

April 20, 1998 4:30 p.m. EDST
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ARRB Draft
SETTLEMENT PROCEDURE AGREEMENT

AGREEMENT made as of April , 1998, by and among the named parties in United States v. Nancy Sheridan and NBC, United States District Court, D.D.C., Case No. 1:97MS00287 (TPJ), including the United States of America and the Assassination Records Review Board (collectively, the "ARRB"), the National Broadcasting Company, Inc. ("NBC"), and Nancy Sheridan, who are parties to the proceeding, and Dr. David G. Marwell ("Dr. Marwell"), each of whom is a Party to this Agreement.

WHEREAS, the Parties to this Agreement are undertaking the following procedures in an effort to narrow and/or resolve their competing claims concerning the materials that are the subject of the Proceeding, to wit, 13 folders relating to the 1967 NBC White Paper on the Jim Garrison investigation (the "Materials"); and

WHEREAS, NBC asserts that it has a well founded claim that some or all of the Materials are privileged from production because of a "qualified journalist's privilege," Federal or State constitutional protections, or state "shield" laws (collectively "Qualified Privilege Claim");

WHEREAS

THE PARTIES THEREFORE AGREE THAT:

1. NBC will undertake a good-faith examination of all of the Materials and will provide to the ARRB all documents within the Materials for which it will not pursue what it believes to be a well founded Qualified Privilege Claim. For the purposes of this Agreement, NBC will provide to the ARRB at a minimum, the following types of documents: (a) all published materials (including, *e.g.*, newspaper clippings and published articles); (b) notes on interviews with a named source *to the extent that* it is already a matter of public record that NBC or Walter Sheridan interviewed the named source *and* that the information in these notes is a matter of public record; (c) notes that are not attributable to a named source *to the extent that* the subject matter of these notes is already a matter of public record; and (d) letters *to the extent that* they are not from or concerning a named source.

2. NBC will provide to the ARRB a Privilege Log that identifies all of the Materials (with reference to the specific Bates numbers set forth on the index of withheld documents annexed hereto as Exhibit A) for which it asserts what it believes to be a well founded Qualified Privilege Claim. The Privilege Log shall identify each document by Bates number and describe with reasonable specificity: (a) the type of document (*e.g.*, letter, memorandum, interview notes, other notes); (b)

date; (c) the basis of NBC's Qualified Privilege Claim (*e.g.*, "identifies confidential source" or "interview of confidential informant"); (d) whether the document itself contains intrinsic information that supports the privilege (*e.g.*, "document contains language assuring source that confidentiality will be protected"); and (e) that NBC, Nancy Sheridan, and their attorneys, having exercised due diligence, are aware of no prior waiver of the Qualified Privilege Claim.

3. The Parties will jointly engage Dr. Marwell as an independent and neutral evaluator. Dr. Marwell agrees to conduct a privileged, in-camera review of the Materials listed on the Privilege Log. Based on such review, Dr. Marwell will render an impartial opinion (pursuant to the procedures set forth below in paragraph 5) as to whether the documents identified on the Privilege Log created pursuant to paragraph 2 are accurately described on the Privilege Log, and whether the Materials, or any portion thereof, substantially contribute to an understanding of the assassination of President John F. Kennedy (a "Substantial Contribution"). The parties agree to accept Dr. Marwell's opinion as to whether the Materials or any portion thereof constitutes a Substantial Contribution as a substantive matter, subject to the procedures and rights set forth below.

4. Dr. Marwell will review the Materials listed on the Privilege Log at the offices of Miller Cassidy Larroca & Lewin at a mutually convenient time. He will not copy or remove any of these Materials from the premises of the Miller Cassidy firm, but may take such notes as he deems necessary to perform the requested services, subject to the privilege restriction set out below in paragraph 9. He may conduct additional research in public archives prior to rendering an opinion concerning the inquiry contemplated by paragraph 5. If he determines that information or documents identified on the Privilege Log are duplicative of information or documents already in the public archives, such information or documents (insofar as they are contained within the Materials listed on the Privilege Log) shall be deemed, by definition, not a Substantial Contribution.

5. Dr. Marwell will render his opinion and the Parties will proceed thereupon, according to the following procedures:

(a) Dr. Marwell will examine the Materials to verify their description on the Privilege Log. If Dr. Marwell concludes that the Materials have not been accurately identified, he will state that conclusion in a letter ("Opinion Letter") that will be sent to all parties and that will identify the document(s) that he believes have not been accurately described.

(b) If Dr. Marwell determines that none of the Materials identified on the Privilege Log constitutes a Substantial Contribution, he will state that conclusion in the Opinion Letter delivered simultaneously to counsel for all Parties, without further explanation or description of the Materials on the Privilege Log.

(c) In the event that Dr. Marwell finds that the documents on the Privilege Log are identified correctly, and that none of the Materials constitutes a Substantial Contribution, this proceeding will be voluntarily dismissed with prejudice pursuant to Fed.R.Civ.P.41(a)(1)(ii), with each side to bear its own costs, and the ARRB and the United States will discontinue all efforts to compel production of the Materials. The stipulation of dismissal will set forth as the grounds for dismissal that “an independent evaluation of the materials that are the subject of this proceeding concluded that none of the materials substantially contributes to an understanding of the assassination of President John F. Kennedy.”

(d) If Dr. Marwell determines that any portion of the Materials contained on the Privilege Log constitutes a Substantial Contribution, he will issue an opinion that offers only that conclusion and that identifies those document(s) (by reference to the Privilege Log) that he determines contain a Substantial Contribution, without further explanation or description of the Materials. In the event NBC desires clarification or explanation of Dr. Marwell’s opinion, it may conduct ex parte oral or written communication with Dr. Marwell on a privileged basis for that purpose.

(e) Within one week of receipt of Dr. Marwell’s opinion that some of the Materials contain a Substantial Contribution, NBC will determine whether or not to release any of those Materials to the ARRB in some form. In the event NBC determines in good faith that it cannot release any such Materials to the ARRB without impairing its Qualified Privilege Claim, the Parties agree to negotiate further in good faith up to May 15, 1998, in an attempt to reach an agreement that will provide for the release of substantive material within the documents, provided that such agreement will not compromise the identity of a confidential source, in an effort to reach a mutually acceptable resolution of this proceeding without further litigation. Such negotiations, as well as any subsequent litigation should those negotiations fail, will be limited to the documents that Dr. Marwell has identified as having been described inaccurately or that are a Substantial Contribution.

6. Dr. Marwell’s written and oral communications with NBC, with the exception of the Opinion Letter, will be subject to NBC’s Qualified Privilege Claim. Dr. Marwell will not disclose to the ARRB or to any other party the contents of such communications with NBC except as NBC shall authorize. Dr. Marwell agrees that, other than in delivering the Opinion Letter pursuant to the procedures outlined in paragraph 5, he will not disclose to any person or entity: (a) the content of any of the Materials; (b) any opinion rendered pursuant to this agreement; (c) any other information learned or notes taken during review of the Materials; or (d) the substance of any Privileged communication with NBC. Neither submission of the Materials to Dr. Marwell for his review, nor any communication with Dr. Marwell by any Party or representative of any Party, shall constitute a waiver of any Party’s attorney-client privilege, attorney work-product privilege, journalist’s privilege,

or other privilege recognized by law. No Party, nor any representative, agency, employee or member of any Party, will at any time seek to pierce those privileges based on any communication with Dr. Marwell, or otherwise invade or attempt to invade the Qualified Privilege Claim attaching to Dr. Marwell's engagement by any means, formal or informal. Neither this agreement nor any communication related thereto shall be filed with the Court except as may be necessary to enforce its terms. The Parties and Dr. Marwell agree and intend that all of the Qualified Privilege Claim restrictions and non-waiver provisions specified herein will continue in perpetuity and will survive the conclusion or termination of Dr. Marwell's engagement and this litigation.

7. Pending the review, opinion-drafting and negotiations, if any, conducted pursuant to paragraphs 1-6, the Parties will suspend further discovery proceedings and motion practice. The Parties will jointly seek to make all best efforts to complete the above procedures before the status conference currently scheduled for May 15, 1998, at 9:30. If, however, despite such efforts the Parties are unable to accomplish dismissal or reach a settlement by that date, they may jointly seek a brief further adjournment for those purposes. In the event no settlement can be reached by the further adjourned date, the Parties agree to use best efforts to complete all remaining discovery within 30 days of that adjourned date, subject to a jointly filed application seeking the Court's approval of an extended discovery period.

8. NBC and ARRB will be jointly responsible for compensation of Dr. Marwell on such terms as they and he agree upon, and for reimbursement of any expenses he may incur. It is understood and agreed that, in undertaking the tasks specified herein, Dr. Marwell will be rendering his personal opinion with respect to the Materials and providing such services in his private capacity, not pursuant to any official duties associated with his present or former employment.

9. This agreement is entered into for settlement purposes only and without prejudice to any and all claims and defenses asserted or to be asserted by any of the parties; however, the Privilege Log created pursuant to Paragraph 4 above shall not be privileged and may be used by either party in the event of litigation. No statement, opinion, action or inaction by any of the parties or by Dr. Marwell in the course of any of the procedures or negotiations described above may be offered or admitted in evidence or otherwise used by any other party for any litigation purpose. None of the Parties will offer or seek to obtain any further testimony by Dr. Marwell, either by affidavit or live testimony, nor will Dr. Marwell otherwise undertake any further role in this proceeding, after he has undertaken his review under this agreement. In the event that Dr. Marwell is served with a subpoena by any person, entity, or court seeking testimony, documents or information related to the Materials or to his services under this agreement, he will provide written notice (via facsimile and mail) to counsel for NBC and the ARRB within 24 hours of such service, and, in the event of an objection to the subpoena by any Party, will withhold disclosure of any information subject to the Qualified Privilege

Claim provisions herein until such objection is resolved by agreement or court order or until he is ordered to comply with the subpoena by a court of competent jurisdiction.

10. The parties agree that ARRB will take the deposition of Nancy Sheridan for purpose of inquiry into whether she has possession, custody, or control over any additional records related to the assassination of President Kennedy.

AGREED:

UNITED STATES OF AMERICA

By: _____

Name:

ASSASSINATION RECORDS REVIEW BOARD

By: _____

Name:

NATIONAL BROADCASTING COMPANY, INC.

By: _____

Daniel M. Kummer, Litigation Counsel

NANCY SHERIDAN

DAVID G. MARWELL