

## **Review Board Recommendations**

The Final Report of the Assassination Records Review Board provides not only an opportunity to detail the extraordinary breadth and depth of the Board's work to identify and release the records of the tragic death of President John F. Kennedy, but also to reflect on the Board's shared experience in carrying out this mission and the meaning of its efforts for the much larger challenge of secrecy and accountability in the federal government. It is true that the Board's role was to a large extent disciplined and tightly focused on the assassination, its aftermath and the broader Cold War context in which the events occurred.

Any evaluation, however, of the unique experience of the Review Board—five private citizens granted unprecedented powers to require public release of long-secret federal records—inevitably presents the larger question of how the Board's work can be applied to federal records policy. There is no doubt that for decades the pendulum had swung sharply toward secrecy and away from openness. Changes wrought by the end of the Cold War and the public's desire to know have begun to shift the balance. The Review Board's mandate represented a new frontier in this changing balance – an entirely new declassification process applied to the most-sought after government secrets. In this chapter, the Board's steps back and reflects on its experiences, raises issues that will help frame the declassification debate, and makes recommendations on the lessons to be learned from the path taken to release of the Kennedy assassination collection. The dialogue about how best to balance national security and privacy with openness and accountability will continue both within government and beyond. The Review Board will necessarily be part of that important debate.

The Review Board was created out of the broad public frustration that the federal government was hiding important information about the Kennedy assassination by placing its records beyond the reach of its citizens. Broad disagreement with the Warren Commission findings, explosive claims in the popular movie *JFK*, and continued deterioration of public confidence in government led to consensus that it was time to open the files. Thus the debate in Congress largely became a debate over what mechanisms could constitutionally compel the opening of the assassination files.

The Review Board's mandate was not to investigate once again the assassination, but to release as many of these heavily restricted documents as possible. Lawmakers commented that the efforts of the Review Board “will stand as a symbol and barometer of public confidence in the review and release of the government records related to the assassination of President Kennedy....Several provisions of [of the Act creating the Board] are intended to provide as much independence and accountability as is possible within our Constitutional framework.” Restoring public confidence in government is a difficult task under any circumstances. The Review Board took this responsibility seriously, however, and set out in April 1994 to create the most complete record possible of the documentary evidence of the assassination so that in the end the American public could draw its own conclusions as to what happened and why on that fateful day in Dallas in November 1963.

From the start, the Review Board did as much of its work in public as it could possibly do, given

the classified material with which it worked. The Board's major policy decisions were all made after carefully consulting with the public through public hearings and *Federal Register* notices. Many of the Board's requests to agencies for additional information were suggested by the Board's continuing dialogue with researchers, authors and experts. Frequent public hearings outside of Washington, experts conferences, ongoing public releases of the records, witness interviews, and media availability were among the many tools the Board used to reach out and communicate with a public strongly interested in the results of the Board's work. The result was that the Board was helped immeasurably not only by the advice and suggestions that resulted from this public dialogue, but by the records that were discovered and opened through the communications. The broad definition of "assassination record" and the foundation for the taking of the original Zapruder film were developed through public hearings. Furthermore, some of the Board's most significant acquisitions of donated collections – for example, the Rankin papers, the Wegman papers and the Garrison grand jury transcripts – were the results of the public hearings.

Public involvement in the Review Board's work was critical to the success of the Board, both because public participation was important for public confidence and because public involvement produced results. The assassination research community, in particular, provided many useful suggestions to the Board, but more importantly perhaps, monitored the Board's work closely and did not permit the Board to back off in its search for records.

The Review Board began its work at a slow pace which was necessary for a group of five private citizens with no prior involvement with the issue. Preparation to weigh the important competing interests of national security and privacy with the public interest took time. Education of the Board and the equally important development of trust among the Board, its staff and agency reviewers takes time, and future declassification efforts need to take that into account. What developed from the early extensive discussions between the Board, its staff and the agency reviewers were thoughtful and well-reasoned decisions that reflected the Board's commitment to the legislation as well as the Board's collective interest in developing the fullest possible historical record surrounding this tragic event.

The precedents that developed from the Board's early deliberations guided the staff in its review of the records and guided agency reviewers in the positions they took toward postponement requests. The development of this unique and valuable set of decisions, which came to be known as the Board's "common law," eventually resulted in thousands of "consent releases," in which documents moved directly from the agencies without redactions to NARA.

There were, of course, many substantive disagreements between the Board and the agencies, but the course of the relationships were characterized chiefly by growing mutual understanding and markedly improved communications. The Board was gratified to see agency reviewers and decisionmakers grow increasingly aware that the responsible release of information can provide an opportunity to create a more complete record of the extensive work that many agencies did on the issues raised by the assassination. Many appeared also to gain a greater appreciation of the tremendous costs of secrecy, both in terms of public confidence and maintenance of records.

There were critics of the Review Board, those who believed that the “targeted declassification” of assassination records not only interfered with the goal of systematic declassification directed by Executive Order 12958, but was also much too expensive. It is difficult, of course, to compare one method of declassification with another, harder still to place a price tag on the nature of the information that is now released and available to the American public. It is worth noting that the Kennedy assassination records were largely segregated due to the use of the records during the many prior government investigations of the assassination. But, the Review Board does recognize that any meaningful approach to declassification will of necessity be multi-faceted, with different methods adopted for different circumstances. The particular circumstances of the assassination of President Kennedy and the highly secretive governmental response have had an enormous impact on public confidence and made the Review Board approach singularly appropriate. When viewed in that light the cost of this four-year project seems entirely appropriate, particularly when compared with the significant costs, both financial and otherwise, of keeping the record secret. The Board is confident that, in this setting, the approach chosen by the Congress to open the Kennedy assassination records was a highly effective one.

The Review Board is certainly aware that there are a great many unresolved issues relating to the assassination of President Kennedy that will be addressed in the years to come. The massive public collection of documents that awaits the researchers will undoubtedly shed light not only on the assassination, but on its broader context as an episode of the Cold War. The community of professional historians, who initially exhibited comparatively slight interest in the Board’s work, has begun paying attention with the new accessibility of records that reflect the Cold War context in which the assassination was enmeshed. Ultimately, it will be years before the JFK Collection at NARA can be judged properly. The test will be in the scholarship that is generated by historians and other researchers who study the extensive documentation of the event and its aftermath. Does the historical record formed by the Board inspire confidence that the record is now reasonably complete? Will the documents released under the JFK Act lead to still other materials? Will the mass of documentary evidence answer the questions posed by historians and others? Will the Board’s compliance program inspire confidence that the agencies have produced all the relevant documentation that exists today in agency files? What do the record tell us about 1960’s and the Cold War context of the assassination?

The Review Board approach, the precedent created, the tools identified and the lessons learned will assist future researchers immeasurably. Agency reviewers will note that the Republic has not collapsed under the weight of threats to national security because of Review Board actions and perhaps, they will also note that openness is itself a good thing and that careful scrutiny of government actions can strengthen agencies and the process of government, not weaken it. There likely will be problems in the future that best lend themselves to the extraordinary attention that a similarly-empowered Review Board can focus. Formation of a historical record that can augment understanding of important events is central not only to openness and accountability, but to democracy itself.

At an early stage in the Review Board’s efforts, one of the Board members commented that the Board should strive to accomplish as much as it could, to be remembered for what it attempted.

Or, to paraphrase Robert Kennedy, the Board should work hard to ensure that its reach continually exceeded its grasp. The Board did not always achieve that standard, but the sheer scope and accessibility of the JFK Collection speaks eloquently about the effort. The Board has left to posterity a historical bequest that is invaluable and unprecedented.

## **Review Board Recommendations**

The Review Board presents recommendations that reflect the Board's experience and provides guidance for those who wish to capitalize on that experience to further reform the process of classification and declassification of federal documents. The Board recognizes that the JFK Act represents but one approach to declassification, one whose activity was designed to review sensitive records concerning a controversial event.

*1. The Review Board recommends that future declassification boards be genuinely independent, both in the structure of the organization and in the qualifications of the appointments.*

The Review Board's independence was grounded in the concept that the Board was in fact an independent agency in the Executive Branch with powers granted through its enabling legislation. This independence was consequently as political as it was legal, facilitating the Board's relations with the agencies.

Although appointed by the President, members of the Review Board could not be terminated except for just cause. By not submitting the Review Board to the supervisory authority of the executive branch, providing an independent staff who answered only to the Board, and establishing strong statutory standards governing the review of records, the JFK Act provided political and legal balance for the conflict with agencies. This balance was absolutely necessary for the Board to stand up to experts and their national security claims.

Furthermore, the independent qualifications of Board members is likewise important. A group of five outsiders, uninvolved in previous investigations or research concerning the assassination, but trained in historical, archival, and legal issues that are central to the records of the assassination, the Board collectively brought a perspective framed by professional training and experience. The absence of any connection or allegiance to the agencies freed the Board to make truly independent decisions. The Review Board absolutely needed its independence in order to accomplish its statutory mandate. For any group charged with declassifying secret records, independence is an essential attribute.

*2. The Review Board recommends that any serious, sustained effort to declassify records requires congressional legislation with (a) a presumption of openness, (2) clear standards of access, (3) an enforceable review and appeals process, and (4) a budget appropriate to scope of the task.*

The JFK Act established admirable and effective standards through its standards of "presumption of disclosure" for releasing records and "clear and convincing evidence of harm" in restricting

them. Both standards helpfully guided the Board in its decision making, were understandable and simple in application. The Board strongly urges that these standards be applied to other efforts to declassify federal records. The discerning enumeration in the Act of criteria for sustaining restricted access created an obligation both for the Review Board and the agencies to apply these criteria to the many issues presented in the documents. These criteria for sustaining restrictions, especially that of “clear and convincing evidence of harm,” provide a very important focus and disciplined way of thinking about federal records and the information they often contain.

The central fact that the access standards were embodied in Congressional legislation was of immeasurable assistance to the Review Board. Although Congress’ inclusion of such standards in the JFK Act helped nearly spark a constitutional battle over the Act’s legality, the power of independence by Congressional mandate surely muted a fair number of agency disputes. Standards set through agency recommendations and presidential inclusion in an executive order would have limited the Board’s ability to compel disclosure.

Other powers conferred on the Board by the JFK Act were similarly central to the exercise of the Board’s duties. The agencies could challenge Board decisions only by appealing decisions to the President who has the “non-delegable” responsibility to decide them. This stringent provision raised our declassification activity to a threshold level that prompted the agencies to weigh the ramifications of any appeal that expended valuable political capital.

The access standards have been a central consideration in guiding the work of the Board, never far from any discussion or decision. Their importance cannot be overlooked, and the pervading influence of the standards was consistently reflected in our deliberations. In balancing the public interest and harm of disclosure, the Board determined that the precept of a “presumption of disclosure” prevailed in *every* case where there was salient information relative to the assassination.

The Board’s relationship with the agencies often faltered over the “clear and convincing evidence of harm” standard. This exacting standard, borrowed from the criminal law, was not only a new declassification criterion, but it placed the burden on the agency to explain why information should remain shrouded in secrecy. This occasioned conflict and misunderstanding, especially as the agencies complained that satisfying the test required unwarranted expenditure of scarce funds. The Board, however, insisted on adherence to the legislative provisions, and the agencies ultimately learned, for the most part, how to satisfy the Board’s expectations. As interpreted by the Review Board, “clear and convincing evidence of harm” required specific reasons for protection. General concepts of “national security” and “individual privacy” were insufficient. If harm were to be caused by release, the Board insisted on understanding the harm. Thus, the specific standard resulted in greater fidelity to the law and more accurate decision making by the Review Board.

Moreover, the Congress provided adequate and sufficient funds for the Board to hire staff to undertake its work. The Board was fortunate to recruit talented and dedicated colleagues who worked closely with the Board to fulfill its important mission. The Review Board’s accomplishment is, in a direct way, that of the staff, and the Board is indebted to them. Other

federal declassification efforts, especially at NARA, need substantially more resources if they are successfully to accomplish their mandates. The work of the Review Board staff shows what adequate funding can achieve.

*3. The Review Board recommends that its “common law” of decision, formed in the context of a “presumption of disclosure” and the “clear and convincing evidence of harm” criteria, be utilized for similar information in future declassification efforts as a way to simplify and speed up releases.*

The Review Board’s understanding of the important standards of a “presumption of disclosure” in the release of documents and “clear and convincing evidence of harm” in sustaining restricted access and its application of the more specific section 6 standards developed slowly as the Board applied the law to the many postponement issues raised in the documents.

In time, the body of decision-making began to grow, and with it what was termed the Board’s “common law,” a collection of decisions that greatly informed staff and agency reviewers how to apply the JFK Act and saved an enormous amount of time by handling similar information in similar ways.

Many documents share common characteristics. The names of agents and informants, crypts, digraphs, the location of CIA stations abroad, and other numerical data used to identify documents, recurred constantly in the documents examined by the Review Board and helped form the Review Board “common law” about how to treat redacted information in federal documents.

As the effort to declassify federal documents presses forward on other fronts, the Review Board believes that there are common ways of handling these categories of information, so that similar substitute language may be provided, and there might also be consensus concerning how long the information needs to be restricted. Handling restricted documents by adopting common substitute language as appropriate will also enhance the efficiency of the review, lowering unit costs for processing documents.

Codification of these rules of application would permit restricted access to some of this information, and yet still indicate to researchers and other citizens what kind of identifying information had been withheld and for how long. The idea of substitute language for critical pieces of redacted information, together with less sweeping and more discerning application of what is to be withheld, offers a promising way of limiting the volume of restricted information in federal documents, either through more uniform and limited classification rules or through earlier and more declassification.

*4. The Review Board recommends that future declassification efforts avoid the major shortcomings of the JFK Act: (a) unreasonable time limits, (b) employee restrictions, (c) application of the law after the Board terminates, and (d) problems inherent with rapid sunset provisions.*

If the JFK Act represented a milestone in articulating important new principles by which to review classified records, there were also shortcomings in the law that should be avoided in future declassification efforts. They include:

- the timetable laid out for the Review Board to accomplish its work was unrealistic and required the Board to play “catch up” from the beginning and required agencies to duplicate their work after the Board began its work;

- the provision that the Board could not hire staff who were currently working anywhere in the government seemed unduly restrictive, and obliged the Board to undertake costly and time-consuming security checks for most employees, for whom security clearances were central to their work with classified documents;

- the Review Board sunsets but the JFK Act does not and as a result, there is uncertainty about the status of openings that will occur after September 1998, and whether any further appeals by agencies might be permitted, and, if so, who would represent the interest of openness;

- the sunset provision in the JFK Act, while embodying the important concept that this effort was not to be permanent, nonetheless undermined the careful review and disposition of the records. The Board inevitably lost critical staff in the final stages because they had to seek job security for themselves and their families. Moreover, the sunset enabled government agencies that were not inclined to cooperate to simply try to outlast the Board. A more open-ended provision would be preferable, in which the Board, supervised by its congressional oversight committee and the Office of Management and Budget, would declare its progress, but not set a termination date until there was agreement concerning the successful completion of the mandate.

*5. The Review Board recommends that the cumbersome, time-consuming and expensive problem of referrals for “third party equities” (classified information of one agency appearing in a document of another) be streamlined by (A) requiring representatives of all agencies with interests in selected groups of records meet for joint declassification sessions, or (B) uniform substitute language be devised to deal with certain categories of recurring sensitive equities.*

The practice of extensive classification of government documents has created a jungle of secrecy in which agencies are protective of one another’s prerogatives, meticulously referring records to the originating agency in all cases. The frequency of this occurrence has had a substantial impact on the rate and pace of release of such information. It is not surprising that sensitive information is shared extensively, especially among law enforcement and intelligence agencies. One consequence of this sharing is that one agency’s restricted information is often found in another’s files. When this occurs, the agency creating the information must agree to its release by another agency. Such equities are expensive to search and release.

The Review Board developed an effective means of mitigating these cumbersome referrals by convening on occasion representatives of agencies with interests in the documents so that a group

of documents could be collectively declassified at once, with representatives there to sign off on the specific interests associated with each agency. A second means of easing this problem is to develop a uniform means of dealing with certain recurring categories of sensitive information. One such way would be to use agreed-upon substitute language to avoid the originating agency referral.

*6. The Review Board recommends that a compliance program be used in future declassification efforts as an effective means of eliciting full cooperation in the search for records.*

The Review Board compliance program was established to ensure that all federal agencies holding assassination records would warrant under oath that every reasonable effort had been made to identify assassination records and that such records had been made fully available for review by the Board. The Board has remained concerned that critical records may have been withheld from the Board's scrutiny and that the Board did not secure all that was "out there." It is all too easy to imagine that agencies and agency personnel not inclined to cooperate might simply have waited, using the JFK Act's sunset provision by waiting for it to take effect and ending the need to cooperate.

The Review Board's solution to this concern was to develop a compliance program in which each agency designated a "compliance officer" to warrant, under oath and penalty of perjury, that records had been diligently searched for and turned over to the Board for review and/or release to NARA. This program entails a detailed review (overseen by Review Board staff) of the effort undertaken by each agency in pursuit of such records and constitutes a record to guide future researchers in examining what assassination records were actually uncovered. The program is also intended to be forward-looking, so that the agencies will continue to follow the provisions of the JFK Act after the Board terminates its role. The program has worked well.

*7. The Review Board recommends that to ensure that the provisions of the JFK Act are exercised after the Review Board terminates NARA has:*

- a. the authority and means to continue to implement Board decisions,*
- b. an appeals procedure be developed that places the burden for preventing access on the agencies, and*
- c. a joint oversight group composed of representatives of the four organizations that originally nominated individuals to serve on the Review Board be created to facilitate the continuing execution of the access provisions of the JFK Act.*

The creation of the JFK Collection at NARA established a large records collection undergoing intense use by researchers. Having created this national research resource, Congress should ensure that NARA receives the additional resources necessary to manage this collection responsibly, and that it is also be given the authority to administer the remaining provisions of the JFK Act.

The Board recommends negotiation of a memorandum of understanding among NARA, the FBI, and the CIA that would establish a common agreement on how to resolve the inevitable issues

concerning the extensive assassination records of these two agencies. This is particularly necessary since additional records will be sent to NARA and additional releases of documents are scheduled to take place after the termination of the Review Board.

The formation of a liaison group composed of individuals from professional organizations that originally nominated members for the Review Board to oversee implementation of the provisions of the JFK Act would ensure the continuing representation of the public interest by those trained to understand continuing historical, archival, and legal issues.

*8. The Review Board recommends that the Review Board model could be adopted and applied whenever there are extraordinary circumstances in which continuing controversy concerning government actions has been most acute and where an aggressive effort to release all "reasonably related" federal records would serve usefully to enhance historical understanding of the event.*

The public stake is clear in creating a mechanism such as the Review Board to inform American citizens of the details of some of the most controversial events in American history. Moreover, the release of documents enables citizens to form their own views of events, to evaluate the actions of elected and appointed officials, and to hold them to account. There will not be a large number of such events, but there must be procedures grounded in experience that might be used to uncover the truth when these events, tragic as most of them are, occur. The provisions of the JFK Act have fostered the release of such documents, and the Board's experience demonstrates that similar legislation would be successful in the future.

*9. The Review Board recommends that both the Freedom of Information Act (FOIA) and Executive Order No. 12958 be strengthened, the former to narrow the categories of information automatically excluded from disclosure, the latter to add "independent oversight" to the process of "review" when agency heads decide that records in their units should be excluded from release.*

Despite the sound public policy goals encompassed in both the FOIA and Executive Order 12958, both of these measures fall short of their goal of access, as evidenced by the inability of researchers to use these measures to obtain access to assassination records. The categories of exclusion are far too broad in the FOIA to constitute a meaningful program of opening restricted federal records, and the succession of Executive Orders issued since the FOIA was enacted reflects the same problem. The most recent Executive Order, No. 12958, also fails by not creating for the federal agencies an "oversight" procedure to ensure that the decisions concerning access to agency records made by that agency's head will be independently reviewed. The mandate to release should be internalized in the agencies and penalties for secrecy must rival in consequence those for unauthorized release.

The mandate of the Review Board, underscored by powers conferred in the JFK Act and further aided by an adequate appropriation, far exceeds what the FOIA and Executive Orders can accomplish because the Review Board has the authority and resources to both review and release.

Proponents of the FOIA and Executive Order declassification would benefit from consulting the

JFK Act to identify how best to augment the resources and authority of those measures.

*10. The Review Board recommends the adoption of a federal classification policy that substantially:*

- a. limits the number of those in government who can actually classify federal documents,*
- b. restricts the number of categories by which documents might be classified,*
- c. reduces the time period for which the document(s) might be classified,*
- d. encourages the use of substitute language to immediately open material which might otherwise be classified, and*
- e. increases the resources available to the agencies and NARA for declassifying federal records.*

The Review Board's experience leaves little doubt that the federal government needlessly and wastefully classified and then withheld from public access millions of important records that did not require such treatment. Consequently, there is little doubt that an aggressive policy is necessary to address the significant problems of lack of accountability and an uninformed citizenry that are created by the current practice of excessive classification and obstacles to releasing such information. This need is not something recently identified, although the Moynihan Commission on Secrecy in Government is a recent expression of this long-standing concern. Change is long overdue and the Review Board's experience amply demonstrates the value of sharing important information with the American public. It is a matter of trust.

The Review Board's recommendations are designed to help ensure that the comprehensive documentary record of the Kennedy assassination is both actively developed after the Board terminates, and that the experience of the Review Board be turned to the larger purpose of addressing the negative consequences of the excessive classification of federal records. The Review Board's effort to accomplish the purposes of the JFK Act has been focused and aggressive. It will be for others, of course, to judge the Board's success in achieving these goals, but there can be no doubt about our commitment to making the JFK Act and an independent Review Board a model for the future.