" on the FCI records, the FBI had provided its "position paper" on FCI activities. In its position paper, the FBI defined "intelligence activities" as "intelligence gathering action or techniques utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest." The FBI's primary argument in support of its request for continued secrecy for intelligence activities was that disclosure of specific information describing intelligence activities would reveal to hostile entities the FBI's FCI targets, measures, and priorities, thereby allowing hostile entities to develop countermeasures.

Sections 6(1)(b) and (c) of the JFK Act provided the standard for postponement. In addition, the JFK Act's legislative history instructed the Review Board to consider a variety of factors related to the need to postpone disclosure of intelligence sources and methods, including the age of the record, whether the use of a particular source or method is already well-known by the public, . . . and whether the source or method is inherently secret, or whether it was the information it collected which was secret.[27]

The Review Board considered the FBI's evidence and weighed it against the public interest in the records. After careful consideration, the Review Board decided to release foreign counterintelligence information in seventeen (17) records. The Board's primary reason for releasing the records was its belief that

[27]S. Rep. No. 328, 102 Cong., 2d Sess. 2977 (1992).

the FBI's evidence did not enumerate specific harms that would result from disclosure.

On May 10 and 28, 1996, the FBI appealed to the President 17 records -- all relating to the FBI's surveillance of officials and establishments of four Communist countries -- the Soviet Union, Cuba, Czechoslovakia, and Poland -- during the 1960s. The FBI's overarching arguments were that disclosure of the information would reveal sensitive sources and methods that would compromise the national security of the United States, and that disclosure of the targets of the surveillance -- the four Communist countries -- would harm the foreign relations of the United States.

The FBI sought to postpone five types of source and method capabilities: tracing of funds, physical surveillance (lookout logs), mail cover, electronic surveillance, and typewriter and fingerprint identification. The Review Board's response briefs to the President dealt with each source or method in turn. Specific details regarding the appeal of each issue are discussed below.

In response to the FBI's overarching argument that disclosure of the information would reveal sensitive sources and methods and compromise the *national security*, the Review Board responded that if the national security would be harmed by release of this information, the harm would have already occurred, since the FBI had already released both the identities of the target countries *and* the sources and methods that the FBI used in its operations. In response to the FBI's arguments that disclosure of the targets of the surveillance would harm the *foreign relations* of the United States, the Review Board responded in three parts: *one,* the information that the FBI sought to protect is widely available in the public domain, from both official government sources and secondary sources, so if foreign relations are harmed by disclosure of the information, then the harm has already occurred; *two,* the FBI simply did not prove its argument that it may have violated international law or "diplomatic standards" by employing the sources or methods at issue as the FBI did not cite the laws or treaties to which it referred and the Review Board could not locate any laws or treaties that were in effect at the time that the records were created; and *three,* despite the FBI's assertion to the contrary, the Review Board had evidence that other governments *do* acknowledge that, in past years, they conducted foreign counterintelligence

operations against other countries.

The Review Board believed that the FBI and the State Department had not provided evidence of a "significant, demonstrable harm" to current foreign relations or intelligence work. Thus, the Board asked the President to deny the FBI's and the State Department's requests for postponement. The White House did not expressly rule on the appeals. Instead, after several meetings involving representatives from the Review Board, the FBI, and the White House, the White House directed the FBI to provide the Review Board with specific evidence in support of its postponements. The White House requested the Review Board to reconsider the Bureau's specific evidence. The FBI, in turn, withdrew the first two of its pending appeals, including some records in which the Review Board voted to release information obtained from a technical source.

After more negotiations, the Review Board and the FBI agreed that the Bureau would generally treat foreign counterintellingence activities against Communist Bloc countries as "consent releases." In those few cases where the Bureau believed that foreign counterintelligence activity against Communist-Bloc countries still required protection, the Bureau submitted for the Board's determination postponement-specific evidence.

To the extent that the information in the proposed redaction did not meaningfully contribute to the understanding of the assassination, the Review Board allowed the FBI to postpone direct discussions of FCI activities against *non*-Communist Bloc countries. With regard to the FBI's "Segregated Collections," the Review Board stated,

> It is presumed that the FBI will, at least partially, carry over its post-appeal standards for disclosing foreign counterintelligence activities targeting Communist-bloc nations. To the extent that the HSCA subjects reflect foreign counterintelligence activities against other nations that have not been addressed by the Review Board in the "core" files, the FBI will be allowed to redact direct discussion of such activities, unless the information in the proposed redaction meaningfully contributes to the understanding of the assassination.

o. Information that reveals the FBI's investigative interest in a diplomatic establishment or personnel of a diplomatic establishment.

i. Review Board guidelines. The Review Board released information that reveals that the FBI has an investigative interest in Communist Bloc countries' diplomatic establishments and personnel. For example, the Review Board routinely released case captions such as "FCI-R" (foreign counterintelligence-Russia), "FCI-Cuba," "FCI-Czechoslovakia," and "FCI-Poland."

On the contrary, the Review Board generally agreed to protect information that reveals that the FBI has an investigative interest in a non-Communist Bloc foreign diplomatic establishment or in foreign personnel.

ii. Commentary. In the FBI's May 10 and 28, 1996, appeals to the President, the overriding issue was whether the FBI could, in 1996, keep secret its investigative interest in the diplomatic establishments and personnel of Communist Bloc countries. For a full discussion of the Review Board's decision-making with regard to the FBI's foreign counterintelligence activities, *see* section 15(b) above.

p. Technical sources in FBI foreign counterintelligence.

i. Review Board guidelines. The Review Board released nearly all general information and some specific information (or operational details) regarding non-current technical sources on Communist Bloc targets.

"General" information is information that the FBI obtains from its technical sources on Communist Bloc countries' diplomatic establishments and personnel, including transcripts from electronic surveillance. "Specific" information is information regarding installation, equipment, location, transmittal, and routing of technical sources. The Review Board evaluated "specific" information about technical sources on a case-by-case basis, agreeing to sustain postponements provided that the FBI proved that the "operational detail" at issue is currently utilized and not officially disclosed.

As a general rule, the Review Board agreed to postpone until the year 2017 symbol and file numbers for technical sources provided that the source is still properly classified pursuant to the current Executive Order. The Review Board released classified symbol and file numbers for technical sources if the number has been previously released in a similar context, or if the source is of significant interest to the public. The Review Board agreed that the phrases, "source symbol number" and "source file number" would be adequate substitute language.

For that material that does not contribute in a meaningful way to the understanding of the assassination, the Review Board released as much information as possible about the FBI's use of technical sources in its foreign counterintelligence activities against non-communist bloc countries. The Review Board did, however, often protect the identity of the country that was the target of the FBI's surveillance. The Review Board was more willing to protect specific details regarding installation, equipment, location, transmittal, and routing of technical sources where the FBI can proved, (1) that the source currently requires protection, and (2) that the Government has not officially disclosed the source.

ii. Commentary. The JFK Act directed the Review Board to release information that specifically identifies "listening devices on telephones." The Act states that these are an "intelligence source or method" that should *not* be postponed in circumstances where they are "already well known by the public."[28]

The Review Board believed that The FBI's use of non-human sources or methods (*e.g.,* electronic surveillance and "black bag jobs") in foreign counterintelligence operations against Communist Bloc countries diplomatic establishments and personnel is, in many aspects, a matter of official public record. The FBI appealed to the President a number of Review Board decisions involving non-human sources or methods. The Review Board staff called to the

[28]S. Rep. No. 328, 102d Cong., 2d Sess. 28 1992) (emphasis added).

attention of the President those prior disclosures that it believed were relevant to deciding the issues on appeal.

In its May 10, 1996, appeal of the Review Board's decisions on FCI records, the FBI requested that the President override the Review Board's decisions to release information that related to electronic intercepts of telephone and teletype communications involving Communist Bloc officials. In its appeal briefs, the FBI argued that its decisions regarding the targets of its electronic surveillance are secrets. The Review Board collected a large body of evidence proving that, at least with regard to Communist-Bloc countries, the Government has already acknowledged that the FBI conducted extensive technical surveillance of foreign establishments during the 1960s. In fact, the official public record and secondary sources revealed information regarding wiretaps and electronic surveillance against foreigners and foreign establishments that was more specific than information that the FBI sought to protect.

q. Other classified file numbers in FBI foreign counterintelligence.

i. Review Board guidelines. The Review Board generally agreed to protect classified file numbers in FBI foreign counterintelligence files, provided the FBI could prove that the file number corresponded to a current and ongoing operation. However, where the classified file number had been released in other contexts, the Review Board voted to release the number.

ii. Commentary. The Review Board agreed that file numbers corresponding to current and ongoing intelligence operations were entitled to protection under section 6(1)(B) and (C). The only question, then, was whether the Review Board would allow the FBI to protect classified file numbers when the corresponding operation was no longer current. The Review Board took the position that non-current classified file were *not* entitled to protection. In its May 28, 1996, appeal on foreign counterintelligence recods, the FBI argued that if the Review Board released classified file numbers for terminated operations, that release would prompt Freedom of Information Act requests for the underlying files, "resulting inevitably in more and more information from the file being released." FBI's May 28, 1998, Appeal at 8. In its June 14, 1996, response, the Review Board stated simply that, "[m]aking it

more difficult for researchers to file FOIA requests is not among the reasons for postponement provided by the JFK Act."

r. FBI mail cover in FCI investigations.

i. Review Board's Guidelines. The Review Board released information that revealed that the FBI conducted mail cover operations against the Soviet Embassy in the 1960s. The Review Board did not encounter a great number of additional records regarding mail cover operations. When the Review Board did encounter mail cover operations in other FBI records, it released the information at issue unless the FBI could provide evidence that the operation was still ongoing and required protection. The Review Board did not relax its standard in the Segregated Collection files.

ii. Commentary. With regard to the FBI's use of mail cover, the Review Board had to decide whether and to what extent it should reveal the Bureau's use of this method in conducting foreign counterintelligence activities. The Review Board used the same reasoning it employed for other FCI activities -- mainly that foreign counteintelligence operations against the USSR and other Communist Bloc countries during the cold war no longer merit protection. Moreover, the Review Board believed that the public is already well aware that the FBI used the methodology of mal cover and thus, such operations should not be protected.

In its May 10, 1996, appeal to the President, the FBI asked the President to overturn the Board's decision to release information from two documents that the FBI alleged would reveal that the FBI engaged in a "mail cover" operation against the Soviet Embassy in Washington, D.C. in 1963. The Bureau argued that the "[h]ow, when where, and [the] circumstances" of its mail cover operation were among its most "closely guarded secrets."

The Review Board responded that the information that the Bureau sought to redact had already been released. The Church Committee disclosed the mail cover operation at issue -- the "Z-coverage" program -- twenty years ago. In addition, the Review Board produced three previously disclosed assassination records in which the FBI disclosed that the Soviet Embassy in Washington, D.C.

was targeted under the "Z-coverage" program, a program that the document discloses existed pursuant to an agreement with the Post Office. As with the other foreign counterintelligence records that the FBI appealed, the FBI ultimately withdrew its appeals and began to treat this type of information as a consent release.

s. FBI tracing of funds in foreign counterintelligence investigations.

i. Review Board's Guidelines. The Review Board released information that disclosed that the FBI was capable of tracking funds and examining bank accounts of Communist-Bloc enterprises.

ii. Commentary. The issue that arose with regard to the FBI's tracing of funds was whether the Review Board should release the FBI's monitoring of financial records and bank accounts for the purpose of investigating espionage. The Review Board decided that since this method had previously been disclosed to the public by the United States Government, the information should not be protected. The Review Board voted to release FBI records regarding tracing of funds transferred to Oswald in Russia and records regarding the FBI's ability to track funds from diplomatic establishments.

In its May 10, 1996, appeal to the President, the FBI and the State Department asked the Presidented to overturn the Review Board's decision to release information from six documents related to the FBI's ability to track funds from diplomatic establishments. The FBI and the State Department argued, *first*, disclosure would reveal sensitive sources and methods, and *second,* disclosure would reveal that Soviet government bank accounts were the target of FBI counterintelligence activities.

The Review Board responded that the "sources and methods" employed in tracking of funds already has been disclosed, citing FBI documents that reveal the FBI's ability to trace funds as well as other federal government records that explained that the FBI engaged in covert examination of financial records and bank accounts in order to determine whether an individual is engaged in espionage. In addition, the Review Board noted that the FBI cannot now classify that the Soviet government was the principal target of the Bureau's

foreign counterintelligence activities in the United States, again citing FBI documents as well as a lengthy list of publicly available federal government publications that disclosed the FBI's interest in Soviet financial activities in the United States. In late 1996, the National Security Agency and the CIA removed whatever fig leaf remained covering the FBI's tracing of funds. In the NSA/CIA joint publication, *Venona: Soviet Espionage and the American Response 1939-1957 (Robert Louis Benson & Michael Warner, eds., 1996),* the agencies released records that explicitly stated that the FBI monitored Soviet bank accounts in the United States. The *Venona* releases also show that the Soviets knew about the FBI's monitoring of their finances in the 1940s.

The Review Board concluded that previous official disclosures of the FBI's ability to trace funds in foreign counterintelligence investigations prevented the FBI from making any plausible or convincing argument that the method was one that should remain secret.

t. FBI physical surveillance.

i. Review Board guidelines. The Review Board released information that disclosed that physical surveillance is a method that the FBI employs in conducting investigations. Moreover, the Review Board specifically released information that the FBI conducted physical surveillance in its foreign counterintelligence investigations against Communist-Bloc countries.

ii. Commentary. In the course of many FBI investigations, physical surveillance is not a classified operation and thus would not be protectable under section 6(1). However, as part of its May 10, 1996, appeal to President Clinton, the FBI requested the President to overturn the Review Board's decision to release on document because it revealed that the FBI conducted physical surveillance on the Soviet Embassy and that it kept a "lookout log" that recorded visitors to the Embassy.

The Review Board had voted to release the record because the FBI had not offered adequate evidence in support of its redactions.

The Review Board again stressed the statutory requirement that the FBI

provide document-specific, clear and convincing evidence in support of its proposed redactions. In its May 23, 1995, brief, the Review Board also noted that not only had the FBI previously officially acknowledged the particular physical surveillance operation that the document at issue revealed, but that former Director Webster had publicly acknowledged that the FBI conducts physical surveillance and used the physical surveillance of the Russian Embassy as an example.

The Review Board concluded that previous official disclosures of the FBI's physical surveillance of the Soviet Embassy prevented the FBI from making any plausible or convincing argument that the method was one that should remain secret. The FBI ultimately withdrew its appeal of the Board's decision on "lookout logs." (Letter from FBI to Hon. Jack Quinn, 9/18/96)

The Review Board's also took the position that, even in documents where the Board might agree to protect the identity of a particularly sensitive target of the FBI's physical surveillance, the fact that the FBI uses the method of physical surveillance in conducting investigations is not secret and is not eligible for postponement.

****** SPACE HOLDER FOR NSA SECTIONS***
to be provided by Michelle ***

4. Personal Privacy

Text of Section 6(3)

> *. . .clear and convincing evidence that the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest*

a. Personal privacy generally.

i. Review Board guidelines. During the course of the Review

Board's work, the Board almost never agreed to sustain agency's requests for postponements on personal privacy grounds. The primary exception to the Review Board's policy to release records with privacy postponements is social security numbers. The Review Board determined that the public interest in disclosure of social security numbers was so small that any risk of harm would outweigh it. Accordingly, the Board routinely protects social security numbers throughout assassination records it reviews.

In the Segregated Collections, the FBI rarely requests that the Review Board sustain privacy postponements, and so the FBI unilaterally releases the information that would fall into the category of "personal privacy" information. In some Segregated Collection records, the Review Board agrees to postpone personal privacy information where agencies provide the Review Board with evidence that the person in question is alive, living in the same area, the public interest in the information is extremely low, and the individual would truly suffer a substantial intrusion of privacy if the Board releases the information. For example, the Review Board agreed to sustain the postponement of the identity of a 13 year old girl who was a rape victim. The girl in question was the niece of an organized crime figure (who was himself only of marginal relevance to the assassination story) and her story appeared in the organized crime figure's FBI file.

ii. Commentary. The Review Board began its document review work in its closed meeting on January 25, 1995. At that meeting, the Review Board discussed personal privacy information in four Warren Commission records, but did not vote on the four records at that meeting, opting instead to defer final decision on the records. On March 6th and 7th, 1995, the Review Board staff presented to the Review Board a briefing book on personal privacy postponements. The Board's General Counsel provided the Board with a memorandum that identified several types of information that would potentially implicate privacy concerns. The Review Board discussed the scope and intent of section 6(3) and how the personal privacy provisions of the JFK Act might apply to eighteen (18) sample documents. At the end of the meeting, the Review Board again decided that it would defer a vote on the records and on the personal privacy postponements in general.

Although the Review Board expected that it would encounter a number of personal privacy postponements, the FBI did not request many postponements citing section 6(3). The CIA never requested a privacy postponement.

In one case, the FBI appealed to the President the Review Board's vote to release information that the FBI requested be postponed on personal privacy grounds. (FBI 5/28/96 Appeal) The Review Board very carefully considered the privacy concerns involved and requested that the President issue a decision that would result in release of the important information in the record.

****** SPACE HOLDER FOR NSA, SECRET SERVICE & MILITARY SECTIONS to be provided by Michelle, Kim, and Doug ******

5. Informant Postponements

Text of Sections 6(2) and 6(4)

> *section (2).. . .clear and convincing evidence that the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person*
>
> *section (4). . .clear and convincing evidence that the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest;*

a. Informant postponements generally.

i. Guidelines. As a general rule, the Review Board did not postpone information that would reveal the identity of an informant unless the

FBI could provide, at least, evidence that the informant was alive and still living in the same area. The Review Board recognized two significant exceptions to the general rule. First, even where the FBI provided such evidence, the Review Board released informant identities if it found that the informant's identity was of high public interest. Second, the Review Board did, in some cases, allow postponement of informant identities even though the FBI could not provide evidence that the informant was alive and living in the same area if the FBI could prove that disclosure would subject the informant to an extremely significant threat of harm.

Where a person's relationship with the FBI had already been made public, the Review Board did not agree to protect the fact of the relationship between the Government and the individual.

ii. Commentary.

A. A note on the statutory framework for review of FBI informant postponements. The FBI initially cited sections 6(2) and 6(4) in support of informant postponements. Section 6(2) clearly requires that the Bureau prove that the informant is living and that the informant faces a substantial risk of harm if the information is released. Because section 6(2) requires informant-specific evidence, the FBI decided to rely exclusively on Section 6(4) for informant postponements, and not Section 6(2) -- even though most of the records, as originally processed by the FBI, refer to both subsections in support of informant postponements.

B. History of Review Board's decision-making on informant postponements. The Review Board first considered informant postponements in its meeting on May 2nd and 3rd, 1995. The FBI's initial evidence in support of informant postponements consisted of a briefing that FBI officials gave to the Review Board, followed by the FBI's "position papers" on confidential informant postponements. In the position paper, the FBI distinguished among informants, explaining that informants differ depending on the type of information they provided to the FBI and the level of confidentiality that existed between the FBI and the informant at the time that the informant provided the information.

After hearing the FBI's general policy arguments, the Review Board

informed the FBI that it interpreted the "clear and convincing" evidence standard to require the agencies to provide very specific evidence tailored to individual postponements.

In the summer of 1995, the Review Board considered four documents containing informant postponements. Three of the documents concerned symbol number informants. The fourth document disclosed the name of a deceased informant. Because the FBI did not present document-specific evidence in support of its postponements, the Board voted to release the records. On August 11, 1995, the FBI appealed to the President the Review Board's decisions on those four records. The FBI argued that disclosure of informant information would result in the following harms: *first,* harm to existing informants; *second,* harm to the FBI's ability to recruit new informants and its ability to obtain cooperation from existing informants, and *third,* harm to the government's "word" since disclosure results in a breach of a promise of confidentiality.

In its response briefs to the President, the Review Board emphasized the JFK Act's clear and convincing evidence standard and explained that speculative harm does not provide sufficient grounds for withholding of information. In addition, the Review Board offered examples of prior releases that had not resulted in expected harm. The FBI did agree to provide particularized evidence on three of the four documents. The FBI's evidence was to interview the informants to determine whether they would object to having their identities disclosed. Of course, all of the informants or their relatives objected to disclosure of their identities. Upon receipt of the FBI's evidence, the Review Board reconsidered the informant postponements and determined that it would release all information except for the numeric portion of the symbol numbers.

The Review Board's September 28, 1995, letter to the FBI informing the FBI of its decisions on the documents provided useful and specific guidance as to what type of evidence the Review Board was looking for -- interviewing informants would not be necessary, nor would the Review Board find it useful. Instead, the Review Board needed to know whether informants were still alive and whether the informant file contained corroborating evidence of harm that would befall the informant if identity were disclosed. Ultimately, the FBI was able to satisfy the Review Board's requests for evidence on informant issues by

providing information that was available at FBI headquarters.

After the FBI appealed the Review Board's decisions on four informant records, the FBI eventually came to eliminate general policy arguments from its evidence submissions and began to provide evidence in support of informant postponements on standard forms titled "Informant Postponement Evidence Form" (attached as Exhibit D). Once the Review Board received the FBI's specific evidence, it started to develop a group of guidelines for the review of informant postponements.

C. Effect of prior disclosures. If the name of an informant in a particular record had already been released in a context that *disclosed the informant relationship with the FBI,*, then the staff recommended that the Review Board release the name. If an informant symbol number in a particular record had already been released in a context where the same informant symbol number was providing the same information as in the record at issue, the staff recommended that the Review Board release the symbol number.

As a practical matter, both the FBI and the Review Board made an effort to track the names and symbol numbers of FBI informants whose relationships with the FBI had already been made public. When Review Board staff members encountered informant names or symbol numbers that were eligible for postponement, staff members researched whether the name or symbol number had already been released. Similarly, the FBI maintains and checks an informant card file that tracks those informant names and symbol numbers that have been publicly disclosed and in what contexts.

b. Individuals who provided information to the FBI, but who did not have an ongoing confidential relationship with the FBI.

i. Review Board guidelines. Where an individual provided information to the FBI and requested that the FBI protect his or her identity, *but the FBI provided no evidence of an ongoing confidential relationship with the individual*, the Review Board voted to disclose all identifying information about that individual.

b. Commentary. When the FBI first began to present

evidence to the Review Board in defense of its attempts to protect its informants, it asked that the Review Board protect the identity of any individual who either expressly or implicitly requested confidentiality when providing information to the Bureau. Persons who provide information in exchange for express promises of confidentiality may include neighbors or other acquaintances of a subject of investigation, as well as employees of state and local governments, financial institutions, airlines, hotels, etc. . . . According to the FBI,

> "Where such a promise is given, documents containing such information will contain the name of the person providing the information as well as language specifically setting forth the fact that confidentiality was requested. No file is opened on such persons and no symbol numbers are assigned to protect their identities."

FBI Memorandum, *FBI Informant/Confidentiality Postponements*, p. 3.

Initially, the FBI's policy was to protect "the identities of persons who gave the FBI information to which they had access by virtue of their employment," regardless of whether "their providing the information . . . involve[d] a breach of trust," provided that the person in question requested confidentiality. Moreover, the FBI implied that, even where a request for confidentiality is not explicit on the face of the document, the identities of such persons will be withheld in cases where their providing the information to the FBI involved a "breach of trust":(*e.g.*, a phone company employee who gives out an unlisted number.)

The Review Board rejected the FBI's argument and voted to release the names pursuant to Section 6(4) of the JFK Act. Section 6(4) requires that the FBI provide clear and convincing evidence that disclosure would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual. That the individual lacks one of the Bureau's many informant designations (*e.g.*, potential security informant ("PSI"), potential criminal informant ("PCI"), panel source, established source, informant symbol number) suggests that the individual did not have an ongoing relationship with the FBI. To the extent that FBI believes that a

particular "protect identity" source did have an ongoing relationship with the FBI, it may provide evidence to the Review Board of the relationship. Without the benefit of such evidence, the Review Board assumes that "protect identity" sources are not sources with an "understanding of confidentiality currently requiring protection." The Review Board learned that FBI agents often offer confidentiality as a matter of course to interviewees, whether or not the individual requests or requires confidentiality. Eventually, the Review Board and the FBI agreed that the FBI would release the names of these individuals unilaterally.

c. Individuals who gave the FBI information to which they had access by virtue of their employment.

i. Guidelines. The FBI unilaterally released the identities of individuals who gave the FBI information to which they had access by virtue of their employment, such as telephone company employees, utility employees,

ii. Commentary. Until the summer of 1995, the FBI protected the identities of all persons who gave the FBI information to which they had access by virtue of their employment provided one of the two following circumstances existed: (1) the employee requested confidentiality, or (2) the employee's providing the information involved a breach of trust (*e.g.,* a phone company employee who gives out an unlisted number.) The Review Board believed that disclosure of the identities of such individuals would not subject the individuals to the type of harm that the JFK Act required to sustain informant postponements. Once the Review Board voted to release the identities of persons who gave the FBI information to which they had access by virtue of their employment, the FBI acquiesced and proceed to unilaterally release the identities of such individuals.

d. Deceased informants.

i. Guidelines. With very few exceptions, the Review Board released the identities of deceased infromants in the core and related files.

In the "Segregated Collection" files, the Review Board did not require that the FBI provide evidence that an informant was alive to sustain a postponement

unless the Review Board staff member had some reason to believe that the informant was deceased. Thus, unless the informant was of relatively high public interest, the Review Board voted to protect the informant's identity. In the cases where a staff member had a reason to believe that an informant was deceased, the staff did request the FBI to provide evidence concerning the informant and released the informant's identity if the informant was deceased.

ii. Commentary. A "Named informant" is an individual whose name appears in assassination records and who had some type of ongoing confidential informant relationship with the FBI. The FBI records often refer to such informants as "PSIs" (potential security informants) or "PCIs" (potential criminal informants), but "established sources," "panel sources," and others might fall into the category of "named informants." The Review Board attempted to categorize informants according to the level of confidentiality that existed between the FBI and the informant. While the Review Board was often willing to sustain postponements of named informants when the FBI could demonstrate that the informant was still living, it believed that deceased informants were generally not entitled to protection.

However, in its response to the FBI's informant appeals, the Review Board did state that, in some rare cases, the FBI might be able to prove clearly and convincingly that a "confidential relationship" with an deceased informant currently required protection. For example, the FBI might be able to show that the relatives of a high-level organized crime informant could still be at risk of retaliation.

The Review Board debated extensively the issue of what constituted adequate evidence that an informant was currently living. Specifically, the Board had to determine what evidence was necessary to prove that someone who, according to a search of the FBI's computer databases, is now living, is in fact the same individual named as an FBI informant.[29]

[29]For a full discussion of the issue regarding "adequate" proof, *see* Memorandum from Philip D. Golrick to the Review Board, *Staff Recommendations on "Negative Contact" Informant Postponements*, May 13, 1996.

Ultimately, the Review Board determined that the FBI must verify that the informant was still alive by matching the informant's name plus date of birth or social security number. The Review Board did not consider name alone or name plus general location to be adequate evidence that an informant was still living.

e. "Negative Contacts": Informants who provided no assassination-related information to the FBI.

i. Review Board guidelines. When an FBI agent asks an informant for information on a particular topic and the informant reports that he or she has no information to provide, the FBI calls the contact a "negative contact." Where the FBI adequately identified the "negative contact" informant as still living,[30] the Review Board agreed to postpone for 10 years "negative contact" named informants and all specific identifying information, such as street addresses, telephone numbers, and informant-specific portions of FBI case numbers and file numbers.

Where the FBI did not adequately identify the informant as still living, the Review Board voted to release the name and any accompanying identifying information. *See* d. (Deceased Informants) above.

The FBI unilaterally released all unclassified "negative contact" (definition below) symbol number informants.

ii. Commentary. In the FBI's early investigations into the assassination of President Kennedy, Director Hoover ordered special agents to ask all informants for relevant information. Even when informants reported that they knew nothing that would assist the FBI in its investigation, FBI agents filed reports in the assassination investigation file documenting the "negative contact."

[30]An informant is "adequately identified as still living" if identified through current information with a living person with the same name and other specifically identifying information (*e.g.,* name and date of birth or social security number.)

As a result of Director Hoover's broad directive to agents to question all informants concerning the assassination, the assassination investigation file provides a reasonably comprehensive picture of the state of the FBI's informant network in late 1963 and early 1964. The FBI, of course, preferred that this overview of its informant operations not be disclosed to the public. The Review Board acknowledged that the public had little or no interest in knowing the identities of each "negative contact" informant. At the same time, the Review Board believed that the public did have an interest in having accurate information concerning the FBI's activities in the days and weeks following the assassination. As a compromise, the FBI agreed that it would unilaterally release all unclassified negative contact symbol number informants (on the theory that, with no additional information from or about the informant, no researcher could ever determine the identity of the informant) and the Review Board agreed that it would protect those "negative contact" named informants that were still alive (on the theory that, since they provided no information about the assassination, there was little value to be gained from disclosing the identities of hundreds of living FBI informants.)

f.. *"Positive Contacts": Informants who provided at least some assassination-related information to the FBI*

a. Review Board guidelines. "Postive contact" informants are informants who provided at least *some* assassination-related information. Where the FBI adequately identified the informant as still living, the Review Board adopted a case-by-case approach, considering the factors listed in the commentary below. When the Review Board voted to postpone the identity of a "positive contact" informant, it voted to postpone it for ten (10) years, and adopted appropriate substitute language. The Review Board released informant names if the informant was of particular relevance to the assassination.

Where the FBI did not adequately identify the informant as still living, the Review Board released the informant's name and any accompanying information. *See* 4. (Deceased Informants) above.

b. Commentary. The Review Board's decisionmaking with

regard to
"positive contact" informant postponements involved an evaluation of some combination of the following factors:

- the significance of the information that the informant provided to understanding of the assassination;
- the importance of the identity of the informant to assessing the accuracy of the reported information; and
- the significance of the threat of harm to the informant from disclosure, considering the following:
  - whether the informant is still living, and if so, whether the informant still lives in the same area;
  - the amount of time that has passed since the informant last provided information;
  - the type of information the informant provided;
  - the level of confidentiality that existed between the FBI and the informant at the time that the informant provided the information; and
  - any specific evidence of possible harm or retaliation that might come to the informant or his or her relatives.

Although no one factor was dispositive in every case, the Board considered certain factors to be more important than others in making decisions to release records. For example, if public interest in a particular document was high, the Board released informant names in the document even though the Bureau was able to provide evidence that would have otherwise justified postponement of the informant's identity.

In those cases where the Review Board agreed to protect an informant's name

and specific identifying information, substitute language such as "informant Name," "street address," "informant file number," or "informant symbol number" replaced the redacted information.

7. FBI Informant Symbol Numbers and File Numbers

a. Review Board guidelines. As a general rule, the Review Board routinely agrees to postpone for ten (10) years the "numeric" portion of informant symbol numbers and the "case number" portion of informant file numbers, *provided* that the informant's symbol number has not already been made public. The Review Board uses the phrases "informant symbol number" and "informant file number" as substitute language.

Routine exceptions to this rule occur in two types of documents: *First,* in documents that refer to an informant by both name and symbol (and/or file) number, the Review Board considers the symbol number to be specific information that might identify an informant*; Second*, the FBI agrees to unilaterally release the entire symbol number for "unclassified negative-contacts" -- those FBI informants who were asked about a particular subject, but had no "positive" information. (*see* 3. FBI Informants: Negative Contacts.)

The non-routine exception to the general rule arises in documents in which the unredacted information in the document *unambiguously* identifies the informant. Such documents are not routine because the Board will not agree to protect the numeric

portions of the informant's symbol and file number in a document that otherwise reveals the informant's identity.

b. Commentary. When the FBI has an informant who provides "valuable and sensitive information to the FBI on a regular basis" (*quoting,* FBI position paper), the FBI may assign a "symbol number" to the informant. The informant does not know his or her symbol number. Rather, the symbol number is an internal number that allows an FBI agent to write reports about the informant and information that the informant provides to the FBI without writing the informant's name. Most informant symbol numbers

consist of three parts -- the prefix indicates the field office to which the informant reports (*e.g.* "NY" for New York, "DL" for Dallas, "TP" for Tampa), the numeric portion corresponds directly to a particular informant, and the suffix indicates whether the informant usually provides the FBI with information about criminal (C) or security (S) cases.[31]

The Review Board came to believe that, in the majority of the FBI's assassination records, disclosure of the numeric portions of the symbol number (and the numeric portions of the corresponding informant file) were of little public interest. Rather than require the FBI to research the status of every symbol number informant, the Review Board determined that it would allow the FBI to protect the numeric portions of informant symbol numbers and file numbers, reserving the right to request evidence on any informant the Review Board considered to be of significant public interest.

In support of its argument to keep the symbol and file numbers for informants secret, the FBI argued that the "mosaic theory" justified postponement of any portion of an informant's symbol number. The Review Board rejected the mosaic theory as the sole basis for postponement of symbol numbers, or for any other particular postponement issue, simply because the mosaic theory itself contains no limiting principle. However, the JFK Act requires the Review Board to balance any incrementally greater risk that the release of further information will lead to disclosure of (and harm to) the informant against the public interest in releasing the information. In striking this balance, the Review Board gave great weight to the public interest in the information provided. In the "core and related" files, the Review Board did not postpone the information provided by symbol number informants even though it would postpone the numeric portion of the symbol number.

The Review Board has consistently released the prefixes and suffixes of informant symbol numbers, even in cases where it sustains the "numeric" part of

[31]In longer, formal FBI reports from field offices to headquarters, where many informants are used, the FBI adds yet another layer of security to the informant'sidentity by assigning temporary symbol numbers (T-1, T-2, etc. . . .). The Review Board never sustained postponements of these temporary numbers.

the symbol number. Thus, for the hypothetical symbol number "NY 1234-C," "NY" and "-C" would be released, even if the Review Board sustained postponement of the "1234." After the Review Board's action, researchers would know that the informant was run by the New York City field office and reported on criminal (rather than "security") cases, but may not know the informant-specific numeric portion of the symbol number.

In the "core and related" files, the Review Board did not postpone any part of a "T-symbol" number. Rather, the FBI began to unilaterally release these "temporary symbols" under the JFK Act after the Review Board's first few discussions about informant postponements.

F. Confidential Relationships Between Governments and Cooperating Foreign Governments

Text of Section 6(4)

> *. . .clear and convincing evidence that the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest;*

1. Foreign Liaison Postponements in the FBI Files

a. Review Board guidelines. Information that the FBI receives from cooperating foreign governments appears throughout the FBI's files. The official position of the FBI is that any foreign government information in FBI files is the property of the foreign government, and as such, the FBI cannot release the information without first obtaining the consent of the foreign government that provided the information. When the Review Board believed that information in FBI records truly was "foreign government" information, it worked with the FBI to approach the foreign governments and attempt to persuade the foreign government that it is in our countries' mutual interests to release liaison information in assassination records. When necessary, the

Review Board requested the assistance of the State Department in approaching foreign governments.

In the "Segregated Collection" files, the Review Board recognized that the cost of releasing foreign government information far outweighed the benefits of releasing information of marginal relevance, as most of the "Segregated Collection" files are. Thus, the Board sustained postponements of foreign government information in the "Segregated Collection" files, provided the information was not assassination-related.

b. Commentary. Given that the FBI has a great deal of foreign government information in its files, the FBI asked the Review Board to postpone release of all such information because it adheres to the position that it does not have authority to release another government's information. The Review Board did not necessarily agree with the FBI's position that the United States cannot unilaterally release information received from another government.

On August 8, 1995, the FBI appealed to the President the Review Board's decisions to release five documents that contained foreign relations postponements. The FBI made three arguments in support of its postponements: *first,* the fact of the liaison relationship between the FBI and the foreign government in question was a classified secret; *second,* the FBI had never officially released documents demonstrating the nature of the relationship between the FBI and foreign government; and *third,* release of information about the relationship would cause dramatic harm to the United States' foreign relations with the foreign government in question.

Three days later, on August 11, 1995, the Review Board responded to the President that its research in publicly available sources supported the Review Board's decisions to release the five records at issue. In response to the FBI's first two arguments, the Review Board explained that the FBI had publicly announced its liaison relationship with the foreign Government at issue more than thirty years ago, and that the FBI *had already* released assassination records that described the FBI's liaison relationship with the foreign government. The Review Board offered a three part response to the FBI's third argument that harm would result from release of information about the liaison relationship:

first, the FBI had not met the "clear and convincing evidence" standard because it had not identified a particular harm that would result, *second,* if foreign relations would be harmed as a result of release of information about the liaison relationship, the harm would have already occurred when the relationship was previously disclosed by the FBI; and *third,* harm to foreign relations was unlikely because the information in the documents is the type of information that we would expect Governments to share in law enforcement activities.

The FBI then consulted representatives of the foreign government to ask whether the foreign government would object to an official disclosure of the liaison relationship. The foreign government asked the FBI not to reveal the relationship, and the FBI argued to the President that the United States should respect the request of the foreign government. The Review Board noted that, had the FBI released the records without consulting the foreign government, foreign relations would not have been harmed, but since the FBI did consult the foreign government, the FBI itself had created a foreign relations problem. Despite the paradox that resulted from the FBI's consultation with the foreign government, the Review Board took the position that the foreign government's desire that the FBI not release the information was a relevant factor in the balancing test but that, in this case, the public interest in disclosure outweighed the foreign government's unexplained desire to protect the information.

After the FBI and the Review Board briefed the issues to the President, representatives of the Review Board and the FBI met with the White House Counsel's Office. The White House asked the Review Board to reconsider its decisions on the documents on appeal, but also instructed the FBI to provide the Review Board with postponement-specific evidence in support of its claimed postponements. The Review Board and the FBI agreed to the White House request and entered into a Stipulation on August 30, 1995.

In an attempt to understand the position of the foreign government, the Review Board met with representatives of the State Department and the foreign government to discuss the documents at issue. As a result of the meeting, the foreign government agreed to release of the overwhelming majority of information in the documents. The Review Board agreed to sustain the one postponement that the foreign government requested, which was the name of the

employee of the foreign government, recognizing that the identity of the individual was of little or no interest to the public.

After the appeals process had ended, the FBI maintained its position that it could not release foreign government information without the consent of the foreign government. The Review Board recognized that it simply did not have the time or the resources to pursue release of each postponement in the same way that it pursued release of the five appealed documents. Initially, the Review Board had hoped to approach each foreign government separately in an attempt to convince the governments that release of liaison information in assassination records would benefit both the United States and the foreign governments. In the end, the Review Board recognized that the easiest way to release the foreign information in the FBI records would be for the FBI, through its "Legats" (Legal Attaches), to request the foreign government at issue to release the information. The Review Board saw three advantages to this approach: *first,* in those cases where the FBI was successful in obtaining release of the information, the record at issue would be available to the public with no further action by the Review Board; *second,* allowing the FBI to request release of foreign information using the same channels through which they obtain foreign information makes it possible for the FBI to maintain positive relations with their foreign contacts, and *third,* the Review Board relinquished no rights to make its own approach to the foreign government, either before or after the FBI Legat had approached its foreign contacts.

Practically, the FBI sent the records at issue to its Legats with a letter from Director Freeh explaining to the foreign government how important release of the information is to the FBI and to the American people. In addition to materials from the FBI, the Review Board enclosed a letter to the foreign governments explaining our statute and our mission and requested release of the records.
note: what follows is what we intend to happen, not what has already happened.

When the Legats were unsuccessful in obtaining the consent of the foreign government to release of the information, either because the Legat's contacts did not approve the release or because the Legat's local contacts no longer existed,

the Review Board, with the help of the State Department, approached the foreign government directly. In meetings with foreign government officials, the Review Board requested that the governments consent to release of information in the FBI files when the Review Board thought that the public interest would be served by disclosure.

*** to be continued as the story unfolds ***

If the Review Board adopted the same policy on marginally relevant foreign government information in the "Segregated Collections" that it follows for records more closely related to the assassination, the Review Board and its staff would have spent the majority of the last year of the Review Board's operations approaching foreign governments to try to obtain the release of information that is of little public interest. The Review Board came to believe that the cost of release of the information outweighs the benefits of releasing this marginally relevant information in the "Segregated Collection" files. Thus, in its April 1998 meeting, it agreed to designate the irrelevant information as "NBR" and applied its "NBR" guidelines.

G. Presidential Protection

Text of Section 6(5)

> *. . . clear and convincing evidence that the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.*

****** SPACE HOLDER FOR SECRET SERVICE SECTIONS***
to be provided by Kim ***

Postscript: Information Exempt from the JFK Act

Section 10: Materials Under Seal of Court

The JFK Act gives the Department of Justice particularized responsibility to assist the Review Board. The Attorney General is to assist in obtaining court records and obtaining Grand jury testimony under seal. Sections 10(A)(1)-(2) an d (10)(b)(1).

Grand Jury Material

Records Under Seal that are not Grand Jury records

Title III records (ELSUR after Congress passed Title III)

Section 11(a): Tax Return Information

Internal Revenue Service Records

Social Security Administration Records

Tax Return Information in the Assassination Records of Other Executive Branch Agencies