

DRAFT

May 20, 1998

HAND DELIVERY

Charles F.C. Ruff, Esq.
Counsel
The White House
Washington, D.C. 20500

Re: Obligation of the President's Foreign Intelligence Advisory Board to Comply with the JFK
Assassination Records Collection Act

Dear Chuck:

I am writing in response to Chairman Rudman's letter to you dated May 13, 1998. Fortunately, a copy of his letter arrived in our offices while the Review Board was meeting, and I was able to distribute copies of it to the Board members. The Board discussed his letter and asked that I, as the person designated as the "principal liaison to Government offices," respond. *See* President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 § 8(a)(4)(A) ("JFK Act"). Although we take issue with several statements in the Chairman's letter, and believe it does not fully recount the nature of our prior discussions and requests, I believe that it is important to focus on three essential points.

First, PFIAB is a "government office" within the meaning of the JFK Act and it is required to comply with the Act. The JFK Act applies to "any . . . executive branch office or agency, and any independent agency." *See* JFK Act § 3(5)(E). Although Chairman Rudman makes reference to PFIAB's having been created by Executive Order rather than by statute, we do not believe that its status exempts it from complying with a law enacted by Congress and signed by the President. Rather than citing any statutory exemption for the non-release of records, Chairman Rudman apparently relies on "PFIAB's historical and proper role as confidential advisors to the President in the most sensitive area of foreign intelligence." Although the Review Board acknowledges PFIAB's traditional role has having provided "confidential advice," there were many other persons and institutions that similarly provided such advice to Presidents Kennedy and Johnson, but none -- other

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than PFIAB -- has suggested that such a status exempts it in any way from complying fully with the JFK Act. We have received and processed confidential briefing records created by National Security Advisors McGeorge Bundy and Walt W. Rostow, Attorney General Robert F. Kennedy and Deputy Attorney General Nicholas deB. Katzenbach, Director of Central Intelligence John McCone, Secretary of Defense Robert S. McNamara (who personally urged us, by the way, to release the tape recordings of his discussions with President Kennedy), and many others. The objections raised by PFIAB have not been raised by the NSC, CIA, FBI, NSA, White House Communications Agency, Secret Service, or any other agency of the U.S. government.

Although we presume that Chairman Rudman is correct in stating that PFIAB has historically not made its records publicly available, the obvious response is that the JFK Act was enacted for the express purpose of releasing records that historically have not been open to the public.

Second, PFIAB currently is in non-compliance with the JFK Act. The JFK Act required all government offices, by September, 1993 (300 days after enactment of the law), to have: (a) identified assassination records in its possession, (b) created Records Identification Forms ("RIFs") for each assassination record, and (c) transferred its assassination records to the National Archives. *See* JFK Act § 5(c). To the extent that an agency seeks to "postpone" the release of information in its records, it is required to submit those records and evidence supporting the proposed postponements to the Review Board. Although "assassination records" have now been identified from among PFIAB's holdings (with the assistance of the Review Board staff), as far as we are aware, no RIFs have been prepared and no PFIAB records have been transferred physically to the National Archives.¹

Rather than complying with these preliminary requirements of the JFK Act -- as have all of its sister agencies -- PFIAB is now raising constitutional objections, quoting from the signing statement by President Bush, and suggesting that the burden is now on the Review Board to provide written justifications for its designations before any further processing of records can proceed. The Review

¹Among the more perplexing of Chairman Rudman's statements was that PFIAB's records "are already at the National Archives, where they have been since at least early 1997 . . ." *See* letter from Warren B. Rudman to Charles F.C. Ruff, May 13, 1998, at 2. Not only had PFIAB never previously advised the Board that such records had been transferred, PFIAB has repeatedly advised that its records could not leave its premises. Moreover, the National Archives, like the Review Board, is unaware of the transfer of any PFIAB records to the Archives. As the attached letter from the head of the JFK Collection at the National Archives attests, he has never received any such records from PFIAB. *See* letter from Steven D. Tilley to T. Jeremy Gunn, May __, 1998, at __.

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Board understands that PFIAB traditionally has played an important role in providing certain types of advice to presidents and the Review Board understands that there may indeed be circumstances where such advice might be shielded from public release. There is, however, an appropriate time for PFIAB to make such assertions: *after* it has prepared RIFs, released all information that is not subject to a privilege, and presented its proposed postponements and evidence to the Board. The Board would then make its formal determinations and PFIAB would have the opportunity to appeal the Board's determinations to the President. This is the procedure that has been followed by every other agency and has previously been explained to PFIAB. By interposing its objections before the preliminary steps have been completed, PFIAB is putting the cart before the horse and interfering with the orderly procedure created by the JFK Act.

Third, time is running out. The Review Board is slated to complete its work and issue its Final Report by September 30, 1998. At this time, it appears that PFIAB is the sole entity within the U.S. government that will not have taken appropriate steps to complete its work under the JFK Act. Unless PFIAB processes its records promptly and properly, our Final Report necessarily will reflect this fact.

* * * *

By this letter, we are requesting that you, as Counsel to the President, either advise PFIAB to comply fully and promptly with its obligations under the JFK Act or, if necessary, request the President to advise PFIAB to comply with its legal obligations. Specifically, PFIAB should: (a) create RIFs for all records designated as "assassination records" by June 15, 1998, (b) transfer immediately to the JFK Collection at the National Archives all assassination records that it is prepared to open in full, and (c) transfer to the Review Board all records for which it seeks postponements, and evidence in support of the postponements, by July 2, 1998.

We are fully prepared to work cooperatively with PFIAB, just as we have attempted to work with all agencies of the government. But it does appear that PFIAB, at this time, believes that it may be peculiarly exempt from at least some of the requirements of the JFK Act.

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I apologize for troubling you with this matter, but it appears from Chairman Rudman's letter that PFIAB will not take further steps without receiving instructions from the White House. We would be pleased to discuss this with you or your representative, but we respectfully request that this matter be acted upon promptly.

Sincerely,

T. Jeremy Gunn
Executive Director and
General Counsel

Enclosure

cc: Chairman Warren B. Rudman
PFIAB

Frank W. Fountain
PFIAB

William H. Leary
National Security Council